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Paper 7
Entered: October 18, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

H&S MANUFACTURING COMPANY, INC.,
Petitioner,

v.

OXBO INTERNATIONAL CORPORATION,
Patent Owner.

Case IPR2016-00909
Patent 8,511,052 B2

Before PHILLIP J. KAUFFMAN, JAMES A. TARTAL, and KEVIN W. CHERRY, *Administrative Patent Judges*.

TARTAL, *Administrative Patent Judge.*

DECISION

Denying Institution of *Inter Partes* Review
37 C.F.R. § 42.108

Petitioner, H&S Manufacturing Company, Inc., filed a Petition requesting an *inter partes* review of claims 1–4 and 6–8 of U.S. Patent No. 8,511,052 B2 ("the '052 patent"). Paper 2 ("Pet."). Patent Owner, Oxbo International Corporation, filed a Preliminary Response. Paper 6 ("Prelim. Resp."). We have jurisdiction under 35 U.S.C. § 314(a), which provides that an *inter partes* review may not be instituted "unless . . . the information presented in the petition . . . shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition."

Upon consideration of the Petition and the Preliminary Response, we conclude the information presented does not show a reasonable likelihood that Petitioner would prevail in showing the unpatentability of any claim of the '052 patent. Accordingly, the Petition is denied and no trial is instituted.

I. BACKGROUND

A. The '052 Patent (Ex. 1001)

The '052 patent, titled "Windrow Merger," issued August 20, 2013, from U.S. Application No. 12/928,978, filed December 22, 2010. Ex. 1001. The '052 patent describes a windrow merger which is used "to gather and merge material, such as cut hay, into a single windrow for harvesting or baling." *Id*. at 1:15–26. According to Patent Owner, "[t]he '052 patent improved windrow merger technology by incorporating a 'trough in which material is conveyed' and a 'rub rail' to produce more consistently uniform windrows." Prelim. Resp. 3.

Figure 1 of the ’052 patent is reproduced below:

