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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte KYLE WILLIAM VON HASSELN

Appeal 2017-010595
Application 13/196,859
Technology Center 1700


INGLESE, Administrative Patent Judge.

DECISION ON APPEAL

Appellant\(^1\) requests our review under 35 U.S.C. § 134(a) of the Examiner’s decision to finally reject claims 10, 12–20, 22–26, and 29. We have jurisdiction over this appeal under 35 U.S.C. § 6(b).

We AFFIRM.

\(^{1}\) Appellant identifies 3D Systems, Inc. as the real party in interest. Appeal Brief filed January 12, 2016 ("App. Br."), 3.
STATEMENT OF THE CASE

Appellant claims a method for making an edible component. App. Br. 3–4. Claim 10, the sole pending independent claim, illustrates the subject matter on appeal and is reproduced below with contested language italicized:

10. A method for making an edible component, comprising
a. depositing successive layers of an unbound powder food material according to digital data that describes the edible component; and
b. applying to one or more regions of each of the successive layers of food material one or more edible binders that bond the food material at said one or more regions to form said edible component,
wherein the digital data describes sequential cross-sectional layers of the edible component, the cross-sectional layers comprising a plurality of voxels, and
wherein *the plurality of voxels vary in food material composition, color, flavor, or a combination thereof.*

App. Br. 13 (Claims Appendix) (emphasis added).


DISCUSSION

Upon consideration of the evidence relied upon in this appeal and each of Appellant’s timely contentions,² we affirm the Examiner’s rejection

² We do not consider any new argument Appellant raises in the Reply Brief that Appellant could have raised in the Appeal Brief. 37 C.F.R. § 41.37(c)(1)(iv); 37 C.F.R. § 41.41(b)(2) (arguments raised for the first
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of claims 10, 12–20, 22–26, and 29 under 35 U.S.C. § 103(a) for the reasons set forth in the Final Action, the Answer, and below.

We review appealed rejections for reversible error based on the arguments and evidence Appellant provides for each issue Appellant identifies. 37 C.F.R. § 41.37(c)(1)(iv); Ex parte Frye, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential), cited with approval in In re Jung, 637 F.3d 1356, 1365 (Fed. Cir. 2011) (explaining that even if the examiner had failed to make a prima facie case, “it has long been the Board’s practice to require an applicant to identify the alleged error in the examiner’s rejections”).

Claims 10, 12–17, 19, 20, 22–25, and 29

Appellant argues claims 10, 12–17, 19, 20, 22–25, and 29 as a group on the basis of independent claim 10, to which we accordingly limit our discussion. App. Br. 4--12; 37 C.F.R. § 41.37(c)(1)(iv).

Lai discloses a method of manufacturing a three-dimensional food product based on a design created by a customer using computer-aided design software. Abstract; ¶ 1, 8–13, 35. Lai discloses that the method involves applying successive layers of edible powder onto a workpiece according to the generated by the computer-aided design software, and using an inkjet printer head to spray an edible binder onto each powder layer. ¶ 22–24; Fig. 1. Lai discloses that the edible powder can be gypsum powder, flour, glutinous rice flour, corn starch, chocolate powder, and other edible powders. ¶ 33. Lai discloses that the particles of edible powder may have different sizes, and may play different roles according to their

time in the Reply Brief that could have been raised in the Appeal Brief will not be considered by the Board unless good cause is shown).
compositions, such as filler, which Lai discloses to be a primary constituent of the edible powder, stabilizer, which Lai discloses to be a secondary constituent of the edible powder, fortifier or binding promoter, and special adhesive. ¶33.

The Examiner finds that Lai discloses that pores in the edible powder of a three-dimensional food product produced according to Lai’s method can absorb an additive sprinkled over the surface of the food “so as to add different flavors and colors to the food and improve the artistic look of the food.” Ans. 5; Lai ¶ 41. The Examiner finds that Lai further discloses that “[u]nlike the monotonous appearance of the traditional food, the present invention adds diversified, innovative, stylish designs for different kinds of food to meet the tailor-made requirements of a customer design.” Final Act. 4; Lai ¶ 43.

Based on these disclosures in Lai, and in view of “the general knowledge in food manufacturing of producing foods having different designs and taste” by “using different materials in different areas,” the Examiner determines that it would have been obvious to one of ordinary skill in the art to use powders having different sizes, colors, and flavors in Lai’s process to create product designs having different appearances, flavorings, and colorings based on manufacturer preferences, such as products having regions or areas with different composition, flavoring, and coloring. Final Act. 3–5; Ans. 5–6.

Appellant argues that Lai discloses using a single edible powder that includes filler particles, stabilizer particles, and special adhesive particles, when carrying out each instance of the manufacturing process described in the reference. App. Br. 7. Appellant contends that the Examiner therefore
“incorrectly relies on Lai’s teachings regarding food powders to assert that Lai also contemplates a food product in which one area has a different composition in terms of flavoring and coloring from another area in the product.” App. Br. 5–7. Appellant asserts that Lai’s disclosures regarding food powder would not have suggested a method of making a food product in which one area has a different composition in terms of flavoring and coloring from another area in the product. App. Br. 8.

