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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ERIC ALDEN RUMER and KEN RUMER

Appeal 2018-006822
Application 13/679,495
Technology Center 2100

Before JENNIFER S. BISK, LARRY J. HUME, and
JULIET MITCHELL DIRBA, *Administrative Patent Judges*.

HUME, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant,¹ Level 3 Communications, LLC, appeals from the Examiner's decision rejecting claims 1–20, which are all claims pending in the application. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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

STATEMENT OF THE CASE²

Appellant’s disclosed embodiments and claimed invention “relate to provisioning and providing computing resources, and in particular, the automatic provisioning of various computing resources of a computing environment.” Spec. ¶ 1.

Claim 1, reproduced below, is representative of the subject matter on appeal (*emphasis* added to contested prior-art limitations):

Exemplary Claims

1. A method for providing a computing environment as a service comprising:

initiating, using at least one processor, an instance of a service comprising source code being developed, the service corresponding to a first computing environment;

configuring, using the at least one processor, a plurality of resources of the service based on configuration information, the plurality of resources including at least one of a database and an application server; and

promoting, using the at least one processor, the plurality of resources and the source code to a second computing environment.

² Our decision relies upon Appellant’s Appeal Brief (“Br.,” filed Jan. 30, 2017); Examiner’s Answer (“Ans.,” mailed Jan. 12, 2018); Final Office Action (“Final Act.,” mailed Aug. 26, 2016); and the original Specification (“Spec.,” filed Nov. 16, 2012). Appellant did not file a Reply Brief in response to the factual findings and legal conclusions in the Examiner’s Answer.

Prior Art

The Examiner relies upon the following prior art as evidence in rejecting the claims on appeal:

Kampas et al. (“Kampas”) US 2012/0124211 A1 May 17, 2012
Watters et al. (“Watters”) US 2013/0174124 A1 July 4, 2013

Rejections on Appeal

Claims 1–20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Watters and Kampas. Final Act. 2.

CLAIM GROUPING

Based on Appellant’s arguments (Appeal Br. 10–15) and our discretion under 37 C.F.R. § 41.37(c)(1)(iv), we decide the appeal of the obviousness rejection of claims 1–20 on the basis of representative claim 1.³

ISSUE

Appellant argues (Br. 10–14) the Examiner’s rejection of claim 1 under 35 U.S.C. § 103(a) as being obvious over the combination of Watters and Kampas is in error. These contentions present us with the following issue:

³ “Notwithstanding any other provision of this paragraph, the failure of appellant to separately argue claims which appellant has grouped together shall constitute a waiver of any argument that the Board must consider the patentability of any grouped claim separately.” 37 C.F.R. § 41.37(c)(1)(iv). In addition, when Appellant does not separately argue the patentability of dependent claims, the claims stand or fall with the claims from which they depend. *In re King*, 801 F.2d 1324, 1325 (Fed. Cir. 1986).

Did the Examiner err in finding the cited prior art combination teaches or suggests “[a] method for providing a computing environment as a service” that includes, *inter alia*, the step of “promoting, using the at least one processor, the plurality of resources and the source code to a second computing environment,” as recited in claim 1?

PRINCIPLES OF LAW

“[O]ne cannot show non-obviousness by attacking references individually where . . . the rejections are based on combinations of references.” *In re Keller*, 642 F.2d 413, 426 (CCPA 1981). “The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference Rather, the test is what the combined teachings of those references would have suggested to those of ordinary skill in the art.” *Id.* at 425.

The relevant inquiry is whether the Examiner has set forth “some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (cited with approval in *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 418 (2007)).

During prosecution, claims must be given their broadest reasonable interpretation when reading claim language in light of the specification as it would be interpreted by one of ordinary skill in the art. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). Under this standard, we interpret claim terms using “the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way

of definitions or otherwise that may be afforded by the written description contained in the applicant's specification." *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

ANALYSIS

In reaching this decision, we consider all evidence presented and all arguments actually made by Appellant. To the extent Appellant has not advanced separate, substantive arguments for particular claims, or other issues, such arguments are waived. 37 C.F.R. § 41.37(c)(1)(iv).

We disagree with Appellant's arguments with respect to claims 1–20 and, unless otherwise noted, we incorporate by reference herein and adopt as our own: (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken, and (2) the reasons and rebuttals set forth in the Examiner's Answer in response to Appellant's arguments. We highlight and address specific findings and arguments regarding claim 1 for emphasis as follows.

The Examiner finds Kampas at paragraphs 46 and 65 teaches or suggests the disputed "promoting" limitation. Final Act. 4 (citing Kampas ¶ 46 for its deployment of a software service, and ¶ 65 for its teaching of using a configuration derived during operation 605 to implement a provisioned environment). The Examiner finds, "provisioning the resources to the cross-platform environment is promoting the resources to the second computing environment." *Id.*

In response,

Appellant respectfully traverses the rejection at least because Kampas also does not disclose "promoting, using the at least

one processor, the plurality of resources . . . to a second computing environment.” In particular, the Office Action cites paragraphs 0046 and 0065 of Kampas to suggest that Kampas discloses “promoting, using the at least one processor, the plurality of resources . . . to a second computing environment.”

Br. 11. Appellant further argues, “[f]ramework 100 of Kampas is not, itself, a ‘first computing environment’ in which an ‘instance of a service comprising source code being developed’ is ‘initiated,’ as set forth in claim 1. Rather, framework 100 of Kampas is a configuration tool. Accordingly, the framework 100 in Kampas cannot be considered a ‘first computing environment,’ as claimed in claim 1.” Br. 12.

