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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DIRK SCHRADER,
CHRISTOPHER SABATER-LUENZEL,
MARTINA BATALIA, THOMAS HENZE,
and SEBASTIAN HEINE

Appeal 2018-003099
Application 13/867,361
Technology Center 1700

Before KAREN M. HASTINGS, MICHAEL G. McMANUS, and
SHELDON M. McGEE, *Administrative Patent Judges*.

HASTINGS, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant¹ requests review under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 1–7, 12–14 and 16–26 under 35 U.S.C. § 103(a) as unpatentable over Mussawir-Key (GB 2474939A, published May 5, 2011). We have jurisdiction pursuant to 35 U.S.C. § 6.

We AFFIRM.

¹ Appellant is the Applicant, "SYMRISE AG", which is identified as the real party in interest (Appeal Br. 1).

BACKGROUND

Claim 1 is illustrative of the claimed subject matter and is reproduced below from the Claims Appendix to the Appeal Brief:

1. Liquid aroma and flavouring compositions, comprising:
 - (a) 10 to 25 percent by weight oil-soluble aroma emulsions, wherein the oil-soluble aroma emulsions component (a), comprises:
 - (a1) 0.1 to 40 percent by weight oil-soluble aromatic compounds,
 - (a2) 5 to 20 percent by weight stabilizers,
 - (a3) 0 to 1 percent by weight-preservatives and
 - (a4) ad 100 percent by weight water
 - (b) 15 to 25 percent by weight inorganic salts,
 - (c) 6 to 12 percent by weight water-soluble constituents,
 - (d) 2 to 10 percent by weight water-insoluble constituents and dyes,
 - (e) 0.1 to 6 percent by weight-hydrocolloids and emulsifiers and
 - (f) ad 100 percent by weight water, and

wherein each of the components (a1)-(a3) are different from each of the components (b)-(e).

Independent claim 21 is also drawn to a liquid aroma and flavouring composition similar to claim 1, however reciting “consisting essentially of” the listed components, with component (a) remaining as “comprises” its four listed components (Appeal Br. Claims Appendix 29–30). Independent claim 26 is also drawn to a liquid aroma and flavoring composition similar to

claim 1, however reciting that component (d) is “5 to 8 percent by weight” instead of “2 to 10 percent by weight” and reciting a viscosity of the composition (Appeal Br. 30–31, Claims Appendix).

ANALYSIS

We have reviewed each of Appellant’s arguments and evidence for patentability. However, we are in agreement with the Examiner that the claimed subject matter would have been obvious to one of ordinary skill in the art within the meaning of § 103 in view of the applied prior art. We determine that, after consideration of all of the evidence in this appeal, including the Specification Examples (e.g., Appeal Br. 20), that the evidence tending to establish the obviousness of the claimed subject matter outweighs any evidence of record that may tend to indicate the non-obviousness thereof.

Accordingly, we sustain the Examiner’s rejections of the claims for essentially those reasons expressed in the Answer and the Final Action, including the Examiner’s Response to Argument sections, and we add the following primarily for emphasis.

It has been established that “the [obviousness] analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). Likewise, it is also well settled that a reference stands for all of the specific teachings thereof as well as the inferences one of ordinary skill in the art would have reasonably been expected to draw therefrom. *See In re Fritch*, 972 F.2d 1260, 1264–65 (Fed. Cir. 1992).

Appellant's arguments for patentability focus on the breadth of Mussawir-Key's disclosure, and that the reference is silent on the problems the inventors were attempting to solve (Appeal Br., Reply Br., *generally*). Appellant states "there is no reason, teaching or suggestion in the prior art to modify the broad disclosures of Mussawir-Key and arrive at the much more specific description of claim 1, which is formulated for a different purpose" (Appeal Br. 15). These arguments are unpersuasive. For one thing, the Supreme Court has stated that it is error to "look only to the problem the patentee [or applicant] was trying to solve." *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 420 (2007); *also In re Beattie*, 974 F.2d 1309, 1312 (Fed. Cir. 1992) ("[T]he law does not require that the references be combined for the reasons contemplated by the inventors.").

