

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ARUN AGARWAL,
Petitioner,

v.

SACHIN JHUNJHUNWALA,
Patent Owner.

PGR2021-00071
Patent 10,689,782 B2

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

DERRICK, *Administrative Patent Judge*.

DECISION
Denying Institution of Post Grant Review
35 U.S.C. § 324

I. INTRODUCTION

Petitioner Arun Agarwal filed a Petition requesting institution of a post grant review of claims 1 and 2 (“the challenged claims”) of U.S. Patent No. 10,689,782 B2 (Ex. 1001, “the ’782 patent”). Paper 1 (“Pet.”). Patent Owner Sachin Jhunjhunwala filed a Preliminary Response. Paper 8 (“Prelim. Resp.”).

We are authorized to institute a post grant review where a petition demonstrates that it is more likely than not that at least one challenged patent claim is unpatentable. *See* 35 U.S.C. § 324. We are never compelled to institute a review, however, because institution is discretionary. *Id.*; *cf. Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1367 (Fed. Cir. 2016) (explaining that under § 314(a), “the PTO is permitted, but never compelled, to institute an IPR proceeding”). As in an IPR proceeding, we deny post grant review, for example, where a petition fails to identify “with particularity” the challenges or evidence supporting them. *Cf. Harmonic*, 815 F.3d at 1363; 35 U.S.C. § 322(a)(3); *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016) (“It is of the utmost importance that petitioners in IPR proceedings adhere to the requirement that the initial petition identify ‘with particularity’ the ‘evidence that supports the grounds for the challenge to each claim.’” (quoting 35 U.S.C. § 312(a)(3))).

For the reasons discussed below, we deny institution of post grant review.

A. *Real Parties-in-Interest and Related Proceedings*

The parties identify AAVN, Inc., and Sachin Jhunjhunwala as the real parties in interest for the Petitioner and Patent Owner, respectively. Pet. 5; Paper 7. The parties do not raise any issue about real parties in interest.

The parties do not identify any judicial or administrative matter involving the '782 patent as a related matter. Pet. 5; Paper 7.

B. The '782 Patent (Ex. 1001)

The '782 patent is titled “Textile Fabric Fabricated of Twill Weave Sheeting” and issued on June 23, 2020, from Application No. 15/440,459, filed on February 23, 2017. Ex. 1001, codes (21), (22), (45), (54). The claimed invention relates to a textile fabric including a twill weave sheeting having 100% cotton warp yarn and 100% polyester weft yarn, wherein the cotton warp yarn and the polyester weft yarn in each surface are a weave, 2 over and 1 under. *Id.* at 6:65–7:12 (independent claim 1).

C. Claimed Subject Matter

Claims 1 and 2 are reproduced below:

1. A textile fabric comprising: a twill weave sheeting comprising a first surface and a second opposite surface, wherein the twill weave sheeting comprises:

- a 100% cotton warp yarn with a yarn count of 40 s to 60 s;
- a 100% polyester weft yarn with a denier of 15 D to 19 D and 7 to 28 filaments;

wherein the cotton warp yarn and the polyester weft yarn in each surface are a weave, 2 over and 1 under;

wherein both the first and second surfaces comprise a proportion of cotton and a proportion of polyester, the proportion of cotton being greater than the proportion of polyester; and

wherein the twill weave sheeting has a high thread count of 200 to 2000 threads per square inch.

Ex. 1001, 6:65–7:12.

2. The textile fabric as claimed in claim 1 for use as a bedding product, wherein the bedding product is selected from the group consisting of a bed sheet, a pillow case, a comforter,

a coverlet, a pillow sham, a dust ruffle, a blanket, a bedspread, and a duvet cover.

Id. at 7:13–17.

II. ANALYSIS

A. *Grounds of Unpatentability*

Petitioner contends that the challenged claims are unpatentable under § 103 for obviousness over the prior art and under § 112 for lack of adequate written description. Pet. 5, 6–7, 8–9, 12–38. The exact grounds and support relied on by Petitioner are neither clear nor set out with particularity. The Petition includes many contradictions between various statements as to the grounds that are individually ambiguous themselves. We highlight these, along with other issues, below in the order they appear in the Petition.

