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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 BRYAN L. YOUNG, AMY LEIGH ROSE,
NATHAN J. PETERSON, JOHN SCOTT CROWE, and
JENNIFER LEE-BARON

_____

Appeal 2019-005597
Application 14/469,885
Technology Center 2100

_____

Before CARL W. WHITEHEAD JR., DAVID M. KOHUT, and
IRVIN E. BRANCH, *Administrative Patent Judges*.

KOHUT, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant[1] appeals from the
Examiner's decision to reject claims 1, 6, 8, 15, 17, 18, 20, 25, 27, 29–35,
37, and 39–41. Final Act., Summary (Form PTOL-326). Claims 2–5, 7,
9–14, 16, 19, 21–24, 26, 28, 36, and 38 are canceled. *Id.* at 2. We have
jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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[1] We use "Appellant" to reference the applicant as defined in
37 C.F.R. § 1.42. Appellant identifies the real party in interest as
"Lenovo Singapore PTE[,] Ltd." Appeal Br. 2.

STATEMENT OF THE CASE

Appellant's Invention

Appellant's invention "determine[s] that a virtual machine (VM) . . . is in an at least [a] partially idle state and pause[s] the VM in response to the determination." Spec., Abst. Independent claim 18 and depending claim 25, reproduced below, are illustrative of argued subject matter.

> 18. A computer readable storage medium that is not a transitory signal, the computer readable storage medium comprising instructions executable by a processor to:
>
> determine that a first virtual machine (VM) running at a device is idle;
>
> pause operation of the first VM in response to the determination and maintain data for the first VM in random access memory (RAM) accessible to the device; and
>
> present a user interface (UI) on a display accessible to the processor, the UI comprising a selector that is selectable to configure a setting for the device so that, in the future, VMs are automatically paused when determinations are made that VMs are in an at least partially idle state.
>
> 25. The computer readable storage medium of Claim 18, wherein the UI comprises a second selector selectable to decline to permit a user to pause VMs in the future.

Appeal Br., Claims Appendix.

Rejections

Claims 1, 6, 8, 15, 17, 18, 20, 25, and 33 stand rejected under 35 U.S.C. § 103 as unpatentable over Chandrachari (US 8,880,687 B1; Nov. 4, 2014), Beveridge (US 2014/0173181 A1; June 19, 2014), and Ginzton (US 8,528,107 B1; Sept. 3, 2013). Final Act. 3–22.

Claims 31, 32, 34, 35, 37, and 39–41 stand rejected under
35 U.S.C. § 103 as unpatentable over Chandrachari, Beveridge, Ginzton, and
Dabagh (US 2010/0174808 A1; July 8, 2010). Final Act. 23–37.

Claims 27, 29, and 30 stand rejected under 35 U.S.C. § 103 as
unpatentable over Chandrachari, Beveridge, Ginzton, and Dwarampudi
(US 2012/0084262 A1; Apr. 5, 2012). Final Act. 37–39.

OPINION

Motivation

For all rejections, Appellant contends the Examiner does not show a
motivation to combine the applied prior art. Appeal Br. 8–9 (claim 25), 14–
15 (claim 33), 15–17 (claims 1, 6, 8, 15, 17, 18, and 20), 18–20 (claims 31,
32, 34, 35, 37, and 39–41), 20–22 (claims 27, 29, and 30). Specifically,
Appellant repeats the same contentions for each of the five sets of claims
parenthetically identified above. *Id.* First, Appellant quotes the Examiner's
rationale/s for combining the applied prior art and then summarily contends
the reasoning "[a]t best" concerns whether an artisan "***could have*** made the
proposed combination." *Id.* at 9, 15, 17, 19, 21. Second, Appellant
summarily contends the record is "silent on any reasons or evidence
. . . prov[ing an] artisan would be ***motivated*** to seek out the particular
secondary references . . . without already knowing about them." *Id.* Third,
Appellant contends a feature of a given reference (e.g., a feature of Ginzton)
is added to the combination but is not disclosed *ipsissimis verbis* in the other
references. *Id.* at 9, 15, 17, 19, 21–22.

