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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/081,779	04/07/2011	Brajesh Kumar Jha	27332	4681

7590 11/17/2016
Frank S. DiGiglio, Scully, Scott, Murphy & Presser
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Garden City, NY 11530

EXAMINER

MATTISON, LORI K

ART UNIT	PAPER NUMBER
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1619

MAIL DATE	DELIVERY MODE
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11/17/2016

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BRAJESH KUMAR JHA, JUERGEN MEYER, BURGHARD
GRUENING, FRANZ-ERICH BAUMANN, WOLFGANG CHRISTOPH,
HEIKE STEMMER and KRISTIANE WARNKE

Appeal 2015-005561
Application 13/081,779¹
Technology Center 1600

Before JEFFREY N. FREDMAN, TIMOTHY G. MAJORS and
DAVID COTTA, *Administrative Patent Judges*.

COTTA, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to particles comprising polyamide 10.10. The Examiner rejected the claims on appeal as anticipated and/or obvious under 35 U.S.C. § 102(b) and § 103(a).

We reverse.

¹ According to Appellants, the real party in interest is Evonik Degussa GmbH. App. Br. 2.

STATEMENT OF THE CASE

Claims 1–10 are on appeal. Claim 1 is illustrative and reads as follows:

1. Particles comprising polyamide 10.10, wherein said particles have a mean particle size from 1 to 50 μm , an apparent density from 180 to 300g/l, a NH_2/COOH end group ratio from 50:50 to 95:5; and a BET surface from 3 m^2/g to 200 m^2/g .

The claims stand rejected as follows:

Claims 1–7 under 35 U.S.C. § 102(b) as unpatentable over Kobo.²

Claims 1–7, 9 and 10 under 35 U.S.C. § 103(a) as unpatentable over the combination of Kobo, MSDS³ and Kashimoto.⁴

Claims 1–8 under 35 U.S.C. § 103(a) as unpatentable over the combination of Kobo and Matsui.⁵

REJECTION OF CLAIMS 1–7 OVER KOBO

All three of the Examiner’s rejections rely primarily upon Kobo. Appellants argue that Kobo is not prior art because it was not publicly accessible prior to the filing of their application. App. Br. 7–13. The only issue before us on appeal is whether there is sufficient evidence in the record to support the Examiner’s finding that Kobo is prior art. Because this issue

² Kobo-Microspheres, Kobo Products Inc. 1–3, <http://www.koboproductsinc.com/Microspheres.html> (“Kobo”).

³ Material Safety Data Sheet for DAIAMID MSP-BOP (“MSDS”).

⁴ Kashimoto, US Patent No. 6,610,278 B2, issued Aug. 26, 2003 (“Kashimoto”).

⁵ Matsui WO 2008/149755 A1, published Dec. 12, 2008 (“Matsui”). The Examiner relied upon US Patent Publication No. 2010/0178309 A1 as the English language translation of Matsui. *See*, Final Act. 9.

is dispositive with respect to all three rejections we address all three rejections together. We find that the record, as presently constituted, is insufficient to support the Examiner's finding that Kobo is prior art.

Kobo is a webpage listing products sold by Kobo Products Inc. A screen capture of Kobo is reproduced below (emphasis added).

Kobo-Microspheres

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[Home](#) | [Contacts](#) | [Products](#) | [Formulas](#) | [Requests](#) | [Literature](#) | [Help](#)

Microspheres

- Polymer Microspheres
- Silica Microspheres
- Cellulose Microspheres
- Surface Treated Microspheres

Click on "Specs" or "MSDS" in the table below to open the documents in PDF format. If you do not have Adobe Acrobat Reader installed on your computer, you may download it on [this site](#).

