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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* PATRICK C. TESSIER and JEFFREY S. HARTZLER

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Appeal 2012-006616  
Application 12/700,643  
Technology Center 3700

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Before JOHN C. KERINS, STEFAN STAICOVICI, and  
MICHAEL L. WOODS, *Administrative Patent Judges*.

WOODS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Patrick C. Tessier and Jeffrey S. Hartzler (“Appellants”) seek our review under 35 U.S.C. § 134 of the final rejection of claims 1–20. Appeal Br. 4. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

### CLAIMED SUBJECT MATTER

The Appellants' invention is directed to a controller for executing remote utility consumption control. Spec. 1, ll. 12–13. Independent claims 1 and 13 are illustrative and are reproduced below with emphasis on some of the contested claim limitations.

1. A wall mountable thermostat having a housing assembly for use in controlling [a] [Heating, Ventilating and Air Conditioning (“HVAC”)] system of a building or other structure, the building or other structure having a local gateway coupled to a communications network, the thermostat comprising:

a user interface for allowing a user to interact with the thermostat;

a wireless transceiver in the housing assembly for wirelessly communicating with the local gateway of the building or other structure, wherein the local gateway is located remotely from the thermostat;

a temperature sensor for sensing a temperature inside the building or other structure and for providing a signal related to the sensed temperature; and

a thermostat controller coupled to the user interface, the wireless transceiver and the temperature sensor, the thermostat controller having a control algorithm for controlling the HVAC system based, at least in part, on one or more control parameters, the thermostat controller configured to receive an electrical signal from the wireless transceiver to allow a user to control the HVAC system as a function of user inputs received from a remote location on the communications network via the local gateway and the wireless transceiver *separate from any utility based control application*, to override user inputs received via the user interface.

13. A zoned HVAC system having two or more zones, comprising:

*a local gateway;*

a first thermostat for controlling a first zone of the zoned HVAC system, the first thermostat having:

*a first wireless transceiver for wirelessly communicating with the local gateway of the building or other structure;*

a first controller coupled to the first wireless transceiver, the first controller having a first control algorithm for controlling the HVAC system based, at least in part, on one or more first control parameters, the first controller configured to allow a user to change one or more of the first control parameters from a remote location on the communications network via the local gateway and the first wireless transceiver;

a second thermostat for controlling a second zone of the zoned HVAC system, the second thermostat having:

*a second wireless transceiver for wirelessly communicating with the local gateway of the [sic] building or other structure; and*

a second controller coupled to the second wireless transceiver, the second controller having a second control algorithm for controlling the HVAC system based, at least in part, on one or more second control parameters, the second controller configured to allow a user to change one or more of the second control parameters from a remote location on the communications network via the local gateway and the second wireless transceiver.

## THE REJECTIONS

The Examiner has:

- (1) rejected claims 1, 5–13, and 17–20 under 35 U.S.C. § 103(a) as being unpatentable over Solomita (US 2004/0034484 A1, published Feb. 19, 2004) in view of Petite (US 6,437,692 B1, issued Aug. 20, 2002);
- (2) rejected claims 2–4 and 14–16 under 35 U.S.C. § 103(a) as being unpatentable over Solomita, Petite, and Schurr (US 6,868,293 B1, issued Mar. 15, 2005);

- (3) rejected claims 1, 6–9, 13, 19, and 20 under 35 U.S.C. § 103(a) as being unpatentable over Kolk (US 6,785,630 B2, issued Aug. 31, 2004) in view of Petite;
- (4) rejected claims 1–20 under 35 U.S.C. § 103(a) as being unpatentable over Glorioso (US 5,926,776, issued July 20, 1999) in view of Petite; and
- (5) provisionally rejected claims 1–20 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1–22 of copending U.S. Patent Application No. 11/777,143 in view of Solomita, Petite, Schurr, Glorioso, Liebl, and Ho.

See Answer 4–13.<sup>1</sup>

#### ANALYSIS

##### *Claims 1–12, 19, and 20 as Unpatentable under 35 U.S.C. § 103(a)*

Independent claim 1 recites, *inter alia*, “a user to control the HVAC system . . . *separate from any utility based control application.*” Appeal Br. 37, Claims App. (emphasis added). Independent claim 19 similarly recites, *inter alia*, “sending a first request . . . *separate from any utility based control application.*” *Id.* at 41 (emphasis added). Claims 2–12 depend from claim 1 and claim 20 depends from claim 19. *Id.* at 37–39 and 41.

