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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MACK DENZIL GREENE

Appeal 2018-003265
Application 13/896,158
Technology Center 2400

Before CAROLYN D. THOMAS, JASON V. MORGAN, and
PHILLIP A. BENNETT, *Administrative Patent Judges*.

THOMAS, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1–5 and 7–21. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We AFFIRM IN PART.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Level 3 Communications, LLC. Appeal Br. 3.

The present invention relates generally to differentiating a portion of network traffic having an Internet Protocol-based attribute with reasonable certainty. Spec., Abstract.

Claims 1 and 8 are illustrative:

1. A method comprising:
 - identifying one or more origination attributes of a communication based on one or more characteristics of a network from which the communication originated;
 - identifying one or more termination attributes of the communication based on one or more characteristics of a destination end of the communication, the termination attributes being identified when the one or more origination attributes include at least one Internet Protocol-based attribute;
 - characterizing a type of the communication, using a processor, based on a correlation of the one or more origination attributes and the one or more termination attributes, the correlation determining whether the one or more origination attributes and the one or more termination attributes include the at least one Internet Protocol-based attribute; and
 - delivering the communication to the destination end based on the at least one Internet Protocol-based attribute.

8. A method comprising:
 - receiving data corresponding to a delivery of network traffic across a communications network, a portion of the network traffic having an Internet Protocol-based attribute;
 - applying a first filter to obtain a first subset of the data based on one or more characteristics of originating access traffic, the first subset including network traffic known to originate with the Internet Protocol-based attribute;
 - applying a second filter to data excluded from the first subset, the second filter being applied based on one or more characteristics of terminating access traffic to obtain a second subset of the data, the second subset including network traffic known to terminate with the Internet Protocol-based attribute;

correlating the first subset with the second subset, using a processor, to identify the portion of network traffic having the Internet Protocol-based attribute;

characterizing a type of the network traffic having the Internet Protocol-based attribute; and

delivering data associated with the network traffic to a destination based on the Internet Protocol-based attribute.

Appellant appeals the following rejections:

R1. Claims 1–5 and 7 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Jungck (US 1020/0103837 A1, Apr. 29, 2010) and Homan-Muise (US 2008/0243725 A1, Oct. 2, 2008);

R2. Claims 8–11 and 13–20² are rejected under 35 U.S.C. § 103(a) as being unpatentable over Jungck, Homan-Muise, and Swander (US 2005/0114704 A1, May 26, 2005);

R3. Claim 12 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Jungck, Homan-Muise, Swander, and Mundra (US 2006/0072548 A1, Apr. 6, 2006); and

R4. Claim 21 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Jungck, Homan-Muise, Swander, and Jedwab (Jonathan Jedwab et al., *Traffic estimation for the largest sources on a network, using packet sampling with limited storage*, Hewlett Packard (1992)).

We review the appealed rejections for error based upon the issues identified by Appellant, and in light of the arguments and evidence produced thereon. *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential).

² Although claims 15–20 are not listed in the heading of the rejection (*see* Final Action 8), claims 15–20 are discussed in the body of the rejection (*id.* at 12–17). Therefore, we shall treat this rejection as including all of claims 8–11 and 13–20.

ANALYSIS

Claims 1–5 and 7 Over Jungck and Homan-Muise

We start by noting that the Examiner relies upon Jungck to teach identifying origination and termination attributes (*see* Final Act. 4), and imports Homan-Muise to teach characterizing a type of communication based on a correlation of IP service use (*see* Final Act. 5).

However, Appellant contends Homan-Muise “simply discloses performing a consumption analysis of IP services that are used by a particular user.” Appeal Br. 10. Appellant further contends that Homan-Muise’s “tracking the activity of the workstation to determine abnormal behavior or to determine misconduct is not equivalent to characterizing the communication as required by claim 1.” Appeal Br. 11. As such, Appellant contends that “[n]either Jungck nor Homan . . . disclose or suggest characterizing a communication using one or more origination attributes and one or more destination attributes as claimed.” *Id.* at 12. We agree with Appellant.

