

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ALEXANDER MAASS

Appeal No. 2006-2480
Application No. 10/384,862

ON BRIEF

Before JERRY SMITH, BARRY, and BLANKENSHIP, Administrative Patent Judges.

JERRY SMITH, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on the appeal under 35 U.S.C. § 134 from the examiner's rejection of claims 1 and 3-10, which constitute all the claims pending in this application.

The disclosed invention pertains to automatically warning inattentive drivers. Specifically, the magnitude of a generated warning signal varies depending on a variable representing the degree of driver inattentiveness. Thus, the higher likelihood that a driver is inattentive, the more clearly the driver is alerted to the warning. Such a warning is rarely perceived as intrusive by an alert driver, yet sufficiently warns an inattentive driver.

Representative claim 1 is reproduced as follows:

1. A method for warning a driver, comprising:
 - implementing a warning by at least one of an acoustic, an optical and a haptic indicator;
 - deriving a variable that represents a degree of a driver's inattentiveness, from at least one operating variable; and
 - generating a warning signal, wherein a magnitude of the warning signal varies depending upon the variable that represents the degree of driver inattentiveness.

The examiner relies on the following references:

Gutta et al. (Gutta)	6,496,117	Dec. 17, 2002
Bevan et al. (Bevan)	6,661,345	Dec. 9, 2003 (filed Oct. 19, 2000)

The following rejections are on appeal before us:¹

1. Claims 1, 3, 4, and 6-10 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Bevan.

¹ We note that the examiner's answer does not expressly state the examiner's grounds of rejection, but instead refers to a previous office action [answer, page 3]. Such incorporations by reference, however, are improper under current practice. See MPEP § 1207.02 ("An examiner's answer should not refer, either directly or indirectly, to any prior Office action without fully restating the point relied on in the answer."). See also Ex parte Metcalf, 67 USPQ2d 1633, 1635 n.1 (B.P.A.I. 2003).

2. Claim 5 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Bevan in view of Gutta.

Rather than repeat the arguments of appellant or the examiner, we make reference to the briefs and the answer for the respective details thereof.

OPINION

We have carefully considered the subject matter on appeal, the rejections advanced by the examiner and the evidence of obviousness relied upon by the examiner as support for the rejections. We have, likewise, reviewed and taken into consideration, in reaching our decision, the appellant's arguments set forth in the briefs along with the examiner's rationale in support of the rejections and arguments in rebuttal set forth in the examiner's answer.

It is our view, after consideration of the record before us, that the evidence relied upon and the level of skill in the particular art would have suggested to one of ordinary skill in the art the obviousness of the invention as set forth in the claims on appeal. Accordingly, we affirm.

In rejecting claims under 35 U.S.C. § 103, it is incumbent upon the examiner to establish a factual basis to support the legal conclusion of obviousness. See In re Fine, 837 F.2d 1071, 1073, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). In so doing, the examiner is expected to make the factual determinations set forth in Graham v. John Deere Co., 383 U.S. 1, 17, 148 USPQ 459, 467 (1966). The examiner must articulate reasons for the examiner's

decision. In re Lee, 277 F.3d 1338, 1342, 61 USPQ2d 1430, 1434 (Fed. Cir. 2002). In particular, the examiner must show that there is a teaching, motivation, or suggestion of a motivation to combine references relied on as evidence of obviousness. Id. at 1343, 61 USPQ2d at 1433-34. The examiner cannot simply reach conclusions based on the examiner's own understanding or experience - or on his or her assessment of what would be basic knowledge or common sense. Rather, the examiner must point to some concrete evidence in the record in support of these findings. In re Zurko, 258 F.3d 1379, 1386, 59 USPQ2d 1693, 1697 (Fed. Cir. 2001). Thus the examiner must not only assure that the requisite findings are made, based on evidence of record, but must also explain the reasoning by which the findings are deemed to support the examiner's conclusion. However, a suggestion, teaching, or motivation to combine the relevant prior art teachings does not have to be found explicitly in the prior art, as the teaching, motivation, or suggestion may be implicit from the prior art as a whole, rather than expressly stated in the references. The test for an implicit showing is what the combined teachings, knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have suggested to those of ordinary skill in the art. In re Kahn, 441 F.3d 977, 987-88, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006) citing In re Kotzab, 217 F.3d 1365, 1370, 55 USPQ2d 1313, 1316-17 (Fed. Cir. 2000). See also In re Thrift, 298 F. 3d 1357, 1363, 63 USPQ2d 2002, 2008 (Fed. Cir. 2002). These showings by the examiner are an essential part of complying with the burden of presenting a

prima facie case of obviousness. See In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). If that burden is met, the burden then shifts to the applicant to overcome the prima facie case with argument and/or evidence. Obviousness is then determined on the basis of the evidence as a whole and the relative persuasiveness of the arguments. See Id.; In re Hedges, 783 F.2d 1038, 1039, 228 USPQ 685, 686 (Fed. Cir. 1986); In re Piasecki, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984); and In re Rinehart, 531 F.2d 1048, 1052, 189 USPQ 143, 147 (CCPA 1976). Only those arguments actually made by appellant have been considered in this decision. Arguments which appellant could have made but chose not to make in the briefs have not been considered and are deemed to be waived [see 37 CFR § 41.37(c)(1)(vii)(2004)].

Regarding independent claims 1 and 10, the examiner's rejection essentially finds that Bevan teaches every claimed feature except for deriving a variable representing a degree of driver inattentiveness from at least one operating variable. The examiner, however, indicates that Bevan's driver alertness determination accounts for different variables (e.g., the driver's blinking rate, heart rate, respiration, etc.) that are weighted differently. The examiner finds that it would have been obvious to one of ordinary skill in the art at the time of the invention to consider one type of variable (e.g., heart rate and respiration) as a "lower" degree of driver inattentiveness that gives a different warning signal as compared to other variables (e.g., eye blink) with a higher degree of

inattentiveness to produce an alarm that increases in magnitude after further determining that the driver has not responded to the first level of warning [final rejection, pages 2 and 3].

Appellant argues that Bevan merely teaches that certain parameters are more strongly correlated to alertness than others, and such parameters are weighted accordingly [brief, pages 8 and 9]. Appellant emphasizes, however, that Bevan does not teach weighting parameters as a function of a parameter's correlation to a particular degree of alertness as claimed [brief, page 9].

Appellant also argues that the magnitude of the warning signal in Bevan remains constant for the initial round of warning regardless of the degree of inattentiveness. According to appellant, the warning signal's magnitude changes only when there is no change in the degree of driver inattentiveness (i.e., when the driver does not respond to the initial round of warning) [brief, pages 9 and 10; reply brief, pages 2 and 4].

The examiner responds that the magnitude of Bevan's warning signal varies according to the degree of driver inattentiveness since the warning signal's magnitude changes based on changes in detected driver "variables" (e.g., eye blinking, head nodding, etc.) [answer, page 4]. The examiner maintains that Bevan continuously monitors such "variables," and the respective alarm magnitudes are determined based on changes in such variables and therefore the degree of inattentiveness [answer, page 6].

We will sustain the examiner's rejection of independent claims 1 and 10.

Bevan's driver alertness monitoring system activates a first stage alert if the subject's detected activity level falls below a predetermined threshold for a predetermined time period [Bevan, col. 7, lines 51-57]. If the subject does not respond to the first stage alert for a predetermined time period as indicated by no change in detected activity, the system then assumes that the subject remains inattentive. Accordingly, a second, more pronounced alert is activated [Bevan, col. 7, line 64 – col. 8, line 4; col. 13, line 57 – col. 14, line 10; Fig. 8].

We find that Bevan's system fully meets independent claims 1 and 10.

Bevan activates the first and second stage alerts responsive to detection of inactivity for predetermined time periods. That is, both alerts are activated responsive to the duration of inattentiveness. But the duration of inattentiveness corresponds to the degree of inattentiveness. Simply put, drivers that are inattentive longer (e.g., inattentive drivers that do not respond to the first stage alert) are more inattentive than drivers that respond more promptly (e.g., inattentive drivers that respond to the first stage alert).

Thus, the claimed "variable that represents a degree of a driver's inattentiveness" is fully met by the duration of inattentiveness determined in Bevan. Moreover, the magnitude of the warning signal (i.e., activating the first and second stage alerts) depends on this inattentiveness duration variable. Therefore, Bevan fully meets the limitations of independent claims 1 and 10.

Although we conclude that Bevan actually anticipates claims 1 and 10, obviousness rejections can nevertheless be based on references that happen to anticipate the claimed subject matter. In re Meyer, 599 F.2d 1026, 1031, 202 USPQ 175, 179 (CCPA 1979). The examiner's rejection of independent claims 1 and 10 is therefore sustained.

Since appellant has not separately argued the patentability of dependent claims 3, 4, and 6-9, these claims fall with independent claims 1 and 10. See In re Nielson, 816 F.2d 1567, 1572, 2 USPQ2d 1525, 1528 (Fed. Cir. 1987). See also 37 CFR § 41.37(c)(vii).

We next consider the examiner's rejection of claim 5 under 35 U.S.C. § 103(a) as being unpatentable over Bevan in view of Gutta. We will sustain the examiner's rejection. We find that the examiner has established at least a prima facie case of obviousness that appellant has not persuasively rebutted. Specifically, the examiner has (1) pointed out the teachings of Bevan, (2) pointed out the perceived differences between Bevan and the claimed invention, and (3) reasonably indicated how and why Bevan would have been modified by the teachings of Gutta to arrive at the claimed invention [final rejection, pages 5 and 6]. Once the examiner has satisfied the burden of presenting a prima facie case of obviousness, the burden then shifts to appellant to present evidence or arguments that persuasively rebut the examiner's prima facie case. Appellant did not persuasively rebut the examiner's prima facie case of obviousness, but merely noted that the addition of Gutta fails to cure the deficiencies of Bevan in

connection with claim 1 [brief, page 11; reply brief, page 5]. The rejection is therefore sustained.

In summary, we have sustained the examiner's rejection with respect to all claims on appeal. Therefore, the decision of the examiner rejecting claims 1 and 3-10 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv).

AFFIRMED

JERRY SMITH)	
Administrative Patent Judge)	
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Administrative Patent Judge)	INTERFERENCES
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