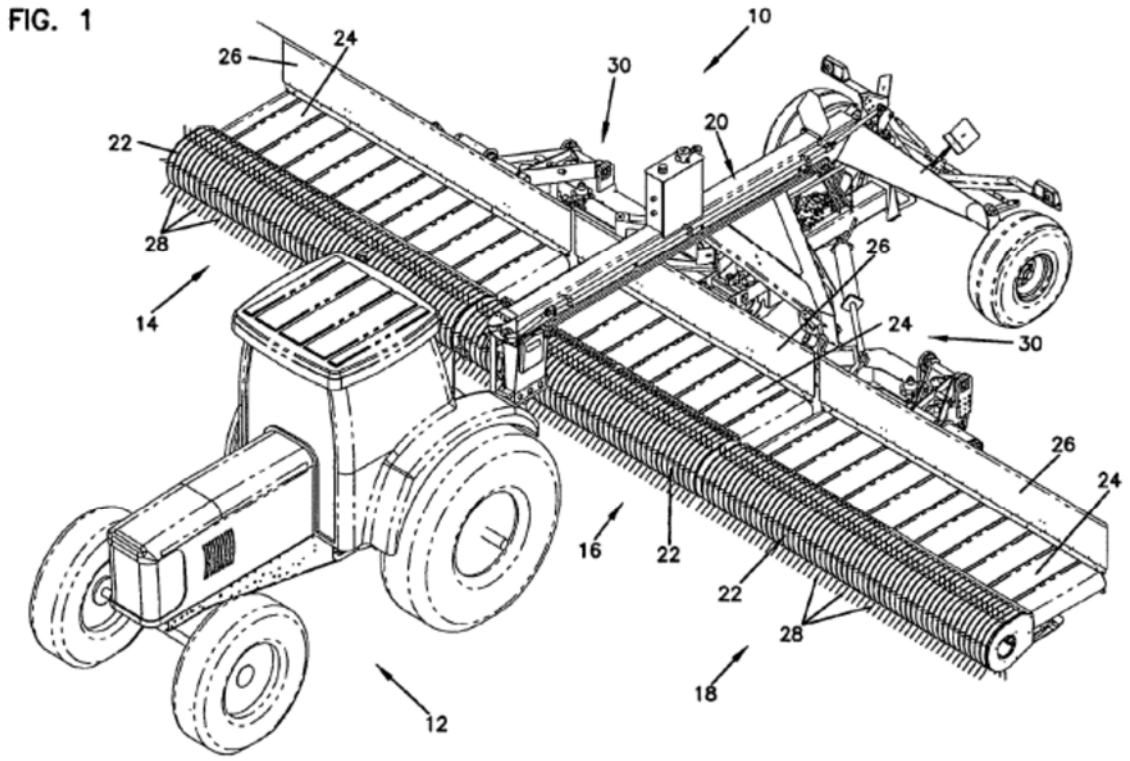


Figure 1 illustrates towing device 12 towing merger 10 comprised of three independent pickup and transfer units 14, 16, and 18. Ex. 1001, 3:12–19. Each unit includes a merger head 22, a conveyor 24, and a shroud 26. *Id.* at 3:19–23, 3:39–41.

Figures 21 of the ’052 patent is reproduced below:

FIG. 21

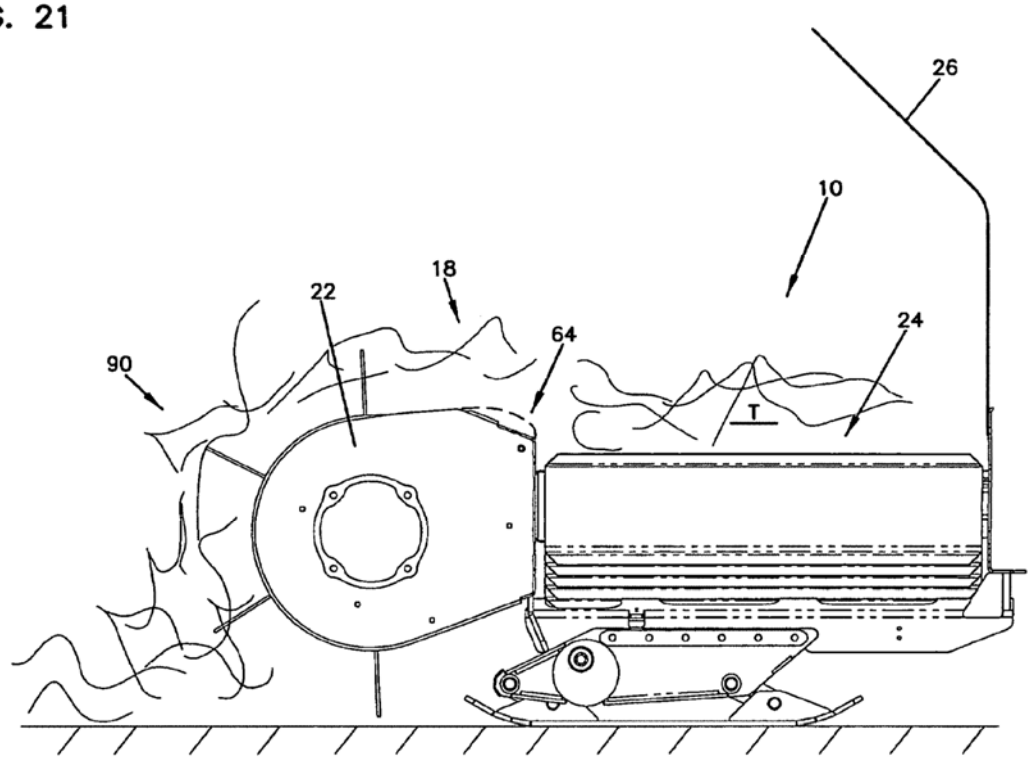


Figure 21 illustrates a side-view of the unit 18 portion of merger 10. *Id.* at 8:62–65. According to the ’052 patent, “the merger heads 22, the shrouds 26, and the conveyors 24 of each unit . . . generally define a trough T into which material 90 (schematically represented) flows during merger operations.” *Id.* Each unit “includes a rub rail 64 . . . positioned adjacent to or within the trough T, and relative to the merger head 22.” *Id.* at 8:66–9:1.

