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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
90/009,261	08/21/2008	5,734,961	ED 017 954 148 US	8409
40401	7590	03/23/2011	EXAMINER	
Hershkovitz & Associates, LLC			FOSTER, ROLAND G	
2845 Duke Street			ART UNIT	PAPER NUMBER
Alexandria, VA 22314			3992	
			MAIL DATE	DELIVERY MODE
			03/23/2011	PAPER

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90/007,957	03/03/2006	5734961	04395.0003.000000	9567
40401	7590	03/23/2011	EXAMINER	
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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
90/007,942	02/17/2006	5734961	62797/P0001RE/10616216	2496
40401	7590	03/23/2011	EXAMINER	
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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
90/007,936	02/17/2006	5734961	18768-002LL1	7819
40401	7590	03/23/2011	EXAMINER	
Hershkovitz & Associates, LLC			FOSTER, ROLAND G	
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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
90/007,839	12/07/2005	5734961	866093	1585
40401	7590	03/23/2011	EXAMINER	
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Patent Trial and Appeal Board

Informative

Standard Operating Procedure 2

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ANTOR MEDIA CORPORATION

Appeal 2010-007531
Reexamination Control 90/007,839; 90/007,936; 90/007,942; 90/007,957;
and 90/009,261
Patent 5,734,961
Technology Center 3900

Before RICHARD TORCZON, KARL EASTHOM, and STEPHEN C. SIU,
Administrative Patent Judges.

SIU, *Administrative Patent Judge.*

DECISION ON REQUEST FOR REHEARING¹

STATEMENT OF THE CASE

In papers filed December 21, 2010, Appellant requests a rehearing
under 37 C.F.R. § 41.52 from the Opinion of the Board of Patent Appeals

¹ The two-month time period for commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the “MAIL DATE” shown on the PTOL-90A cover letter attached to this decision.

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and Interferences (hereinafter Board), dated October 21 2010. In the
Opinion, we affirmed the Examiner's rejections on the following bases:

(1) claims 1-3, 5-7, 9, 11-15, 17-19, 21-24, and 26 under 35 U.S.C. §
102(a) and 102(b) as being anticipated by Ghafoor or Huang and, in the
alternative, under 35 U.S.C. § 103(a) as being unpatentable over the
combination of Ghafoor and Huang;

(2) claims 27-29 under 35 U.S.C. § 102(a) and 102(b) as being
anticipated by Ghafoor and, in the alternative, under 35 U.S.C. § 103(a) as
being unpatentable over the combination of Ghafoor and Huang;

(3) claim 25 under 35 U.S.C. § 103(a) as being unpatentable over
Ghafoor and either Barrett or Huang and, in the alternative, over Huang and
Barrett;

(4) claims 1-3, 5, and 13-15 under 35 U.S.C. § 102(b) as being
anticipated by MINOS; and

(5) claims 1-29 under 35 U.S.C. § 103(a) as being unpatentable over
Barrett and MINOS.

Appellant alleges that the Board erred by misapprehending or
overlooking Appellant's arguments previously raised in the Briefs. (Req.
Reh'g. 1-11) as follows.

Alleged Oversight #1: Relative skill in the art

Appellant argues that we overlooked the fact that "Dr. Mercer . . .
avers familiarity with those skilled in the pertinent arts in 1989" (Req.

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Reh'g. 3). To the extent that Dr. Mercer is familiar with those of skill in the art in 1989, we withdraw any comments to the contrary. However, for reasons previously cited and given the level of skill in the art, the error is harmless because Appellant has not established that the cited references constitute a non-enabling anticipatory reference. Nor do we find that Dr. Mercer's familiarity with those of skill in the art in 1989 demonstrates that the Ghafoor reference is non-enabling.

Alleged Oversight #2 and #3: Addressing Wands Factors

Appellant argues that "the Board improperly overlooked Dr. Mercer's Wands analysis" (Req. Reh'g 4). As an example, Appellant argues that "on page 4, paragraph 11(c), Dr. Mercer points out that the Ghafoor reference fails to disclose how its unrealized gigabit network might directly interface with a workstation" (Req. Reh'g 4). Even assuming that the Ghafoor reference fails to disclose how a specific network interfaces with a workstation, there is an insufficient showing that, given the relative skill in the art, the state of the prior art, or the predictability of the art, for example, that the amount of direction present would not be adequate to connect a workstation with a network. In other words, the mere absence of a disclosure of connecting a workstation with a network is insufficient to show that one of skill in the art would have been unable to connect a workstation to a network without undue experimentation with a proper showing to that effect.