With respect to the base combination of Chandrachari, Beveridge, and
Ginzton (applied by all rejections) Appellant argues that the advantages of
the combination proffered by the Examiner are immaterial to the

obviousness analysis. *Id.* at 4. Instead, Appellant contends that the "proper question" of obviousness is as follows:

> [T]he question under the law is not whether the skilled artisan, once presented with the references, would recognize "advantages" of combining them[.] The proper question is whether the skilled artisan would be motivated to pick out and combine the references in the first place.

Id. at 5, 9 (emphasis omitted).

Contrary to the above contentions, there is no requirement to "prove [an] artisan would . . . seek out the particular secondary references . . . without already knowing about them" (Appeal Br. 9, 15, 17, 19, 21); rather, an artisan is categorically aware of all prior art.[2] *See Standard Oil Co. v. Am. Cyanamid Co.*, 774 F.2d 448, 454 (Fed. Cir. 1985) ("The issue of obviousness is determined entirely with reference to a *hypothetical* 'person having ordinary skill in the art[]' . . . who is presumed to be aware of all the pertinent prior art."). Further, there is no requirement for an *ipsissimis verbis* relationship between combined teachings of prior art (*see* Appeal Br. 9, 15, 17, 19, 21–22), nor even for a disclosed relationship if the plain inferences and creativity of an artisan provide sufficient reason for the combination (*see infra* 6 (requirements for a prima facie case of obviousness)). *See also In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004) (References need not even be analogous to one another, but rather "qualify as prior art for an obviousness determination [] when analogous to the claimed invention."); *In re Schaumann*, 572 F.2d 312, 317 (CCPA 1978) (Even where a prior art teaching is needed, an *ipsissimis verbis* test would

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[2] Appellant does not dispute that the applied references are analogous art to the claimed invention.

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wrongly "ex[]alt[] form over substance."). And lastly, the proper question of motivation is indeed whether an artisan would see a benefit of combining prior art as proposed. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 424 (2007) ("[T]he issue [is] too narrowly [considered] by, in effect, asking whether a pedal designer writing on a blank slate would have chosen both [the pedal structure of the] Asano [patent] and a modular sensor similar to the ones used in the Chevrolet . . . patent. . . . The proper question to have asked was whether a pedal designer of ordinary skill . . . would have seen a benefit to upgrading Asano with a sensor.").

A prima facie case of obviousness is achieved if the record clearly conveys to a person of ordinary skill in the art a reason for concluding the combination (or modification) of prior art would have been obvious, such that the applicant can understand and address the merits of the combination. *See KSR*, 550 U.S. at 418 (requirements for obviousness analysis); *In re Jung*, 637 F.3d 1356, 1362 (Fed. Cir. 2011) (requirements for a prima facie case). If the combination entails more than a simple swapping or adding of features to predictably improve a device, then it ***may*** be necessary to identify interrelated teachings of the applied prior art that would prompt an artisan to make the combination. *KSR*, 550 U.S. at 417–18. However, if the plain inferences and creativity of an artisan (e.g., common sense) provide sufficient reason for the combination, the analysis "need not seek out precise teachings" to make the combination. *Id.* at 418. In sum, "obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation, or by overemphasis on the importance of published articles and the explicit content of issued patents." *Id.* at 419.

In light of the above contentions and considerations, we are not persuaded that Appellant shows the record lacks a prima facie case of obviousness. For example, Appellant does not contend or provide sufficient evidence to show that the combination of prior art entails more than a simple and predictable improvement, such that a specific teaching or suggestion of the combination should be shown in the prior art. Indeed, though repeatedly contesting the Chandrachari-Ginzton combination, Appellant does not provide sufficient evidence to show error in the Examiner's specific findings regarding the combination of the references. Appeal Br. 9, 15, 17.

We agree with the Examiner that the Chandrachari-Ginzton combination is simple and predictable. Final Act. 15–16 (Chandrachari), 6–7 (Ginzton); Ans. 44–46. The Examiner's combination starts with Chandrachari's invention whereby a VM host (manager module) can set a VM to be monitored and paused for idleness. Final Act. 15 (citing Chandrachari col. 18, ll. 1–5). The Examiner combines Ginzton's UI whereby a VM host administrator can authorize a VM user to modify a VM, such as permit the user to pause the VM. Final Act. 17 (citing Ginzton col. 12, ll. 20–33), 20–21 (citing Ginzton col. 11, ll. 40–55).

The Examiner finds that adding Ginzton's UI authorization to modify a VM—and thereby adding a UI authorization to set a VM to be monitored and paused for idleness (as in Chandrachari)— would be obvious to one of ordinary skill in the art because it would provide more security to the VM host. Ans. 46, 54 (citing Ginzton col. 2). At the time of Appellant's invention, VM host administrators ubiquitously controlled permissions to modify VMs and did so to protect VM hosts and VMs. *See, e.g.*, Ginzton col. 2, ll. 14–16 ("[T]he invention may be implemented in a corporate

environment with a variety of restrictions to improve security."); *see also*
KSR, 550 U.S. at 421 (providing "factfinders recourse to common
sense"). Appellant does not provide sufficient argument or evidence to rebut
this or any other rationale provided by the Examiner (as discussed *supra*).

Accordingly, for the reasons stated, we are unpersuaded by
Appellant's arguments directed to motivation.

Claims 25 and 31

For each of claims 25 and 31, Appellant also contends the Examiner
unreasonably asserts Ginzton as teaching or suggesting the claimed "second
selector that is selectable to decline to permit a user to pause VMs in the
future." Appeal Br. 4–8, 10–13 (emphasis omitted).[3] Specifically,
Appellant contends Ginzton teaches only a UI capability to bar (i.e., "to
decline to permit," as claimed) a user from pausing VMs—not use of a
UI-displayed "selector" to bar a user from pausing VMs. *Id.* Appellant
further contends that, even assuming Ginzton's UI permissions to modify a
VM ("restrictions") are set by an administrator's interaction with a UI, the
permissions could nonetheless be set without a "selector . . . [as] construed
in conformance with Appellant's specification." Reply Br. 4, 7–8 (emphasis
omitted). We are unpersuaded for two reasons.

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[3] Appellant's arguments repeatedly assert claim 33's following language:
"UI comprises a second selector that is selectable to decline to permit a user
to pause VMs in the future but still allow a system administrator to pause
VMs in the future." Appeal Br. 10–13; Reply Br. 6. The arguments,
however, address only the following portion: "UI comprises a second
selector that is selectable to decline to permit a user to pause VMs in the
future." Appeal Br. 11–13; Reply Br. 7–8. As can be seen, the addressed
portion is identical to claim 25's disputed limitation.

First, Appellant does not identify a function or structure of the claimed selector (e.g., a UI-displayed feature) for us to compare against Ginzton's teachings. Second, at the time of Appellant's invention (2014), a software application's UI was ubiquitously presumed to be a graphical UI (GUI) whereby a user inputs selectable states (e.g., yes/no permissions) via graphic buttons. *See KSR*, 550 U.S. at 421 (providing "factfinders recourse to common sense"); *see also Koninklijke Philips N.V. v. Google LLC*, 948 F.3d 1330, 1337 (Fed. Cir. 2020) ("Regardless of the tribunal, . . . common sense and common knowledge can, under certain circumstances, be used to supply a missing limitation."). Appellant's Specification illustrates "selector elements" 506, 606, 608, 610, 612, 616, 618 as graphic buttons.

In view of the above, even assuming (arguendo) the claimed second selector comprises one of the disclosed "selector element" features, importation of that feature to the claimed invention would not patentably distinguish over Ginzton's UI as understood by artisans (i.e., understood as inputting selectable states via graphic buttons).

Accordingly, for the reasons stated, we are unpersuaded of Examiner error by Appellant's arguments directed to the claimed second selector.

OVERALL CONCLUSION

We are unpersuaded of error and accordingly affirm the Examiner's decision to reject claims 1, 6, 8, 15, 17, 18, 20, 25, 27, 29–35, 37, and 39–41.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 6, 8, 15, 17–18, 20, 25, 33	103	Chandrachari, Beveridge, Ginzton	1, 6, 8, 15, 17, 18, 20, 25, 33	
31, 32, 34, 35, 37, 39–41	103	Chandrachari, Beveridge, Ginzton, Dabagh	31, 32, 34, 35, 37, 39–41	
27, 29, 30	103	Chandrachari, Beveridge, Ginzton, Dwarampudi	27, 29, 30	
Overall Outcome			1, 6, 8, 15, 17, 18, 20, 25, 27, 29–35, 37, 39–41	

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