In the Introduction, the Petition states: “Evidence in this petition establishes that claims 1–2 . . . are unpatentable under 35 U.S.C. § 103 and § 112.” *Id.* at 5 (Introduction).

In a section identifying the “statutory grounds on which the challenge is based,” the Petition states:

Claims 1–2 of the ’782 patent are *unpatentable for at least the following grounds*:

Ground 1: Claim(s) 1–2 of the ’782 patent are unpatentable under 35 U.S.C. § 103 as being obvious over U.S. Patent No. 9,474,395 (hereinafter “Garg”; also attached as “Exhibit 2”) in view of U.S. Patent Publication No. 2018/0080151 (hereinafter “Goenka”; also attached as “Exhibit 3”) and common knowledge. Additional references utilized under 35 U.S.C. 103 include U.S. Patent Publication No. 2017/0159214 (hereinafter “Sundararajan”; also attached as “Exhibit 4”) and U.S. Patent No. 10,443,159 (hereinafter “Agarwal”; also attached as “Exhibit 5”).

Ground 2: Claims 1–2 of the ’782 patent are unpatentable under 35 U.S.C. § 112 because of the lack of written description.

Id. at 6–7 (emphasis added) (original emphasis omitted). As highlighted in the text, the Petition—stating claims are “unpatentable for at least the following grounds”—does not clearly limit the scope of the challenge to what follows in the text. *Id.* at 6. Moreover, it does not identify the particular combinations of the additional references, i.e., Sundararajan and Agarwal, with Garg and Goenka, in “Ground 1.” *Id.*

In a section identifying “[h]ow the construed claims are unpatentable,” the Petition states:

An explanation of how the construed claims 1–2 of the ’782 patent are unpatentable under the statutory grounds identified above is provided in Section VI *infra* [pages 12–38]. *Additionally, a claim chart detailing the mapping between claims 1–2 and prior art references has been provided under “Exhibit 8” [Ex. 1008].*

Id. at 8 (emphasis added). As highlighted in the text, the Petition refers to the claim chart filed as Exhibit 1008 as detailing the mapping of prior art references to claims 1 and 2. Exhibit 1008 details the mapping of Garg, Goenka, Sundararajan, and Agarwal identified above, but also includes the mapping of more than ten (10) additional references to the claims. Ex. 1008.

The following discussion highlights particular statements from Section VI.

In a section identifying “supporting evidence,” the Petition states:

The exhibit numbers of the supporting evidence relied upon to support the challenge and the relevance of the evidence to the challenge raised, including identifying specific portions of the evidence that support the challenge, are provided in Section VI *infra* and in the form of claim charts. An Appendix of Exhibits is also attached.

Pet. 8–9 (emphasis added). As highlighted in the text, the Petition relies on the claim chart for the interpretation and mapping of prior art references to the claims. *Id.*

In a section providing a “detailed explanation,” the Petition states that “[c]laims 1 and 2 of the ’782 patent are unpatentable under 35 U.S.C. § 103 as being obvious over Garg in view of common knowledge.” *Id.* at 12. This particular ground is not identified in the statement of “statutory grounds on which the challenge is based,” discussed above. *See id.* at 6–7. This demonstrates that what is listed there is only a subset of the grounds relied on, in accordance with the statement that the claims “are unpatentable *for at least the following grounds.*” *Id.* at 6 (emphasis added).

The contention that the claims are “obvious over Garg in view of common knowledge” is followed by a section titled “35 U.S.C. § 103 arguments based on Garg,” which includes the introduction of Goenka (Ex. 1003) and the contention that “it is clear that twill weaves are disclosed in Goenka,” and that “[a]nyone of ordinary skill in the art would be able to combine a twill weave of Goenka (and the ‘2/1’ twill weave, which is a long-time industry standard’) with the teachings of Garg discussed above to realize all limitations of claims 1–2 of the ’782 patent.” Pet. 22–23. Still within this same section—“35 U.S.C. § 103 arguments based on Garg”—the Petition also states the claims “are unpatentable under 35 U.S.C. § 103 as being obvious over Goenka in view of common knowledge and Garg for at least the following reasons.” *Id.* at 23.