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Appellant further argues that “even a cursory review of paragraphs 11 et seq. demonstrates that Dr. Mercer’s Declaration performed a systematic analysis of the pertinent Wands factors” (Req. Reh’g 4) and that “Dr. Mercer comes to the repeated conclusion . . . that MINOS ‘fails to provide sufficient teaching . . . to make or use the proposed . . . system **without undue experimentation**’ . . . See, e.g., page 10, paragraph 21” (Req. Reh’g. 4) and that “Dr. Mercer specifically argues that . . . the MINOS reference . . . could not enable various features of the claimed subject matter . . . without undue experimentation” (Req. Reh’g. 5).

Paragraph 11 of the Declaration (Decl.) was addressed above.

In paragraph 12 of the Declaration, Dr. Mercer states that “[o]ne of ordinary skill in the art in 1989 would not have been able to make or use the Ghafoor user terminal nor to communicate to or from the user terminal with the servers and central controller without undue experimentation in light of the lack of teaching in Ghafoor” (Decl. 5). While Dr. Mercer states his general belief that one of ordinary skill in the art would have had to engage in undue experimentation given the Ghafoor reference, Dr. Mercer fails to state any specific facts supporting this conclusion.

In paragraph 13 of the Declaration, Dr. Mercer states that “Ghafoor does not adequately teach how to integrate multiple objects” and “does not state how integration is performed . . . [or] what an integrated object looks and sounds like to a user” (Decl. 6). However, Dr. Mercer does not demonstrate that “integration” of objects would have required undue

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experimentation on the part of one of skill in the art given the level of skill in the art, state of the prior art, level of predictability of the art or the nature of the invention, for example. In fact, Dr. Mercer fails to provide a sufficient showing as to the nature and characteristics of such factors with respect to integrating multiple objects at all.

In paragraph 14 of the Declaration, Dr. Mercer states that “Ghafoor does not teach how to achieve the functions of the central controller” (Decl. 6) and “ascribes various functions to the central controller without explaining how the functions are achieved” (Decl. 7). As above, Dr. Mercer fails to provide a sufficient showing that one of skill in the art would have had to engage in undue experimentation in operating a controller given the level of skill in the art, relative skill level of those in the art or the predictability of the art (of operating a controller). Even assuming Dr. Mercer’s contention to be true that Ghafoor fails to disclose specific functions of the controller, since Dr. Mercer fails to demonstrate that one of ordinary skill in the art would have required such specific disclosures by Ghafoor to practice the invention without undue experimentation given, for example, the level of skill in the art or the state of the prior art, we are not persuaded by Dr. Mercer’s arguments.

In paragraph 15 of the Declaration, Dr. Mercer states that “the hierarchy of Ghafoor . . . does not make sense and would not function as outlined in Ghafoor” (Decl. 8) but, contrary to Appellant’s contention, fails to provide a sufficient showing that one of ordinary skill in the art would

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have had to engage in undue experimentation to practice the invention, given the Ghafoor disclosure.

In paragraph 16 of the Declaration, Dr. Mercer states that “it is unclear as to what the phrase ‘compact information about the multimedia object’ ...refers” (Decl. 8) but does not demonstrate that the disputed phrase in the Ghafoor reference would have necessitated one of ordinary skill in the art to have engaged in undue experimentation to practice the invention.

Without such a showing and without a statement as to the relevance of the disputed phrase in Ghafoor, we cannot conclude that one of ordinary skill in the art would have had to engage in undue experimentation based merely on the alleged lack of clarity of the disputed phrase in the Ghafoor reference.

In paragraph 17 of the Declaration, Dr. Mercer states that “Ghafoor does not teach the particular compression techniques that may be used” and “does not teach the use of compression techniques with respect to audio and music” (Decl. 8). As above, Dr. Mercer fails to provide a sufficient showing that one of ordinary skill in the art, given the Ghafoor disclosure, would have had to engage in undue experimentation to apply compression techniques or to compress audio or music data. For example, Dr. Mercer fails to demonstrate that the level of skill in the art of data compression or the predictability or unpredictability of the art of data compression was such that one of ordinary skill in the art, given the amount of direction or guidance presented in the Ghafoor reference, would have had to engage in undue experimentation to compress data.

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In paragraph 18 of the Declaration, Dr. Mercer states that “the MINOS I paper is an academic paper which is forward-looking” (Decl. 8) and that Dr. Mercer believes “that one of ordinary skill in the art in 1989 would not have looked to MINOS I for implementing a multimedia system” (Decl. 9). In paragraph 28 of the Declaration (Decl.), Dr. Mercer states that “it is interesting to note the very forward-looking tones of Ghafoor and MINOS I” (Decl. 13). As above and contrary to Appellant’s contention, even assuming that the MINOS reference is “forward-looking” as Dr. Mercer argues, Dr. Mercer fails to provide an adequate showing that one of ordinary skill in the art (given the level of skill in the art or state of the prior art, for example) would have had to engage in undue experimentation to practice the invention.

In paragraph 19 of the Declaration, Dr. Mercer states that “MINOS I expressly recognizes that sizable challenges remain to be resolved” (Decl. 9) but does not provide a sufficient showing that such alleged “challenges” would have necessitated undue experimentation on the part of one of ordinary skill in the art. Even assuming that there were, in fact, “challenges” to be faced, we cannot agree with Appellant that the MINOS is non-enabling because, for one thing, Appellant has not indicated a connection between the presumed challenges to be faced and the lack of enabling disclosure in MINOS. In other words, we do not find that simply facing challenges is necessarily the same as engaging in undue experimentation.

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In paragraph 20 of the Declaration, Dr. Mercer states that “[t]he testbed system of MINOS I is expressly described as being non-operational . . . MINOS I, page 20, first paragraph under ‘The Query Evaluation Subsystem,’ lines 7-8” (Decl. 9-10) because “this system was not developed” (Decl. 10). MINOS discloses a “simulation module” that “enable[s] us to concentrate on the client workstation storage and retrieval issues” (MINOS I, p. 20). We do not agree that a “simulation module” addressing issues in “workstation storage and retrieval,” as disclosed by MINOS I indicates that the system is “non-operational,” as Dr. Mercer argues. In any event, Dr. Mercer does not provide a sufficient showing that one of ordinary skill in the art would have had to engage in undue experimentation to utilize a “workstation storage and retrieval” system.

In paragraph 21 of the Declaration, Dr. Mercer states that “[o]ne of ordinary skill in the art in 1989 would not have been able to make or use the system disclosed in MINOS I without undue experimentation . . . based upon the above and other deficiencies in MINOS I” (Decl. 10) and in paragraph 22 of the Declaration (Decl.), Dr. Mercer states that “I believe that one of ordinary skill in the art in June 1989 would understand a ‘high data rate telecommunication network’ to require a data rate of at least 64 Kbits/sec” (Decl. 10). However, Dr. Mercer fails to provide a sufficient factual showing supporting this contention.

In paragraph 23 of the Declaration, Dr. Mercer states that “such a LAN [of MINOS] is not a ‘high data rate telecommunication network’ . . .

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because such a LAN does not include telephony links and only provides communications over short distances” (Decl. 10-11). MINOS I discloses, for example, “high bandwidth local area networks” (p. 10) and “[h]igh capacity communication networks” (p. 11) which Appellant has not demonstrated to be different from the claimed “high data rate telecommunication network” recited in claim 1, for example. Nor has Dr. Mercer provided a sufficient showing supporting the contention that undue experimentation would have been required on the part of one of ordinary skill in the art.

Appellant argues that Dr. Mercer states that a certain subsystem in MINOS was not developed and that a LAN does not include telephony links. Even assuming these assertions to be correct, we do not find a relationship, nor has Appellant demonstrated a relationship, between whether or not a particular subsystem is developed or not or whether a LAN includes telephony links and whether one of skill in the art would have had to engage in undue experimentation to perform the MINOS disclosure. Without such a showing, we cannot agree with Appellant that MINOS is a non-enabling reference.

