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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 BRENT BURSEY

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Appeal 2020-001028
Application 14/105,367
Technology Center 3600

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Before MELISSA A. HAAPALA, KARA L. SZPONDOWSKI, and
MICHAEL J. ENGLE, *Administrative Patent Judges*.

SZPONDOWSKI, *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 2–12 and 14–28, constituting all claims

pending in the application. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

STATEMENT OF THE CASE

This is the second appeal that the Board has considered regarding this patent application. In Appeal No. 2016-008118 (PTAB Nov. 2, 2017), the Board affirmed the Examiner's rejections based on 35 U.S.C. § 101 and 35 U.S.C. § 103(a) over the same references as in the current appeal. We note that the claims were amended subsequent to the Decision in the first appeal.

Appellant's invention generally relates to "[a]n enterprise geospatial intelligence service oriented architecture (EGI-SOA) [that] provides a consumer with one or more tailored products in response to either a dynamic request or a standing request by the consumer." Spec., Abstract. Claims 5, 17, and 25 are independent. Claim 5, reproduced below, is illustrative of the claimed subject matter:

> 5. A method comprising the following steps:
>
> (a) one or more computers autonomously determining if one or more tailored geospatial intelligence products are requested tailored geospatial intelligence products that meet criteria of a standing request by a consumer; and
>
> (b) one or more computers autonomously pushing to the consumer the one or more requested tailored geospatial intelligence products, autonomously transforming each of the one or more tailored geospatial intelligence products by the one or more computers based on contexts for each respective tailored geospatial intelligence product by an autonomous transforming process comprising the following steps:
>
> (c) the one or more computers filtering an event cloud to match one or more events in the event cloud to an event pattern;
>
> (d) the one or more computers extracting contexts for each event matched in step (c);
>
> (e) the one or more computers translating a workflow with the contexts into an executable process;

(f) the one or more computers generating a first descriptive intermediate file based on a workflow to be used in forming the one or more tailored geospatial intelligence products;

(g) the one or more computers generating a second descriptive intermediate file based on the services associated with the workflow that will be used to form one or more tailored geospatial intelligence products;

(h) the one or more computers generating a third descriptive intermediate file based on how the services interact with each other; and

(i) the one or more computers generating a fourth descriptive intermediate file based on the support data for the workflow.

REJECTIONS[2]

Claims 2, 4–11, 14, 16–23, and 25–28 stand rejected under pre-AIA 35 U.S.C. § 103(a) as unpatentable over the combination of Kelly et al. (US 2005/0278386 A1, published Dec. 15, 2005 (hereinafter "Kelly")), Clar et al. (US 2009/0202109 A1, published Aug. 13, 2009 (hereinafter "Clar")), and Balabhadrapatruni et al. (US 2002/0178252 A1, published Nov. 28, 2002 (hereinafter "Balabhadrapatruni")). Final Act. 8–19.

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[2] The Examiner objects under 35 U.S.C. § 132(a) to Appellant's amendment to incorporate U.S. Patent No. 9,535,927 B2 by reference in the Specification, and states "Applicant is required to cancel the new matter in the reply to this Office Action." Final Act. 2; Ans. 4–5. We do not address Appellant's arguments as to this objection (Appeal Br. 8), as it is not an appealable matter. *See* MPEP § 604.4(c) ("Where the new matter is confined to amendments to the specification, review of the examiner's requirement for cancelation is by way of petition.").

Claims 3, 12, 15, and 24 are rejected under pre-AIA 35 U.S.C. § 103(a) as unpatentable over the combination of Kelly, Clar, Balabhadrapatruni, and Admitted Prior Art. Final Act. 19–21.

ANALYSIS

Appellant presents four arguments as to why the Examiner erred in rejecting independent claims 5, 17, and 25 over the combination of Kelly, Clar, and Balabhadrapatruni: (1) Kelly does not teach or suggest "autonomously transforming"; (2) Kelly teaches away from "autonomously transforming"; (3) modifying Kelly to provide "autonomously transforming" changes the principle of operation of Kelly; and (4) Clar does not teach or suggest "autonomously transforming." *See generally* Appeal Br.; Reply Br.

We do not find Appellant's arguments persuasive. There is no dispute that "autonomously transforming" should be interpreted to mean "without any direct human intervention." Spec. ¶ 47; Ans. 6; Appeal Br. 12–13. There is also no dispute that Kelly does not explicitly teach "autonomously transforming." *See* Ans. 6 ("Kelly does not explicitly teach autonomously transforming comprising autonomously filtering, autonomously extracting, and autonomously translating"); Final Act. 4, 10 (same); Appeal Br. 16 ("Kelly discloses a scheme whereby the user is directly involved and, therefore, does not disclose or fairly teach 'autonomously transforming,' as claimed") (emphasis omitted); Reply Br. 4–5 (same). The Examiner relies on Clar to teach or suggest "autonomously transforming," and provides rationale to modify Kelly with the teachings of Clar. *See* Final Act. 4, 6, 10–12. Appellant has not explicitly addressed or rebutted the Examiner's

rationale for modifying Kelly with the teachings of Clar, other than as described below. *See generally* Appeal Br., Reply Br.[3]

Appellant argues that Kelly teaches away from the claimed invention because the Kelly workflow "occurs with reliance upon customer or technician intervention." Appeal Br. 16; *see also* Appeal Br. 19 (arguing Kelly teaches away because "Kelly specifically requires human intervention") (emphasis omitted); Reply Br. 5 ("by definition Kelly <u>must teach away</u> from the disclosed invention, since, it is inarguable that Kelly specifically requires human intervention").

We are not persuaded by this argument. "A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant." *In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994). "A reference does not teach away, . . . if it merely expresses a general preference for an

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[3] Appellant contends that based on previous appeal 2014-003565, which dealt with a related application, it is *res judicata* that Kelly fails to provide . . . a reason to modify Kelly to perform the "autonomously transforming" step. Appeal Br. 19. However, in that case, the Board found that "[w]hat is missing here is a reason to modify Kelly to perform, at least, step (e), 'autonomously' . . . as MacLaurin is alleged to disclose." *Ex parte Bursey*, 2017 WL 2377769, at *2 (PTAB May 25, 2017). Although the Examiner must establish that "there was an apparent reason to combine the known elements in the fashion claimed," *KSR Int'l Int'l Co. v. Teleflex*, 550 U.S. 398, 418 (2007), the apparent reason to combine references need not come from the references themselves. *See DyStar Testilfarben GmbH v. C.H. Patrick Co.*, 464 F.3d 1356, 1368 (Fed. Cir. 2006). Here, the Examiner has provided reasoning to combine Kelly with Clar (a different reference than in previous appeal 2014-003565), which Appellant has not persuasively rebutted or addressed. *See* Final Act. 4, 6, 10–12.

alternative invention but does not criticize, discredit, or otherwise discourage investigation into the invention claimed." *Galderma Labs., L.P. v. Tolmar, Inc.*, 737 F.3d 731, 738 (Fed. Cir. 2013); *see also In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004). We agree with the Examiner that Appellant has not persuasively argued that Kelly teaches away from the claimed invention. *See* Ans. 7–9. Appellant merely argues that Kelly provides an alternative solution – that allows for human intervention – without providing persuasive evidence or reasoning that Kelly criticizes, discredits, discourages, or would lead away from performing the relevant actions without human intervention. In effect, Appellant is arguing that Kelly does not teach the limitation, which is not sufficient to show that Kelly teaches away from the disputed limitation.

Appellant further argues that one of ordinary skill in the art would not modify Kelly "to provide 'autonomously' or 'autonomously transforming' as claimed, since doing so would change the principle of operation of Kelly (which requires reliance upon customer or technician intervention), thereby rendering Kelly unsatisfactory for its intended purpose." Appeal Br. 16; *see also* Reply Br. 8–9. The Examiner responds that "[t]he intended purpose of Kelly is to provide a system that 'facilitates updating of geospatial information' and 'allows updates to be effectuated in an efficient manner.'" Ans. 7. Appellant has not rebutted the Examiner's statement of Kelly's intended purpose, nor has Appellant provided more than conclusory statements in support of its arguments that the proposed modification changes Kelly's principle of operation. *See* Appeal Br. 16; Reply Br. 8–9. Nor has Appellant stated what it believes to be Kelly's intended purpose.

Kelly is generally directed to "updating geospatial information such as those used in generation of maps, online maps, and navigational systems." Kelly ¶ 2. Kelly describes several advantages to its system, including "providing a geospatial information system and method that facilitates updating of geospatial information" and "providing a geospatial information system and method that allows updates to be effectuated in an efficient manner." Kelly ¶¶ 19–20. Based on Kelly's disclosure, we agree with the Examiner's description of Kelly's intended purpose and are not persuaded that Kelly's intended purpose is reliant upon customer or technician intervention. We, therefore, are not persuaded that the Examiner's proposed modifications would render Kelly unsatisfactory for its intended purpose.

Appellant further contends that Clar does not disclose "autonomously" or "autonomously transforming," because Clar discloses user intervention by allowing a user of the system "to adjust the mapping sensitivity of the system and/or allowing the threshold λ to be fixed and/or configurable by a user." Appeal Br. 20–21 (citing Clar ¶¶ 58, 66); *see also* Reply Br. 5–8.

Appellant's arguments are not persuasive. Paragraph 58 of Clar states:

> Controller **34** may compare the newly-gathered points stored in temporary map **46** to corresponding previously-gathered points contained in terrain map **32** (i.e., the previously-mapped surface). Controller **34** may determine whether an update to terrain map **32** is warranted based on the comparison. In particular, controller **34** may compare the heights of points stored in temporary map **46** to the heights of corresponding points stored in terrain map **32.** FIG. 7 shows a graphical illustration of the height differences Δ between terrain map **3 2** and temporary map **46** at each x^0 -y^0 coordinate pair.

Each height difference Δ may or may not warrant an update to terrain map **32.** It is to be appreciated that height differences Δ (positive or negative) below a certain height magnitude threshold λ may not warrant an update to terrain map **32.** For example, if a small amount of material is removed from or added to a location on the surface **14** of worksite **10** that causes a change in height Δ of only a few centimeters, an update to terrain map **32** is probably not warranted. Updating terrain map **32** in such instances may, for example, impose an undue processing burden on system **22.** Conversely, changes of height Δ greater than a few centimeters, or another magnitude λ indicative of a significant change to the worksite terrain **16,** may warrant an update to terrain map **32.** *As such, controller 34 may have a stored value for magnitude threshold λ. The value may be preset based on the particular application or configurable to allow a user of system 22 to adjust the mapping sensitivity of system 22.*

Clar ¶ 58 (emphasis added). Paragraph 66 of Clar states:

Controller **34** may then determine if a change to terrain map **32** is warranted based on the comparison in step **72** (step **74).** Specifically, controller **34** determine if height differences between terrain map **3 2** and temporary map **46** at x^0 -y^0 coordinate pairs are greater in magnitude than a height magnitude threshold λ. *As mentioned above, the threshold λ may be fixed and/or configurable by a user of system 22 allow changes in mapping sensitivity of system 22.*

Clar ¶ 66 (emphasis added). Clar generally describes performing a comparison of heights of points to determine if changes to a terrain map should be made. Clar ¶¶ 58, 66. If a height difference is below a certain threshold (λ), changes may not be warranted. *Id*. Appellant contends that the configuration of Clar's threshold (λ) requires human intervention, and therefore, is not "autonomous." Appeal Br. 21; Reply Br. 6–8. Appellant argues that "[w]ithout human, the system of Clar would have a fixed

threshold, i.e., not transformed. Such user intervention is in the only means to transform and is in direct contrast to operating 'autonomously' or in a manner of 'autonomously transforming,' as claimed." Reply Br. 8.

We disagree. As emphasized above, Clar explicitly discloses that threshold λ may be preset at a fixed value. Clar ¶¶ 58, 61. Alternatively, Clar discloses that threshold λ may be configurable by the user, in order to adjust the system sensitivity. *Id.* Appellant's arguments solely focus on the latter disclosure and ignore Clar's disclosure of a preset threshold λ. Appellant does not persuasively address why a preset threshold λ requires human intervention. We agree with the Examiner that Clar's disclosure of a preset threshold λ suggests that no human intervention is involved. *See* Ans. 9. Moreover, although, Appellant argues that a "fixed threshold" is not "transformed," (Reply Br. 8), Appellant does not sufficiently explain this argument in the context of the claims. Rather, we agree with the Examiner that even in an embodiment where the user configures the threshold parameter, this step is outside the scope of the claim limitations, and would not preclude the system from performing the recited actions autonomously (e.g., comparing values to the threshold without human intervention). *See* Ans. 9.

Accordingly, we are not persuaded the Examiner erred in rejecting claims 5, 17, and 25 under 35 U.S.C. § 103. Appellant does not separately or substantively argue dependent claims 2–4, 6–12, 14–16, 18–24, and 26–28; rather, Appellant repeats the argument that the combination of references does not teach or suggest "autonomously" or "autonomously transforming," argues that the additional references fail to cure the deficiencies, then conclusorily states that Kelly, Clar, Balabhadrapatruni, or Official Notice

"fail to disclose or fairly suggest the additional elements [of the dependent claim]," and repeats the claim language without further argument. *See* Appeal Br. 26–34; Reply Br. 9–12.[4] Such arguments are not substantive arguments for patentability and are insufficient to establish error in the rejection. *See In re Lovin*, 652 F.3d 1349, 1357 (Fed. Cir. 2011) ("[W]e hold that the Board reasonably interpreted Rule 41.37 to require more substantive arguments in an appeal brief than a mere recitation of the claim elements and a naked assertion that the corresponding elements were not found in the prior art."); *cf. In re Baxter Travenol Labs.*, 952 F.2d 388, 391 (Fed. Cir. 1991) ("It is not the function of this court to examine the claims in greater detail than argued by an appellant, looking for non-obvious distinctions over the prior art.").

Accordingly, for the reasons set forth above, we sustain the Examiner's 35 U.S.C. § 103(a) rejection of claims 2–12 and 14–28.

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[4] In support of its arguments for claims 3, 12, 15, and 24, Appellant also argues that it "disagrees with the Office Action's assertion that '[t]he existing knowledge hereby construed as facts includes: it is an old and well-known business practice to check whether a product matches a customer's specification and customizing and completing the development of the product; Bayesian inference is an old and well-known concept used in the field of invention to statistically improve decision making by a computing system.'" Appeal Br. 32. However, to adequately traverse the Examiner's taking of Official Notice, Appellant must present arguments to the effect that the Officially Noticed facts are not common knowledge. *See* MPEP § 2144.03C (9th Ed.); *see also In re Boon*, 439 F.2d 724, 728 (CCPA 1971); *In re Chevenard*, 139 F.2d 711, 712 (CCPA 1944). Appellant has not done so here. We agree with the Examiner that Appellant has failed to adequately traverse the Official Notice. *See* Ans. 15.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
2, 4–11, 14, 16–23, 25–28	103(a)	Kelly, Clar, Balabhadrapatruni	2, 4–11, 14, 16–23, 25–28	
3, 12, 15, 24	103(a)	Kelly, Clar, Balabhadrapatruni, Admitted Prior Art	3, 12, 15, 24	
Overall Outcome			2–12, 14–28	

AFFIRMED