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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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PRAVIN **BHAGWAT**, HEMANT CHASKAR, DAVID C. KING  
and JAI RAWAT

Junior Party  
(Patent 7,002,943)

v.

SCOTT **HRASTAR** and MICHAEL T. LYNN

Senior Party  
(Application 10/160,904)

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Patent Interference No. 105,516 (JL)  
(Technology Center 2600)

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1 Before SCHAFER, LEE and MOORE, *Administrative Patent Judges*.

2 LEE, *Administrative Patent Judge*.

3 **Decision -- Motions -- Bd.R. 125(a)**

4 Pending before us are Bhagwat's Motion 1 alleging no interference-in-fact, Bhagwat's  
5 Motion 2 seeking to designate certain Hrastar claims as not corresponding to the count, and  
6 Bhagwat's Motion 3 asserting unpatentability of Hrastar's claims under 35 U.S.C. § 112, first  
7 paragraph.

8 Also pending before us are Hrastar's Motion 1 asserting unpatentability of certain  
9 Bhagwat claims under 35 U.S.C. § 102, and Hrastar's Motion 2 asserting unpatentability of  
10 certain Bhagwat claims under 35 U.S.C. § 103.

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A. Background Facts

1. This interference was declared on November 6, 2006.
2. Bhagwat is involved on the basis of its Patent 7,002,943, filed October 15, 2004.
3. Bhagwat has been accorded benefit of the filing dates of Application 60/560,034, filed April 6, 2004, Application 60/543,631, filed February 11, 2004, Application 60/610,417, filed September 16, 2004, and Application 60/610,419, filed September 16, 2004.
4. Hrastar is involved on the basis of its Application 10/160,904, filed June 3, 2002.
5. Hrastar's application was published on October 14, 2004, in Publication No.: US 2004/0203764. In this decision, references to Paragraph Nos. in Hrastar's specification refer to the printed paragraph numbers in Hrastar's published application.
6. The count of this interference is defined as Hrastar's application claim 21 or Bhagwat's patent claim 1.
7. At the time of declaration of the interference, the claims designated as corresponding to the count were Bhagwat's patent claims 1-52 and Hrastar's application claims 21-55.
8. Bhagwat filed three substantive motions: Motion 1 alleging no interference-in-fact; Motion 2 seeking to designate claims 25-27, 29-30, 33-43, and 46-50 as not corresponding to the count; and Motion 3 alleging that all of Hrastar's claims corresponding to the count are unpatentable under 35 U.S.C. § 112, first paragraph, both for lack of written description and for lack of enabling disclosure.
9. All of Hrastar's involved claims 21-55 are not original claims but were added after filing of Hrastar's involved application.
10. The subject matter of this interference pertains to a method for monitoring a selected airspace associated with local area networks of computing devices, by determining a security policy which characterizes wireless activity in the airspace as permitted, denied, or ignored (Bhagwat claim 1) or by identifying one or more tests which characterizes wireless traffic in the airspace as allowable, security violations, or harmless (Hrastar claim 21).
11. Hrastar's claim 21 is the only independent Hrastar claim and reads as follows:
  21. A method for monitoring a selected airspace associated with local area networks of computing devices, the method comprising:

1 providing one or more standard local area networks to be protected, the  
2 standard local area network being characterized by a wireless airspace within the  
3 one or more standard local area networks;

4  
5 identifying one or more tests associated with the one or more standard  
6 local area networks, the one or more tests at least characterizing a type of wireless  
7 traffic in the wireless airspace to be identified as allowable, identified as security  
8 violations or identified as harmless;

9  
10 connecting one or more sensor devices into the standard wired local area  
11 network, the one or more sensor devices being deployed within the selected area  
12 to cause at least a portion of the wireless airspace to be secured according to the  
13 identified one or more tests;

14  
15 coupling a host system to the standard local area network;

16  
17 determining if at least one of the sensor devices is coupled to the one or  
18 more standard local area networks to be protected;

19  
20 surveying the wireless airspace to establish that the one or more sensor  
21 devices substantially identifies the wireless airspace to be secured;

22  
23 monitoring wireless traffic in the airspace using the one or more sensor  
24 devices;

25  
26 distinguishing between traffic associated with the monitoring of the  
27 wireless traffic to at least determine if the wireless traffic communicates to at least  
28 one of the one or more networks to be protected;

29  
30 detecting a security violation based upon at least the distinguished portion  
31 of the information from the monitoring of the wireless traffic; and

32  
33 triggering a notification process or an active defense associated in  
34 accordance with and based upon the security violation for the one or more  
35 standard wired local area network to be protected.

