

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* EARL CLYDE COX

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Appeal 2008-4852  
Application 10/744,488  
Technology Center 2600

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Decided: January 15, 2009

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Before KENNETH W. HAIRSTON, JOHN A. JEFFERY, and  
CARLA M. KRIVAK, *Administrative Patent Judges*.

KRIVAK, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134 from a final rejection of claims 1-27, 29-31, 34-36, and 40-46. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

## STATEMENT OF CASE

Appellant's claimed invention is a wireless consumer communications device having a single button for capturing and sending images in a single operation (Spec. ¶ [02]). The communication device receives an indication signal and may wirelessly transfer a captured image to a policing authority and/or a service provider providing wireless service for the communication device. An audio and/or visual signal may be displayed while capturing the signal (Spec. ¶ [07]).

Independent claim 1, reproduced below, is representative of the subject matter on appeal.

1. A method for processing an image by a consumer handheld communication device, the method comprising:

receiving an indication that a capture and send function is activated;

capturing at least one image by the consumer handheld communication device; and

wirelessly transferring said at least one captured image from the consumer handheld communication device to at least one of a policing authority and a service provider providing wireless service for the consumer handheld communication device.

## REFERENCES

Lonka	US 6,308,084 B1	Oct. 23, 2001
Zellner	US 6,807,564 B1	Oct. 19, 2004 (filed Jun. 2, 2000)
Bates	US 2002/0080256 A1	Jun. 27, 2002
Goldstein	US 2003/0031206 A1	Feb. 13, 2003 (filed Aug. 13, 2001)

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Kim	US 6,681,120 B1	Jan. 20, 2004 (effectively filed Apr. 25, 1997)
Cooper	US 2004/0198441 A1	Oct. 7, 2004 (effectively filed Jul. 29, 2002)
McElveen	US 2004/0185900 A1	Sep. 23, 2004 (filed Mar. 20, 2003)
Kondo	US 2005/0183040 A1	Aug. 18, 2005 (effectively filed Aug. 30, 2000)
Steinberg	US 6,873,743 B2	Mar. 29, 2005 (effectively filed Mar. 29, 2001)

The Examiner rejected claims 1, 10, 14, 23, 27, and 36 under 35 U.S.C. § 102(e) based upon the teachings of McElveen.

The Examiner rejected claims 2, 15, 28, and 41 under 35 U.S.C. § 103(a) based upon the teachings of McElveen and Lonka.<sup>1</sup>

The Examiner rejected claims 3, 5, 16, 18, 29, and 31 under 35 U.S.C. § 103(a) based upon the teachings of McElveen and Kondo.

The Examiner rejected claims 4, 17, and 30 under 35 U.S.C. § 103(a) based upon the teachings of McElveen, Kondo, and Bates.

The Examiner rejected claims 6, 19, and 42 under 35 U.S.C. § 103(a) based upon the teachings of McElveen and Goldstein.

The Examiner rejected claims 7, 20, and 43 under 35 U.S.C. § 103(a) based upon the teachings of McElveen, Goldstein, and Zellner.

The Examiner rejected claims 8, 21, and 34 under 35 U.S.C. § 103(a) based upon the teachings of McElveen and Kim.

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<sup>1</sup> It should be noted claim 28 is not pending in the application. This claim, along with claims 32, 33, and 37-39, was cancelled by the Amendment filed February 21, 2006.

The Examiner rejected claims 9, 22, and 35 under 35 U.S.C. § 103(a) based upon the teachings of McElveen and Steinberg.

The Examiner rejected claims 11-13, 24-26, and 44-46 under 35 U.S.C. § 103(a) based upon the teachings of McElveen and Cooper.

The Examiner rejected claim 40 under 35 U.S.C. § 103(a) based upon the teachings of McElveen.

Appellant contends McElveen does not teach transferring captured image data to at least one of a policing authority and a service provider providing wireless service for the consumer handheld communication device (App. Br. 14; Reply Br. 2).<sup>2</sup>

#### ISSUE

Did the Examiner err in construing McElveen's monitor device as a service provider providing wireless service as claimed by Appellant, in the rejection under 35 U.S.C. § 102(e)?

#### FINDINGS OF FACT

1. Appellant's invention is a hand held communications device that transfers at least one of a captured image to a policing authority and/or a service provider providing for the consumer handheld communication device (Spec. ¶ [07]).