We agree with Appellant that Homan-Muise’s “correlation of IP service use” is distinguishable from the claimed “correlation of . . . origination attributes and . . . termination attributes,” as the former regards what the workstations are being used for, e.g., to send/receive emails, while the latter regards examining the communication’s origin and destination attributes. Appeal Br. 10–11.

Furthermore, the Examiner has not shown that the cited combination of references illustrate a nexus between Jungck’s identifying origination and termination attributes and Homan-Muise’s correlation of IP service use.

Here, claim 1 requires “a correlation of . . . origination attributes and . . . termination attributes.” *See* claim 1. Because the Examiner has merely shown that Homan-Muise teaches correlating of IP service use, we see no causal link between Homan-Muise’s correlation and Jungck’s origination/termination attributes. As such, we agree with Appellant that neither Jungck nor Homan-Muise teach or suggest the aforementioned limitation.

Thus, we disagree with the Examiner’s finding that the combined teaching of Jungck and Homan-Muise teach a correlation of origination and termination attributes, as recited in independent claim 1. Accordingly, we will not sustain the Examiner’s obviousness rejection of claims 1–5 and 7.

*Claims 8–11 and 13–20
Over Jungck, Homan-Muise, and Swander*

Here the Examiner brings in a third reference, Swander, and now relies upon Swander to teach “network traffic known to originate with the Internet Protocol-based attribute . . . network traffic known to terminate with the Internet Protocol-based attribute . . . and correlating the first subset with the second subset . . . to identify the portion of network traffic having the Internet Protocol-based attribute” (*see* Final Act. 9–10), Jungck to teach “network traffic having the Internet Protocol-based attribute” (*see* Final Act. 8), and Homan-Muise to merely teach “characterizing a type of the network traffic” (*see* Final Act. 10).

We find that Appellant’s contentions regarding the aforementioned findings unavailing. Specifically, Appellant’s argument against Jungck separately from Swander and/or Homan-Muise does not persuasively rebut the combination made by the Examiner. *See* Appeal Br. 12–13. One cannot

show non-obviousness by attacking references individually, where the rejections are based on combinations of references. *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

Here, Appellant's arguments do not take into account what the collective teachings of the prior art would have suggested to one of ordinary skill in the art and are therefore ineffective to rebut the Examiner's prima facie case of obviousness. *See In re Keller*, 642 F.2d 413, 425 (CCPA 1981) ("The test for obviousness is not whether . . . the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art.") (citations omitted). This reasoning is applicable here because Appellant's argument is based on the notion that the entire claim invention must be expressly suggested in any one or all of the references, as opposed to rebutting what the combined teachings suggest.

Accordingly, we sustain the Examiner's rejection of claims 8–11 and 13–20.

Claim 12

Over Jungck, Swander, Homan-Muise, and Mundra

Appellant has not presented separate arguments for dependent claim 12. Therefore, claim 12 falls with independent claim 8. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Claim 21

Over Jungck, Swander, Homan-Muise, and Jedwab

Appellant has not presented separate arguments for dependent claim 21. Therefore, claim 21 falls with independent claim 8. *See* 37 C.F.R. § 41.37(c)(1)(iv).

CONCLUSION

Appellant has demonstrated that the Examiner erred in rejecting claims 1–5 and 7 as being unpatentable under 35 U.S.C. § 103 over Jungck and Homan-Muise.

However, the Examiner’s rejections of claims 8–21 as being unpatentable under 35 U.S.C. § 103 over Jungck, Homan-Muise, Swander, and various other references are affirmed.

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–5, 7	103	Jungck, Homan-Muise		1–5, 7
8–11, 13–20	103	Jungck, Homan-Muise, Swander	8–11, 13–20	
12	103	Jungck, Homan-Muise, Swander, Mundra	12	
21	103	Jungck, Homan-Muise, Swander, Jedwab	21	
Overall Outcome			8–21	1–5, 7

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED IN PART