

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DOMINICK THERESA, MICHELE KRAMER,
and NICK THERESA

Appeal 2014-005835
Application 12/570,827
Technology Center 3600

Before: STEFAN STAICOVICI, LEE L. STEPINA, and
FREDERICK C. LANEY, Administrative Patent Judges.

STEPINA, Administrative Patent Judge.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134 from the Examiner's Non-Final rejection of claims 1, 3–6, 8, and 19–25. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM and enter NEW GROUNDS OF REJECTION pursuant to our authority under 37 C.F.R. § 41.50(b).

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CLAIMED SUBJECT MATTER

The claims are directed to a color coded marking system. Spec. 1 (Title). Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. An identification system comprising:

a plurality of first labels removably carried on at least one substrate, each of the plurality of first labels including a first color thereon, each of the first labels further including a marking selected from either pre-set words or pre-set symbols to identify a content category, the first color being associated with the content category by being placed in juxtaposition with the marking;

a plurality of attachment members, each of the attachment members including the first color thereon and being associated with the content category by matching the first color of plurality of the first labels; and

a plurality of wrist bands configured to be wearable on the wrist of a wearer, each of the wrist bands being substantially of the first color and being associated with the content category by matching the color of the plurality of first label;

wherein one of the plurality of first labels is selectable for removable application to a flash memory device to identify the content category of data stored on flash memory device by the marking and the first color, wherein one of the attachment members is configured for removable attachment with an attachment feature of the flash memory device and one of the wristbands is selectable for attachment with the attachment member, the attachment member and the wrist band further identifying the content category of the flash memory device by matching the first color the selected label.

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REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Dompier	US 3,124,286	Mar. 10, 1964
Yu	US 6,763,410 B2	July 13, 2004
Erickson	US 2002/0180588 A1	Dec. 5, 2002
Slater	US 2006/0026878 A1	Feb. 9, 2006

REJECTIONS

(I) Claim 25 is rejected under 35 U.S.C. § 112, second paragraph, as indefinite.

(II) Claims 1, 3–6, 8, 19, and 20 are rejected under 35 U.S.C. § 103(a) as unpatentable over Slater, Dompier, and Erickson.

(III) Claims 21–25 are rejected under 35 U.S.C. § 103(a) as unpatentable over Yu, Slater, Dompier, and Erickson.

OPINION

Rejection (I)

Claim 21 recites, in part, “a first label removably applied on the surface of the flash memory device, the label including a marking thereon.” Appeal Br. 43. Claim 25 recites, in part, “[t]he assembly of claim 21, wherein the label is a first label, the assembly further including a second label.” Appeal Br. 44.

In rejecting claim 25 as indefinite, the Examiner states, “[c]laim 25 recites the limitation ‘a first label’ in line 2. It is unclear if another first label is being claimed since a first label is claimed in claim 21.” Non-Final Act. 3.

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Appellants contend that the above-noted language in claim 25 “has been the same the last 4 times,”¹ and assert “[i]t should also be mentioned, that the Examiner now for the first time upon reopening prosecution raised the argument about ‘a first label’ which all previous times, the Examiner stayed silent.” Appeal Br. 21. Appellants also state, “[a]fter a very careful review of the Appellant wording in claim 25 that someone in the arts would also agree, that the wording is correctly written in claim 25 and it makes clear sense.” Appeal Br. 21.

We are not persuaded by Appellants’ arguments regarding the clarity of claim 25. As is apparent from the portion of claim 21 reproduced above, claim 21 introduces “a first label,” and then refers to the first label as “the label.” Dependent claim 25 recites “the label” and specifies that this label is “a first label.” We agree with the Examiner that such circular terminology is unclear, and we sustain the Examiner’s rejection of claim 25 as indefinite.

Rejections (II) and (III)

Appellants present substantially the same arguments for independent claim 1 as those made for independent claim 21. *See* Appeal Br. 12–38. As such, aside from sections with headings for dependent claims, the following analysis applies equally to Rejections (II) and (III).

The Examiner finds that Slater discloses many of the features recited in claim 1, but “Slater does not directly disclose the identification system to further comprise attachment members.” Non-Final Act. 4. Nonetheless, the Examiner finds that Dompier teaches “an attachment member (Figure 1

¹ Claim 25 was added by amendment on February 7, 2012, after which, further prosecution on the merits occurred before the filing of the present Appeal.