Figure 22 of the ’052 patent is reproduced below:

FIG. 22

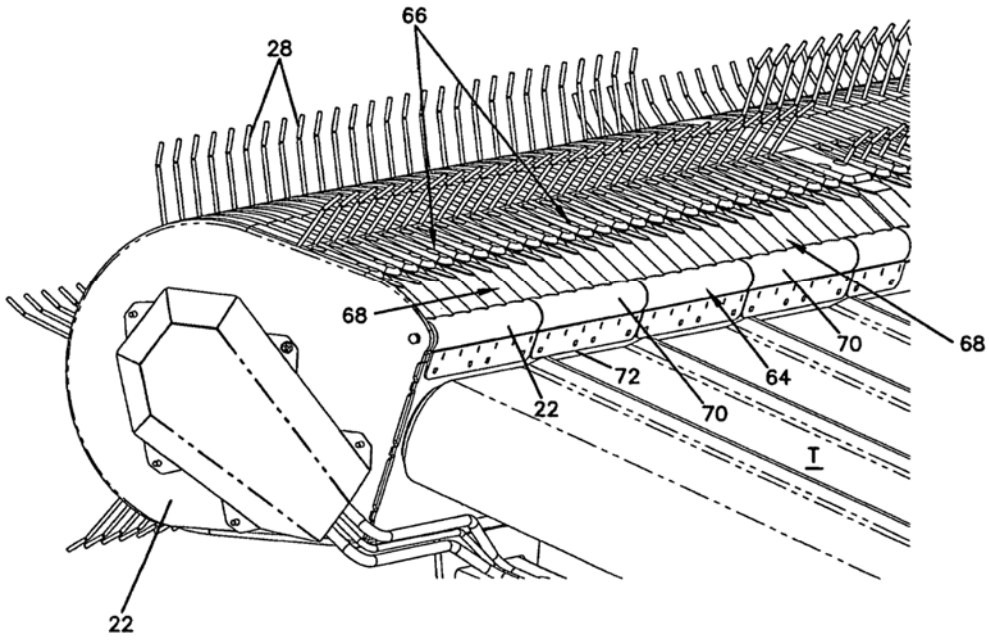


Figure 22 illustrates a rear perspective view of the unit 18 portion of merger 10. *Id.* at 2:54–55. During operation of merger head 22, combs 68 remove material from tines 28 as tines 28 rotate and pass through slots 66. *Id.* at 9:4–18. The ’052 patent further explains that:

> As material 90 is conveyed through the trough T toward the end of the merger 10, the material encounters the smooth surface 70 of the rub rail 64, as opposed to the material encountering projections and/or the slots 66, for example. As a result, less swirling or clumping occurs, and a more uniform windrow is produced. The smooth surface 70 of the rub rail 64 further reduces swirling, catching or clumping to aid in containing the material within the trough T until conveyed to the end of the merger.

Id. at 9:38–46.

B. Illustrative Claim

Claim 1 of the ’052 patent is independent. Claims 2–4 and 6–8 depend from claim 1. Claim 1 is illustrative of the claims at issue:

> 1. A windrow merger configured for moving along a forward direction of travel, comprising:
>
> a) a pickup and transfer unit defining a trough in which material is conveyed, the unit including a merger head and a belt conveyor, the merger head including a plurality of tines that rotate during operation; a comb at least partially defining slots through which the tines pass during rotation; and
>
> b) a rub rail mounted on the pickup and transfer unit intermediate the comb and the belt conveyor and within the trough, the rub rail having a tube portion including an upper surface forming a continuous unobstructed rounded surface arcing rearward and downward toward the belt conveyor.

