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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte AKE SJOBERG

Appeal 2018-008549
Application 13/595,795
Technology Center 1700

Before KAREN M. HASTINGS, JEFFREY B. ROBERTSON, and
JANE E. INGLESE, *Administrative Patent Judges*.

INGLESE, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant¹ requests our review under 35 U.S.C. § 134(a) of the Examiner's decision to finally reject claims 1–12.² We have jurisdiction over this appeal under 35 U.S.C. § 6(b).

We AFFIRM.

STATEMENT OF THE CASE

Appellant claims surface structured decorative boards. Appeal Br. 2–3. Independent claims 1 and 11 illustrate the subject matter on appeal and

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies Pergo (Europe) AB as the real party in interest. Appeal Brief filed April 19, 2018 (“Appeal Br.”) at 1.

² Final Office Action entered June 30, 2017 (“Office Act.”) at 1.

are reproduced below with contested language italicized:

1. Surface structured decorative boards comprising:
 - an upper side decorative surface;
 - an upper side surface structure;
 - a base layer; and
 - a rectangular shape comprising two shorter end edges on opposing ends of the rectangle, and two longer side edges on opposing sides of the rectangle, wherein the two shorter end edges form first and second opposite edges,
 - wherein the structure is comprised by at least two surface grades forming a decorative surface pattern on said upper side, *said pattern being applied in predetermined fixed positions on at least the first and the second edges of a same board and on an adjacent board, that the first edge pattern positions and the second edge pattern positions are identical on the same board and an adjacent board so that the pattern extends continuously over the abutting first and second edges of adjacent boards,*
 - wherein the adjacent boards have a wood decor, said wood decor being formed on a decorative paper layer comprised in said upper side decorative surface,
 - wherein one of the surface grades consists of groups of small oblong indentations in sweeping wood grain pattern matching the wood decor,
 - wherein *the remaining part of the decorative surface pattern on adjacent boards is different,* but also comprises the two surface grades, however in a different pattern.

11. Surface structured decorative boards comprising:
 - an upper side decorative surface;
 - an upper side surface structure;
 - a base layer; and
 - a rectangular shape comprising two shorter end edges on opposing ends of the rectangle, and two longer side edges on opposing sides of the rectangle, wherein the two shorter end edges form first and second opposite edges,
 - wherein the structure is comprised by at least two surface grades forming a decorative surface pattern on said upper side, *said pattern being applied in predetermined fixed positions on at least the first and the second edges of a plurality of boards,*

wherein the predetermined fixed positions are identical on each of the plurality of boards, whereby the first edge pattern positions and the second edge pattern positions are identical so that the pattern extends continuously over the abutting first and second edges of any two adjacent boards of the plurality of boards,

wherein the adjacent boards have a wood decor, said wood decor being formed on a decorative paper layer comprised in said upper side decorative surface,

wherein one of the surface grades consists of groups of small oblong indentations in sweeping wood grain pattern matching the wood decor,

wherein *the remaining part of the decorative surface pattern on adjacent boards is different*, but also comprises the two surface grades, however in a different pattern.

Appeal Br. 17, 19–20 (Claims Appendix) (emphasis added and spacing altered relative to original).

The Examiner maintains the following rejections in the Examiner’s Answer entered June 28, 2018 (“Ans.”):

I. Claims 1, 2, 4–6, 9, and 10 under 35 U.S.C. § 103(a) as unpatentable over Cruz³ in view of Kraft;⁴

II. Claim 3 under 35 U.S.C. § 103(a) as unpatentable over Cruz in view of Kraft and Vaisman;⁵

III. Claims 7 and 8 under 35 U.S.C. § 103(a) as unpatentable over Cruz in view of Kraft and Harwood;⁶ and

IV. Claims 11 and 12 under 35 U.S.C. § 103(a) as unpatentable over Cruz in view of Kraft and Vaisman.

³US 6,638,387 B2, issued October 28, 2003.

⁴US 2003/0021938 A1, published January 30, 2003.

⁵US 4,546,025, issued October 8, 1985.

⁶US 5,728,476, issued March 17, 1998.

DISCUSSION

Upon consideration of the evidence relied upon in this appeal and each of Appellant's timely contentions,⁷ we affirm the Examiner's rejections of claims 1–12 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 the Appellant provides for each ground of rejection the Appellant contests. 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.”)).

Rejection I

We turn first to the Examiner's rejection of claims 1, 2, 4–6, 9, and 10 under 35 U.S.C. § 103(a) as unpatentable over Cruz in view of Kraft. Appellant addresses this rejection by presenting arguments directed to claim 1 only, to which we accordingly limit our discussion. Appeal Br. 4–10; 37 C.F.R. § 41.37(c)(1)(iv).

Appellant does not dispute the Examiner's finding that Cruz discloses direct pressure laminates having the features of the surface-structured

⁷ We do not consider the arguments at pages 2 to 3 of the Reply Brief because Appellant does not show good cause for raising these arguments for the first time in the Reply Brief. 37 C.F.R. § 41.37(c)(1)(iv) (2017); 37 C.F.R. § 41.41(b)(2) (arguments raised for the first 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).

decorative boards recited in claim 1, with the exception of disclosing that the laminates include a pattern applied in predetermined fixed positions on at least first and second edges of the same laminate and on an adjacent laminate, and the first and second edge pattern positions are identical on the same laminate and an adjacent laminate so that the pattern extends continuously over the abutting first and second edges of adjacent laminates, but the remaining part of the decorative surface pattern on adjacent laminates is different. *Compare* Final Act. 2–3, *with* Appeal Br. 4–9.

The Examiner determines, however, that it would have been obvious, in view of the following disclosures in Kraft, to modify the direct pressure laminates disclosed in Cruz to have such features. Final Act. 3–5. Kraft discloses joining two or more pieces of sheet flooring in a manner that disguises the joined areas or seams so that they are invisible or barely visible. Kraft ¶¶ 1, 7. Kraft discloses that the pieces of joined sheet flooring can be “similarly patterned,” can have the same pattern, or can have different patterns, and the patterns may be any multicolored design or image, including wood grain. Kraft ¶¶ 1, 25, 52. Kraft discloses that the “two or more sheets . . . can have a matching pattern along the seam,” and discloses aligning the sheets so that the pattern does not have visible discontinuities and appears seamless, as illustrated in Figure 2. Kraft ¶¶ 12, 19, 20, 21; Fig. 2.

In view of these disclosures in Kraft, the Examiner concludes that it would have been obvious to one of ordinary skill in the art at the time of Appellant’s invention “to combine the aesthetics of the surface coverings of Kraft with the direct pressure laminates of Cruz” by applying a pattern to Cruz’s direct pressure laminates in predetermined fixed positions on at least

first and second edges of the same laminate and on an adjacent laminate, such that the first and second edge pattern positions are identical on the same laminate and an adjacent laminate, resulting in the pattern extending continuously over the abutting first and second edges of adjacent laminates, as disclosed in Kraft. Final Act. 4–5. The Examiner further determines that Kraft’s disclosure of flooring sheets that can have different patterns and are joined together with an invisible seam would have suggested that the remainder of the adjacent laminates disclosed in Cruz, modified to have identical edge patterns as suggested by Kraft, could include different patterns. Ans. 18.

Appellant argues that even if “one of ordinary skill in the art would have turned to Kraft to modify Cruz,” the “skilled artisan would not have arrived at a panel where the pattern at the edge regions is identical on adjacent panels so that the pattern extends continuously over the abutting first and second edges of adjacent panels, while the remainder of the adjacent panels has different patterns, as claimed.” Appeal Br. 8–9. Appellant argues that any decorative panels produced as a result of a combination of Cruz and Kraft would have entirely matching patterns or designs across the entirety of their decorative surface because neither Cruz nor Kraft discloses “adjacent panels with different remainder of the wood pattern.” Appeal Br. 6, 9. Appellant argues that Cruz “only shows one board,” while Kraft teaches “a pattern which repeats itself over the entirety of two adjacent sheets” and “each sheet is the very same.” Appeal Br. 8–9 (citing Kraft ¶ 53).

Appellant’s arguments are unpersuasive of reversible error in the Examiner’s rejection, however, mainly because they do not take into

consideration the entirety of Kraft's disclosures. As discussed above, Kraft discloses joining two or more pieces of sheet flooring so that the seams are invisible or barely visible. Kraft ¶¶ 1, 7. Although Kraft does disclose that the adjacent, joined flooring sheets can have the same pattern, Kraft also discloses that the joined flooring sheets can be "similarly patterned" or can have different patterns. Kraft ¶¶ 1, 52. Kraft further discloses that the "two or more sheets . . . can have *a matching pattern along the seam.*" Kraft ¶¶ 12, 21 (emphasis added). This qualification that the matching pattern could be "along the seam" reasonably indicates that the matching pattern need not occur over the entire surface of the sheets, particularly in view of Kraft's disclosure that the sheets can have similar or different patterns.

Accordingly, Kraft's disclosures as a whole reasonably would have suggested that the adjacent flooring sheets could have matching patterns along the seam, while the pattern in the remainder of the sheets could differ, such that the two sheets, taken in their entireties, would be "similarly patterned" or would have different patterns. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) ([A]n obviousness analysis "need not seek out precise teachings directed to the specific subject matter of the challenged claim, for [an examiner] . . . can take account of the inferences and creative steps that a person of ordinary skill in the art would employ."); *see also In re Preda*, 401 F.2d 825, 826 (CCPA 1968) ("[I]t is proper to take into account not only specific teachings of the reference but also the inferences which one skilled in the art would reasonably be expected to draw therefrom.").

Therefore, contrary to Appellant's arguments, direct pressure laminates produced as a result of a combination of the disclosures of Cruz and Kraft would not be limited to laminates having matching patterns or

designs across the entirety of their decorative surfaces. Rather, the combined disclosures of Cruz and Kraft would have suggested direct pressure laminates as disclosed in Cruz in which adjacent laminates have identical (or matching) edge patterns as disclosed in Kraft, while the pattern in the remainder of the adjacent laminates could differ, as suggested by Kraft.

Moreover, Appellant's arguments do not demonstrate that identical patterns at edge regions of adjacent surface-structured decorative boards and different patterns in the remainder of the adjacent boards as recited in claim 1 is of any functional significance or serves a unique or critical purpose. Appeal Br. 4–10. Nor do Appellant's arguments demonstrate that such patterns on adjacent decorative boards provide any unexpected result or advantage. *Id.* Accordingly, modifying Cruz's direct pressure laminates to have identical edge patterns on adjacent laminates and different patterns in the remainder of the adjacent laminates, as recited in claim 1, would have been a matter of design choice that was well within the level of ordinary skill in the art at the time of Appellant's invention. *In re Chu*, 66 F.3d 292, 298–99 (Fed. Cir. 1995) (“design choice” is appropriate where the applicant fails “to set forth *any* reasons why the differences between the claimed invention and the prior art would result in a different function or give unexpected results.”); *In re Kuhle*, 526 F.2d 553, 555 (CCPA 1975) (use of claimed feature solves no stated problem and presents no unexpected result and “would be an obvious matter of design choice within the skill of the art”).

Appellant argues that “it would not have been obvious to combine Cruz and Kraft as proposed” given their “marked and disparate distinctions.”

Appeal Br. 6. Appellant argues that “while Cruz deals with wood patterns,” Kraft does not disclose differing or varying wood patterns from one panel to another, and “only teaches all-over repeating patterns or no pattern at all.” Appeal Br. 6 (citing Kraft ¶¶ 11, 17, 19, 25, and Fig. 2). Appellant argues that “while Cruz deals with panels,” Kraft does not disclose panel flooring, “but only sheet type flooring.” Appeal Br. 6.

Appellant’s arguments are again unpersuasive of reversible error. We note initially that, contrary to Appellant’s assertion that Kraft “only teaches all-over repeating patterns or no pattern at all,” as discussed above, Kraft discloses joining two or more pieces of sheet flooring that can be “similarly patterned,” can have the same pattern, or can have different patterns, and Kraft discloses that the pattern may be any multicolored design or image, including wood grain. Kraft ¶¶ 1, 25, 52.

As for Appellant’s assertion of “marked and disparate distinctions” between Cruz and Kraft, as the Examiner points out, Cruz’s disclosures as a whole would have suggested to one of ordinary skill in the art at the time of invention that the direct pressure laminates of Cruz’ invention could be used as a flooring material, and Kraft similarly discloses flooring material. Ans. 14 (citing Cruz col. 1, 11–19 and Kraft ¶ 1). Although Kraft discloses sheet flooring rather than direct pressure laminates, which Appellant refers to as “panels,” one of ordinary skill in the art seeking to join direct pressure laminates as disclosed in Cruz so that a decorative pattern on the laminates would not have visible discontinuities and would appear seamless, reasonably would have looked to Kraft’s disclosure of seamlessly joining patterned pieces of sheet flooring. One of ordinary skill in the art, therefore, would have been led “to combine Cruz and Kraft as proposed,” contrary to

Appellant's arguments.

Appellant argues that “the combination of Kraft and Cruz is improper because the rejection relies on information gleaned solely from Appellant's specification.” Appeal Br. 7. Appellant argues that “only after reviewing the instant disclosure would one of ordinary skill in the art appreciate the desirability of providing floor panels with a wood grain pattern that varies from one panel to the next, but are also configured such that the pattern at the edges is continuous and uniform such that the pattern extends seamlessly across the seam.” *Id.*

As discussed above, however, the combined disclosures of Cruz and Kraft would have suggested direct pressure laminates as disclosed in Cruz in which adjacent laminates have identical (or matching) edge patterns as disclosed in Kraft, while the pattern in the remainder of the adjacent laminates differs, as suggested by Kraft. Contrary to Appellant's arguments, the Examiner's proposed combination is therefore not based on information gleaned solely from Appellant's Specification, but, rather, is based on the combined disclosures of Cruz and Kraft.

We accordingly sustain the Examiner's rejection of claims 1, 2, 4–6, 9, and 10 under 35 U.S.C. § 103(a).

Rejections II and III

To address these rejections of claims 3, 7, and 8 under 35 U.S.C. § 103(a) as unpatentable over Cruz in view of Kraft and Vaisman or Harwood, Appellant argues that “[n]either of Vaisman and/or Harwood . . . compensate for the above-noted deficiencies with respect to claim 1.” Appeal Br. 9.

Because we are unpersuaded of reversible error in the Examiner's rejection of claim 1 for the reasons discussed above, Appellant's position as to these rejections is also without merit. We accordingly sustain the Examiner's rejections of claims 3, 7, and 8 under 35 U.S.C. § 103(a).

Rejection IV

We now turn to the Examiner's rejection of claims 11 and 12 under 35 U.S.C. § 103(a) as unpatentable over Cruz in view of Kraft and Vaisman.

Appellant addresses this rejection by presenting arguments directed to claim 11 only, and in so doing, Appellant repeats the arguments that Appellant presents for claim 1, while providing one new argument directed to Vaisman. Appeal Br. 10–16. We accordingly limit our discussion to claim 11, and to Appellant's new argument directed to Vaisman, because the arguments that Appellant repeats for claim 11 that are the same as the arguments Appellant presents for claim 1 are unpersuasive of reversible error in the Examiner's rejection of claim 11 for the same reasons that they are unpersuasive of reversible error in the Examiner's rejection of claim 1, discussed above.

Appellant argues that "Vaisman does not disclose, teach or suggest surface structured decorative boards comprising, *inter alia*, identical edge patterns at predetermined fixed positions at each of the first and second end edges of each of the boards, wherein the remaining part of the decorative surface pattern is different." Appeal Br. 12. Appellant argues that Vaisman instead discloses "an asymmetrical design applied to a series of tiles such that when the tiles are assembled together the asymmetrical design is depicted," which, Appellant argues, "is not analogous to the claimed structured decorative boards having a wood décor." *Id.*

Claim 11 differs from claim 1 by reciting application of a pattern on at least first and second edges of a *plurality* of boards, rather than on “a same board and on an adjacent board” as recited in claim 1. The Examiner relies on Vaisman’s disclosure of decorative tiles having an asymmetrical design on one surface that extends to the edges of the tiles, and orienting numerous individual tiles in different ways to form a large variety of differing designs. Final Act. 10; Vaisman col. 1, ll. 56–58; col. 6, ll. 12–20; Figs. 18–20. The Examiner finds that these disclosures would have suggested application of a pattern on at least first and second edges of a *plurality* of Cruz’s direct pressure laminates, as required by claim 11. Final Act. 10.

Appellant’s arguments are unpersuasive of reversible error in the Examiner’s rejection of claim 11 because the arguments are improperly based on Vaisman alone, and do not take into consideration what the combined disclosures of Cruz, Kraft, and Vaisman would have suggested to one of ordinary skill in the art at the time of Appellant’s invention. *In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986) (“Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references”); *In re Keller*, 642 F.2d 413, 425 (CCPA 1981) (The test for obviousness “is what the combined teachings of the references would have suggested to those of ordinary skill in the art.”).

As discussed above, the combined disclosures of Cruz and Kraft would have suggested direct pressure laminates as disclosed in Cruz in which adjacent laminates have identical (or matching) edge patterns as disclosed in Kraft, while the pattern in the remainder of the adjacent laminates differs, as suggested by Kraft. Because Appellant does not dispute

the Examiner's factual findings directed to Vaisman (Appeal Br. 10–16), Appellant's argument that Vaisman does not disclose, teach, or suggest subject matter suggested by the combined disclosures of Cruz and Kraft is unpersuasive of reversible error.

We accordingly sustain the Examiner's rejection of claims 11 and 12 under 35 U.S.C. § 103(a).

CONCLUSION

Claims Rejected	Basis	Affirmed	Reversed
1, 2, 4–6, 9, and 10	§ 103(a) Cruz, Kraft	1, 2, 4–6, 9, and 10	
3	§ 103(a) Cruz, Kraft, Vaisman	3	
7, 8	§ 103(a) Cruz, Kraft, Harwood	7, 8	
11, 12	§ 103(a) Cruz, Kraft, Vaisman	11, 12	
Overall Outcome		1–12	

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