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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte VENKATESH JOSHI

Appeal 2017-002607
Application 13/279,174[1]
Technology Center 2400

Before JOHN A. JEFFERY, BRUCE R. WINSOR, and
JUSTIN BUSCH, *Administrative Patent Judges*.

WINSOR, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134(a) from the final rejection of claims 21–44, which constitute all the claims pending in this application (Final Act. 1). We have jurisdiction under 35 U.S.C. § 6(b).

We affirm-in-part.

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[1] The real party in interest identified by Appellant is ARUBA NETWORKS, INC. Appeal Br. 3.

STATEMENT OF THE CASE

Appellant's disclosed "[e]mbodiments of the invention relate to methods of transitioning voice clients among wireless networks." Spec. ¶ 8. Claims 21 and 28, which are illustrative, read as follows:

> 21. A computer implemented method, comprising:
>
> receiving, at a network monitor including one or more hardware processors, one or more beacon frames including load elements that characterize WiFi access point loads for associated WiFi access points;
>
> determining that a WiFi access point load of the WiFi access point loads exceeds a threshold load; and
>
> in response to a determination that the WiFi access point load of the WiFi access point loads exceeds the threshold load, transmitting a message from the network monitor to a WiFi access point of the WiFi access points, wherein the WiFi access point is associated with the WiFi access point load, wherein the message comprises an instruction to cause the WiFi access point to send a transition management message to a subset of voice clients, wherein the subset of voice clients includes all idle voice clients associated with the WiFi access point, and wherein the transition management message comprises an instruction to cause an idle voice client of the idle voice clients to transition to another WiFi access point.
>
> 28. The method of claim 21, wherein the message comprises the instruction to cause the WiFi access point to send the transition management message only to voice clients that are idle and not to voice clients that are not idle.

Claims 28, 36, and 44 stand rejected under 35 U.S.C. § 112, first paragraph,[2] as failing to comply with the written description requirement. *See* Final Act. 2–3.

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[2] All rejections are under the provisions of 35 U.S.C. in effect prior to the effective date of the Leahy-Smith America Invents Act of 2011. *See, e.g.*,

Claims 21–24, 26, 29–32, 34, 37–40, and 42 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Zou et al. (US 2011/0250891 A1; Oct. 13, 2011) and Hasse (US 2005/0208950 A1; Sept. 22, 2005). *See* Final Act. 4–17.

Claims 25, 27, 33, 35, 41, and 43 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Zou, Hasse, and IEEE Standard for Information technology -- Telecommunications and information exchange between systems -- Local and metropolitan area networks -- Specific requirements; *Part 11: Wireless LAN Medium Access Control (MAC) and Physical Layer (PHY) Specifications, Amendment 2: Fast Basic Service Set (BSS) Transition*, IEEE Std. 802.11r, 2008. *See* Final Act. 17–21.

Rather than repeat the arguments here, we refer to the Briefs ("Appeal Br." filed Mar. 18, 2016; "Reply Br." filed Dec. 1, 2016) and the Specification ("Spec." filed Oct. 21, 2011) for the positions of Appellant and the Final Office Action ("Final Act." mailed Sept. 21, 2015) and Examiner's Answer ("Ans." mailed Oct. 5, 2016) for the reasoning, findings, and conclusions of the Examiner. Only those arguments actually made by Appellant have been considered in this decision. Arguments that Appellant did not make in the Briefs have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(iv) (2015).

ISSUES

The dispositive issues presented by Appellant's arguments are as follows:

Final Act 2, 3.

Does the Examiner err in finding "the message comprises the instruction to cause the WiFi access point to send the transition management message only to voice clients that are idle and not to voice clients that are not idle," as recited in claim 28, is unsupported by Appellant's written description?

Does the Examiner err in finding the combination of Zou and Hasse teaches or suggest "a determination that the WiFi access point load of the WiFi access point loads exceeds the threshold load," as recited in claim 21?[3]

ANALYSIS

Rejection under 35 U.S.C. § 112, 1st paragraph

The Examiner finds the phrase "the message comprises the instruction to cause the WiFi access point to send the transition management message only to voice clients that are idle and not to voice clients that are not idle," as recited in claim 28, is not supported by Appellant's Specification because "[t]he [S]pecification teaches sending the message to idle voice clients attached to the access point, but does not limit the message to <u>only</u> the idle voice clients." Final Act. 2 (emphasis in original). The Examiner explains "Appellant's [S]pecification does not provide a reason to exclude the subject matter[,] does not describe alternate features (i.e. other station types[), and] mentions nothing other than idle voice clients." Ans. 4.

Appellant contends paragraphs 8 and 18 of the Specification, "which indicate that the 'BSS Transition Management Request frame [is sent] to <u>all</u>

[3] Appellant's arguments present additional issues for claim 21. However, because the identified issue is dispositive of the appeal, we do not reach the additional issues.

associated voice clients which are idle,' clearly provide support for sending the BSS Transition Management Request frame to only all of the associated voice clients which are idle." Appeal Br. 8 (emphasis in original). In particular, paragraph 8 of the Specification provides a meaningful distinction between voice clients that are idle and those inherently not idle. Reply Br. 3. Appellant further contend paragraph 3 of the Specification provides a reason to exclude non-idle voice clients because paragraph 3 of the Specification describes maintaining a high Quality of Service (QoS), and handing off non-idle voice clients "inherently may negatively impact QoS." Reply Br. 3.

We agree with the Examiner. The limitation "only" idle voice clients does not appear in the claims as originally filed, but rather was added during prosecution. *Compare* Spec. 5–6 (original claims), *with* Amendment after Final Rejection 2–5 (Jan. 26, 2015) (amended claims). The language at lines 2–3 of claim 28 recites "to send the transition management message *only* to voice clients that are idle and not to voice clients that are not idle" (Appeal Br. 29 (Claims App'x) (emphasis added)). The ordinary meaning of "only," which is consistent with claim 28, is "*adverb* . . . **1 a** : as a single fact or instance and nothing more or different . . . **b** : solely, exclusively." Merriam-Webster's Collegiate Dictionary 812 (10th ed. 1999). Sending a transition management message to "only" voice clients that are idle is sending the transition management message exclusively to idle voice clients, and not to voice clients that are not idle — a negative limitation.

It is well settled that negative limitations are permissible forms of expression to define the scope of a claimed invention. *See generally Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, 923 (Fed. Cir. 1991). But the mere absence of a positive recitation in the original disclosure is not basis to

exclude the limitation. MPEP § 2173.05. Rather, "[n]egative claim limitations are adequately supported when the specification describes a *reason* to exclude the relevant limitation." *Santarus, Inc. v. Par Pharmaceutical, Inc.*, 694 F.3d 1344, 1351 (Fed. Cir. 2012) (emphasis added). "The '*reason*' required by *Santarus* is provided, for instance, by properly describing alternative features of the patented invention." *Inphi v. Netlist, Inc.*, 805 F.3d 1350, 1356 (Fed. Cir. 2015) (emphasis added).

We agree with Appellant that paragraphs 8 and 18 the Specification support sending a message to voice clients which are idle. *See* Appeal Br. 7–8; Reply Br. 2–3. However, Appellant has not provided sufficient evidence and/or a persuasive line of technical reasoning explaining why sending a message to non-idle voice clients would result in handing off non-idle voice clients (*see* Reply Br. 3) and therefore providing a reason to exclude non-idle voice clients. Moreover, paragraphs 8 and 18 of the Specification do not provide a meaningful distinction between idle and non-idle voice clients providing a reason that sending a message to "<u>all associated voice clients which are idle</u>" would preclude also sending the message to non-idle voice clients. Therefore, we are not persuaded by Appellant's arguments.

We find the original disclosure does not reasonably convey such a reason for exclusion. Therefore, the disclosure does not "'clearly allow persons of ordinary skill in the art to recognize that [the inventor] invented what is claimed.'" *Ariad Pharmaceuticals v. Eli Lilly and Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc) (quoting *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1562–63 (Fed. Cir. 1991)). "[W]hile the description requirement [of § 112] does not demand any particular form of disclosure, or

that the specification recite the claimed invention *in haec verba*, a description that merely renders the invention obvious does not satisfy the requirement." *Id.* at 1352 (citations omitted). Therefore, to the extent that Appellant contends that the recited negative limitation would have been obvious from the original disclosure, such a contention is unavailing in light of *Ariad*. Accordingly, Appellant has not persuaded us the Examiner erred in rejecting claim 28 as unsupported by the written description of Appellant's Specification. For the foregoing reasons, we sustain the rejections of (1) claim 28; and (2) claims 36 and 44, which recite limitations substantially similar to that argued regarding claim 28 and were not separately argued with particularity (*see* Appeal Br. 7–8).

