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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ELVIS ABREU and OSVALDO RODAMEZ ABREU

Appeal 2019-000860
Application 14/971,979
Technology Center 2600

Before JOSEPH L. DIXON, ST. JOHN COURTENAY III, and
LARRY J. HUME, *Administrative Patent Judges*.

COURTENAY, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant¹ appeals under 35 U.S.C. § 134(a) from the Examiner's Final Rejection of claims 1–6, 9–12, 14–17, 20–26, 28, and 31–43, which constitute all the claims pending in this application. Claims 7, 8, 13, 18, 19, 27, 29, and 30 are canceled. We have jurisdiction over the pending claims under 35 U.S.C. § 6(b). An oral hearing was conducted on May 21, 2020.

We affirm.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). According to Appellant, the real party in interest is All Phase Consulting, Inc. *See* Appeal Br. 3.

STATEMENT OF THE CASE²

Introduction

Embodiments of Appellant’s invention relate generally to “simultaneously managing an incoming call while playing media on the electronic device, without interrupting the playing of the media on the electronic device.” (Spec. ¶ 11).

Representative Independent Claim 14

14. An electronic device employing an uninterrupted media play and call management system for managing an incoming call during playing of a viewable media on the electronic device without interrupting the playing of the media on the electronic device, the electronic device further employing a single translucent screen that is configured to simultaneously allow uninterrupted playing of the viewable media and at least one or more of managing calls or text messaging, the electronic device comprising:

a non-transitory computer readable storage medium configured to store computer program instructions defined by the uninterrupted media play and call management system;

at least one processor communicatively coupled to the non-transitory computer readable storage medium, the at least one processor configured to execute the defined computer program instructions;

a display screen configured to display a graphical user interface provided by the uninterrupted media play and call management system; and

the uninterrupted media play and call management system comprising:

² We herein refer to the Final Office Action, mailed Mar. 26, 2018 (“Final Act.”); Appeal Brief, filed Aug. 23, 2018 (“Appeal Br.”); the Examiner’s Answer, mailed Oct. 4, 2018 (“Ans.”); and Reply Brief, filed Nov. 13, 2018 (“Reply Br.”).

a data reception module configured to receive an indication of the incoming call during the playing of the media on the electronic device via the graphical user interface;

a notification generation module configured to generate a notification object with one or more of a plurality of call management options for the incoming call in one of a plurality of configurable formats based on preconfigured criteria, wherein the preconfigured criteria comprises a text only mode for allowing communication using text messages while supporting the continued playing of the media on the user device via the graphical user interface without the interruption by the incoming call;

a notification overlay module configured to overlay the generated notification object with the one or more of the call management options as the single translucent screen on the graphical user interface, while supporting continued playing of the media on the electronic device via the graphical user interface without interrupting the incoming call, wherein the single translucent screen allows viewing of the media being played on the graphical user interface;

the data reception module further configured to receive a selection of one of the one or more of the call management options through the overlaid notification object from the electronic device and process the received selection of the one of the one or more of the call management options; and

*an **action module** configured to perform one or more executable actions on one or more of the incoming calls and the playing of the media on the electronic device based on the processed selection of the one of the one or more of the call management options, the call management options comprising:*

accepting the incoming call while supporting the continued playing of the media on the user device; and

sending a message indicating an availability of the user device only for the text communication for the duration of the playing of the media.

Appeal Br. 33–36, CLAIMS APPENDIX (Disputed limitations emphasized).

Evidence

The prior art relied upon by the Examiner as evidence:

Name	Reference	Date
Luehrig et al.	US 2003/0039339 A1	Feb. 27, 2003
Hannum et al.	US 2006/0020993 A1	Jan. 26, 2006
Ort et al.	US 7,342,594 B1	Mar. 11, 2008
Eide et al.	US 2008/0209480 A1	Aug. 28, 2008
Carion et al.	US 2009/0036105 A1	Feb. 5, 2009
Vendrow	US 2009/0086953 A1	Apr. 2, 2009
Sommer	US 2009/0187956 A1	July 23, 2009
Yeh et al.	US 2010/0261505 A1	Oct. 14, 2010
Dorcey	US 2013/0254708 A1	Sept. 26, 2013
“Incoming Mail”	Non-Patent Literature	Oct. 6, 2013
Cannon et al.	US 2014/0018049 A1	Jan. 16, 2014
Kim et al.	US 2014/0215401 A1	July 31, 2014
Kim et al.	US 2015/0121278 A1	Apr. 30, 2015

Rejections

Rej.	Claims Rejected	35 U.S.C. §	Reference(s)/Basis
A	43	112(a)	Written description
B	14, 15, 21–23, 28	103	Cannon et al. (“Cannon”), Eide et al. (“Eide”), Ort et al. (“Ort”), Kim et al. (US 2015/0121278 A1) (“Kim ’278”), Luehrig et al. (“Luehrig”)
C	1–4, 9, 20, 32, 40–42	103	Cannon, Ort, Kim ’278, Luehrig
D	5, 33, 36	103	Cannon, Ort, Kim ’278, Luehrig, Kim et al. (US 2014/0215401 A1) (“Kim ’401”)
E	16, 24	103	Cannon, Eide, Ort, Kim ’278, Luehrig, Kim ’401
F	6, 31	103	Cannon, Ort, Kim ’278, Luehrig, Kim ’401, Carion et al. (“Carion”)
G	17	103	Cannon, Eide, Ort, Kim ’278, Luehrig, Kim ’401, Carion
H	11, 34	103	Cannon, Ort, Kim ’278, Luehrig, Sommer
I	25	103	Cannon, Eide, Ort, Kim ’278, Luehrig, Sommer
J	10	103	Cannon, Ort, Kim ’278, Luehrig, Hannum et al. (“Hannum”)
K	12, 35	103	Cannon, Ort, Kim ’278, Luehrig, Dorcey
L	26	103	Cannon, Eide Ort, Kim ’278, Luehrig, Dorcey
M	37, 38	103	Cannon, Ort, Kim ’278, Luehrig, Incoming Mail
N	39	103	Cannon, Ort, Kim ’278, Luehrig, Yeh et al. (“Yeh”)
O	43	103	Cannon, Ort, Kim ’278, Luehrig, Vendrow

ANALYSIS

Rejection A of claim 43 under 35 U.S.C. § 112(a), written description

Claim 43 recites: “The method of claim 42, wherein the plurality of incoming calls includes a first incoming call and a second incoming call, the first incoming call being accepted, the second incoming call occurring during the accepted first incoming call.”

