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EXAMINER

KHAN, OMER S

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte RAJ B. APTE, ERIK JOHN HASENOEHRL, and
CHRISTOPHER PAULSON

Appeal 2016-001551
Application 13/551,546
Technology Center 2600

Before ALLEN R. MacDONALD, KARA L. SZPONDOWSKI, and
PHILLIP A. BENNETT, *Administrative Patent Judges*.

MacDONALD, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from a Final Rejection of claims 1, 3, 4, and 6–16, which are all the claims pending in the application. We have jurisdiction under 35 U.S.C. § 6(b).

Exemplary Claim

Exemplary claim 1 under appeal reads as follows (emphasis added):

1. A lighting device, comprising:
a light emitter receptacle;
a power connector configured to connect to a power source, the power connector connected to the receptacle; and
a communication module ***comprising a room-limited communications module and a room-transparent communication module.***

Rejections

The Examiner provisionally rejected claim 16 on the ground of nonstatutory obviousness-type double patenting as not being patentably distinct from claim 25 of U.S. Patent Application 13/943,817 in view of Hazani et al. (US 2008/0231111 A1; published September 25, 2008). Final Act. 4.¹

The Examiner provisionally rejected claim 16 on the ground of nonstatutory obviousness-type double patenting as not being patentably

¹ Appellants do not appeal this rejection. App. Br. 2. Therefore, we affirm *pro forma*. Except for our ultimate decision, this rejection is not discussed further herein.

distinct from claim 28 of U.S. Patent Application 13/943,816 in view of Hazani. Final Act. 4.²

The Examiner rejected claims 1, 3, 4, and 6–14 under 35 U.S.C. § 103(a) as being unpatentable over Hazani. Final Act. 5.³

The Examiner rejected claims 15 and 16 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Hazani and Mushkin et al. (US 2002/0178292 A1; published November 28, 2002). Final Act. 11.⁴

Appellants' Contentions

1. Appellants contend that the Examiner erred in rejecting claim 1 under 35 U.S.C. § 103(a) because:

Claim 1 includes the limitation that the communications module include both a room-limited communications module and a room-transparent communication module. That limitation is not found in the prior art. Although the Hazani reference does teach the use of a non-wired interface and a wired interface, there is nothing in the reference that teaches or suggests such a use actually may be interpreted as a combination of room-limited and room-transparent communication modules.

² Appellants do not appeal this rejection. App. Br. 2. Therefore, we affirm *pro forma*. Except for our ultimate decision, this rejection is not discussed further herein.

³ Separate patentability is not argued for claims 3, 4, and 6–14. Except for our ultimate decision, the Examiner's rejection of these claims is not discussed further herein.

⁴ Claims 15 and 16 are grouped together. Although Appellants discuss both claims 15 and 16 (App. Br. 3–4), the discussion thereof does not comply as separately argued as required by 37 C.F.R. § 41.37(c)(1)(iv) (“Under each heading identifying the ground of rejection being contested, any claim(s) argued separately or as a subgroup ***shall be argued under a separate subheading*** that identifies the claim(s) by number” (emphasis added)). However, we exercise our discretion and we treat claims 15 and 16 as separately argued.

App. Br. 3.

2. Appellants contend that the Examiner erred in rejecting claim 15 under 35 U.S.C. § 103(a) because:

[T]here is no reason why the Mushkin reference would be combined with the Hazani reference as it was in the rejection. The Mushkin reference does not teach or suggest anything about lighting devices. Rather, Mushkin focuses on sensors and lighting control devices that communicate with each other over some type of network, such as over power lines. Other than a mere conclusion that one of skill in the art would combine the references, there is no reasoning set forth that indicates why the references would be combined or how the references would be combined to provide the claimed invention.

App. Br. 3–4.

3. Appellants contend that the Examiner erred in rejecting claim 16 under 35 U.S.C. § 103(a) because:

Even if the references were to be combined, the combination would not result in the claimed invention. Rather, one would merely get an add-on module that has improved synchronization between the modules.

App. Br. 4.

Issue on Appeal

Did the Examiner err in rejecting claims 1, 15, and 16 as being obvious?

ANALYSIS

We have reviewed the Examiner's rejections in light of Appellants' arguments (Appeal Brief) that the Examiner has erred. We disagree with Appellants' conclusions. Except as noted below, we adopt as our own (1)

the findings and reasons set forth by the Examiner in the Final Office Action from which this appeal is taken and (2) the reasons set forth by the Examiner in the Examiner's Answer in response to Appellants' Appeal Brief. We concur with the conclusions reached by the Examiner. We highlight the following additional points.

