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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte LAWNIE HENDERSON TAYLOR

Appeal 2018-005029
Application 14/971,878
Technology Center 1700

Before ROMULO H. DELMENDO, KAREN M. HASTINGS, and
JANE E. INGLESE, *Administrative Patent Judges*.

HASTINGS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant¹ requests our review under 35 U.S.C. §134 of the Examiner's decision rejecting claims 131–153. We have jurisdiction over the appeal under 35 U.S.C. §6(b).

We AFFIRM.

¹ Appellant is the applicant, LH Taylor Associates, Inc. Note that the real party in interest is identified as “Lawnie H. Taylor” (Appeal Br. 4). We further note that a related case, *In re Taylor*, 2011-1275 (Fed. Cir. 2011) was decided in prior application 11/505,445 (wherein the court affirms the Board's decision holding all claims of the '445 Application unpatentable).

Claim 131 is illustrative:

131. A method for ascertaining the natural fabric effect quality of a hypochlorite bleach composition, said quality in the range of fabric-damaging to abated-damaging to cotton-safe, said composition in the process of formulation or already existing, wherein the amounts of the essential components of a bleach composition are expressed in a ratio value as wt % alkali-metal hydroxide over wt % alkali-metal hypochloride-salt, or the reciprocal, which ratio value is selected to define the desired natural fabric effect quality of the composition (eg., 1:30 – fabric-damaging, 1:2– cotton-safe, etc.),

wherein a bleach composition so composed and set with a natural fabric effect quality must be characterized by the selected ratio value that defines said fabric effect quality,

wherein said ratio value and the amount of an essential component are expressed as *known* factors of the ratio equation by which the amount of the other essential component is determined and limited,

whereas, for an existing bleach composition the natural fabric effect quality is identified by the value of the bleach ratio calculated as the *unknown* term of a ratio equation, said calculated ratio value determined and limited by the amounts of the two essential components as *known* factors of the ratio equation,

wherein a bleach composition composed with a pre-selected natural fabric effect quality in the range of damaging to abated-damaging to cotton-safe comprises,

(a) an amount of an alkali-metal hypochlorite -salt, as a *known* factor of a ratio equation, said amount effective for cleaning stain from a soft-fabric article,

(b) an amount of an alkali-metal hydroxide as an *unknown* term of the ratio equation, said amount calculated by (a) and (c),

(c) a ratio value, as a *known* factor of the ratio equation, said value selected in the range 1:30 to 1:1, or reciprocal value selected in the range 30:1 to 1.1, to set the pre-

selected quality of natural fabric effect of the bleach composition in the range of fabric-damaging to abated-damaging to cotton-safe;

wherein the pH of said composition is at least 11.

Claim 145, the only other independent claim, is directed to a bleach product with a ratio value of alkali metal hypochlorite salt to alkali metal hydroxide “selected” in the range of 1:30 to 1:1 or its reciprocal, similar to claim 131, “to set the quality of natural fabric safety of the bleach product” (Claims Appendix).²

The Examiner maintains, and Appellant appeals, the following rejections:

- I. Claims 131–153 under 35 U.S.C. § 101 because the claimed invention is directed to non-statutory subject matter;
- II. Claims 131–153 under 35 U.S.C. §102(b) as anticipated by, or in the alternative under §103(a) as obvious over, Scialla (US 6,120,555, issued Sep. 19, 2000).
- III. Claims 131–135, 137–149, 151–153 under 35 U.S.C. §102(b) as anticipated by, or in the alternative under §103(a) as obvious over, Agostini (US 6,416,687 B1; issued July 9, 2002)
- IV. Claims 131–135, 137–149, 151–153 under 35 U.S.C. §102(b) as anticipated by, or in the alternative under §103(a) as obvious over, Grande (US 6,448,215 B1, issued Sept. 10, 2002).

² None of the dependent claims properly depend from claim 131 or 145; rather, they depend from cancelled claims. Correction is needed in any further prosecution of this case.

At the outset, we note this appeal is from the Examiner's Non-final action mailed Feb. 2, 2017, which contained a rejection of all the claims under 35 U.S.C. 112, first paragraph, as lacking enablement. In a Non-Final Action mailed Jan. 12, 2018, the Examiner did not repeat this rejection and instead made a rejection of all the claims under 35 U.S.C. 112 as indefinite; however, this action was "vacated" in a communication mailed to Appellant by the USPTO on Jan. 25, 2018. Since the Appeal Brief was filed Aug. 7, 2017, Appellant properly responded to the lack of enablement rejection made in the office action mailed Feb. 2, 2017. The Examiner did NOT repeat the "lack of enablement" rejection in the Answer, instead, the rejection from the *vacated* office action based on indefiniteness was made (Ans. 3–5). This rejection, however, was not properly designated as a new ground of rejection in the Examiner's Answer, which, e.g., requires a Group Director's signature, and is thus not properly before us. Appellant (who is representing himself in this case) appears to believe that the lack of enablement rejection remains as he continues to present arguments directed to the lack of enablement rejection (Reply Br. 3, 4), which the Examiner did not maintain in the Answer.³ Accordingly, we determine that there is no rejection of the claims under 35 U.S.C. § 112 (either for indefiniteness or for lack of enablement) properly before us. We thus do not comment on the merits of either one of the § 112 rejections, since neither rejection is properly before us.