Ex. 1001, 10:17–30.

C. Related Proceedings

The parties state that the ’052 patent is a subject of the following civil action: *Oxbo Int’l Corp. v. H&S Mfgr’g Co.*, No. 15-292-jdp (W.D. Wis. 2015). Pet. 2; Paper 5, 2.

D. Asserted Grounds of Unpatentability

Petitioner contends that claims 1–4 and 6–8 are unpatentable based on the following grounds:

Reference[s]	**Basis**	**Challenged Claims**
2004 Oxbo Manual[1]	§ 102	1, 4, 6, and 8
2004 Oxbo Manual and Pourchet[2]	§ 103	2, 3, and 7
Dow[3] and 2006 Oxbo Manual[4]	§ 103	1, 4, 6, and 8
Dow, 2006 Oxbo Manual, and Pourchet	§ 103	2, 3, and 7

II. ANALYSIS

A. Claim Construction

The Board interprets a claim using the "broadest reasonable construction in light of the specification of the patent in which it appears." 37 C.F.R. § 42.100(b). We presume a claim term carries its "ordinary and customary meaning," which is "the meaning that the term would have to a person of ordinary skill in the art in question" at the time of the invention. *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007). A patentee may, however, act as their own lexicographer and give a term a particular meaning in the Specification, but must do so with "reasonable

[1] 310 Windrow Merger Parts & Operator's Manual, Publications No. 91217-C, Model Year 2004, revised Mar. 1, 2006 (Ex. 1005, the "2004 Oxbo Manual").
[2] WO 2007/082624 A1 (PCT/EP2006/070097) published July 26, 2007 (Ex. 1009, "Pourchet")
[3] U.S. Patent No. 7,310,929 B2, issued Dec. 25, 2007 (Ex. 1008, "Dow").
[4] 310 Windrow Repair Parts Manual, Publications No. 91284-C, Model Year 2006, revised Feb. 6, 2007 (Ex. 1007, the "2006 Oxbo Manual").

clarity, deliberateness, and precision." *In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994). Only terms which are in controversy need to be construed, and then only to the extent necessary to resolve the controversy. *Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999).

1. "a pickup and transfer unit defining a trough in which material is conveyed"

Claim 1 recites "a pickup and transfer unit defining a trough in which material is conveyed" (the "trough feature"). Petitioner contends that the broadest reasonable construction of "trough in which material is conveyed" is "a channel located between the back of the merger head and the front of the shroud." Pet. 13. However, Petitioner offers no explanation of what a "channel" is or why that term provides further meaning to the claim term "trough." Nor is there any suggestion that "channel" appears anywhere in the '052 patent. Petitioner's declarant, Mr. Ralph Shirley, provides no explanation of the proposed construction, stating instead only that Petitioner's proposed construction is "consistent with how one of ordinary skill in the art would have understood" the term. Ex. 1010 ¶ 32. Such unsupported and conclusory statements are unhelpful in determining the broadest reasonable meaning of "trough."

The specification of the '052 patent is clear: "the merger heads 22, the shrouds 26, and the conveyors 24 of each unit . . . generally define a trough T into which material . . . flows during merger operations." Ex. 1001, 8:62–65. Figures 21 and 22 of the '052 patent illustrate the trough as having two side walls and a depressed bottom. Claim 1 expressly states that material is conveyed "*in*" the trough and that a rub rail is "*within*" the trough. Patent Owner further demonstrates, and we agree, that the plain and

ordinary meaning provided by general dictionary definitions likewise establish that a "trough" has depth. *See* Prelim. Resp. 13–17 (contending that Petitioner's proposed construction is unreasonable because Petitioner implicitly argues a trough does not require a dimension of depth). We decline to adopt Petitioner's proposed construction, apply the ordinary and customary meaning of claim terms, and determine that no express construction is necessary for "a pickup and transfer unit defining a trough in which material is conveyed."

