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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* DENNIS ERIK BOUWKNEGT and HENK DEN BOK

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Appeal 2019-003958  
Application 15/102,555  
Technology Center 2400

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Before ALLEN R. MacDONALD, MICHAEL J. STRAUSS,  
and GREGG I. ANDERSON, *Administrative Patent Judges*.

ANDERSON, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from the Examiner's decision to reject claims 24–27, 29, 35, 37, 45–50. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

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<sup>1</sup> 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 Telefonaktiebolaget L M Ericsson (publ). Appeal Br. 2.

CLAIMED SUBJECT MATTER

The claims are directed to synchronizing two media streams during playout. Spec.,<sup>2</sup> 1:10–11. For instance, two media streams may respectively be a first stream for a cooking recipe and a second stream for a cooking show to be displayed to a user simultaneously on different devices. *Id.* at 1:19–31. Other approaches to synchronization were not well suited for coping with problems when the media streams were broadcast from different sources. *Id.* at 3:10–27. For instance, broadcasting over different routes could interrupt synchronization or there could be other interruptions to time synchronization (e.g., if parts of a media stream were skipped or time shifted). *Id.*

Method claim 24, reproduced below, is illustrative of the claimed subject matter:

24. A method for synchronized provision to a first device of at least two different media streams comprising a first media stream and a second media stream, the method comprising:

generating a plurality of identifiers that each indicate different sequence numbers to which respective action indicators are allocable, wherein the different sequence numbers indicate different respective locations in the second media stream, wherein at least some of the different respective locations are isochronous in the second media stream;

storing the plurality of identifiers in an identifier storage and allocating an action indicator to each of at least some of the

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<sup>2</sup> We use “Spec.” to refer to the Specification filed June 8, 2016, “Final Act.” to refer to the Final Action mailed June 14, 2018, “Appeal Br.” to refer to the Appeal Brief filed December 7, 2018, “Ans.” to refer to the Examiner’s Answer filed February 22, 2019, and “Reply Br.” to refer to the Reply Brief filed April 22, 2019.

- stored plurality of identifiers, wherein at least one action indicator identifies the first media stream;
- encoding a carrier with the plurality of identifiers and the second media stream, wherein the plurality of identifiers are encoded at locations in the second media stream that are indicated by the respective ones of the plurality of identifiers;
- decoding the plurality of identifiers and the second media stream from the received carrier;
- submitting the decoded plurality of identifiers to the first device;
- providing the decoded second media stream to the first device;
- retrieving, by the first device, any action indicators allocated to the decoded identifiers;
- requesting the first media stream identified by at least one retrieved action indicator; and
- providing the requested first media stream, such that the provisions of the first media stream and the second media stream to the first device are synchronized to each other based on the retrieved action indicators.

## REFERENCES

The Examiner relies upon the following references:

Name <sup>3</sup>	Reference	Date
Hwang	US 2013/0074141 A1	Mar. 21, 2013
Schwartz	US 2007/0199035 A1	Aug. 23, 2007
Gerken	US 2007/0022437 A1	Jan. 25, 2007

## REJECTIONS

Claims 24–27, 29, 35, 37, 45, and 47–50 are rejected as unpatentable under 35 U.S.C. § 102(a)(2) over Hwang. Final Act. 2–9, Ans. 3–9.

Claims 33, 36, and 38 are rejected as unpatentable under 35 U.S.C. § 103 over Hwang and Gerken. Ans. 9–11.

Claim 46 is rejected as unpatentable under 35 U.S.C. § 103 over Hwang and Schwartz. Final Act. 9, Ans. 11–12.

