UNITED STATES PATENT AND TRADEMARK OFFICE

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CenturyLink Intellectual Property LLC
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EXAMINER
KIM, HEE SOO

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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Ex parte MICHAEL K. BUGENHAGEN

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Appeal 2019-000946
Application 13/302,051
Technology Center 2400

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Before ALLEN R. MacDONALD, MIRIAM L. QUINN, and
DAVID J. CUTITTA II, *Administrative Patent Judges*.

MacDONALD, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant[1] appeals from the
Examiner's decision to reject claims 1, 3–11, 18–20, and 22–30. Claims 2
and 21 have been cancelled, and claims 12–17 have been withdrawn from
consideration. Appeal Br. 29–32. We have jurisdiction under 35 U.S.C.
§ 6(b).

We AFFIRM.

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[1] Appellant identifies the real party in interest as Century Link Intellectual
Property LLC. Appeal Br. 3.

CLAIMED SUBJECT MATTER

Claim 29 is illustrative of the claimed subject matter (reproduced

in-part with emphasis, formatting, and bracketed material added):

29. A method, comprising:

[A.] Maintaining . . . a class of service state for a connection
. . . ;

[B.] Receiving, from the customer device, configuration
information for configuring the class of service state;

[C.] Modifying the class of service state in response to
receiving the configuration information;

[D.] Determining one or more network performance statistics
pertaining to network performance between the customer
device and at least one other network point, . . . ;

[E.] Providing, to a customer associated with the customer
device, the one or more network performance statistics;

[F.] Receiving, from the customer, a request to run an
application over a network session;

[G.] *Providing*, to the customer device, *a busy indicator* if
network conditions indicate that insufficient bandwidth
exists to satisfy the request, wherein *the busy indicator
further includes an explanation of network conditions*
that prevented operation of the requested action, wherein
*the explanation includes an indication of a number of
computing applications or devices* that are currently using
a broadband connection;

[H.] *Generating an alarm based on user input specifying
which network conditions should generate an alert*,
wherein the network conditions comprise at least one of
network utilization of the broadband connection exceeding
a specified threshold portion of an overall bandwidth,
insufficient bandwidth, or a packet loss condition; and

[I.] Based on a determination that packet loss is occurring,
sending a notification to the customer, wherein the

notification includes an indication that the request to run
the application over the network session cannot be
performed due to the packet loss.

REFERENCES[2]

The prior art relied upon by the Examiner is:

Name	Reference	Date
Goto	US 2007/0025237 A1	Feb. 1, 2007
Molen	US 2008/0089237 A1	Apr. 17, 2008
Schryer	US 2008/0279112 A1	Nov. 13, 2008
Rahman	US 2009/0116379 A1	May 7, 2009
Yang	US 2010/0246436 A1	Sept. 30, 2010
Singhal	US 2011/0249572 A1	Oct. 13, 2011

REJECTIONS

The Examiner rejects claims 1, 3, 5–11, 18, 19, 22–24, 29, and 30
under 35 U.S.C. § 103(a) as being unpatentable over the combination of
Molen, Yang, Rahman, Schryer, Goto, and Singhal. Final Act. 2–13. We
select claim 29 as the representative claim for this rejection. Appellant does
not argue separate patentability for claims 1, 3, 5–11, 18, 19, 22–24, and 30.

The Examiner rejects claims 4, 20, and 25–28 under 35 U.S.C.
§ 103(a) as being unpatentable over Molen, Yang, Rahman, Schryer, Goto,
and Singhal in various combinations with other references. Final Act. 13–
18. Appellant does not present arguments for claims 4, 20, and 25–28.
Thus, the rejections of these claims turn on our decision as to claim 29.

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[2] All citations herein to patent and pre-grant publication references are by
reference to the first named inventor only.

Except for our ultimate decision, we do not address claims 1, 3–11, 18–20, 22–28, and 30 further herein.

OPINION

We have reviewed the Examiner's rejections in light of Appellant's Appeal Brief and Reply Brief arguments.

The Examiner and Appellant have treated the term "and" throughout the claims as meaning "and," not "and/or." This restrictive reading is contrary to Appellant's instruction that "use of the terms 'and' and 'or' means 'and/or' unless otherwise indicated." Spec. ¶ 27. This Opinion is based on treating the claims using the restrictive reading of "and" which is subsumed within the actual broader reading of "and/or."

