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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE
THE PATENT TRIAL AND APPEAL BOARD

Ex parte THORSTEN KNOBLOCH,¹
Jennifer Lori Steeves-Kiss, Michael Ricardo Burns,²
Illya Torrance Thomas, John Paul Brase,
Dennis Xavier Legault, and Dean Larry DuVal

Appeal 2015-002023
Application 11/897,768
Technology Center 1700

Before JEFFREY T. SMITH, MARK NAGUMO, and MONTÉ T. SQUIRE,
Administrative Patent Judges.

NAGUMO, *Administrative Patent Judge.*

DECISION ON APPEAL

Thorsten Knobloch, Jennifer Lori Steeves-Kiss, Michael Ricardo Burns,² Illya Torrance Thomas, John Paul Brase, Dennis Xavier Legault, and Dean Larry DuVal (“P&G”) timely appeal under 35 U.S.C. § 134(a)

¹ The real party in interest is identified as The Procter & Gamble Company (“P&G”). (Appeal Brief, filed 20 May 2014 (“Br.”).)

² Deceased; Mary Windes Burns, Legal Representative.

from the Final Rejection³ of claims 1, 2, and 4–16, which are all of the pending claims. We have jurisdiction. 35 U.S.C. § 6. We affirm.

OPINION

A. Introduction⁴

The subject matter on appeal relates to sale-displays of toilet paper. The '768 Specification refers to toilet paper as “sanitary tissue product,” or “toilet tissue product,” which it defines as “a wiping implement for post-urinary and/or post-bowel movement cleaning.” (Spec. 4, ll. 23⁵–24.) The Specification teaches that different consumers of sanitary toilet tissue products desire “different common intensive property values” in those products (*id.* at 1, ll. 25–27), and that there is a need for indicia that would enable the consumer to identify quickly, while shopping amongst plural similar products, a particular product having the particular desired intensive property values (*id.* at 2, ll. 3–17.) The Specification reveals that “non-textual indicia,” in particular, “pattern[s],” that are “psychologically matched” to an “intensive property” such as strength provide an effective means to identify and distinguish products having distinct “intensive properties” or distinct “values of intensive properties.” (*Id.* at ll. 13–22.)

³ Office action mailed 7 December 2012 (“Final Rejection”; cited as “FR”).

⁴ Application 11/897,768, *Array of sanitary tissue products*, filed 31 August 2007, claiming the benefit of a provisional application filed 23 February 2007. We refer to the “’768 Specification,” which we cite as “Spec.”

⁵ Line-numbers of the Specification reported throughout this Opinion are based on the marginal line number nearest the first-cited line. Inspection of Specification pages 1–2 indicates that the algorithm used to generate the filed copy of the Specification has an anomalous line-counting scheme.

As hinted by the numerous quote marks, numerous terms are defined expressly by the Specification. The most important terms for understanding this appeal are listed below.

The term “array of toilet tissue products” means “a group of sanitary [toilet] tissue products that provide a similar benefit to a consumer.” (Spec. 6, ll. 7–8.) Speaking plainly, such an array is all toilet paper, not a mix of, e.g., toilet paper and paper towels or facial tissues or other items.

The term “intensive property” means “a property of a . . . sanitary [toilet] tissue product . . . selected from the group consisting of: lint, softness, basis weight, texture, tensile strength, especially total dry tensile strength, absorbency and mixtures thereof.” (*Id.* at ll. 27–30.) Definitions of each member of this group are provided. (*Id.* at 9, l. 20, through 10, l. 18.)

The term “value” of an intensive property is a “measured value” of that property. (*Id.* at 7, ll. 1–3.)

The term “pattern” means “an emboss pattern and/or a through-air-dried pattern.” (*Id.* at 8, ll. 28–29.)

The term “psychologically matched” means “that a non-textual indicia on a package housing a sanitary tissue product of the present invention and/or on the sanitary tissue product, itself, denotes (i.e., serves as a symbol for; signifies; represents something) an intensive property of the sanitary tissue product.” (*Id.* at 8, ll. 30, to 9, l. 1.)

The term “non-textual indicia” means “non-text indicia that communicates to a consumer through a consumer’s senses.” (*Id.* at ll. 21–22.) The senses of sight (for visual indicia) and touch (for texture indicia) (*id.* at ll. 23–24) appear to be relevant for “patterns” used to “convey[]

information to a consumer about a product housed within the package”
(*id.* at 7, ll. 30–31).

