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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ROBERT LEE POPP, ANDREW MARK LONG,
THOMAS MICHAEL ALES, and KRISTINA SMITS

Appeal 2015-001578
Application 12/982,174
Technology Center 3700

Before DONALD E. ADAMS, JEFFREY N. FREDMAN, and
TIMOTHY G. MAJORS, *Administrative Patent Judges*.

PER CURIAM

DECISION ON APPEAL

This is an appeal¹ under 35 U.S.C. § 134 involving claims to an absorbent article with an integrated machine-readable code. The Examiner rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

¹ Appellants identify the Real Party in Interest as Kimberly-Clark Worldwide, Inc. (*see* App. Br. 1).

Statement of the Case

Background

Appellants' invention relates to "absorbent articles that include an information conveying and/or information access device that can be easily incorporated into the article and that can provide a user with access to information that is related to the product" (Spec. 2:14–17). More particularly, Appellants' invention "is directed to incorporating a machine readable code, such as a two dimensional code, into an absorbent article that, when read by a suitable reader device, provides information about the product" (*id.* at 2:18–20).

The Claims

Claims 1–4 and 6–30 are on appeal. Independent claim 1 is representative and reads as follows (emphasis added):

1. An absorbent article comprising a crotch region positioned in between a front region and a back region, the absorbent article including a longitudinal center line and a lateral center line, the absorbent article defining an inside surface that faces a wearer and an opposite outside surface, the absorbent article including a front waist edge and a back waist edge that define a waist opening opposite two leg openings, the absorbent article having a longitudinal length that extends along the longitudinal center line from the front waist edge to the back waist edge, the absorbent article further comprising:

an outer cover having an interior surface and an exterior surface;

an absorbent structure positioned adjacent to the interior surface of the outer cover, the absorbent structure including a front longitudinal end and a back longitudinal end, the absorbent structure further including a first transverse side and a second transverse side; and

a machine readable code located on the absorbent article at a location capable of being scanned by a suitable reader device, wherein the machine readable code is configured to provide information related to the absorbent article when scanned by a suitable reader device, the machine readable code being positioned on the absorbent article below the waist opening a distance that is at least 10% of the longitudinal length of the absorbent article, the machine readable code also being positioned on the absorbent article at a location that coincides with being between the first transverse side and the second transverse side of the absorbent structure, the machine readable code comprising a two dimensional code.

The Issues

- A. The Examiner rejected claims 1–4, 6, 10–15, 21–23, and 28 under 35 U.S.C. § 103(a) as obvious over Stenberg² and Pickens³ (Final Act. 3–9⁴).
- B. The Examiner rejected claims 3, 16, 20, and 30 under 35 U.S.C. § 103(a) as obvious over Stenberg, Pickens, and Sosalla⁵ (Final Act. 10–12).
- C. The Examiner rejected claim 7 under 35 U.S.C. § 103(a) as obvious over Stenberg, Pickens, and Hovis⁶ (Final Act. 12).
- D. The Examiner rejected claim 8 under 35 U.S.C. § 103(a) as obvious over Stenberg, Pickens, and Pruden⁷ (Final Act. 12–13).
- E. The Examiner rejected claim 9 under 35 U.S.C. § 103(a) as obvious over Stenberg, Pickens, and Wagman⁸ (Final Act. 13).

² Stenberg, US 2002/0016579 A1, published Feb. 7, 2002.

³ Pickens, III, US 6,758,391 B1, issued July 6, 2004.

⁴ The Examiner lists claim 5 as being rejected (*see* Final Act. 3). However, claim 5 is canceled (*see* Final Act. 1; App. Br. 24 (Claims Appendix)).

⁵ Sosalla et al., US 2005/0148961 A1, published July 7, 2005 (“Sosalla”).

⁶ Hovis, US 2007/0278316 A1, published Dec. 6, 2007.

⁷ Pruden et al., US 2004/0246529 A1, published Dec. 9, 2004 (“Pruden”).