2. McElveen teaches a cell phone and cell phone monitoring device. The cell phone includes a button or voice executable command to instruct the phone to acquire digital image data and send the data to a preset

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<sup>2</sup> We refer throughout this opinion to the Revised Appeal Brief filed November 13, 2007.

number representing the monitoring system. The monitoring system determines whether an emergency situation exists and takes appropriate measures (Abstract).

3. McElveen provides a monitoring system, including a plurality of servers -- preferably trusted servers (§ [0010]). The monitoring service can store the data for reviewing later, store the data for reviewing later and evaluating the data to potentially contact emergency services, or store the data for reviewing later and immediately contacting emergency services (§ [0013]).

4. The monitoring device of McElveen receives data transmitted thereto from the cell phone. After receipt, the data is tested to determine whether the data includes an emergency situation indicator. If so, control is transferred to a notify authorities step (step 414; Fig. 4A) that determines the type of emergency and contacts the appropriate authorities such as *police*, fire, EMS, or the like” (emphasis added) (§ [0024]).

5. Lonka teaches a mobile communications device that can also be used as a camera. The mobile communications device is activated for photography using a menu control. The user sees the image of a viewfinder of the camera on the display 7 of the radio part 1 and can aim the camera (col. 3, ll. 10-23) and take a picture. The picture is stored in a memory of the mobile communications device and can be transmitted to a personal computer, email system, or other mobile communications device (col. 3, ll. 46-53).

## PRINCIPLES OF LAW

### *Anticipation*

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros. v. Union Oil Co. of Calif.*, 814 F.2d 628, 631 (Fed. Cir. 1987).

The inquiry as to whether a reference anticipates a claim must focus on what subject matter is encompassed by the claim and what subject matter is described by the reference. As set forth by the court in *Kalman v. Kimberly-Clark Corp.*, 713 F.2d 760, 772 (Fed. Cir. 1983), it is only necessary for the claims to “‘read on’ something disclosed in the reference, i.e., all limitations of the claim are found in the reference, or ‘fully met’ by it.”

### *Obviousness*

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 (Fed. Cir. 1988). In so doing, the Examiner must make the factual determinations set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966). “[T]he examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability.” *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). If the Examiner’s burden is met, the burden then shifts to the Appellants 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. *Id.* at 1445.

Discussing the question of obviousness of a patent that claims a combination of known elements, the Court in *KSR Int'l v. Teleflex, Inc.*, 127 S. Ct. 1727 (2007) explains:

When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, §103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill. *Sakraida* [v. *AG Pro, Inc.*, 425 U.S. 273 (1976)] and *Anderson's-Black Rock [ , Inc. v. Pavement Salvage Co.*, 396 U.S. 57 (1969)] are illustrative—a court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.

*KSR*, 127 S. Ct. at 1740.

## ANALYSIS

### *Anticipation*

The Examiner indicates (Ans. 3-4) how the various limitations in Appellant's claimed invention read on the disclosure of McElveen with respect to representative appealed independent claim 1.<sup>3</sup> In particular, the

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<sup>3</sup> Appellant argues claims 1, 14, and 27 together as a group. See App. Br. 14. Accordingly, we select claim 1 as representative. See 37 C.F.R. § 41.37(c)(1)(vii).

Examiner refers to paragraph [0024] of McElveen (Ans. 4) and states that the “monitoring center provides a service to the wireless device” (Ans. 11).

Appellant contends the monitoring service is not the same as the claimed recitation of a “**service** provider providing wireless service for the consumer handheld communication device” (App. Br. 17; Reply Br. 2). Appellant also asserts McElveen only discloses if “an emergency exists, as determined by the monitoring service...then the ‘authorities’ are notified” (App. Br. 16). Thus, Appellant argues, because McElveen refers to a monitoring service separately from notifying the authorities, the monitoring service is not a policing authority (*id.*).

Claim 1 recites, in pertinent part, wirelessly transferring the captured image to *at least one* of (1) a policing authority, and (2) a service provider. As such, only one of these alternatives need be disclosed by McElveen to meet this limitation. Nevertheless, McElveen fully meets both of these alternatives.