Appellant notes the Examiner relies upon paragraph 47 of the Specification in his analysis. *See* Final Action 30: “The Specification merely mention calls being handled in a generic sense, such as shown in ¶ 0047 for example denying all calls.” However, Appellant contends:

the best description of the Claim 43 term “*the plurality of incoming calls includes a first incoming call and a second incoming call, the first incoming call being accepted, the second incoming call occurring during the accepted first incoming call*” is in **paragraph [0042]** and the snippet of code included therein (the description of this term can be found elsewhere in the Specification as well). **Paragraph [0042]** discusses a “stack of calls” and then provides the PhonecallReceiver class code snippet to show how the plurality of calls is handled. The initial comments say that the receiver is recreated randomly, indicating that it is created whenever a call is received. The code also includes a lastState and a current state. This indicates that the code handles the lastState==CALL_STATE_OFFHOOK and the state==CALL_STATE_RINGING, which is the situation described in Claim 43, where the first incoming call is accepted (lastState == CALL_STATE_OFFHOOK) and a second call occurring.

As such, claim 43 is enabled by, at a minimum, **paragraph [0042]**, and the Applicants respectfully request that the Examiner's rejection under 35 USC § 112, ¶ 1 be overturned.

Appeal Br. 28 (emphasis added).

Our reviewing court guides the written description “must clearly allow persons of ordinary skill in the art to recognize that [the inventor] invented what is claimed.” *Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc) (citation and quotations omitted). The test is whether the disclosure “conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.” *Id.* “[A]ctual ‘possession’ or reduction to practice outside of the specification is not enough. Rather, . . . it is the specification itself that must demonstrate possession.” *Id.* at 1352; *see also PowerOasis, Inc. v. T-Mobile USA, Inc.*, 522 F.3d 1299, 1306–07 (Fed. Cir. 2008) (explaining that § 112, ¶ 1 “requires that the written description actually or inherently disclose the claim element”).

Our reviewing court provides further guidance:

[I]t is “not a question of whether one skilled in the art might be able to construct the patentee’s device from the teachings of the disclosure. . . . Rather, it is a question whether the application necessarily discloses that particular device.” . . . A description which renders obvious the invention for which an earlier filing date is sought is not sufficient.

Lockwood v. Am. Airlines, Inc., 107 F.3d 1565, 1572 (Fed. Cir. 1997) (quoting *Jepson v. Coleman*, 314 F.2d 533, 536 (CCPA 1963)).

Thus, under the controlling authority of *Lockwood*, the requisite written description support for dependent claim 43 “is a question [of] whether the application *necessarily* discloses that particular device . . . A description which renders *obvious* the invention for which an earlier filing date is sought is not sufficient.” *Lockwood*, 107 F.3d at 1572 (emphasis added).

Applying this reasoning here, we have reviewed the code listing (including the embedded comments), as described in paragraph 42 of Appellant’s originally-filed Specification. At best, we find the code listing and embedded comments in paragraph 42 of the Specification merely describe **plural calls** (e.g., “by identifying a stack of calls is implemented as a wrapper for a ‘PhonecallReceiver’ class . . .”).

In particular, Appellant has not shown written description support for the temporal limitation recited in claim 43: i.e., “the first incoming call being accepted, *the second incoming call occurring during the accepted first incoming call.*” (Emphasis added).

We note the listing in paragraph 42 of the Specification (on pages 19 and 20) indicates (in the code listing comment) that the “Incoming call- goes from IDLE to RINGING when it rings, to OFFHOOK when it’s answered, to IDLE when it is hung up.” However, we find nothing in the subsequent “switch (state)” case statement that *necessarily* discloses a “*second incoming call occurring during the accepted first incoming call,*” as recited in dependent claim 43 (emphasis added). *See Lockwood*, 107 F.3d at 1572.

To the extent that Appellant’s code listing (Spec. ¶ 42) might *arguendo* **suggest** the temporal limitation recited in claim 43 (and thus render it obvious), we find Appellant has not identified sufficient written description support, as required to show possession of the invention under 35 U.S.C. § 112, first paragraph, because *Lockwood* (107 F.3d at 1572) guides that a “description which renders *obvious* the invention for which an earlier filing date is sought is not sufficient.” (emphasis added). Therefore, on this record, we find Appellant has not shown the originally-filed Specification “conveys to those skilled in the art that the inventor had

possession of the claimed subject matter as of the filing date.” *Ariad Pharm.* 598 F.3d at 1351. *See* claim 43.

Accordingly, we sustain the Examiner’s Rejection A of claim 43 under 35 U.S.C. § 112(a), as lacking adequate written description to demonstrate possession of the dependent claim 43 limitation added by amendment during the prosecution. *Cf.* Original claims 1–20.

*Rejection B of Independent Claim 14, and
Rejection C of Independent Claims 1, 20, and 40*

Under 35 U.S.C. § 103, we focus our analysis on the following argued limitations regarding Rejection B of independent claim 14, and also on Rejection C of independent claims 1, 20, and 40, which recite similar limitations.

Issue: Did the Examiner err by finding that the cited references collectively teach or suggest the disputed limitations:

*an **action module** configured to perform one or more executable actions on one or more of the incoming calls and the playing of the media on the electronic device based on the processed selection of the **one of the one or more of the call management options**, the call management options comprising:*

[A] *accepting the incoming call while supporting the continued playing of the media on the user device; and*

[B] *sending a message indicating an availability of the user device only for the text communication for the duration of the playing of the media[,]*

within the meaning of independent claim 14?³ (Emphases added). *See* Final Act. 34–35.