⁸ Wagman et al., US 7,181,066 B1, issued Feb. 20, 2007 (“Wagman”).

F. The Examiner rejected claims 17–19 under 35 U.S.C. § 103(a) as obvious over Stenberg, Pickens, and Kong⁹ (Final Act. 13–15).

G. The Examiner rejected claims 24–27 under 35 U.S.C. § 103(a) as obvious over Stenberg, Pickens, and Raufman¹⁰ (Final Act. 15–17).

H. The Examiner rejected claim 29 under 35 U.S.C. § 103(a) as obvious over Stenberg, Pickens, and Thomas¹¹ (Final Act. 17–18).

A, C–H. 35 U.S.C. § 103(a) over (A) Stenberg and Pickens, (C) Stenberg, Pickens, and Hovis, (D) Stenberg, Pickens, and Pruden, (E) Stenberg, Pickens, and Wagman, (F) Stenberg, Pickens, and Kong, (G) Stenberg, Pickens, and Raufman, and (H) Stenberg, Pickens, and Thomas

Because the same issue is dispositive for these seven rejections, we will consider them together.

The Examiner finds that Stenberg teaches

an absorbent article 1 comprising a crotch region positioned in between a front region and a back region (fig. 1–5), . . . the absorbent article 1 further comprising: an outer cover 3 having an interior surface and an exterior surface (par. 24); an absorbent structure 4 positioned adjacent to the interior surface of the outer cover (par. 24), . . . and a readable code 11 located on the absorbent article at a location capable of being scanned by a suitable reader device (fig. 1–5; par. 36), wherein the readable code 11 is configured to provide information related to the absorbent article when scanned by a suitable reader device (par. 36), the readable code 11 being positioned on the absorbent article 1 below the waist opening a distance that is at least 10% of the longitudinal length of the absorbent article 1 of the longitudinal length of the absorbent article 1, the readable code

⁹ Kong et al., US 6,706,342 B2, issued Mar. 16, 2004 (“Kong”).

¹⁰ Raufman et al., US 2002/0062117 A1, published May 23, 2002 (“Raufman”).

¹¹ Thomas et al., US 2006/0293634 A1, published Dec. 28, 2006 (“Thomas”).

11 also being positioned on the absorbent article at a location that coincides with being between the first transverse side and the second transverse side of the absorbent structure 4 (fig. 1–5).

(Final Act. 3–4.)

The Examiner acknowledges that “Stenberg is silent as to whether the readable code comprises a two-dimensional machine readable code” (*id.* at 4).

The Examiner, however, turns to Pickens and finds that it teaches a machine readable code comprising a two-dimensional code to store more data by encoding information in the x and in the y directions (col. 1, ll. 47–50; fig[s]. 1A, 1B). Pickens further teaches that supermarkets and department stores have been using bar code scanning systems for years for identification and inventory purposes (col. 1, ll. 15–27). Almost every product in a store has its own unique bar code on the product’s packaging (col. 1, ll. 15–27). The use of bar codes is no longer limited to just providing the price of an item, and has expanded into other markets as well (col. 1, ll. 15–30).

(*Id.*)

The Examiner determines that

the readable codes of Stenberg and Pickens are each taught by the prior art to be useful for encoding information in an optically detectable fashion to provide useful identification and inventory information. Therefore, the readable code of Stenberg and the two-dimensional machine readable code of Pickens are considered equivalents recognized by the prior art to be useful for the same purpose.

(*Id.*)

The Examiner concludes that it would have been obvious to modify the article taught by Stenberg with the machine readable code comprising a two dimensional code, as taught by Pickens, to store more data by encoding information in the x and in the y directions and because simple substitution of one known element for another to obtain predictable results is prima facie obvious.

(*Id.* at 4-5.)

The issue with respect to these rejections is: Does the evidence of record support the Examiner's conclusion that Stenberg and Pickens render the claims prima facie obvious?