First, McElveen wirelessly transfers a captured image to a “service provider.” Contrary to Appellant’s contentions, the definition of a service provider fully meets the function of a monitoring service. That is, a service provider provides services *including* monitoring services for communicating emergencies. The service provider may perform, and does perform, more than a monitoring service. Thus the claim language does not preclude this function.

Even if, *arguendo*, the monitoring service is not a service provider, McElveen wirelessly transfers a captured image to a “policing authority.” In this regard, the service provider monitors signals, and determines if an image should be forwarded to an emergency service (FF 3, 4). The claims as

written do not preclude this service, and actually forward an image to a “policing authority” (FF 4), albeit alternatively or together with providing the image to a service provider. Thus, the monitoring service is looking for emergencies whether or not the user is aware of this function. Under the broadest reasonable interpretation of the claim language, claim 1 does not preclude a monitoring type of service provider.

Therefore, claim 1, and claims 14 and 27 (which recite commensurate limitations), as written “read on” all of the limitations of McElveen including the monitoring service disclosed. Thus, McElveen anticipates claims 1, 14, and 27. The Examiner’s rejection of those claims and dependent claims 10, 23, and 36, which were not separately argued, is sustained.

#### *Obviousness*

The Examiner rejected the remaining claims over various combinations of McElveen in view of Lonka, Kondo, Bates, Goldstein, Zellner, Kim, Steinberg, and Cooper. Particularly, the Examiner rejected claims 2, 15, 28, and 41 under 35 U.S.C. § 103(a) based upon the teachings of McElveen and Lonka.

Appellant argues the proposed combination of McElveen and Lonka does not teach or suggest “at least one transceiver that wirelessly transfers said at least one captured image from the consumer handheld communication device to at least one of a policing authority and a service provider providing wireless service for the consumer handheld communication device,” as recited in claim 41 (App. Br. 21).

Although Lonka does not specifically disclose wirelessly sending an image to an emergency service, the image is wirelessly transferred from the

handheld communication device to an electronic service (FF 5). It would have been obvious to skilled artisans to then wirelessly send the image to an emergency service, particularly in view of McElveen's teachings noted above. Thus, the collective teachings of McElveen and Lonka teach this limitation.

Additionally, Appellant argues independent claim 41 recites, in part, "at least one of a display that displays a visual signal during said capturing of said at least one image **and** a speaker that emits an audio signal during said capturing of said at least one image" (App. Br. 21). Appellant urges the Examiner's citation of Lonka at column 3, lines 11-13 (FF 5) as disclosing this limitation is unfounded (App. Br. 21). Appellant cites Lonka, at column 3, lines 30-35, as teaching only capturing an image and not as teaching emitting an audio signal during capture of the image (App. Br. 22). The Examiner counters, "Taking a picture is the same thing as capturing the image. Since Appellant uses the alternative case for this limitation Lonka does teach '*displaying at least one of* an audio and a visual signal during said capturing of said at least one image'" (Ans. 12). The alternative language of the claim, as recognized by the Examiner, allows either limitation to be met. The Examiner is correct in finding that Lonka meets the visual limitation.

Appellant has not presented separate arguments for patentability of any of the remaining claims subject to the Examiner's 35 U.S.C. § 103(a) rejections. Appellant instead has relied on arguments (App. Br. 23-25) made with respect to independent claims 1, 14, and 27 in regard to the McElveen reference, which arguments were found to be unpersuasive as discussed *supra*. Thus, Appellant has not presented persuasive evidence of error in the

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Examiner's obviousness rejections of claims 2-9, 11-13, 15-22, 24-26, 29-31, 34, 35, and 40-46 over the collective teachings of McElveen in view of Lonka, Kondo, Bates, Goldstein, Zellner, Kim, Steinberg, and Cooper.

### CONCLUSION

The Examiner did not err in construing McElveen's monitor device as a service provider providing wireless service in rejecting claims 1, 10, 14, 23, 27, and 36 under 35 U.S.C. § 102(e) over McElveen.

The Examiner also did not err in rejecting claims 2-9, 11-13, 15-22, 24-26, 29-31, 34, 35, and 40-46 under 35 U.S.C. § 103(a).

### DECISION

The Examiner's decision in rejecting claims 1-27, 29-31, 34-36, and 40-46 is affirmed.

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

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