

AIRBUS S.A.S. v. FIREPASS CORP., Appeal No. 2019-1803 (Fed. Cir. November 8, 2019).
Before Lourie, Stoll, and Moore. Appealed from PTAB.

Background:

Firepass owns a patent directed to a system for providing a hypoxic atmosphere for preventing and extinguishing fires. Airbus filed a request for *inter partes* reexamination, which now has returned to the Federal Circuit from a prior appeal in which the Federal Circuit vacated the PTAB's decision dismissing Airbus's cross-appeal for lack of jurisdiction and remanded to the PTAB to consider Airbus's challenge to the claims at issue.

On remand, the Examiner rejected the claims as obvious over various references. Firepass appealed the Examiner's rejection of the claims to the PTAB, arguing that the primary reference (an earlier-issued patent with the same named inventor as the patent at issue) was not analogous art. The PTAB found that the primary reference was not analogous art (i.e., it was neither from the same field of endeavor nor reasonably pertinent to the particular problem with which the inventor was involved) and reversed the Examiner's rejection of the claims. The PTAB explained that there was no articulated rational underpinning that sufficiently links the problem of fire suppression/prevention confronting the inventor of the patent at issue to the invention disclosed in the primary reference (directed to human therapy, wellness, and physical training). In its analysis, the PTAB declined to consider Airbus's argument that breathable fire suppressive environments were well-known in the art because none of the four references relied on by Airbus in this regard was applied in the rejection at issue. Airbus appealed.

Issue/Holding:

Did the PTAB err in reversing the Examiner's rejection? Yes, vacated and remanded.

Discussion:

The Federal Circuit held that the PTAB erred in its "reasonably pertinent" determination because the PTAB declined to consider record evidence advanced by Airbus to demonstrate the knowledge and perspective of a person of ordinary skill in the art at the time of the invention, which the Federal Circuit noted is inextricably tied to the reasonably pertinent inquiry. Here, in finding that the primary reference was not reasonably pertinent to the problem of fire prevention and suppression, the Federal Circuit found that the PTAB accurately observed that the Examiner's rejection did not provide or explain the requisite correlation between the problems addressed by the primary reference and the patent at issue—but in doing so, the PTAB erred in its analysis by declining to consider evidence relied on by Airbus (i.e., the four references that Airbus asserted would establish the necessary link) to demonstrate the knowledge and perspective of a person of ordinary skill in the art at the time of the invention.

Accordingly, because the PTAB's analysis of whether the primary reference is analogous art did not properly take into account the relevant evidence of record (cited by Airbus), the Federal Circuit vacated the PTAB's reversal of the Examiner's rejection and remanded for the PTAB to reconsider its analogous art determination in view of this additional evidence.