Findings of Fact

1. Stenberg's Figure 1 is reproduced below:

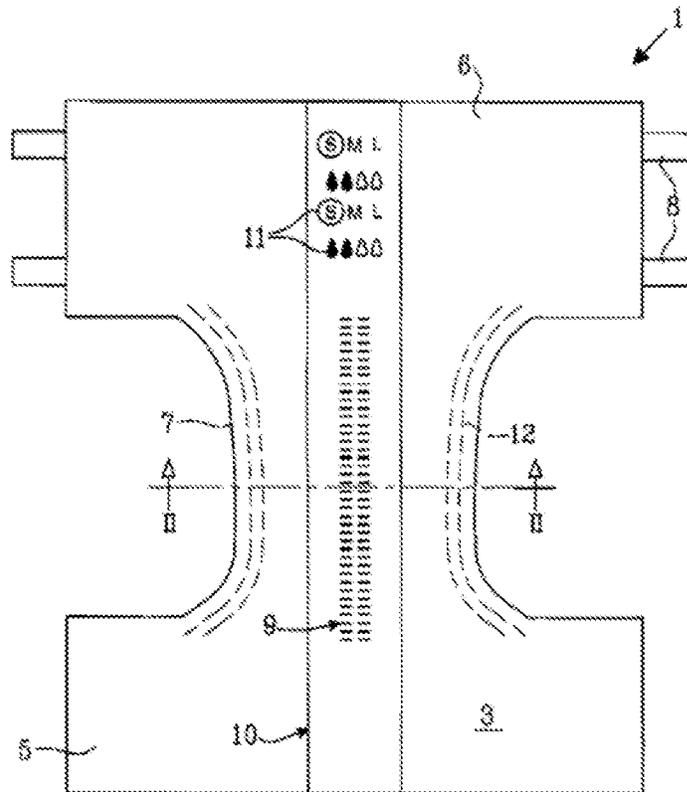


FIG. 1

Figure 1 shows an

[a]bsorbent article such as a diaper and incontinence guard, in which on the inside of the liquid impervious backsheet (3), i[.] e[.] on the side adjacent the absorbent body, there is arranged a wetness indicator (9) in a certain pattern, which is visible through the backsheet material. The wetness indicator (9) is applied on or adjacent at least one strip (10) having a color or tint different from the rest of the backsheet material (3). The color or tint of the strip (10) can also be an indication of the product type, size absorption capacity or the like of the article. Moreover there can on the strip (10) be printed symbols (11), codes or the like indicating product type or the like.

(Stenberg Abstract, *see also* Final Act. 3–4.)

2. Stenberg teaches that “[o]n or adjacent the strip **10** there can be further arranged symbols **11**, codes or the like, which indicate the product type, size, absorption capacity or the like” (Stenberg ¶ 36, *see also* Final Act. 3–4).

3. Pickens teaches “[a]n optical scanning system and method for scanning graphical codes on an object or media to obtain the Internet address that is represented by the graphical code” (Pickens Abstract; *see also* Final Act. 4).

4. Pickens teaches

Supermarkets and department stores have been using bar code scanning systems for years for identification and inventory purposes. Almost every product in a store has it[s] own unique bar code on the product’s packaging. The use of bar codes is no longer limited to just providing the price of an item. For instance, U.S. Pat. No. 5,612,527 to Ovadia, relates to a coupon redemption system, where a bar code contains not only information about the amount of the discount and the expiration date of the coupon, but also the address of the consumer who

received the coupon in the mail. By including the address of the coupon user, the purchasing habits of the shopper can be tracked.

The use of bar codes has expanded into other markets as well. For example, U.S. Pat. No. 5,465,291 to Barrus et al[.], discloses bar codes for placing purchase orders from remote locations,

(Pickens 1:15–30; *see also* Final Act. 4.)

5. Pickens teaches that “[t]he demand to store more data has also increased. In order to encode more information, bar codes have expanded in both the x and in the y directions, thereby increasing the size of the bar codes” (Pickens 1:47–50; *see also* Final Act. 4).