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Element 12); and a wrist band configured to be wearable on the wrist of a wearer (Element 6), wherein the attachment member is configured for removable attachment with an attachment feature of the device and wristband is selectable for attachment with the attachment member.” *Id.* The Examiner reasons that it would have been obvious to a person of ordinary skill in the art to modify the device taught in Slater to include an attachment member and wristband because “[s]uch a modification would provide a means to secure the device on one’s wrist.” *Id.* The Examiner also states:

Slater in view of Dompier does not directly disclose a plurality of attachment members and wristbands and a plurality of substrates. Duplication of parts is common and well known in the art to provide a plurality of parts for a system. Erickson discloses a system of labeling memory devices wherein the labels comprise color coded indicators to assist viewers in recognizing the content of the memory devices ([0032]).

Id.

Appellants contend:

(1) Erickson invention is not about color and/or color is not within Erickson invention to function and/or work, (2) Erickson invention does not disclose, teach and suggest any part of the Appellant’s claimed elements, (3) Erickson in [0032] is not speaking about color of his invention as Erickson in [0032] is just mentioning color on behalf of a third party, (4) Erickson invention also can not have been about a “system of labeling memory devices” stated by the Examiner, because “memory devices” was not invented until after Erickson art because abandoned in 2002 as Yu on July 13, 2004 received patent #6763410 for USB Memory Devices and (5) The Examiner re-opening prosecution using mainly Erickson invention to argue “COLOR” as Erickson reference should be moot within Appellant appeal.

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Appeal Br. 13–14. Regarding Appellants’ contention that Erickson discusses color “on behalf of a third party,” Appellants state, “[s]peaking on behalf of a third party does not make [the] Erickson invention about COLOR whatsoever.” *Id.* at 14. Appellants also argue that Examiner teaches an RFID tag, which “has NOTHING TO DO WITH COLOR.” *Id.*

Appellants’ arguments regarding Erickson are not persuasive. Erickson teaches marking the source of an item with an RFID tag. Erickson ¶ 31. Erickson states:

In many file rooms, color-coded file folders are used to help users organize records. Colors may be used for categories or sorting. An RFID element could be embedded or added to the color-coded label. A separate color could, for example, be used to indicate that a file has been converted, meaning that an RFID tag or label has been attached to it, so that a user can quickly determine which files are still awaiting conversion and which have already been converted. If a folder were sold with embedded RFID capability, the memory on the RFID tag could be pre-programmed to include the color-coding information.

Id. ¶ 32 (emphasis added). Thus, Erickson identifies the file folders with both RFID tags and via color-coded labels. Accordingly, the color-coded labels and RFID tags bear a correlation to each other. Consequently, although color-coding may not be the focus of the disclosure in Erickson, because Erickson identifies file folders with both RFID tags and color-coded labels, we do not agree with Appellants’ contention that “Erickson[’s] invention is not about color[,] and/or color is not within Erickson invention to function and/or work [sic]” and thus, “Erickson[’s] invention does not disclose, teach and suggest any part of the Appellant’s claimed elements.” Appeal Br. 13.

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As for Appellants' contention that the discussion in paragraph 32 of Erickson relates to a third party, assuming for the purposes of argument that this contention is correct, Appellants do not explain persuasively why such disclosure should not be available to the Examiner in analyzing Appellants' claims. *See In re Heck*, 699 F.2d 1331, 1333 (Fed. Cir. 1983) (Explaining that "[t]he use of patents as references is not limited to what the patentees describe as their own inventions").

Regarding Appellants' assertion that Erickson cannot have been related to memory devices "because 'memory devices' was not invented until after Erickson art [was] abandoned in 2002 as Yu on July 13, 2004 received patent #6763410 for USB Memory Devices [sic]" (Appeal Br. 14), this argument is unpersuasive because both Yu and Erickson are prior art to Appellants' Application. Whether Erickson (which was published on December 5, 2002) was abandoned before Yu's patent issued is not relevant to the question of whether these references qualify as prior art. *See* 35 U.S.C. § 102.