In paragraph 24 of the Declaration, Dr. Mercer states that “MINOS I mentions ISDN . . . [but] does not disclose the use of an ISDN network in the . . . system” (Decl. 11). In paragraph 25 of the Declaration (Decl.), Dr. Mercer states that MINOS I “does not teach decompression of transmitted signals” (Decl. 11). In paragraph 26 of the Declaration, Dr. Mercer states

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that “MINOS I fails to teach ‘expanding . . . transmitted signals’” because, according to Dr. Mercer, “MINOS I teaches that ‘[m]iniatures are representations of information in an object in a condensed form.’ MINOS I, page 32, note 6” (Decl. 12). However, in each of these cases, Dr. Mercer does not demonstrate the necessity of undue experimentation on the part of one of ordinary skill in the art.

In paragraph 27 of the Declaration, Dr. Mercer states that “one of ordinary skill in the art in June 1989 would [not] have been able to make or use the distributed multimedia information system envisioned by MINOS I” (Decl. 13) but fails to support this contention with a sufficient showing of the necessity of undue experimentation on the part of one of ordinary skill in the art.

As the Examiner pointed out (Ans. 47-48) as referenced in our Decision (Dec’n 9), the ‘961 patent provides minimal detail and shows that conventional workstations were employed for connections to a network. Appellant does not rebut this finding. *See Paulsen*, 30 F.3d at 1481 n.9 (“We also note that under the enablement standard that AST would have us apply to Yokoyama, the ‘456 patent itself would be non-enabling.”)

Appellant argues that Dr. Mercer states that one of ordinary skill in the art is an individual with at least an undergraduate degree. Even assuming this to be true, neither Appellant nor Dr. Mercer indicates how an individual with at least an undergraduate degree would have needed to engage in undue experimentation to practice the MINOS disclosure. We do

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not follow Appellant's reasoning that the mere fact that an individual has an undergraduate degree (or some advanced degree) indicates that the MINOS reference is a non-enabling reference or that the individual with at least an undergraduate degree would have to engage in undue experimentation to perform the MINOS disclosure. *Ex parte Jud*, 85 USPQ2d 1280, 1283 (BPAI 2007) (expanded panel) (explaining that what a person having ordinary skill in the art knows and can do is more important than an abstract statement about education level and experience).

Huang Reference arguments

Appellant argues "at the top of page 31 . . . [the] arguments of Appellant's Response [regarding the Huang reference] were expressly incorporated by reference into Appellant's Appeal Brief and were intended to constitute the most important and substantial arguments proffered to the Board with regard to Huang" (Req. Reh'g. 6).

Appellant stated that claims were rejected as being anticipated by Huang (App. Br. 30) and that "Patent Owner has previously responded to this argument. Response to Office Action dated February 19, 2009, pgs. 90-99" (App. Br. 31). On careful reading of the cited passage in the Appeal Brief, contrary to Appellant's assertion, Appellant has not incorporated any arguments into the Appeal Brief by reference. Rather, Appellant merely indicated in the Brief that Appellant previously responded to arguments and findings previously presented by the Examiner. *See Halliburton Energy*

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Servs., Inc. v. M-I LLC, 514 F.3d 1244, 1250 n.2 (Fed. Cir. 2008)

(explaining that skeletal arguments and truffle hunts do not preserve an issue); *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 629 (7th Cir. 2003) (incorporation into brief not a proper way to raise an issue).

MINOS Reference arguments

Appellant argues “the Board did not address arguments incorporated by reference regarding MINOS” (Req. Reh’g. 7), “where Appellant incorporated by reference those arguments previously made by Appellant in the Response to the Office Action dated February 19, 2009 at pages 70-75” (Req. Reh’g. 7). As described above for the Huang reference, Appellant did not incorporate any arguments regarding MINOS by reference. Rather, Appellant merely stated that Appellant previously responded to arguments that the Examiner had previously presented.

Ghafoor Reference arguments

Appellant argues “the Board did not address arguments incorporated by reference regarding Ghafoor” (Req. Reh’g. 7) at “page 20 of Appellant’s Brief where Appellant incorporated by reference those arguments previously made by Appellant in the Response to the Office Action dated February 19, 2009 at pages 29-34” (Req. Reh’g. 7). However, Appellant merely states that Ghafoor is “forward looking, and not enabled with respect to methods and systems claimed by Castille” and that this point was “previously argued”

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in the cited Response to Office Action. Nowhere does Appellant “incorporate by reference” the Response to Office Action. In addition, the issue of whether Ghafoor is or is not an enabling disclosure was fully addressed in the Decision.

