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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte TODD E. CHORNENKY

Appeal 2017-011686
Application 13/787,119
Technology Center 2600

Before DEBRA K. STEPHENS, DANIEL J. GALLIGAN, and DAVID J. CUTITTA II, *Administrative Patent Judges*.

STEPHENS, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134(a) from a final rejection of claims 1–19, 31–40, and 42–44, which are all of the claims pending in the application. We have jurisdiction under 35 U.S.C. § 6(b). Claims 20–30 and 41 have been cancelled.

We AFFIRM-IN-PART.

CLAIMED SUBJECT MATTER

According to Appellant, the claims are directed to an on-screen virtual diagonal keyboard (Spec. 3:17–18, Abstract). Claim 1, reproduced below, is illustrative of the claimed subject matter:

> 1. A diagonal virtual keyboard, comprising:
>
> rows of keys defining a keyboard axis, a keyboard diagonal and side borders of said diagonal virtual keyboard;
>
> said keyboard axis disposed mediate said side borders of said diagonal virtual keyboard and runs through a point formed, external to one side border of said diagonal virtual keyboard, by an intersection of a first secondary axis extending through a key "Q" and a second secondary axis extending through a key "P" in a conventional QWERTY keyboard, wherein one of said first and second secondary axes is disposed inwardly from and parallel to a respective side border;
>
> said rows of keys disposed in series with each other along said keyboard axis and within said side borders of said diagonal virtual keyboard so that all alphabetical keys are displayed on said display screen; and
>
> said keyboard axis being disposed at an acute or obtuse angle relative to a user of said diagonal virtual keyboard and being generally aligned along a length of an arm of the user using said diagonal virtual keyboard.

REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Rush	US 6,230,222 B1	May 8, 2001
Skillman	US 2007/0200828 A1	Aug. 30, 2007
Fong	US 2010/0251161 A1	Sept. 30, 2010
Avkarogullari	US 2011/0164184 A1	July 7, 2011
Liu	US 2011/0238676 A1	Sept. 29, 2011
Huang	US 2011/0264442 A1	Oct. 27, 2011

Ferren	US 2012/0075194 A1	Mar. 29, 2012
Wang	US 2012/0092196 A1	Apr. 19, 2012
Krishnamurthy	US 8,176,324 B1	May 8, 2012
Newell	US 2012/0200571 A1	Aug. 9, 2012
Santos-Gomez	US 2013/0135350 A1	May 30, 2013
Yang	US 2014/0082546 A1	Mar. 20, 2014

REJECTIONS

Claims 33–37 and 39 stand rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the enablement requirement (Final Act. 3–4).

Claims 32–34, 37, and 42–44 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Ferren (*id.* at 4–9).

Claims 1–10, 12, 14, 16, 19, and 31 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Yang and Ferren (*id.* at 9–19).

Claim 11 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Yang, Ferren, and Santos-Gomez (*id.* at 19).

Claim 13 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Yang, Ferren, and Huang (*id.* at 19–20).

Claim 15 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Yang, Ferren, and Wang (*id.* at 20–21).

Claim 17 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Yang, Ferren, and Fong (*id.* at 21–22).

Claim 18 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Yang, Ferren, and Krishnamurthy (*id.* at 22–23).

Claim 35 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Ferren and Avkarogullari (*id.* at 23–24).

Claim 36 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Ferren and Rush (*id.* at 24).

Claim 38 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Ferren and Liu (*id.* at 24–25).

Claim 39 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Ferren and Newell (*id.* at 25–26).

Claim 40 stands rejected under 35 U.S.C. §103(a) as being unpatentable over Ferren and Skillman (*id.* at 26–27).

Our review in this appeal is limited only to the above rejections and the issues raised by Appellant. Arguments not made are waived. *See* MPEP § 1205.02; 37 C.F.R. §§ 41.37(c)(1)(iv) and 41.39(a)(1).

ISSUE 1

Enablement

Appellant argues the invention as recited in claims 33–37 and 39 is enabled (App. Br. 41–42). The issue presented by the argument is:

Issue 1: Has the Examiner erred in concluding claims 33–37 and 39 fail to comply with the enablement requirement?

