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Table with 5 columns: APPLICATION NO., FILING DATE, FIRST NAMED INVENTOR, ATTORNEY DOCKET NO., CONFIRMATION NO. Includes application details for Pietro BUTTOLO and examiner SYED, NABIL H.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte PIETRO BUTTOLO, JAMES STEWART RANKIN II,
STEPHEN RONALD TOKISH, and STUART C. SALTER

Appeal 2019-000184
Application 15/076,978
Technology Center 2600

Before JOSEPH L. DIXON, HUNG H. BUI, and
JON M. JURGOVAN, *Administrative Patent Judges*.

DIXON, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellant¹ requests rehearing of the Decision entered November 20, 2019. In the Decision, we affirmed the Examiner’s rejections of claims 1–20 under 35 U.S.C. § 103 based upon representative claim 12.

A request for rehearing “must state with particularity the points [of law or fact] believed to have been misapprehended or overlooked by the Board,” and must otherwise comply with 37 C.F.R. § 41.52(a)(1).

¹ We use the word “Appellant” to refer to “applicant(s)” as defined in 37 C.F.R. § 1.42. The real party in interest is Ford Global Technologies, LLC. (Appeal Br. 2.)

At the outset, we note that Appellant filed the original Appeal Brief on March 19, 2018 with an After Final Amendment which was denied entry by the Examiner because the proposed amendment was “not limited to canceling claims (where the cancellation does not affect the scope of any other pending claims) or rewriting dependent claims into independent form (no limitation of a dependent claim can be excluded in rewriting that claim). See 37 CFR 41.33(b) and (c).” (Adv. Act. 1, dated March 28, 2018.)

In response to a Notice of Non-Compliant Appeal Brief, dated April 6, 2018, Appellant filed a Supplemental Appeal Brief to correct the Claims Appendix, but did not provide corresponding corrections to the arguments in the original Appeal Brief. In the original Appeal Brief, Appellant generally argued the amended claim language and did not set forth separate arguments for patentability of each of the independent claims. In the Reply Brief, filed October 3, 2018, Appellant argued beyond the scope of the arguments presented in the original Appeal Brief. Again, Appellant did not set forth separate arguments for patentability of each of the independent claims and did not specifically address any dependent claims in the Reply Brief.²

As a result of Appellant’s unclear Appeal and Reply Briefs, Appellant now contends that the Board misapprehended or overlooked the fact that independent claim 19 contains the argued claim limitation as the disputed regarding the Howarter reference. (Req. Reh’g 2–4.)

² Because Appellant proposed to delete the dependent claims 2–11 and 13–18 in the proposed After Final Amendment, Appellant did not argue any of the dependent claims in the Appeal and Reply Briefs. Consequently, arguments thereto are waived. 37 C.F.R. § 41.37(c)(1)(iv) (2017).

Our Decision, mailed November 20, 2019, exercised the discretion to select a representative claim pursuant to 37 C.F.R. § 41.37(c)(1)(iv) and addressed Appellant's arguments thereto. In the Request for Rehearing, Appellant contends "Language removed from claim 12 in response to the advisory action, and language around which Applicant's argument centered, was still partially (but sufficiently to render a decision on the merits) present in claim 1 and still fully present in claim 19." (Req. Reh'g. 2.)

We disagree with Appellant regarding independent claim 1 partially including the argued limitations "sufficient[ly] to render a decision on the merits."

Appellant also disagrees with our selection of representative claim 12 as the representative claim for the group, but (1) does not identify any points misapprehended or overlooked in our Decision regarding independent claims 1 and 12, and (2) does not dispute our authority to select a representative claim.

We further note that the Examiner did not reject independent claims 1 and 12 using the Howarter reference in the grounds rejection. Therefore, any argument to the Howarter reference to distinguish the claimed invention cannot be persuasive of error in the Examiner's factual findings or conclusion of obviousness of independent claims 1 and 12 because the reference was not relied upon by the Examiner. Even if the argued language was "partially" found in independent claim 1, as Appellant contends (Req. Reh'g. 2 ("the partial inclusion"), 3 ("in claim 1 in part-form.")), the arguments to the unapplied prior art reference (Howarter) are irrelevant to the Examiner's factual findings and conclusion of obviousness of independent claims 1 and 12. Therefore, Appellant's arguments in the

Briefs to independent claims 1 and 12 could NOT have shown error in the Examiner's obviousness determination, and, likewise, we could not have overlooked or misapprehended any points thereto.

Moreover, Appellant has not identified that (1) we misapprehended or overlooked any points in interpreting Appellant's arguments to the claims as a group, and (2) Appellant set forth separate arguments for patentability of each of the independent claims in the Briefs. Nor has Appellant identified that the Board misapprehended or overlooked any points using the authority to select a representative claim for the group. (Req. Reh'g 2-4.)

Essentially, Appellant contends that the Board should modify the arguments presented in the Briefs and speculate as to the general arguments and claim language for independent claims 1 and 12. We decline to speculate.

Specifically, Appellant contends:

Because the Board rendered no decision on the merits of Applicant's arguments with regards to the prior art, Applicant requests reconsideration of the argument with regards to at least claims 1 and 19. Applicant requests reconsideration of the clearly erroneous conclusion (concluded by extension from claim 12), that claims 1 and 19 also lack some or all of the language around which the argument centered, and therefore the argument with respect to claims 1 and 19 "is not commensurate in scope with the express language of claim" 1 or 19.

(Req. Reh'g 4.)

As discussed above, the argued Howarter reference was not relied upon in either of the prior art rejections of claims 1 and 12. Therefore, in addition to the arguments not being commensurate in scope to the express claim language, argument to the specific Howarter reference is irrelevant the

rejections of independent claims 1 and 12 which do not rely upon Howarter reference.

Appellant argues in the original Appeal Brief the language which was present in original independent claim 19, and Appellant merely argues that the primary question on appeal is whether the prior art Howarter teaches or suggests “measured signal strengths of the multiple wireless signals matching a predefined pattern of increasing signal strength.”³ (Appeal Br. 6.) Appellant merely reproduces the three paragraphs of the Howarter reference relied upon by the Examiner, and Appellant generally contends:

since none of the other references include this element, and since this is not covered by the Examiner’s Official Notice, there is no reference teaching or suggesting the preceding, and all references in combination fail to render the preceding obvious. For at least this reason, claims 1, 12 and 19 are allowable.

(Appeal Br. 7.)

We find Appellant’s argument to be a general argument for patentability without explanation as to why the proffered paragraphs do not teach or suggest the claimed limitation because there are different combinations of references applied to each of independent claims 1, 12, and 19. Therefore, Appellant’s argument cannot be a specific argument for patentability. Merely reciting the language of the claim is insufficient. *See* 37 C.F.R. § 41.37(c)(iv) (“A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the

³ Appellant additionally argued “Across the span of the 3 rejections based on Howarter, those of previous claims 6, 16 and 19, the Examiner only ever cites paragraphs [0044] – [0046] of Howarter.” (Appeal Br. 6.) Appellant’s argument may be directed to content of dependent claims 6 and 16 which were rejected based upon the Howarter reference, but the Howarter reference was not relied upon in the rejection independent claims 1 and 12.

claim.”). Merely alleging that the references fail to support an obviousness rejection (*e.g.*, Appeal. Br. 7) is insufficient to persuade us of Examiner error. Attorney arguments and conclusory statements that are unsupported by factual evidence are entitled to little probative value. *In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997); *see also In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984); and *Ex parte Belinne*, 2009 WL 2477843, at *3–4 (BPAI Aug. 10, 2009) (informative); *see also In re Lovin*, 652 F.3d 1349, 1357 (Fed. Cir. 2011).

Here, we find Appellant’s arguments are conclusory in nature and fail to address the thrust of the Examiner’s different obviousness rejections in combination with the additional teachings of the other prior art references.

On this record, we find Appellant has failed to present *substantive* arguments and supporting *evidence* persuasive of Examiner error. *Cf. In re Baxter Travenol Labs.*, 952 F.2d 388, 391 (Fed. Cir. 1991) (“It is not the function of this court to examine the claims in greater detail than argued by an appellant, looking for [patentable] distinctions over the prior art.”). Based upon our review of the record, we find Appellant has failed to present substantive arguments supported with specific factual evidence of sufficient character and weight to persuade us of error regarding the Examiner’s conclusion of obviousness.

Claim 19

For completeness, we respond to Appellant’s arguments, as applied to claim 19. From our review of those portions of the Howarter reference relied upon by the Examiner in the rejection of claim 19, we agree with the Examiner that the Howarter reference teaches and suggests a determination of a pattern of increasing signal strength as the user is approaching a vehicle.

Therefore, we find Appellant's arguments in the original Appeal Brief unavailing to show error in the Examiner's factual findings or conclusion of obviousness of independent claim 19. (Final Act. 12; Ans. 3).

Appellant further generally argues the Howarter reference and relies upon paragraph 43 of the Specification in an attempt to distinguish the claimed invention which gives an "example" of the predefined pattern, "as opposed to a mere increase or decrease in RSSI [(Received Signal Strength Indicator)] between one signal and the next." (Reply Br. 2.)

We find Appellant's reliance on the Specification unavailing because we further note that the disclosed "example" is not a limiting definition to differentiate the claimed invention, and the disclosed predefined pattern is directed to the "channels" in paragraph 43 of the Specification.⁴

We find Appellant's claim language is not commensurate in scope with the disclosure in paragraph 43. We note that paragraph 43 also discloses "To make the authentication process even more robust, the signal

⁴ The Specification discloses:

The filtered signals to/from the vehicle security module could be confirmed if they satisfy the following three properties, for example:

1. The signal should be monotonically increasing on the average of the channels combined.
2. The signal should increase from threshold1 to threshold2 in less than a predetermined time interval.
3. The channel signal distribution must be either of these two patterns:
 - a. Two channels on same side have consistently higher signal than two channels on opposite side; or
 - b. One channel has higher signal than two adjacent channels and even larger than opposite channel (when approaching at an angle).

(Spec. ¶ 43.)

intensity (RSSI) of messages from the personal devices to multiple modules on the vehicle could be required to match the signature pattern of somebody walking toward the vehicle.” (Spec. ¶ 43; (*see generally* Spec. ¶ 51, disclosing no specific pattern other than generally (“a rapidly increasing strength as the driver approaches.”))) We agree with the Examiner that the Howarter reference teaches and suggests a general pattern of increasing signal strength, as the Examiner maintained. (Final Act. 12; Ans. 3).

We decline to consider the additional argument in the Reply Brief concerning the “condition vehicle system access on the time delay being below a predefined threshold,” because Appellant does not provide a basis that this argument is responsive to the Examiner’s Answer or show good cause for its untimely presentation.⁵ *See* 37 C.F.R. § 41.41(b)(2) (2017) (“Any argument raised in the reply brief which was not raised in the appeal brief, or is not responsive to an argument raised in the examiner’s answer . . . will not be considered by the Board for purposes of the present appeal, unless good cause is shown.”).

CONCLUSION

Although we disagree with Appellant that we overlooked Appellant’s separate argument for patentability of independent claims 1 and 19, we have considered Appellant’s arguments as they separately apply to independent claim 19 but not independent claim 1 because the argued reference was not relied upon in the rejection of claim 1. Appellant’s arguments do not show error in the Examiner’s obviousness rejection of independent claim 19.

⁵ Additionally, we find the Examiner relied upon the Masudaya reference, rather than the Howarter reference for this limitation.

Therefore, we deny Appellant’s Request for Rehearing to modify the outcome of our Decision.

DECISION

For the above reasons, we deny the request for rehearing of our original Decision.

Outcome of Decision on Rehearing:

Claims	35 U.S.C. §	References/ Basis	Denied	Granted
12, 14	103	Khan, Povolny	12, 14	
13	103	Khan, Povolny, Reiser	13	
18	103	Khan, Povolny, Puetz	18	
1–3	103	Khan, Povolny, Masudaya	1–3	
4, 5	103	Khan, Povolny, Masudaya, Puetz	4, 5	
6–8	103	Khan, Povolny, Masudaya, Howarter	6–8	
15, 16	103	Khan, Povolny, Howarter	15, 16	
17	103	Khan, Povolny, Howarter, Puetz	17	
9–11	103	Khan, Povolny, Masudaya, Oesterling	9–11	
19, 20	103	Khan, Nagai, Masudaya, Puetz, Howarter	19, 20	
Overall Outcome			1–20	

Final Outcome of Appeal after Rehearing:

Claims Rejected	35 U.S.C. §	Basis	Affirmed	Reversed
12, 14	103	Khan, Povolny	12, 14	
13	103	Khan, Povolny, Reiser	13	
18	103	Khan, Povolny, Puetz	18	
1-3	103	Khan, Povolny, Masudaya	1-3	
4, 5	103	Khan, Povolny, Masudaya, Puetz	4, 5	
6-8	103	Khan, Povolny, Masudaya, Howarter	6-8	
15, 16	103	Khan, Povolny, Howarter	15, 16	
17	103	Khan, Povolny, Howarter, Puetz	17	
9-11	103	Khan, Povolny, Masudaya, Oesterling	9-11	
19, 20	103	Khan, Nagai, Masudaya, Puetz, Howarter	19, 20	
Overall Outcome			1-20	

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).

DENIED