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PAULY, DEVRIES SMITH & DEFFNER, L.L.C.
SUITE 900
121 SOUTH 8TH STREET
MINNEAPOLIS, MN 55402-2841

EXAMINER	
NGUYEN, TAN QUANG	

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kds@pdsdlaw.com

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DOUGLAS EDWARD DEVRIES, KERRY L. KELLER, and TIMOTHY J. MCGRATH

Appeal 2019-004695
Application 15/223,894
Technology Center 3600

Before JENNIFER D. BAHR, MICHAEL J. FITZPATRICK, and LISA M. GUIJT, *Administrative Patent Judges*.

GUIJT, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant[1] seeks our review under 35 U.S.C. § 134(a) of the rejection of claims 1–24. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

[1] We use the word "Appellant" to refer to "applicant" as defined in 37 C.F.R. § 1.42. Appellant identifies Consumer Safety Technology, LLC as the real party in interest. Br. 3.

THE INVENTION

Appellant's invention relates to "networked vehicle intoxication immobilization." Spec. ¶ 2. Claims 1 and 13 are the independent claims on appeal. Claim 1, reproduced below, is illustrative of the subject matter on appeal.

> 1. A vehicle immobilization system comprising:
>
> a detection element operable to detect a level of an intoxicant in a user's breath;
>
> a control module operable to receive a signal from the detection element indicating the level of intoxicant in the user's breath, and to selectively restrict operation of the vehicle based on the level of intoxicant in the user's breath exceeding a threshold by selectively sending a signal via a connection between the control module and the vehicle using data link connector (DLC) of the vehicle, wherein the control module is further operable to monitor vehicle data via the data link connector (DLC) of the vehicle, wherein the control module is operable to detect if the vehicle is moved without the user providing a valid breath sample using information received via the DLC, wherein the control module is operable to record a violation if the vehicle is moved without the user providing a valid breath sample.

THE REJECTION[2]

The Examiner relies upon the following as evidence in support of the rejection:

NAME	REFERENCE	DATE
Freund	US 6,748,792 B1	June 15, 2004
Ballard	US 6,853,956 B2	Feb. 8, 2005

[2] The Examiner's provisional statutory double-patenting rejection is moot, in view of the abandonment of US Patent App. 15/622,309 on June 13, 2019.

Claims 1–24 stand rejected under 35 U.S.C. § 103 as being unpatentable over Freund and Ballard.

OPINION

Regarding independent claim 1, the Examiner finds that Ballard generally discloses the claim limitations, including selectively restricting operation of the vehicle based on the level of intoxicant in the user's breath by selectively sending a signal via a connection between the control module and the vehicle using data link connector (DLC), or on-board diagnostics system (OBD), of the vehicle. Final Act. 3 (citing Ballard, Fig. 2); *see also* Ans. 9 (citing Ballard 5:16–6:12). The Examiner relies on Freund for teaching a control module operable to record a violation if a vehicle is moved without a user providing a valid breath sample, as claimed. Final Act. 3 (citing 5:46–6:3, 7:58–8:2). Specifically, the Examiner finds that Freund suggests recording the exact location of a vehicle when a violation occurs, so that law enforcement can be dispatched and the impaired driver intercepted. Ans. 9 (citing Freund 5:43–52, 59–64). The Examiner also finds that Freund teaches that a person is impaired when the driver's blood alcohol level exceeds a predetermined limit *or* the driver did not perform the test. *Id.* (citing Freund 7:33–39). The Examiner reasons that it would have been obvious to incorporate Freunds' teaching into Ballard's system to have the violation information available for future reference. Final Act. 3.

Appellant argues that the passages in Freund relied on by the Examiner do not "teach or suggest recording a violation if the vehicle is moved without a valid breath sample." Br. 11. Appellant submits that Freund's only use of the word "violation" is "in the context of tampering

with the device, if time for testing has expired, and not properly positioning a testing unit." *Id.* (citing Freund 4:26–30, 8:28–32, 63–66, 9:12–19, Fig. 3).

As relied on by the Examiner, Freund discloses that system 10 can include various components (Freund 5:32–30, 46–47), such as "a global positioning system (GPS) 33," whereby "the exact location of the vehicle 28 when a violation occurred could be recorded," and also "a radio function," which "could be effective in notifying the monitoring facility or law enforcement of a failed impairment test" (*id.* 5:47–52, 56–59). Freund also discloses that "if driver 16 is operating a vehicle 28 and is prompted . . . to provide a sample and ignores the prompt, after a certain predetermined amount of time . . . a violation procedure will be initiated," wherein "the violation procedure . . . could consist of sounding the horn 25 and/or flashing the lights 27." Freund 9:2–6, 12–14. Freund also discloses, in other contexts, such as a failed blood alcohol level test, *recording* the event. *Id.* 9:29–32 ("the failed impairment test is recorded and can be accessed for the appropriate disciplinary action").