ANALYSIS

The Examiner concludes claim 33, which recites "identify[ing] a numeric key value of said each icon being touched by a user or clicked on by way of a data entry device based on a unique region of numeric values," does not satisfy the enablement requirement of 35 U.S.C. § 112, first paragraph (Final Act. 3–4; Ans. 19). In particular, the Examiner determines "a particular key corresponding to a unique region of numeric values . . . is not clearly explained or described in the [S]pecification" in a way that enables the skilled artisan to practice the invention (Ans. 19). Specifically,

the Examiner determines the Specification provides "no steps or further explanation . . . as to how the decoding of ARGB color values correspond to touch input of a particular key or how lower-order bits are used to construct the numeric key value, or how a numeric key value is identified" or "how a contact position on the keyboard with a finger is associated with ARGB hex values" (*id.*).

Appellant responds that "at least the disclosure in ¶0124 – ¶0147 will enable one skilled in the art" without any further elaboration (App. Br. 42).

Appellant, however, does not proffer sufficient evidence or argument persuading us the Examiner erred. Specifically, Appellant's citations are to the Specification, and Appellant provides no elaboration or explanation as to how the disclosure contains sufficient description to enable an ordinarily skilled artisan to make and use the invention.[1] Moreover, Appellant's bare citations do not respond to the Examiner's determination that the Specification fails to provide the "steps" for identifying a key based on a selected region, e.g., to account for a finger contact position covering many pixels, and thus, to account for "if the finger overflows and covers another key" during a touch selection (Ans. 19).

The Examiner further concludes the Specification does not satisfy the enablement requirement of 35 U.S.C. § 112, first paragraph, for claims 34–37 and 39 (Final Act. 3–4; Ans. 19). Appellant does not provide a separate response for those claims (*see* App. Br. 42), similarly failing to proffer sufficient evidence or argument addressing the Examiner's determinations. Accordingly, Appellant has not persuaded us the Examiner erred in rejecting

[1] We also note Appellant's citations are to paragraph numbers; however, the originally filed Specification does not have paragraph numbers.

claims 33–37 and 39 for failing to satisfy the enablement requirement of 35 U.S.C. § 112, first paragraph.[2]

ISSUE 2

Rejection under 35 U.S.C. § 102 (e): Claims 32–34, 37, and 42–44

Appellant contends the invention as recited in claims 32–34, 37, and 42–44, is not anticipated by Ferren (App. Br. 12–29). The issues presented by the arguments are:

Issue 2a: Has the Examiner erred in finding Ferren discloses "said diagonal keyboard scalable, during use of said device, proportionally in both height and width to maintain same aspect ratio," as recited in claims 32 and 42 and similarly recited in claim 44?

Issue 2b: Has the Examiner erred in finding Ferren discloses "a height of said diagonal virtual keyboard being different than a width thereof," as recited in claim 43?

ANALYSIS

"keyboard scalable . . . to maintain same aspect ratio": Claims 32, 33–40, 42, and 44

Appellant contends the Examiner erred in finding Ferren discloses "said diagonal keyboard scalable, during use of said device, proportionally in both height and width to maintain same aspect ratio," as recited in claims 32 and 42 and similarly recited in claim 44 (App. Br. 24–25; Reply Br. 5–6

[2] Should there be further prosecution, we note claims 38, 40, and 41 depend from claim 34 and accordingly inherit claim's 34 deficiency.

(emphasis omitted)).[3] Specifically, Appellant argues "Ferren is silent as to any scalability of the keyboard . . . particularly 'proportionally in both height and width to maintain same aspect ratio'" (Reply Br. 6; *see* Ans. 24).

We are persuaded. The Examiner finds Ferren discloses that "the user may request to initiate calibration/scaling the diagonal virtual keyboard" (Final Act. 5, (citing Ferren ¶ 27), 8–9), where "the width and height of the virtual keyboard is twice that of another arc" and scaled accordingly (Ans. 9–10). However, we do not find where Ferren discloses that the scaled keyboard "maintain[s] [a] same aspect ratio." Instead, Ferren's discloses a "calibration arc" that "calibrate[s] the location of a keyboard row so the keys on that row will be at a convenient position for the user's thumb" (Ferren ¶ 27). While the calibration arc may size or scale the keyboard according to the calibration arc, placing keys along the calibration arc (Ferren ¶¶ 28–31), the Examiner has not shown where, or explained how, Ferren necessarily maintains the same aspect ratio when its keyboard is scaled.