Sole independent claim 1 is representative and reads⁶:

An array of toilet tissue products comprising
a first toilet tissue product comprising a first pattern and
a second toilet tissue product comprising a second pattern
different from the first,

wherein

the first pattern communicates to a consumer a first
intensive property of toilet tissue products and
the second pattern communicates to a consumer an
intensive property of toilet tissue products different
from the first intensive property,

wherein

the first toilet tissue product is housed within a first
toilet tissue product package and
the second toilet tissue product is housed within a
second toilet tissue product package and

wherein

*the first and second toilet tissue product packages are
separate from each other [~~and are not contained
together in an outer package~~]*

*such that the first toilet tissue product package is
displayed on a store shelf separate from the second
toilet tissue product package*

*in a way that the first and second toilet tissue product
packages are visible to a consumer during the*

⁶ The version in the Claims Appendix differs from claim 1 as filed in the amendment dated 13 August 2012, which is the last amendment of record. In that amendment, the first bracketed phrase is deleted, and the second bracketed phrase is added. In the event of further examination, the record should be clarified as to the proper language of the claims.

consumer's purchasing decision process [and are not in contact with each other].

(Claims App., Br. 7; indentation, paragraphing,⁷ emphasis, brackets, strike-through, and underscore added.)

The Examiner maintains the following grounds of rejection⁸:

- A. Claims 1, 2, and 4–16 stand rejected under 35 U.S.C. § 112(1) for lack of written description.
- B. Claims 1, 2, 4–8, 15, and 16 stand rejected⁹ under 35 U.S.C. § 103(a) in view of the combined teachings of

⁷ In compliance with 37 C.F.R. § 1.75(i) (2013): “Where a claim sets forth a plurality of elements or steps, each element or step of the claim should be separated by a line indentation.”

⁸ Examiner's Answer mailed 23 October 2014 (“Ans.”).

⁹ Claim 3 was canceled in the amendments filed 13 August 2012; the inclusions of claim 3 in the rejection (Ans. 3, l. 13; 7, ll. 10–12) are harmless oversights.

Boudrie,¹⁰ Admitted Prior Art,¹¹ Gonzalez,¹² Knobloch,¹³ and Meyer.¹⁴

- B1. Claim 2 stands rejected under 35 U.S.C. § 103(a) in view of the combined teachings of Boudrie, Admitted Prior Art, Gonzalez, Knobloch, Meyer, and Cashmere.¹⁵
- B2. Claim 8 stands rejected under 35 U.S.C. § 103(a) in view of the combined teachings of Boudrie, Admitted Prior Art, Gonzalez, Knobloch, Meyer, and Kimberley-Clark.¹⁶
- B3. Claims 9–11 stand rejected under 35 U.S.C. § 103(a) in view of the combined teachings of Boudrie, Admitted Prior Art, Gonzalez, Knobloch, Meyer, and Vinson '352.¹⁷

¹⁰ Laura L. Boudrie, *Packaging configurations for consumable products*, U.S. Patent No. 7,621,397 B2 (24 November 2009), based on an application filed 15 December 2005.

¹¹ Admitted Prior Art is identified as the disclosures in the '768 Specification at 1, line 5, to 8, line 29. (Ans. 4, l. 11.)

¹² Luz M. Gonzalez, *The impact of ad background color on brand personality and brand preferences*, College of Business Administration, Undergraduate Thesis. California State University, Long Beach, California (2005).

¹³ Thorstep [sic: Thorsten] Knobloch et al., *Patterned fibrous structures*, U.S. Patent Application Publication 2006/0113049 A1 (1 June 2006), based on an application filed 28 February 2005, now U.S. Patent No. 8,034,215 (11 October 2011), assigned to The Proctor and Gamble Co., the real party in interest in this Appeal.

¹⁴ Alvin H. Meyer, *Snap-on adjustable sliding clip for shelf partitions*, U.S. Patent No. 3,815,519 (1974).

¹⁵ *Cashmere premium quality bathroom tissue*, Kimberley-Clark website: <http://web.archive.org/web/20061027025443/cashmere.ca/index.php> (accessed 1 July 2009).