However, the Examiner’s determination that it would have been obvious to one of ordinary skill in the art at the time of Appellant’s invention to produce a food product using the manufacturing process disclosed in Lai having one area with different flavoring and coloring than another area in the product is not based solely on Lai’s disclosures regarding edible powders. Final Act. 3–5; Ans. 5–6. Rather, as discussed above, the Examiner takes official notice that it was generally known in the art at the time of Appellant’s invention to manufacture food products having various designs and tastes by using different materials in different areas of the products. Final Act. 4–5; Ans. 6. Because this finding is reasonable, and because Appellant does not challenge it, we accept it as fact. App. Br. 4–12; Reply Br. 2; In re Kunzmann, 326 F.2d 424, 425 n.3 (CCPA 1964).

As the Examiner correctly finds, Lai discloses improving the artistic look of a food product by adding different flavors and colors to the product, and discloses that the manufacturing process described in the reference provides diversified, innovative, stylish designs for different kinds of food that meet particular customer requirements. Final Act. 4; Ans. 5–6; Lai ¶¶ 41, 43. Lai further discloses that various types of edible powders can be used in the process described in the reference, and indicates that the particles
of edible powder “may come with different sizes and play different[] roles according to their compositions.” ¶ 33 (emphasis added).

In view of these disclosures in Lai, and in view of the undisputed knowledge in the art at the time of Appellant’s invention of manufacturing food products having various designs and tastes by using different materials in different areas of the products, one of ordinary skill in the art reasonably would have been led to use the manufacturing process described in Lai to produce a three-dimensional food product having regions or areas with different composition, flavoring, and coloring to create diversified, innovative, stylish product designs based on customer preferences.

Appellant argues that Lai’s disclosures regarding food powder do not enable a method of making a food product in which one area has a different composition in terms of flavoring and coloring from another area in the product. App. Br. 8.

However, “a non-enabling reference may qualify as prior art for the purpose of determining obviousness under § 103.” Symbol Techs., Inc. v. Opticon, Inc., 935 F.2d 1569, 1578 (Fed. Cir. 1991). Nonetheless, Appellant’s unsupported arguments do not demonstrate that one of ordinary skill in the art could not have arrived at an edible component as recited in claim 1 having a plurality of voxels that vary in food material composition, color, flavor, or a combination thereof, without undue experimentation based on the disclosures of Lai, together with information known in the art, at the time of Appellant’s invention. App. Br. 4–12; In re Antor Media Corp., 689 F.3d 1282, 1288 (Fed. Cir. 2012) (A prior art printed publication, like a prior art patent, “is presumptively enabling barring any showing to the contrary by a patent applicant or patentee.”); In re Morsa, 713 F.3d 104, 110 (Fed. Cir.
Specifically, on this record, Appellant does not provide sufficient
evidence or reasoning, such as evidence or reasoning based on the factors
listed in In re Wands, 858 F.2d 731, 737 (Fed. Cir. 1988), to demonstrate
that one of ordinary skill in the art could not have used the manufacturing
process described in Lai to produce an edible component as recited in claim
1 having a plurality of voxels that vary in food material composition, color,
flavor, or a combination thereof, without undue experimentation. App. Br.
4–12.

Appellant argues that Lai does not teach, suggest, or enable a method
of making an edible component having voxel-by-voxel variability of food
properties, such as food material composition, color, and flavor. App. Br. 8–
9. Appellant contends that Lai fails to disclose an edible component formed
from cross-sectional layers comprising a plurality of voxels in which
proximal voxels of the plurality of voxels vary in food material composition,
color, flavor, or a combination thereof, and one of ordinary skill in the art
would not have arrived at a method of producing such an edible component
without knowledge of Appellant’s disclosure. App. Br. 9. Appellant further
asserts that the mere recitation in Lai that Lai’s invention adds diversified,
innovative, stylish designs for different kinds of food to meet the tailor-made
requirements of a customer design cannot make up for the complete absence
in Lai of any disclosure of a system or method that would enable one of
ordinary skill in the art to produce an edible component with voxel-by-voxel
However, as the Examiner correctly finds, claim 1 does not require “voxel-by-voxel” variability of food properties. Ans. 7. Nor does claim 1 require “proximal voxels” to vary in food material composition, color, flavor, or a combination thereof. Id. Rather, claim 1 recites a method for making an edible component according to digital data that describes sequential cross-sectional layers of the edible component comprising a plurality of voxels that vary in food material composition, color, flavor, or a combination thereof. Accordingly, the plain language of claim 1 requires a plurality of voxels in an edible component produced according to the steps recited in the claim to vary in food material composition, color, flavor, or a combination thereof. Consequently, Appellant’s arguments are unpersuasive of reversible error because they are not grounded on limitations that appear in the claims. In re Hiniker Co., 150 F.3d 1362, 1368–1369 (Fed. Cir. 1998); In re Self, 671 F.2d 1344, 1348 (CCPA 1982).

We accordingly sustain the Examiner’s rejection of claims 10, 12–17, 19, 20, 22–25, and 29 under 35 U.S.C. § 103(a).

Claims 18 and 26

Although Appellant separately addresses claims 18 and 26, Appellant’s statements do not constitute substantive arguments as to the separate patentability of these claims because Appellant merely asserts without further explanation that Lai does not disclose, and would not have suggested, the subject matter recited in these claims. App. Br. 9; 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 claim elements and a naked assertion that the corresponding elements were not found in the prior art. Because Lovin
did not provide such arguments, the Board did not err in refusing to separately address claims 2–15, 17–24, and 31–34.”).

We accordingly sustain the Examiner’s rejection of claims 18 and 26 under 35 U.S.C. § 103(a).

DECISION

We affirm the Examiner’s rejection of claims 10, 12–20, 22–26, and 29 under 35 U.S.C. § 103(a).

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

AFFIRMED