

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex Parte ERIN H. SIBLEY

Appeal No. 2006-2918  
Application No. 09/844,919

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ON BRIEF

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Before JERRY SMITH, BLANKENSHIP and SAADAT, Administrative Patent Judges.

JERRY SMITH, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on the appeal under 35 U.S.C. § 134 from the examiner's rejection of claims 1-22, which constitute all the claims pending in this application.

The disclosed invention pertains to a method and system for distributing electronic content within a wireless local area network.

Representative claim 1 is reproduced as follows:

1. A system of distributing electronic content comprising:

a network operations center forming a composite broadcast signal having digital electronic content during a vertical blanking interval of a primary channel signal;

a content delivery system receiving said composite broadcast signal from said network operations center and broadcasting said composite broadcast signal;

a base station receiving said composite broadcast signal grabbing frames from the composite broadcast signal and forming a wireless local area network, said base station rebroadcasting at least a portion of said composite signal as a rebroadcast signal using said wireless local area network; and

a plurality of user appliances positioned within said local area network and receiving said rebroadcast signal.

The examiner applies the following reference:

Allport	6,097,441	Aug. 01, 2000
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The examiner cites the following references in support of the taking of Official Notice:

Hendricks et al. (Hendricks)	5,990,927	Nov. 23, 1999
Campbell	6,167,263	Dec. 26, 2000
Knoblach et al. (Knoblach)	6,628,941	Sep. 30, 2003
		(filed June 29, 1999)

IEEE 100, The Authoritative Dictionary of IEEE Standard Terms, Seventh Edition (December 2000), pages ii, 633, 725-726.

Claims 1-8, 10, 12, and 14-17 stand rejected under 35 U.S.C. § 102(b) as being anticipated by the disclosure of Allport. Claims 9, 11, 13, and 18-22 stand rejected under 35 U.S.C. § 103(a). As evidence of obviousness the examiner offers Allport along with the taking of Official Notice.

Rather than repeat the arguments of appellant or the examiner, we make reference to the briefs and the answer for the respective details thereof.

### OPINION

We have carefully considered the subject matter on appeal, the rejections advanced by the examiner and the evidence of anticipation and obviousness relied upon by the examiner as support for the rejections. We have, likewise, reviewed and taken into consideration, in reaching our decision, the appellant's arguments set forth in the briefs along with the examiner's rationale in support of the rejections and arguments in rebuttal set forth in the examiner's answer.

It is our view, after consideration of the record before us, that the evidence relied upon supports each of the examiner's rejections of the claims on appeal. Accordingly, we affirm.

We consider first the rejection of claims 1-8, 10, 12, and 14-17 as being anticipated by Allport. Anticipation is established only when a single prior art reference discloses, expressly or under the principles of inherency, each and every element of a claimed invention as well as disclosing structure which is capable of performing the recited functional limitations. RCA Corp. v. Applied Digital Data Systems, Inc., 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984); W.L. Gore and Associates, Inc. v. Garlock, Inc., 721 F.2d 1540, 1554, 220 USPQ 303, 313 (Fed. Cir. 1983).

The examiner has indicated how the invention of these claims is deemed to be fully met by the disclosure of Allport [final rejection, pages 2-5; incorporated into answer at page 3<sup>1</sup>]. With respect to independent claim 1, appellant argues that there is no teaching in Allport of a wireless local area network. More particularly, appellant argues that Allport is limited to a remote control that directly communicates with the base station 75 and not more than one user device [brief, pages 6-7]. The examiner responds that the wireless communication link between the base station and remote control of Allport meets the definition of a network as set forth in the IEEE 100 Dictionary. The examiner also points out that Allport discloses multiple displays and is, therefore, not limited to a single user appliance [answer, pages 4-5]. Appellant responds that the base station and remote control of Allport communicate directly and, therefore, do not form a network as set forth in claim 1. Appellant also points out that the base station and remote control of Allport fail to meet the recitation of a plurality of user appliances in claim 1. Appellant also responds that the multiple displays of Allport do not represent a plurality of user appliances, but instead, represent multiple displays on a single device. Finally, appellant asserts that the examiner's reliance on the IEEE dictionary is improper for a rejection under 35 U.S.C. § 102 [reply brief, pages 1-3].

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<sup>1</sup> Such incorporation of previous actions is not proper under current practice.

We will sustain the examiner's rejection of claim 1 as being anticipated by Allport. We do not agree with appellant's argument that Allport fails to disclose a wireless local area network. There is a local area network between base station unit 75, remote control unit 10, and TV 80 when the term "local area network" is given its broadest reasonable interpretation. Since appellant provided no specific definition for this term, the examiner acted correctly in seeking to find the conventional meaning for the term. The examiner, therefore, did not err in referring to a standard technical dictionary to define the term. We agree with the examiner that the base station, remote control and TV of Allport form a local area network based on the evidence before us. The connection between base station 75 and the remote control 10 can be wireless [column 10, lines 9-10]. The connection between base station 75 and TV 80 is wired or may be wireless (modem ports) [column 9, line 66-column 10, line 8]. The connection between remote control 10 and TV 80 is wireless [column 10, lines 36-38]. Since at least some of the connections between the elements on the network are wireless, we find that the local area network of Allport can be properly construed as a wireless local area network. In other words, the term "wireless local area network" does not require that every connection on the network be a wireless connection.