We find that a preponderance of the evidence supports the Examiner's finding that Freund discloses a system that records a violation, and also gives as an example of a violation ignoring a prompt to provide a blood alcohol signal while driving, such that Freund suggests to one skilled in the art that the control module is operable to record a violation if the vehicle is moved without the user providing a valid breath sample. "A reference must be considered for everything that it teaches, not simply the described invention or a preferred embodiment." *In re Applied Materials, Inc*., 692 F.3d 1289, 1298 (Fed. Cir. 2012).

Appellant also argues that "[w]hile Ballard . . . mentions 'control' through the OBD-II port and mentions interrupting operation of a vehicle components, there is no discussion or description of the capability to send or *sending a signal* to restrict operation of the vehicle," as claimed. Br. 15 (emphasis added). Appellant submits that "[t]he only concrete example of how to restrict operation of the vehicle in Ballard is to interrupt the operation of the fuel pump, an engine starter, or an ignition circuit," and that "[o]peration of these components could be interrupted in various ways without the use of a signal." *Id.* at 13–14 (citing Ballard at 5:16–55, 57–65, Fig. 2). Appellant also submits that "Ballard primarily discloses the OBD port as providing diagnostic information and machine operating data for the machine, not as a way to receive a signal." *Id.* at 15.

As relied on by the Examiner, Ballard discloses that

> [c]omputing device 15 is also electrically connected to an on-board diagnostic port 41 via electronic circuit 17 [(which channels machine operating data to the sobriety interlock device 11)]. Port 41 is preferably a connection port on machine 19[3] [(i.e., an automobile)] for a second generation "on-board diagnostics system or OBD-II, that provides diagnostic information and machine operating data for machine 19.

Ballard 5:16–21; 6:11–13. Ballard specifically discloses that

> [a] person of ordinary skill in the art will also recognize that electronic circuit 17 could also be used to control the operation of the machine 19 through on-board diagnostic port 41. Electronic circuit 17 would permit the engine on the machine to be stopped by interrupting operation of a fuel pump, an engine starter, or an ignition circuit.

[3] *See, e.g.*, Ballard 3:33–36 ("[s]obriety interlock device 11 is installed on a machine 19 to insure that the machine is not operated by inebriated operators," wherein "[t]ypically the machine 19 is an automobile").

Id. at 5:57–64.

Thus, a preponderance of evidence supports the Examiner's finding that Ballard discloses that *a signal* is sent from the sobriety interlock device via electronic circuit 17 and OBD-II to interrupt operation of the engine starter.

Appellant further argues that "Ballard fails to enable control through the OBD-II port" because "two short sentence[s] do[es] not enable one of ordinary skill in the art to control a vehicle through a connection to an OBD-II port," and that "[u]ndue experimentation would be required to actually practice the teachings of Ballard to 'control the operation of machine 19 through on-board diagnostic port 41,'" for example, "to 'permit the engine on the machine to be stopped by interrupting operation of a fuel pump, an engine starter, or an ignition circuit.'" Br. 15–16. Appellant submits that the Specification "provides several different examples of how to specifically control operation of a vehicle." *Id.* at 16 (citing Spec. ¶¶ 46, 47, 69, 70).

We are not persuaded by Appellant's argument, which does not provide sufficient evidence of undue experimentation, in view of Ballard's disclosure that controlling operation of a vehicle via an OBD-II port is within the knowledge of a person of ordinary skill in the art. Attorney argument cannot take the place of evidence in the record. *Estee Lauder, Inc. v. L'Oreal, S.A.*, 129 F.3d 588, 595 (Fed.Cir. 1997). In particular, regarding controlling operation of a vehicle via an OBD-II port, the Specification, as relied on by Appellant *supra*, discloses that: (i) "the control module prevents the vehicle from starting by disabling a vehicle system such as the fuel pump, ignition, starter, etc. *via the OBDII diagnostic connector*" (Spec. ¶ 47 (emphasis added)); (ii) "the intoxication interlock system *interrupts* a

vehicle bus such as the On-Board Diagnostic (OBDII) bus . . . *by disrupting* the bus to prevent operation of the vehicle," for example, "the intoxication interlock system *shorts* the data bus through its connection to the vehicle's OBDII diagnostic connector, thereby preventing communication on the bus" or "*injects noise or other signals onto the bus* that prevent normal operation of the bus" (*id.* ¶ 69 (emphasis added)); and (iii) "[a] vehicle bus such as the OBDII bus . . . is used to restrict operation of the vehicle in another example *by sending instructions* from the intoxication interlock system to one or more car components, such as the fuel pump, starter relay, or ignition" (*id.* ¶ 70 (emphasis added)). However, Appellant has not demonstrated that interrupting and/or disrupting the OBD-II bus by shorting, or injecting noise or other signals into, the circuit is beyond the knowledge of a person of ordinary skill in the art, as stated in Ballard.

Accordingly, we sustain the Examiner's rejection of independent claim 1. Appellant chose not to present arguments for the patentability of claims 2–24 apart from the arguments presented *supra* for claim 1, and therefore, for essentially the same reasons as stated *supra*, we also sustain that Examiner's rejection of claims 2–14. Br. 10–16.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)	Affirmed	Reversed
1–24	103	Ballard, Freund	1–24	

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