Sound as the data of interest

Regarding the Examiner’s rejection of claims 1-3, 5-7, 9, 11-15, 17-19, 21-24, and 26 as being anticipated by Huang, Appellant argued in the Appeal Brief that Huang fails to disclose “sound as the data of interest” (App. Br. 31). We noted that none of the disputed claims recite that sound must be the “data of interest” (Decision 17). Therefore we determined that Appellant’s arguments were irrelevant.

In response, Appellant now argues that “the terms ‘expansion means,’ ‘transducer means,’ and ‘compression means’ as recited in the various independent claims are both in means-plus-function form with no recited structure” (Req. Reh’g. 8). We do not see any relevance to whether various independent claims are in “means-plus-function” format and whether the claims recite sound as “data of interest” or not. We also still observe that none of the claims in dispute with respect to this issue recite sound as the data of interest. Since Appellant has still not shown that sound must be the data of interest in the disputed claims, we find no relevance in Appellant’s argument that Huang supposedly fails to disclose this feature.

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In addition to being irrelevant to the issue of whether the disputed claims recite “data of interest” or not, Appellant’s argument that at least some of the claims are in “means-plus-function” format with respect to a “expansion means,” “transducer means,” and “compression means” and that there is “no recited structure” in the claims (Req. Reh’g. 8) was not previously raised in the Appeal Brief and is not responsive to a new ground of rejection made pursuant to 37 C.F.R. § 41.50(b). Therefore, we will not further comment on this argument. “Arguments not raised in the briefs before the Board and evidence not previously relied upon in the brief . . . are not permitted in the request for rehearing” 37 C.F.R. § 41.52(a)(1). In any event, the “means-plus-function” issue was addressed by the Examiner (Ans. 37-41) and we adopt the Examiner’s findings with respect to this issue, which we hereby incorporate by reference.

Ghafoor – two-way transmission

Appellant re-iterates arguments that “nothing in Section 2.2 [of Ghafoor] specifically teaches two-way transmission” (Req. Reh’g. 10). As we stated in the Decision:

Ghafoor discloses a system including a “workstation . . . to display multiple data to the user” (pg. 462, col. 2) and a communication network “to interconnect geographically dispersed servers and users with broadband multimegabit services” (pg. 462, col. 2) over [which] data is transmitted. Ghafoor discloses a system in which geographically dispersed user workstations exchange data with servers via high speed

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data communication networks which we find indistinguishable from the feature disputed by Appellant. Nor has Appellant stated any differences.

(Decision 15).

Appellant still has not stated any differences. Therefore, we are not persuaded by Appellant's arguments.

Ghafoor – screen plotting means

Appellant argues that Ghafoor fails to disclose “a ‘screen plotting means’” (Req. Reh’g. 10) or that graphs, maps, or charts of Ghafoor is not “part of an ‘input means’” (Req. Reh’g. 10). As described above, the Examiner addressed the “means-plus-function” issue (Ans. 37-41). We adopt the Examiner’s findings with respect to this issue. For example, the Examiner finds that an “input means” “would appear to broadly correspond to some type of input device” (Ans. 39). Since any graphs, maps, or charts of Ghafoor would be received via “some type of input device” in the process of “still picture communication” (Ghafoor, p. 462, col. 2), we do not find Appellant’s arguments persuasive of error.

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CONCLUSION

We have considered Appellant's arguments. For at least the foregoing reasons, we find Appellant's arguments to be unpersuasive as to error in the Decision. Therefore, Appellant's request for rehearing is denied with respect to making any change to our decision to affirm the Examiner's rejections.

DENIED

ack

Counsel for Patent Owner:

HERSHKOVITZ & ASSOCIATES, LLC
2845 Duke Street
Alexandria, VA 22314

Counsel for Third Parties:

Alan L. Whitehurst
Jones Day
51 Louisiana Avenue N.W.,
Washington, DC 20005

Thomas A. Rozylowics
Fish & Richardson, PC
1425 K Street, NW, Suite 1100
Washington, DC 20005

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Howrey, LLP
c/o Docketing Department
Attn: Janelle D. Waack
1111 Louisiana
25th Floor
Houston, TX 7702-5242

Robert C. Laurensen
Howrey, LLP
2020 Main Street
Suite 10000
Irvine, CA 92614

Paul Rauch
Evan Law Group LLC
600 West Jackson Blvd.
Suite 625
Chicago, IL 60661