Principles of Law

The Supreme Court explains that “the [obviousness] analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR Int’l v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

“The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *Id.* at 416. “If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability.” *Id.* at 417.

Analysis

We adopt the Examiner’s findings of fact and reasoning regarding the scope and content of the prior art (Final Act. 3–18; Ans. 2–7; FF 1–8) and agree that the claims are obvious over Stenberg and Pickens. We address Appellants’ arguments below.

Claims 1, 24, and 28:

Appellants contend that

the essence of Stenberg is to make it easier for nurses and healthcare professionals to locate and assess visual indicators or indicia on an absorbent article in order to facilitate the reading thereof.

In this regard, Appellant respectfully submits that Stenberg teaches away from combining with Pickens and further from the claimed invention. For instance, Appellant respectfully submits that, upon considering Stenberg, a person of ordinary skill in the art would be lead in a direction divergent from the path taken by the Appellant because they would not consider replacing the symbols of Stenberg for any kind of machine readable code, as required by the claimed invention.

(App. Br. 10–11.) Appellants also argue that “there is no motivation for combining the teachings and suggestions of Stenberg and Pickens” (*id.* at 11; *see also* Reply Br. 4). Appellants further contend that “such modification [of Stenberg] would further complicate the identification process and require further processing equipment in order to interpret the graphical codes,” and therefore, “would render the article of Stenberg unsatisfactory for its intended purpose” (App. Br. 12; *see also* Reply Br. 5).

We do not find these arguments persuasive.

As the Examiner explains, “Stenberg is teaching that the **printed symbols (11), codes or the like** [can] facilitate the **ease** of finding and keeping track of the correct diapers in a storage space” (Ans. 3; *see also* FF 1, 2 (“which indicate the product type, size, absorption capacity or the like”)). The Examiner further explains that

Pickens teaches in the background of the invention that organizations “have been using bar code scanning systems for years for identification and inventory purposes.” (Pickens, col. 1, ll. 15–17). Pickens throughout the rest of the background of the

invention teaches how bar codes have expanded in the use and data that they carry (Pickens, col. 1, ll. 15 – col. 2, ll. 17). (Ans. 3–4; *see also* FF 3, 4 (“Supermarkets and department stores have been using bar code scanning systems for years for identification and inventory purposes), 5.)

We thus agree with the Examiner that it would have been obvious to modify the article taught by Stenberg with the machine readable code comprising a two dimensional code, as taught by Pickens, to store more data by encoding information in the x and in the y directions and because simple substitution of one known element for another to obtain predictable results is *prima facie* obvious. (Final Act. 4–5; *see also* Ans. 5 (“The use of a scanner to read the code of Pickens still results in identification of the article as well as the added benefits of inventory control”).) Stenberg does not discredit, criticize, or disparage the claimed two-dimensional code but instead suggests that “[o]n or adjacent the strip **10** there can be further arranged symbols **11**, codes or the like, which indicate the product type, size, absorption capacity or the like” (FF 2). Like our appellate reviewing court, “[w]e will not read into a reference a teaching away from a process where no such language exists.” *DyStar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1364 (Fed. Cir. 2006).

Even if ease of use was reduced somewhat to gain the benefit of identification and inventory control, that would not mean claim 1 is nonobvious. *See In re Urbanski*, 809 F.3d 1237, 1243 (Fed. Cir. 2016) (holding that a combination of references may be obvious even if the combination is at the expense of a benefit of one of the references). Appellants provide no persuasive factual evidence to show that Stenberg’s device, as modified by the Examiner, would be inoperable. *See also In re*

Geisler, 116 F.3d 1465, 1470 (Fed. Cir. 1997) (“[A]ttorney argument [is] not the kind of factual evidence that is required to rebut a prima facie case of obviousness”).