In rejecting the claims under REJECTIONS (1)–(4), summarized above, the Examiner interprets the claim term “separate from [any] utility

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<sup>1</sup> The Examiner also relied on the teachings of Liebl (US 5,361,982, issued Nov. 8, 1994), Erikson (US 5,533,668, issued July 9, 1996), Ho (US 5,833,134, issued Nov. 10, 1998), Tate (US 4,969,508, issued Nov. 13, 1990), Motoyama (US 6,766,223 B1, issued July 20, 2004), Das (US 7,039,404 B2, issued May 2, 2006), and Chen (GB 2 403 097 A, pub. Dec. 22, 2004) as evidence of well-known features. See Answer 5–7.

based control application” to mean that the claimed system can be applied to a system different from a utility company’s control, and relies on Petite for disclosing “remote monitoring and control for . . . *environmental or safety systems.*” See Final Act. (mailed May 11, 2011) 3–4 and 7 (citations omitted); Answer 5, 8, and 10 (emphasis added).

In response, the Appellants argue that “[n]othing in . . . Petite . . . discloses . . . *separate from any utility based control application*” as recited in claim 1 (emphasis added) and that Petite’s relevance “is not understood.” Appeal Br. 12. The Appellants make a similar argument with respect to the rejection of independent claim 19. See *id.* at 18–19.

In the Answer, the Examiner appears to adopt an alternative construction of this claim limitation in finding that “[i]n addition, a user with access to remotely adjust the controls on a home heating system . . . is also considered as the applications to ‘separate from utility control’.” Answer 15 (citing Petite, col. 10, ll. 26–28.)

We give claims their broadest reasonable interpretation consistent with the drawings as well as the Specification. See *In re Prater*, 415 F.2d 1393, 1404–05 (CCPA 1969). This interpretation must also be consistent with the one that those skilled in the art would reach. *In re Cortright*, 165 F.3d 1353, 1358 (Fed. Cir. 1999).

The Appellants’ Figure 2 and the Specification provide that “*a user owner of the dwelling 200 sends control signals from the signal source 240 to the gateway 230 . . . which controls the HVAC system 220 . . . [so that] users can remotely control HVAC equipment . . . via the gateway, either in addition to or separate from any utility-based control.*” Spec. 11, ll. 9–16 (emphasis added) and Fig. 2.

Based on the Specification and Figure 2, we find that a reasonable construction of the term, “separate from utility based control application,” as interpreted by those skilled in the art, means that the claimed user is not the utility company, but instead, for example, an *owner of the dwelling*.

As the Examiner initially applied a different construction during prosecution, he has also failed to establish where in the prior art the claimed HVAC systems are remotely controlled by a user that is not the utility company, but rather, the *owner of the dwelling*.<sup>2</sup>

Therefore, we do not sustain the rejection of claims 1–12, 19, and 20 under 35 U.S.C. § 103(a).

*Claims 13–18 as Unpatentable under 35 U.S.C. § 103(a)*

As summarized above, the Examiner rejects:

- (i) Claims 13, 17, and 18 as unpatentable over Solomita in view of Petite;
- (ii) Claims 14–16 as unpatentable over Solomita, Petite, and Schurr;
- (iii) Claim 13 as unpatentable over Kolk in view of Petite; and
- (iv) Claims 13–18 as unpatentable over Glorioso in view of Petite.

*Claims 13, 17, and 18 as Unpatentable over Solomita in view of Petite*

In rejecting claim 13, the Examiner determines that “it is well known in the art that a HVAC with single zone and single thermostat can be extended to a HVAC system with multiple zones and multiple thermostats.” Answer 6 (citing Liebl, among other references).

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<sup>2</sup> See, e.g., Answer 4–12, for Examiner’s findings within the cited prior art of remote control of an HVAC system.

In response, the Appellants argue that “Solomita [] and Petite [] cannot be fairly considered to teach first and second thermostats, each controlling a corresponding zone of a zoned HVAC system, with each thermostat capable of communicating with the same local gateway.” Appeal Br. 16. The Appellants further argue that Petite does not appear to disclose communication via local gateway, maintaining that, “[m]erely mentioning that a transceiver may be interfaced with a list of sensors and/or actuator types used within building control systems (e.g., smoke detector, thermostat, and security system) cannot be seen to disclose that a local gateway communicates with multiple thermostats.” Reply Br. 7; *see also id.* at 6–7.