¹⁶ Kimberley-Clark website, accessed 8 November 2010, http://www.kimberly-clark.com/ourbrands/consumer_brands.aspx

¹⁷ Kenneth Douglas Vinson et al., U.S. Patent No. 5,851,352 (1998).

- B4. Claim 12 stands rejected under 35 U.S.C. § 103(a) in view of the combined teachings of Boudrie, Admitted Prior Art, Gonzalez, Knobloch, Meyer, and Vinson '329.¹⁸
- B5. Claims 13 and 14 stand rejected under 35 U.S.C. § 103(a) in view of the combined teachings of Boudrie, Admitted Prior Art, Gonzalez, Knobloch, Meyer, Vinson '352, and Vinson '329.
- B6. Claim 16 stands rejected under 35 U.S.C. § 103(a) in view of the combined teachings of Boudrie, Admitted Prior Art, Gonzalez, Knobloch, Meyer, and Callahan.¹⁹

B. Discussion

Findings of fact throughout this Opinion are supported by a preponderance of the evidence of record.

Initially, we find that P&G presents substantive arguments for patentability based only on limitations recited in claim 1. (Br. 2–4.) The “separate” arguments for separately rejected claims 2 (B1), 8 (B2), 9–14 (B3–B5), and 16 (B6) (Br. 4–6) amount to no more than assertions that the additional references do not cure the defects of the rejection of independent claim 1.²⁰ Such assertions do not amount to the separate argument required under the Rules governing appeals to this Board. 37 C.F.R. § 41.37(c)(iv) (2013); *cf. In re Lovin*, 652 F.3d 1349, 1357 (Fed. Cir. 2011) (“[W]e hold that the Board reasonably interpreted Rule 41.37 to require more substantive arguments in an appeal brief than a mere recitation of the claim elements and a naked assertion that the corresponding elements

¹⁸ Kenneth Douglas Vinson et al., U.S. Patent No. 6,162,329 (2000).

¹⁹ Joseph W. Callahan and John G. Trumbull, U.S. Patent No. 4,135,024 (1979).

²⁰ No Reply Brief was filed.

were not found in the prior art. Because Lovin did not provide such arguments, the Board did not err in refusing to separately address claims 2–15, 17–24, and 31–34.”) Accordingly, all claims stand or fall with claim 1.²¹

Written Description

The Examiner finds inadequate written description in the Specification as filed for the limitations, “displayed separate from one another on a store shelf,” and “not in contact with each other.” (FR 2, last para.)

The Examiner finds that the passage cited by Knobloch, “[a]s shown in Fig. 4, in one example, an array of sanitary tissue products **24**²² (displayed on a store shelf **25** for example) housed within different packages **26, 28, 30**” (Spec. 11, ll. 31–32; cited at Br. 2, last para.) does not have the same meaning as “displayed separate from one another . . . not in contact with one another.” (FR 3, ll. 2–4.)

The inquiry into the adequacy of the written description afforded by the originally filed specification is factual. *Ariad Pharmaceuticals, Inc. v. Eli Lilly and Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010)(en banc) (“This

²¹ P&G attempts to incorporate by reference arguments for patentability made in a response to a non-final Office Action. (Br. 3, ll. 13–16.) Such incorporation by reference contravenes 37 C.F.R. § 41.37(c)(1)(iv) (2013), the third sentence of which reads (emphasis added), “*Except* as provided for in §§ 41.41 [Reply Brief], 41.47 [Oral hearing] and 41.52 [Rehearing], any arguments or authorities not included in the appeal brief will be refused consideration by the Board for purposes of the present appeal.” None of the exceptions are relevant to this appeal.

²² Throughout this Opinion, for clarity, labels to elements are presented in bold font, regardless of their presentation in the original document.

inquiry, as we have long held, is a question of fact.”). The Examiner does not explain what distinct meaning the claim language conveys compared to the language cited in the Specification; nor is a distinction apparent to us from the plain language of the claims in light of the disclosure in the Specification.

We therefore reverse the rejection for lack of written description of these limitations.