Appellant contends Cannon does not teach an **action module** accepting a call. Appeal Br. 25. In particular, Appellant urges:

Each of claims 1-6, 9-12, 14-17, 20-26, 28, and 31-43 contain the term “an **action module** . . . *accepting the incoming call while supporting the continued playing of the media on the user device*”. The Office Action looks to Cannon for this term (as well as Kim at [0033]), in particular looking to paragraph [0004]: “As a specific example, assume that a user watches a television program. In response to detecting occurrence of a phone call, conventional technology can be used to initiate display of a phone number, and possibly a name associated with the person making the phone call, on a television screen. Accordingly, based on information about the call displayed on the display screen, the subscriber can decide whether to answer or ignore the call.”

Appeal Br. 25 (emphasis added).

However, Appellant is incorrect. Only claims 14, 23–26, and 40 positively recite “an **action module**” (emphasis added). This list includes independent claims 14 and 40. Claims 15–17, 21, 22, and 28 also include an “action module” by virtue of their dependency from independent claim 14. Independent claim 40 has no dependent claims. Therefore, the argued “**action module**” is only pertinent to claims 14–17, 21–26, 28, and 40.

³ Throughout this opinion, we give the claim limitations the broadest reasonable interpretation consistent with the Specification. *See In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

Rejection C of Independent Claims 1 and 20

Regarding independent claims 1 and 20, and the claims which depend therefrom, these claims are silent regarding any mention of “an **action module**” as recited in independent claims 14 and 40. However, claims 1 and 20 recite the same call management options, identified herein as limitations **A** and **B**:

performing one or more executable actions on one or more of the incoming calls and the playing of the media on the user device by the uninterrupted media play and call management system *based on the processed selection* of the one of the one or more of the call management options, the call management options comprising:

[**A**] accepting the incoming call while supporting the continued playing of the media on the user device; and

[**B**] sending a message indicating an availability of the user device only for the text communication for the duration of the playing of the media.

Claim 1 (emphasis and bracketed labeling added).

We emphasize the claim 1 language that merely requires: “*performing one or more executable actions . . . based on the processed selection* of the one of the one or more of the *call management options*” **A** and **B**. (emphasis added).

Independent claim 20 also recites: “*performing one or more executable actions . . . based on the processed selection* of the one of the one or more of the *call management options* **A** and **B**. (emphasis added).

See independent claim 20, in pertinent part:

a fifth computer program code for *performing one or more executable actions* on one or more of the incoming calls and the

playing of the media on the user device *based on the processed selection* of the one of the one or more of the *call management options*, the call management options comprising:

[A] accepting the incoming call while supporting the continued playing of the media on the user device; and

[B] sending a message indicating an availability of the user device only for the text communication for the duration of the playing of the media.

Claim 20 (emphasis and bracketed labeling added).

As an initial matter of claim construction for independent claims 1 and 20, we conclude claims 1 and 20 merely require the cited combination of references to teach or suggest performing *one or more executable actions on one or more of the incoming calls* based on the “processed selection” of *either* call management option **A** or call management option **B**, *but not both A and B*.

When a claim covers several alternatives, the claim may be unpatentable if any of the alternatives within the scope of the claim are taught by the prior art. *See Brown v. 3M*, 265 F.3d 1349, 1351 (Fed. Cir. 2001); *see also Schumer v. Lab. Computer Sys., Inc.*, 308 F.3d 1304, 1311 (Fed. Cir. 2002) (citing *Brown v. 3M*, 265 F.3d at 1352).

This reasoning is applicable here. Therefore, for independent claims 1 and 20 (which do not include an “**action module**”) the Examiner need only show **one** of call management options **A** or **B**. We note Appellant has not traversed the Examiner’s specific findings regarding the “sending a message” call management option **B** for independent claims 1 and 20. *See* Final Act. 44 (citing Luehrig, TABLE 2, chat option). Arguments not made are waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Because Appellant also argues that “Cannon does not teach **an action module** accepting a call” with respect to independent claims 1 and 20, which *do not recite* an “**action module**,” we find Appellant’s argument for claims 1 and 20 is not commensurate with the scope of the claims, and is therefore unpersuasive. *See* Appeal Br. 25 (emphasis added).

*Rejection B of Independent Claim 14 and
Rejection C of Independent Claim 40*

Independent claims 14 and 40 identically recite, in pertinent part:
an **action module** configured to perform *one or more executable actions* on one or more of the incoming calls and the playing of the media on the electronic device based on the processed selection of the one of the one or more of the call management options, the call management options comprising:

[A] accepting the incoming call while supporting the continued playing of the media on the user device; and

[B] sending a message indicating an availability of the user device only for the text communication for the duration of the playing of the media.

For the reasons discussed *infra* regarding independent claims 14 and 40, which recite an “**action module**,” we find the Examiner has provided a teaching or suggestion of the disputed call management option **A** (“accepting the incoming call while supporting the continued playing of the media on the user device.”).

Claim Construction of an “Action Module”

We note that Figure 6 of Appellant’s drawings depicts the claimed “**action module**” merely as a **box** labeled “**action module**.” Our reviewing court has articulated a new standard of review for claim language that relies on “nonce” words (such as “module”), instead of express means-plus-function language (using the word “means”), as follows:

The standard is whether the words of the claim are understood by persons of ordinary skill in the art to have a *sufficiently definite meaning as the name for structure*. *Greenberg*, 91 F.3d at 1583. When a claim term lacks the word “means,” the presumption can be overcome and [pre-AIA] § 112, para. 6 will apply if the challenger demonstrates that the claim term *fails to “recite sufficiently definite structure” or else recites “function without reciting sufficient structure for performing that function.”* *Watts*, 232 F.3d at 880.

Williamson v. Citrix Online, LLC, 792 F.3d 1339, 1349 (Fed. Cir. 2015) (emphasis added).

Here, Appellant appears to have substituted the “nonce” word “module” in place of “means for” —i.e., independent claims 14 and 40 recite an “**action module**” that we conclude connotes a generic “black box” for “performing one or more executable actions . . . based on the processed selection of the one of the one or more of the call management options, the call management options comprising:” the recited functions **A** and **B** (emphasis added).

Therefore, a question arises as to whether Appellant has established in the Specification or Drawings (or by other evidence of record) that the “**action module**” recited in independent claims 14 and 40, would have been understood by persons of ordinary skill in the art to have a *sufficiently*

*definite meaning as the name for a **specific structure** capable of performing the intended functions.*

“Structure disclosed in the specification qualifies as ‘corresponding structure’ if the intrinsic evidence clearly links or associates that structure to the function recited in the claim.” *Williamson LLC*, 792 F.3d at 1352 (*citing B. Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419, 1424 (Fed. Cir. 1997)).

Although Appellant’s Specification at paragraph 108 (as discussed by Appellant during the May 21, 2020 oral hearing — *See* RECORD OF ORAL HEARING Transcript 7, ll. 5–12, 19) describes various functions performed by the “**action module**” according to several different embodiments, our reviewing court guides: “the fact that one of skill in the art could program a computer to perform the recited functions **cannot create structure** where none otherwise is disclosed.” *Williamson LLC*, 792 F.3d at 1351 (*citing Function Media, L.L.C. v. Google, Inc.*, 708 F.3d 1310, 1319 (Fed. Cir. 2013)) (emphasis added).

The Federal Circuit has held “the corresponding structure for a § 112 ¶ 6 claim for a computer-implemented function is the **algorithm** disclosed in the specification.” *Aristocrat Techs. Austl. Party Ltd. vs. Int’l Game Tech.*, 521 F.3d 1328, 1333 (Fed. Cir. 2008) (quoting *Harris Corp. v. Ericsson Inc.*, 417 F.3d 1241, 1249 (Fed. Cir. 2005)) (emphasis added).

Additionally, specific portions of the specification must *clearly link or associate a computer program or algorithm to the function corresponding to the claimed means*. *See Medical Inst. & Diag. Corp. v. Elektra AB*, 344 F.3d 1205, 1211 (Fed. Cir. 2003) (emphasis added).

Paragraph 108 of Appellant’s Specification describes functional language, in pertinent part: “**The action module 607** performs one or more

executable actions on the incoming call and/or the playing of the media on the user device 601 based on the received and processed selection of the call management options.” (Emphasis added).

In particular, paragraph 108 of the Specification describes: “In an embodiment, the **action module 607** configures the GUI 610a into a configurable number of interface sections to *allow a recipient of the incoming call to execute* one of the call management options during the playing of the media on the user device 601.” Spec. ¶ 108 (emphasis added).

Regarding the “*recipient of the incoming call*” (i.e., a **person**) who executes “*one of the call management options*” as described in paragraph 108 of the Specification (emphasis added), our reviewing court provides precedential authority that “a human being cannot constitute a ‘means.’” *Default Proof Credit Card Sys., Inc. v. Home Depot U.S.A., Inc.*, 412 F.3d 1291, 1300 (Fed. Cir. 2005) (citing *In re Prater*, 415 F.2d 1393, 1398 (CCPA 1969)).

Because we find paragraph 108 of the Specification does not provide a supporting *algorithm* that is clearly linked to the function(s) corresponding to the claimed means (i.e., an “**action module**” — which cannot be a *human being*), a question arises as to whether any patentable weight should be accorded to the disputed “**action module**” and associated functions **A** and **B** (call management options), as recited in independent claims 14 and 40 (emphasis added).

In the event of further prosecution, we leave it to the Examiner to determine whether Appellant’s Specification describes sufficient structure corresponding to the claimed “**action module**” for performing the recited

functions to the extent that at least independent claims 14 and 40 (and the claims which depend therefrom) may be indefinite under 35 U.S.C. § 112(b) (emphasis added). “If there is no structure in the specification corresponding to the means-plus-function limitation in the claims, the claim will be found invalid as indefinite.” *Biomedino, LLC v. Waters Techs. Corp.*, 490 F.3d 946, 950 (Fed. Cir. 2007). Although the Board is authorized to reject claims under 37 C.F.R. § 41.50(b), no inference should be drawn when the Board elects not to do so. *See* Manual of Patent Examining Procedure (“MPEP”) § 1213.02 (9th ed., Rev. 08.2017 (Jan. 2018)).⁴

Moreover, we agree with and adopt the Examiner’s findings regarding the claimed disputed call management option **A**, as recited in independent claims 14 and 40: “*accepting the incoming call while supporting the continued playing of the media on the user device.*” *See* Final Act. 34.

In particular, the Examiner (*id.*) points to paragraph 27, *inter alia*, of Cannon which describes, in pertinent part: “a subscriber can manage incoming calls via input with respect to visual prompts simultaneously displayed on a display screen along with concurrently displayed streaming content.”

⁴ In the alternative, if Appellant’s claimed “**action module**” is merely software *per se* (*see* Specification, Figure 6, box 607 labeled “ACTION MODULE,” wherein if the element is not a “means” to which 35 U.S.C. § 112, sixth paragraph analysis is applicable, then the claimed “**action module**” is simply **an element defined solely by the function to be performed** (i.e., the claimed “**action module**” is *a purely functional element unlimited by any particular structure for performing the recited function*). As such, the claim would be unpatentable under 35 U.S.C. § 112, first paragraph, for lack of an enabling disclosure commensurate with the scope of the claim. In the event of further prosecution, we leave such determination to the further consideration of the Examiner.

We emphasize that “the question under 35 USC 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) (quoting *In re Lamberti*, 545 F.2d 747, 750 (CCPA 1976)); *see also* MPEP § 2123.

This reasoning is applicable here. Therefore, for at least the aforementioned reasons, on this record, and based upon a preponderance of the evidence, Appellant has not persuaded us the Examiner erred regarding the disputed “**action module**” claim limitation that is “configured to perform *one or more executable actions* on one or more of the incoming calls and the playing of the media on the electronic device **based on the processed selection** of the one of the one or more of the *call management options*, the call management options comprising:” functions **A** and **B** (as identified above), as recited in independent claims 14 and 40.

