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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* FREDERICK ENNS, MICHEL VEILLETTE, and  
RANDALL WAYNE FREI

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Appeal 2017-009831  
Application 14/218,211  
Technology Center 2400

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Before ST. JOHN COURTENAY III, LARRY J. HUME, and  
JOYCE CRAIG, *Administrative Patent Judges*.

COURTENAY, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

This is an appeal under 35 U.S.C. § 134(a) from the Examiner's Final Rejection of claims 1–12. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

*Invention*

The disclosed and claimed invention on appeal relates to “improved communications between HAN devices and head-end systems utilizing a communications hub function over a WAN such as a cellular network.” (Spec. 2).

*Representative Claim*

1. A computer implemented method for coordinating firmware updates comprising:
  - receiving, from a designated server, firmware upgrades at a hub device, wherein the firmware upgrades comprise one or more firmware upgrade images for updating
    - [L1] one or more target devices, wherein the hub device acts as both a coordinator and gateway between a wide area network (WAN) and one or more home area network (HAN) devices;
    - [L2] authenticating, at the hub device, the one or more firmware upgrade images;
    - performing firmware upgrade on a target device when the target device is the hub device;
    - transferring, from the hub device, the one or more firmware upgrade images to the one or more target devices when the one or more target devices are HAN devices;
    - [L3] initiating upgrade of the one or more target devices in accordance with the transferred one or more firmware upgrade images;
    - [L4] reporting, by the hub device, a status of each of the one or more target devices to the WAN; and
    - [L5] messaging, by the hub device, activation instructions for the one or more firmware upgrade images to the one or more target devices.

(Contested limitations L1 – L5 are emphasized).

*Rejections*

A. Claims 1, 4, and 7–11 are rejected under pre-AIA 35 U.S.C. § 103(a) as being obvious over the combined teachings and suggestions of O’Neill (US 2003/0182414 A1, iss. Sept. 25, 2003) and Keany et al. (“Keany,” US 2008/0059275 A1, publ. March 6, 2008).

B. Claims 2, 3, 5, 6, and 12 are rejected under pre-AIA 35 U.S.C. § 103(a) as being obvious over the combined teachings and suggestions of O'Neill, Keany, and Kapadekar et al. (“Kapadekar,” US 2007/0093243 A1, publ. April 26, 2007).

#### *Grouping of Claims*

Based on Appellants’ arguments in the Appeal Brief, we decide the appeal of rejection A of separately argued claims 1 and 4, separately, *infra*. We decide the appeal of claims 7–11, also rejected under rejection A, based upon representative claim 7. We decide the appeal of claims 2, 3, and 12, rejected under rejection B, based upon representative claim 2. To the extent Appellants have not advanced separate, substantive arguments for the remaining claims on appeal, such arguments are considered waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).

#### ANALYSIS

In reaching this decision, we consider all the evidence presented and all arguments actually made by Appellants. We find Appellants’ arguments unpersuasive for the reasons discussed *infra*. We adopt as our own: (1) the findings and legal conclusions set forth by the Examiner in the Final Office Action from which this appeal is taken (Final Act. 2–9), and (2) the findings, legal conclusions, and explanations set forth in the Answer in response to Appellants’ arguments (Ans. 9–14). We highlight and address specific findings and arguments for emphasis in our analysis below.

*Rejection A of Independent Claim 1 under 35 U.S.C. § 103(a)*

Appellants contend, “O’Neill fails to teach a hub, [and] Keany fails to teach a hub that is both a coordinator and a gateway between a WAN and a HAN.” (App. Br. 10).

We are not persuaded by Appellants’ arguments because Appellants are arguing the references separately.<sup>1</sup> The Examiner cites Keany, not O’Neill, for teaching or suggesting a hub and a HAN. (Final Act. 5; *see* Keany Fig. 1, ¶16). The Examiner cites O’Neill (Figs. 1B, 1C, ¶¶ 40, 160) for teaching a device that is both a coordinator and a gateway between a WAN and another network. (Final Act. 3).

