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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* R. ANDREW POOLE and ROBERT D. FARRIS

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Appeal 2014-09150  
Application 13/197,267  
Technology Center 2400

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Before ERIC S. FRAHM, JEFFREY A. STEPHENS, and  
NORMAN H. BEAMER, *Administrative Patent Judges*.

FRAHM, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF CASE

*Introduction*

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's Final Rejection of claims 1, 2, 4, 5, 7–15, 17–22, 24, and 25. Claims 3, 6, 16, and 23 have been canceled. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

*Appellants' Disclosed Invention*

Appellants' disclosed and claimed invention is a method of and system for providing playback of broadcast video programs at a customer's premises in the event of power loss and/or service interruption (Title; claims 1, 12; Abs.; Spec. ¶¶ 2–6, 9; Fig. 1).

*Exemplary Claims*

Exemplary independent claims 1, 10, and 12 under appeal, with emphases added to disputed portions of the claims, read as follows:

1. A method comprising:

monitoring, by a device at a customer premises, a condition relating to power at the customer premises to automatically detect a power outage at the customer premises, the power outage comprising a loss at the customer premises of power supplied from a commercial power grid to the customer premises and causing an interruption to a video service provided through a network to a video device within the customer premises;

*sending, in response to the loss at the customer premises of the power supplied from the commercial power grid to the customer premises, a notice of the interruption through the network to a node having a video recorder in the network;*

recording, at the video recorder in the network and during the interruption caused by the power outage at the customer premises, a video program that was being accessed by the video device within the customer premises before the interruption, at least from a point in the video program substantially corresponding to a point when the interruption occurred; and

after communication through the network with the video device within the customer premises is resumed after an end of the interruption, transmitting at least a portion of the recorded video program starting from the point substantially corresponding to the point when the interruption occurred, from

the video recorder through the network to the video device within the customer premises.

10. The method of claim 1, further comprising: when communication through the network to the video device within the customer premises resumes after an end of the interruption, *transmitting an offer* to the viewer within the customer premises to resume the video program that was being viewed within the customer premises;

wherein the transmitting of at least a portion of the recorded video program to the video device within the customer premises is responsive to an acceptance of the offer by the viewer.

12. A method comprising:

monitoring, by a device at a customer premises, a condition relating to power at the customer premises to automatically detect a power outage at the customer premises, the power outage causing an interruption to a video-on-demand service provided through a network to a video device within the customer premises;

sending, by the device at the customer premises, a notice of the interruption through the network to a node having a video-on-demand server in the network;

*stopping, by the video-on-demand server in response to the notice of the interruption, a transmission of a video program that was being accessed by the video device within the customer premises before the interruption; and*

noting, by the video-on-demand server, a point in the video program substantially corresponding to a point when the interruption occurred for use as a new transmission starting point upon a resumption of the video-on-demand service.

*Examiner's Rejections*

(1) The Examiner rejected claims 1, 2, 4, 5, 7–11, 13–15, 17–22, 24, and 25 as being unpatentable under 35 U.S.C. § 103(a) over the combination of Vereen (US 7,287,175 B2; issued Oct. 23, 2007) and Yamada (US 7,636,544 B2; issued Dec. 22, 2009). Final Act. 5–14; Advisory Action mailed February 5, 2014 (hereinafter, “Advisory Action”), p. 2; Ans. 3–15.

(2) The Examiner rejected claim 12 as being unpatentable under 35 U.S.C. § 103(a) over the combination of Vereen, Yamada, and Katz (US 7,103,906 B1; issued Sept. 5, 2006). Final Act. 14–15; Advisory Action 2–3; Ans. 15–18.

*Issues on Appeal*

Appellants, in the Appeal Brief and Reply Brief, present arguments as to claim 1, and rely on those arguments as to claims 2, 4, 5, 7–9, 11, 13–15, 17–22, 24, and 25 (App. Br. 15–32; Reply Br. 6–28). In the Appeal Brief, Appellants, for the first time during prosecution of the instant application, present arguments as to the Official Notice taken by the Examiner as to claim 10 (App. Br. 32–33; *see also* Reply Br. 26–28). Appellants also present separate arguments as to claim 12 (App. Br. 34–38; Reply Br. 28–32). Accordingly, we select claim 1 as representative of the group of claims consisting of claims 1, 2, 4, 5, 7–9, 11, 13–15, 17–22, 24, and 25, and we will address representative independent claim 1, dependent claim 10, and independent claim 12 in our analysis *infra*.

