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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte XAVIER BALOURDET

Appeal 2016-006357
Application 13/683,834
Technology Center 3700

Before LINDA E. HORNER, LISA M. GUIJT, and
JEFFREY A. STEPHENS, *Administrative Patent Judges*.

HORNER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Xavier Balourdet (Appellant)¹ seeks our review under 35 U.S.C. § 134 of the Examiner’s decision, as set forth in the Final Office Action, dated May 11, 2015 (“Final Act.”), rejecting claims 1, 2, 5–14, and 20–22. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ Appellant identifies the real party in interest as XCIEL, INC. Appeal Br. 3.

CLAIMED SUBJECT MATTER

Appellant's claimed subject matter relates to an "explosion proof tablet enclosure." Spec., Title. Claims 1, 20, and 22 are independent. Claim 1 is reproduced below.

1. An explosion proof enclosure comprising:
 - a first portion;
 - a second portion, wherein the first portion and the second portion are configured to be releasably coupled to each other;
 - wherein the enclosure has an assembled configuration having an internal chamber;
 - wherein the enclosure is configured to house a tablet computer in the internal chamber; and
 - a window defined by an outer edge that extends through the first portion, wherein the window allows a user to actuate a touch screen of the tablet computer when the enclosure is in the assembled configuration;
 - wherein a sealing surface is disposed about the outer edge of the window to sealingly engage against a surface of the tablet computer when the enclosure is in the assembled configuration;
 - wherein, when in the assembled configuration, combustion within the internal chamber is prevented from escaping into the surrounding environment in response to the sealing engagement between the sealing surface and the surface of the tablet computer.

EVIDENCE

The Examiner relied upon the following evidence:

Fearing	US 5,534,664	July 9, 1996
Song	US 2011/0051348 A1	Mar. 3, 2011
Simpson	US 2012/0057295 A1	Mar. 8, 2012
Rayner	US 2012/0314354 A1	Dec. 13, 2012

Muday US 2013/0258573 A1 Oct. 3, 2013

REJECTIONS

The Final Action included the following grounds of rejection:

1. Claims 1, 5, 7, and 20–22 under 35 U.S.C. § 103(a) as unpatentable over Rayner and Muday.
2. Claim 2 under 35 U.S.C. § 103(a) as unpatentable over Rayner, Muday, and Fearing.
3. Claim 6 under 35 U.S.C. § 103(a) as unpatentable over Rayner, Muday, and Song.
4. Claims 8–14 under 35 U.S.C. § 103(a) as unpatentable over Rayner, Muday, and Simpson.

ANALYSIS

First Ground of Rejection

Appellant presents the same arguments directed to independent claims 1, 20, and 22, and does not present any separate arguments for patentability of dependent claims 5, 7, and 21. Appeal Br. 17–23. We select claim 1 as representative of the claims subject to the first ground of rejection, and the remaining claims 5, 7, and 20–22 stand or fall with claim 1. 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner found that Rayner teaches an enclosure as called for in claim 1 except that Rayner “does not explicitly teach the enclosure and/or seal to be explosion proof.” Final Act. 3–4 (Examiner finding that “Rayner teaches the enclosure to be waterproof and dust proof”). The Examiner turned to Muday for its disclosure of a protective enclosure for a tablet

where the enclosure is “hermetically seal[ed] . . . from outside contamination in order to prevent the ingress of environmental contaminants into the enclosure.” *Id.* at 4 (citing Muday, paras. 71, 76). The Examiner determined that “[o]ne of ordinary skill in the art would have found it obvious to strengthen the seal of Rayner such that it was not only waterproof and dust proof but also hermetic as suggested by Muday in order to prevent ingress of environmental contaminants into the enclosure.” *Id.* The Examiner found that “[h]ermetically sealing the Rayner enclosure would in effect also make the enclosure explosion proof in that combustion would be prevented from escaping due to the enclosure being airtight.” *Id.*; *see also* Ans. 8 (Examiner finding that a “hermetic seal not only prevents ingress but also egress since any air from the inside of the enclosure would be prevented from escaping to the outside environment”).

Appellant contends that the Examiner erred in finding that modifying Rayner to include a hermetic seal would result in an enclosure that prevents combustion within the internal chamber from escaping into the surrounding environment, as called for in claim 1. Appeal Br. 18–19. Appellant argues that a hermetic or “air-tight” seal is not necessarily capable of preventing the egress of combustion into a surrounding environment because combustion within an enclosure may result in higher fluid pressure within the enclosure than in the surrounding environment. *Id.* at 19. Appellant contends that because Muday is silent as to hermetically sealing its enclosure against such a pressure differential and because a hermetic seal may not prevent combustion from escaping, the Examiner failed to provide a basis in fact

and/or technical reasoning to reasonably support the finding that Rayner's enclosure, as modified by Muday, would possess inherently the claimed characteristic. *Id.* at 19–20. Appellant further relied on a Declaration of Xavier Balourdet (“Inventor Dec.”) in which the inventor describes the hazardous location classification system and describes certain physical testing of a commercially available metal enclosure sold by Xciel, Inc. that found the enclosure to be in compliance with the applicable standards of the hazardous location system.