A.

Appellant raises the following argument in contending that the Examiner erred in rejecting claim 29 under 35 U.S.C. § 103(a).

> The Examiner fails to establish that [the] cited references **teach or suggest** "*providing, to the customer device, a busy indicator if network conditions indicate that insufficient bandwidth exists to satisfy the request, wherein the busy indicator further includes an explanation of network conditions that prevented operation of the requested action, <u>wherein the explanation includes an indication of a number of computing applications or devices that are currently using a broadband connection</u>,*" as required by pending claim 29.

Appeal Br. 21 (additional emphasis added).

Appellant further argues as follows:[3]

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[3] We read the "clearly teaches" language quoted here as –renders obvious–. As the Appellant acknowledges the rejection is based on the claimed

The Examiner asserts that Schryer, in combination with Rahman, "*clearly teaches* that an indicator is provided to the user when network conditions indicate that insufficient bandwidth exists to satisfy the request, including an explanation of network conditions that prevented operation of the requested action, and an indication of a number of computing applications or devices that are currently using a broadband connection." Examiner's Answer, p. 4. However, this is not the case.

Rahman discloses that "[i]n response to the insufficient bandwidth notification, the multimedia receiver provides an indicator to the viewer that the selected channel is not available for presentation due to insufficient bandwidth in the network connection."

Rahman, ¶ 0015. Rahman further discloses that "a list of multimedia channels being provided to the viewer's premises is displayed for the viewer and the viewer is given the option to terminate provision of one or more of the other multimedia channels so as to make additional bandwidth available for the channel initially requested by the viewer." Rahman, ¶ 0015. However, the Examiner expressly conceded in the final office action that "*Rahman did not specifically teach* wherein the explanation includes *an indication of a number of computing applications or devices* that are currently using a broadband connection." Office Action, p. 6.

Schryer cannot be used to make up for the deficiencies of Rahman, with regard to pending claim 29. *Although Schryer discloses* "[e]ach icon 410 can represent the configuration settings 415 of the one or more media devices 108, thereby allowing the user to identify other media devices 108 in the media network 100 that are utilizing media resources" (Schryer, ¶ 0026), *these icons are not displayed with a busy indicator indicating insufficient bandwidth*.

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invention being "obvious" (Appeal Br. 18) under 35 U.S.C. § 103(a), we deem the Examiner's misstatement to be harmless error.

Thus, the **combination of Rahman and Schryer would result in two separate and distinct functionalities** (1) a busy indicator that indicates a list of multimedia channels being provided to the viewer's premises and (2) a GUI that identifies media devices 108 in the media network 100 that are utilizing media resources. There is no indication in Schryer that the GUI that identifies media devices 108 in the media network 100 that are utilizing media resources is displayed with a busy indicator in response to a determination of insufficient bandwidth.

Therefore, the combination of Rahman and Schryer **would not result in** identifying a <u>number</u> of computing applications or a <u>number</u> of devices that are <u>currently</u> using a broadband connection in response to an indication that network conditions indicate that insufficient bandwidth exists to satisfy the request to run an application, which is recited by claim 29.

Reply Br. 5–6 (additional emphasis added).

We are unpersuaded by Appellant's argument. First, Appellant does not address the actual reasoning of the Examiner's rejection. Instead, Appellant attacks the Rahman reference singly for lacking a teaching that the Examiner relied on a combination of Rahman and Schryer to show. Then Appellant similarly attacks the Shryer reference singly for lacking a teaching that the Examiner relied on the combination of Rahman and Schryer to show. In particular, the rejection does not rely on Rahman for teaching the "indication of a number of computing applications or devices" (Reply Br. 5) aspect disputed by Appellant. *See* Final Act. 7 (finding Schryer teaches, "an indication of a number of computing applications or devices"). Further, the rejection does not rely on Schryer for teaching the "busy indicator indicating insufficient bandwidth" (Reply Br. 5) aspect disputed by Appellant. *See* Final Act. 6 (finding Rahman teaches "a busy indicator if network conditions indicate that insufficient bandwidth exists"). One cannot

show nonobviousness by attacking references individually when the rejection is based on a combination of references. *In re Merck & Co. Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986); *see also In re Keller,* 642 F.2d 413, 425 (CCPA 1981) (explaining the relevant inquiry is whether the claimed subject matter would have been obvious to those of ordinary skill in the art in light of the *combined teachings* of those references).

