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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CHARLES FLOYD, MICHAEL RISSO, AIMEE DISKIN, and HANNAH ROSENBERG

Appeal 2018-002015
Application 14/686,213
Technology Center 3600

Before BRETT C. MARTIN, JEREMY M. PLENZLER, and ARTHUR M. PESLAK, *Administrative Patent Judges*.

PLENZLER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant seeks our review under 35 U.S.C. § 134(a) of the Examiner's Decision rejecting claims 1–8. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

CLAIMED SUBJECT MATTER

Claim 1 is the sole independent claim, with claims 2–8 depending therefrom. Claim 1 is representative of the claims on appeal, and is reproduced below:

> 1. A cat scratcher attractant device comprising:
>
> a vertically extending axis;
>
> a housing having a hollow interior; and
>
> a cap terminating an end of said housing;
>
> said cat scratcher attractant device further comprising:
>
> a motor and microprocessor supported by and enclosed within said housing or cap;
>
> said motor having a rotatable shaft positioned along said vertically extending axis;
>
> a power source for providing power to said motor and microprocessor;
>
> a wand and an attractant, said wand having first and second ends, said first end being fixed to said rotatable shaft and said second end being fixed to said attractant;
>
> said microprocessor being programmed to control operation of said motor to cause said wand to rotate intermittently; and
>
> said cat scratcher attractant device further being characterized as having a cat scratching surface on an exterior of said housing.

REJECTIONS[1]

1. Claim 8 is rejected under 35 U.S.C. § 112(a) as failing to comply with the written description requirement.

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[1] The Final Action also include claim objections, which Appellant addresses in the Appeal Brief. *See* Appeal Br. 3–4. As the Examiner correctly notes (Ans. 2), the appropriate way to dispute the Examiner's objections is by Petition (*see* 37 C.F.R. § 1.181).

2. Claim 7 is rejected under 35 U.S.C. § 112(b) as being indefinite.

3. Claims 1–7 are rejected under 35 U.S.C. § 103 as being unpatentable over Stewart (US 6,345,593 B1, Feb. 12, 2002) and Nobile (US 9,565,835 B1, issued Feb. 14, 2017).

4. Claim 8 is rejected under 35 U.S.C. § 103 as being unpatentable over Stewart, Nobile, and Applicant Admitted Prior Art.[2]

OPINION

Claim 8 – Section 112(a)

Claim 8 depends from claim 1, and recites that "said microprocessor is provided with at least two programs for selectively controlling the rotation of said shaft." The Examiner explains that "not a single algorithm for selectively controlling the rotation of the shaft is disclosed nor is a particular action of the motor shaft such that one could determine how the microprocessor could be programmed to perform the functions been recited." Final Act. 5. The Examiner further notes that "the programs are not described as a set of steps, there are no flowcharts depicted, and there are no algorithms recited in the disclosure." *Id.* at 6.

Appellant responds that "[a]nyone skilled in this art would clearly know how to program a microprocessor," explaining that "[p]rogramming a microprocessor is routine" and "the Examiner makes note of a microprocessor disclosed by Nobile which 'can be programmed with

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[2] The Examiner notes that "Official Notice [was taken] that motorized cat toys using motors having a shaft for manipulating an attractant, wherein the motor is controlled by a microprocessor having at least two programs for selectively controlling the rotation of a motor shaft are well-known in the art," and because "Applicant failed to make any challenge of the taking of official notice . . . the previously made statement is now considered to be Applicant Admitted Prior Art (AAPA)." Final Act. 2.

instructions to rotate the motor bi-directionally with variations in speed to affect the motion of the attractant.'" Appeal Br. 4.

Appellant focuses on whether one skilled in the art would have known how to program a microprocessor, in a general manner, rather than identifying any support for two separate programs in the Specification. The Examiner explains that "[f]rom a review of the originally filed disclosure, only page 6, lines 18–27 appear to describe the programming," and "[b]ased upon this disclosure, there is no explanation as to what if anything differentiates the two programs." Ans. 3. That is, the rejection is not based on whether one skilled in the art would know how to program a microprocessor, generally. Rather, the rejection is based on the failure to disclose the content of two separate programs, even at a basic level.

