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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte NICHOLAS DIPAOLO

Appeal 2019-006589
Application 13/330,526
Technology Center 3600

Before EDWARD A. BROWN, WILLIAM A. CAPP, and
LEE L. STEPINA, *Administrative Patent Judges*.

BROWN, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1, 3, 4, 6–10, and 15–17, which are the pending claims. 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 the real party in interest as Nicholas DiPaolo. Appeal Br. 3.

CLAIMED SUBJECT MATTER

Claim 1, reproduced below, is representative of the claimed subject matter:

1. A puppy apartment container comprising:
 - a top frame, a bottom frame, and four wire walled sidewall frames forming a rectangularly-shaped container portion; and
 - an apartment room divider having a wire walled dividing frame adjustably attachable in a plurality of locations to a container portion interior and being less in height and width than said container portion and having a kennel opening positioned within said dividing frame thereby allowing an animal to pass from one interior apartment portion of the container to another interior apartment portion;
 - wherein the adjustable attachment of the apartment room divider between the plurality of locations within the container portion interior changes the relative size of the one interior apartment portion of the container in relation to the another interior apartment portion;
 - wherein the sidewall frames and dividing frame each have perpendicularly running welded wires having surfaces being formed by spaced parallel end and side wire members being evenly divided into a plurality of rectangles by means of regularly spaced cross-wires thereby forming wire walls;
 - wherein the dividing frame is adjustably attachable in the plurality of locations to the spaced parallel end and side wire members of two of the oppositely disposed sidewall frames, wherein the plurality of locations comprise at least three pairs of successively disposed spaced parallel end and side wire members of the two oppositely disposed sidewall frames.

Appeal Br. 25 (Claims App.).

REJECTION

Claims 1, 3, 4, 6–10, and 15–17 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Cantwell (US 2012/0186529 A1, published July 26, 2012) and Matteson (US 2011/0168104 A1, published July 14, 2011).

ANALYSIS

Appellant argues the rejection of claims 1, 3, 4, 6–10, and 15–17 as a group. Appeal Br. 11–24. We select claim 1 as representative of the group to decide the appeal as to the rejection. Claims 3, 4, 6–10, and 15–17 stand or fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

In rejecting claim 1, the Examiner finds that Cantwell discloses a puppy apartment container comprising, *inter alia*, a rectangularly-shaped container portion, and a room divider (divider panel 400) adjustably attachable to a container portion interior to change the relative size of the interior. Final Act. 2 (citing Cantwell ¶ 42, Figs. 2, 4). The Examiner concedes that Cantwell does not disclose that the dividing frame has a kennel opening positioned within it, as claimed. *Id.* at 3. The Examiner relies on Matteson as teaching an animal cage including a divider panel (divider 28) that has an opening (e.g., opening 94) for allowing an animal to pass through. *Id.* (citing Matteson ¶ 40). The Examiner concludes that it would have been obvious to modify the container of Cantwell in view of Matteson’s teaching to have an opening in the room divider frame, “since Cantwell states the divider is used to separate *objects* within the container and doing so would allow the animal to access the *objects* separated by the dividing panel.” *Id.* (emphasis added).

Appellant contests the rejection based on three arguments. Appeal Br. 12–22. First, Appellant contends that the Examiner mischaracterized what “object” Cantwell is actually referring to in paragraph 42. *Id.* at 12. Appellant asserts that the Examiner indicates that the term “object” refers to food, toys or other inanimate objects, whereas Cantwell teaches that the object is the animal itself. *Id.* Appellant contends that Cantwell does not suggest separating such inanimate objects inside the same crate, based on the last sentence of paragraph 42, which states “[t]his enhances the flexibility of the crate 100 and its ability to contain one or more animals in separate areas therein.” *Id.* at 13. Appellant asserts that paragraphs 5 and 17 reinforce that Cantwell teaches that animals, not inanimate objects, can be separated. *Id.* at 13–15. Appellant also contends that, in paragraph 32 of Cantwell, the reference to an “object” relates to an animal. *Id.* at 15. Appellant acknowledges, however, that paragraphs 48 and 56 of Cantwell use the term “object” in referring to an inanimate object, but contends that Cantwell does not suggest that the divider is used to separate such inanimate objects in the container. *Id.* at 15–16.

In response, the Examiner disagrees with Appellant about the meaning of the term “objects” in paragraph 42 of Cantwell. Ans. 3. The Examiner submits that paragraphs 48 and 60 describe “[a] blanket, pad, cloth, or other object.” *Id.* The Examiner submits that Cantwell does not correlate the term “object” to anything other than an inanimate object. *Id.*

Appellant’s first argument is unpersuasive. As noted by the Examiner, Cantwell uses the term “object” in describing inanimate items that can be placed inside the cage for animals. Ans. 3. Cantwell discloses an animal crate comprising a divider panel that can be located within the

crate to change the relative size of adjacent interior spaces. Cantwell also discloses that “the divider panel 400 can be coupled to the top panel 102 along any of these wires to adjust the desired space on each side of the divider panel 400.” Cantwell ¶ 42. Cantwell further discloses that “[i]t can also be advantageous to reduce the amount of space a younger animal may have inside the crate, and it can be easily accomplished by installing the divider panel.” *Id.* (emphasis added). Accordingly, Cantwell teaches the advantage of having the capability to adjust the size of the interior space of the cage to match the size of an animal contained in the space, and also teaches the provision of a divider panel to achieve this advantage.

Cantwell describes various “objects” that can be placed in the crate. As disclosed by Cantwell, a pan 800 can be placed in the crate, where “[t]he pan 800 can have a raised periphery so that food, water, and other items do not easily spill out of the pan 800.” Cantwell ¶ 47. Additionally, “a pad, bedding, cloth, or other object can be either placed on the pan 800 or inserted through the opening 802 instead of the pan 800.” *Id.* ¶ 48.

Matteson discloses an animal cage 10 including a divider 28 positioned inside the cage to divide the interior into adjacent chambers 30, 32. *See* Matteson ¶ 34, Figs. 1, 4. Openings 88 and 94 provided in upper and lower door panels 38 and 40, respectively, can be aligned with openings 34 and 36 in divider 28 for allowing an animal to pass through openings 34 and 36. *Id.* ¶ 40. Matteson also discloses that “the divider can be positioned at various locations within the cage interior to create different size chambers,” and that “[c]ages need to be appropriately sized for the animals to be housed. They need to be big enough, but not too big.” *Id.* ¶ 7. Accordingly, Matteson, like Cantwell, teaches the advantage of matching the

size of the chambers to the size of contained animals, and teaches the provision of a divider to achieve this advantage. Matteson also teaches that an animal contained in a smaller sized chamber can pass to an adjacent larger sized chamber via the opening in the divider.

Appellant's first argument focuses on Cantwell only. However, when a rejection is based on a combination of prior art disclosures, attacking the references individually is typically unpersuasive because it fails to address what the collective information demonstrates a skilled artisan knew at the time of the invention. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986) (citing *In re Keller*, 642 F.2d at 425). As Appellant's first argument does not address the combination of teachings, it is unpersuasive.

Second, Appellant contends that providing a hole in Cantwell's divider panel 400 defeat Cantwell's purpose, that is, to separate animals. Appeal Br. 17–18. In support, Appellant quotes description in paragraphs 5, 10, and 17 of Cantwell and portions of MPEP §§ 2143.01(V) and (VI). *Id.* at 17–18. Accordingly, Appellant contends, the Examiner's combination cannot be considered an obvious modification of Cantwell. *Id.* at 18.

In response, the Examiner acknowledges that Cantwell discloses that the divider panel can separate animals from one another. Ans. 4 (citing Cantwell ¶¶ 5, 17, 57). The Examiner also notes that paragraph 17 of Cantwell states, “[i]t can also be advantageous to reduce the amount of space a younger animal may have inside the crate, and it can be easily accomplished by installing the divider panel,” and paragraph 42 of Cantwell states, “another embodiment of a crate is illustrated with a divider panel coupled thereto. One of the advantages of this embodiment is the ability to separate objects being contained in the crate.” *Id.* The Examiner submits

that an example of an inanimate object known in the art is a water bowl or food bowl that would be provided in a separate compartment to prevent the animal from spilling the food or water, and a blanket on the other side of the pet crate to allow the animal to sleep in a separate section. *Id.* The Examiner finds Appellant's argument unpersuasive because it "is only drawn to the divider panel being used to separate two or more animals, and [is] silent to Cantwell's statement of using the divider panel with . . . one animal and for separating objects." *Id.*

Appellant's second argument is also unpersuasive. Providing an opening in Cantwell's divider panel would allow an animal to pass through the divider panel from one interior chamber to an adjacent interior chamber. As explained by the Examiner, the animal would be able to access food and/or water contained in one chamber, and to access an object such as a blanket or pad contained in an adjacent chamber where the animal sleeps or rests.

We are unpersuaded that providing an opening in Cantwell's divider panel, as taught by Matteson, would prevent the cage from being able to separate animals contained in adjacent chambers from each other. For example, in situations where a larger animal is contained in a larger chamber of the cage defined by the divider panel, an adjacent smaller chamber could be sized to contain a smaller animal but not the larger animal. This arrangement would also allow the smaller animal to access the larger chamber, but not vice versa. Ultimately, regardless of whether an animal could traverse the divider panel after the Examiner's proposed modification, Cantwell's *crate* would still function for its intended purpose, namely, confining animals, and the principle of operation of the crate would not be

changed. *See* MPEP §§ 2143.01(V) and (VI). We agree with the Examiner that it would have been obvious to modify the divider panel of Cantwell to have an opening to allow animals to pass through from one area of the cage to an adjacent area.

Third, Appellant contends that the invention lies in the discovery of the source of a problem. Appeal Br. 18. According to Appellant, Cantwell and Matteson both fail to teach or suggest “the need for a structure to closely follow the growth of the puppy such that the puppy would be forced to always relieve themselves into the potty portion and not relieve themselves into the sleeping portion.” *Id.* at 19. Appellant contends that a nonobvious invention may arise from the identification of a problem, or its source, even if the solution to the problem would have been obvious once the source was identified. *Id.* (quoting *In re Peehs*, 612 F.2d 1287, 1288 (CCPA 1980)).

In response, the Examiner submits that the proposed modification “would provide a separate compartment to prevent the animal from spilling food or water within a bowl while allowing the animal access to an area that does not contain the food or water bowl for other activities, such as sleeping.” Ans. 5. The Examiner determines that “the only solution to providing access to multiple compartments within the pet crate is not based on ‘a new way to potty train a puppy,’ as alleged by [Appellant],” but is “for separating and giving access to objects that would hinder the normal activities of an animal within the crate.” *Id.*

We understand the Examiner’s position is that the Patent Office is not required to look only to the problem Appellant was trying to solve. We agree. “Under the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide

a reason for combining the elements in the manner claimed.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 420 (2007). Under the correct analysis, even if the Examiner’s stated reason for modifying Cantwell is not to address the problem of finding “a new way to potty train a puppy,” which Appellant contends is the problem addressed by the claimed invention, the Examiner has explained how the proposed modification addresses another need or problem. Namely, the Examiner reasons that the proposed modification of Cantwell would still allow different sized animals to be contained in different chambers of the cage, yet the modification would also allow such animals to pass through the divider to access different “objects” placed in the respective different chambers, for example. Thus, we determine that the Examiner has articulated an adequate reason with a rational underpinning to combine the teachings of Cantwell and Matteson to result in the claimed puppy apartment container.

Appellant also contends that the Examiner’s rejection is based on improper hindsight. Appeal Br. 23. As a general rule, the articulation of a reason to combine teachings that is supported by rational underpinnings prevents hindsight bias from arising. *See In re Cree*, 818 F.3d 694, 702 & n.3 (Fed. Cir. 2016) (holding a showing of sufficient evidence that a person of ordinary skill in the art would have had a reason to combine the references as a predictable use of prior art elements according to their established functions fully addressed the argument that the rejection was based on “impermissible hindsight.”); *see also KSR*, 550 U.S. at 417 (holding that “it can be important to identify a reason that would have prompted a skilled artisan to combine the elements in the way the claimed invention does because a patent composed of several elements is not proved

obvious merely by demonstrating that each of its elements was, independently, known in the art”). We note that the reason for combining references cannot be gleaned solely from Appellant’s disclosure. It must be based only on knowledge that was within the level of ordinary skill in the art at the time the claimed invention was made. *See In re McLaughlin*, 443 F.2d 1392, 1395 (CCPA 1971). As discussed above, the Examiner has relied on teachings of Cantwell and Matteson, not solely on Appellant’s disclosure. Accordingly, Appellant’s hindsight contention is also unpersuasive.

Finally, we have also considered each of Appellant’s contentions set forth in the Reply Brief, but find the contentions unpersuasive.

We sustain the rejection of claim 1, and claims 3, 4, 6–10, and 15–17 depending therefrom.

DECISION SUMMARY

In summary:

Claim(s) Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 3, 4, 6–10, 15–17	103(a)	Cantwell, Matteson	1, 3, 4, 6– 10, 15–17	

PERIOD FOR RESPONSE

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