Combinability of the References

Appellant contends the Examiner has not presented a prima facie case for combining Cannon, with the secondary teachings of Ort, Luehrig, and Eide, based upon the following arguments:

1. The respective teachings of each of Ort, Luehrig, and Eide cannot be relied on to provide the motivation for combining each with the Cannon reference.
2. The earlier disclosure dates of the Ort, Luehrig, and Eide reference clearly demonstrates that it is not obvious to combine each with the later disclosed Cannon reference.
3. The Examiner has not specified the person skilled in the art, as required for an obviousness analysis.
4. The different patent classes under which Ort, Luehrig, and Eide are organized constitutes additional evidence of non-obviousness.
5. Cannon teaches rejecting calls, not ways of accepting calls, and thus teaches away from the claimed invention.
6. The present invention fills a long felt need, as articulated by the Declaration of Alejandra Martinez Cuevas.

See Appeal Br. 15–25.

We note independent claims 1, 20, and 40 were rejected by the Examiner under Rejection C, based upon the collective teachings and suggestions of Cannon, **Ort**, Kim '278, and Luehrig.

In contrast, Rejection B of independent claim 14 was rejected by the Examiner over the collective teachings of Cannon, **Eide**, **Ort**, Kim '278, and Luehrig.

We note Appellant appears to be contesting the combinability of the references of independent claims 1, 20 and 40 (as rejected under Rejection C) on the basis of independent claim 14, which is rejected under

Rejection B. However, under our procedural rule, it is improper to argue claims as a single group if some of the claims were rejected by the Examiner under a different ground of rejection. *See* 37 C.F.R. § 41.37(c)(1)(iv).

We nevertheless address Appellant’s combinability arguments *seriatim*:

1. *The respective teachings of each of Ort, Luehrig, and Eide cannot be relied on to provide the motivation for combining each with the Cannon reference.*

Appellant argues that each of Ort, Luehrig, and Eide merely teaches an embodiment of the invention and there’s no reason or hint as to why one of ordinary skill in the art would combine each teaching with Cannon. *See* Appeal Br. 16–22.

The Examiner disagrees, and states: “obviousness may be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art.” *In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988), *In re Jones*, 958 F.2d 347, 21 (Fed. Cir. 1992), and *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007). *See* Ans. 17.

The Examiner finds that modifying “Cannon’s non-interruption viewing system to *include Eide’s features of simultaneously sending texts, instant messages on the content they are viewing on their mobile devices without stopping the content on a graphical user interface*” would be “***advantageous . . . [to] support multi-tasking users***” (emphasis added). Final Act. 35.

The Examiner additionally finds that modifying “Cannon’s non-interruption viewing system to include *Ort’s features of rendering*

overlapping graphical objects on a mobile device wherein the ‘blocking’ object is rendered as translucent to avoid a non-blocking display” would “***advantageously avoid irritating obstruction of other content.***” Final Act. 36 (emphasis added).

Similarly, the Examiner also finds that “includ[ing] the plurality of call handling options of Cannon with the *specific options of Luehrig* to advantageously provision interactive communications in manners that overcome various limitations [as] discussed in Luehrig- ¶0004-0006, [would] ***allow alternative means for communication in inconvenient situations.***” Final Act. 37 (emphasis added).

We note that an obviousness inquiry is not limited to the prior art’s preferred embodiment. *See, e.g., Pfizer, Inc. v. Apotex, Inc.*, 480 F.3d 1348, 1370 (Fed. Cir. 2007). “Combining two embodiments disclosed adjacent to each other in a prior art patent does not require a leap of inventiveness.” *Boston Scientific Scimed, Inc. v. Cordis Corp.*, 554 F.3d 982, 991 (Fed. Cir. 2009). “[I]n a section 103 inquiry, ‘the fact that a specific [embodiment] is taught to be preferred is not controlling, since all disclosures of the prior art, including unpreferred embodiments, must be considered.’” *Merck & Co. v. Biocraft Labs., Inc.*, 874 F.2d 804, 807 (Fed. Cir. 1989) (quoting *In re Lamberti*, 545 F.2d 747, 750 (CCPA 1976)).

Appellant does not point to any evidence of record that shows combining the teachings of Cannon, **Eide**, Kim ’278, and Luehrig in the manner proffered by the Examiner (Final Act. 35) would have been “uniquely challenging or difficult for one of ordinary skill in the art” or would have “represented an unobvious step over the prior art.” *Leapfrog*

Enters., Inc. v. Fisher-Price, Inc., 485 F.3d 1157, 1162 (Fed. Cir. 2007) (citing *KSR*, 550 U.S. at 418).

Therefore, based upon our review of Rejection B, (modifying Cannon with the teachings and suggestions of **Eide**, **Ort**, Kim '278, and Luehrig), and Rejection C (modifying Cannon with the teachings and suggestions of **Ort**, Kim '278, and Luehrig), we find the Examiner has provided sufficient “articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006). See Final Act. 35–37 (Rejection B, including three motivation statements), and Final Act. 43–44 (Rejection C including two motivation statements).

Hindsight

Appellant also repeatedly argues that “[u]sing the present application as a roadmap is improper hindsight reconstruction.” Appeal Br. 17, 19, and 21.

The Examiner disagrees and explains that “[a]ny judgement on obviousness is in a sense necessarily a reconstruction based on hindsight reasoning, but so long as it takes into account only knowledge which was within the level of ordinary skill in the art at the time the claimed invention was made and does not include knowledge gleaned only from Appellant’s disclosure, such a reconstruction is proper.” *In re McLaughlin*, 443 F.2d 1392, 1395 1352 (Fed. Cir. 2013). See Ans. 19–20, 23, and 25.