In maintaining this rejection, the Examiner does not rely on Solomita or Petite for disclosing multi-zone HVAC systems. Instead, the Examiner finds that “multi-zones associate[d] with multi-thermostats is well known in the art.” Answer 19. The Examiner also cites multiple prior art references as evidence to support his finding. *See id.* at 6; *see also id.* at 18. The Examiner then concludes that it would have been obvious for a person having ordinary skill in the art to extend the single zone/thermostat system of Solomita and Petite to multiple zones/thermostats because “the prior art demonstrates that the separated controlled zones provide comfort for different users or purposes in different zones.” *See id.* at 6.

With respect to the “local gateway” limitation, the Examiner cites to Figure 2 of Petite and finds that “Petite discloses the same one local gateway 220 communicat[ing] with sensor/actuator/transceiver 222 and sensor/actuator/transceiver 224. The sensor/actuator can be thermostat . . . Therefore, one local gateway 220 is able to communicate with multiple thermostats 222 and 224.” *Id.* at 18.



Figure 2 of Petite is reproduced below:

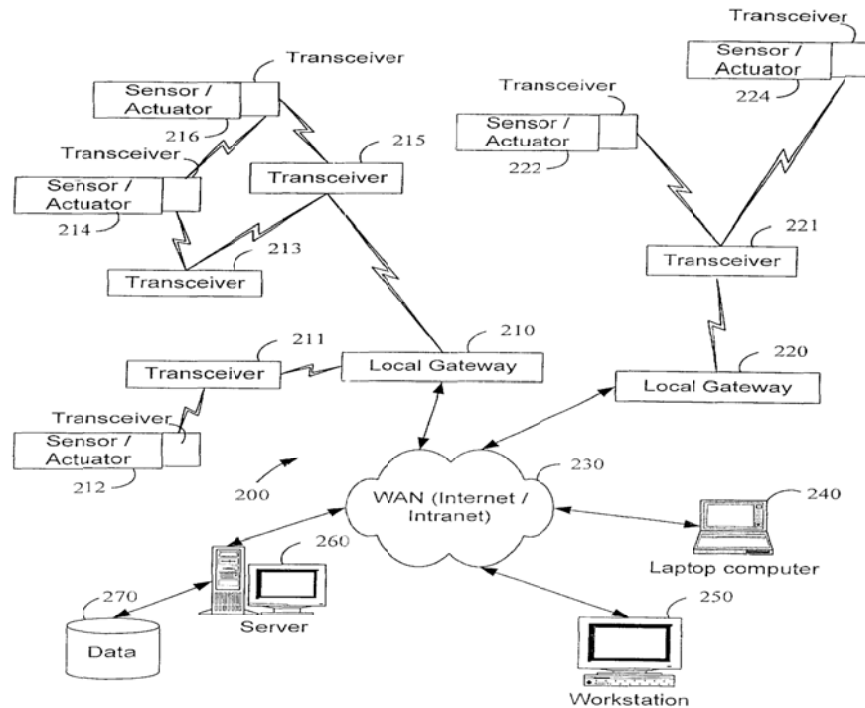


FIG. 2

Figure 2 depicts Petite’s two “thermostats” 222 and 224 communicating with one gateway 220.

The Appellants also argue that because Liebl discloses “a temperature control system within a building where . . . the thermostats and control unit . . . communicate over the power conductors within the building . . . a local gateway would certainly not be necessarily present within the Liebl [] system.” Reply Br. 7. The Appellants do not explain, however, how Liebl’s disclosure of thermostats and control units communicating over *power conductors* indicates error in the Examiner’s rejection.

For the foregoing reasons, we agree with the Examiner in rejecting claim 13 and note that the Appellants have not shown how the Examiner’s reliance on the prior art, including Figure 2 of Petite, in meeting this claim limitation is in error. Therefore, we sustain the rejection of claim 13.

With respect to claim 17, the Appellants argue that neither Petite nor Solomita discloses the limitations of this claim, emphasizing the claim terms “first controller,” “second controller,” “viewed from a remote location,” “and via the local gateway.” Appeal Br. 16–17 (underlining omitted).

In response, the Examiner maintains that the prior art, including Figure 2 of Petite, discloses these limitations. Answer 18–19. We agree with the Examiner’s rejection of claim 17 and note that Petite’s computer 240 includes a screen for remotely viewing, via local gateway 220, multiple sensors/actuators 222 and 224. *See* Petite, Fig. 2. Furthermore, the modified system of Solomita and Petite, as proposed by the Examiner, would have first and second controllers. Therefore, we sustain the rejection of claim 17.

With respect to claim 18, the Appellants argue that the Examiner’s explanation for rejecting the claim does not “address the actual language of the claim” and that “‘Monitors the usage data, environmental data and safety data’ . . . is not the same as” the limitations recited in claim 18. Appeal Br. 17–18.

In response, the Examiner again explains that Figure 2 of Petite discloses screen 240 and local gateway 220, with gateway 220 communicating with multiple thermostats 222 and 224 via transceivers. Answer 20.

The Appellants’ argument is not persuasive, in that a reference does not have to provide an *ipsissimis verbis* disclosure of a claimed feature. We agree with the Examiner’s rejection of claim 18 and note that the Appellants have not shown how the Examiner’s reliance on the prior art, including Figure 2 of Petite, in meeting this claim limitation is in error. Therefore, we sustain the rejection of claim 18.

For the foregoing reasons, we sustain the rejection of claims 13, 17, and 18 under 35 U.S.C. § 103(a) as being unpatentable over Solomita in view of Petite.

*Claims 14–16 as Unpatentable over Solomita, Petite, and Schurr*

Claim 14 recites, *inter alia*, “a first housing . . . *removably coupled* to [a] first base . . . the first housing carrying [a] first controller, and the first base carrying [a] first wireless transceiver.” Appeal Br. 40, Claims App. (emphasis added). Claims 15 and 16 depend from claim 14 and, likewise, include the same limitation.

The Appellants argue that the prior art relied upon by the Examiner does not disclose the claimed *removable thermostat housing*. Appeal Br. 20–21.

In rejecting these claims, the Examiner relies on Figure 2 of Schurr and explains that Schurr’s disclosed thermostat is considered “removably coupled since the 7 day-programming thermostat is mounted on the base which includes 2-way communication.” Answer 22. The Examiner also notes that the recited claimed language, including *removably coupled*, is not “disclosed in the Specification.” *Id.*

Figure 2 of Schurr is reproduced below:

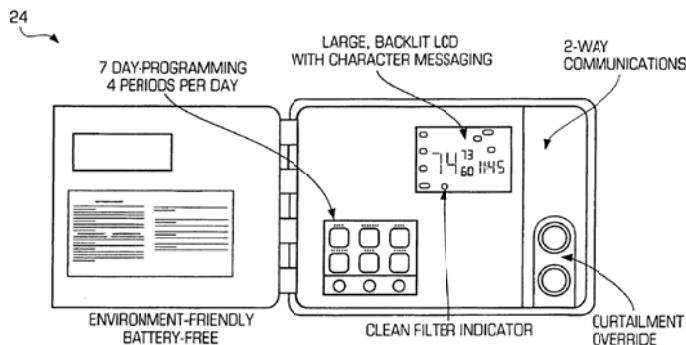


Figure 2 depicts Schurr’s “removable housing.”

Although we appreciate the Examiner's position that certain claim language is not disclosed in the Specification, this is not relevant to the rejection at hand. What is relevant, however, is that the Examiner has not adequately explained how the relied-upon Figure 2 of Schurr discloses the claimed *housing carrying a controller and removably coupled to a base*, as recited in the claims.

Therefore, we do not sustain the rejection of claims 14–16 under 35 U.S.C. § 103(a) as unpatentable over Solomita, Petite, and Schurr.

*Claim 13 as Unpatentable over Kolk in view of Petite  
under 35 U.S.C. § 103(a)*

In combining Kolk with Petite, the Examiner determines that:

[I]t would have been obvious . . . to modify the apparatus of Kolk [] with a wireless gateway communication, remote environmental or safety monitor and remote temperature control in view of Petite [] so as to have an alternative suitable communication and remote HVAC control as additional function from remote location beside for the utility.

Answer 8.

In the Reply Brief, the Appellants argue that “[t]he Examiner has not provided any objective reason to modify Kolk [] in the manner recited in claim 13, other than relying on the instant specification, which is clear error.” Reply Br. 13.