In a subsequent section titled “35 U.S.C. § 103 arguments based on Goenka,” the Petition states that “[a]s seen above, the Petitioner submits that Goenka, along with Garg, shows or suggests all limitations of claims 1–2 of

the '782 patent,” and then, in the same section, beginning on the same page, that:

With regard to the highest thread count of 2000 of the twill weave sheeting claimed in the '782 patent, Applicant respectfully submits that Sundararajan discloses the aforementioned thread count.

...

The Petitioner *has not subjected Sundararajan to the complete interpretation and mapping of claims 1–2 of the '782 patent in this Petition for the purposes of brevity. The claim chart submitted herewith shows the interpretation of Sundarajan [sic] with respect to claims 1–2 of the '782 patent.*

Id. at 31–33 (emphasis added) (original emphasis omitted). The Petition thus refers us to the interpretation and mapping of Sundararajan to claims 1 and 2 that is set forth in the claim chart, “for the purposes of brevity.” *Id.* at 33. The reliance on Sundararajan goes beyond “thread count,” discussed in the Petition itself, because the claim chart addresses other elements of the claims. *Id.* at 32; Ex. 1008, 1–5.¹ It is unclear what combination(s) of teachings from Sundararajan are intended, and for what element(s), in the absence of a clearly stated ground citing to specific portions of the record.

In a subsequent section titled “35 U.S.C. § 103 arguments based on Sundararajan,” the Petition states that

As seen above, Sundararajan, in combination with Goenka, Garg and the industry standard ‘2/1’ twill weave, shows or suggests all limitations of independent claims 1–2 of the '782 patent. Thus, claims 1–2 of the '782 patent are

¹ As filed, Exhibit 1008 lacks pagination. Accordingly, we refer to the pages by number from first to last, in order.

unpatentable over Sundararajan, Garg, Goenka (and the industry standard).

Pet. 33. In this same section, the Petition goes on to state

With regard to the ‘7 to 28 filament’ count of the 100% polyester weft yarn claimed in the ’782 patent, the Petitioner respectfully submits that Agarwal discloses the aforementioned limitation

...

Again, the *Petitioner has not subjected Agarwal to the complete interpretations [sic] and mapping of claims 1–2 of the ’782 patent in this Petition for the purpose of brevity. The claim chart submitted herewith shows the interpretations of Agarwal in detail with respect to claims 1–2 of the ’782 patent.*

Id. (emphasis added) (original emphasis omitted). The Petition again refers us to the claim chart for the interpretation and mapping of the reference to claims 1 and 2 that is set forth in the claim chart. *Id.* The reliance on Agarwal goes beyond what is discussed in the Petition itself. *Id.* at 33–34; Ex. 1008, 1–5. As with Sundararajan, noted above, it is unclear what combination(s) of teachings from Agarwal are intended, and for what element(s), in the absence of a clearly stated ground citing to specific portions of the record.

In a subsequent section titled “35 U.S.C. § 103 arguments based on Agarwal,” the Petition states

As seen above, Agarwal, in combination with Goenka, Garg and the industry-standard “2/1” twill weave, shows or suggests all limitations of independent claims 1–2 of the ’782 patent

....

Applicant respectfully submits that *there are other references that either by themselves or in combination with one or more other references read onto all limitations of independent claims 1–2 of the ’782 patent. These references can be found in the claim chart [Exhibit 1008]*

....

Each of the combination of (i) Garg, Goenka and the industry standard, (ii) Garg, Goenka, Sundararajan and the industry-standard, (iii) Garg, Goenka, Agarwal and the industry-standard, and (iv) Garg and the industry standard discloses each and every element of claims 1–2 . . . It would not have required undue experimentation . . . to have made and used *the anticipatory subject matter* . . . because all the relevant claim elements discussed in the combinations of references were known . . .

Pet. 34 (emphasis added). The Petition again contends that “other references . . . by themselves or in combination with one or more other references read onto all limitations” of the claims and that “[t]hese references can be found in the claim chart.” *Id.* Thus, as discussed above, it is unclear what combination(s) of teachings are intended, and for what element(s), in the absence of clearly stated grounds citing to specific portions of the record. Further, even the specific combinations that are identified, i.e., those relying on Garg, Garg and Goenka, and Garg and Goenka in combination with either Agarwal or Sundararajan, are inconsistent with the identification of statutory grounds earlier in the Petition, which neither identifies Garg alone, nor specifies how Agarwal and Sundararajan are combined with Garg and Goenka. *Compare id.* at 34, *with id.* at 6.

