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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte RANDY A. BICKEL and MATTHEW J. COPELAND

Appeal 2017-010221
Application 13/998,673
Technology Center 3700

Before LINDA E. HORNER, MICHELLE R. OSINSKI, and
SUSAN L. C. MITCHELL, *Administrative Patent Judges*.

MITCHELL, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

The Appellant¹ seeks our review under 35 U.S.C. § 134(a) of the Examiner's rejections of claims 1–13 as set forth in a Final Office Action.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real parties in interest as Dexter Axle Company and DexKo Global, Inc. Appeal Brief (February 6, 2017) (“Appeal Br.”) 2.

Final Office Action (May 4, 2016) (“Final Act.”); 37 C.F.R. § 41.31(a)(1).
We have jurisdiction under 35 U.S.C. § 6(b).

The Examiner rejected all of the pending claims as unpatentable over combinations of prior art. The Appellant asserts that the Examiner failed to identify the level of ordinary skill in the art applied in making the rejections, thus, rendering the rejections unclear. Appellant did not address substantively the rejections of the claims made by the Examiner.

For the reasons explained below, we find that the Examiner provided sufficient explanation for the rejections to enable Appellant to respond. Thus, we AFFIRM.

CLAIMED SUBJECT MATTER

The claimed subject matter relates to a hinged vent unit that may be used on the roof of a vehicle. Specification (November 21, 2013) (“Spec.”) ¶¶ 7, 38. Claims 1 and 12 are the only independent claims. Appeal Br. (Claims Appendix) 15–17. Claim 1 illustrates the subject matter on appeal and is reproduced below.

1. A vent comprising:
 - a ceiling garnish for mounting with a ceiling of a vehicle space;
 - a roof flange for mounting with a roof of a vehicle space and with the ceiling garnish, opposite the ceiling garnish;
 - a cover member hinged to the roof flange for covering a vent opening formed by the roof flange and ceiling garnish; and
 - a lever slidingly connected to the cover member and pivotally connected to the roof flange, the lever having a handle serially engagable [sic] with a plurality of flange detents and lockable therein; the lever pivotally moveable upon retraction of the handle against a biasing member force.

Appeal Br. (Claims Appendix) 15.

EVIDENCE

Ramniceanu	US 3,305,168	Feb. 21, 1967
Bickel et al.	US 2007/0015450 A1	Jan. 18, 2007
Perkins et al.	US 2007/0184775 A1	Aug. 9, 2007
Petrossian	US 2008/0113613 A1	May 15, 2008
Hua	US 2010/0056035 A1	Mar. 4, 2010

OBJECTIONS AND REJECTIONS

The Final Office Action includes an objection to claim 2 because two different terms, “a fan” and “the air movement device,” are used to refer to the same component of the claimed apparatus. Final Act. ¶¶ 5, 7.

The Final Office Action also includes the following rejections:

1. Claims 1, 2, 5, 7, 8, and 11 are rejected under 35 U.S.C. § 103 as being unpatentable over Hua and Petrossian;
2. Claims 3 and 4 are rejected under 35 U.S.C. § 103 as being unpatentable over Hua, Petrossian, and Ramniceanu;
3. Claims 6, 9, and 10 are rejected under 35 U.S.C. § 103 as being unpatentable over Hua, Petrossian, and Perkins; and
4. Claims 12 and 13 are rejected under 35 U.S.C. § 103 as being unpatentable over Bickel and Petrossian.

ANALYSIS

Level of Ordinary Skill in the Art

Appellant asserts that “[t]he primary issue in this appeal is the lack of evidence to support the Examiner’s contention regarding the level of ordinary skill in the art.” App. Br. 3. Specifically, Appellant contends that

the Examiner has failed to identify the applicable level of ordinary skill in the art or any evidence to support the level of ordinary skill in the art at the time of the invention, and thus, has made no prima facie case for obviousness. *Id.* Appellant concludes that “without the context of the ‘level of ordinary skill,’ evaluation of the obviousness rejections is stymied and the Office Actions are rendered unclear.” *Id.* at 10.²

The Examiner responds that the Manual of Patent Examining Procedure expressly states that the level of ordinary skill in the art may be implicit. Examiner’s Answer (May 16, 2017) (“Ans.”) 7 (citing MPEP § 2141(II)(C)). The Examiner also notes that the references relied upon in rejecting the claims on appeal were publically available as of the effective filing date of the application and assumed to be known by the hypothetical person of ordinary skill in the art. *Id.* The Examiner concludes that “the hypothetical person having ordinary skill would have been aware of the references and there is proper motivation to combine the references found in the rejection (although not argued).” *Id.* at 7–8.

Appellant replies that its express request and need for the explicit statement of the level of ordinary skill in the art necessitates that the Examiner provide such an express statement. Reply Brief (July 19, 2017)

² Appellant notes that it petitioned the Director to require the Examiner to provide the level of ordinary skill in the art and that evidence upon which the Examiner made that determination. App. Br. 5. After noting that the level of ordinary skill in the art may be implicit in view of the applied prior art and that the Final Office Action appeared to be complete, the Director dismissed the Petition as the Appellant was addressing the Examiner’s substantive position on patentability that may only be resolved on appeal here. Decision on Petition (Aug. 1, 2016) (“Dec. on Pet.”) 1–2.

(“Reply Br.”) 2. In responding to the Examiner’s statement concerning the age of the asserted references, Appellant concludes that:

As a matter of common sense, old references are often not considered by someone designing certain products today. Ordinarily skilled artisans in many arts will likely only look back so far in seeking information. The USPTO itself demonstrates this with its public search records substantively limited to word-searchable patents since 1976. . . . Does the “ordinary skill” relied upon by the Examiner include the skill to research old prior art? We have no way of knowing, at this point in time with the non-information the Examiner gave.

Id. at 3–4.

As the Examiner appropriately recognized, “[t]he person of ordinary skill in the art is a *hypothetical* person who is *presumed* to know the relevant prior art.” *In re GPAC Inc.*, 57 F.3d 1573, 1579 (Fed. Cir. 1995) (emphasis added). Appellant’s discussion concerning which prior art particular artisans would likely view in designing a product similar to what is claimed is not relevant.

In determining the level of ordinary skill in the art, we are to consider the “type of problems encountered in the art; prior art solutions to those problems; rapidity with which innovations are made; sophistication of the technology; and educational level of active workers in the field.” *Id.* (quoting *Custom Accessories Inc. v. Jeffrey-Allan Indus., Inc.*, 807 F.2d 955, 962 (Fed. Cir. 1986)). “A specific finding on the level of skill in the art is not, however, required where the prior art itself reflects an appropriate level and a need for testimony is not shown.” *Litton Indus. Products, Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163–64 (Fed. Cir. 1985).

Here we find that the prior art does itself reflect an appropriate level of ordinary skill in the art, and the Examiner's discussion of the prior art as applied to the claims adequately apprised Appellant of the Examiner's assessment of the ordinary level of skill in the art. For instance, the Examiner explains how the majority of the limitations of claim 1 are taught by Hua, and that Petrossian teaches the remaining limitations. *See* Final Act. ¶ 10. The Examiner then explains that:

It would have been obvious to one having ordinary skill in the art before the effective filing date to have modified the adjustment mechanism as taught by Hua by using the adjustment mechanism as taught by Petrossian in order to provide a position regulating which provides simple locking/unlocking, exact locking positions, and a lock that is simple and economical to manufacture.

Id. (citing Petrossian ¶ 6 (stating a need in the art for “a damper positioning lock that provides a number of exact locking positions,” “that provides for simple locking/unlocking of the lever,” and “that is simple and economical to manufacture”). The Examiner provides similar explanations for each combination of prior art for each rejection. *See id.* ¶¶ 17, 19–21, 23–24. Implicit in the Examiner's analysis is a resolution of the level of ordinary skill in the art, as evidenced, for example, by the Examiner's reference to Petrossian's teachings of a lock that provides simple locking/unlocking and is simple to manufacture. *Id.* ¶ 10 (citing Petrossian ¶ 6).

“[T]he PTO carries its procedural burden of establishing a prima facie case when its rejection satisfies 35 U.S.C. § 132, in ‘notify[ing] the applicant . . . [by] stating the reasons for [its] rejection . . . together with such information and references as may be useful in judging of the propriety of continuing the prosecution of [the] application.’” *In re Jung*, 637 F.3d 1356,

1362 (Fed. Cir. 2011) (quoting 35 U.S.C. § 132). “That section ‘is violated when a rejection is so uninformative that it prevents the applicant from recognizing and seeking to counter the grounds for rejection.’” *Id.* (quoting *Chester v. Miller*, 906 F.2d 1574, 1578 (Fed. Cir. 1990)). We determine that the Examiner’s explanations concerning what each reference teaches and why one of ordinary skill in the art would have combined such teachings is sufficient explanation of the level of ordinary skill in the art such that Appellant is apprised of the Examiner’s position and is able to respond to same. If Appellant disagrees with the Examiner’s explanation as to why one of ordinary skill in the art would have combined the teachings of the prior art of any combination in the manner claimed, it was incumbent upon Appellant to respond with particularity to the substance of the Examiner’s findings and reasoning. Because Appellant has offered no substantive response to the stated rejections of the claims, we sustain those rejections.

Objection to Claim 2

The Examiner objected to claim 2 because the claim term “the air movement device” lacks antecedent basis although the Examiner understood that “the air movement device” referred to the previously stated “fan.” Final Act. ¶ 5. The Examiner suggested that “the air movement device” could be changed to “the fan,” or “a fan” could be changed to “an air movement device.” *Id.*

Appellant responds that because the claim is understood and the Examiner put the explanation in the record that “the air movement device” means “a fan,” nothing more is needed. Appeal Br. 13–14. Appellant asks that the objection be withdrawn as moot. *Id.* at 14.

The objection relates to a petitionable matter and not to an appealable matter. See, e.g., *In re Mindick*, 371 F.2d 892, 894 (CCPA 1967) (holding that the refusal of an examiner to enter an amendment of claims is reviewable by petition under 37 C.F.R. § 1.181, and not by appeal to the Board); *In re Berger*, 279 F.3d 975, 984 (Fed. Cir. 2002) (citing *In re Hengehold*, 440 F.2d 1394, 1403–04 (CCPA 1971)) (stating that there are many kinds of decisions made by examiners that are not appealable to the Board when they are not directly connected with the merits of issues involving rejections of claims, and holding that “the kind of adverse decisions of examiners which are reviewable by the [B]oard must be those which relate, at least indirectly, to matters involving the rejection of claims”)); MPEP §§706.01, 1002.02(c)(4), 1201 (the Board will not ordinarily hear a question that is reviewable by petition). Thus, the relief sought by Appellant would have been properly presented by a petition to the Director instead of by appeal to this Board. Accordingly, we will not consider this issue.

DECISION

The decision of the Examiner rejecting claims 1–13 is 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). See 37 C.F.R. § 1.136(a)(1)(iv).

CONCLUSION

In summary:

Claims Rejected	Basis	Affirmed	Reversed
1, 2, 5, 7, 8, 11	§ 103 Hua and Petrossian	1, 2, 5, 7, 8, 11	
3, 4	§ 103 Hua, Petrossian, Ramniceanu	3, 4	
6, 9, 10	§ 103 Hua, Petrossian, Perkins	6, 9, 10	
12, 13	§ 103 Bickel, Petrossian	12, 13	
Overall Outcome		1-13	

AFFIRMED