Based on Appellants' arguments in the Appeal Brief (App. Br. 15–38) and the Reply Brief (Reply Br. 6–33), the following issues are presented on appeal:

(1) Did the Examiner err in rejecting claims 1, 2, 4, 5, 7–11, 13–15, 17–22, 24, and 25 as being obvious over the combination of Vereen and Yamada because: (a) the combination does not teach or suggest the limitation at issue in representative claim 1 of “sending, in response to the loss at the customer premises of the power supplied from the commercial power grid to the customer premises, a notice of the interruption *through the network to a node having a video recorder in the network;*” and/or (b) Vereen and Yamada are not properly combinable and there is no teaching, suggestion or motivation provided for the combination?

(2) Did the Examiner err in rejecting claim 10 as being obvious over the combination of Vereen, Yamada, and Official Notice because the combination fails to teach or suggest “transmitting an offer to the viewer within the customer premises,” as set forth in claim 10?

(3) Did the Examiner err in rejecting independent claim 12 as being obvious over the combination of Vereen, Yamada, and Katz because the combination, and specifically Katz, does not teach or suggest the limitation at issue in claim 12 of “stopping, by the video-on-demand server in response to the notice of the interruption, a transmission of a video program that was being accessed by the video device within the customer premises before the interruption”?

#### ANALYSIS

We have reviewed the Examiner’s rejections (Final Act. 5–15) in light of Appellants’ contentions in the Appeal Brief (15–38) and the Reply Brief (6–33) that the Examiner has erred, as well as the Examiner’s (i) Advisory

Action (pp. 2–3), and (ii) response to Appellants’ arguments in the Answer (Ans. 3–18). We disagree with Appellants’ arguments.

*Claims 1, 2, 4, 5, 7–11, 13–15, 17–22, 24, and 25*

With regard to representative claim 1 and dependent claim 10, we adopt as our own (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken (Final Act. 5–7), as well as the Advisory Action (p. 2); and (2) the reasons set forth by the Examiner in the Examiner’s Answer in response to Appellants’ Appeal Brief (*see* Ans. 2–15). We concur with the conclusions reached by the Examiner with regard to the obviousness of claims 1 and 10 in view of the combination of Vereen and Yamada. We also agree with the Examiner that Appellants did not timely object to the Official Notice that the transmission of offers were well known, as evidenced by Ellis (US 7,370,343 B1; issued May 6, 2008) and/or Elcock (US 2005/0160308 A1; published July 21, 2005).

With regard to representative claim 1, the Examiner is correct that the combination of Vereen and Yamada teaches or suggests “sending, in response to the loss at the customer premises of the power supplied from the commercial power grid to the customer premises, a notice of the interruption through the network to a node having a video recorder in the network” (Ans. 8). In addition, the broadest reasonable interpretation of the disputed limitation of claim 1 does not require the “node” be remote from the customer premises. In this light, Appellants’ contentions in the Appeal Brief (App. Br. 15–21) that the “sending . . .” limitation is neither disclosed nor suggested by Vereen and Yamada are not persuasive.

We are also unpersuaded by Appellants’ contentions (App. Br. 25–27) that the Examiner has failed to provide evidentiary support for the

motivation to combine Yamada with the teachings of Vereen. Evidentiary support from the reference is not necessary because the motivation can come, for instance, from general knowledge within the art.<sup>1</sup> However, Appellants have not responded to or refuted the Examiner's explanation that it would have been obvious to modify Vereen with Yamada "for the purpose of generating record necessity or record cancel commands to [a] remote recording server based on status information of the terminal in order to provide [the] user with missed content due to interruptions" (Final Act. 7). Further, we agree with the Examiner's response (Ans. 10--12) to Appellants' arguments concerning any lack of motivation, teaching away, and/or changed operating principals (App. Br. 21--30), including that it would have been obvious to "implement features of detection and transmission of terminal status information including reception of a TV broadcast as well as battery capacity, taught by Yamada et al into [the] optical network terminal