Microspheres Filter
 Microspheres & Microspheres Composites Europe Program Filter
 Microspheres & Microspheres Composites Asia Program Filter
 Microspheres & Microspheres Composites Latin America Program Filter
 Microspheres & Microspheres Composites India Program Filter

Polymer Microspheres

Trade Name	INCI Name	Size (µm)	Dil. Alc. (g/100g)	Refract. Index	Density (g/cc)	Visc. (cP)	MSDS
MSF-1000P/ENE-ACK	Alkylated Cellulohydrate	15	N/A	N/A	N/A	Specs	MSDS
EA-201P*	Styrene/Acrylic Acid Copolymer	40	60	1.51	1.4	Specs	MSDS
Fire-Bonds 50-31076 (Softballs AP)*	Ethylene/Propylene Copolymer	12	62	1.49	1.12	Specs	MSDS
BPO-650	HDPE/Trimethyl Hexylactone Crosspolymer (Acid) Silica	7	65	1.52	6.4	Specs	MSDS
BPO-500	HDPE/Trimethyl Hexylactone Crosspolymer (Acid) Silica	10	65	1.52	9.5	Specs	MSDS
BPO-500F	HDPE/PPG/Polypropylene Copolymer (Acid) Silica	13.5	52	1.52	8.5	Specs	MSDS
BPO-500W	HDPE/Trimethyl Hexylactone Crosspolymer (Acid) Silica	11	60	1.52	8.2	Specs	MSDS
BPA-900	Polyacrylate Methacrylate	10	60	1.49	5.2	Specs	MSDS
BPA-500X	Methyl Methacrylate Copolymer	7	98	1.49	6.7	Specs	MSDS
MSP-322	Polymethyl Methacrylate	7	60	1.49	1.2	Specs	MSDS
MSP-RT5	Methyl Methacrylate Copolymer	8	57	1.48	6.7	Specs	MSDS
MSP-930	Methyl Methacrylate Copolymer	9	210	1.46	5.0	Specs	MSDS
MSF-MSF-1001-012	Methyl Methacrylate Copolymer	10	150	1.49	1.3	Specs	MSDS
MSF10-1215	Methyl Methacrylate Copolymer	13	330	1.49		Specs	MSDS
TR-2	Nylon-6	20	140	1.53	1.1	Specs	MSDS
MSF 0.25µm MSF-300	Nylon-12/10	30	50		3.58	Specs	MSDS
SP-10	Nylon-12	30	60	1.53	6.7	Specs	MSDS
SP-300	Nylon-12	30	60	1.53	4.7	Specs	MSDS
DATAHID MSP-100	Nylon-12	7.5	24	1.53	3.1	Specs	MSDS
GLASSMS MSP-5	Lactulactone/Poly(1,4-Butanediol-4-yl)benzoinolone Acid Copolymer	12.4	66	1.5	2.6	Specs	MSDS
CL-2000P*	Polyethylene	12	60	1.51	4.0	Specs	MSDS
TCPEARL 10 110A*	Polyethylsiloxane	11	51	1.41	4.5	Specs	MSDS
TCPEARL 10 120A*	Polyethylsiloxane	2	54	1.41	6.0	Specs	MSDS
TCPEARL 10 130A*	Polyethylsiloxane	5	54	1.41	8.2	Specs	MSDS
TCPEARL 10 1500B*	Polyethylsiloxane	5	54	1.41	8.0	Specs	MSDS
TCPEARL 10 3000A*	Polyethylsiloxane	5.3	54	1.41	7.5	Specs	MSDS

Evidence Appendix 5. The Examiner relied upon the highlighted product information from the above screen capture – i.e. the product information for DAIAMID MSP-BIO – in finding claims 1–7 anticipated by Kobo.

As evidence that Kobo was available before Appellants’ filing date,⁶ the Examiner relies upon: 1) the date on which Kobo was published as indexed by Google, and 2) the issue date of the Material Safety Data Sheet (“MSDS”) for the DAIAMID MSP-BIO product. Ans. 9.