We are, therefore, constrained by the record to find the Examiner errs in finding Ferren discloses "said diagonal keyboard scalable, during use of said device, proportionally in both height and width to maintain same aspect ratio," as recited in claims 32 and 42 and similarly recited in claim 44. Further, because we agree with at least one of the arguments advanced by Appellant, we need not reach the merits of Appellant's other arguments (*see* App. Br. 12–23). Dependent claims 31 and 33–40 stand with their

[3] Although Appellant argues the present limitation in regards to claim 42 (App. Br. 25–25; Reply Br. 5–6), claims 32 and 44, also rejected under 35 U.S.C. § 102(e) as being anticipated by Ferren, recite the same or similar language. Therefore, we address the limitation as it applies to claims 32, 42, and 44.

respective independent claims. Therefore, we cannot sustain the rejection of claims 32–34, 37, 42, and 44 under 35 U.S.C. § 102(e) and the rejections of claims 31, 35, 36, and 38–40 under 35 U.S.C. § 103(a).

Our reversal should not be taken as an indication of allowability or non-obviousness. Whether an ordinarily skilled artisan would have found it obvious to maintain the keyboard aspect ratio during Ferren's keyboard scaling is not a question before us because the Examiner has not made those conclusions; we will not speculate in that regard here in the first instance on appeal.

"a height . . . different than a width": Claim 43

Appellant contends the Examiner erred in finding Ferren discloses "a height of said diagonal virtual keyboard being different than a width thereof," as recited in claim 43 (App. Br. 26–28; Reply Br. 6). Specifically, Appellant argues "the person of ordinary skill in the art would not have recognize[d] that Ferren's keyboard, provided in a 90° segment shape, has different height and width" (App. Br. 28). Appellant further argues "even if, for the sake of argument, the 'height' of the [calibration] arc can be different than a 'width' thereof, the keyboard is generated as [a] 90° segment keyboard" (*id.*).

We disagree with Appellant's assertion that Ferren's keyboard may only be a keyboard with equal height and width. The Examiner points out that Ferren discloses a user drawing a "calibration arc" for "calibrating the size of the keyboard to the individual user" (Ferren ¶ 27) such that the arc's "height is different than the width" (Final Act. 9 (emphasis omitted)). Appellant asserts that, even if the "'height' of the [calibration] arc can be different than a 'width' thereof, the keyboard is generated as [a] 90° segment

keyboard," i.e., a keyboard with the same height and width (App. Br. 28). However, as the Examiner points out (Ans. 11), Ferren discloses "[o]nce the arc locations have been determined . . . the device may assign the position of each key *along each arc*, with each arc representing a row of keys" (Ferren ¶ 30 (emphasis added); *see* Ferren ¶ 18 ("the arcs may not be perfectly circular")). As such, Ferren's keyboard has a differing height and a differing width because the keys of the keyboard are placed along Ferren's arc, and that arc has differing height and width. Accordingly, we are not persuaded the Examiner erred in finding Ferren describes "a height of said diagonal virtual keyboard being different than a width thereof," within the scope of the claim.

Thus, we are not persuaded the Examiner erred in finding Ferren discloses the invention as recited in independent claim 43.

ISSUE 3

Rejections under 35 U.S.C. § 103 (a): Claims 1–19 and 31

Appellant contends the invention as recited in claims 1–10, 12, 14, 16, 19, and 31 is patentable over Yang and Ferren (App. Br. 31–41) and dependent claims 11, 13, 15, 17, and 18 are patentable over Yang and Ferren in combination with Santos-Gomez, Huang, Wang, Fong, and Krishnamurthy, respectively (App. Br. 41). The issues presented by the arguments are:

Issue 3a: Has the Examiner shown the combination of Yang and Ferren teaches or suggests

> said keyboard axis disposed mediate said side borders of said diagonal virtual keyboard and runs through a point formed, external to one side border of said diagonal virtual keyboard, by

> an intersection of a first secondary axis extending through a key "Q" and a second secondary axis extending through a key "P,"

as recited in claim 1?