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<sup>1</sup> *In re Sernaker*, 702 F.2d 989, 994--95 (Fed. Cir. 1983); *see also Dystar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick, Co.*, 464 F.3d 1356, 1368 (Fed. Cir. 2006):

Indeed, we have repeatedly held that an implicit motivation to combine exists not only when a suggestion may be gleaned from the prior art as a whole, but when the 'improvement' is technology-independent and the combination of references results in a product or process that is more desirable, for example because it is stronger, cheaper, cleaner, faster, lighter, smaller, more durable, or more efficient. Because the desire to enhance commercial opportunities by improving a product or process is universal—and even common-sensical—we have held that there exists in these situations a motivation to combine prior art references even absent any hint of suggestion in the references themselves.

of Vereen et al *in order to provide [a] user with missed content due to interruptions* (Yamada: Abstract; Col.2 lines 32-34).” Ans. 12 (underlined emphasis omitted and italicized emphasis added).

With regard to dependent claim 10 separately argued, we agree with the Examiner (Ans. 15) that Appellants did not timely or adequately traverse the Official Notice taken as to modifying Vereen and Yamada to include transmission of an offer in order to conserve network bandwidth (*see* Final Act. 9). Specifically, the Examiner first took Official Notice that transmitting an offer to conserve network bandwidth was well-known prior to Appellants’ claimed invention in the Non-Final Office Action mailed March 15, 2013 (p. 11). Appellants’ response filed June 27, 2013 did not refute this Official Notice. The Examiner took Official Notice again in the Final Office Action mailed October 30, 2013, and again, Appellants’ response filed January 22, 2014 failed to refute the Official Notice taken. In this light, Appellants’ contentions on appeal that the Examiner’s reliance on Official Notice is somehow improper (App. Br. 32–33; Reply Br. 26–28) are untimely and not well taken. The time to object or refute the Official Notice taken was in Appellants’ response made June 27, 2013, after the Examiner’s Non-Final Office Action mailed March 15, 2013, and/or in Appellants’ response made January 22, 2014, after the Examiner’s Final Office Action mailed October 30, 2013. *See* MPEP § 2144.03(C).

Assuming *arguendo* that Appellants’ traversal of the Official Notice was timely, an adequate traverse of the Examiner’s taking of Official Notice must contain sufficient information or argument to create on its face a reasonable doubt regarding the circumstances justifying the Examiner’s

notice of what is well known to one of ordinary skill in the art. *In re Boon*, 439 F.2d 724, 728 (CCPA 1971).

To adequately traverse such a finding, an applicant must specifically point out the supposed errors in the examiner's action, which would include stating why the noticed fact is not considered to be common knowledge or well-known in the art. *See* 37 CFR 1.111(b). *See also* [*In re Chevenard*, 139 F.2d 711, 713 (CCPA 1943)] (“[I]n the absence of any demand by appellant for the examiner to produce authority for his statement, we will not consider this contention.”). A general allegation that the claims define a patentable invention without any reference to the examiner's assertion of official notice would be inadequate. If applicant adequately traverses the examiner's assertion of official notice, the examiner must provide documentary evidence in the next Office action if the rejection is to be maintained. *See* 37 CFR 1.104(c)(2). *See also* [*In re Zurko*, 258 F.3d 1379, 1386 (Fed. Cir. 2001)] (“[T]he Board [or examiner] must point to some concrete evidence in the record in support of these findings” to satisfy the substantial evidence test). If the examiner is relying on personal knowledge to support the finding of what is known in the art, the examiner must provide an affidavit or declaration setting forth specific factual statements and explanation to support the finding. *See* 37 CFR 1.104(d)(2).

MPEP § 2144.03(C); *see also* *K/S HIMPP v. Hear-Wear Techs., LLC*, 751 F.3d 1362, 1365–66 (Fed. Cir. 2014).

After Appellants' belated arguments regarding Official Notice in the Appeal Brief (App. Br. 26–28), the Examiner provided references (Ellis and Elcock) showing the noticed facts to be well-known (Ans. 15). Ellis and Elcock, taken with the other applied references of Vereen and Yamada and the knowledge of a person of ordinary skill in the art at the time of Appellants' claimed invention, teach or suggest the feature recited in claim 10 of “transmitting an offer to the viewer within the customer premises.” The Examiner has pointed to concrete evidence (e.g., Ellis at Fig. 22a and

col. 19, line 46 to col. 20, line 46 and Elcock at ¶ 29, cited in the Answer at page 15) in support of the findings regarding transmission of offers being well known at the time of the invention. *See In re Zurko*, 258 F.3d 1379, 1386 (Fed. Cir. 2001) (“the Board [or Examiner] must point to some concrete evidence in the record in support of these findings” (referring to assertions by PTO of facts not of record, such as officially noticed facts) to satisfy the substantial evidence test); *see also In re Berg*, 320 F.3d 1310, 1313, 1315 (Fed. Cir. 2003) (affirming the Board’s affirmance of an Examiner’s obviousness rejection which relied upon a noticed fact where appellant did not sufficiently rebut the prima facie case). Appellants’ arguments that Ellis and Elcock do not disclose or suggest transmitting an offer to view missed video programming (App. Br. 32–33; Reply Br. 26–28), are not persuasive since the Examiner’s obviousness rejection of claim 10 also relied on Vereen and Yamada, as well as the knowledge of the ordinarily skilled artisan that it is desirable to prevent unnecessary transmission of missed content, and network bandwidth can thus be conserved, by transmitting an offer to the user at the customer premises and resuming responsive to offer acceptance (*see* Final Act. 9).

#### *Claim 12*

With regard to independent claim 12, we adopt as our own (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken (Final Act. 14–15), as well as the Advisory Action (pp. 2–3); and (2) the reasons set forth by the Examiner in the Examiner’s Answer in response to Appellants’ Appeal Brief (*see* Ans. 15–18). We concur with the

conclusions reached by the Examiner with regard to the obviousness of claim 12 in view of the combination of Vereen, Yamada, and Katz. Specifically, we agree with the Examiner (Final Act. 15; Advisory Action 3; Ans. 16–17) that (i) Katz teaches a video-on-demand service that, in response to the notice of the interruption, stops the transmission of a video program that was being accessed by a video device at the customer’s premises before an interruption as recited in claim 12 (*see* Final Act. 15; Advisory Action 3; Ans. 16–17); and (ii) it would have been obvious to modify Vereen and Yamada with the video-on-demand stop feature of Katz “for the purpose of allowing users to terminate content and resume said content on demand basis subsequent to interruption(s)” (Final Act. 15; Advisory Action 3; Ans. 17).

#### CONCLUSIONS

(1) The Examiner did not err in determining the combination of Vereen and Yamada teaches or suggests the limitations of representative claim 1 and dependent claim 10, because: (a) the combination of Vereen and Yamada teaches or suggests the contested limitations (i) “sending, in response to the loss at the customer premises of the power supplied from the commercial power grid to the customer premises, a notice of the interruption *through the network to a node having a video recorder in the network*” as recited in representative claim 1, and (ii) “transmitting an offer to the viewer within the customer premises” as recited in claim 10 when taken with the knowledge of a person of ordinary skill in the art, including the Officially Noticed facts; and (b) Vereen and Yamada are properly combinable.

(2) The Examiner did not err in rejecting claim 12 as being unpatentable under 35 U.S.C. § 103(a) over the combination of Vereen, Yamada, and Katz because the combination teaches or suggests the limitation of “stopping, by the video-on-demand server in response to the notice of the interruption, a transmission of a video program that was being accessed by the video device within the customer premises before the interruption.”

#### DECISION

We affirm the Examiner’s obviousness rejections of claims 1, 2, 4, 5, 7–13–15, 17–22, 24, and 25.

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