As for whether "Erickson . . . should be moot within Appellant[s'] appeal" (Appeal Br. 14), Appellants' make no persuasive argument as to why the above-noted teaching in Erickson regarding color-coded folders and RFID tags is not properly applied by the Examiner or should be unavailable to the Examiner.

Appellants state, "[i]n further view, as discussed in claim 21 with respect to claim 1 as nothing within the cited arts specifically associates a color with an associated marking by juxtaposition of the color thereon." *Id.* at 18. Appellants' assertion is not persuasive because Slater teaches that the labels may be color-coded based on a device's function. *See* Slater ¶ 15.

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Additionally, Erickson identifies the file folders with both RFID tags and via color-coded labels. *See* Erickson ¶ 32; *see also* Ans. 2–3.

Appellants next argue that the Examiner relies *solely* on Erickson in the rejection of claim 1 (as well as claims 5 and 21), and Erickson does not disclose any portion of claim 1. Appeal Br. 19–21. In this regard, Appellants state, “[t]he Examiner addressing solely Erickson **to claim 1, 5 and 21** which the claims is about color, the color coded marking system, attachments, symbols, words on labels and etc.” *Id.* We do not agree with Appellants on this issue because the Examiner’s rejection of claims 1 and 5 is based on a combination of Slater, Dompier, and Erickson (*see* Non-Final Act. 3–6), and the Examiner’s rejection of claim 21 is based on a combination of Yu, Slater, Dompier, and Erickson (*see id.* at 6–8).

Claims 5, 20, and 24

Aside from the arguments made for independent claim 1, Appellants assert that claims 5, 20, and 24 require the recited markings to include symbols (Appeal Br. 20), and that none of the cited references teach markings including symbols (*id.* at 22–26).

Claim 5 does not require symbols. Claim 5 depends from claim 1, which requires “a marking selected from either pre-set words **or** pre-set symbols.” *Id.* at 40 (emphasis added). When a claim contains alternatives, the claim is met if any of the alternatives is known in the prior art. *See Brown v. 3M*, 265 F.3d 1349, 1351 (Fed. Cir. 2001) (*citing Titanium Metals Corp. of America v. Banner*, 778 F.2d 775, 782 (Fed. Cir. 1985)). Thus, in claim 1, the marking is not required to be a pre-set symbol because symbols are merely one of two alternatives for the marking, i.e., the marking may be a pre-set word instead. Claim 5 further limits what the symbols (one of the

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recited alternatives recited in claim 1) may be, but does not require the marking to be a symbol. Accordingly, even assuming for the purposes of argument that Appellants' assertion regarding a failure of the cited references to disclose markings that are symbols is correct, this argument is not commensurate with the scope of claim 5. Thus, we sustain the Examiner's rejection of claim 5. As our interpretation of claim 5 differs significantly from the Examiner's, we designate our affirmance of the Examiner's rejection of claim 5 a NEW GROUND OF REJECTION.

Unlike claim 5, claim 20 recites a marking including a symbol. *See* Appeal Br. 42. Further, claim 24 recites, "[t]he assembly of claim 21, wherein the marking includes a symbol." Appeal Br. 43.

The Examiner finds that Slater discloses "each of the first and second labels further including a marking selected from either pre-set words or pre-set symbols to identify a content category." Non-Final Act. 3-4 (citing Slater, Fig. 1); *see also* Non-Final Act. 8. In the Answer, the Examiner elaborates on this finding, stating the Examiner "identifies the word 'symbols' as described on Webster dictionary, ': an arbitrary or conventional sign used in writing or printing relating to a particular field to represent operations, quantities, elements, relations, or qualities'" and "Slater discloses a label set having symbols and color variation for a color coding system of label objects (keys)." Ans. 4.

We reproduce Figure 1 of Slater below.

