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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ROLF VANDOREN

Appeal 2019-004929
Application 15/108,652
Technology Center 3700

Before MICHAEL J. FITZPATRICK, WILLIAM A. CAPP, and
JILL D. HILL, *Administrative Patent Judges*.

CAPP, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant¹ seeks our review under 35 U.S.C. § 134(a) of the final rejection of claims 1–11, 14, and 16–18. We have jurisdiction under 35 U.S.C. § 6(b).²

We AFFIRM.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies Smart NV as the Applicant and real party in interest. Appeal Br. 2.

² This case came before the Board for a regularly scheduled telephonic oral hearing on July 28, 2020. Citations to the Hearing Transcript are indicated by the prefix “Tr.”

THE INVENTION

Appellant's invention relates to game boards and associated games.

Spec. 1. Claim 1, reproduced below, is illustrative of the subject matter on appeal.

1. A game comprising:

a variable gameboard (10);

a plurality of game pieces (11),

wherein the gameboard (10) comprises;

at least two gameboard parts (1) with sides that can be coupled to each other,

wherein the least two gameboard parts (1) can be positioned with respect to one another in different orientations to form at least two variants of a partial or complete gameboard (10),

whereby the gameboard parts (1) are each provided with at least one coupling means (6, 8) on at least one of the sides (2) to enable the reverse coupling of the gameboard part (1) in the said different orientations,

whereby the at least one coupling means (6, 8) of an above-mentioned gameboard part (1) are arranged such that they can form a coupling with identical coupling means (6, 8) of at least one other of said gameboard parts (1),

the at least two game board parts (1) having a top (3) and a bottom (4) and being provided on the top (3) and/or bottom (4) with fields (5) for placing the game pieces (11),

whereby these fields (5) are arranged in rows and columns extending in two directions, the central points of the fields (5) having a regular distance (A) between them, the coupling means (6, 8) and fields (5) being so arranged that for the at least two variants of the gameboard, at least one column or row continues over the adjacent parts of the gameboard parts (1); and

wherein at least some of the game pieces (11) comprise more than one element (13), whereby each element (13) is complementary in dimensions and/or form to a field (5), and whereby the mutual core distance (S) of the elements (13) is equal to the regular distance (A) between the fields (5).

THE REJECTIONS

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

NAME	REFERENCE	DATE
Floden	US D545,379 S	June 26, 2007
Skoger	US D601,206 S	Sept. 29, 2009
Appelblatt	US 8,505,918 B1	Aug. 13, 2013
Sniderman	GB 1,512,943	June 1, 1978

The following rejections are before us for review:

1. Claims 1–7, 9–11, 14, and 16–18 are rejected under 35 U.S.C. § 103 as being unpatentable over Appelblatt and either of (1) Floden; or (2) Skoger.
2. Claim 8 is rejected under 35 U.S.C. § 103 as being unpatentable over Appelblatt, Sniderman, and either of (1) Floden; or (2) Skoger.

OPINION

Unpatentability of Claims 1–7, 9–11, 14, and 16–18 over Appelblatt and either Floden or Skoger

Appellant argues claims 1–7, 9–11, 14, and 16–18 as a group. Appeal Br. 3–11. Claim 1 is representative. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner finds that Appelblatt discloses the invention substantially as claimed except for possibly teaching fields arranged in two directions, for which the Examiner relies on either of Floden or Skoger. Final Act. 2–3. The Examiner concludes that it would have been obvious to a person of ordinary skill in the art at the time of the invention to create a game board with fields arranged in rows and columns. *Id.* at 3. According to the Examiner, a person of ordinary skill in the art would have done this as such is commonly known in playing a wide variety of games. *Id.*

Appellant first argues that claim 1 requires that each gameboard part accommodate at least two game pieces. Appeal Br. 5–6. In essence, Appellant alleges that Appelblatt lacks this requirement because each module only has one field that accommodates only one game piece.³ *Id.* This argument requires construction of the term “fields” as it appears in the claim.