Moreover, we agree with the Examiner that O’Neill’s update server, acting as a gateway, and coordinating the transfer of update packages, teaches, or at least suggests, contested limitation L1: “one or more target devices, wherein the hub device acts as both a coordinator and gateway between a wide area network (WAN) and one or more home area network (HAN) devices,” as recited in claim 1. (Ans. 10–11).

We find a preponderance of the evidence supports the Examiner’s findings because O’Neill’s update server coordinates transfers of update packages to a plurality of client devices, in which the update server acts as a gateway. *See* O’Neill ¶ 47 (“the update server array 122 may **coordinate** the transfer of a plurality of update packages”), ¶ 60 (“the update device server(s) 136 acts as **gateways**”) (emphasis added). We further agree with

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<sup>1</sup> One cannot show non-obviousness by attacking references individually where the rejections are based on combinations of references. *In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

the Examiner’s findings because we find Keany’s remote network devices, which include a gateway, teach or at least suggest<sup>2</sup> the disputed term. (Final Act. 5, citing Keany ¶ 16).

Appellants further urge: “the cited combination fails to teach a **firmware** upgrade, rather than a **software** upgrade.” (App. Br. 10).

However, the Examiner concludes the claimed “firmware” is a type of software and further finds O’Neill’s updating of *firmware or software* components in devices teaches, or at least suggests, “firmware upgrades,” as recited in claim 1. (Ans. 10, citing O’Neill ¶¶ 42, 63).

We find Appellants’ argument unavailing because it is grounded on an erroneous premise that firmware is not a type of software. We agree with the Examiner’s findings, because we find O’Neill’s over the air (OTA) updating of software or firmware teaches or at least suggests the disputed limitation. *See* O’Neill ¶ 42 (“One desirable feature of the **update management system** is that it may be readily adapted for use in wireless update procedures or over the air (OTA) updating. This method allows updates for **software or firmware components** in devices without hardware changes.”) (emphasis added).

Appellants further contend, “[t]he cited combination fails to teach messaging the activation instructions to the target devices *after* the hub has received and transmitted a status of each target device receiving the

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<sup>2</sup> Our reviewing court guides: “the question under [35 U.S.C. § 103] is not merely what the references expressly teach but what they would have **suggested** to one of ordinary skill in the art at the time the invention was made.” *Merck & Co. v. Biocraft Labs., Inc.*, 874 F.2d 804, 807 (Fed. Cir. 1989) (emphasis added); *see also* MPEP § 2123.

upgrade,” because both references teach “automatic execution of a software upgrade.” (App. Br. 11).

The Examiner notes that Appellants are arguing limitations not recited in the claim. (Ans. 11). Because computer implemented method claim 1 is silent regarding any *transmitting* step, we agree with the Examiner that Appellants’ arguments are not commensurate with the scope of the claim(s). Further, claim 1 is silent as to the hub having the argued “received and transmitted a status” steps. *See* App. Br. 11 (“The cited combination fails to teach messaging the activation instructions to the target devices *after* the hub has **received and transmitted** a status of each target device receiving the upgrade.”) (Emphasis added).

We also are not persuaded by Appellants’ arguments because we find O’Neill’s description of the update server array coordinating the transfer of a plurality of update packages, and the update server array retrieving the required version of the update packages, teaches or at least suggests the contested limitation. (O’Neill ¶¶ 47, 60).

For at least the aforementioned reasons, on this record, and based upon a preponderance of the evidence, we are not persuaded by Appellants’ arguments alleging the proffered combination of references does not teach or suggest the contested limitations, within the meaning of claim 1.<sup>3</sup> Therefore, we sustain the Examiner’s rejection A of claim 1.

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<sup>3</sup> We give the claims their broadest reasonable interpretation consistent with the Specification. *See In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997). While we interpret claims broadly but reasonably in light of the Specification, we nonetheless must not import limitations from the Specification into the claims. *See In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993).

*Rejection A of Dependent Claim 4 under 35 U.S.C. § 103(a)*

Dependent claim 4 recites: “The method of claim 1, further comprising scheduling an activation time for each firmware upgrade.”