2. "mounted" and Other Claim Terms

Claim 1 recites "a rub rail mounted on the pickup and transfer unit." Petitioner argues that the claim term "mounted" should be construed to mean "fastened to" since "[a]n integrally molded component is different than a separate piece because the latter must somehow be fastened to those other components." Pet. 13–14. Again, Mr. Shirley states only that Petitioner's proposed construction is "consistent with how one of ordinary skill in the art would have understood" the term. Ex. 1010 ¶ 32.

Patent Owner contends that "'[m]ounted' in the '052 patent has no special meaning," and "merely means that the rub rail is fixed in position on the pickup and transfer unit." Prelim. Resp. 18. We determine no express construction is necessary for "mounted" or any other claim term, and apply the ordinary and customary meaning of each term.

B. Asserted Unpatentability Based on the 2004 Oxbo Manual, the 2006 Oxbo Manual, Dow, and Pourchet

Petitioner contends claims 1–4 and 6–8 of the '052 patent are unpatentable under various grounds, all of which are based, at least in part, on either the 2004 Oxbo Manual or the 2006 Oxbo Manual. Pet. 10–11.

According to Petitioner, the 2004 Oxbo Manual is "a parts and operator's manual for Oxbo's 2004 Model Year 310 Windrow Merger," bears a 2004 copyright date, and further states that it was revised as of March 1, 2006. *Id.* at 18. Similarly, Petitioner contends the 2006 Oxbo Manual "was published by Oxbo for its Model Year 2006 310 Windrow Merger," bears a 2006 copyright date, and further states that it was revised as of February 6, 2007. *Id.* at 35.

1. Petitioner Has Not Made a Threshold Showing that Either the 2004 Oxbo Manual or the 2006 Oxbo Manual is a Prior Art Printed Publication

The scope of an *inter partes* review is limited. In particular, 35 U.S.C. § 311(b) provides:

> SCOPE.—A petitioner in an inter partes review may request to cancel as unpatentable 1 or more claims of a patent only on a ground that could be raised under section 102 or 103 and only on the basis of prior art consisting of patents or printed publications.

The determination of whether a given reference qualifies as a prior art "printed publication" involves a case-by-case inquiry into the facts and circumstances surrounding the reference's disclosure to members of the public. *In re Klopfenstein*, 380 F.3d 1345, 1350 (Fed. Cir. 2004). The key inquiry is whether the reference was made "sufficiently accessible to the public interested in the art" before the critical date. *In re Cronyn*, 890 F.2d 1158, 1160 (Fed. Cir. 1989); *In re Wyer*, 655 F.2d 221, 226 (CCPA 1981). "A given reference is 'publicly accessible' upon a satisfactory showing that such document has been disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or

art exercising reasonable diligence, can locate it." *Bruckelmyer v. Ground Heaters, Inc.*, 445 F.3d 1374, 1378 (Fed. Cir. 2006) (citation omitted).

Petitioner offers little explanation or evidence in support of its contention that the 2004 Oxbo Manual and the 2006 Oxbo Manual are prior art printed publications. With respect to the 2004 Oxbo Manual, Petitioner does no more than identify a copyright date which does not correspond to the date of revision that also appears on the document. Pet. 18. With respect to the 2006 Oxbo Manual, Petitioner further contends that "by its nature, the repair parts manual was made available to the public." *Id.* at 35. The statement of Mr. Shirley, to which the Petition cites as support, offers no evidence specific to the manuals asserted as prior art, but instead consists of a general observation that Patent Owner sold windrow mergers, and a conclusory statement that "manuals such as these were distributed to the consuming public by Oxbo as manufacturers typically do." Ex. 1010 ¶ 34. Mr. Shirley is not explicit in what "manuals such as these" he is referring to, but the paragraph cited by Petitioner addresses "similar manuals for its 2003 and 2005 Model Year 310 Windrow Mergers," not explicitly the 2004 Oxbo Manual and the 2006 Oxbo Manual.