During examination of a patent application, pending claims are given their broadest reasonable construction consistent with the specification. *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). Under the broadest reasonable interpretation standard, claim terms are given their ordinary and customary meaning as would be understood by one of ordinary skill in the art in the context of the entire disclosure. *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007). Construing claims broadly during prosecution is not unfair to the applicant, because the applicant has the opportunity to amend the claims to obtain more precise claim coverage. *Am. Acad. of Sci. Tech Ctr.*, 367 F.3d at 1364.

A claim construction analysis begins with, and is centered on, the claim language itself. *See Interactive Gift Express, Inc. v. Compuserve, Inc.*, 256 F.3d 1323, 1331 (Fed. Cir. 2001). Furthermore, claim language must be construed in the claim in which it appears. *IGT v. Bally Gaming Int’l, Inc.*, 659 F.3d 1109, 1117 (Fed. Cir. 2011). Extracting a single word from a claim divorced from the surrounding limitations can lead construction astray. *Id.* Here, claim 1 merely recites that the “game board parts” have

³ Actually, Appellant’s modules can accommodate a plurality of game pieces owing to the fact that game pieces can be stacked vertically on top of one another. *See e.g.*, Appelblatt, Fig 1. However, the decision we reach here does not depend on this fact.

“fields” for placing game pieces thereon. Claims App. Thus, “fields” is construed in relation to the plural “game board parts.” However, whereas “game board parts” is clearly intended to refer only to the plural (“at least two”), there is no analogous limitation on the number of field(s) for each game board part. Thus, even if each game board part has only one field, the “at least two game board parts” of claim 1 would have, in the aggregate, at least two fields, thereby satisfying Appellant’s contention that “fields” is limited to the plural form of the word. *Id.*

Appellant does not direct us to any language in the Specification that limits “fields” to more than one field per game board part. *See generally* Appeal Br. Appellant’s Specification, in one instance, refers to “the” (arguably singular) game board part as possessing “fields” in the plural. Spec. 4. However, this is mentioned merely as a preferred embodiment.⁴ *Id.* Statements regarding a preference are not definitive on whether a preferred embodiment limits the scope of a claim. *Polaris Indus., Inc. v. Arctic Cat, Inc.*, 882 F.3d 1056, 1069 (Fed. Cir. 2018). Indeed, we are admonished that it is improper to read a limitation from the specification into the claims. *Arlington Indus., Inc. v. Bridgeport Fittings, Inc.*, 345 F.3d 1318, 1327 (Fed. Cir. 2003). In context, the plural form of a term in a claim can describe a universe ranging from one to some higher number, rather than requiring

⁴ Appellant’s Specification also informs us that:

The present invention is by no means limited to the embodiments described as an example and shown in the drawings, but a gameboard part, a gameboard and game according to the invention can be reali[z]ed in all kinds of forms and dimensions, without departing from the scope of the invention.

Spec. 10.

more than one item. *Versa Corp. v. Ag-Bag Int'l Ltd.*, 392 F.3d 1325, 1330 (Fed. Cir. 2004). Appellant presents nothing from the record that necessarily restricts the number of fields in a game board part to more than one.

Appellant next argues that Appelblatt fails to disclose game board parts that each have a plurality of fields arranged in rows and columns extending in two directions. Appeal Br. 6. This argument runs afoul of the same singular versus plural issue that we discussed in the previous paragraph regarding fields and game board parts. *Versa*, 392 F.3d at 1330.

Appellant's game board part limitation, broadly but reasonably construed, is satisfied by Appelblatt's module 14, which contains a single "field." *Am. Acad. of Sci. Tech Ctr.*, 367 F.3d at 1364. Otherwise, as can be readily seen, for example, in Figures 1 and 21, Appelblatt's modules 14 (214) are arranged in rows and columns. Appelblatt Figs. 1, 21. As long as Appelblatt's modules (fields) are arranged in rows and columns on the "game board," there is no separate requirement in the claim that each module contains multiple fields in a row and column arrangement. Here again, Appellant is trying to import a limitation from the preferred embodiment in the Specification where no such limitation appears in the body of the claim. *Arlington Indus.*, 345 F.3d at 1327.

Furthermore, Appellant erroneously insists that each individual module is the only structure in Appelblatt that may be considered to be a "game board part." Appellant fails to consider that Appelblatt's modules can be assembled into game boards parts comprised of a plurality of modules, which parts, nevertheless, are less than the complete game board. For Example, Appelblatt's individual modules can be assembled into 2x2

game board part arrays which, in turn, can then be assembled into a 4x4 (or larger) game board. Viewed in this way, Appelblatt is seen to have game board parts with a plurality of fields that are arranged in rows and columns in precisely the manner Appellant argues that the claim should be construed. *Id.*

Appellant next argues that Appelblatt fails to disclose a variable gameboard with at least two variants as claimed. Appeal Br. 3–4. In response, the Examiner points to Appelblatt’s plurality of interconnected modules 214 and explains that Appelblatt teaches that such modules can be connected to form an infinite numbers of arrays. Ans. 3; Appelblatt col. 7, ll. 23–36; col. 9, ll. 13–27, Fig. 21. During oral argument, Appellant attempted to raise a new argument that a “variant” is required to exhibit an offset, such as illustrated in Figures 10 and 11. Tr. 5:9–22. However, there is no requirement in claim 1 that a variant exhibit such an offset. Claims App. Our comments below about Appellant raising new arguments after the Answer is filed applies, in equal force, to this issue.

Appellant next argues that Appelblatt fails to disclose “variants” of the gameboard where rows and columns continue over adjacent parts of the gameboard parts. Appeal Br. 6. Appellant provides no explanation or discussion as to what is meant by this conclusory assertion. *Id.* Appellant offers no proposed construction of “variant” and does not direct to us to any language in the Specification that offers an operational definition of “variant.” Under the circumstances, a broad but reasonable construction of “variant” is in order. *Am. Acad. of Sci. Tech Ctr.*, 367 F.3d at 1364. We construe a game board “variant” to be any second game board configuration that varies from a first game board configuration. Appelblatt’s modules are

designed to be arranged in rows and columns. *See* Appelblatt Figs. 1, 2, 5, and 15–21. The modules can be connected to form an infinite number of arrays. *Id.* at col. 9, ll. 24–27. Thus, we are at a loss to understand how Appellant’s cursory, conclusory argument about variants distinguishes the invention from Appelblatt and is supposed to apprise us of Examiner error.

In the Reply Brief, Appellant raises a new argument that, even if Appelblatt discloses an infinite number of arrays, it is, nevertheless, limited to having each module oriented in the same direction as every other module. Reply Br. 1. Appellant further argues that:

By specifying a requirement for a change in “orientation” with “respect to each other”, Applicant intends to capture the fundamental difference between the variability disclosed in Appelblatt, which is limited to differently sized square/rectangle arrays, or partial arrays such as L shapes, and the type of variability shown in Applicant's figures, which includes gameboard parts configured to form variants wherein the orientations of the parts with respect to each other are different.

Id. With respect to Appellant’s – “*Applicant intends to capture*” – comment, Appellant is reminded that claim language is construed from the perspective of someone of ordinary skill in the art, not any point of view unique to the inventor. *Am. Acad. of Sci. Tech Ctr.*, 367 F.3d at 1364. Appellant bears the burden of precise claim drafting so that the person of ordinary skill in the art understands the scope of what – “*Appellant intends to capture.*” *In re Morris*, 127 F.3d 1048, 1056-57 (Fed. Cir. 1997).

Secondly, we have a rule governing raising new arguments, for the first time, in a reply brief.

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.

37 C.F.R. § 41.41(b)(2). Nothing in the Reply Brief regarding “orientation” purports to be responsive to an argument raised in the Examiner’s Answer or otherwise establishes “good cause” for not raising this issue in the Appeal Brief.

However, even if we were to consider this new argument (we do not), it is not persuasive. Appellant does not direct us to any language in the Specification that mandates a narrow interpretation of “orientation” so as to require rotation in the X-plane. Appelblatt teaches that modules 14 feature an elongated stand-off 22 and a corner foot 24. Appelblatt col. 5, ll. 19–32. Two stand-offs 22 are positioned proximate the side edges of each of two consecutive sides of modules 14. *Id.* Elongated tab 26 is formed in each of stand-offs 22. *Id.* Tabs 26 protrude outwardly from stand-offs 22 in a plane that is oriented parallel to and below the plane of the top of the module 14. *Id.* Tabs 26 are inserted in the grooves formed between foot 24 and stand-offs 22 of adjacent modules 14. *Id.* Appelblatt’s modules can be repositioned with respect to which sides of the respective modules are connected as long as the connection is between a tab and a groove.

Moreover, contrary to Appellant’s position, Appelblatt’s modules are readily capable of connecting to each other in more than one rotational orientation. A connection between modules requires a single tab on a module to be connected to a single groove on another module. It is elemental that, as each module has two tabs and two grooves, a module can be rotated in orientation so that either of the two tabs can be connected to either of the two grooves. We are confident that the Examiner could have made these observations in the Answer had Appellant followed our rules and given the Examiner a fair opportunity to respond. In any event, Appellant’s

belatedly asserted argument is not supported by the record before us. The Examiner's finding that Appelblatt discloses a variable gameboard with at least two variants is supported by a preponderance of the evidence.

Finally, Appellant argues that it would not have been obvious to modify Appelblatt to achieve the claimed invention. Appeal Br. 9–11. In advancing this argument, Appellant does not dispute the Examiner's finding that arranging gameboard fields in arrays of rows and columns is "commonly known in the art." *Id.*; Final Act. 3. Neither does Appellant deny that Floden and Skoger each disclose gameboards with fields arranged in rows and columns. *Id.*

Appellant's arguments are predicated on the assumption that the allegedly required "modifications" mentioned in this section of the Appeal Brief are necessary to satisfy the "arranged in rows and columns" language of the claim. For reasons previously discussed with respect to the individual claim limitations placed in issue, we do not accept Appellant's underlying premise. The Examiner's proposed modification of Appelblatt by Floden or Skoger is a contingency that only becomes necessary if we, in the first instance, decide that Appelblatt does not teach fields that are arranged in two directions. Final Act. 3. Inasmuch as we find that Appelblatt should be construed as teaching fields arranged in two directions, such contingency to modify with Floden/Skoger does not come into play in our analysis. However, were we to consider that such modification is necessary, we deem it to be well within the ambit of ordinary skill in the art and, furthermore, determine that the Examiner's stated rationale ("*as commonly known in the art*") to be sufficient to support the rejection. Contrary to Appellant's conclusory and factually unsupported argument, it is a simple matter,

requiring less than even ordinary skill, to assemble Appelblatt's modules into, for example, a plurality of 2x2 arrays and then assemble such 2x2 arrays into a 4x4 square array or an L-shaped array.

The Examiner's findings of fact are supported by a preponderance of the evidence and the Examiner's legal conclusion of unpatentability is well-founded. Accordingly, we sustain the Examiner's unpatentability rejection of claims 1-7, 9-11, 14, and 16-18.

*Unpatentability of Claim 8
over Appelblatt, Sniderman, and either Floden or Skoger*

Claim 8 depends directly from claim 6 and indirectly from claim 1. Claims App. Appellant does not separately argue the rejection of this claim. *See generally* Appeal Br. We sustain the rejection of claim 8. *See* 37 C.F.R. § 41.37(c)(1)(iv) (failure to separately argue claims constitutes a waiver of arguments for separate patentability).

CONCLUSION

Claims Rejected	§	References	Affirmed	Reversed
1-7, 9-11, 14, 16-18	103	Appelblatt, Floden, Skoger	1-7, 9-11, 14, 16-18	
8	103	Appelblatt, Sniderman, Floden, Skoger	8	
Overall Outcome			1-11, 14, 16-18	

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