

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

A.R.M., INC.,
Petitioner,

v.

COTTINGHAM AGENCIES LTD,
Patent Owner.

Case IPR2014-00671
Patent 7,666,103

Before JAMES T. MOORE, JAMES A. TARTAL, and
CARL M. DEFRANCO, *Administrative Patent Judges*.

TARTAL, *Administrative Patent Judge*.

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

I. INTRODUCTION

Petitioner, A.R.M., Inc., filed a Petition requesting an *inter partes* review of claims 1–46 of U.S. Patent No. 7,666,103 (Ex. 1001, “the ’103 patent”). Paper 2 (“Pet.”). Patent Owner, Cottingham Agencies, Ltd., filed a Preliminary Response (Paper 8, “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.”

Patent Owner also filed a “Disclaimer under 37 C.F.R. [§] 1.321” (Paper 9, “Disclaimer”) stating that it disclaims claims 19, 20, 37, 38, and 40 of the ’103 patent. Accordingly, because Patent Owner has disclaimed claims 19, 20, 37, 38, and 40, *inter partes* review may not be instituted based on those claims. *See* 35 U.S.C. § 253(a), 37 C.F.R. § 42.107(e).

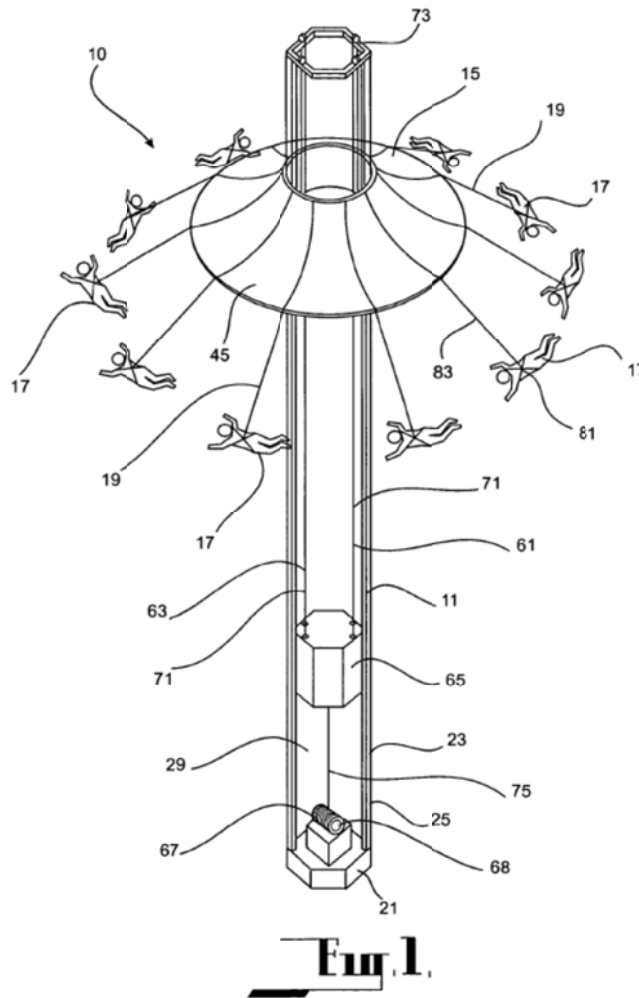
Additionally, upon consideration of the Petition, we conclude the information presented does not show there is a reasonable likelihood that Petitioner would prevail in showing the unpatentability of any of the remaining challenged claims 1-18, 21-36, 39, or 41-46. Accordingly, we do not authorize an *inter partes* review to be instituted as to the ’103 patent.

A. Related Proceedings

The parties state that the ’103 patent has been asserted by Patent Owner against Petitioner in the United States District Court for the District of Connecticut in *Cottingham Agencies, Ltd. v. A.R.M., Inc.*, Civil Action No. 13-01603-JCH. Pet. 2; Paper 7, 1.

B. The '103 Patent

The '103 patent, titled "Amusement Ride," describes an amusement ride involving riders being conveyed through the air. Ex. 1001, Abstract. One embodiment of the claimed amusement ride is shown in Figure 1 of the '103 patent, reproduced below:



According to the '103 patent, Figure 1 illustrates aerial amusement ride 10, involving conveyance of riders through the air in a manner simulating flight at an elevation sufficiently high to produce a thrilling sensation. *Id.* at 4:58–62. Aerial amusement ride 10 comprises tower 11

anchored to the ground, support head 15 mounted on the tower, and suspension links 19 suspended from support head 15 for conveying riders 17 through the air about the tower. *Id.* at 4:63–67.