With respect to the Google index date, the Examiner generated a date by appending “&as_qdr=y15” to a Google search, producing the following search result:

Kobo-Microspheres - Kobo Products Inc.
www.koboproductsinc.com/Microspheres.html
Dec 6, 2009 - Kobo Products: the Pigments and **Powders**
Specialist. ... **Nylon-6**. 20. 141. 1.53. 3.5. Spess · MSDS.
DAIAMID MSP-BIO. **Nylon-10/10** ...

Evidence Appendix 8. The above search result reflects a screen capture provided by the Examiner to the Appellants purportedly identifying December 6, 2009 as the publication date of Kobo. *Id.* at 1. As evidence that this search technique provides the publication date of Kobo, the Examiner cited lifehacker.com, which states:

To make sure you know when a page was published *before* you visit the site, just add the following to the end of the URL of your search results: &as_qdr=y15...

When you're searching for something and the date is important...you can quickly identify newer web pages. The operator you add to the end of the URL returns web pages *indexed by Google* over the past 15 years...

Ans. 12.

⁶ Appellants’ U.S. Patent Application was filed on April 7, 2011, claiming priority from a European Patent Application filed April 7, 2010.

We are not persuaded that we can rely on the December 6, 2009 date generated by appending “&as_qdr=y15” to a Google search as the date the relevant portion of Kobo – the portion relating to DAIAMID MSP-BIO – was published. Here, it appears that Kobo Products Inc., may update its webpage periodically to reflect changes in its microsphere product line. This is evidenced by the “new” notation beside several of the products listed on the website, including DAIAMID MSP-BIO. *See*, Evidence Appendix 4–7.

The record does not include persuasive evidence explaining how a “&as_qdr=y15” Google search dates webpages that periodically undergo revision. Does the search identify the date on which the first iteration of the webpage (potentially not including the relevant information) was published, or the date on which the current version of the webpage was last edited? The record does not provide an answer. The importance of this information is highlighted by the fact that the Examiner’s screen capture of Kobo – dated August 9, 2013 – identifies DAIAMID MSP-BIO as “NEW.” Absent information on the manner in which a “&as_qdr=y15” Google search dates webpages that are subject to revisions, we are not persuaded that we can rely upon on December 6, 2009 as the date the relevant content of Kobo was published.

The Examiner also relied on the issue date of the MSDS as evidence that Kobo constitutes prior art. As an initial matter, we note that in rejecting the claims at issue, the Examiner relied on information contained in Kobo that is not in the MSDS, namely information regarding particle size and density. *See*, Final Act. 3–4; *see also*, Evidence Appendix 2–7. Because the MSDS itself does not include all of the information relied upon by the

Examiner in finding the relevant claims to be anticipated, the publication date of the MSDS is not, by itself, dispositive. Rather, the publication date of the MSDS is relevant only to the extent it informs us about the publication date of the Kobo website.⁷

In this case, the MSDS appears to be a document with an existence independent of the website, as evidenced by the statement that it was prepared “[a]ccording to Regulation EC No. 1907/2006.” *See*, Evidence Appendix 2. Because the MSDS exists independent of the website, the hyperlink to the MSDS on the Kobo webpage could have been generated at any point subsequent to the creation of the MSDS. The date of the MSDS thus does not establish a prior art date for Kobo.

Accordingly we reverse the Examiner’s rejection of claims 1–7 under 35 U.S.C. § 102(b) as unpatentable over Kobo, the Examiner’s rejection of claims 1–7, 9 and 10 under 35 U.S.C. § 103(a) as unpatentable over the combination of Kobo, MSDS and Kashimoto, and the Examiner’s rejection of claims 1–8 under 35 U.S.C. § 103(a) as unpatentable over the combination of Kobo and Matsui.

SUMMARY

For these reasons and those set forth in the Examiner's Answer, the Examiner’s final decision to reject claims 1–10 is reversed.

REVERSED

⁷ The MSDS may also have relevance as to when – if at all – Kobo Products Inc. began selling DAIAMID MSP-BIO in the United States. We need not address this issue as it is not presented here.