Issue 3b: Has the Examiner shown Ferren teaches or suggests "each end of said keyboard diagonal is alignable with a respective corner of said screen," as recited in claim 9?

Issue 3c: Has the Examiner shown Ferren teaches or suggests "side borders of said keyboard do not extend beyond borders of said screen," as recited in claim 9?

ANALYSIS

"keyboard axis disposed mediate . . . runs through a point formed, external to one side border" – Claim 1

Appellant contends the Examiner erred in finding the combination of Yang and Ferren teaches

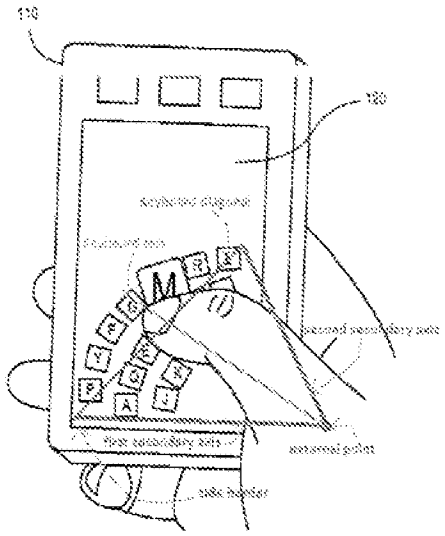
> [a] keyboard axis disposed mediate said side borders of said diagonal virtual keyboard and runs through a point formed, external to one side border of said diagonal virtual keyboard, by an intersection of a first secondary axis extending through a key "Q" and a second secondary axis extending through a key "P,"

as recited in claim 1 (App. Br. 34–37). Appellant argues that neither Ferren nor Yang teach an external point and, instead, are "directed to a sector-shape keyboard with the (pivot) point being aligned . . . with a corner of the display screen," rather than a point external to the borders of the keyboard on the display screen (App. Br. 34–35; *see* App. Br. 36–37). Appellant further argues Yang "fails to define/teach such claimed 'keyboard axis' and 'keyboard diagonal'" and "fails to define/teach . . . secondary ax[es] in . . . FIG. 11" (App. Br. 36).

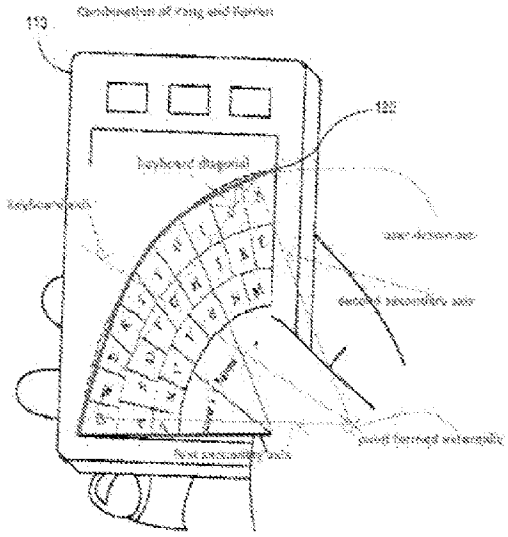
We are not persuaded. As an initial matter, the claimed keyboard axis, first secondary axis, second secondary axis, and external point are reference lines and points defined by their position and orientation in relation to a diagonal virtual keyboard that has been created. In particular, claim 1 only requires the secondary axes to extend respectively through the virtual keyboard's "Q" and "P" keys and to intersect external to the virtual keyboard's borders to form a point and only requires the keyboard axis to be "mediate" to the virtual keyboard's boarders and to run to the external point reference. Furthermore, the Specification does not define explicitly "a keyboard axis," "a first secondary axis," "a second secondary axis," or "a point formed, external," and instead provides examples describing that those axes and points are references designated by their relation to an existing virtual keyboard (Spec. 12:7–22, Fig. 1; *see* Spec. 13:10–14, 14:15–19). Accordingly, based on the claim and in light of the Specification, any arbitrary reference, positioned and oriented in relation to an existing virtual keyboard in the claimed manner, may be "a keyboard axis," "a first secondary axis," "a second secondary axis," or "a point formed, external."