We are not persuaded, based on the facts of this case, that the presence of a copyright notice dated prior to the revision date of the document and a generic reference to the "nature" of a document as a manual is sufficient evidence to support a threshold showing of public accessibility as of a particular date to support institution of *inter partes* review. *See, e.g.*, *ServiceNow, Inc. v. Hewlett-Packard Co.*, Case IPR2015-00716, slip op. at 17 (PTAB Aug. 26, 2015) (Paper 13) (finding a copyright notice

insufficient); *but see Ford Motor Co. v. Cruise Control Techs. LLC*, Case IPR2014-00291, slip op. at 7–8 (PTAB June 29, 2015) (Paper 44) (finding a copyright notice sufficient evidence of publication) (citing *FLIR Sys., Inc. v. Leak Surveys, Inc.*, Case IPR2014-00411, slip op. at 18–19 (PTAB Sept. 5, 2014) (Paper 9)). While Petitioner argues that the copyright date and the revision date of both manuals predate the priority date of the '052 patent, Petitioner has provided no evidence that the references at issue were disseminated as of any particular date, and does not otherwise explain why these particular manuals were "sufficiently accessible to the public interested in the art" before the critical date. *See In re Cronyn*, 890 F.2d at 1160; *see also ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 865–66 (Fed. Cir. 2010) (finding no error in district court's determination that user manuals were not printed publications in the absence of evidence of the source, publication, or public accessibility of either manual). Accordingly, the information presented does not show a reasonable likelihood that Petitioner would prevail in showing the unpatentability of any challenged claims of the '052 patent based on the 2004 Oxbo Manual or the 2006 Oxbo Manual.

2. Petitioner Has Not Shown that Any of the Asserted References Disclose the Trough Feature, as Claimed

As discussed above, claim 1 requires "a pickup and transfer unit defining a trough in which material is conveyed." Petitioner contends the 2004 Oxbo Manual and Dow disclose the recited trough feature.

With regard to the 2004 Oxbo Manual, Petitioner argues that "[t]he pickup head and conveyor assemblies together with a cover at the back of the conveyor define a trough in which the gathered crop is conveyed

ultimately to be placed on the ground in a windrow." Pet. 22 (citing Ex. 1005, pp. 23213, 23224 (photo 3), 23286–90); *see also id.* at 20.

The third photo on page 23224 of the 2004 Oxbo Manual cited by Petitioner is reproduced below.



The photo above from the 2004 Oxbo Manual appears to show a portion of the 310 Windrow Merger. Neither Petitioner nor Mr. Shirley further explains why the photo shows the trough feature, as claimed. *See* Ex. 1010 ¶ 37 (stating that "[t]he trough can be seen in the figure" (referring to third photo on page 23224 of the 2004 Oxbo Manual), and that "[i]n my opinion one of ordinary skill in the art would view these assemblies as the pickup and transfer unit as claimed in the '052 Patent").

Contrary to Petitioner's conclusory assertions, we agree with Patent Owner that Petitioner has not sufficiently identified any structure in the 2004