As to Appellants' above contention 1, Appellants argue that "[a]lthough the Hazani reference does teach the use of a non-wired interface and a wired interface, there is nothing in the reference that teaches or suggests such a use actually may be interpreted as a combination of room-limited and room-transparent communication modules." We disagree. Hazani explicitly suggests multiple network interfaces that can be a mix of interface types:

While the invention has been described with regard to outlets having a single network interface (e.g. single connector 258), it will be appreciated that the invention equally applies to the case wherein multiple network interfaces are supported. Furthermore, a mix of interface types may be employed, such as wired digital, wired analog and non-wired interfaces all in the same outlet.

Hazani ¶ 175. The exemplary interfaces include non-wired interfaces, and Hazani explicitly teaches such non-wired interfaces include light and radio frequency. Hazani ¶ 174. Appellants' Specification at paragraph 22 states that "room-limited" includes "optical . . . signals," i.e., light as in Hazani, and "room-transparent" means "not limited by walls and floors," which would be recognized to include the radio frequency interface of Hazani.

As to Appellants' above contention 2, we disagree. Appellants argue that Mushkin does not teach or suggest "anything about lighting devices." App. Br. 3. However, Appellants are mistaken. As the Examiner points out

(Final Act. 14), Mushkin at paragraph 3 indicates the relevance of his invention to lighting control. But more importantly, the Examiner did not cite Mushkin for the “lighting device” limitation. Rather, the Examiner relied on Hazani to teach “a lighting device.” Final Act. 5.

We conclude that Appellants’ argument does not address the actual reasoning of the Examiner’s rejections. Instead, Appellants attack the references singly for lacking teachings that the Examiner relied on a combination of references to show. It is well established that one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. *See In re Keller*, 642 F.2d 413, 425 (CCPA 1981); *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). The effect of Appellants’ argument is to raise and then knock down a straw man rejection of claim 15 that was never made by the Examiner in that the Examiner did not rely solely on Mushkin as argued. In other words, Appellants argue findings the Examiner never made. This form of argument is inherently unpersuasive to show Examiner error. Our reviewing court requires that references must be read, not in isolation, but for what they fairly teach in combination with the prior art as a whole. *Merck*, 800 F.2d at 1097.

Further as to contention 2, Appellants argue “there is no reason why the Mushkin reference would be combined with the Hazani reference as it was in the rejection.” App. Br. 3. Hazani teaches a communication network over the service wiring. Hazani ¶ 252. Mushkin teaches an alternative communication network. Mushkin ¶¶ 46–48. We conclude the modification of Hazani is mere substitution of one known element for a similar known element. Appellants’ argument is at odds with the Court’s explicit guidance

in *KSR* (“[W]hen a patent claims a structure already known in the prior art that is altered by the mere substitution of one element for another known in the field, the combination must do more than yield a predictable result”). *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007). Additionally, Appellants have not presented evidence sufficient to show that combining the prior art was “uniquely challenging or difficult for one of ordinary skill in the art” or “represented an unobvious step over the prior art.” *Leapfrog Enters., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1162 (Fed. Cir. 2007) (citing *KSR*, 550 U.S. at 418–19).

As to Appellants’ above contention 3, we disagree. Appellants speculate that the combination of Hazani and Mushkin render obvious “an add-on module that has improved synchronization between the modules.” App. Br. 4. Even if we were to agree that the cited combination also renders obvious an invention other than the invention of Appellants’ claim 16, this is simply not a relevant argument as to whether the Examiner has provided a proper final conclusion that the combination of references renders obvious the claimed invention. A combination of references is not precluded from rendering obvious any number of distinct inventions.

CONCLUSIONS

(1) The Examiner has not erred in rejecting claims 1, 3, 4, and 6–16 as being unpatentable under 35 U.S.C. § 103(a).

(2) The Examiner did not err in provisionally rejecting claim 16 on the ground of nonstatutory obviousness-type double patenting as not being patentably distinct.

(3) Claims 1, 3, 4, and 6–16 are not patentable.

DECISION

The Examiner's rejections of claims 1, 3, 4, and 6–16 as being unpatentable under 35 U.S.C. § 103(a) are affirmed.

The Examiner's two provisional rejections of claim 16 on the ground of nonstatutory obviousness-type double patenting 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)(1)(iv).

AFFIRMED