We note Appellant has not identified knowledge gleaned only from the present application that was not within the level of ordinary skill at the time the claimed invention was made. See *McLaughlin*, 443 F.2d at 1395. Moreover, Appellant has not provided any objective evidence of secondary considerations (e.g., unexpected results), which our reviewing court guides

“operates as a beneficial check on hindsight.” *Cheese Sys., Inc. v. Tetra Pak Cheese & Powder Sys., Inc.*, 725 F.3d 1341, 1352 (Fed. Cir. 2013).

2. *The age (earlier disclosure dates) of the Ort, Luehrig, and Eide references is insufficient to show non-obviousness.*

Appellant argues with respect to Ort that “the history of the technology in this area clearly demonstrates that it is not obvious to combine Ort with Cannon. Ort was filed in 2000, a dozen years before Cannon (2012). If it were obvious, then Cannon would have incorporated Ort’s work from years before in his patent application. Cannon did not include Ort, because it was not obvious to Cannon to do so.” Appeal Br. 17. Additionally, Appellant repeats the same argument regarding the age of the references against both Luehrig and Eide. *See* Appeal Br. 19 and 21–22.

The Examiner disagrees and explains that “there is no specific MPEP provision or case law that specifies history of technology or the chronological order among qualified prior art[] as an indicia of nonobviousness.” Ans. 18, 22, and 23.

We agree with the Examiner’s response because *In re Wright* (569 F.2d 1124, 1127 (CCPA 1977)) guides: “The mere age of the references is not persuasive of the unobviousness of the combination of their teachings, absent evidence that, notwithstanding knowledge of the references, the art tried and failed to solve the problem.”

3. *The Examiner has not specified the person skilled in the art, as required for an obviousness analysis.*

Appellant argues that “[w]ithout an analysis of a person of ordinary skill in the art, the Examiner has not presented a *prima facie* case for obviousness.” Appeal Br. 17.

In response, we note the level of skill in the art is “a prism or lens” through which we view the prior art and the claimed invention. *Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001) (“the level of skill in the art is a prism or lens through which a judge, jury, or the Board views the prior art and the claimed invention”). Factors pertinent to a determination of the level of ordinary skill in the art include: (1) educational level of the inventor; (2) type of problems encountered in the art; (3) prior art solutions to those problems; (4) rapidity with which innovations are made; (5) sophistication of the technology, and (6) educational level of workers active in the field. *Environ. Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 696–697 (Fed. Cir. 1983) (citing *Orthopedic Equip. Co. v. All Orthopedic Appl., Inc.*, 707 F.2d 1376, 1381–82 (Fed. Cir. 1983)). Not all such factors may be present in every case, and one or more of these or other factors may predominate in a particular case. *Id.* Moreover, these factors are not exhaustive but are merely a guide to determining the level of ordinary skill in the art. *Daiichi Sankyo Co. Ltd., Inc. v. Apotex, Inc.*, 501 F.3d 1254, 1256 (Fed. Cir. 2007).

In determining a level of ordinary skill, we also may look to the prior art, which may reflect an appropriate skill level. *Okajima*, 261 F.3d at 1355. Additionally, the Supreme Court informs us that “[a] person of ordinary skill is also a person of ordinary creativity, not an automaton.” *KSR*, 550 U.S. at 421.

Here, Declarant *Alejandra Martinez Cuevas* attests that a “Bachelor’s Degree in Computer Science” plus relevant experience qualifies the Declarant “as an expert in the field of media play and call management systems.” Declaration 1. We accept this general level of education/experience as representative of the level of ordinary skill in the art

as applicable to this appeal.

4. *The different patent classes under which Ort, Luehrig, and Eide are organized constitutes additional evidence of non-obviousness.*

Appellant also argues that the classification system differences amongst the Cannon, Ort, Luehrig, and Eide patent references are additional evidence of non-obviousness. Appeal Br. 17–19 and 21–22.

The Examiner disagrees (Ans. 20), and asserts that while Patent Office classification of references and the cross-references in the official search notes of the class definitions are some evidence of “nonanalogy” or “analogy” respectively in determining what is analogous prior art for the purpose of analyzing the obviousness of the subject matter at issue, the predecessor to our reviewing court has found “the similarities and differences in structure and function of the inventions disclosed in the references to carry far greater weight.” *In re Ellis*, 476 F.2d 1370, 1372 (CCPA 1973). *See* Ans. 20.

The evidence of classification in different categories by the PTO “is inherently weak . . . because considerations in forming a classification system differ from those relating to a person of ordinary skill seeking solution for a particular problem.” *In re Mlot-Fijalkowski*, 676 F.2d 666, 670 n. 5 (CCPA 1982). “Whether a reference in the prior art is ‘analogous’ is a fact question.” *In re Clay*, 966 F.2d 656, 658 (Fed. Cir. 1992) (citing *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1568 n.9 (Fed. Cir. 1987)).

We agree with the Examiner because we find the cited references are reasonably pertinent to the particular problem with which the inventor is involved. Although diverse classifications amongst the cited references can

constitute *some* evidence of “non-analogy,” we find this evidence is far outweighed by the references’ structural and functional similarities that render them analogous art.

On this point, Appellant has not proffered any additional argument or evidence showing why the cited references do not possess any structural and functional similarities to the claimed invention. Nor has Appellant explained why these references are not reasonably pertinent to the problem faced by the inventor, assuming *arguendo* that a particular reference is not in the same field of endeavor as the claimed invention.⁵

5. *Cannon teaches rejecting calls, not ways of accepting calls, and thus teaches away from the claimed invention.*

Appellant also argues that “Cannon, in its abstract, teaches against the claims articulated in the present patent application. As such, one of ordinary skill in the art, looking at Cannon would have stopped reading further in Cannon, and could not have been inclined to create the current invention.” Appellant specifically asserts that “Cannon teaches rejecting calls, not ways of *accepting calls*.” Appeal Br. 22 (emphasis added).

Additionally, Appellant also looks to support in the Declaration of *Alejandra Martinez Cuevas* (“Declarant”), dated February 16, 2018 and submitted under 37 C.F.R. § 1.132, in which the Declarant opined that

⁵ Two separate tests define the scope of analogous prior art: (1) whether the art is from the same field of endeavor, regardless of the problem addressed and, (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved. *In re Deminski*, 796 F.2d 436, 442 (Fed. Cir. 1986); *see also In re Wood*, 599 F.2d 1032, 1036 (CCPA 1979) and *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004).

“*Cannon teaches against answering the call.* Cannon focuses on blocking calls and not displaying notifications.” Decl. ¶ 12 (emphasis added).

Appellant’s argument in substance appears to be that Cannon essentially “teaches away” from the claimed invention. The Examiner disagrees and points to paragraph 114 of Cannon as permitting “accepting calls.” Ans. 29. See Cannon ¶ 114: i.e., “If the user 108 does not **answer** the phone device 115, the call may be forwarded to voice mail. In each case, the subscriber 108 can continue to view a rendition of the streaming content displayed on the display screen 130 after providing different types of input 505.” (emphasis added).

We agree with the Examiner’s findings. (*id.*) We note “[a] finding that two inventions were designed to resolve different problems . . . is insufficient to demonstrate that one invention teaches away from another.” *Nat’l Steel Car, Ltd. v. Canadian Pac. Ry., Ltd.*, 357 F.3d 1319, 1339 (Fed. Cir. 2004). Teaching an alternative or equivalent method, however, does not teach away from the use of a claimed method. *In re Dunn*, 349 F.2d 433, 438 (CCPA 1965). Moreover, “the prior art’s mere disclosure of more than one alternative does not constitute a teaching away from any of these alternatives *because such disclosure does not criticize, discredit, or otherwise discourage the solution claimed.*” *In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004) (emphasis added).

Here, Cannon describes receiving user input (in response to receiving an incoming call) and “[i]f the user 108 *does not answer the phone device* 115, the call may be forwarded to voice mail.” Cannon ¶ 114 (emphasis added). Therefore, we find Cannon is at least suggestive of permitting the acceptance (i.e., answering) of calls. Accordingly, we are not persuaded that

Cannon “teaches away” from the claimed invention.

6. *The present invention fills a long felt need, as articulated by the Declaration of Alejandra Martinez Cuevas (“Declarant”).*

Appellant also submits that the Declarant’s expert opinion, in the Declaration dated February 16, 2018, and submitted under 37 C.F.R. § 1.132, is evidence of the long felt need “to selectively prevent the interruption of television (or other devices) viewing by telephone calls.” Decl. ¶ 3.

The Declarant states that Appellant’s patent application “solves the unwanted phone call interruption problem, as related to watching television or other media, by placing the call information on the screen in a translucent screen and providing the user with the option to accept the call, reject the call, send a text message, or other options.” Decl. ¶ 6.

The Declarant further states that “[b]efore the 14/971,979 patent application, if a user [was] watching the news from their smartphone, and someone calls, the video will stop, and the call would take place. There is no logical need to stop watching the news to answer a call, *only the prior technology’s failure* requires the video to stop.” Decl. ¶ 8 (emphasis added).

Further evidencing the purported *long-felt need* of the claimed invention, the Declarant points to legislative history and refers to the Telephone Consumer Protection Act of 1991 to show that “the need to avoid the interruption of television and other media by unwanted calls existed since at least 1991.” Decl. ¶ 4 (*see* Exhibit A).

Additionally, the Declarant refers to a 2017 NBC story by Jennifer Schlesinger and Andrea Day that reported robo-calling was soaring in spite

of the Federal Trade Commission’s “Do Not Call” registry. Decl. ¶ 5 (*see* Exhibit B).

The Examiner finds the expert opinion (Declaration) insufficient to establish the *long-felt need* of the claimed invention. Ans. 12. The Examiner identifies, *inter alia*, two deficiencies with respect to the expert opinion:

First, the Examiner finds the “evidence[] listed by the Exhibits [is] simply related to the broad issue of telemarketing calls/robot calls without specifically targeting a particular context (i.e. while watching television) . . . The complaints as detailed in the Exhibits at best express the *undesirability of telemarketing calls/robot calls and a general wish to block/halt such calls [altogether]*, regardless of what specifically the callee might be doing/viewing at the time of receiving such calls.” Ans. 12.

Second, the Examiner finds that with respect to Appellant’s claims, “there is no means to prevent/block/halt the arrivals of telemarketing/robot calls *because the claimed invention does not filter calls but only appear[s] to notify and present the call handling options regardless of who the caller is.*” Ans. 12 (emphasis added).

Establishing a long-felt need requires objective evidence showing the existence of a persistent problem recognized by those of ordinary skill in the art for which a solution was not known. *In re Gershon*, 372 F.2d 535, 538–39 (CCPA 1967). *See* Ans. 28 (citing *Gershon*). Hence, the Appellant must present affidavits or other factual evidence of “a failure of others to provide a feasible solution to [a] long-standing problem” and evidence “that experts did not foresee” the solution claimed. *See In re Piasecki*, 745 F.2d 1468, 1475 (Fed. Cir. 1984). Finally, the invention must satisfy the long-felt need.

In re Cavanagh, 436 F.2d 491, 496 (CCPA 1971).

Here, the Examiner finds Declarant’s statements and supporting exhibits merely establish a long-felt interest to **block** “unwanted,” “intrusive,” and “nuisance” phone calls in ways that balance[] “[i]ndividuals’ privacy rights, public safety interests, and commercial freedom[] of speech.” Exhibit A (Title 47 U.S.C. § 227 - Restrictions on use of telephone equipment), page 2. *See* Ans. 12. This interest or need is purportedly different than the “problem” identified by the Appellant.

In the Specification (¶ 9), Appellant identifies six needs and problems addressed by the claimed invention:

1. “[to] simultaneously manage an incoming call during performance of an activity, for example, playing of media such as a video on . . . [an] electronic device by a user, *without interrupting the playing of the media on the electronic device.*” (Emphasis added).

2. “[to] generate[] non-intrusive notification objects with detailed information in different configurable formats based on user preferences to notify the user about the incoming call *without interrupting the playing of the media on the electronic device.*” (Emphasis added).