The portion of the Specification noted by the Examiner simply discloses "the microprocessor being programmed to control operation of motor 34 to cause wand 20 to rotate intermittently" with the desire to "[i]deally . . . provide[] . . . at least two programs for selectively controlling rotation of shaft 42." Spec. 6:21–24. Appellant identifies nothing in the Specification to dispute the Examiner's rejection.

For the reasons set forth above, we are not apprised of Examiner error.

Claim 7 – Section 112(b)

Appellant does not dispute the Examiner's rejection of claim 7 as indefinite. *See* Appeal Br. 5. Accordingly, we summarily affirm that rejection.

Claims 1–8 – Section 103

Appellant argues claims 1–7 as a group. Appeal Br. 5–7. We select claim 1 as representative. Claims 2–7 stand or fall with claim 1. *See* 37

C.F.R. § 41.37(c)(1)(iv). Claim 8 depends from claim 1, and Appellant does not present separate arguments for claim 8. Appeal Br. 8.

The Examiner finds that Stewart teaches the majority of the elements recited in claim 1, but "do[es] not expressly disclose that the PC board is a microprocessor (i.e. a subset type of an integrated circuit/PCB which comprises memory for storing instructions)" programmed for intermittent rotation of the wand. Final Act. 9. The Examiner finds that Nobile teaches these features. *See id.* at 9 (citing Nobile 5:37–44) ("Nobile teaches a cat attractant device comprising an attractant which is manipulated by a motor connected to a microprocessor having instructions" and "that the microprocessor can be programmed with instructions to rotate the motor bi-directionally and with variations in speed to effect the motion of the attractant."). The Examiner reasons, for example, that it would have been obvious

> to utilize a microprocessor storing instructions for varying the direction and rotation of a motor as taught by Nobile in place of the generic PCB taught by Stewart et al in order to provide increased motion/realism to the attractant such that a cat maintains interest longer and/or must move over a greater area, thereby increasing the exercise provided, in order to interact with the attractant.

Id.

Appellant does not dispute the majority of the Examiner's findings or the rationale to combine Nobile's teachings with those of Stewart. *See* Appeal Br. 5–7. The only dispute before us concerns Appellant's contention that "Nobile fails to teach a microprocessor-controlled pet toy which enables the wand to rotate intermittently" and that the resulting combination of teachings asserted by the Examiner requires motion activation. Appeal Br.

6–7. Appellant contends, for example, that Nobile's "microprocessor is used for such things as 'creating bi-directional motion, speed variations, laser blinking and the like'" and "if Stewart and Nobile were to be combined, one would have a toy which is only activated by motion but, once activated, the attractant can move bi-directionally at varying speeds." *Id.* at 7 (citing Nobile 5:43–44). Appellant's contentions are not persuasive.

As noted above, for example, Appellant acknowledges that Nobile's microprocessor is programmed for bi-directional rotation. *See id.* Bi-directional rotation is one form of intermittent rotation because rotation in a given direction is alternating, rather than continuous. Appellant's contention regarding the combination requiring activation by motion is not commensurate with the scope of the claim. Claim 1 simply requires that the "microprocessor [is] programmed to control operation of said motor to cause said wand to rotate intermittently." That intermittent rotation can be initiated, for example, by some form of switch being actuated (like in Nobile) or with some form of motion activation input (like in Stewart). The claim does not specify the type of initial activation, just that once activated, the "microprocessor . . . cause[s] said wand to rotate intermittently."

For at least these reasons, we are not apprised of Examiner error in the rejection of claims 1–8 under 35 U.S.C. § 103.

DECISION

We AFFIRM the Examiner's decision to reject claim 8 under 35 U.S.C. § 112(a).

We AFFIRM the Examiner's decision to reject claim 7 under 35 U.S.C. § 112(b).

We AFFIRM the Examiner's decision to reject claims 1–8 under 35 U.S.C. § 103.

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