Appellant's argument that "the pivot point of the user's thumb" in Ferren and Yang is at the corner of a screen (App. Br. 34–37) does not address the Examiner's finding that the combination of Ferren and Yang teaches "a point formed, external to one side border of said diagonal virtual keyboard" (Final Act. 10–12; *see* Ans. 4–6). As discussed above, the claims encompass any arbitrarily designated reference point positioned and oriented in relation to a virtual keyboard in the claimed manner. The Examiner designates an external reference point and relies on Ferren to teach a virtual

keyboard with reference axes and points (Final Act. 11–12). The Examiner annotates the virtual keyboard in Figure 1 of Ferren, reproduced below:



(Ans. 5). Annotated Figure 1 of Ferren illustrates a virtual keyboard with annotated secondary axes, an annotated external point, and an annotated keyboard axis within the boundaries of its virtual keyboard. Furthermore, the Examiner finds, and we agree, Yang's virtual QWERTY keyboard, having arbitrary reference lines extending through its "P" and "Q" keys, teaches "a first secondary axis extending through a key 'Q' and a second secondary axis extending through a key 'P'" (Final Act. 10 (emphasis omitted) (citing Yang Fig. 1); *see* Ans. 14). The Examiner combines an illustration from Figure 11 of Yang with annotated Figure 1 of Ferren, to create the illustration reproduced below:



(Ans. 14). The Examiner's illustration combines Yang's virtual keyboard of Figure 11 with the diagonal, axes, and external point references of the annotated Figure 1 of Ferren (*id.* at 13–14). Appellant's arguments, which focus on the pivot point of a user's thumb in Ferren and Yang (App. Br. 34–37), do not address the Examiner's annotated "point formed externally" to the virtual keyboard's boundaries. The Examiner's external point is a reference point defined by intersecting secondary axes, positioned and oriented to extend through the "Q" and "P" keys, as required by the claims. Even further, Appellant's argument that Yang does not teach a keyboard axis or diagonal (App. Br. 35) does not address the Examiner's combination of Ferren and Yang. As shown in the Examiner's illustrated combination, the keyboard axis reference designated by the Examiner is between the borders of the virtual keyboard, through its keys, and runs to the external point, as required by the claims. Moreover, as shown in the Examiner's illustrated combination, a keyboard diagonal reference line is diagonally oriented and positioned along the virtual keyboard.

Additionally, the claim does not require any specific proportions or measurements; therefore, Appellant's contention that Ferren's figure does not teach precise proportions is not persuasive of Examiner error (Reply Br. 7).

Accordingly, we are not persuaded the Examiner erred in finding the combination of Ferren and Yang teaches the invention as recited in independent claim 1 and dependent claims 2–8, and 10–19, not separately argued (App. Br. 41). Therefore, we sustain the rejection of claims 1–8 and 10–19 under 35 U.S.C. § 103(a).

"keyboard diagonal is alignable": Claim 9

Appellant contends the Examiner erred in finding Ferren teaches "each end of said keyboard diagonal is alignable with a respective corner of said screen," as recited in claim 9 (App. Br. 38; Reply Br. 7). Specifically, Appellant notes Ferren's "keyboard configuration shown in FIG. 1 is designed for right-handed operation by making the **rows of keys concentric about the lower right-hand corner**" (App. Br. 38 (quoting Ferren ¶ 25)). Further, Appellant argues the Specification teaches "alignment of the keyboard diagonal with opposite corners of the display" (Reply Br. 7 (citing Spec. Figs. 1, 2, 6)).

Appellant's argument directed to Ferren's *key rows* (App. Br. 38) does not address the Examiner's finding that the combination of Ferren and Yang teaches a keyboard diagonal spanning opposite corners of the screen that "is alignable with a respective corner of said screen" (*see* Ans. 14). Furthermore, Appellant's indication that Figures 1, 2, and 6 of the Specification teach an "alignment of the keyboard diagonal with opposite

corners of the display" (Reply Br. 7) is not commensurate with the scope of the claim. More specifically, the claim does not recite that the keyboard diagonal is in alignment with opposite corners of the display; rather, claim 9 recites the diagonal is "alignable." Moreover, the Specification does not use the term "alignable." Accordingly, the keyboard diagonal reference the Examiner finds in the combination of Ferren and Yang, teaches a keyboard diagonal "alignable with a respective corner of said screen," within the meaning of claim 9.