3. “[to] allow[] a user to configure a text only mode on the user device for managing an incoming call from a caller during the playing of the media on the user device, where the text only mode allows the caller to *communicate with the user only through text messages* for the duration of the playing of the media.” Spec. ¶ 11 (Emphasis added).

4. “[to] *allow the user to communicate with a sender of the incoming call*, that is, a caller through text messages or social media while continuing the playing of the media uninterrupted on separate sections of a

display screen of the electronic device.” Spec. ¶ 9 (Emphasis added).

5. “[to] *handle audio of an incoming call without interrupting any video* component of the media being played on the electronic device, for example, by continuing display of the video component while muting the audio component of the media being played for a *duration of the incoming call.*” (Emphasis added).

6. “[to] automatically record any media being played on the electronic device and/or in a cloud computing environment when the *user chooses to accept an incoming call.*” (Emphasis added).

To be given substantial weight in the determination of obviousness, objective evidence of non-obviousness (including factors such as commercial success, industry praise, and long-felt need) must be relevant to the subject matter as claimed, and therefore it must be determined whether there is a **nexus** between the merits of the claimed invention and the evidence of secondary considerations. *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 305 n.42 (Fed. Cir. 1985).

Based upon our review of the Declaration evidence, we do not find a strong relevance or correlation (“nexus”) between the long-felt need sought to be established by the Declarant and the subject matter as claimed.

Declarant’s expert opinion merely establishes a long-felt interest to **block** undesired calls. **In contrast**, Appellant’s claimed invention solves the problem of *managing incoming calls without interrupting* the playing of media (e.g., a video). Appellant’s invention also manages the playing of the media *while accepting or responding to incoming calls*, e.g., texting.

Accordingly, we do not find Declarant’s statement and supporting Exhibits A and B are sufficiently persuasive to establish the purported long-

felt need of the claimed invention.

On the totality of this record, and based upon a preponderance of the evidence, we are not persuaded of error regarding the Examiner's underlying factual findings and ultimate legal conclusion of obviousness.

For at least the aforementioned reasons, we affirm the Examiner's Rejection B of independent claim 14. We separately affirm Rejection C of independent claims 1, 20 and 40, which recite similar limitations. *See* Final Act. 40–54.

The remaining dependent claims also rejected under Rejections B and C (and not argued separately) fall with the respective independent claim from which they depend. *See* 37 C.F.R. § 41.37(c)(1)(iv) (2018). Accordingly, we sustain the Examiner's obviousness Rejection B of claims 14, 15, 21–23, and 28, and we sustain the Examiner's obviousness Rejection C of claims 1–4, 9, 20, 32, and 40–42.⁶

⁶ We note the Examiner omitted claims 41 and 42 from the heading of Rejection C on page 40 of the Final Action. However, the Examiner provided a detailed statement of rejection for claims 41 and 42 under the Rejection C heading on page 56 of the Final Action. We have made appropriate correction herein.

Rejections D–O of the Remaining Dependent Claims under § 103

In view of the lack of any substantive, separate arguments directed to Rejection D of claims 5, 33, and 36; Rejection E of claims 16 and 24; Rejection F of claims 6 and 31; Rejection G of claim 17; Rejection H of claims 11 and 34; Rejection I of claim 25; Rejection J of claim 10; Rejection K of claims 12 and 35; Rejection L of claim 26; Rejection M of claims 37 and 38; Rejection N of claim 39; and Rejection O of claim 43, under § 103 (*see* Appeal Br. 14–15), we sustain the Examiner’s Rejections D–O of the remaining dependent claims. Arguments not made are waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).

CONCLUSIONS

The Examiner did not err in rejecting claims 1–6, 9–12, 14–17, 20–26, 28, and 31–43 as being obvious under 35 U.S.C. § 103, over the cited combinations of references, and the Examiner did not err in rejecting claim 43 under 35 U.S.C. § 112(a) as lacking written description support.

DECISION SUMMARY

Rej	Claims Rejected	35 U.S.C. §	Reference(s)/ Basis	Affirmed	Reversed
A	43	112(a)	Written Description	43	
B	14, 15, 21–23, 28	103	Cannon, Eide, Ort, Kim ’278, Luehrig	14, 15, 21–23, 28	
C	1–4, 9, 20, 32, 40–42	103	Cannon, Ort, Kim ’278, Luehrig	1–3,4, 9, 20, 32, 40	

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Rej	Claims Rejected	35 U.S.C. §	Reference(s)/ Basis	Affirmed	Reversed
D	5, 33, 36	103	Cannon, Ort, Kim '278, Luehrig, Kim '401	5, 33, 36	
E	16, 24	103	Cannon, Eide, Ort, Kim '278, Luehrig, Kim '401	16, 24	
F	6, 31	103	Cannon, Ort, Kim '278, Luehrig, Kim '401, Carion	6, 31	
G	17	103	Cannon, Eide, Ort, Kim '278, Luehrig, Kim '401, Carion	17	
H	11, 34	103	Cannon, Ort, Kim '278, Luehrig, Sommer	11, 34	
I	25	103	Cannon, Eide, Ort, Kim '278, Luehrig, Sommer	25	
J	10	103	Cannon, Ort, Kim '278, Luehrig, Hannum	10	
K	12, 35	103	Cannon, Ort, Kim '278, Luehrig,	12, 35	

Rej	Claims Rejected	35 U.S.C. §	Reference(s)/ Basis	Affirmed	Reversed
			Dorcey		
L	26	103	Cannon, Eide Ort, Kim '278, Luehrig, Dorcey	26	
M	37, 38	103	Cannon, Ort, Kim '278, Luehrig, Incoming Mail	37, 38	
N	39	103	Cannon, Ort, Kim '278, Luehrig, Yeh	39	
O	43	103	Cannon, Ort, Kim '278, Luehrig, Vendrow	43	
	Overall Outcome			1–6, 9–12, 14–17, 20–26, 28, 31–43	

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