C. Illustrative Claims

Of the challenged claims, claims 1, 36, 37, 41, 43, and 45 are independent. Claim 1 is illustrative of the claimed subject matter:

1. An aerial amusement ride comprising:
 - (a) a column, extending from a base portion to a rider carrier support portion, said column comprising:
 - (i) a plurality of elongated members;
 - (ii) a plurality of struts, said elongated members being interconnected by said plurality of struts, said elongated members and said struts forming an open framework structure with open spaces defined by said elongated members and said struts, said elongated members defining at least one support surface, said support surface extending from points proximate said rider carrier support portion of said column to points proximate the base portion of said column,
 - (b) a hub displaceably mounted on said column, said hub riding on said at least one support surface, whereby said hub may be displaced along said column,
 - (c) a pulley mounted on said column above or proximate said rider carrier support portion,
 - (d) a first drive motor,
 - (e) a cable having a first point on said cable and a second point on said cable, said cable extending around said pulley, said cable being coupled at said first point on said cable to said hub and at said second point on said cable to said first drive motor,
 - (f) a support structure mounted for rotation on said hub,
 - (g) a plurality of rider carriers configured to support riders, and
 - (h) a plurality of links secured to said support structure at one link end at a radial distance from the column and to said

rider carriers at another link end, said links allowing, upon rotation of said support structure and resultant movement of said rider carriers around the axis of said column, the rider carriers to move radially outwards from the column as the speed of rotation of said support structure increases.

D. Asserted Grounds of Unpatentability

Petitioner contends that claims 1–46 of the '103 patent are unpatentable under 35 U.S.C. § 103(a) based on the following grounds:

References	Basis	Challenged Claims
Walsh ¹ and Barnstormer ²	§ 103(a)	1–9, 11, 14–18, 21–33, 37, 38, 40, 45, and 46
Walsh, Barnstormer, and Spieldiener ³	§ 103(a)	10, 11, 19, and 20
Walsh, Barnstormer, and Harrap ⁴	§ 103(a)	8–13
Walsh, Barnstormer, and Gnezdilov ⁵	§ 103(a)	34–36, 39, 41–44, and 46

¹ U.S. Patent No. 1,023,897, issued Apr. 23, 1912 (Ex. 1002, “Walsh”).

² Petitioner identifies Ex. 1003 as “Barnstormer,” a one page, undated document depicting an amusement park ride. Like Petitioner, we will refer to Ex. 1003 as “Barnstormer,” and to the amusement park ride of the same name as “the Barnstormer ride.”

³ U.S. Patent No. 4,576,373, issued Mar. 18, 1986 (Ex. 1004, “Spieldiener”).

⁴ U.S. Patent No. 6,126,552, issued Oct. 3, 2000 (Ex. 1005, “Harrap”).

⁵ U.S. Patent No. 6,592,463 B1, issued Jul. 15, 2003 (Ex. 1006, “Gnezdilov”).

II. ANALYSIS

Each of the grounds of unpatentability asserted by Petitioner relies upon Barnstormer. In its “List of Exhibits,” Petitioner provides citations to the exhibits relied upon in the Petition, including the following:

Exhibit 1003: Barnstormer (*Barnstormer*) (Ex. 1003); prior art to the ’103 patent under 35 U.S.C. §§ 102(b) and 103(a).

Pet. ii. Petitioner further states that:

Both Walsh, issued April 23, 1912, and Barnstormer—produced, sold, and used by the general public—were public disclosures more than one year prior of the ’103 patent filing date. Ex. 1007 is a brochure created prior to the closure of Opryland Amusement Park in 1997 showing the Barnstormer as operated and available to the public. The attached Declaration of David Gill (Ex. 1008) dates the Barnstormer reference to before the filing date of the ’103 patent.

Pet. 8. Contrary to Petitioner’s assertion, the Declaration of David Gill makes no mention of Barnstormer, Exhibit 1003. Instead, Mr. Gill states that “the Barnstormer ride was built by Bradley & Kaye of Long Beach, California, and installed and operated for the public at various amusement parks from the late 1970’s into the 1990’s.” Ex. 1008, ¶ 7.

Mr. Gill’s statement does not date Barnstormer to before the filing date of the ’103 patent. In fact, as opposed to “the Barnstormer ride,” neither the Petition nor the Declaration of Mr. Gill identifies any date for Barnstormer, and none appears on the face of the document. *See* Ex. 1003. Similarly, Petitioner offers no explanation of the source of Barnstormer, and provides virtually no argument or evidence in support of the conclusion that

Barnstormer was a printed publication available as prior art to the '103 patent.

The scope of *inter partes* review is limited, as is made clear by 35 U.S.C. § 311(b), which states:

A petitioner in an inter partes review may request to cancel as unpatentable 1 or more claims of a patent . . . 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).

Although Petitioner has provided evidence that “the Barnstormer ride” was operated and available to the public before the filing date of the '103 patent, Petitioner has not provided sufficient evidence to support a threshold showing that Barnstormer is a printed publication. Petitioner offers no evidence of a date certain for when Barnstormer was a publication,

and no evidence that Barnstormer was disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence, could have located it. We conclude that Petitioner has not shown sufficiently that Barnstormer is available as prior art for purposes of *inter partes* review.

As a result, because each of the grounds of unpatentability asserted by Petitioner relies upon Barnstormer, we determine that the information presented does not establish a reasonable likelihood that Petitioner would prevail in showing that at least one challenged claim of the '103 patent is unpatentable based on the asserted grounds.

III. CONCLUSION

For the foregoing reasons, we do not institute an *inter partes* review on any of the asserted grounds as to any of the challenged claims of the '103 patent.

IV. ORDER

Accordingly, it is:

ORDERED that claims 19, 20, 37, 38, and 40 of the '103 patent have been disclaimed by Patent Owner pursuant to 35 U.S.C. § 253(a); and,

FURTHER ORDERED that the Petition to institute *inter partes* review of the '103 patent is DENIED, and no trial is instituted.

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