³ See 37 C.F.R. § 41.37(c)(1) ("a brief filed by an appellant who is not represented by a registered practitioner need only substantially comply with paragraphs (c)(1)(i), (c)(1)(ii), (c)(1)(iv), and (c)(1)(v) of this section").

ANALYSIS

The Rejection under 35 USC § 101

Although Appellant argued the claims as a group in this rejection, we select claim 131 as representative of the method claims and claim 145 as representative of the product claims.

Appellant contends that the claims are directed to “selecting a ratio” which is not an abstract idea (Appeal Br. 10). Appellant further points out that it has been established that even if a mathematical equation is needed to complete a claimed method and system, this does not doom a claim to abstraction (Reply Br. 5). Appellant contends that the claimed invention is “technology new to the prior art” since “[a] user is able to formulate a hypochlorite bleach in neat form with a pre-selected quality of fabric safety, preselected anywhere in the range of cotton safe to cotton damaging” (Reply Br. 5).

These arguments are not persuasive of error in the Examiner’s rejection as to method claim 131. *Alice Corp. Pty. Ltd. v. CLS Bank International*, 134 S. Ct. 2347 (2014), identifies a two-step framework for determining whether claimed subject matter is judicially-excepted from patent eligibility under § 101.

According to *Alice* step one, “[w]e must first determine whether the claims at issue are directed to a patent-ineligible concept,” such as an abstract idea. *Alice*, 134 S. Ct. at 2355. In that regard, the Examiner correctly determined that a method for “ascertaining the natural fabric effect quality of a hypochlorite bleach composition” as recited in claim 131 is a mental step and determining a ratio indicative of fabric safety is thus an abstract idea, which is nonstatutory subject matter (e.g., Ans. 15 (the

Examiner states “‘selecting a ratio’ is certainly a mental activity, as a selection or decision, if it is conducted by a human, can only take place in the mind”).

Step two is “a search for an ‘inventive concept’—*i.e.*, an element or combination of elements that is ‘sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.’” *Alice*, 134 S. Ct. at 2355 (alteration in original) (quoting *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 72–73 (2012)). In this regard, the Examiner de facto determined that, generically linking the use of a judicial exception to a particular technological environment or field of use is insufficient; determining fabric safety indicia of a bleach based on a wide range of ratios for known components of a bleach composition is likewise insufficient to qualify as significantly more. The Examiner correctly determined that there is nothing more in the claim to make its subject matter “patent eligible” since there is no dispute that the routine step of mixing hypochlorite bleach and sodium hydroxide is well known, and even this step is not expressly recited in claim 131 (e.g., Ans. 7).

For the foregoing reasons, the Appellant has not shown error in the Examiner’s *Alice* step two determination that the method claims do not include an element or combination of elements sufficient to ensure that in practice they amount to significantly more than to be upon the ineligible concept itself.

On the other hand, we must reverse this rejection as to product claim 145. Independent claim 145 is directed to a “bleach product” with a “natural fabric safety quality in the range of fabric-damaging to . . . cotton-safe” that “comprises” a “selected” ratio from 1:30 to 1:1 of hypochlorite to sodium

hydroxide (see, Claims Appendix, Appeal Br. 15). The Examiner only addresses method claim 131 in the rejection, and never explicitly discusses product claim 145 (Ans. 5-7; Non-Final Action 2). Since claim 145 is directed to statutory subject matter, that is, a product (i.e., composition of matter), the Examiner has not adequately explained why it is directed to non-statutory subject matter.

The Rejections under 35 USC §§102/103

Appellant does not argue any claim separate from the other in any of the rejections listed as II to IV above; Appellant also does not present arguments specific to any of the three applied references (Appeal Br. 11, 12 (Appellant's arguments are set out to apply to all three prior art rejections)).

Accordingly, we select independent claim 145 directed to a “bleach product” with a “natural fabric safety quality in the range of fabric-damaging to . . . cotton-safe” that “comprises” a “selected” ratio from 1:30 to 1:1 of hypochlorite to sodium hydroxide, as representative of the subject matter before us for review on appeal for all three prior art rejections (see, Claims Appendix, Appeal Br. 15). We decide the appeal based on the arguments made by Appellant in support of the patentability of claim 145, which are the same for each rejection (Appeal Br. 11, 12; Reply Br. 5, 6).

We have reviewed each of Appellant's arguments for patentability. We determine that a preponderance of the evidence supports the Examiner's finding that the claimed subject matter of each independent claim is anticipated, or alternatively obvious, within the meaning of § 102 or § 103 in view of the applied prior art. Accordingly, we will sustain the Examiner's rejections for essentially those reasons expressed in the Answer, including

the Examiner's Response to Argument section, and we add the following primarily for emphasis.

In order to anticipate, a reference must identify something falling within the claimed subject matter with sufficient specificity to constitute a description thereof within the purview of § 102. *In re Schaumann*, 572 F.2d 312, 317 (CCPA 1978). It is well established that specific examples of the claimed subject matter are not necessary to establish anticipation. Rather, to anticipate, one skilled in the art must be able to “at once envisage” the claimed subject matter in the prior art disclosure. *In re Petering*, 301 F.2d 676, 681 (CCPA 1962). It is also well settled that when a claimed product reasonably appears to be substantially the same as a product disclosed by the prior art, the burden is on the applicant to prove that the prior art product does not necessarily or inherently possess characteristics attributed to the claimed product, and that it is of no moment whether the rejection is based on § 102 or § 103 since the burden on the applicant is the same. *In re Spada*, 911 F.2d 705, 708 (Fed Cir. 1990); *In re Best*, 562 F.2d 1252, 1255 (CCPA 1977).

Appellant has not provided any persuasive reasoning or credible evidence to refute the Examiner's determination that the sodium hypochlorite:sodium hydroxide bleach compositions found in each reference possess a ratio thereof within the range recited in each independent claim, and the amount of each component necessarily provided an effective fabric cleaning composition that was, e.g., fabric safe (Ans. 13–15; e.g. Scialla col. 8, Examples 4, 5, ll. 25, 26 (the compositions “provided improved fabric safety and/or improved whiteness to fabrics”). *See, e.g., Atlas Powder Co. IRECO Inc.*, 190 F.3d 1342, 1345 (Fed. Cir. 1999)(presuming anticipation

based on a substantial overlap between the claimed ranges of ingredients in an explosive composition and the ranges of the same disclosed in a prior art reference); *In re Ornitz*, 351 F.2d 1013, 1016–17 (CCPA 1965) (“Even assuming arguendo appellant to have discovered that ranges of some constituents are critical to certain [important] properties, we are not convinced of novelty in the claimed range of compositions since Payson [i.e., prior art,] discloses those properties for substantially the same ranges of composition.”).

Appellant’s arguments that the references fail to teach all the elements of the independent claims is unavailing (Appeal Br. 12).⁴ Appellant also fails to appreciate that the claims on appeal are open to additional components (via the use of “comprising” language), and fail to recite a “neat form” of sodium hypochlorite with sodium hydroxide (Reply Br. 6 (pointing out that each reference has other components, and stating none of the references had “the neat form, sodium hydroxide essential component, and the application of a ratio” as required herein). Limitations not appearing in the claims cannot be relied upon for patentability. *In re Self*, 671 F.2d 1344, 1348 (CCPA 1982). The Examiner has made out a prima facie case, thereby shifting the burden of production to Appellant, and Appellant has not met the burden to show that the compositions of the applied prior art do not inherently satisfy the claimed invention. Conclusory arguments in a brief cannot take the place of evidence. *In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974).

⁴ Appellant urges us to consider the prosecution and claims of US 8,846,597 (Appeal Br. 12; Reply Br. 5), however, we merely note that a bleach product as recited in claim 145 is not claimed therein, nor is a method as set out in claim 131.

Assuming arguendo that a case of anticipation has not been met, a “recognition in the prior art that a property is affected by the variable is sufficient to find the variable result-effective.” *In re Applied Materials, Inc.*, 692 F.3d 1289, 1297 (Fed. Cir. 2012). As indicated by the applied prior art, the amount of sodium hydroxide and sodium hypochlorite are each a result-effective variable for a fabric cleaning composition, and the prior art exemplifies overlapping ranges for both components (*Ans. generally*). Moreover, 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 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). Appellant does not rely upon any evidence of unexpected results.

Accordingly, the Examiner has presented a prima facie case of unpatentability under either one of § 102 or § 103 of the bleach composition as recited in claim 145 (or the corresponding method claim 131 and all dependent claims not separately argued) for all the reasons set forth in the Non-Final Action mailed Feb. 2, 2017 and Answer.

Accordingly, the Examiner’s § 102 and, in the alternative, § 103, rejections are affirmed with respect to all of the claims on appeal.

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

ORDER
AFFIRMED