We also do not agree with appellant's argument that there are not a plurality of user appliances on the local area network of Allport. Allport indicates that although the invention is described as a "dual display" system, the invention is equally applicable to a "multiple display" system [column 5, lines 59-62]. The two displays of the dual display system are the TV 80 and

a display associated with remote control 10. Therefore, when using the teachings of Allport in a multiple display system, it would have suggested to the artisan the addition of another TV 80 or some other user appliance having a display for television signals. Therefore, the multiple display system of Allport would clearly meet the claim recitation of a plurality of user appliances positioned within the local area network.

Since claims 2-8, 10, and 12 have not been separately argued by appellant, we also sustain the examiner's rejection of these claims for the same reasons just discussed.

With respect to independent claim 14, appellant again argues that Allport fails to disclose a wireless local area network [brief, page 8]. We will sustain the examiner's rejection of claim 14 for the same reasons discussed above with respect to claim 1. Since claims 15-17 have not been separately argued by appellant, we also sustain the examiner's rejection of these claims.

We now consider the rejections of the claims under 35 U.S.C. § 103. In rejecting claims under 35 U.S.C. § 103, it is incumbent upon the examiner to establish a factual basis to support the legal conclusion of obviousness. See In re Fine, 837 F.2d 1071, 1073, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). In so doing, the examiner is expected to make the factual determinations set forth in Graham v. John Deere Co., 383 U.S. 1, 17, 148 USPQ 459, 467 (1966). The examiner must articulate reasons for the examiner's decision. In re Lee, 277 F.3d 1338, 1342, 61 USPQ2d 1430, 1434 (Fed. Cir. 2002). In particular, the examiner must show that there is a teaching, motivation, or suggestion of a motivation to combine references

relied on as evidence of obviousness. Id. 277 F.3d at 1343, 61 USPQ2d at 1433-34. The examiner cannot simply reach conclusions based on the examiner's own understanding or experience - or on his or her assessment of what would be basic knowledge or common sense. Rather, the examiner must point to some concrete evidence in the record in support of these findings. In re Zurko, 258 F.3d 1379, 1386, 59 USPQ2d 1693, 1697 (Fed. Cir. 2001). Thus the examiner must not only assure that the requisite findings are made, based on evidence of record, but must also explain the reasoning by which the findings are deemed to support the examiner's conclusion. However, a suggestion, teaching, or motivation to combine the relevant prior art teachings does not have to be found explicitly in the prior art, as the teaching, motivation, or suggestion may be implicit from the prior art as a whole, rather than expressly stated in the references. The test for an implicit showing is what the combined teachings, knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have suggested to those of ordinary skill in the art. In re Kahn, 441 F.3d 977, 987, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006) (citing In re Kotzab, 217 F.3d 1365, 1370, 55 USPQ2d 1313, 1317 (Fed. Cir. 2000)). See also In re Thrift, 298 F. 3d 1357, 1363, 63 USPQ2d 2002, 2008 (Fed. Cir. 2002). These showings by the examiner are an essential part of complying with the burden of presenting a prima facie case of obviousness. Note In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). If that burden is met, the burden then shifts to the applicant to overcome the prima facie case with argument and/or evidence. Obviousness is then determined on the basis of the evidence as a whole and the relative

persuasiveness of the arguments. See id.; In re Hedges, 783 F.2d 1038, 1039, 228 USPQ 685, 686 (Fed. Cir. 1986); In re Piasecki, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984); and In re Rinehart, 531 F.2d 1048, 1051, 189 USPQ 143, 147 (CCPA 1976). Only those arguments actually made by appellant have been considered in this decision.

Arguments which appellant could have made but chose not to make in the brief have not been considered and are deemed to be waived [see 37 CFR § 41.37(c)(1)(vii)(2004)].

The examiner has indicated how the invention of these claims is deemed to be rendered obvious by the teachings of Allport and the taking of Official Notice [final rejection, pages 6-9, incorporated into answer at page 3]. With respect to claim 9, appellant argues that although stratospheric platforms are known in the art, the combination of a stratospheric platform and a base station that forms a wireless local area network with user appliances is not taught by Allport [brief, page 8]. The examiner responds that Allport teaches that any data source could be used, and the examiner cites Knobloch and Campbell as teaching the use of stratospheric platforms for broadcast communications [answer, pages 6-7]. Appellant responds that there is no teaching or suggestion for a stratospheric platform, and therefore, the combination proposed by the examiner is a hindsight reconstruction of the invention [reply brief, pages 3-4].