As aptly pointed out by the Examiner, the flavoring composition of Mussawir-Key fully encompasses the claimed flavoring composition; indeed, both compositions may be sprayed onto a food after cooking to add flavor thereto. *See In re Peterson*, 315 F.3d 1325, 1329 (Fed. Cir. 2003) ("In cases involving overlapping ranges, we and our predecessor court have consistently held that even a slight overlap in range establishes a *prima facie* case of obviousness."); *Merck & Co. v. Biocraft Labs., Inc.*, 874 F.2d 804, 807 (Fed. Cir. 1989) (holding that the prior art's disclosure of over 1200 possible combinations rendered all possible formulations obvious). One of ordinary skill would have readily appreciated that choices of flavoring components and other ingredients would have benefits, both lost and gained, for, e.g., resulting taste sensations. *See also, cf. Winner Int'l Royalty Corp. v. Wang*, 202 F.3d 1340, 1349 n.8 (Fed. Cir. 2000) ("The fact that the motivating benefit comes at the expense of another benefit, however, should

not nullify its use as a basis to modify the disclosure of one reference with the teachings of another. Instead, the benefits, both lost and gained, should be weighed against one another”). Notably, the claims recite relatively broad ranges of numerous generically named components (e.g., aromatic compound, stabilizer, preservative, etc.) that would predictably result in a wide range of flavors.

Appellant has not shown error in the Examiner’s determination that one of ordinary skill would have chosen the ingredients of the flavouring composition of Mussawir-Key so as to result in a dispersion or emulsion (similar to that claimed and described by Appellant) having any one of a wide variety of pleasing tastes to a consumer (e.g., Ans. 8–10; Mussawir-Key p. 1, 2, 6, 8, 9).

Appellant further urges that the proffered data evince unexpected results (Appeal Br. 20). *See, e.g., In re Woodruff*, 919 F.2d 1575, 1578 (Fed. Cir. 1990) (where the difference between the claimed invention and the prior art is some range, the applicant must show that the particular range is critical, generally by showing that the claimed range achieves unexpected results relative to the prior art range).

It is well established that the burden of showing unexpected results rests on the person who asserts them by establishing that the difference between the claimed invention and the closest prior art was an unexpected difference. It is not enough for the Appellants to show that the results in the compared examples differ. The difference must be shown to be an unexpected difference. *See In re Freeman*, 474 F.2d 1318, 1324 (CCPA 1973); *In re Klosak*, 455 F.2d 1077, 1080 (CCPA 1972). Appellant does not direct us to Specification statement that the results would have been

unexpected by one of ordinary skill in the art. Appellant has provided mere attorney argument to that effect, and such arguments of counsel cannot take the place of evidence. *See In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984); *In re Payne*, 606 F.2d 303, 315 (CCPA 1979); *In re Greenfield*, 571 F.2d 1185, 1189 (CCPA 1978). Further, the showing of unexpected results must be commensurate in scope with the claims. *See In re Peterson*, 315 F.3d 1325, 1330–31 (Fed. Cir. 2003). Appellant has not shown reversible error in the Examiner’s findings that the evidence relied upon by Appellant (two examples as set forth in the Specification that allegedly show enhanced aroma or saltiness) is not commensurate in scope with the breadth of any of the claims on appeal, and therefore is not persuasive evidence of nonobviousness (Ans. 11; Appeal Br. 20).

Balancing all the evidence anew, it is our conclusion that the evidence for obviousness outweighs any evidence against obviousness.

Appellant’s argument that claim 21’s recitation of “consisting essentially of” precludes “oil or non-stick substances that actually reduce the amount of flavor for the weight of material” (Appeal Br. 23) are not persuasive, since Appellant has not met the burden to show that prior art ingredients not recited in the claim materially affect the basic and novel characteristics of a claimed invention. It is an applicant’s burden to show that prior art ingredients not recited in the claim materially affect the basic and novel characteristics of a claimed invention. *In re De Lajarte*, 337 F.2d 870, 873-74 (CCPA 1964). The claim phrase “consisting essentially of” limits the scope of a claim to the specified ingredients and to those that do not materially affect the basic and novel characteristics of the claimed invention. *In re Herz*, 537 F.2d 549, 551-52 (CCPA 1976). In assessing

whether ingredients materially affect the basic and novel characteristics of a claimed invention, the claim must be read in light of the specification. *See, e.g., PPG Indus. v. Guardian Indus., Corp.*, 156 F.3d 1351, 1355 (Fed. Cir. 1998) (“PPG could have defined the scope of the phrase ‘consisting essentially of’ for purposes of its patent by making clear in its specification what it regarded as constituting a material change in the basic and novel characteristics of the invention.”).