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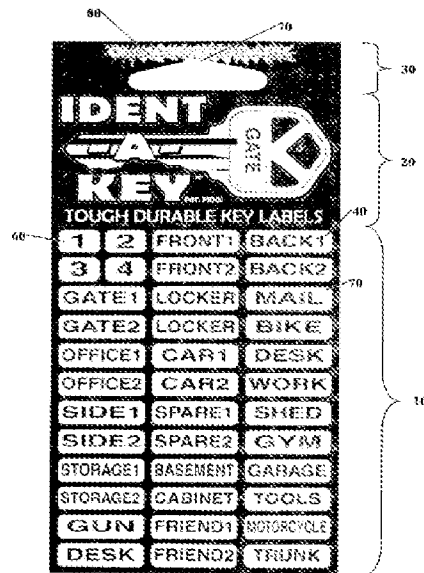


Figure 1 of Slater depicts a sheet of labels, each displaying a word, number, or combination thereof. Slater ¶ 22.

Appellants' claim 1 lists words and symbols as alternatives. Specifically, claim 1 recites "each of the first labels further including a marking selected from either pre-set words or pre-set symbols." Appellants' Specification identifies numbers, words, and graphical markings separately, with graphical markings identified as "symbols." *See* Spec. ¶¶ 20–24; Fig. 1. Original claim 1 also differentiates between words, numbers, and symbols, reciting in part, "one or more items selected from the list of colored write-on, colored pre-set words, colored pre-set symbols, colored pre-set numbers and colored multi-mixed decorative design labels." In light of Appellants' Specification, we interpret the term "symbols" as recited in the claims to exclude text and numbers.

The Examiner does not identify any disclosure in Slater corresponding to a "symbol" as we interpret this term. Rather, Figure 1 of Slater depicts labels carrying only text and/or numbers. However, Appellants' attempt to distinguish Slater based on what is depicted on the recited labels (symbols

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instead of text or numbers), that is, the content of recited labels, is not persuasive.

Our reviewing court has held that non-functional descriptive material cannot lend patentability to an invention that would have otherwise been anticipated by the prior art. *In re Ngai*, 367 F.3d 1336, 1339 (Fed. Cir. 2004). *Cf. In re Gulack*, 703 F.2d 1381, 1385 (Fed. Cir. 1983) (noting that when descriptive material is not functionally related to the substrate, the descriptive material will not distinguish the invention from the prior art in terms of patentability). *King Pharms., Inc. v. Eon Labs, Inc.*, 616 F.3d 1267, 1279 (Fed. Cir. 2010) (“[T]he relevant question is whether ‘there exists any new and unobvious functional relationship between the printed matter and the substrate.’”) (citations omitted). *See also In re Xiao*, 462 Fed. Appx. 947 (Fed. Cir. 2011) (Non-precedential) (Non-functional descriptive material, being useful and intelligible only to the human mind, is given no patentable weight).

In *Xiao*, the Examiner rejected a claim to a combination lock with tumbler rings each having multiple alphabetical letters and a single wildcard position label. *Id.* at 949. The wildcard position label was defined as different from any of the alphabetical letters. *Id.* The Examiner found that one prior art reference, Gray, disclosed all the features recited in the claim except a wildcard position label different from and configured for representing any letter. *Id.* The Examiner considered the wildcard position labels to be printed matter unrelated to the function of the claimed lock, and therefore, not entitled to patentable weight.² *Id.* *Xiao* argued that the

² As an alternative ground of rejection, the Examiner found that a second prior art reference, Fiegenger, disclosed position labels, and implementing

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wildcard position labels exhibited a synergistic functional relationship with the claimed lock and should thus be accorded patentable weight. *Id.* at 950. Rejecting this argument and denying patentable weight to the claimed use of the wildcard position labels, the Federal Circuit held, “the presence or identity of a given position label has no bearing on the lock’s ultimate function, and the claimed device can be used in the same way and for the same purposes with or without wild-card position labels.” *Id.* at 951.

The symbols recited in claims 20 and 24 are similar to the wildcard position labels discussed in *Xiao*. The particular language of the message on the label, whether via text or non-textual symbol, does not functionally relate to the label upon which the message is carried. Rather, the label performs its intended function when the message is conveyed via text the same way the label performs its intended function when the message is conveyed via a symbol. Accepting Appellants’ argument would permit the patentability of labels on items based on the particular types of characters (alphabetical, numerical, or symbolic) used to convey the same information. Accordingly, we construe claims 20 and 24 more broadly than did the Examiner inasmuch as it was not necessary for the Examiner to find labels including the *symbols* recited in claims 20 and 24 because, in this case, the particular form of the message displayed on the recited labels does not carry patentable weight. Rather, finding labels as recited, but with text instead of symbols, would have been sufficient.

them in the lock of Gray would have been a matter of design choice. *Xiao*, 462 Fed. Appx. at 949. The Court did not reach this argument in light of affirming the rejection based on denying the recitation of the wildcard position label patentable weight. *Id.* at 952.