We will sustain the examiner's rejection of claim 9<sup>2</sup>. The examiner took Official Notice of stratospheric platforms and explained why it would have been obvious to the artisan to modify Allport's system to include a stratospheric platform. Appellant's argument regarding a wireless local area network is not persuasive because Allport teaches such a network for reasons discussed above. Appellant's argument regarding hindsight reconstruction is not persuasive because the evidence on this record clearly establishes that it was conventional in the art to deliver video content by using a stratospheric platform. Appellant has failed to address the merits of the examiner's position as to why the invention of claim 9 would have been obvious in view of the cited evidence.

With respect to claim 11, appellant argues that although compression is known, the combination of compression with a base station that forms a wireless local area network is not taught or suggested by Allport [brief, page 9]. The examiner responds that Allport teaches everything except compression, and the examiner cites Hendricks as teaching compression [answer, pages 7-8]. Appellant responds that the examiner's citation of Hendricks represents hindsight reconstruction of the invention. Appellant points out that since the rejection was on Allport taken alone, the citation of Hendricks indicates that the rejection is deficient in making out a prima facie case of obviousness [reply brief, page 4].

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<sup>2</sup> We note that there is no antecedent basis for the phrase "said high altitude device" in claims 8 and 9. Perhaps these claims should depend from claim 7 instead of claim 1.

We will sustain the examiner's rejection of claim 11 although we discourage this practice by the examiner of relying on references which are not listed in the statement of the rejection or using Official Notice as a substitute for the proper listing of references relied on. The examiner took Official Notice that it was conventional in the art to compress video data for transmission in order to save bandwidth. Thus, the rejection was not on Allport alone, as argued by appellant, but instead, was on Allport and Official Notice. The citation of Hendricks was merely used to replace this Official Notice with an actual reference. The fact that Allport itself does not suggest the advantages of compressed data transmission does not make the rejection based on hindsight. The advantages of data compression were well known at the time this application was filed as evidenced by the references cited. Appellant has failed to address the merits of the examiner's position as to why the invention of claim 11 would have been obvious in view of the cited evidence.

With respect to claim 13, appellant argues that the combination of a fiber optic network with a base station that forms a wireless local area network is not taught or suggested by Allport [brief, page 9]. The examiner responds that Allport teaches everything except a fiber optic network, and the examiner cites Hendricks as teaching a fiber optic network [answer, pages 8-9]. Appellant responds that the examiner's citation of Hendricks represents hindsight reconstruction of the invention. Appellant points out that since the rejection was on Allport taken alone, the citation of Hendricks indicates that the rejection is deficient in making out a prima facie case of obviousness [reply brief, page 4].

We will sustain the examiner's rejection of claim 13 despite the manner in which the examiner has entered evidence into this case. The examiner took Official Notice that it was conventional in the art to deliver video content using a fiber optic network. Thus, the rejection was not on Allport alone, as argued by appellant, but instead, was on Allport and Official Notice. The citation of Hendricks was merely used to replace this Official Notice with an actual reference. The fact that Allport itself does not suggest the advantages of fiber optic data transmission does not make the rejection based on hindsight. The advantages of fiber optic data transmission were well known at the time this application was filed as evidenced by the references cited. Appellant has failed to address the merits of the examiner's position as to why the invention of claim 13 would have been obvious in view of the cited evidence.

With respect to claim 18, appellant argues that digitally compressing electronic content into a digital video stream that is eventually inserted into the vertical blanking interval is not taught in addition to rebroadcasting the digital video stream using a wireless local area network [brief, page 9]. The examiner responds by referring to the arguments with respect to claim 11 [answer, page 9].

We will sustain the examiner's rejection of claim 18 for the reasons discussed above with respect to claims 1 and 11. Since claims 19, 20 and 22 are not separately argued, we also sustain the examiner's rejection of these claims.

With respect to claim 21, appellant argues that since digitally compressing the digital video stream is not taught or suggested by Allport, then digitally decompressing the signal is also not taught or suggested [brief, page 10]. The examiner responds that Hendricks was cited to teach compressing and decompressing of video content [answer, page 10]. Appellant responds that there is no teaching of decompression in Allport. Appellant also asserts that since there is no local area network in Allport, there is no need for compression or decompression. Appellant also points out that the rejection is deficient because the examiner now relies on the additional reference to Hendricks [reply brief, pages 4-5].

We will sustain the examiner's rejection of claim 21. Each of appellant's arguments with respect to claim 21 has been considered with respect to one or more claims above. Therefore, appellant's arguments fail to persuade us of error in the rejection of claim 21 for reasons discussed above.

In summary, we have sustained each of the examiner's rejections of the claims on appeal. Therefore, the decision of the examiner rejecting claims 1-22 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv).

AFFIRMED

JERRY SMITH	)	
Administrative Patent Judge	)	
	)	
	)	
	)	BOARD OF PATENT APPEALS
	)	
HOWARD B. BLANKENSHIP	)	AND
Administrative Patent Judge	)	
	)	INTERFERENCE
	)	
	)	
MAHSHID D. SAADAT	)	
Administrative Patent Judge	)	

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Application 09/844,919

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