

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* DAVID B. NELSON, ROGER P. DURAND,  
and JULIAN WRAY WEST

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Appeal 2007-3534  
Application 10/116,447  
Technology Center 2100

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Decided: July 15, 2008

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Before LANCE LEONARD BARRY, HOWARD B. BLANKENSHIP, and  
STEPHEN C. SIU, *Administrative Patent Judges*.

BARRY, *Administrative Patent Judge*.

DECISION ON APPEAL

I. STATEMENT OF THE CASE

A Patent Examiner rejected claims 1-31. The Appellants appeal therefrom under 35 U.S.C. § 134(a). We have jurisdiction under 35 U.S.C. § 6(b).

#### A. INVENTION

The invention at issue on appeal is an encryption method that complies with the Institute of Electrical and Electronic Engineers' 802.11 standard for wireless local area networks and uses the Wired Equivalency Privacy ("WEP") algorithm. More specifically, the invention periodically generates a new pair of encryption keys: one key for transmission; the other key for reception. An access point and at least one wireless client share the pair. (Spec. 4.)

#### B. ILLUSTRATIVE CLAIM

Claim 28, which further illustrates the invention, follows.

28. A method for enhancing the security of a network including one or more wireless access points associated with one or more clients that have established communication with the network, the method comprising the steps of:

- a. generating a plurality of encryption keys;
- b. transmitting the encryption keys to the one or more clients;
- c. generating a set of replacement encryption keys; and
- d. replacing the transmitted encryption keys with the generated set of replacement encryption keys at the initiation of the one or more access points.

#### C. REJECTIONS

Claims 1-7, 10-18, and 21-31 stand rejected under 35 U.S.C. § 102(e) as anticipated by U.S. Patent No. 6,453,159 ("Lewis").

Claims 8, 9, 19, and 20 stand rejected under 35 U.S.C. § 103(a) as obvious over Lewis and 802.11 WIRELESS SECURITY IN BUSINESS NETWORKS TECHNOLOGY BRIEF, Dell Computer Corporation.

## II. CLAIMS 1-7, 10-18, AND 21-31

When multiple claims subject to the same ground of rejection are argued as a group by appellant, the Board may select a single claim from the group of claims that are argued together to decide the appeal with respect to the group of claims as to the ground of rejection on the basis of the selected claim alone. Notwithstanding any other provision of this paragraph, the failure of appellant to separately argue claims which appellant has grouped together shall constitute a waiver of any argument that the Board must consider the patentability of any grouped claim separately.

37 C.F.R. § 41.37(c)(1)(vii) (2006).<sup>1</sup>

Here, the Appellants argue claims 1-7, 10-18, and 21-31, which are subject to the same ground of rejection, as a group. (App. Br. 4-5.) We select claim 28 as the sole claim on which to decide the appeal of the group. "With this representation in mind, rather than reiterate the positions of the parties *in toto*, we focus on the issues therebetween." *Ex Parte Zettel*, No. 2007-1361, 2007 WL 3114962, at \*2 (BPAI 2007).

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<sup>1</sup> We cite to the version of the Code of Federal Regulations in effect at the time of the Appeal Brief. The current version includes the same rules.

#### A. EXAMINERS' FINDINGS

The Examiner makes the following findings.

As per independent claim 28, Lewis teaches a method for enhancing the security of a network including one or more wireless access points associated with one or more clients that have established communication with the network, the method comprising the steps of:

- a. generating a plurality of encryption keys (*note claim 9; also note column 12, line 48 - a different encrypt key for the access point and a different encrypt key for the mobile would constitute a key pair; also note Fig. 2 - the encryption engines in the access point and the mobile terminal are capable of generating plurality of encryption keys*);
- b. transmitting the encryption keys to the one or more clients (*note column 9, lines 38-41; also note column 6, lines 53-58; also note Fig. 1*);
- c. generating a set of replacement encryption keys (*note claim 9*); and
- d. replacing the transmitted encryption keys with the generated set of replacement encryption keys at the initiation of the one or more access points (*note claim 9; also note column 6, lines 58 – 65; also note column 14, lines 14-24*).

(Ans. 10-11.) The Appellants argue "that Lewis does not teach that the access point may transmit the replacement keys" (App. Br. 5) and that "the Lewis reference fails to uncover any mention of adjusting key exchange rate based on crypto attack rates." (*Id.*) Therefore, the issue is whether the Appellants have shown error in the Examiner's findings.