## OPINION

*Issue: Does the Examiner improperly rely on multiple embodiments of Hwang to find claim 24 is anticipated?*

The Examiner finds Hwang discloses all of the limitations of claim 24, including “generating a plurality of identifiers that each indicate different sequence numbers to which respective action indicators are allocable . . . .” Final Act. 3 (citing Hwang Fig. 6,<sup>4</sup> ¶¶ 68, 115, 124, 127, 137). For the limitation “encoding a carrier with the plurality of identifiers and the second media stream . . .” the Examiner relies on paragraph 68 of Hwang, which references Figure 4.<sup>5</sup> *Id.* at 4 (quoting Hwang ¶ 68 (“If the same source data can be read from multiple locations, the AAT may include multiple adjunct\_asset\_locators for an adjunct asset.”), Figs. 4, 6). Another example

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<sup>3</sup> All reference citations are to the first named inventor only.

<sup>4</sup> Illustrating Media Transport (MMT) Processing Unit (MPU). Hwang ¶¶ 60, 137–138.

<sup>5</sup> Illustrating Adjunct Asset Table (AAT). Hwang ¶¶ 67–68.

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is the recitation “requesting the first media stream identified by at least one retrieved action indicator,” for which the Examiner relies in part on paragraph 137 of Hwang and its description of Figure 6. *Id.* at 5 (citing Hwang ¶¶ 122, 137, Figs. 5, 6).

Appellant contends the Examiner relies on two separate embodiments from Hwang, AAT and MPU, in order to meet all the recitations of claim 24. Appeal Br. 8–9. Specifically, Appellant points to Hwang’s AAT technique and MPU technique as the showing for “generating and storing a plurality of identifiers indicating different sequence numbers.” *Id.* at 9. Appellant argues the Examiner’s showing requires that at least some of the stored identifiers relate to “different respective locations in one media stream (second media stream), and then allocating an action indicator that indicates a different media stream (first media stream).” *Id.* According to Appellant, the AAT technique relates to a single stream, the “adjunct stream,” and not the two media streams claimed. *Id.* at 10 (citing Hwang ¶ 68).

Appellant argues the MPU technique’s “sequence numbers are not allocated an action indicator or even any identifier from an AAT.” Appeal Br. 10. Appellant argues any MPU sequence number “is merely a reference point in the regular media stream” in a “known timeline specific to the MPU sequence number technique to execute a formula for determining the start point of another asset relative to one of the sequence numbers (i.e.,  $\text{asset2\_idbegin}=\text{asset1\_Id.MPU}(123)$ )).” *Id.*; *see* Hwang Fig. 6 (including the “ $\text{asset2\_idbegin}=\text{asset1\_Id.MPU}(123)$ ”).

Appellant concludes by arguing the rejection of claim 24 fails because each and every claim element is not found in a single embodiment of Hwang. Appeal Br. 10–11 (citing MPEP § 2131 (citations omitted)).

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Appellant points out that anticipation requires that “each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference” and that if “different embodiments of a teaching are combined an obviousness analysis is warranted.” *Id.* at 11 (citing *In re Arkley*, 455 F.2d 586, 587 (Fed. Cir. 1972)).

The Examiner does not specifically respond to this argument. *See generally* Ans. 14–17. In the Answer, the Examiner arguably relies only on the MPU embodiment. *See id.* at 16 (citing Hwang ¶¶ 22–23). Appellant responds that that first embodiment described in paragraph 22 of Hwang “relates to receiving and storing composition information (CI)” of Hwang’s Figure 6, which illustrates CI in the MPU embodiment. Reply Br. 3 (citing Hwang ¶¶ 21–23). According to Appellant, paragraph 23 also describes “receiving and storing control information regarding adjunct media data” which is the AAT embodiment. *Id.* (citing Hwang ¶¶ 21–23, 67–69, Fig. 4).

We agree with Appellant that the anticipation rejection relies on multiple embodiments, AAT and MPU, of Hwang. We also find the Examiner does not dispute that the rejection relies on two embodiments. We also find the Examiner agrees that two embodiments are relied on for the anticipation rejection. *See, e.g.*, Ans. 16 (“Applicant’s invention is directed to the first embodiment . . .” (citing Hwang ¶ 23)); *see also* Reply Br. 2 (arguing Examiner admits two embodiments are relied on).

