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Paper 14
Date: October 11, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

JUPITER RESEARCH, LLC,
Petitioner,

v.

VPR BRANDS, L.P.,
Patent Owner.

IPR2022-00299
Patent 8,205,622 B2

Before JO-ANNE M. KOKOSKI, WESLEY B. DERRICK, and JULIA HEANEY, *Administrative Patent Judges.*

KOKOSKI, *Administrative Patent Judge*.

DECISION
Denying Petitioner's Request on Rehearing of
Decision Denying Institution
37 C.F.R. § 42.71(d)

I. INTRODUCTION

Jupiter Research, LLC ("Petitioner") filed a Request for Rehearing (Paper 13, "Request" or "Req.") of our Decision (Paper 12, "Decision" or "Dec.") denying institution of an *inter partes* review of claims 13–18 ("the challenged claims") of U.S. Patent No. 8,205,622 B2 ("the '622 patent," Ex. 1001). Paper 2 ("Pet."). In our Decision, we determined that the information presented in the Petition did not establish a reasonable likelihood of showing that: (1) claims 13–15, 17, and 18 are anticipated by Hon;[1] (2) claims 13–15 are anticipated by Cox;[2] (3) claim 16 would have been obvious over the combined teachings of Cox and Hon; and (4) claims 16–18 would have been obvious over the combined teachings of Cox and Zhu.[3] Dec. 11, 12, 18, 24. For the reasons that follow, Petitioner's Request is denied.

II. STANDARD OF REVIEW

When rehearing a decision on institution, we do not review the merits of the decision *de novo*, but instead review the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion may be determined "if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors." *Arnold Partnership v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004) (citing *In re Gartside*, 203 F.3d 1305, 1315–16 (Fed. Cir. 2000)). The party requesting rehearing has the burden to show that the decision should be modified.

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[1] Hon, US 8,375,957 B2, issued Feb. 19, 2013 (Ex. 1008).
[2] Cox, US 6,234,167 B1, issued May 22, 2001 (Ex. 1007).
[3] Zhu, CN 201104488Y, published Aug. 27, 2008 (Ex. 1009, with certified English translation).

37 C.F.R. § 42.71(d). Additionally, the request for rehearing "must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply." *Id*.

III. ANALYSIS

In the Decision, we determined that Petitioner did not adequately establish that Hon, Cox, and/or Zhu disclosed or taught "an electric airflow sensor [that is used/configured] to turn on and off the electric power source by way of detecting an airflow" as required by the challenged claims. Dec. 11, 12, 18, 24. Petitioner contends that "the Decision misapprehended/overlooked several points with respect to the electric airflow sensor as described in the '622 Patent and interpreted by Patent Owner" that "culminated in overlooking several key teachings in the references cited in the Petition." Req. 2-3. Petitioner's Request is based on two sets of arguments. First, Petitioner argues that the Board misapprehended the nature of the claimed electric airflow sensor. Req. 3–6. Second, Petitioner argues that the Board overlooked or misapprehended Cox's express teaching of an electric airflow sensor. *Id*. at 6–15. We have reviewed the Request and carefully considered the arguments presented. For the following reasons, we are not persuaded that we abused our discretion in denying institution of an *inter partes* review of the challenged claims.

A. The Board Did Not Misapprehend the Nature of the Claimed "Electric Airflow Sensor"

Petitioner argues that "[t]he Board determined that the electric airflow sensor of the '622 Patent was not mechanical and did not include mechanical components." Req. 3. We disagree with Petitioner's characterization of our Decision. We agree with Petitioner that an electric airflow sensor, as

claimed in the '622 patent, can include mechanical components, and did not say otherwise in our Decision.

In particular, we adopted the constructions of "electric airflow sensor" and "detecting an airflow" stipulated to by the parties in related litigation. Dec. 7. Under these stipulated constructions, "electric airflow sensor" was construed to mean "an electric sensor to detect air movement generated by a user's inhaling or puffing act." *Id*. (citing Ex. 1006, 2, 3). "Detecting an airflow" was construed to mean "determining that a user is inducing airflow into or out of the device." *Id*. (citing Ex. 1006, 2, 3). Consistent with these constructions, in the Decision we explained that Petitioner must show that the asserted references disclose or teach "an *electric* sensor that determines that a user's inhaling or puffing act is inducing airflow into or out of the device to meet the 'electric air flow sensor [that is used/configured] to turn on an off the electric power source by way of detecting an airflow' limitation of claims 13 and 17." *Id*. at 9–10 (emphasis added). Petitioner's arguments in the Request overlook the claims' requirement that the sensor be electric.