"side borders": Claim 9

Appellant next contends the Examiner erred in finding Ferren teaches "side borders of said keyboard do not extend beyond borders of said screen," as recited in claim 9 (App. Br. 38–39). Specifically, Appellant notes Ferren discloses "the full available keyboard may be thought of as an approximate wheel with four quadrants, with each quadrant having a separate set of characters, and **with only one quadrant visible on the touch screen at a time**" (*id.* (quoting Ferren ¶ 24)).

We are not persuaded because Appellant's argument discusses an embodiment of Ferren on which the Examiner does not rely (*id.*). Moreover, Appellant does not address the Examiner's conclusion that the combination of Ferren and Yang renders the disputed limitation obvious (*see* Final Act. 15). In particular, the Examiner determines the combination of Yang and Ferren teaches "the keyboard size can be adjusted to maintain a size ratio between the screen and the keyboard such that the side borders of the keyboard do not extend beyond borders of the screen" (Ans. 16; Final Act. 15). Appellant has not proffered sufficient evidence or argument to

persuade us the Examiner's combination fails to teach the disputed limitations.[4]

Accordingly, we are not persuaded the Examiner erred in finding the combination of Ferren and Yang teaches the invention as recited in dependent claim 9. Therefore, we sustain the rejection of claim 9 under 35 U.S.C. § 103(a).

DECISION[5]

The Examiner's rejection of claims 33–37 and 39 under 35 U.S.C. § 112, first paragraph, as failing to comply with the enablement requirement is affirmed.

The Examiner's rejection of claims 32–34, 37, 42, and 44 under 35 U.S.C. § 102(e) as being anticipated by Ferren is reversed.

The Examiner's rejection of claim 43 under 35 U.S.C. § 102(e) as being anticipated by Ferren is affirmed.

The Examiner's rejection of claims 1–10, 12, 14, 16, and 19 under 35 U.S.C. § 103(a) as being unpatentable over Yang and Ferren is affirmed.

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[4] We also note, although not relied upon in affirming the Examiner's rejection, Yang teaches a keyboard within the borders of a screen (*see* Yang Fig. 11, ¶ 60).

[5] Should there be further prosecution of claims 1 and 43, both of which similarly recite a "diagonal virtual keyboard," the Examiner may wish to consider whether the "diagonal virtual keyboard," claimed without any structure providing or supporting the virtual keyboard, should be rejected under 35 U.S.C. § 101 as not being directed to one of the four statutory categories of patentable subject matter – process, machine, manufacture, or composition of matter.

The Examiner's rejection of claim 31 under 35 U.S.C. § 103(a) as being unpatentable over Yang and Ferren is reversed.

The Examiner's rejection of claim 11 under 35 U.S.C. § 103(a) as being unpatentable over Yang, Ferren, and Santos-Gomez is affirmed.

The Examiner's rejection of claim 13 under 35 U.S.C. § 103(a) as being unpatentable over Yang, Ferren, and Huang is affirmed.

The Examiner's rejection of claim 15 under 35 U.S.C. § 103(a) as being unpatentable over Yang, Ferren, and Wang is affirmed.

The Examiner's rejection of claim 17 under 35 U.S.C. § 103(a) as being unpatentable over Yang, Ferren, and Fong is affirmed.

The Examiner's rejection of claim 18 under 35 U.S.C. § 103(a) as being unpatentable over Yang, Ferren, and Krishnamurthy is affirmed.

The Examiner's rejection of claim 35 under 35 U.S.C. § 103(a) as being unpatentable over Ferren and Avkarogullari is reversed.

The Examiner's rejection of claim 36 under 35 U.S.C. § 103(a) as being unpatentable over Ferren and Rush is reversed.

The Examiner's rejection of claim 38 under 35 U.S.C. § 103(a) as being unpatentable over Ferren and Liu is reversed.

The Examiner's rejection of claim 39 under 35 U.S.C. § 103(a) as being unpatentable over Ferren and Newell is reversed.

The Examiner's rejection of claim 40 under 35 U.S.C. §103(a) as being unpatentable over Ferren and Skillman 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). *See* 37 C.F.R. § 41.50(f).

AFFIRMED-IN-PART