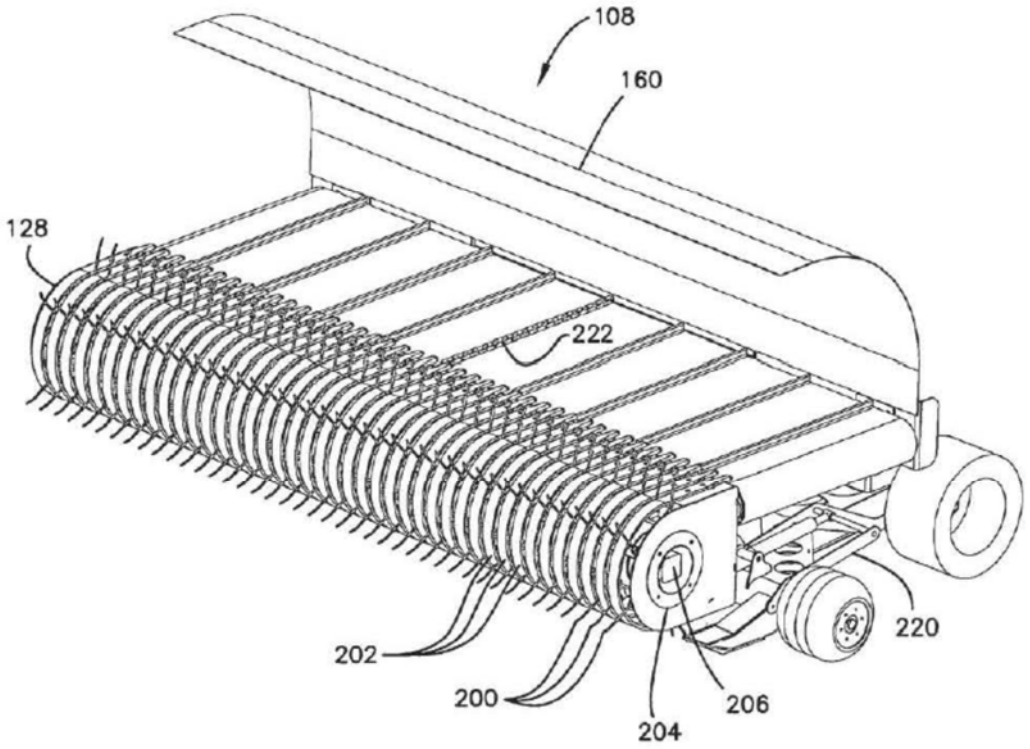
Oxbo Manual corresponding to the trough feature. *See* Prelim. Resp. 27–32. The figures and photos cited by Petitioner all show that the pickup head of the 2004 Oxbo Manual "does not form a wall on the forward side of the conveyor and that the conveyor belt is horizontally flush with the pickup head." Prelim. Resp. 28. Petitioner has not shown how the pickup head depicted in the 2004 Oxbo Manual, together with the conveyor and cover, "defines a trough" because the conveyor belt is horizontally flush with the pickup head. As explained in our claim construction discussion above, we agree with Patent Owner that the recited trough feature requires a depth formed by two sides. Petitioner has not shown how the 2004 Oxbo Manual satisfies this limitation.[5]

Petitioner also contends that Dow discloses the recited trough feature. Pet. 36. According to Petitioner, with respect to Dow, "[e]ach of the three merger heads has a pickup assembly and associated conveyer with a shroud, which together form a trough in which crops are conveyed laterally to a windrow." *Id.* at 39 (citing Ex. 1008, 4:62–5:4).

[5] Although Petitioner does not explicitly contend that the 2006 Oxbo Manual discloses the trough feature, Patent Owner states, and we agree, that the 2006 Oxbo Manual, with the same pertinent disclosures as the 2004 Oxbo Manual, does not disclose a "trough in which material is conveyed" for the same reasons that the 2004 Oxbo Manual does not disclose the trough feature. *See* Prelim. Resp. 47.

Petitioner contends the arrangement is best seen in Figure 15 of Dow, reproduced below. Pet. 39.