Second, Appellant's argument speculates that the combination of Rahman and Schryer would render obvious a system with "two separate and distinct functionalities." Reply Br. 5. Even if we were to agree that the cited combination also renders obvious an invention other than the invention of Appellant's claim 29, this is simply not a relevant argument as to whether the Examiner has provided a proper final conclusion that the combination of references renders obvious the claimed invention. A combination of references is not precluded from rendering obvious any number of distinct inventions.

<div align="center">B.</div>

Also, Appellant raises the following argument in contending that the Examiner erred in rejecting claim 29 under 35 U.S.C. § 103(a).

> The Examiner fails to establish that the cited references teach or suggest "*generating an alarm <u>based on user input specifying which network conditions should generate an alert,</u> wherein the network conditions comprise <u>at least one of network utilization of the broadband connection exceeding a specified threshold portion of an overall bandwidth, insufficient bandwidth, or a packet loss condition,</u>*" as required by pending claim 1.

Appeal Br. 24.

> [T]he <u>manager 102</u>, of Singhal, may receive one or more operating parameters from a user to set up the <u>network monitors 104</u>. ***There is no indication*** that the operating parameters received by the <u>manager 102</u> and set up on <u>the network monitors 104</u> would cause the <u>network manager 102</u> to provide alarms and alerts based on predefined events.
>
> In fact, (1) receiving parameters from a user for setting the operation of the network monitors 104 and (2) providing alarms and alerts based on predefined events (e.g., network utilization reaching a limit or detecting critical errors in the network 110) are ***two separate and distinct functions*** that Singhal's network manager 102 performs. The network manager 102 of Singhal receives a first set of parameters (operating parameters) from a user to set up the operation of network monitors 104. The network manager 102 of Singhal may also provide alarms based on a second set of parameters (predefined events).
>
> In Singhal, the ***first set of parameters (operating parameters)*** received by the network manager 102 from the user are ***<u>distinct and separate from</u>*** the ***second set of parameters (predefined events)*** that cause the alarm or alert on network manager 102. In Singhal, "[t]he operating parameters set by the manager 102 may include, among others, information stored in an adaptive session record (ASR), the format of the ASR, and lengths of time the ASR should be stored." Singhal, ¶ 0029. ***The predefined events of Singhal may be "network utilization reaching a limit or detecting critical errors*** in the network 110." Singhal, ¶ 0030. Although a user, in Singhal, may input the one or more first parameters (operating parameters), ***there is no indication that a user may define the one or more second parameters (predefined events)***.

Appeal Br. 25 (additional emphasis added).

Essentially, Appellant argues that Singhal's "predefining" an event (e.g., alarm limit) ***does not*** indicate "a user" may predefine the event (e.g., alarm limit). Even if we adopt Appellant's position that Singhal does not indicate ***a user*** may define the event, we are unpersuaded the Examiner has

erred. As Appellant acknowledges, Singhal discloses: "[t]he manager 102 may perform one or more of the following functions: . . . (vii) provide alarms and alerts on predefined events (e.g., network utilization reaching a limit or detecting critical errors in the network 110)." Accepting Singhal's silence as to the entity performing the "predefining," there are finite number of possibilities as to that entity (i.e., programmer, system administrator, or end user) interacting with the network. Therefore, we conclude it would have been obvious to try the user as the predefining entity that Appellant argues is not taught by Singhal. The Court in *KSR* states:

> When there is a design need or market pressure to solve a problem and there are *a finite number of identified, predictable solutions*, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense.

KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 421 (2007) (emphasis added). Again, it is not disputed that Singhal shows the desirability of providing alarms and alerts on predefined events.

CONCLUSION

The Examiner has not erred in rejecting claims 1, 3–11, 18–20, and 22–30 as being unpatentable under 35 U.S.C. § 103(a).

The Examiner's rejections of claims 1, 3–11, 18–20, and 22–30 as being unpatentable under 35 U.S.C. § 103(a) are **affirmed**.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 3–11, 18–20, 22–30	103(a)	Molen, Yang, Rahman, Schryer, Goto, Singhal	1, 3–11, 18–20, 22–30	

TIME PERIOD FOR 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). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED