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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte HOLGER BRUNNBERG, MARTIN OBERMALER, and DARLUSZ KRAKOWSKI

Appeal 2015-003114
Application 12/978,859
Technology Center 2400

Before CAROLYN D. THOMAS, JOHN F. HORVATH, and KARA L. SZPONDOWSKI, *Administrative Patent Judges*.

THOMAS, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants seek our review under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 1–10, all the pending claims in the present application. *See* Claim Appendix; *see also* App. Br. 3–4. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

The present invention relates generally detecting a defective node which is connected to a bus. *See* Abstract.

Claim 1 is illustrative:

> 1. A method for detecting a defective node which is connected to a bus, comprising:
>
> incrementing, by a node, an internal error counter in a normal operating state of the node when an error is detected,
>
> switching the node to an isolated operating state of the node, in which the node does not exchange any messages via the bus if the internal error counter of the node exceeds a predetermined error threshold value,
>
> switching the node from the isolated operating state to the normal operating state when a condition is fulfilled,
>
> detecting the switching of the node from the isolated operating state to the normal operating state as state change, and
>
> detecting the node as being defective if a rate of the detected state changes exceeds an adjustable change rate or a number of detected state changes exceeds an adjustable state change threshold value.

Appellants appeal the following rejections:[1]

R1. Claim 1 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Kuban (US 2008/0274689 A1; Nov. 6, 2008) and Muto (US 4,951,281; Aug. 21, 1990) (*see* Ans. 3); and

R2. Claims 2–10 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Kuban, Muto, and Seven (US 2007/0018719 A1; Jan. 25, 2007) (*see* Ans. 5).

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[1] The Examiner noted typographical errors and modified the grounds of rejection set forth in the Office Action dated February 28, 2014 due to the dependency discrepancies noted by Appellants (*see* Ans. 3, 20; *see also* App. Br. 8). In order to expedite matters, we shall accept this modification.

ANALYSIS

Procedural Matter

Appellants contend that "[t]he amendments and new claims in the after-final amendment filed on March 29, 2014 should have been entered" (App. Br. 4). In particular, the Examiner refused to enter the after-final amendment (*see* Ans. 19). We take this opportunity to direct Appellants' attention to MPEP § 1201, which states:

> The line of demarcation between appealable matters for the Board of Patent Appeals and Interferences (Board) and petitionable matters for the Director of the U.S. Patent and Trademark Office (Director) should be carefully observed. The Board will not ordinarily hear a question that should be decided by the Director on petition, and the Director will not ordinarily entertain a petition where the question presented is a matter appealable to the Board.

MPEP § 1201, 8th ed., rev. July 2008.

In the present case, it appears Appellants have not filed a petition to resolve the Examiner's refusal to enter proposed amendments prior to the matter reaching the Board. The Examiner's refusal to enter an amendment is reviewable by petition under 37 C.F.R. § 1.181 and thus not within the jurisdiction of the Board. 37 C.F.R. § 1.127 (2009); *In re Mindick*, 371 F.2d 892, 894 (CCPA 1967) (holding that the refusal of an examiner to enter an amendment after final rejection of claims is a matter of discretion, and any abuse of discretion is remedied by a Rule 181 petition to the Commissioner of Patents, and not by appeal to the Board of Appeals).

In the present case, it would have been desirable for the Appellants to have resolved the refusal to enter proposed amendments by petition prior to the matter reaching the Board.

Claim 1

Issue 1: Did the Examiner err in finding that Kuban and Muto collectively teaches or suggests detecting the node as being defective if a rate of the detected state changes exceeds an adjustable change rate, as set forth in claim 1?

Appellants contend "counter B of Muto is tracking cumulated errors, but not the number or rate of state changes" (App. Br. 6). "None of the counters as taught by Muto are concerned with counting state changes . . . the two desired results requires that the nodes be in opposing states" (*id.* at 7).

In response, the Examiner finds that "Muto discloses '**detecting the node as being defective**' . . . and '**if a number**' . . . '**exceeds an adjustable**' . . . '**threshold value**' . . . [and] Kuban teaches '**detected state changes**'" (Ans. 15). We agree with the Examiner.

Specifically, the Examiner is relying on the combined teachings of Muto and Kuban to teach or suggest *detecting the node as being defective if a rate of the detected state changes exceeds an adjustable change rate or a number*, as set forth in claim 1. For example, the Examiner relies on Kuban's disclosure of state changes in that Kuban discloses

> [t]he error counters are incremented and decremented . . . based on the type of error detected and the error state of the node . . . nodes **112** with high error counts may be put in the passive state . . . . If their error counts are reduced . . . they are allowed to rejoin the bus **114** in the active state

(*see* Kuban ¶ 45). Appellants' contentions fail to address the Examiner's aforementioned findings regarding Kuban, importantly because the Examiner imports Muto merely to highlight *detecting the node as being*

defective if a number exceeds an adjustable threshold value (*see* Muto 17:1–5), not for counting state changes.

Thus, Appellants' arguments do not take into account what the collective teachings of the prior art would have suggested to one of ordinary skill in the art and is, therefore, ineffective to rebut the Examiner's prima facie case of obviousness. *See In re Keller*, 642 F.2d 413, 425 (CCPA 1981) ("The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art.") (Citations omitted). This reasoning is applicable here.

Accordingly, we sustain the Examiner's rejection of claim 1.

Claims 2–10

Issue 2: Has the Examiner met the burden of establishing that Seven constitutes analogous art?

Appellants contend that "Seven is non-analogous art" (App. Br. 8) because "[t]his field of art [in Seven] is not even remotely related to the problem of the presently disclosed and claimed subject matter" (*id.* at 9).

The field of endeavor test "requires the PTO to determine the appropriate field of endeavor by reference to explanations of the invention's subject matter in the patent application, including the embodiments, function, and structure of the claimed invention." *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004) (citation omitted). Here, the Examiner is silent about Appellants' field of endeavor and does not cite any evidence in the

Specification supporting a conclusion that Appellants' field of endeavor is the same as Seven. *See id.* at 1326 ("[T]he PTO must show adequate support for its findings on the scope of the field of endeavor in the application's written description and claims, including the structure and function of the invention."). Thus, we agree with Appellants' contentions that the Examiner fails "to investigate the technical content and teachings of the instant patent application" (*see* Reply Br. 3).

Likewise, the Examiner does not make any findings in support of a determination that Seven is analogous art under the second test. "A reference is reasonably pertinent if . . . it is one which, because of the matter with which it deals, logically would have commended itself to an inventor's attention in considering his problem." *In re Klein*, 647 F.3d 1343, 1348 (Fed. Cir. 2011) (quoting *In re Clay*, 966 F.2d 656, 659 (Fed. Cir. 1992). *See also In re Oetiker*, 977 F.2d 1443, 1447 (Fed. Cir. 1992) ("[I]t is necessary to consider 'the reality of the circumstances' . . . —in other words, common sense—in deciding in which fields a person of ordinary skill would reasonably be expected to look for a solution to the problem facing the inventor."). Here, the Examiner does not identify the problem with which Appellants are involved, or explain how Seven is pertinent to that problem.

Because the Examiner has not met the burden of establishing that Seven constitutes analogous art, we do *not* sustain the rejection of claims 2–10 as obvious in view of the cited references.

DECISION

We reverse the Examiner's § 103(a) rejection of claims 2–10.

We affirm the Examiner's § 103(a) rejection of claim 1.

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).

AFFIRMED-IN-PART