36  
37 12. Hrastar filed two substantive motions: Motion 1 alleging that Bhagwat's claims  
38 1-24, 26-28, 30-32, 39-45, and 51-52 are unpatentable under 35 U.S.C. § 102(b) as anticipated  
39 by prior art; and Motion 2 alleging that Bhagwat's claims 25, 29, 33-38, and 46-50 are  
40 unpatentable under 35 U.S.C. § 103 as unpatentable for obviousness over prior art.

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## 1 B. Discussion

## 2 Bhagwat's Motion 1

3 Through Motion 1, Bhagwat asserts that there is no interference-in-fact. As the moving  
4 party, Bhagwat bears the burden of proof to establish entitlement to the relief requested. 37 CFR  
5 § 41.121(b). Unless demonstrated otherwise by Bhagwat, the status quo in existence upon the  
6 initial declaration of this interference is presumptively correct. That is an important concept  
7 often missed by parties filing a motion which in whole or in part requires a demonstration of  
8 nonobviousness as is the case here. All too frequently, parties fail to place themselves outside of  
9 the usual scenario during patent examination where it is the Examiner who has the burden of  
10 proof to demonstrate obviousness of a claim. In those situations, an applicant need only rebut  
11 the Examiner's position and talk about the prior art applied by the Examiner. As a party movant  
12 whose burden it is to demonstrate unobviousness in a motion alleging no interference-in-fact,  
13 however, Bhagwat cannot take such a limited approach. Bhagwat is not now responding to an  
14 obviousness rejection.

15 The proper context is this: An interference has been declared because it is deemed that  
16 the parties' claims are directed to the same patentable invention; Bhagwat can have this  
17 interference terminated on a judgment of no interference-in-fact if it can demonstrate, by motion,  
18 that none of Hrastar claims anticipates or renders obvious any Bhagwat claim or that none of  
19 Bhagwat's claims anticipates or renders obvious any Hrastar claim. *See, e.g., Winter v. Fujita*,  
20 53 USPQ2d 1234 (BPAI 1999). Bhagwat may not limit its consideration of prior art within any  
21 nonobviousness analysis to only those pre-existing in the record of the involved cases. While it  
22 certainly is true that Bhagwat cannot be reasonably expected to account for the entire body of  
23 prior art in existence somewhere in the world including that which is unknown to Bhagwat, but it  
24 can be and indeed is expected to account for that prior art which its inventors are aware or is  
25 otherwise known to party Bhagwat. *See Pechiney Emballage Flexible Europe v. Cryovac Inc.*,  
26 73 USPQ2d 1571 (BPAI 2004). Bhagwat's addressing only the "prior art of record" reflects a  
27 misidentification of the nature of Bhagwat's motion, the status quo, and the burden of proof.

28 Obviousness is a legal determination made on the basis of underlying factual inquiries  
29 including (1) the scope and content of the prior art; (2) the differences between the claimed  
30 invention and the prior art; (3) the level of ordinary skill in the art; and (4) any objective  
31 evidence of unobviousness, *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966). In this case,

1 Bhagwat must begin with the obviousness conclusion already presumed, and prove the negative,  
2 nonobviousness. The same underlying factual inquiries are involved.

3 Bhagwat's motion is based on three features present in each of Bhagwat's claims.  
4 According to Bhagwat, each of the three features is not present in any Hrastar claim and those  
5 differences between the Bhagwat claims and Hrastar claims are such that none of Hrastar's  
6 claims would have anticipated or rendered obvious any Bhagwat claim.

7 The first feature is this process step: "determining a security policy associated with the  
8 one or more segments of the legacy local area network, the security policy at least characterizing  
9 a type of wireless activity in the unsecured airspace to be permitted, denied, or ignored." On  
10 page 16 of Bhagwat's motion, in lines 23-24, it is stated: "[N]o **prior art of record** discloses or  
11 suggests determining a security policy for network traffic that characterizes the wireless  
12 activities as allowed, denied, or ignored" (Emphasis added). Paragraph 268 of Bhagwat's  
13 statement of material facts states: "None of **the prior art of record** discloses or suggests  
14 determining a security policy for network traffic that characterizes the traffic as allowed, denied,  
15 or ignored" (Emphasis added). Paragraph 160 in the declaration of Dr. Kevin J. Negus in  
16 support of Bhagwat's Motion 1 states: "Further, in my opinion, based on **the prior art of**  
17 **record** I have analyzed, none of **the prior art of record** discloses or suggests determining a  
18 security policy for network traffic that characterizes the traffic as allowed, denied, or ignored"  
19 (Emphasis added).

20 The second feature is this process step: "determining if the one or more sniffer devices  
21 substantially covers the portion of the unsecured airspace to be secured." On page 18 of  
22 Bhagwat's motion, in lines 4-6, it is stated: "[N]o **prior art of record** discloses or suggests  
23 determining if the sensors used to detect wireless traffic in a wireless network intrusion  
24 prevention system substantially cover the airspace to be secured" (Emphasis added). Paragraph  
25 281 of Bhagwat's statement of material facts states: "None of the **prior art of record** would  
26 have disclosed or suggested to a person of ordinary skill in the art to determine if the sensors  
27 used to detect wireless traffic in a wireless network intrusion prevention system substantially  
28 cover the airspace to be secured" (Emphasis added). Paragraph 169 in the declaration of Dr.  
29 Kevin J. Negus in support of Bhagwat's Motion 1 states: "Also in my opinion, based on the  
30 **prior art of record** I have analyzed, none of the **prior art of record** would have disclosed or  
31 suggested to a person of ordinary skill in the art to determine if the sensors used to detect

1 wireless traffic in a wireless network intrusion prevention system substantially covers the  
2 airspace to be secured” (Emphasis added).

3         The third feature is this process step: “detecting a violation of the security policy based  
4 upon at least the classifying of the portion of the information from . . . monitoring . . . the  
5 wireless activity.” On page 18 of Bhagwat’s motion, in lines 16-17, it is stated: “[N]o **prior art**  
6 **of record** discloses or suggests Bhagwat’s ‘detecting violation/classifying information’  
7 limitation . . .” (Emphasis added). Paragraph 286 of Bhagwat’s statement of material facts  
8 states: “None of the **prior art of record** would have disclosed or suggested to a person of  
9 ordinary skill in the art Bhagwat’s ‘detecting violation/classifying information’ limitations . . .”  
10 (Emphasis added). Paragraph 173 in the declaration of Dr. Kevin J. Negus in support of  
11 Bhagwat’s Motion 1 states: “It is also my opinion, based on the **prior art of record** that I have  
12 analyzed, that none of the **prior art of record** would have disclosed or suggested to a person of  
13 ordinary skill in the art Bhagwat’s ‘detecting violation/classifying information’ limitations . . .”  
14 (Emphasis added).

15         Bhagwat’s limiting its analysis to only the “prior art of record” does not persuade us that  
16 Dr. Negus or the named inventors of Bhagwat’s involved application or Bhagwat’s real party in  
17 interest Airtight Networks, Inc. was not aware of any prior art, whether or not in the  
18 administrative record, which disclosed the features at issue. Note further that Dr. Negus’  
19 testimony is based only on the prior art of record that he has analyzed and Bhagwat has not  
20 pointed us to any representation by Dr. Negus that he has analyzed all the prior art of record. On  
21 this record, Dr. Negus’ testimony does not even support Bhagwat’s limited conclusion that none  
22 of the prior art of record, including the ones Dr. Negus did not analyze, teaches any of the three  
23 claim features identified above.

24         Bhagwat has sought a relief far beyond what the supporting evidence can justify.  
25 Bhagwat may not have a reasonable expectation that while it refrains from making a  
26 representation of what it is aware that exists in the prior art the Board still would be persuaded  
27 that certain claimed subject matter would not have been obvious over the count. Bhagwat’s has  
28 made amply clear that its position is based at most only on all of the prior art of record, and  
29 perhaps not even that, and not on the basis of all that which Bhagwat or its technical witness is  
30 aware. For the foregoing reasons, Bhagwat has not shown that it is entitled to the relief  
31 requested, i.e., that there is no interference-in-fact. The motion is **denied**.

1 In the alternative, the motion is denied for an additional reason.

2 Bhagwat did not submit objective evidence of unobviousness. Bhagwat did, however,  
3 submit a declaration of Dr. Kevin J. Negus in connection with establishing what one with  
4 ordinary skill in the art would have known, i.e., the level of ordinary skill in the art. The level of  
5 ordinary skill in the art is a critical element in the unobviousness analysis as it is the case in any  
6 obviousness analysis. The prior art need not expressly describe each and every claim feature to  
7 render a claimed invention obvious to one with ordinary skill in the art. One with ordinary skill  
8 in the art is presumed to have skills apart from what the prior art references explicitly say. *See In*  
9 *re Sovish*, 769 F.2d 738, 743 (Fed. Cir. 1985). In *KSR International Co.*, 127 S. Ct. 1727, 1742  
10 (2007), with regard to motivation to combine teachings, the Supreme Court stated: “Rigid  
11 preventive rules that deny factfinders recourse to common sense, however, are neither necessary  
12 under our case law nor consistent with it.” A person of ordinary skill in the art is also a person of  
13 ordinary creativity, not an automaton. *Id.* It has long been the case that a conclusion of  
14 obviousness may be made from common knowledge and common sense of the person of  
15 ordinary skill in the art without any specific hint or suggestion in a particular reference. *In re*  
16 *Bozek*, 416 F.2d 1385, 1390 (CCPA 1969).

17 Because any teaching not explicitly described in the prior art can still be accounted for by  
18 reliance on the knowledge or common sense possessed by one with ordinary skill in the art,  
19 Bhagwat’s motion must adequately explain why any alleged missing teaching could not have  
20 been accounted for or made up by the ordinary creativity or common sense possessed by one  
21 with ordinary skill in the art. Bhagwat made no attempt whatsoever in that regard. Bhagwat did  
22 not point us to any testimony of Dr. Negus discussing why one with ordinary skill in the art,  
23 while exercising only ordinary creativity and common sense, would not have made up for the  
24 deficiencies in the explicit teachings from the prior art. Bhagwat took the erroneous approach  
25 that if a feature is not described somewhere in the prior art in the exact context as it is claimed,  
26 then the claimed subject matter could not have been obvious to one with ordinary skill in the art.  
27 That is not the law. The misplaced argument treats one with ordinary skill as a machine, or  
28 “automaton” incapable of doing anything except follow directions to the “T.” As we know from  
29 the Supreme Court’s decision in *KSR International Co.*, *supra*, one with ordinary skill in the art  
30 possesses ordinary creativity and is not an “automaton.” *See also In re Sovish*, 769 F.2d at 743  
31 (“[Applicant’s] argument presumes stupidity rather than skill.”).

Bhagwat's Motion 3

1  
2 By this motion, Bhagwat asserts that all of Hrastar's involved claims 21-55 are  
3 unpatentable under 35 U.S.C. § 112, first paragraph, both for lack of written description and for  
4 lack of enabling disclosure.

5 To satisfy the written description requirement under 35 U.S.C. § 112, first paragraph, the  
6 specification must convey with reasonable clarity to those skilled in the art that as of the filing  
7 date of the application the inventor was in possession of the claimed invention. *Vas-Cath Inc. v.*  
8 *Mahurkar*, 935 F.2d 1555, 1563-64 (Fed. Cir. 1991). Moreover, the specification must have  
9 written description support for the full scope of what is claimed, not just for an embodiment  
10 falling within the scope of the claim. *See Squires v. Corbett*, 560 F.2d 424, 435 (CCPA 1977);  
11 *Hunt v. Treppschuh*, 523 F.2d 1386, 1389 (CCPA 1975).