Appellant’s argument that claim 23 (and claim 26) recites a viscosity for the composition that is not taught or suggested by Mussawir-Key (Appeal Br. 24, 25) is not persuasive for reasons set out by the Examiner (e.g., Ans. 5). Notably, Appellant’s Specification describes a broad viscosity range that overlaps that of Mussawir-Key, and both Appellant² and Mussawir-Key suggest having an appropriate viscosity to allow for spraying the flavoring on the food. Thus, one of ordinary skill in the art would have readily appreciated that the viscosity of the liquid flavoring is a result effective variable. *In re Applied Materials, Inc.*, 692 F.3d 1289, 1297 (Fed.

² Indeed, Appellant describes that the spray apparatus for the purpose of adding the flavoring are components that a “relevant person skilled in the art is notoriously familiar with for this purpose” (Spec. 11, ll. 5-6). This implies that the skilled artisan would also have fully appreciated the relevant viscosities appropriate for such spray apparatus. An applicant cannot defeat an obviousness rejection by asserting that the cited references fail to teach or suggest elements which the applicant has acknowledged are taught by the prior art. *Constant v. Advanced Micro-Devices, Inc.*, 848 F. 2d 1560, 1570 (Fed. Cir. 1988) (“A statement in a patent that something is in the prior art is binding on the applicant and patentee for determinations of anticipation and obviousness.”) and *In re Nomiya*, 509 F.2d 566, 571 n.5 (CCPA 1975) (A statement by an applicant that certain matter is prior art is an admission that the matter is prior art for all purposes).

Cir. 2012) (“A recognition in the prior art that a property is affected by the variable is sufficient to find the variable result-effective.”). It is well settled that it would have been obvious for an artisan with ordinary skill to develop workable or even optimum ranges for result-effective parameters. *In re Boesch*, 617 F.2d 272, 276 (CCPA 1980). In light of these circumstances, the use of the claimed viscosity does not appear to patentably distinguish over a viscosity that one of ordinary skill in the art, using no more than ordinary creativity, would have used for Mussawir-Key’s flavor composition.

Appellant’s argument with respect to dependent claim 5 and independent claim 26 that the recitation of 5 to 10 weight percent water-insoluble is not taught or suggested by Mussawir-Key (Appeal Br. 24, 25) is not persuasive. As pointed out by the Examiner, Mussawir-Key (similar to Appellant) forms a dispersion or emulsion of “particles, grains or fine powder” (Mussawir-Key p. 1, ll. 11–17; Appellant’s Spec. 10, ll. 30-31 (the inventive “products are emulsions or fine particle dispersions”)). While Mussawir-Key prefers that “small solid particulates” constitute less than 2 percent by weight of the composition, it is also stated that this 2 percent is “in combination with all other solid-free or *substantially* solid-free components” and helps ensure the composition may be sprayed through a spray dispensing mechanism onto the food. As pointed out by the Examiner, Appellant also sprays his composition onto the food (e.g., Ans. 5). Thus, contrary to Appellant’s assertion that Mussawir-Key fears clogging a spray nozzle (Appeal Br. 17), it appears that the claimed amount would not have clogged a spray apparatus as used in Mussawir-Key. Appellant also has not adequately responded to the Examiner’s position that the claimed insoluble

Appeal 2018-003099
Application 13/867,361

constituents or dyes may also be dispersed or emulsified into the final composition (Ans. 8, no reply brief has been filed). In light of these circumstances, the use of the claimed weight percent of water insoluble “constituents and dyes” does not appear to patentably distinguish over an amount that one of ordinary skill in the art, using no more than ordinary creativity, would have used for Mussawir-Key’s flavor composition.

Accordingly, the § 103 rejection advanced by the Examiner in this appeal is sustained.

ORDER

The Examiner’s decision 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).

AFFIRMED