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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte STEFAN JENZOWSKY, NORBERT LOBLG, and
RUDOLF STELZL

Appeal 2015-002357
Application 12/094,001
Technology Center 2400

Before THU A. DANG, JOHN A. EVANS, and
MELISSA A. HAAPALA, *Administrative Patent Judges*.

HAAPALA, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellants have requested rehearing of the decision entered September 1, 2016, which affirmed the Examiner's decision to reject claims 1–16 under 35 U.S.C. § 103(a) and reversed the Examiner's decision to reject claims 1–5 and 14 under 35 U.S.C. § 112, second paragraph. We have considered Appellants' arguments, and we are not persuaded that any matters were misapprehended or overlooked in our Decision. Therefore, the request for rehearing is *denied*.

DISCUSSION

A request for rehearing “must state with particularity the points [of law or fact] believed to have been misapprehended or overlooked by the Board,” and must comply with 37 C.F.R. § 41.52(a)(1)(2012).

Appellants’ request for rehearing contends that there were legal errors in our Decision. Req. Reh’g 1–6. Specifically, Appellants argue that it was legal error for us to fail to acknowledge the substantive changes in the Examiner’s position in the Answer, which Appellants contend amounted to a new ground of rejection, and refusing to hear Appellants’ challenge responding to the Examiner’s new facts and rationales. *Id.* at 2–3.

Appellants further argue that substantive arguments were presented in the Appeal Brief and it was both legally and factually erroneous for the arguments to be characterized as “not a substantive argument for separate patentability.” *Id.* at 4–6. Appellants additionally argue our Decision failed to even recognize the arguments presented that a person having ordinary skill in the art would have no reason to select Daniels to cure Dooms’ deficiencies. *Id.* at 6.

We note that Appellants presented a new argument in the Reply Brief that the claimed subject matter requires the “interruption of the first program” must be “caused by the additional program contribution.” Reply Br. 7. As set forth in our Decision, in the absence of showing of good cause explaining why the argument could not have been presented in the principle Brief, we deemed the argument waived and did not consider it. Dec. 5 n.3. We disagree with Appellants’ assertion in the Request for Rehearing that the new argument was necessitated by a substantive change in position by the

Examiner that raised new facts and rationale. In the Answer, the Examiner provided further explanation to respond to Appellants' argument that a person of ordinary skill would have no reason to combine Daniels with Doods. Ans. 12. Contrary to Appellants' arguments (Req. Reh'g 2–3; Reply Br. 7), the Examiner did not newly contend that the user action taught the claimed “interruption of the first program,” but rather still relies on the same finding made in the Final Office Action that the advertisement taught by Doods (equated to be the “additional program content”) teaches the recited interruption of the first program “caused by the additional program content.” *See* Ans. 12; Final Act. 6. Therefore, we are not persuaded it was legal error to decline to consider Appellants' new arguments in the Reply Brief. We also note that even if the argument had been timely filed and considered, it would not be persuasive. We agree with the Examiner that Doods' description of automatically detecting commercials (“additional program contribution”) teaches the recited “recognize an interruption of the content of the first program, the interruption caused by the additional program contribution.” *See* Doods 3:11–15.

We are also not persuaded it was legal error for our Decision to characterize Appellants' arguments regarding the “determine and transmit”¹ limitations as essentially an assertion the cited prior art does not teach the claimed language and not a substantive argument for patentability. *See* Dec. 5. In the Brief, Appellants' arguments begin with a description of Doods and an assertion that “as admitted by the present Office Action, Doods fails to disclose [the “determine and transmit” limitations].” App. Br. 13.

¹ Our Decision used “determine and transmit” to refer to the claim limitations specified in Issue B. *See* Dec. 3.

Appellants then present arguments regarding the combination (e.g., Daniels provides no motivation to select a different channel as required by Dooms; a person of ordinary skill would have no good reason to refer to Daniels to cure the deficiencies of Dooms). *Id.* at 14. As discussed *infra*, our Decision did address these arguments, which are arguments that the combination is improper, not substantive arguments explaining why the combination of references does not disclose the “determine and transmit” limitations. In the Brief, Appellants also assert that Dooms does not teach controlling where in the second program its content is to begin, but as acknowledged previously by Appellants, the Examiner relied on Daniels to teach these deficiencies (recited “determining a time of continuation”). *See id.* Appellants then contend the relied-upon combination does not teach the “determine and transmit” limitations. *Id.* In none of these assertions does Appellants substantively address the specific findings relied upon by the Examiner or explain why the specific relied upon combined teachings do not teach or suggest the “determine and transmit” limitations. Nor are the specific findings addressed in the Reply Brief. *See* Reply Br. 8. Therefore, as set forth in our Decision, Appellants did not present substantive arguments to overcome the prima facie case presented by the Examiner with regard to these limitations. *See* Dec. 5–6.

Furthermore, contrary to Appellants’ assertions that we did not address the arguments that a person of ordinary skill in the art would not have combined Doom and Daniels (Req. Reh’g 5–6), our Decision did address these arguments and found them to be unpersuasive. *See* Dec. 6. Specifically, we determined the Examiner provided sufficient articulate reasoning, with rational underpinning, to support the combination. *Id.*

For the reasons stated above, Appellants have not shown we misapprehended or overlooked any issue of fact or law in our Decision.

CONCLUSION

We have *granted* Appellants' request for rehearing to the extent that we have reconsidered our Decision entered September 1, 2016. Appellants have not shown that we misapprehended or overlooked any issue of law or fact in reaching that Decision. Accordingly, the request is *denied*.

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). *See* 37 C.F.R. § 41.50(f).

REHEARING DENIED