"[T]he PTO gives claims their 'broadest reasonable interpretation.'"  
*In re Bigio*, 381 F.3d 1320, 1324 (Fed. Cir. 2004) (quoting *In re Hyatt*,

211 F.3d 1367, 1372 (Fed. Cir. 2000)). "Moreover, limitations are not to be read into the claims from the specification." *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993) (citing *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989)).

Here, as noted by the Examiner, the "feature[s] upon which applicant relies [are] not recited in the . . . claim[ ] . . ." (Ans. 17.) More specifically, claim 28 requires neither that an "access point . . . transmit the replacement keys" (App. Br. 5) nor that the keys be replaced "based on crypto attack rates." (*Id.*) The arguments based on these unclaimed features show no error in the Examiner's findings.

#### B. NEW ARGUMENT

The Appellants include a new argument about "Dependent Claims 3, 14, 27, and 31" (Reply Br. 6) in their Reply Brief. Therefore, the issue is whether the new argument should be considered.

"[I]t is inappropriate for appellants to discuss in their reply brief matters not raised in . . . the principal brief[ ]. Reply briefs are to be used to reply to matter[s] raised in the brief of the appellee." *Kaufman Company, Inc. v. Lantech, Inc.*, 807 F.2d 970, 973 n. (Fed. Cir. 1986). "Considering an argument advanced for the first time in a reply brief . . . is not only unfair to an appellee . . . but also entails the risk of an improvident or ill-advised opinion on the legal issues tendered." *McBride v. Merrell Dow and*

*Pharms., Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) (internal citations omitted).

There are cogent reasons for not permitting an appellant to raise issues or arguments in a reply brief. Among them are the unfairness to the appellee who does not have an opportunity to respond and the added burden on the court that a contrary practice would entail. As the Tenth Circuit put it, permitting an appellant to raise new arguments in a reply brief "would be unfair to the court itself, which without the benefit of a response from appellee to an appellant's late-blooming argument, would run the risk 'of an improvident or ill-advised opinion, given [the court's] dependence . . . on the adversarial process for sharpening the issues for decision.'" *Headrick [v. Rockwell Int'l Corp.]*, 24 F.3d [1272,] 1278 [(10th Cir. 1994)], (quoting *Herbert v. Nat'l Academy of Sciences*, 974 F.2d 192, 196 (D.C. Cir. 1992)).

*Carbino v. West*, 168 F.3d 32, 34-35 (Fed. Cir. 1999).

Here, because the findings related to claims 3, 14, 27, and 31 that the Examiner makes in the Examiner's Answer (pp. 5, 7-8, 10, and 11) are identical to those in the Final Rejection (pp. 5, 7-8, 10, 11), from which the instant appeal was taken, we find nothing that would have prompted the aforementioned argument in the Reply Brief. The Appellants could have made the argument in their Appeal Brief. The term "reply brief" is exactly that, a brief in reply to new rejections or new arguments set forth in an examiner's answer. The Appellants may not present arguments in a piecemeal fashion, holding back arguments until an examiner answers the original brief. Of course, the Appellants may present new arguments directly to the Examiner for consideration as part of a continuing application. Therefore, we will not consider the new argument.

### III. CLAIMS 8, 9, 19, AND 20

Rather than arguing the rejection of claims 8, 9, 19, and 20 separately, the Appellants rely on the aforementioned arguments. (App. Br. 5.) For the aforementioned reasons, we are unpersuaded by these arguments.

### IV. ORDER

For the aforementioned reasons, we affirm the rejections of claims 1-31.

"Any arguments or authorities not included in the brief or a reply brief filed pursuant to [37 C.F.R.] § 41.41 will be refused consideration by the Board, unless good cause is shown." 37 C.F.R. § 41.37(c)(1)(vii). Accordingly, our affirmances are based only on the arguments made in the Appeal Brief and Reply Brief. Any arguments or authorities omitted therefrom are neither before us nor at issue but are considered waived. *Cf. In re Watts*, 354 F.3d 1362, 1367 (Fed. Cir. 2004) ("[I]t is important that the applicant challenging a decision not be permitted to raise arguments on appeal that were not presented to the Board.")

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No time for taking any action connected with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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