We find that the Examiner's stated reasoning, “so as to have an alternative suitable communication and remote HVAC control as additional function from remote location beside for the utility,” is based on the use of impermissible hindsight reconstruction in view of the Appellants' disclosure. *See Sensonics Inc. v. Aerosonic Corp.*, 81 F.3d 1566, 1570 (Fed. Cir. 1996). At the outset, we note that for the reasons set forth *supra*, the Examiner does

not establish that the remote user in Petite is not the utility company. Furthermore, we note that Kolk's system is already remotely controlled. *See* Kolk, Fig. 1. We thus find the Examiner's rejection insufficient to explain what in the prior art would have prompted a person having ordinary skill in the art to include Petite's remote system into Kolk's remote temperature regulating system. The Examiner has not provided any findings that either Kolk or Petite recognized a problem with the remote technique used in Kolk. As such, absent hindsight, we fail to see why one having ordinary skill in the art would have been led by the teachings of Petite to modify the temperature remote system of Kolk in the manner claimed.

Therefore, we do not sustain the rejection of claim 13 under 35 U.S.C. § 103(a) as unpatentable over Kolk in view of Petite.

*Claims 13–18 as Unpatentable over Glorioso in view of Petite*

*Under 35 U.S.C. § 103(a)*

In combining Glorioso with Petite, the Examiner determines that:

[I]t would have been obvious to . . . modify the apparatus of Glorioso [] with a gateway communication, environmental or safety systems in view of Petite [] so as to control the data exchange with intermediate controlled gateway device responding to demand/response commands sent from energy provider.

Answer 10.

The Appellants argue that “[t]he Examiner has not provided any objective reason to modify Glorioso [] in the manner recited in claim 13, other than relying on the instant specification, which is clear error.” Reply Br. 20.

We agree with the Appellants that the Examiner's stated reasoning, “so as to control the data exchange with intermediate controlled gateway

device responding to demand/response commands sent from energy provider” (Answer 10), lacks the rational underpinning required to support an obviousness rejection. *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). More specifically, the Examiner has failed to explain how Petite’s remote system would control Glorioso’s smart thermostat. Therefore, we do not sustain the rejection of claim 13, nor that of claims 14–18, which depend therefrom, under 35 U.S.C. § 103(a) as unpatentable over Glorioso in view of Petite.

*Claims 1–20 as Rejected For Nonstatutory Double Patenting*

The Examiner provisionally rejects claims 1–20 on the ground of nonstatutory obviousness-type double patenting over claims 1–22 of copending U.S. Patent Application Number 11/777,143 in view of Solomita, Petite, Ho, Liebl, Schurr, and Glorioso. Answer 13.

In response, the Appellants represent that they “*will consider filing a terminal disclaimer if/when the claims are otherwise indicated as being in condition for allowance.*” Appeal Br. 36 (emphasis added).

As the Appellants do not argue that the rejection is in error or even represent that they will file terminal disclaimer, we summarily affirm the provisional rejection of claims 1–20 on the ground of obviousness-type double patenting as an obvious variation of claims 1–22 of copending U.S. Patent Application No. 11/777,143 in view of Solomita, Petite, Ho, Liebl, Schurr, and Glorioso.

## SUMMARY

The Examiner's decision to reject claims 1, 5–12, 19, and 20 under 35 U.S.C. § 103(a) as being unpatentable over Solomita in view of Petite is reversed.

The Examiner's decision to reject claims 13, 17, and 18 under 35 U.S.C. § 103(a) as being unpatentable over Solomita and Petite is affirmed.

The Examiner's decision to reject claims 2–4 and 14–16 under 35 U.S.C. § 103(a) as being unpatentable over Solomita, Petite, and Schurr is reversed.

The Examiner's decision to reject claims 1, 6–9, 13, 19, and 20 under 35 U.S.C. § 103(a) as being unpatentable over Kolk in view of Petite is reversed.

The Examiner's decision to reject claims 1–20 under 35 U.S.C. § 103(a) as being unpatentable over Glorioso in view of Petite is reversed.

The Examiner's decision to provisionally reject claims 1–20 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1–22 of copending U.S. Patent Application No. 11/777,143 in view of Solomita, Petite, Schurr, Glorioso, Liebl, and Ho is summarily affirmed.

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

AFFIRMED

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