Obviousness

P&G urges that the Examiner’s reliance on Gonzalez, “that purportedly teaches colors ‘from yellow to blue, green, and red that affect physiological and psychological emotions, attitudes . . .’” (Br. 3, last para.), constitutes harmful error because “the claimed invention is not directed to colors, patterns, etc. on a *package*. The invention is directed to first and second patterns on ‘toilet tissue products’ each of which are housed in their respective packages, as claimed.” (*Id.*) “Accordingly,” P&G concludes, “*regardless* of what Knobloch et al. or Meyer teaches in addition to the first three cited references, the Appellants respectfully submit that the Examiner’s reasoning for finding obviousness is wholly insufficient and in error in its fundamental misunderstanding of the invention.” (*Id.* at 4, ll. 1–4; emphasis added.)

P&G appears to have misapprehended the Examiner’s analysis.

We begin by noting that the plain language of claim 1 (and the dependent claims) supports P&G’s characterization of the claim. In particular, we note that the claims do not require that the patterns embossed on the first and second tissue products be visible through the packaging.

Nor do the claims require that the first and second toilet tissue product packages allow the patterns on the tissue products to be seen,²³ or that the packages bear representations of those patterns.²⁴ We will not read limitations from examples in the Specification into the claims. *In re Am. Acad. Sci. Tech. Ctr.*, 367 F.3d 1359, 1369 (Fed. Cir. 2004) (it is improper to read limitations from preferred embodiments in the specification into the claims.).

The Examiner finds—and P&G does not dispute—that Boudrie describes products having different patterns, but doesn’t teach first and second emboss patterns that communicate distinct first and second intensive properties of the respective toilet tissue products. (FR 3, l. 18, through 4, l. 4.) The Examiner finds that communicating intensive properties by colors is known in the prior art, as shown by the descriptions of prior art in the Specification (“Admitted Prior Art,” “APA”) (*id.* at 4, ll. 5–12), and that it is known to use packaging to communicate intensive properties of the packaged items to consumers (*id.* at 5, ll. 3–8). The Examiner finds further that Gonzalez provides “consistent” teachings that colors are useful because they “affect physiological and psychological emotions, attitudes, and for

²³ Contrast with Fig. 3 (not reproduced here), and the associated text, which describes Fig. 3 as showing “a package **10** for housing a sanitary tissue product **20** [which] may be made such that a surface **22** of the sanitary tissue product **20** housed within the package **10** is visible to a consumer at the point of sale and/or in advertising.” (Spec. 11, ll. 23–25.)

²⁴ Contrast with the description in the Specification (Spec. 11, l. 31, through 12, l. 21) of Fig. 4 (not reproduced here) as showing packages **26**, **28**, **30**, that bear “non-textual indicia” **32**, **34**, **36**, respectively, that may be “psychologically matched to a . . . intensive property present in the . . . sanitary tissue product” (*id.* at 12, ll. 7–8).

brand personalities to aid in advertising.” (*Id.* at 4, ll. 13–16.) The Examiner finds that Knobloch teaches embossed patterns that convey softness or strength on sanitary tissue products (*id.* at 6, ll. 1–2), and that Meyer teaches the display of various products on shelves in a grocery store separate from the other in a way that the first and second products are visible to a consumer during the purchasing decision (*id.* at ll. 18–22). The Examiner reasons, step by step, that it would have been obvious to emboss the toilet tissue products having different intensive properties, such as strength and softness, with corresponding patterns, and to package and display the products separately, on a shelf, both types of products being visible to the consumer at the same time, to convey the intensive properties to the consumer while the purchasing decision is being made. In particular, the Examiner explains that

[i]t would have been obvious . . . to have modified Boudrie to include at least two packages separated on shelves as claimed because Boudrie can place Fig. 1 twice on the shelf of Meyer or the Fig. 1 can be placed singly on one shelf, separate as taught by Meyer for better organization, aiding the shopper in determining the cost and able to view what he wants and the quantity desired, and as a means of displaying or identifying signs.

(FR 7, ll. 1–5.)

Given the failure of P&G to challenge the Examiner’s findings regarding Knobloch and Meyer, the consequent failure of P&G to challenge the Examiner’s complete reasoned explanation of obviousness, and the breadth of the claims indicated *supra*, we are not persuaded that the occasionally broad statements amount to harmful error.

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C. Order

It is ORDERED that the rejection of claims 1, 2, and 4–16 under 35 U.S.C. § 112(1) for lack of written description is reversed.

It is ORDERED that the rejections of claims 1, 2, and 4–16 under 35 U.S.C. § 103(a) are affirmed.

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