Appellants contend “claim 4 teaches scheduling activation of the firmware upgrade AFTER the firmware upgrade has already been downloaded and installed, as described above.” (App. Br. 11).

The Examiner finds O’Neill’s staggering of the delivery of the update packages teaches or suggests this disputed limitation. (Ans. 12, citing O’Neill ¶ 51). The Examiner’s findings are further buttressed by O’Neill’s teaching of the update installation process remaining inactive until the next scheduled activation. (O’Neill ¶¶ 64, 68). *See* n.2, *supra*.

Therefore, based upon a preponderance of the evidence, we are not persuaded by Appellants’ arguments alleging the proffered combination of references does not teach or suggest the contested limitation, within the meaning of claim 4. Accordingly, we sustain the Examiner’s rejection A of claim 4.

*Rejection A of Dependent Claims 7–11 under 35 U.S.C. § 103(a)*

Dependent representative claim 7 recites: “The method of claim 1, wherein when there are two or more target devices, the firmware upgrade is performed sequentially.”

Appellants urge: “[t]he cited combination fails to teach any type of firmware upgrade as being performed sequentially, simultaneously, or in any manner as taught in Appellants’ claims 7-11.” (App. Br. 12).

We are not persuaded by Appellants’ argument because we find the *sequential upgrade* feature of claim 7 is taught or suggested by O’Neill’s description of an update server that sends the update package in *subsections*

to the client device, in which “[t]he *subsections* are applied *sequentially* to complete the update process.” (O’Neill ¶ 75 (emphasis added)). *See also* O’Neill at ¶¶ 18, 42, 64.

For at least these reasons, on this record, and based upon a preponderance of the evidence, we are not persuaded by Appellants’ argument, and we sustain the Examiner’s rejection A of representative claim 7, and grouped claims 8–11, which fall with claim 7. *See Grouping of Claims, supra.*

*Rejection B of Dependent Claims 2, 3, and 12 under 35 U.S.C. § 103(a)*

Regarding claims 2, 3, and 12, Appellants argue “[n]owhere does *Kapadekar* teach any circumstances for aborting the upgrade on all devices, as taught in Appellants’ invention.” (App. Br. 13).

However, we agree with the Examiner that Appellants are arguing limitations not commensurate with the scope of the claim. Claim 2 recites “one or more target devices,” whereas Appellants argue “all devices.”

Therefore, we sustain the Examiner’s rejection B of representative claim 2, and of grouped claims 3 and 12, which fall with claim 2. *See Grouping of Claims, supra.*

*Rejection B of Dependent Claims 5 and 6 under 35 U.S.C. § 103(a)*

Appellants advance conclusory, attorney arguments without a substantive argument regarding claims 5 and 6, which are rejected under rejection B.<sup>4</sup> (App. Br. 13). Arguments not made are waived. *See* 37

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<sup>4</sup> It is well settled that mere attorney arguments and conclusory statements, which are unsupported by factual evidence, are entitled to little probative value. *In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997); *see also In re*

C.F.R. § 41.37(c)(1)(iv). Because we are not persuaded the Examiner erred, we sustain the Examiner's rejection B of dependent claims 5 and 6.

*Reply Brief*

To the extent Appellants may advance new arguments in the Reply Brief not in response to a shift in the Examiner's position in the Answer, we note arguments raised in a Reply Brief that were not raised in the Appeal Brief, or are not responsive to arguments raised in the Examiner's Answer, will not be considered except for good cause. *See* 37 C.F.R. § 41.41(b)(2).

DECISION

We affirm the Examiner's rejections of claims 1–12 under pre-AIA 35 U.S.C. § 103(a).

No time for taking any action connected with this appeal may be extended under 37 C.F.R. § 1.136(a)(1). *See* 37 C.F.R. § 41.50(f).

AFFIRMED

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*Pearson*, 494 F.2d 1399, 1405 (CCPA 1974) (attorney argument is not evidence). *See also* Manual of Patent Examining Procedure (MPEP) § 2145 (9th ed. Nov. 2015) (“Attorney argument is not evidence unless it is an admission, in which case, an examiner may use the admission in making a rejection.”).