The Petition may also contend that the claims are unpatentable under § 102, although it is far from clear in doing so. As noted above, the Petition identifies the “statutory grounds” by stating that the claims “are unpatentable for *at least* the following grounds” (emphasis added), followed by a section on obviousness under § 103 and a section on lack of written description under § 112. Pet. 6–7. This statement leaves open that other grounds may apply, and while it might otherwise be ignored, the Petition also expressly states that there are “references [that] can be found in the claim chart

[Exhibit 1008]” that “by themselves . . . read onto all limitations” of the claims and refers to what is taught by the references as “anticipatory subject matter.” *Id.* at 34. Coupled with the reliance on the claim charts as “detailing the mapping between claims . . . and prior art references” (*id.* at 8, *see also* 33 (regarding mapping as to Agarwal)), and statements throughout the claim chart, including for Garg, Goenka and Agarwal, that references “[i]nclude[] support for *all limitations* of [c]laims 1 and 2” (*see, e.g.*, Ex. 1008, 1 (“Garg ’395” and “Goenka ’151”), 5 (“Agarwal ’159”) (emphasis added)), it is not clear whether or not the Petition also relies on anticipation grounds.

In sum, for the reasons discussed above, it is not clear what prior art grounds are set forth in the Petition and, for many of the grounds, what particular evidence is relied on to support the grounds and how it should be applied.

Turning to the contended ground under § 112 based on a lack of written description, the Petition sets forth the characteristics of the claimed fabric, reproducing text of both claims 1 and 2, and states that “the specification would not have demonstrated . . . that the patent applicant actually invented, or ‘possessed,’ the claimed subject matter when the application was filed.” Pet. 34–35; Ex. 1001, 6:65–7:17 (claims 1–2).

What follows in the Petition, however, is not an articulation of a ground based on a lack of written description, or even reasonably limited to the application of § 112, but includes arguments directed to other legal and policy issues.

The Petition begins with argument grounded on the contended lack of patentability of the claims over the prior art:

As seen above, . . . [the claims] have been shown to be unpatentable . . . the product claims such as claims 1–2 of the '782 patent would always be unpatentable under 35 U.S.C. [§] 102, except when they include a novel material of a warp yarn and/or a weft yarn and/or are shown to result in characteristics . . . that are beyond typical expectations and are explicitly based on specific proportions of materials . . . the Detailed Description of the corresponding patent application must include data pertinent to the non-obvious experimentation required to realize those specific proportions or descriptions of the novel material.

Pet. 35–36. The Petition also states that “[t]he above expectations of the Detailed Description are essential under [§ 112] because otherwise the field would attract frivolous patent applications that include product claims with random characteristics thrown in” and that “when it is only the random characteristics . . . that distinguish . . . from prior art references, the specific manufacturing process . . . becomes the patentable Intellectual Property (IP) and not the product . . . itself.” *Id.* at 36 (emphasis omitted).

This is followed by discussion regarding contended “goals” of the '782 patent, i.e., “wrinkle resistance, dimensional strength and texture of the fabric,” in which Petitioner argues that

If there is a specific manufacturing process that results in a unique combination of characteristics . . . it is the process that is the patentable IP and not the product itself. Making the product the patentable IP results in “reinventing the wheel” . . . by way of frivolous individual patent applications . . . the gate-keeping process of the USPTO itself would be flawed if . . . trial-and-error combinations of characteristics of existing materials of warp yarns and weft yarns as part of fabric products were repeatedly part of claims of issued patents.

Id. at 36–37.

Further argument is directed to the process of examination of patent applications, and particularly the use of an Affidavit² filed during prosecution of the application that issued as the '782 patent. *Id.* at 37–38. Petitioner contends that an applicant can “get away with” “claim[ing] specific combinations of numbers related to fabric thread counts and warp yarn and weft yarn deniers and counts” and filing an affidavit showing properties that are “not part of the original disclosure.” *Id.* at 37.

Petitioner also contends that

[because] the characteristics of the textile fabric are shown to exist in prior art references, the '782 patent must at least describe a novel manufacturing process that results in a textile fabric that has the characteristics of pre-existing textile fabrics. In this case, it is the manufacturing process that should have method claims directed thereto to go through the prosecution process.