In response to Appellant’s argument, the Examiner takes a broad but reasonable interpretation (*see Morris*, 127 F.3d at 1054) of the disputed “promoting” step by noting “Appellant has defined ‘promoting’ in their Specification” in paragraphs 37, 40, and 43 (Ans. 4–5) and, “[a]s such the Examiner contends that it is clear from the Appellant’s specification that the term ‘promote’ is interchangeably used with terms such as ‘transmit’, ‘deploy’, and ‘transfer’.” Ans. 5. “[I]n view of the above discussion [regarding paragraphs 46 and 65 of the Kampas reference, cited for teaching or suggesting the disputed ‘promoting’ limitation], the Examiner maintains that the provisioning and deploying operations disclosed in the Kampas reference are equivalent to the promotion operation recited in Claim 1, particularly since provisioning is well-known to include at least one of ‘deploy, send, transmit, copy and transmit, promote and/or otherwise provide’ as [disclosed] in Paragraph [0040] of the . . . specification.” Ans. 6.

The Examiner further finds

a process of deploying software, i.e. promoting code, was taught in the Watters reference, see Paragraphs [0074] and [0075] as cited in the outstanding rejection, and as such the recitations of provisioning and deploying resources disclosed in Kampas are to be viewed in light of the Watters reference disclosure, as it is well-known that the process of deploying software routinely includes the resources necessary to support the operation of said software, as this would simplify the process of deploying fully functional software.

Ans. 6.

We agree with the Examiner's findings and are not persuaded by Appellant's arguments that Kampas does not disclose "promoting, using the at least one processor, the plurality of resources . . . to a second computing environment."

Appellant also contends the Examiner "has provided no statement why it would have been obvious in light of the references to combine Watters and Kampas [to] promote both the source code and the resources of the service, and any such statement would necessarily be the result of impermissible hindsight. As such, the Office Action has not met its *prima facie* burden to prove obviousness for at least this additional reason."

Appeal Br. 14. We disagree.

We disagree because, in compliance with *KSR*, we find the Examiner did provide a statement concerning motivation to combine Watters with Kampas, specifically, that "[i]t would have been obvious at the time the invention was made to a person having ordinary skill in the art to have modified the method as disclosed by Watters with the configuration information as taught by Kampas for purposes of 'improving a data center's

ability to execute operations quickly under standardized protocols and with consistent quality of service.” Final Act. 4 (citing *Kampas* ¶ 9).

With respect to establishing a prima facie case, the Federal Circuit has repeatedly noted that “the prima facie case is merely a procedural device that enables an appropriate shift of the burden of production.” *Hyatt v. Dudas*, 492 F.3d 1365, 1369 (Fed. Cir. 2007) (citing *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992)). The Examiner satisfies the burden of establishing a prima facie case under 35 U.S.C. § 132 by setting forth a rejection in a sufficiently articulate and informative manner. *See In re Jung*, 637 F.3d 1356, 1363 (Fed. Cir. 2011). If the Examiner “adequately explain[s] the shortcomings . . . the burden shifts to the applicant to rebut the prima facie case with evidence and/or argument.” *Hyatt*, 492 F.3d at 1370.

We are not persuaded by Appellant’s argument that the Examiner failed to make a prima facie case of obviousness. First, as explained in *In re McLaughlin*:

Any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning, but so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made and does not include knowledge gleaned only from applicant’s disclosure, such a reconstruction is proper.

In re McLaughlin, 443 F.2d 1392, 1395 (CCPA 1971).

Our review of the record establishes that the Examiner’s case for obviousness is only based on knowledge which was within the level of ordinary skill at the time of Appellant’s invention and does not include knowledge gleaned only from Appellant’s disclosure.

Second, the Examiner identifies the relevant portions of each of the references relied on throughout the Examiner's Answer. See Final Act. 2–4. To the extent that the Examiner relies on the knowledge of one of ordinary skill in the art to combine the teachings of the references, this practice is consistent with current case law. For example, the Supreme Court explains:

Often, it will be necessary for a court to look to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, all in order to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue. To facilitate review, this analysis should be made explicit. *See In re Kahn*, 441 F.3d 977, 988 (C.A.Fed.2006) (“[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness”). As our precedents make clear, however, the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.

KSR, 550 U.S. at 418.

In this case, the Examiner's conclusions of obviousness are clearly articulated and are based on detailed factual findings supported by the references of record. See Final Act. 2–4; Ans. 3–6. Thus, we agree with the Examiner's factual findings and legal conclusions.

Therefore, based upon the findings above, on this record, we are not persuaded of error in the Examiner's reliance on the cited prior art combination to teach or suggest the disputed limitation of claim 1, nor do we find error in the Examiner's resulting legal conclusion of obviousness.

Accordingly, we sustain the Examiner's obviousness rejection of independent claim 1, and grouped claims 2–20 which fall therewith. *See* Claim Grouping, *supra*.

CONCLUSION

The Examiner did not err with respect to the obviousness rejection of claims 1–20 under 35 U.S.C. § 103(a) over the cited prior art combination of record, and we sustain the rejection.

DECISION SUMMARY

Claims Rejected	35 U.S.C. §	Basis / References	Affirmed	Reversed
1–20	103(a)	Obviousness Watters, Kampas	1–20	

FINALITY AND RESPONSE

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).

AFFIRMED