The Examiner responded that “the claims do not require any pressure differential and only requires that in [an] assembled configuration, combustion within the internal chamber is prevented from escaping into the surrounding environment.” *Id.* at 8; *see also id.* at 9 (“a small degree of combustion taking place without resulting in any change in pressure can be prevented with a hermetic seal as taught by Muday”). The Examiner found the declaration by the inventor to be ineffective to show non-obviousness because “there was no nexus between the declaration and the claimed subject matter” and “the declaration failed to give any reason why it would not be obvious to hermetically seal a tablet enclosure.” *Id.* at 10.

Appellant replies:

the fact that the combustion escape prevention feature could potentially occur with a hermetic sealing feature is not sufficient to establish the inherency of the combustion escape prevention feature in the hermetic sealing feature . . . as it is directed to a mere possibility, and not the necessity of the combustion escape prevention feature being present in the teachings of Muday.

Reply Br. 2.

The express and inherent disclosures of a prior art reference may be relied upon in the rejection of claims under 35 U.S.C. §§ 102 or 103. *In re Napier*, 55 F.3d 610, 613 (Fed. Cir. 1995) (“The inherent teaching of a prior art reference, a question of fact, arises both in the context of anticipation and obviousness.”). “[W]hen the PTO shows sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not.” *In re Spada*, 911 F.2d 705, 708–09 (Fed. Cir. 1990); *see also In re Best*, 562 F.2d 1252, 1255 (CCPA 1977) (“Where, as here, the claimed and prior art products are identical or substantially identical, or are produced by identical or substantially identical processes, the PTO can require an applicant to prove that the prior art products do not necessarily or inherently possess the characteristics of his claimed product.”); *In re King*, 801 F.2d 1324, 1327 (Fed. Cir. 1986) (finding it insufficient for an appellant to merely assert that the prior art does not inherently possess the characteristic relied on and challenge the PTO to prove the contrary by experiment or otherwise. “The PTO is not equipped to perform such tasks.”). “Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.” *In re Robertson*, 169 F.3d 743, 745 (Fed. Cir. 1999) (citations and internal quotation marks omitted).

For the reasons that follow, we find that the Examiner had a sound basis for believing that the enclosure of Rayner, as modified by the hermetic seal of Muday, is capable of preventing combustion from escaping as called

for in claim 1. We further find that Appellant has not met its burden to show that the enclosure of claim 1 is structurally different from the modified Rayner enclosure or that the modified Rayner enclosure fails to necessarily or inherently possess the characteristics of his claimed enclosure.

We find that the Examiner had a sound basis for finding that the hermetic seal in the modified Rayner enclosure would be capable of preventing “combustion within the internal chamber . . . from escaping into the surrounding environment in response to the sealing engagement between the sealing surface and the surface of the tablet computer,” as called for in claim 1. As noted by the Examiner, the claim is written broadly to call for prevention of “combustion” generally without any limitations in the claim on the conditions of the combustion within the internal chamber that must be prevented from escaping. Ans. 8. We find the Examiner’s finding reasonable that the hermetic seal, being airtight, would also prevent egress of any air from inside of the enclosure to the surrounding environment. *Id.* at 7–8; *see also id.* at 9 (Examiner finding that “a small degree of combustion taking place without resulting in any change in pressure can be prevented with a hermetic seal”).

We find the Examiner’s inherency determination rests on a sound basis in part because the structure of the sealing surface described in Appellant’s Specification does not appear to differ significantly from the structure of the sealing surface of the Rayner enclosure, as modified by Muday. Appellant identifies sealing surface 308 as corresponding to the claimed sealing surface. Appeal Br. 8. The Specification describes:

Sealing surface 308 extends between an outer edge 309 and the outer edge 303 of window 302. Surface 308 is configured to sealingly engage the front face 101 of tablet 100 so as to prevent or at least substantially restrict fluids or particles (e.g., dust, particulates, fibers, etc.) from entering or exiting enclosure 200 when assembly 10 is in its assembled configuration (Figures 2A-2B). Sealing surface 308 also includes a first portion 308a that extends about first aperture 304 and a second portion 308b that extends about second aperture 306.

Spec., para. 27. Thus, sealing surface 308 is described as being configured to sealingly engage the tablet to prevent or restrict fluids or particles from entering and exiting the enclosure. Likewise, Rayner's top member interior perimeter portion 20a and O-ring 15b provide a sealing surface that is disposed about the outer edge of the window to sealingly engage against a surface of the tablet computer when the enclosure is in the assembled configuration. Final Act. 3 (citing Rayner, paras. 23, 40, 123, 152-54); *see also* Rayner, paras. 138, 141, Figs. 2C, 4A; Appeal Br. 12 (Appellant's discussion of Rayner's interior perimeter portion 20a). In particular, Rayner describes:

top member interior portion 20a is configured as a wiper portion . . . to function in part as a seal and partly as a particle catch preventing or otherwise reducing the ingress of liquid or particulate matter for ingressing beneath the wiper when the top member 2 is coupled to the electronic device.

Rayner, para. 138. When portion 20a and O-ring 15b are modified to provide a hermetic seal, as suggested by Muday, the modified sealing surface provides an airtight seal that prevents passage of air past the seal. The preponderance of the evidence demonstrates that the structure of

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Rayner's seal, as modified by Muday, is similar to the sealing surface 308 described in Appellant's Specification. Based on the fact that the modified Rayner enclosure and the claimed enclosure are substantially identical, the Examiner had a sound basis for finding that Rayner's modified enclosure would be capable of preventing combustion within the internal chamber from escaping into the surrounding environment.

Thus, we find that the Examiner set forth adequate evidence of inherency to shift the burden to require Appellant to prove that Rayner's modified enclosure does not necessarily or inherently possess the characteristics of his claimed product. Appellant has not met this burden. Appellant has not pointed to any structural difference between the claimed sealing surface and the sealing surface of the prior art that would render the prior art sealing surface incapable of preventing combustion from escaping the enclosure. Appellant's contention that "in the event of combustion within housing 60 [of Rayner], the increased temperature in cavity 63 caused by the internal combustion *may result* in a pressure differential" and that "the seal provided by housing 60 *may be incapable* of resisting the pressure differential . . . and as a result, *may allow* fluid communication from cavity 63 to the surrounding environment" (Appeal Br. 19 (emphasis added)) is not commensurate with the scope of claim 1. Claim 1 does not require the enclosure to prevent escape of combustion under any particular type of conditions. Ans. 8 (Examiner noting that the claims fail to recite any type of conditions or that combustion must result in a pressure difference).

Appellant's reliance on the Inventor's Declaration is unavailing. Although the Declaration states that a commercial enclosure product sold by Xciel, Inc. meets industry standards to be capable of use with an electronic device in certain hazardous locations, the Declaration fails to tie this evidence to the claims. In fact, the claims do not require the claimed enclosure to meet any particular component standards or to prevent combustion from escaping in a manner sufficient to allow for use in any particular categories of hazardous locations (e.g., Class I and II, Division 2).

For these reasons, Appellant has not demonstrated error in the Examiner's finding that the modified enclosure of Rayner would be capable of preventing combustion from escaping into a surrounding environment, as recited in claim 1.

Appellant's additional argument (Appeal Br. 20–21) that the Examiner failed to take Official Notice with respect to the missing element of an enclosure that prevents escape of combustion is also unavailing because it is based on the premise that an element is missing from the combination of Rayner and Muday. For the reasons provided above, we disagree with this premise.

Appellant raised a new argument for the first time in the Reply Brief that the Examiner failed to provide a legally sufficient rationale for the proposed modification of Rayner with the teaching of Muday. Reply Br. 3–4. Appellant contends that this argument is in response to the Examiner's statement of the reason to combine as set forth in the Response to Arguments portion of the Answer. *Id.* at 3 (citing Ans. 7). Upon

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examination of the prosecution, however, we note that this same statement of the reason to combine was set forth by the Examiner in the Final Action. Final Act. 4. As such, Appellant's argument raised for the first time in the Reply Brief is untimely and Appellant has not made a showing of good cause as to why the Board should consider the belated argument.

Accordingly, we will not consider it. *See* 37 C.F.R. § 41.41(b)(2).

For these reasons, we sustain the rejection of claim 1, and claims 5, 7, and 20–22 which fall with claim 1, under 35 U.S.C. § 103(a) as unpatentable over Rayner and Muday.

Remaining Grounds of Rejection

Appellant does not present separate arguments for the patentability of dependent claims 2, 6, and 8–14 over Rayner, Muday, and one of Fearing, Song, and Simpson. Appeal Br. 23–31 (Appellant arguing that Fearing, Song, and Simpson do not cure the asserted deficiency in the combination of Rayner and Muday). Thus, for the same reasons as set forth above in our analysis of claim 1, we likewise sustain the rejections under 35 U.S.C. § 103(a) of claim 2 as unpatentable over Rayner, Muday, and Fearing, claim 6 as unpatentable over Rayner, Muday, and Song, and claims 8–14 as unpatentable over Rayner, Muday, and Simpson.

DECISION

The decision of the Examiner to reject claims 1, 2, 5–14, and 20–22 is AFFIRMED.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED