UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte SHUTING ZHANG

Appeal 2021-000087
Reexamination Control 90/014,234
Patent D810,925 S[1]
Technology Center 2900

Before DANIEL S. SONG, RAE LYNN P. GUEST, and JEREMY M. PLENZLER, *Administrative Patent Judges.*

GUEST, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(b), Appellant[2] appeals from the Examiner's decision to reject the design claim under 35 U.S.C. § 102(a) as unpatentable over Chinese registration number 303890343 (Exhibit C of the original *ex parte* request, hereinafter, "CN '343"), Chinese registration number 303903427 (Exhibit D of the original *ex parte* request, hereinafter,

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[1] Issued February 20, 2018 (hereinafter "the '925 patent").
[2] We use the word Appellant to refer to the owner of the '925 patent. Appellant identifies the real party in interest as inventor and applicant Shuting Zhang. Appeal Br. 2.

"CN '427"), a print out from a website, allegedly published on May 28, 2014 (Exhibit E of the original *ex parte* request, http://www.babytree.com/community/club201400/topic_20912410.html, hereinafter, "BabyTree"), and a second print out from a website, allegedly published on December 18, 2014 (Exhibit F of the original *ex parte* request, http://product.800400.net/detail/7816236.html, hereinafter, "Funny Baby"). We have jurisdiction under 35 U.S.C. §§ 6(b) and 315.

We REVERSE.

CLAIMED SUBJECT MATTER

Appellant's design is entitled "BREAST PUMP." The claim is directed to an ornamental design for a breast pump having an elongated, bulbous body including a cylindrical ring around a diameter of the body, the body being connected to a funnel-shaped cup mounted to the top of the body at an angle and defining an opening into the body, the cup having a longitudinal groove formed on its vertical inner surface extending from the opening toward, and nearly to, the radial extent of the cup. Figure 6, below, is a representation of the breast pump.

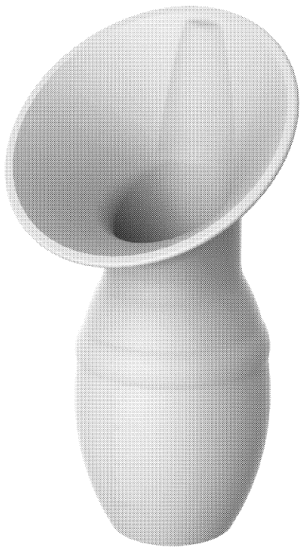

Fig. 6

OPINION

As an initial matter, we note that Appellant submitted a declaration that CN '343 and CN '427 fall within the exceptions of 35 U.S.C. § 102(b)(1) and, therefore, are not prior art under 35 U.S.C. § 102. Specifically, Appellant submits that a commercial product embodying the subject matter of the '925 patent was on sale as early as February 15, 2016, prior to the filing of CN '343 and CN '427 on October 12, 2016 and April 6, 2016, respectively. Appeal Br. 5–6. Appellant further submits that the disclosure fell within the one-year grace period for disclosure by the inventor or obtained from the inventor. *Id*. As a result, Appellant contends that CN '343 and CN '427 are not prior art because the claimed subject matter was disclosed during the grace period by Appellant before the filing and publication of CN '343 and CN '427. The Examiner concurs and has withdrawn the rejections based on these references. Ans. 5–6. Accordingly, all arguments in regard to CN '343 and CN '427 are moot.

After reviewing carefully each of Appellant's arguments for patentability, we determine that a preponderance of the evidence supports reversing the Examiner's finding that the claimed design lacks novelty within the meaning of § 102 on the basis that insufficient evidence exists to find either BabyTree or Funny Baby is a printed publication under § 102. Accordingly, we reverse the Examiner's rejections for the reasons set forth below.

We address the following issue on appeal: Whether sufficient evidence exists to find that BabyTree and Funny Baby were publicly accessible so as to qualify as printed publications under 35 U.S.C. § 102.

We do not find sufficient evidence to determine that BabyTree and Funny Baby constitute printed publications under 35 U.S.C. § 102. Accordingly, we reverse the rejections made by the Examiner for the reasons discussed below.

Under 35 U.S.C. § 102(a) "A person shall be entitled to a patent unless . . . the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention." Similarly, under 35 U.S.C. §§ 301, 302, reexamination may only be requested on the basis of "prior art consisting of patents or printed publications." A "printed publication" is a legal conclusion based on underlying factual findings (*Nobel Biocare Servs. AG v. Instradent USA, Inc.*, 903 F.3d 1365, 1375 (Fed. Cir. 2018) (citing *Jazz Pharm., Inc. v. Amneal Pharm., LLC*, 895 F.3d 1347, 1356 (Fed. Cir. 2018))), including whether the reference was publicly accessible. *Id.* (citing *In re NTP, Inc.*, 654 F.3d 1279, 1296 (Fed. Cir.

2011)). "Whether a reference is publicly accessible is determined on a case-by-case basis based on the 'facts and circumstances surrounding the reference's disclosure to members of the public.'" *Id.* (quoting *In re Lister*, 583 F.3d 1307, 1311 (Fed. Cir. 2009)).

Here, an anonymous third party, through counsel, provided the USPTO with copies of two webpages in a foreign language constituting the BabyTree and Funny Baby references, each paired with an uncertified English translation. Both documents and translations were submitted by a third party requester in a very unclear, grainy or pixelated manner and the text and details over the figures are very difficult to discern. The BabyTree webpage appears to offer a breast pump (i.e., the webpage is titled "Who wants ? ? ?") and includes the date May 28, 2014 above a picture of the pump. The English translation of the BabyTree webpage does not include that date or identify in any manner as to what that date represents.

The Funny Baby webpage appears to offer a breast pump for sale with a picture of the breast pump. The Chinese document appears to have an English date of "2014-12-15," but the English translation of the Funny Baby webpage appears to translate that date as "Last updated 2014-12-18" under a tab titled "Product Information."

We recognize that the dates on the BabyTree and Funny Baby webpages are relevant evidence of public accessibility, but they are not dispositive. *See Nobel Biocare*, 903 F.3d at 1376. Specifically, there is no evidence corroborating that the aforementioned dates mean the BabyTree and Funny Baby designs depicted on the webpages were publicly accessible on those dates. Also, there appears to be no additional information to

provide context or accuracy to the dates. Further, while the Funny Baby date indicates that the product information was last updated on December 18, 2014, there is no additional evidence to corroborate that the picture was publicly accessible on that date. Further, the webpages are no longer available for viewing on the Internet. Indeed, there is no certification of the translations or any other verification that the translations are accurate or reliable. There is simply no explanation or verification of the source, date or accessibility of the information presented on these documents. While we can put some weight in the duty of a signatory of a registered patent attorney in accordance with 37 C.F.R. § 11.18 that statements of fact are "believed to be true," we simply cannot find the evidence sufficient to establish the documents as prior art.

In sum, there is insufficient evidence to establish that the referenced designs were publicly available on the dates listed on the webpages. For example, there is no affidavit attesting to the relationship between the dates and the designs, and there is no documentation showing a chain of custody of Exhibits E and F, i.e., to explain or verify how the Requester came about them.[3] Without such information, we have no means to determine the

[3] We find the fact that an anonymous third party requester submitted these references different from a situation where the Examiner was the first to raise the evidence during prosecution of an application. Indeed, in the latter circumstance, upon a challenge as to the authenticity, the Examiner would have at his command further evidence or support for the assertion that the art was prior art under 35 U.S.C. § 102. Here, however, the Examiner is in no position to support the authenticity of the documents and, in an *ex parte* reexamination, the third party requestor is in no position to provide further evidence in support of the assertion that the references were indeed publicly

meaning, authenticity, or accuracy of the aforementioned dates. Accordingly, the Examiner's rejections are reversed for lack of substantial evidence that the dates on the webpages showing the BabyTree and Funny Baby designs indicate when those designs were publicly accessible.

CONCLUSION

On the record before us, we reverse the rejections maintained by the Examiner.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1	102(a)	BabyTree		1
1	102(a)	Funny Baby		1
Overall Outcome				1

REVERSED

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available. *See* 37 C.F.R. § 1.550(g) (explaining the limited role of a third party requester in *ex parte* reexamination).