It is not always the case that two embodiments of a single reference prevent a claim from being anticipated. *Chamberlain Group, Inc. v. Techtronic Industries Co.*, 935 F.3d 1341, 1350 (Fed. Cir. 2019). “[T] the relevant question is whether the reference is sufficiently clear in disclosing the combinability of those elements such that a skilled artisan would ‘at once envisage’ the claimed combination.” *Id.* (citing *Kennametal, Inc. v.*

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*Ingersoll Cutting tool Co.*, 780 F.3d 1376 (Fed. Cir. 2015)). That is not the situation presented here. As noted above, there is no dispute that the rejection relies on two separate embodiments. The Examiner does not allege that a person of ordinary skill would “at once envisage” or otherwise connect the embodiments to arrive at the claimed combination.

“Combining two embodiments disclosed adjacent or side by side to each other” does not “require a leap of inventiveness” and may be a predictable variation supporting an obviousness determination. *Boston Scientific Scimed, Inc. v. Cordis Corp.*, 554 F.3d 982, 991 (Fed. Cir. 2009). But there is no obviousness rejection for us to consider.

In an *ex parte* appeal, the Board “is basically a board of review—we review . . . rejections made by patent examiners.” *Ex parte Gambogi*, 62 USPQ2d 1209, 1211 (BPAI 2001). “The review authorized by 35 U.S.C. Section 134 is not a process whereby the examiner . . . invite[s] the [B]oard to examine the application and resolve patentability in the first instance.” *Ex parte Braeken*, 54 USPQ2d 1110, 1112 (BPAI 1999). Because we are a board of review, and not a place of initial examination, we will not engage in the *de novo* examination required to supplement the Examiner’s findings in connection with the whether or not a person of ordinary skill would “at once envisage” the claimed combination based on the two embodiments disclosed in Hwang. We also express no opinion as to whether independent claim 24 would have been obvious over the two embodiments disclosed in Hwang if supported by additional explanation and/or references. We leave any such further consideration to the Examiner. 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* MPEP § 1213.02 (9<sup>th</sup> Ed., Mar. 2014).



Furthermore, our decision is limited to the findings before us for review. The Board does not “allow” claims of an application and cannot direct an Examiner to pass an application to issuance. Rather, the Board’s primary role is to review adverse decisions of examiners including the findings and conclusions made by the Examiner. *See* 37 C.F.R.

§ 41.50(a)(1) (“The Board, in its decision, may affirm or reverse the decision of the examiner in whole or in part on the grounds and on the claims specified by the examiner”).

We do not sustain the rejection to claim 24. The same reasons for the rejection are asserted by the Examiner for the remaining independent claims 26, 35, and 37. *See* Final Act. 2–5. For the same reasons we do not sustain the rejection to claim 24, we do not sustain the rejections under §102(a)(2)<sup>6</sup> to claims 26, 35, and 37. Dependent claims 25, 27, 29, 45–50 depend from claims where we have not sustained the rejection and we do not sustain the rejections to claims 25, 27, 29, 45–50. Still further, we do not sustain the rejections of claim 33, 36, 38, and 46 under 35 U.S.C. §103 as the Examiner’s application of the Gerken and Schwartz references fail to cure the deficiency in the base rejection addressed *supra*.

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<sup>6</sup> The argued rejection under § 102 is not rehabilitated merely by changing the rejection to be under 103 absent the Examiner providing missing reasoning for combining Hwang’s two embodiments.

DECISION SUMMARY

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
24–27, 29, 35, 37, 45, 47–50	102(a)(2)	Hwang		24–27, 29, 35, 37, 45, 47–50
33, 36, 38	103	Hwang, Gerken		33, 36, 38
46	103	Hwang, Schwartz		46

REVERSED