



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/739,155	06/15/2015	DANIEL A. NEWMAN	04709.0201USU1	3463
127749	7590	01/23/2020	EXAMINER	
M&G Spectrum P.O. Box 2903 Minneapolis, MN 55402			NGUYEN, VY T	
			ART UNIT	PAPER NUMBER
			3761	
			NOTIFICATION DATE	DELIVERY MODE
			01/23/2020	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

USPTO127749@merchantgould.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DANIEL A. NEWMAN, JOSE MANUEL TORRES PEREZ,
DEREK JAMES MEYERS, and JOSEPH CHRISTOPHER CARLEY

Appeal 2018-008148
Application 14/739,155
Technology Center 3700

Before LINDA E. HORNER, MICHELLE R. OSINSKI, and
GEORGE R. HOSKINS, *Administrative Patent Judges*.

OSINSKI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant¹ appeals under 35 U.S.C. § 134(a) from the Examiner's decision rejecting claims 1, 3–9, 12–14, 17, and 20.² We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We REVERSE.

¹ We use the term “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Spectrum Brands, Inc. Appeal Br. 3.

² Claims 2, 10, 15, 18, and 19 are cancelled, and claims 11 and 16 are withdrawn. Appeal Br. 17–19 (Claims App.).

THE CLAIMED SUBJECT MATTER

Claim 1, the sole independent claim, is reproduced below.

1. A basking heater comprising:

(a) a housing defining a bottom and defining an interior; the bottom having an opening in communication with the interior; the housing including a top opposite of the bottom;

(b) a heating element within the housing interior; the heating element being connected to a power source and oriented to radiate heat through the opening in the bottom;

(c) an attachment arrangement adapted to selectively attach the heater to a terrarium; wherein a height of the housing from the bottom to the top is not greater than 3 inches;

(d) a porous grill in the housing interior extending over and covering the opening in the bottom; the porous grill being between the heating element and the bottom; the porous grill being opposite of the top of the housing; and

(e) a power switch controlling an amount of power to the heating element; the power switch having at least 3 settings including no power, low power, and high power.

EVIDENCE

The Examiner relied on the following evidence in rejecting the claims on appeal:

Ueda	US 6,040,564	Mar. 21, 2000
Thomas	US 2002/0148410 A1	Oct. 17, 2002
Wang	US 2014/0001171 A1	Jan. 2, 2014

REJECTIONS

- I. Claims 1, 3–7, 9, 12–14, 17, and 20 stand rejected under 35 U.S.C. § 103 as unpatentable over Wang and Thomas. Final Act. 3–10.
- II. Claim 8 stands rejected under 35 U.S.C. § 103 as unpatentable over Wang, Thomas, and Ueda. *Id.* at 10–11.

OPINION

Rejection I

The Examiner finds that Wang discloses, among other things, a basking heater comprising (a) a housing defining both a bottom and an interior, the bottom having an opening 21 in communication with the interior and (b) a heating element 13 within the housing interior. Final Act. 3–4 (citing Wang Fig. 5). The Examiner acknowledges that Wang does not disclose “a porous grill in the housing interior extending over and covering the opening in the bottom; the porous grill being between the heating element and the bottom.” *Id.* at 5.

The Examiner turns to Thomas, finding that Thomas teaches, among other things, a porous grill (“‘simple heater grill’ 40 in Fig. 22”) in the housing interior (“‘housing’ 6, wherein housing 6 comprises an interior as seen in Fig. 22”), where the porous grill is “between the heating element [4] and the bottom” and “opposite of the top . . . of the housing.” *Id.* (italics omitted). The Examiner includes an annotated reproduction of Figure 22 of Thomas to illustrate what the Examiner considers the top and bottom of the housing. *Id.* at 6. The Examiner’s annotated version of Figure 22 of Thomas is reproduced below.

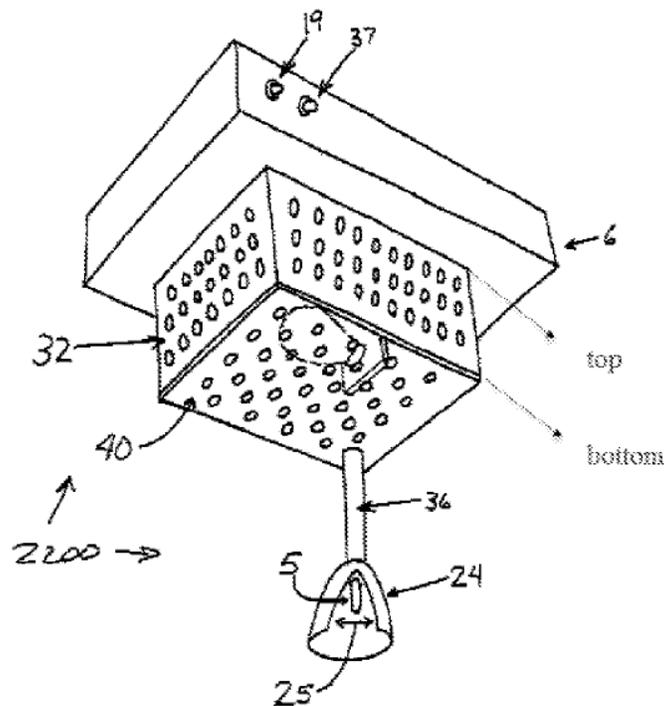


Figure 22
Annotated Fig. 22 of Thomas

Figure 22 of Thomas depicts a perspective view from underneath of heater 2200 with housing 6 that encloses control circuit 17 (not shown) and simple heater grill 40 placed in front of heating element 4 (shown as a lightbulb) in heater element housing 32. Thomas ¶¶ 27, 84, 187. The annotated figure includes notations indicating what the Examiner considers to be the “top” and “bottom” of the housing as referenced in independent claim 1. Final Act. 6. The Examiner concludes that it would have been obvious to

modify the heater of Wang [as] taught and/or suggested by Thomas wherein the heater comprises a porous grill in the housing interior extending over and covering the opening in the bottom, the porous grill being between the heating element and the bottom and the porous grill being opposite of the top of the housing in order to protect the heating element when it is placed in front of the heating element and its holes help to facilitate air circulation and prevent excessive heat buildup

Id. at 7 (bolded emphasis omitted).

Appellant argues “the structure 40 alleged by the Examiner to be the porous grill is not within the housing interior, as claimed.” Appeal Br. 13. We agree with Appellant that the Examiner has not shown by a preponderance of the evidence that Thomas teaches or suggests a porous grill within the housing interior. To the extent the Examiner is taking the position that Thomas teaches structure 40 being within the interior of housing 6 for control circuit 17, it is clear from Annotated Figure 22 that structure 40 is not within or inside an interior of housing 6. To the extent the Examiner is taking the position that Thomas teaches structure 40 being within the interior of heater element housing 32, it is not clear from Annotated Figure 22 that structure 40 is within or inside of an interior of heater element housing 32. Rather, it appears that structure 40 simply may be attached to a bottom surface of a perimeter edge of heater housing element 32, rather than structure 40 being within or inside of an interior of heater element housing 32. Thomas Fig. 22.

Moreover, Appellant argues that the Examiner has not shown how porous grill 40 is “between the heating element (inner light bulb) and the bottom because the Examiner is asserting the grill 40 and the bottom are the same piece.” Appeal Br. 13 (underlining omitted). We agree with Appellant that to the extent the Examiner is identifying the same element as both the porous grill and the bottom of the housing, the Examiner has not shown Thomas to teach the porous grill being *between* the heating element and the bottom of the housing. To the extent that the Examiner is identifying the bottom surface of the perimeter edge of heater element housing 32 as the bottom of the housing, the Examiner has still failed to show by a

preponderance of the evidence that Thomas teaches or suggests the porous grill being between the heating element and the bottom of the housing. In particular, as described above, structure 40 simply may be attached to the bottom surface of the perimeter edge of heater housing element 32 such that the Examiner-identified porous grill 40 is not between heating element 4 and the bottom of heater housing element 32, but rather is on the same side of both heating element 4 and the bottom of heater housing element 32.

In sum, we agree with Appellant that the Examiner has not shown by a preponderance of the evidence that Thomas teaches “a porous grill in the housing interior . . . between the heating element and the bottom [of the housing],” as claimed. As such, the Examiner’s conclusion of obviousness (Final Act. 7) is based on an erroneous finding as to the scope and content of Thomas.

To the extent that the Examiner’s rejection may be predicated, not on Thomas teaching or suggesting a position of a porous grill in a housing interior between the heating element and the bottom of the housing, but on the obviousness of utilizing Thomas’s porous grill in Wang’s housing interior between Wang’s heating element and the bottom of Wang’s housing (Ans. 3), the Examiner has not provided a reason with rational underpinnings to explain why one of ordinary skill in the art would have been led to utilize Thomas’s porous grill both in an interior of Wang’s housing and between the heating element and the bottom of Wang’s housing. *See In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (requiring “some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness”) (cited with approval in *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 419 (2007)).

More particularly, the Examiner's articulated reasoning of "to protect the heating element when the heater grill is placed in front of the heating element" (Final Act. 7; Ans. 3) explains only why Thomas's heater grill 40 would be placed in front of Wang's heating element at all (including in a position on an underside of the bottom of Wang's housing), not necessarily why Thomas's heater grill would be placed specifically in an interior of Wang's housing between the heating element and the bottom of Wang's housing. Similarly, the Examiner's articulated reasoning of "the heater grill having holes to help to facilitate air circulation and prevent excessive heat buildup" (Final Act. 7; Ans. 3 (citing Thomas ¶ 187)) explains only why the heater grill would be porous, not necessarily why Thomas's heater grill would be placed specifically in an interior of Wang's housing between the heating element and the bottom of Wang's housing. *See* Reply Br. 3–4 ("The Examiner's Answer provides no explanation for where one of ordinary [skill] would learn to position the porous grill in the housing interior and between the heating element and the bottom of the housing.").

We note that in the Examiner's Answer, the Examiner points out that Wang's "heating layer 13 is covered by a front heat-radiating face 11 of the flat heater body 10." Ans. 2 (italics omitted). To the extent that the Examiner's discussion of front heat-radiating face 11 of flat heater body 10 (*id.*) is meant to be indicative of some type of alternative rejection in which Wang's front heat-radiating face 11 is modified or the subject of a substitution with Thomas's simple heater grill, the Examiner's only articulated rejection is based on "modify[ing] the heater of Wang to *include* the heater grill as taught and/or suggested by Thomas" (*id.* at 3 (emphasis added)). Consequently, the Examiner's articulated rejection is based on

including or adding Thomas's simple heater grill 40, not on *modifying* Wang's front heat-radiating face 11 or *substituting* Thomas's simple heater grill 40 for Wang's front heat-radiating face 11. Moreover, even if we were to consider the Examiner to be presenting an alternative rejection based on modifying or substituting Thomas's simple heater grill 40 for Wang's front heat-radiating face 11, the Examiner has not adequately accounted for how Wang's front heat-radiating face 11, as modified or substituted therefor, would extend over and cover the opening in the bottom of Wang's housing, as is required by claim 1.

For the foregoing reasons, we do not sustain the rejection of claim 1 and its dependent claims 3–7, 9, 12–14, 17, and 20, under 35 U.S.C. § 103 as unpatentable over Wang and Thomas.

Rejection II

The Examiner's rejection of claim 8 either relies on the same deficient finding that Thomas teaches a porous grill in a housing interior between the heating element and the bottom of the housing or the same deficient reasoning lacking rational underpinnings to explain adequately why one of ordinary skill in the art would have been led to include Thomas's porous grill in an interior of Wang's housing and between the heating element and the bottom of Wang's housing. Final Act. 10–11. The Examiner does not explain how Ueda would remedy the deficiency of the combination of Wang and Thomas. Accordingly, we do not sustain the rejection of claim 8 under 35 U.S.C. § 103 as unpatentable over Wang, Thomas, and Ueda.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 3-7, 9, 12-14, 17, 20	103	Wang, Thomas		1, 3-7, 9, 12-14, 17, 20
8	103	Wang, Thomas, Ueda		8
Overall Outcome				1, 3-9, 12-14, 17, 20

REVERSED