Rejection under 35 U.S.C. § 103(a)

The Examiner relies on Zou to teach determining a WiFi access point load exceeds a threshold, as recited in claim 21. Final Act. 4–5 (citing Zou ¶¶ 31, 50–51); *see also* Ans. 5–9 (additionally citing Zou ¶¶ 35, 45, 50). The Examiner explains "if the system is overloaded, it will send a paging message from the network, to the cell, to the idle device to cause it to reselect." Ans. 8; *see also id.* nn.11–13 (citing Zou ¶¶ 35, 45, 50) (emphasis omitted). The Examiner further explains "the system being overloaded would be the system having a load that is above a threshold. However, Zou specifically teaches use of thresholds in" paragraph 50 [of Zou]. Ans. 8 n.11 (emphasis omitted).

Appellant argues, *inter alia*, that Zou does not teach or suggest a determination that a WiFi access point load of WiFi access point loads exceeds a threshold load. *See generally* Appeal Br. 13; Reply Br. 4–5.

Accepting, *arguendo*, that Zou teaches determining that both system and access network loads exceed a threshold, we nonetheless agree with Appellant.

Zhou's wireless communication "system" (Zou ¶ 33) teaches including access points 215 (Zhou Fig. 2, ¶ 33) that provide service within microcells. "Moreover, when the system is overloaded, the speed factor may be a secondary consideration" in redirection decisions. Zhou ¶ 45. Although the Examiner asserts a paging message is sent from a network to a cell if a *system* is overloaded (Ans. 8), the Examiner does not point to, nor do we find, any teaching of Zhou of determining that an *access point* 215 from the system exceeds a threshold load. Therefore, Zhou's overloaded system alone (¶ 45) does not teach or suggest the disputed limitation.

Turning to Zhou's access network (Zhou ¶¶ 49, 50), Zhou teaches an example of an overall load being relatively high when a measured load on an "access network or system" is above a predetermined threshold load. However, we find nothing in Zhou that teaches a determination that a WiFi *access point* load exceeds a threshold load. To be sure, Zhou (¶ 6) does teach "access points or access networks" can provide wireless connectivity to mobile units, but one of ordinary skill would not understand this disclosure to suggest access points are the same as access networks, particularly in light of Zhou's teaching that "access network or system" loads are above a predetermined threshold load (¶¶ 49, 50), and that "[b]ase stations or access points" provide wireless connectivity in a small area (¶ 6). Therefore, the disclosure of Zhou's access network load exceeding a predetermined threshold load from paragraphs 49 and 50 does not teach or suggest the disputed limitation.

We find Appellant demonstrates that the Examiner errs in finding the combination of Zou and Hasse teaches or suggests the disputed limitation of claim 21. Accordingly, we do not sustain the rejections of (1) claim 21; (2) independent claims 29 and 37, which include limitations substantially similar to the disputed limitation (*compare* Appeal Br. 28 (Claims App'x), *with id.* at 29–30, 32–33) and were rejected on substantially the same bases as claim 21 (*see* Final Act. 9–10, 13–14); and (3) claims 22–27, 30–35, and 38–43,[4] which variously depend from claims 21, 29, and 37 (*see In re Fine*, 837 F.2d 1071, 1076 (Fed. Cir. 1988) ("Dependent claims are nonobvious under section 103 if the independent claims from which they depend are nonobvious.")).

DECISION

The decision of the Examiner to reject claims 28, 36, and 44 under 35 U.S.C. § 112, first paragraph, is affirmed.

The decision of the Examiner to reject claims 21–27, 29–35, and 37–43 under 35 U.S.C. § 103(a) is reversed.

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). *See* 37 C.F.R. §§ 41.50(f), 41.52(b).

AFFIRMED-IN-PART

[4] We note that Appellant incorrectly identifies claims 28, 36, and 44 as rejected under 35 U.S.C. § 103(a). *Compare* Appeal Br. 23–25, *with* Final Act. 26–27.