Appellants contend that “nowhere does Stenberg disclose any concerns for ‘keeping track’ of such articles, as asserted by the Examiner’s Answer” (Reply Br. 4). Appellants’ contention fails to account for Picken’s contribution to the combination of Stenberg and Pickens (FF 4 (“Supermarkets and department stores have been using bar code scanning systems for years for identification and inventory purposes”)).

Claim 15:

Claim 15 requires “wherein the entire two dimensional code is scannable at a location that coincides with a position of the absorbent structure within the absorbent article” (App. Br. 25 (Claims Appendix)).

Appellants contend that “Stenberg clearly teaches away from placing a machine readable code, such as a two dimensional code, within the crotch region of the article disclosed therein,” and that “a person of ordinary skill in the art would be lead [sic] in a direction divergent from the path taken by the Appellant because they would not consider placing a two-dimensional code within the crotch region of the article of Stenberg because of the difficulty in locating such code” (*id.* at 14).

We note that claim 15 does not require “a two dimensional code, within the crotch region” but instead, requires “the entire two dimensional code is scannable at a location that coincides with a position of the absorbent structure.” “[L]imitations are not to be read into the claims from the specification.” *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993). *See also In re Self*, 671 F.2d 1344, 1348 (CCPA 1982) (“[A]ppellant’s

arguments fail from the outset because . . . they are not based on limitations appearing in the claims.”).

Even so, as the Examiner explains,

[i]t would have been obvious to one of ordinary skill in the art at the time the invention was made to modify Stenberg in view of Pickens with the entire machine readable code that is scannable at a location that coincides with a position of the absorbent structure within the absorbent article because said modification is an aesthetic design change relating to ornamentation only.

(Final Act. 8.)¹² Appellants do not identify any secondary consideration, such as unexpected results, that would overcome the prima facie case of obviousness as to positioning the machine readable code on one area versus another equivalent area of an absorbent article. *See also In re Geisler*, 116 F.3d at 1470.

B. 35 U.S.C. § 103(a) over Stenberg, Pickens, and Sosalla

The Examiner acknowledges that “Stenberg in view of Pickens disclose the invention as discussed above in claim 1, but are silent as to whether the two-dimensional code is scannable from the inside surface of the absorbent article” (Final Act. 10).

The Examiner turns to Sosalla and finds that it “teaches an analogous absorbent article that features an interior graphic disposed on the interior article surface (abstract; par. 42–45). Sosalla further teaches that the interior graphic is useful as a more meaningful training aid (par. 57)” (*id.*).

¹² The Examiner also explains that “Stenberg shows an embodiment showing strip (10) having printed symbols, codes or the like indicating product type or the like positioned in the crotch region of the absorbent article (1) depicted in Figure 5” (Ans. 5).

The Examiner concludes that it would have been obvious to “provide the two-dimensional that is scannable from the inside surface of the absorbent article, as taught by Sosalla, to provide an absorbent article that is a more meaningful training aid” (*id.*).

The issue with respect to this rejection is: Does the evidence of record support the Examiner’s conclusion that Stenberg, Pickens, and Sosalla render the claims *prima facie* obvious?

Findings of Fact

6. Sosalla teaches that “the graphics may take various forms, such as in the form of a character, object and/or alphanumeric (e.g., numbers, words, phrases, instructions, etc.), and the like” (Sosalla ¶ 3; *see also* Sosalla ¶ 42; Final Act. 10; Ans. 7).

7. Sosalla teaches that “the pant . . . may include a single interior graphic . . . on the interior article surface” (Sosalla ¶ 42; Final Act. 10).

8. Sosalla teaches that “[s]uch total graphic areas as described above suitably draws the attention of the wearer and can therefore act as a more meaningful training aid” (Sosalla ¶ 57; Final Act. 10).

Analysis

We agree with the Examiner that the claims are obvious over Stenberg, Pickens, and Sosalla. We address Appellants’ arguments below.

Claims 3 and 16 require “wherein the two dimensional code is scannable from the inside surface of the absorbent article” (App. Br. 24–25 (Claims Appendix)).