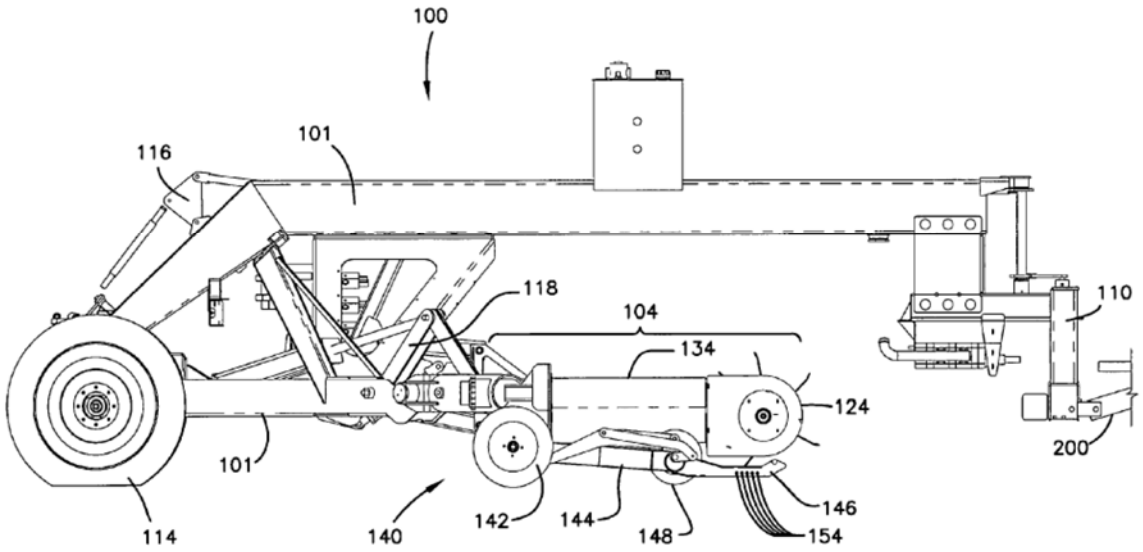
FIG.15



Dow Figure 15 shows pickup transfer assembly 108, including merger head 128, arcing shroud 160. Ex. 1008, 4:42–44, 4:66–5:1, 6:18–20. Neither Petitioner nor Mr. Shirley further explains why the Dow apparatus shows the trough feature, as claimed. *See* Ex. 1010 ¶ 69 (stating that "[t]he trough can be seen in [Dow] Figure 15," and that "[i]t is my opinion that one of ordinary skill in the art would understand these assemblies to be the pickup and transfer unit disclosed in the '052 Patent").

Patent Owner contends that Dow does not disclose a trough, as shown in Figure 3 of Dow, reproduced below.

FIG.3



Dow Figure 3 shows merger apparatus 100, including head unit 124 and conveyor 134. Ex. 1008, 4:35–37, 62–66. We agree with Patent Owner that Dow, as shown in Figure 3, illustrates "a pickup head and conveyor belt on the same horizontal plane," and that the belt conveyor "is not located in a depth or depression between the pickup heads and front of shrouds." Prelim. Resp. 45–46. As noted above, we agree with Patent Owner that the recited trough feature requires a depth formed by two sides. Petitioner has not shown how the pickup head depicted in Dow, together with the conveyor and shroud, "defines a trough" because the conveyor belt is horizontally flush with the pickup head. As explained in our claim construction discussion above, we agree with Patent Owner that the recited trough feature requires a depth formed by two sides. Petitioner has not shown how Dow satisfies this limitation.

Petitioner has not sufficiently shown that any of the asserted references discloses "a pickup and transfer unit defining a trough in which material is conveyed," as recited in claim 1, the only challenged independent claim. Accordingly, the information presented does not show a reasonable likelihood that Petitioner would prevail in showing the unpatentability of any challenged claims of the '052 patent based on the 2004 Oxbo Manual, the 2006 Oxbo Manual, Pourchet, or Dow.

III. CONCLUSION

For the foregoing reasons, the information presented in the Petition and accompanying evidence does not establish a reasonable likelihood that Petitioner would prevail in showing the unpatentability of any claim of the '052 patent.

IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that the Petition is *denied* and no trial is instituted.

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