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NIXON & VANDERHYE, PC 901 NORTH GLEBE ROAD, 11TH FLOOR ARLINGTON, VA 22203			CHAN, WEI	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte KLAAS ARNOUT¹

Appeal 2017-010266
Application 13/950,699
Technology Center 2800

Before RAE LYNN P. GUEST, DONNA M. PRAISS, and
CHRISTOPHER C. KENNEDY, *Administrative Patent Judges*.

GUEST, *Administrative Patent Judge*.

DECISION ON APPEAL

I. STATEMENT OF CASE

Appellant appeals under 35 U.S.C. § 134(a) from the Examiner’s decision to reject claims 1, 6–9, and 12–14 under 35 U.S.C. § 102(b) as anticipated by Bergman² and claims 2–5, 10, 11, and 15 under 35 U.S.C. § 103(a) as unpatentable over Bergman in view of additional prior art. *See* Examiner’s Non-Final Office Action, dated Sept. 13, 2016 (“Non-Final Act.”); Examiner’s Answer, dated May 8, 2017 (“Ans.”). We have jurisdiction under 35 U.S.C. § 6(b).

¹ Appellant identifies Manzana BVBA as the real party in interest. Appellant’s Appeal Brief (“Br. 3”).

² US 2009/0200967 A1, published August 13, 2009, naming Bergman et al. as inventors.

We REVERSE.

Appellant's invention is related to a contact switch for the operation of lighting. Specification ("Spec.") 1:2. According to the Specification, the invention provides a switch for simple and efficient changes in light schemes, including changing, for example, the level of light (dimming) and/or color. *Id.* 1:14–21, 4:15–17. In particular, the Specification describes a switch where the color and the light level of an LED can be varied depending on the time period in which a sensor is contacted. Spec. 7:14–8:2.

Independent claim 1 is exemplary of the subject matter on appeal and reproduced below:

1. Switch, suitable for forwarding at least two functions to a lighting system, wherein the switch comprises the following elements:

- a sensor, configured to detect a contact;
- an illuminating element;
- an LED, wherein the LED can assume a plurality of colours, and wherein the LED is configured to illuminate the illuminating element; and
- an electronic circuit, configured to measure the time period of contact with the sensor, and configured to select a function from the at least two functions;

wherein the selection of a function from the at least two functions is dependent on the time period in which the sensor is contacted, and wherein the colour of the LED varies depending on the time period in which the sensor is contacted, wherein the electronic circuit is configured to control the LED with a periodic colour change in a repeating cycle during contact with the sensor.

Br. 23, Claim App'x.

In addition to Bergman as a primary reference, the Examiner applies the following prior art references:

Schlangen et al. (Schlangen)	US 2010/0277316 A1	Nov. 4, 2010
Chemel et al. (Chemel)	US 2010/0296285 A1	Nov. 25, 2010
Jeanneteau et al. (Jeanneteau)	US 2011/0187539 A1	Aug. 4, 2011
Bahrehmand	US 8,344,639 B1	Jan. 1, 2013

The Examiner maintains the following rejection:

1. Claims 1, 6–9, and 12–14 under pre-AIA 35 U.S.C. § 102(b) as being anticipated by Bergman;
2. Claims 2, 4, 5, and 15 under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over of Bergman in view of Chemel;
3. Claim 3 under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Bergman in view of Chemel and Bahrehmand;
4. Claim 11 under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Bergman in view of Schlangen;
5. Claim 10 under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Bergman in view of Jeanneteau.

II. DISCUSSION

With respect to claim 1, Appellant mainly contends that Bergman does not teach an electronic circuit that “is configured to control the LED with a periodic colour change in a repeating cycle during contact with the sensor,” as recited in claim 1. Br. 8.

The Examiner finds that Bergman teaches this limitation in teaching that the “light emitting-elements 23 are thus capable of emitting light of

different colors” (Bergman ¶ 39) and “a full rotation of the finger tip over the ring-shaped hue selection surface 20 may accomplish the selection of one of the hues” (Bergman ¶ 48). Non-Final 4–5. The Examiner further finds that the limitation is an intended use of the claimed electronic circuit and that the prior art switch of Bergman is capable of performing the intended use by the user operating the touch sensor and completing a full rotation of the finger. Non-Final. 3.

Appellant is correct (Br. 13) that when functional language is associated with programming or some other structure required to perform the function, that programming or structure must be present in order to meet the claim limitation. *See Typhoon Touch Techs., Inc. v. Dell, Inc.*, 659 F.3d 1376, 1385 (Fed. Cir. 2011). As such, in these circumstances, the “capable of” test requires that the prior art structure be capable of performing the function without further programming. *Id.*

We agree with the Appellant that the Examiner has not explained with sufficient specificity how the prior art teaches a switch with an electronic circuit configured such that sensor contact causes both color variation depending upon the time period in which the sensor is contacted and a periodic color change in a repeating cycle. Bergman describes a first switch in which sensor contact provides a color palate that zooms into a second more narrow color palate (i.e. a single, not periodic or repeating, color change) after sensor contact in a single location for a period of time. *See* Bergman ¶¶ 11, 48 (Figs. 3A-3C). Bergman also describes an alternative switch in which the color palate changes in the first instant based on the particular location in which the sensor is contacted (i.e., by moving a fingertip a full rotation over the ring-shaped hue selection surface 20), rather

than by the time period in which the sensor is contacted. Bergman ¶¶ 11, 55 (Figs. 5A–5C).

The Examiner has not shown that Bergman describes with sufficient specificity an embodiment meeting all the limitations of the claim, namely where sensor contact causes both color variation depending upon the time period in which the sensor is contacted and a periodic color change in a repeating cycle.

Appellant presents separate arguments for claims 6 and 9 as a group, claim 8, claims 12 and 13 as a group, and claim 14. However, because the Examiner relied upon the same finding of Bergman with respect to these claims, which we found insufficient to anticipate the independent claims, we do not sustain the rejection of these claims for the same reason.

Similarly, the Examiner relies on the same findings in rejecting dependent claims based on obviousness. Accordingly, we do not sustain the Examiner's obviousness rejections on appeal for the same reasons.

In sum, we do not sustain any of the Examiner's rejections and reverse the Examiner's decision to reject claims 1–15.

REVERSED