Appellants contend that there are “no suggestion to combine the teachings and suggestions of Stenberg and Pickens with Sosalla” (App. Br.

17). Appellants argue that Stenberg teaches away from combining with Sosalla (*see id.*) because

such modification would destroy the intended purpose of Stenberg, which is to provide an article that makes it easier for nurses and healthcare professionals to locate these visual indicators and indicia in order to facilitate the reading thereof. For instance, such placement would make it difficult for nurses and healthcare professionals to locate and assess these visual indicators and indicia.

(*Id.* at 18; *see also* Reply Br. 6–7.) Appellants further contend that “a two dimensional code on the interior article surface of an article will not have the same effect as graphics including fish, alphabets, animals, cars, water toys, and the like when attempting to utilize such as training aids” (App. Br. 21).

We do not find these arguments persuasive.

The Examiner applies Sosalla for teaching positioning the modified article with a two-dimensional code of Stenberg and Pickens, at the inside surface of the absorbent article, as opposed to “graphics including fish, alphabets, animals, cars, water toys, and the like” (*see* Final Act. 10).

Sosalla teaches that “the graphics may take various forms, such as in the form of a character, object and/or alphanumeric (e.g., numbers, words, phrases, instructions, etc.), and the like” (FF 6). Sosalla further teaches that “the pant . . . may include a single interior graphic . . . on the interior article surface” (FF 7). Sosalla also teaches that “[s]uch total graphic areas as described above suitably draws the attention of the wearer and can therefore act as a more meaningful training aid” (FF 8).

As the Examiner explains, “[p]roviding the machine readable code on the interior of the absorbent article would obviously still allow for

identification of the article while also being useful as a training aid by directing the wearer to a[] website address” (Ans. 6).

Stenberg does not discredit, criticize, or disparage positioning information on the inside of the absorbent article but instead suggests that “[o]n or adjacent the strip **10** there can be further arranged symbols **11**, codes or the like, which indicate the product type, size, absorption capacity or the like” (FF 2). *See DyStar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d at 1364.

Even if ease of use was reduced somewhat to gain the benefit of aiding or providing information for training, that would not mean claims 3 and 16 are nonobvious. *See In re Urbanski*, 809 F.3d at 1243. Appellants provide no persuasive factual evidence to show that Stenberg’s device, as modified by the Examiner, would be inoperable. *See In re Geisler*, 116 F.3d at 1470 (“[A]ttorney argument [is] not the kind of factual evidence that is required to rebut a prima facie case of obviousness”).

Therefore, we are not persuaded by Appellants’ contention to the contrary.

SUMMARY

In summary, we affirm the rejection of claims 1 and 28 under 35 U.S.C. § 103(a) as obvious over Stenberg and Pickens. Claims 2–4, 6, 10–15, and 21–23 fall with claim 1.

We affirm the rejection of claims 3, 16, 20, and 30 under 35 U.S.C. § 103(a) as obvious over Stenberg, Pickens, and Sosalla.

We affirm the rejection of claim 7 under 35 U.S.C. § 103(a) as obvious over Stenberg, Pickens, and Hovis.

Appeal 2015-001578
Application 12/982,174

We affirm the rejection of claim 8 under 35 U.S.C. § 103(a) as obvious over Stenberg, Pickens, and Pruden.

We affirm the rejection of claim 9 under 35 U.S.C. § 103(a) as obvious over Stenberg, Pickens, and Wagman.

We affirm the rejection of claims 17–19 under 35 U.S.C. § 103(a) as obvious over Stenberg, Pickens, and Kong.

We affirm the rejection of claim 24 under 35 U.S.C. § 103(a) as obvious over Stenberg, Pickens, and Raufman. Claims 25–27 fall with claim 24.

We affirm the rejection of claim 29 under 35 U.S.C. § 103(a) as obvious over Stenberg, Pickens, and Thomas.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED