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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BLUE HOUSER, TOMMY McNALLY, MICHAEL WEBB,
MAX SMITH, and ASA CHRISTIANDER

Appeal 2017-004287
Application 13/635,268
Technology Center 2600

Before JOHN A. JEFFERY, ST. JOHN COURTENAY III, and
CATHERINE SHIANG, *Administrative Patent Judges*.

JEFFERY, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's decision to reject claims 1–48. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

Appellants' invention is a door control apparatus that holds a door open upon detecting a person or object in an area proximate to the door. *See generally* Abstract; Spec. ¶ 7. Claim 1 is illustrative:

1. A door control apparatus in electrical communication with an electromechanical door holder for operative connection to a hinged door, the electromechanical door holder including a door closer for applying a closing action to the hinged door and a solenoid disposed in the door closer operable

to close a valve to prevent the flow of hydraulic fluid in the door closer to cause the hinged door to stay open, the hinged door being above a floor and pivotally movable over a range of open positions between a closed position and a fully open position and being releasable by a person manually opening the door at a release position anywhere in the range of open positions, and the door being mounted to a structure surrounding the door in the closed position, the structure including a door frame and a wall, the door control apparatus comprising:

control circuitry; and

a sensor adapted to detect a person, object, or both in a first designated area proximate to the door, the sensor connected to the control circuitry, wherein the sensor is operable to signal the control circuitry upon a detection event,

wherein upon a detection event the control circuitry is operable to signal the solenoid to close the valve and cause the electromechanical door holder to hold the door open at a release position that is variable and may be automatically located at any position within the range of open positions.

THE REJECTIONS

The Examiner rejected claims 1–48 under 35 U.S.C. § 112(b) or 35 U.S.C. § 112 (pre-AIA), second paragraph as indefinite. Final Act. 3–4.¹

The Examiner rejected claims 1, 16, 36, and 48 under 35 U.S.C. § 103(a) as unpatentable over Sasaki (US 7,064,666 B2; June 20, 2006) and Simpson (US 4,793,023; Dec. 27, 1988). Final Act. 5–7.

The Examiner rejected claims 2, 3, 6, 7, 9, 17, 18, 21, 22, 24, and 31 under 35 U.S.C. § 103(a) as unpatentable over Sasaki, Simpson, and Heckethorn (US 4,665,378; May 12, 1987). Final Act. 8–12.

¹ Throughout this opinion, we refer to (1) the Final Rejection mailed September 17, 2015 (“Final Act.”); (2) the Appeal Brief filed August 16, 2016 (supplemented October 21, 2016) (“Br.”); and (3) the Examiner’s Answer mailed November 25, 2016 (“Ans.”).

The Examiner rejected claims 4, 5, 19, and 20 under 35 U.S.C. § 103(a) as unpatentable over Sasaki, Simpson, Heckethorn, and Stanczak (US 5,903,217; May 11, 1999). Final Act. 12–13.

The Examiner rejected claims 8 and 23 under 35 U.S.C. § 103(a) as unpatentable over Sasaki, Simpson, Heckethorn, and Higley (US 7,690,802 B2; Apr. 6, 2010). Final Act. 14.

The Examiner rejected claims 10–13 and 25–28 under 35 U.S.C. § 103(a) as unpatentable over Sasaki, Simpson, Heckethorn, and Hunter (US 5,227,631; July 13, 1993). Final Act. 14–16.

The Examiner rejected claims 14 and 29 under 35 U.S.C. § 103(a) as unpatentable over Sasaki, Simpson, and Carpenter (US 2009/0260289 A1; Oct. 22, 2009). Final Act. 16–17.

The Examiner rejected claims 15, 40, and 41 under 35 U.S.C. § 103(a) as unpatentable over Sasaki, Simpson, and Hulse (US 5,636,477; June 10, 1997). Final Act. 17–18.

The Examiner rejected claims 32, 37, 38, 43, 44, 46, and 47 under 35 U.S.C. § 103(a) as unpatentable over Sasaki, Simpson, and Stanczak. Final Act. 18–21.

The Examiner rejected claim 33 under 35 U.S.C. § 103(a) as unpatentable over Sasaki, Simpson, Stadler (7,762,022 B2; July 27, 2010), and Heckethorn. Final Act. 21–22.

The Examiner rejected claims 34 and 35 under 35 U.S.C. § 103(a) as unpatentable over Sasaki, Simpson, Stadler, Heckethorn, and Mullet (US 6,326,754 B1; Dec. 4, 2001). Final Act. 22–23.

The Examiner rejected claims 39 and 45 under 35 U.S.C. § 103(a) as unpatentable over Sasaki, Simpson, Heckethorn, and Stanczak. Final Act. 23–24.

The Examiner rejected claims 30 and 42 under 35 U.S.C. § 103(a) as unpatentable over Sasaki, Simpson, Heckethorn, and Hulse. Final Act. 24–25.

THE INDEFINITENESS REJECTION

The Examiner finds that because independent claims 1, 16, 32, 36, and 48 recite the release position is *automatically* located at any position in a range of a door's open positions, this automatic location is inconsistent with the recitation that the release position is a position at which a person *manually* opening the door releases the door. Final Act. 3. Because the release position depends on a user, the Examiner reasons that this position cannot be *automatically* located as claimed. Final Act. 3; Ans. 3–4. Regarding independent claim 31, the Examiner acknowledges that the claim does not limit the position to a manual release position, but finds that the recited position nevertheless depends on a user opening the door manually to that position. Final Act. 3.

Appellants argue that because the release position is variable, it is not a particular or predetermined location, but rather depends on where the user releases the door each time it is moved to an open position. Br. 7. As such, Appellants contend, the Examiner correctly interprets this claimed feature as automatically holding a door open at a release position where a user releases opening of the door. Br. 7–8.

ISSUE

Has the Examiner erred in rejecting claim 1 under § 112, second paragraph by concluding that automatically locating a release position at any range of open positions renders the claim indefinite because the release position depends on a user opening the door manually to that position?

ANALYSIS

On this record, we find no error in the Examiner's indefiniteness rejection of claim 1. Claim 1 recites, in pertinent part, a door that is releasable by a person *manually* opening the door at a release position anywhere in the range of open positions between a closed position and a fully open position.² This active method step renders apparatus claim 1 indefinite, for it raises the question of whether the claim would be infringed by devices that are merely capable of performing the recited function, or that they must actually perform that function. *See IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377, 1384 (Fed. Cir. 2005); *see also Rembrandt Data Technologies, LP v. AOL, LLC*, 641 F.3d 1331, 1339 (Fed. Cir. 2011) (data transmitting device held indefinite for reciting transmitting method step). Claim 1 is, therefore, indefinite as a hybrid claim, as are independent claims 16, 36, and 48 that recite commensurate limitations.

² We note the “person” recited in apparatus claim 1 is outside the scope of the claimed apparatus. Moreover, a human being cannot constitute a means. *Default Proof Credit Card System, Inc. v. Home Depot U.S.A., Inc.*, 412 F.3d 1291, 1300 (Fed. Cir. 2005) (citing *In re Prater*, 415 F.2d 1393, 1398 (CCPA 1969)). “A single claim which claims both an apparatus and the method steps of using the apparatus is indefinite under 35 U.S.C. 112, second paragraph.” MPEP § 2173.05(p)(II).

Claim 1 further recites that an electromechanical door holder holds the door open at a variable *release position* that may be *automatically* located at any position within the range of open positions. But as the Examiner explains, these limitations yield the inconsistent result of determining the release position *automatically*, yet also determining that position *manually* by a user releasing the door at that position. Ans. 3 (noting this inconsistency). Nevertheless, for examination purposes, the Examiner interprets the claim to require *automatically holding the door open* at a release position located where a user releases the door (Final Act. 3)—an interpretation that is undisputed. Br. 7–8 (agreeing with this interpretation). The Examiner, however, emphasizes that the claim was not presented in this manner and, as such, the claim remains indefinite. Ans. 3–4.

We agree. Although the Examiner’s interpretation avoids the above-noted inconsistency *for examination purposes*, including the prior art rejections, the claim is still indefinite. Indeed, the Examiner’s approach comports with established guidelines promoting compact prosecution. *See* MANUAL OF PATENT EXAMINING PROCEDURE (MPEP) § 2173.06 (9th ed. Rev. 07.2015, Nov. 2015) (noting that, if appropriate, indefinite claims should also be rejected over prior art, and the Examiner’s construction articulated clearly on the record).

Although the Examiner’s construction avoids the above-noted inconsistency *for examination purposes*, that does not obviate the indefiniteness issue, for there are still plausible constructions of claim 1 yielding the above-noted inconsistency. *See Ex parte Miyazaki*, 89 USPQ2d 1207, 1211 (BPAI 2008) (precedential) (“[I]f a claim is amenable to two or more plausible claim constructions, the USPTO is justified in requiring the

applicant to more precisely define the metes and bounds of the claimed invention by holding the claim unpatentable under 35 U.S.C. §112, second paragraph, as indefinite.”). Therefore, claim 1 is indefinite given its multiple plausible interpretations.

We reach a similar conclusion regarding independent claim 31. Although the Examiner acknowledges that claim 31 does not limit the recited position to a manual release position, Appellants do not persuasively rebut the Examiner’s finding that the recited position cannot be located automatically when interpreted in light of the two associated embodiments in the Specification. *See* Final Act. 3; Br. 6–8. Claim 31 is, therefore, also indefinite given its multiple plausible interpretations. *See Miyazaki*, 89 USPQ2d at 1211.

Therefore, we are not persuaded that the Examiner erred in rejecting claims 1–48 as indefinite.

THE OBVIOUSNESS REJECTION OVER SASAKI AND SIMPSON

The Examiner finds that Sasaki discloses a door control apparatus with many recited elements of claim 1 except for, among other things, holding the door open at a release position that is variable and may be automatically located at any position within a range of open positions. Final Act. 5–6.³ The Examiner, however, cites Simpson for teaching these

³ Although the Examiner cites an additional reference to Zengguang in the body of the rejection (Final Act. 6), Appellants do not dispute the Examiner’s reliance on this reference for the limited purpose for which it was cited.

features in concluding that the claim would have been obvious. Final Act. 6–7.

Appellants argue that because the recited release position is variable, it is not located at a particular or predetermined location as taught by the cited prior art. Br. 7–8.

ISSUE

Under § 103, has the Examiner erred in rejecting claim 1 by finding that Sasaki and Simpson collectively would have taught or suggested a door control apparatus where the door is held open at a release position that is variable and may be automatically located at any position within a range of open positions?

ANALYSIS

On this record, we find no error in the Examiner’s rejection. In short, Appellants do not persuasively rebut the Examiner’s finding that Simpson teaches the recited variable release position because (1) Simpson’s settable cam can be varied for multiple different positions, and (2) a door can be held open by *at least* the preset angle of openness by energizing a solenoid. Ans. 4 (citing Simpson, col. 6, ll. 5–17). Although Appellants contend that because the release position taught in the cited prior art is not variable because this position is a particular or predetermined location (Br. 7–8), Appellants do not persuasively rebut the Examiner’s above-noted findings to the contrary. Moreover, Simpson’s variable release position at least suggests a range of positions within the claimed range of open positions—an

overlap triggering a presumption of obviousness. *See Ormco Corp. v. Align Technology, Inc.*, 463 F.3d 1299, 1311 (Fed. Cir. 2006).

Lastly, Appellants' contention that Sasaki does not disclose the particular disputed elements of claim 1 (Br. 7–8) is unavailing where, as here, the rejection is not based on Sasaki alone for those features, but rather on the cited references' collective teachings. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986); *see also* Ans. 4 (citing Simpson for teaching the variable release position limitation). Nor are we persuaded of error in the Examiner's reliance on Sasaki for other recited limitations, as well as its combinability with Simpson, for the reasons indicated by the Examiner. Final Act. 3–7; Ans. 4.

Therefore, we are not persuaded that the Examiner erred in rejecting claim 1 under § 103, and claims 16, 36, and 48 not argued separately with particularity.

THE OTHER OBVIOUSNESS REJECTIONS

We also sustain the Examiner's obviousness rejections of claims 2–15, 17–35, and 37–47. Final Act. 5–25. Because these rejections are not argued separately with particularity, we are not persuaded of error in these rejections for the reasons previously discussed.⁴

⁴ To the extent that Appellants intend to argue claim 15 separately (*see* Br. 3), apart from summarily asserting that the Sasaki and Simpson fail to disclose the claimed switch, Appellants do not particularly show error in the Examiner's findings and conclusions in rejecting this claim. *See* 37 C.F.R. § 41.37(c)(1)(iv) (noting that an argument that merely points out what a claim recites is unpersuasive). *Accord In re Lovin*, 652 F.3d 1349, 1357 (Fed. Cir. 2011) (“[T]he Board reasonably interpreted Rule 41.37 to require more substantive arguments in an appeal brief than a mere recitation of the

CONCLUSION

The Examiner did not err in rejecting claims 1–48 under §§ 112, second paragraph and 103.

DECISION

We affirm the Examiner’s decision to reject claims 1–48.

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

claim elements and a naked assertion that the corresponding elements were not found in the prior art.”). In any event, even if we were to construe this assertion as a separate argument, it is not germane to the Examiner’s additional reliance on Hulse for teaching the claimed switch. *See* Final Act. 17–18.