Specifically, Petitioner argues that the Board erred in determining "that the allegedly pressure driven sensor (including the membrane/diaphragm) of Hon, the air flow detecting device (and alternative/additional pressure drop detecting device taught to be a diaphragm microphone) of Cox, and the airflow/pressure responsive circuit of Zhu involved mechanical components and thus cannot anticipate electric airflow sensors." Req. 4. Our Decision, however, was not premised on the involvement of mechanical components in the sensors of Hon, Cox, or Zhu, nor did we find that asserted references could not be electric airflow sensors. Instead, we determined that the information in the Petition did not

adequately establish how or why the airflow sensors in Hon, Cox, and Zhu were *electric*, rather than solely mechanical, sensors.

For example, we explained that the "disclosures in Cox indicate that air flow detecting device 51 is a sensor that detects air movement generated by a user's inhaling or puffing act." Dec. 15. We then went on to say that we were not persuaded "that Petitioner sufficiently establishes that air flow detecting device 51 is an *electric* airflow sensor." *Id*. at 15–16. In other words, it was not sufficient for Petitioner to show that Cox taught an airflow sensor; Petitioner also had to establish that Cox's airflow sensor was electric. The Decision goes on to say:

> Petitioner does not explain how a mechanical sensor that outputs an electric signal is different from a mechanical airflow sensor without such an electric output. For example, Petitioner does not address whether a mechanical sensor with an electric output would have the "aging or short life drawbacks of the current mechanical device technology" or provide the advantages of an electric airflow sensor, such as making the user's puffing action easier or smoother, and being "more sensitive in turning on and off the vaporizing process than the conventional mechanical system." Moreover, Cox does not provide detail as to how air flow detecting device 51 interacts with control device 43 other than sending it a signal.

Id. at 16–17 (citing Ex. 1001, 3:34–38).

Thus, we did not find that Cox did not teach or disclose an electric airflow sensor. Instead, we found the Petition lacking because Petitioner *did not adequately establish* that Cox's air flow detecting device was an *electric* sensor that detected air movement. *See* 37 C.F.R. § 42.22(a)(2) (A petition must include "a detailed explanation of the significance of the evidence including material facts, and the governing laws, rules, and precedent."). We made similar findings with respect to Petitioner's arguments that Hon

and Zhu each teach or disclose the claimed electric airflow sensor. *See* Dec. 11 ("[T]o the extent that Petitioner is arguing that [Hon's] silica gel corrugated membrane 208, switch spring 212, and sensor 207 together form an airflow sensor, Petitioner does not adequately establish that such an airflow sensor would be an *electric* sensor, rather than a mechanical device that detects airflow."), 23-24 ("Petitioner's conclusory statement that Zhu teaches an electric airflow sensor simply because contact pieces 403 and 404 are provided on integrated circuit board 3 does not explain sufficiently, let alone with particularity, how or why Zhu discloses an 'electric airflow sensor.'").

It was Petitioner's burden to establish that Hon, Cox, and/or Zhu discloses or teaches "an electric airflow sensor" as required by the challenged claims. We are not persuaded that we misapprehended or overlooked the nature of the claimed electric airflow sensor when we determined that Petitioner did not meet that burden.

B. The Board Did Not Misapprehend or Overlook the Express Teachings in Cox

The Petition (Pet. 35, n.150, 151) identifies the following passages in Cox to support the argument that Cox discloses an electric airflow sensor:

> The aerosol generator 21 preferably includes an air detecting device 51 for determining when a predetermined air flow rate exists, which may be indicative that a user is drawing on the open end 53 of the mouthpiece 49 section, and the controller is preferably arranged to control the power source to supply power to the valve 35 and the heater 33, and any other components, in response to the signal from the air flow detecting device.
>
> …
>
> As an alternative to, or in addition to, using an air flow detecting device 51 to send a signal to the control device 43, as

> seen in FIG. 2 in phantom, a pressure drop detecting device 57 for determining when a predetermined pressure drop occurs proximate the first end 29 of the tube 27 may be used.

Ex. 1001, 5:50–60, 6:32–37. In the Decision, we explained that "[t]hese disclosures in Cox indicate that air flow detecting device 51 is a sensor that detects air movement generated by a user's inhaling or puffing act." Dec. 15 (citing Ex. 1001, 5:54–61).

In the Request, Petitioner argues that we overlooked that Cox "clearly shows an air flow detecting device that determines the presence of an air flow and signals when the rate is determined to exist and thus controls the power source." Req. 9. Petitioner also recognizes that the Decision cites the passages in Cox on which Petitioner relies, and determines that those disclosures teach a sensor that detects air movement. Req. 8 (citing Dec. 15). And we agree with Petitioner that Cox teaches that air flow detecting device 51 sends a signal to control device 43 to indicate that the predetermined air flow rate exists. Pet. 35 (citing Ex. 1007, 5:50–60, 6:32–35). As we explained in the Decision, however, we disagree with Petitioner that these teachings are sufficient to show that Cox discloses an *electric* airflow sensor. *See* Dec. 15–18.

In that regard, Petitioner argues that "[n]either the Patent Owner nor the Board offered any explanation for how an air flow detecting device that determines when a predetermined air flow rate exists could be only a mechanical component and not an electric airflow sensor." Req. 8. As an initial matter, we note that it is Petitioner's burden to show with particularity why a challenged claim is unpatentable. *Harmonic Inc. v. Avid Tech. Inc.*, 815 F.3d 1356, 1363 (Fed. Cir. 2016); *see also* 37 C.F.R. § 42.104(b)(4) (A petition "must specify where each element of the claim is found in the

prior art patents or printed publications relied upon."). And Petitioner again mischaracterizes our Decision with respect to Cox. We did not find that an air flow detecting device "could only be a mechanical component"; instead, we determined that Petitioner failed to explain how or why Cox's air flow detector 51 was met the "electric" part of the claimed "electric airflow sensor." In the Decision, we explained that

> Cox does not provide detail as to how air flow detecting device 51 operates, or describe how air flow detecting device 51 interacts with control device 43 other than sending it a signal. In contrast, Cox teaches that a pressure drop detecting device can be used as an alternative, or in addition, to air flow detecting device 51, and provides a specific example of a puff-actuated pressure drop sensing device.

Dec. 17. In other words, we agree that Cox's air flow detecting device 51 detects airflow and sends a signal to control device 43, but neither Cox itself nor the Petitioner provides details of the signal or the manner in which it is sent. Although there is an express disclosure in Cox with respect to a puff-actuated pressure drop sensing device, Cox does not expressly disclose the use of an electric air flow sensor. Thus, it was incumbent upon Petitioner to explain how Cox teaches or discloses an electric air flow sensor, or that a person of ordinary skill in the art would have understood Cox as disclosing an electric airflow sensor, and could have combined Cox's disclosures with their own knowledge to make the claimed invention. Petitioner failed to adequately do so in the Petition, and the Request does not persuade us otherwise.

Petitioner also contends that we overlooked that Cox teaches that its air flow detecting device 51 has "the same benefits for inhaler-type products when discussing its air flow detecting device" and those alleged in the '622 patent, such as making the user's puffing action easier. Req. 10

(citing Ex. 1001, 3:34–38; Ex. 1007, 6:54–58). Petitioner, however, does not direct us to where Petitioner made this argument in the Petition. A request for rehearing is not an opportunity to supplement a petition and make arguments a party did not make earlier.

Petitioner then contends that Cox "expressly provides description of the air flow detecting device 51 that meets/exceeds the level of description provided for the electric airflow sensor of the '622 patent." *Id*. at 11 (citing Pet. 16, 35); *see also id*. at 11–14 (charts providing disclosures in the '622 patent and Cox with respect to airflow sensors). Although the Request directs us to pages 16 and 35 of the Petition in connection with this contention, neither page compares the description of Cox's air flow detecting device 51 with the descriptions provided in the '622 patent. *Id*. Page 16 contains a part of Petitioner's overview of Cox, mostly directed to the control device. Pet. 16. Page 35 is directed to Petitioner's contention that Cox discloses the electric airflow and therefore anticipates claim 13 of the '622 patent. *Id*. at 35. In arguing that Cox discloses an electric airflow sensor, the Petition does not compare Cox's description of air flow detecting device 51 with the descriptions in the '622 patent; Petitioner does that for the first time in the Request. We could not have overlooked or misapprehended arguments and evidence that were not before us in the Petition. *Compare* Pet. 16, 35 *with* Req. 11–14.

IV. CONCLUSION

We have reviewed and considered the arguments in Petitioner's Request, and conclude that Petitioner has not carried its burden of demonstrating that we misapprehended or overlooked any matters, and therefore abused our discretion, in denying institution of *inter partes* review of the challenged claims of the '622 patent.

V. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that the Petitioner's Request for Rehearing is *denied*.

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