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Slater discloses labels for placement on a variety of items, wherein the labels are related to the content of the item. *See* Slater ¶ 16 (stating “[t]he need for such a product can be found in a number of places where people carry multiple objects that appear the same. Keys are just one example of an object that appear similar. Other examples include pill bottles that could include markings for morning pill and evening pill”); *see also* Slater, Fig. 1. Thus, in light of the lack of patentable weight given to the particular form of markings recited in claims 20 and 24, Slater meets the requirement that the labels have a marking including a symbol. Regarding the recitation in claim 20 that “ones of the first labels having a marking including words are on a first substrate and ones of the first labels having a marking including a symbol are on a second substrate,” because the depiction of symbols rather than text carries no patentable weight in the context of claim 20, this recitation merely requires a plurality of substrates. Providing a plurality of substrates carrying labels would have been obvious because Slater suggests providing substrates including all the same label as well as substrates including various labels. *See id.* ¶ 25. Further, Slater discloses hanger hole 70 on packaging 20, which suggests hanging multiple substrates for display at a retail location. *See id.* ¶¶ 22–24; Fig. 1. Accordingly, based on our claim construction above, we enter a NEW GROUND OF REJECTION of claim 20 as unpatentable over Slater, Dompier, and Erickson and of claim 24 as unpatentable over Yu, Slater, Dompier, and Erickson.

Appellants next argue “[c]laims 1, 3–6, 8, 19–25 are not obvious under 35 U.S.C. §103(a) over Slater in view of Dompier in view of Erickson in view of Yu and all fails to teach all components/elements, no suggestion to combine references and no reasonable expectation of success.” Appeal

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Br. 27 (emphasis omitted). Appellants then list various features disclosed in Appellants' Specification, without identifying which claim recites any particular feature, and Appellants assert that certain features are disclosed in one or more of Slater, Dompier, Erickson, and Yu, and others are not.

Appeal Br. 27–32. *See also* Appeal Br. 34 ([S]tating: “Slater shows color but is very limited to other color levels and color symbols. Slater also does not teach any attachments, Dampier and Yu has attachments but no color, no marking system and Erickson is moot fails to teach any component of the Appellant invention”).

We do not find persuasive this unsupported assertion that elements are missing from the art. Rejections (II) and (III) are based on the Examiner's proposed *combinations* of references, and merely listing elements allegedly missing from individual references is insufficient to apprise us of Examiner error. *See In re Lovin*, 99 USPQ2d 1373, 1379 (Fed. Cir. 2011) ([H]olding that the Board had reasonably interpreted 37 C.F.R. § 41.37(c)(1)(vii) as requiring “more substantive arguments in an appeal brief than a mere recitation of the claim elements and a naked assertion that the corresponding elements were not found in the prior art”). Moreover, nonobviousness cannot be established by attacking the references individually when the rejection is predicated upon a combination of prior art disclosures. *See In re Merck & Co. Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). Appellants assert “[t]he only place that teaches the advantage of a color coded marking system is the Appellant's [S]pecification and claims.” Appeal Br. 33. We do not agree. Slater teaches that the labels may be color-coded to associate a color with a function of the device upon which the label is placed. *See Slater* ¶ 15 ([S]tating that “[a]nother feature of the invention is to provide the labels in a

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variety of colors so a user can associate each color with a function”). Further, as discussed above, Erickson identifies the file folders with both RFID tags and via color-coded labels. *See* Erickson ¶ 32; *see also* Ans. 2–3.

Appellants also contend that “color, symbols and attac[h]ments as suggested by the Examiner would change the principle of operation of Slater, Dampier, Erickson and Yu inventions.” Appeal Br. 33.

We are not persuaded by this argument because Appellants do not explain what principle of operation would be changed in Slater (the reference modified in the rejections based on § 103). Further, in the Examiner’s proposed combination, the labels in Slater would perform the same function Slater explicitly discloses, namely, labeling objects according to their purpose. *See* Slater Abst. (stating “[t]he invention is used to provide identification to items that may have a similar appearance”); *see also* Slater ¶¶ 9, 15–16.

Appellants next argue that “nothing within Slater and Dampier teaches or suggests matching the color of an attachment feature to further identify the category of the USB memory device by the predetermined association of the category with the color.” Appeal Br. 34.

We disagree because, as discussed above, both Slater and Erickson disclose color-coding. *See* Slater ¶ 15; *see also* Erickson ¶ 32. Moreover, Slater explicitly discloses that his labels may be applied to any items that appear similar to each other. *See* Slater Abstract, ¶ 16.

Appellants also assert that nothing in the cited references teaches or describes the “identification system [recited in claim 1] in which the color of the attachment member and the wrist band match that of the label, which is a pre-associated with a category-identifying marking, serving to further

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ascribe such an identifying characteristic to the attachment member and the wrist band.” Appeal Br. 34–35.

This argument addresses the references individually and fails because the Examiner’s rejection of claim 1 is based on a combination of Slater, Dompier, and Erickson, and the Examiner’s rejection of claim 21 is based on a combination of Yu, Slater, Dompier, and Erickson. *See Non-Final Act.* 3–5.

Appellants next assert that there would have been no reasonable expectation of success in combining Slater, Dompier, Erickson, and Yu; a person of skill in the art would not have had a reason to combine these references; and “Slater, Dompier, Erickson, and Yu all teach against such combinations.” Appeal Br. 36. Appellants also argue “Slater art is not intended to be integrated onto USB Memory Device as a COLOR CODED MARKING SYSTEM with ATTACHMENTS as it’s only for a key and the key is only for one particular thing (example: bike, shed, mail, garage and etc).” *Id.* at 37.

We do not find these assertions to be persuasive inasmuch as they amount to unsupported allegations without adequate explanation. Appellants’ provide no persuasive evidence or technical reasoning explaining why, in the art of labeling items, there would be any difficulty in implementing the Examiner’s proposed combination. Nor do Appellants persuasively explain why any of the references teach away from the Examiner’s proposed combination. Indeed, as discussed above, Slater explicitly states that his labels may be used for items (objects that appear similar, such as pill bottles) *other than keys*. *See Slater* ¶ 16, Abstract. Appellants’ assertion that there is no reason to combine the cited references

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as proposed by the Examiner suffers from the same deficiency. The Examiner set forth specific rationales for the proposed combinations of references (*see* Non-Final Act. 3–9), and Appellants’ contentions do not adequately address these.

We have reviewed all of Appellants’ arguments, but we find them to be unpersuasive. Accordingly, we sustain Rejections (I)–(III).

DECISION

(I) The Examiner’s rejection of claim 25 as indefinite is affirmed.

(II) The Examiner’s rejection of claims 1, 3–6, 8, 19, and 20 as unpatentable over Slater, Dompier, and Erickson is affirmed, and we designate our affirmance of the rejection of claims 5 and 20 as a NEW GROUND OF REJECTION.

(III) The Examiner’s rejection of Claims 21–25 as unpatentable over Yu, Slater, Dompier, and Erickson is affirmed, and we designate our affirmance of the rejection of claim 24 as a NEW GROUND OF REJECTION.

This decision contains new grounds of rejection pursuant to 37 C.F.R. § 41.50(b). Section 41.50(b) provides “[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review.” Section 41.50(b) also provides:

When the Board enters such a non-final decision, the appellant, within two months from the date of the decision, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

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(1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new Evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the prosecution will be remanded to the examiner. The new ground of rejection is binding upon the examiner unless an amendment or new Evidence not previously of Record is made which, in the opinion of the examiner, overcomes the new ground of rejection designated in the decision. Should the examiner reject the claims, appellant may again appeal to the Board pursuant to this subpart.

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same Record. The request for rehearing must address any new ground of rejection and state with particularity the points believed to have been misapprehended or overlooked in entering the new ground of rejection and also state all other grounds upon which rehearing is sought.

Further guidance on responding to a new ground of rejection can be found in the Manual of Patent Examining Procedure § 1214.01.

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

AFFIRMED