12 Each of Hrastar's claims 22-55 depends, directly or indirectly, from independent claim  
13 21, and thus includes each feature of the independent claim. Claim 21 expressly recites this  
14 process step:

15 identifying one or more tests associated with the one or more standard local area  
16 networks, the one or more tests at least characterizing a type of wireless traffic in  
17 the wireless airspace to be identified as allowable, identified as security violations  
18 or identified as harmless;

19  
20 According to Bhagwat, Hrastar's specification is without written description support for the  
21 above-reproduced claim limitation included in each of Hrastar's involved claims 21-25. As the  
22 moving party, Bhagwat bears the burden of proof to demonstrate that it is entitled to the relief  
23 requested. 37 CFR § 41.121(b). For reasons discussed below, Bhagwat has satisfied its burden.

24 Bhagwat points out reasonably that the ostensibly closest disclosure in Hrastar's  
25 specification to something being "harmless" is a reference in Paragraph 114 of Hrastar's  
26 specification to possibly "harmless equipment of nearby companies" the existence of which  
27 causes Hrastar's security scheme to detect more devices in a wireless network area than was  
28 expected. (Motion 4:5-7). Bhagwat notes correctly that that disclosure reflects merely a  
29 recognized possibility and is not accompanied by or followed up with description of any intent or  
30 means to determine whether such "harmless equipment" of nearby companies is indeed the  
31 actual reason why more devices are detected than was expected. (Motion 4:17-20).

32 Even assuming that Hrastar discloses both the intent and the means to determine whether  
33 "harmless equipment of nearby companies" is an actual cause of its detecting more equipment

1 than was expected in the wireless network area, Bhagwat correctly notes that the claim feature at  
2 issue is for characterizing wireless traffic, not specific equipment, as allowable, a security  
3 violation, or harmless. Equipment always has the potential to be misused. When referring to  
4 equipment of nearby companies as harmless (Specification ¶ 114), Hrastar’s disclosure makes  
5 the assumption, not necessarily true, that the equipment will not ever be used in a harmful  
6 manner, such as being involved in unauthorized wireless communications. Such an assumption  
7 does not qualify as any test administered on wireless traffic stemming from that equipment.

8 Bhagwat’s motion appropriately discusses each of the wireless space intrusion detection  
9 tests illustrated in Hrastar’s Figure 3, and correctly notes that each of the tests, i.e., signature  
10 detection 325, protocol violation 330, statistical anomaly 335, and policy violation 340, performs  
11 two-way testing which determines only whether there is or is not a security violation. According  
12 to Bhagwat, a two-way determination does not satisfy the claim requirement of tests which  
13 characterize a type of wireless traffic in the wireless airspace as identifiable in one of three  
14 categories, i.e., “allowable,” “security violation,” and “harmless.” We agree. Hrastar’s  
15 specification does not define or shed a guiding light on the meaning of “harmless” as a category  
16 of wireless communication. But in the context as claimed, there are three different categories  
17 and “harmless” does not and cannot mean the same as “allowable.” An assertion to the contrary  
18 would be unreasonable. Nothing precludes the categories from overlapping each other, but no  
19 two categories may take on the same identity, based on customary use of the English language.

20 Hrastar fails to successfully rebut Bhagwat’s demonstration of a prima facie case of  
21 entitlement to relief. Hrastar has not demonstrated with persuasive evidence that one with  
22 ordinary skill in the art, in light of Hrastar’s disclosure, would have understood the involved  
23 claim limitation as requiring nothing more than a determination of whether there is or is not a  
24 security violation. Hrastar has submitted no declaration from anyone which represents that one  
25 with ordinary skill in the art, because of certain conventions or practices in this field, would read  
26 the recitation of three categories as presenting only two distinct categories and that the  
27 “harmless” classification is only a repeat of something being “allowable.” Hrastar merely argues  
28 that if a wireless communication is tested and determined as not a security violation and thus  
29 allowable, then it is also harmless. But that position unreasonably contracts three categories of  
30 wireless traffic into two, i.e., security violation or not a security violation. Hrastar has  
31 established no basis for doing so.

1           Expressed in another way, Hrastar must have written description for the full scope of  
2 what is claimed and not just a possible scenario or embodiment within that scope. It is true that  
3 Hrastar's disclosure has description for determining what is not a security violation and thus  
4 what is reasonably also deemed harmless, but the entire scope of what is harmless  
5 communication is broader than that which is determined to be not a security violation. Some  
6 communications which are security violations may, in fact, still be harmless. That is true in  
7 ordinary life situations and is also reflected in Hrastar's own disclosure.

8           For example, a neighbor's wireless laptop computer is an unauthorized device but if it is  
9 communicating only with the neighbor's own router which is not connected to the protected local  
10 network, that communication can be ignored and deemed harmless even though it may not  
11 actually pass one or more tests for security policy violations. Hrastar's own disclosure  
12 distinguishes rogue devices from harmless equipment belonging to nearby companies.  
13 (Specification ¶ 113). Note that the equipment is deemed harmless without regard to whether  
14 communication involving that equipment passes or fails any security policy test. Thus, Hrastar  
15 has not established that the only harmless wireless traffic is that which has passed the test for  
16 security policy violation. Consequently, the fact that communications which pass the security  
17 policy tests are always harmless is not adequate basis to support a written description for the  
18 three categories of wireless traffic specified in this claim limitation:

19           identifying one or more tests associated with the one or more standard local area  
20 networks, the one or more tests at least characterizing a type of wireless traffic in  
21 the wireless airspace to be identified **as allowable**, identified **as security**  
22 **violations** or identified **as harmless**. (Emphasis added.)  
23

24           Bhagwat has shown that Hrastar's claims 21-55 are unpatentable under 35 U.S.C. § 112,  
25 first paragraph, for lack of written description in the specification, as discussed above. We do  
26 not reach Bhagwat's other assertion that these same claims are also unpatentable under 35 U.S.C.  
27 § 112, first paragraph, for lack of an enabling disclosure in the specification.

28           The motion is **granted-in-part**.

Hrastar's Motions 1 and 2

By its Motion 1, Hrastar asserts that Bhagwat's claims 1-24, 26-28, 30-32, 39-45, and 51-52 are unpatentable for anticipation under 35 U.S.C. § 102(b).

By its Motion 2, Hrastar asserts that Bhagwat's claims 25, 29, 33-38, and 46-50 are unpatentable for obviousness under 35 U.S.C. § 103.

Because all of Hrastar's claims have been determined as unpatentable for lack of written description under 35 U.S.C. § 112, first paragraph, and because written description is a threshold issue in an interference proceeding, 37 CFR § 41.201, Hrastar has no standing to challenge the patentability of Bhagwat's patent claims. Accordingly, Hrastar's Motions 1 and 2 are **dismissed**.

Bhagwat's Motions 2

Because this case will not proceed to priority determination, Bhagwat's Motion 2 seeking to designate certain Bhagwat claims as not corresponding to the count is moot and is **dismissed**.

C. Conclusion

Bhagwat's Motion 1 is **denied**.

Bhagwat's Motion 2 is **dismissed**.

Bhagwat's Motion 3 is **granted-in-part**. Hrastar's claims 21-55 are unpatentable under 35 U.S.C. § 112, first paragraph, for lack of written description in the specification and will be cancelled in due course.

Hrastar's Motions 1 and 2 are **dismissed**.

It is

**ORDERED** that because Hrastar's claims are unpatentable under 35 U.S.C. § 112, first paragraph, for lack of written description, and because written description under 35 U.S.C. § 112, first paragraph, is a threshold issue in an interference, Hrastar has no standing to continue in this interference; *see* 37 CFR § 41.201;

**FURTHER ORDERED** that no priority motion will be filed by either party; and

**FURTHER ORDERED** that judgment will be entered against Hrastar in a separate paper.

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