Id. at 38.

The Petition further states that

The '782 patent has no description of a manufacturing process whatsoever. Moreover, the Detailed Description . . . offers nothing more than a restatement of claims 1–2 couched under generic terms. There are absolutely no figures/drawings to provide context to the embodiments. The issuance of a patent such as the '782 patent incentivizes patent trolling and filing of frivolous patent applications directed to fabric claims merely based on tweaking fabric/yarn numbers and trial-and-error experimentation with no formal scientific processes and methodologies backing them.

Id. (emphasis omitted).

² The Petition identifies Exhibit 7 [sic, 1007] as an “Affidavit submitted on February 4, 2020 wrt [sic] the patent application pertaining to the '782 patent.” Pet. 4. Accordingly, we take “Affidavit” to mean Exhibit 1007, despite it not being so identified in the argument itself.

In sum, the “written description” argument set forth is not so much an articulation of how the claims do not meet the written description requirement, or any other requirement under Section 112, but rather that different claims should have issued and that the patent examination process is flawed. *Id.* at 35–38. In particular, the argument focuses on how the claims that Petitioner contends should have issued—product claims with further limitations or method claims—lack sufficient written description support. *Id.* That focus on claims that did not issue, however, has no apparent relevance to the claims at issue here, which did issue in the ’782 patent. Although it might be possible to puzzle through the arguments to discern grounds for the claims 1 and 2 of the ’782 patent based on Section 112, the exact grounds and what is intended as evidence for each are not sufficiently clear on this record.

B. Petition Fails to Meet Requirements for Institution

A petition for post grant review must identify “in writing and with particularity, each claim challenged, the grounds on which the challenge to each claim is based, and the evidence that supports the grounds for the challenge to each claim.” 35 U.S.C. § 322(a)(3); 37 C.F.R. § 42.204(b). Our reviewing court, in the context of *inter partes* review, describes this particularity requirement as “of the utmost importance.” *Intelligent Bio-Sys.*, 821 F.3d at 1369. Further, our rules require that each petition include “[a] full statement of the reasons for the relief requested, including a detailed explanation of the significance of the evidence including material facts, and the governing law, rules, and precedent.” 37 C.F.R. § 42.22(a)(2).

The requirement for particularity “takes on heightened importance when considered in conjunction with” the “‘all-or-nothing’ approach” that applies to decisions on institution. *Adaptics Ltd. v. Perfect Co.*, IPR2018-

01596, Paper 20 at 17 (PTAB Mar. 6, 2019) (informative, designated Aug. 2, 2019). Under that approach, we must execute “a binary choice” to institute on all grounds asserted in the petition or none. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354, 1359–60 (2018); 35 U.S.C. § 324(a); Patent Trial and Appeal Board Consolidated Trial Practice Guide (Nov. 2019) (“CTPG”), 13 (“The Board will not institute on fewer than all claims or all challenges in a petition.”).

As detailed above in discussing the “grounds of unpatentability,” we are unable to reasonably determine exactly what grounds Petitioner is asserting. For the prior art grounds, this includes what references are relied on, and in what combinations, as well as how these references (or combinations) are to be mapped to the claims. Similarly, for the “written description” ground, it is likewise not clear what grounds under § 112 are set forth in the Petition, as detailed above. Accordingly, the Petition falls far short in setting forth the grounds as a whole. *See* 35 U.S.C. § 322(a)(3) (requiring identification of “the grounds” and “the evidence that supports the grounds” with particularity); 37 C.F.R. § 42.204(b). And because, if we institute review, *SAS* requires that we do so on all grounds asserted in the Petition, we cannot limit this proceeding to a subset of those asserted and thereby remedy the Petition’s failure to identify and set forth the grounds with particularity. *Id.*; *SAS*, 138 S. Ct. at 1354, 1359–60; 35 U.S.C. § 324(a); CTPG, 13.

In sum, the Petition fails to identify the grounds and evidence that supports the grounds with the required particularity. Accordingly, we deny the Petition and do not institute a post grant review.

III. CONCLUSION

We deny the Petition and do not institute post grant review.

IV. ORDER

It is:

ORDERED that the Petition is *denied* and no post grant review is instituted.

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