

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CAPTIONCALL, LLC,
Petitioner,

v.

ULTRATEC, INC.,
Patent Owner.

IPR2020-01215
Patent 10,469,660 B2

Before WILLIAM V. SAINDON, NATHAN A. ENGELS, and
SCOTT B. HOWARD, *Administrative Patent Judges*.

ENGELS, *Administrative Patent Judge*.

DECISION
Denying Institution of *Inter Partes* Review
35 U.S.C. § 314

I. INTRODUCTION

Petitioner CaptionCall, LLC filed a Petition (Paper 1, “Pet.”) requesting *inter partes* review of claims 1–45 of U.S. Patent No. 10,469,660 B2 (Ex. 1001, “the ’660 patent”). Patent Owner, Ultratec, Inc. did not file a Preliminary Response.

Under 35 U.S.C. § 314(a), an *inter partes* review may not be instituted unless the information presented in the Petition and any response thereto shows “there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” Upon consideration of the Petition and the evidence of record, we determine that Petitioner has not demonstrated a reasonable likelihood of prevailing in establishing unpatentability of at least one claim of the ’660 patent. Accordingly, we deny the Petition and do not institute an *inter partes* review.

A. *Related Matters*

The parties identify U.S. Patent Nos. 10,015,311; 8,917,821; 8,416,925; and 7,881,441 (which was subject to IPR2015-01886) as related patents that may be affected by this proceeding. Pet. 1–2; Paper 3, 2. Patent Owner additionally identifies US Patent Application No. 16/559,172 and US Patent Application No. 16/559,323 as related applications. Paper 3, 1.

B. *Real Parties in Interest*

Petitioner identifies CaptionCall LLC and Sorenson Communications, LLC as the real parties-in-interest. Pet. 1.

Patent Owner identifies Ultratec, Inc. and CapTel, Inc. as the real party in interest. Paper 3, 1.

C. The '660 Patent

The '660 patent “relates generally to telephone systems and specifically to telephone systems that provide for real-time text captioning for the hard of hearing.” Ex. 1001, 1:25–27. The '660 patent states that features of such systems include text telephone (“TTY”), also known as telecommunications devices for the deaf (“TDD”). According to the '660 patent:

Hearing users may communicate with deaf users who have TTY devices through so-called “relays.” A relay is a service funded by telephone communication surcharges that provides a “call assistant” who intermediates between a deaf user and a hearing user. The call assistant communicates with the deaf user using a TTY and communicates with the hearing user by voice over a standard telephone line.

Id. at 1:35–41.

The '660 patent describes an embodiment in which “a standard desktop computer 14 may work in conjunction with a standard telephone (i.e., not text captioned), in this case a cell telephone 72 . . . without a direct connection between the cell telephone 72 and the computer 14.” *Id.* at 12:39–45. This embodiment is pictured in Figure 5, reproduced below.

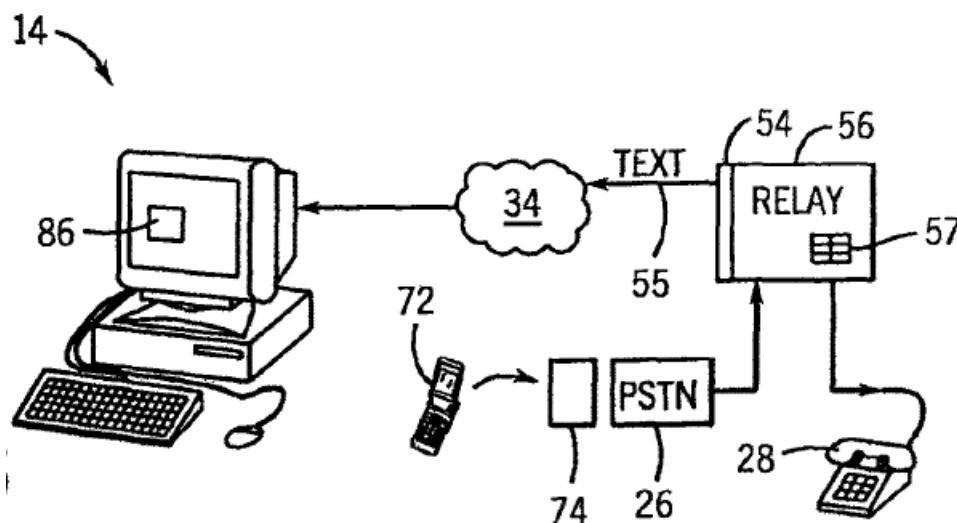


Figure 5 depicts computer 14 connected by Internet 34 to relay service 56, with relay service 56 also connected to external telephone 28 and to cell phone 72 by public switched telephone network 26. *Id.* at 12:39–53.

D. Illustrative Claim

Claims 1, 25, and 38 are independent claims. Claim 1, reproduced below, is illustrative of the subject matter of the challenged claims.

1. A communication system, comprising:

a wireless mobile device that includes a mobile device processor and a mobile device display;

an appliance including a display configured to display text captions corresponding to voice communications between a wireless mobile device and a hearing user's device that is located remotely from the appliance to enable an assisted user using the mobile device to participate in communication sessions with a hearing user using the hearing user's device, wherein the appliance has a first network address and the mobile device is associated with a second address that is different than the first network address and wherein the appliance is independent of the mobile device, the first and second addresses useable to link to the appliance and the mobile device for communication therewith, respectively, the mobile device including a mobile device display and a processor, the appliance comprising:

at least one communication component configured to enable the appliance to communicate with a relay;

an appliance display; and

an appliance processor operably coupled to the at least one communication component and the display;

wherein, the mobile device processor is configured to, upon an incoming call being received by the mobile device, present a first indication of the call via the mobile device display;

the appliance processor configured to:

upon answering an incoming call, while at least one of the mobile device and the appliance is used by the assisted user to communicate via voice signals with the hearing user's

- device, independent of any user action to associate the mobile device and the appliance subsequent to the call being received, receive text originating at the relay, the text corresponding to a transcript of the hearing user's voice signal originating at the hearing user's device, wherein the text signal is received from the relay; and
- (ii) cause text captions corresponding to the received text to be displayed on the appliance display; and
- wherein the mobile device is only wirelessly linked to other devices within the communication system.

E. Alleged Grounds of Unpatentability

Petitioner asserts that claims 1–45 would have been unpatentable on the following grounds:

Claims Challenged	35 U.S.C. § ¹	Reference(s)/Basis
1–21, 23–38, 41, 43–45	102	McLaughlin '169 ²
1–21, 23–38, 41, 43–45	103	McLaughlin '169
1–21, 23–38, 41, 43–45	102	McLaughlin '795 ³
1–21, 23–38, 41, 43–45	103	McLaughlin '795
22, 42	103	McLaughlin '169, August ⁴
22, 42	103	McLaughlin '795, August

¹ The Leahy-Smith America Invents Act (“AIA”) included revisions to 35 U.S.C. § 103 that became effective on March 16, 2013. Because the '660 patent claims the benefit of the filing date from an application filed before March 16, 2013, we apply the pre-AIA version of the statutory basis for unpatentability. *See* Ex. 1001, code (63).

² US 2005/0232169 A1, published Oct. 20, 2005 (Exhibit 1004) (“McLaughlin '169”).

³ US Provisional Patent Application 60/562,795. (Exhibit 1005) (“McLaughlin '795”).

⁴ US 5,671,267, issued Sept. 23, 1997 (Exhibit 1007) (“August”).

39, 40	103	McLaughlin '169, Michaelis ⁵
39, 40	103	McLaughlin '795, Michaelis
1–7, 9–15, 17–21, 23–25, 28–30, 32–38, 41, 43	103	Engelke ⁶
8, 31	103	Engelke, McClelland ⁷
22, 42	103	Engelke, August
39, 40	103	Engelke, Michaelis

Petitioner also relies upon the testimony of Benedict J. Occhiogrosso (Ex. 1019).

II. ANALYSIS

A. *Legal Standards*

As noted above, Petitioner asserts grounds of both anticipation and obviousness. “Because the hallmark of anticipation is prior invention, the prior art reference—in order to anticipate under 35 U.S.C. § 102—must not only disclose all elements of the claim within the four corners of the document, but must also disclose those elements arranged as in the claim.” *Net MoneyIn, Inc. v. VeriSign, Inc.*, 545 F.3d 1359, 1369 (Fed. Cir. 2008) (internal quotation marks omitted). For obviousness, the Supreme Court set out a framework for assessing obviousness under § 103 that requires consideration of four factors: (1) the “level of ordinary skill in the pertinent art,” (2) the “scope and content of the prior art,” (3) the “differences between the prior art and the claims at issue,” and (4) “secondary considerations” of

⁵ US 2005/0063520 A1, published Mar. 24, 2005 (Exhibit 1008) (“Michaelis”).

⁶ US 2002/0085685 A1, published July 4, 2002 (Exhibit 1009) (“Engelke”).

⁷ US 2005/0129185 A1, published June 16, 2005 (Exhibit 1010) (“McClelland”).

non-obviousness such as “commercial success, long felt but unsolved needs, failure of others, etc.” *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966).

B. Level of Ordinary Skill in the Art

Factors pertinent to a determination of the level of ordinary skill in the art include “(1) the educational level of the inventor; (2) type of problems encountered in the art; (3) prior art solutions to those problems; (4) rapidity with which innovations are made; (5) sophistication of the technology; and (6) educational level of active workers in the field.” *Envtl. Designs, Ltd. v. Union Oil Co. of Cal.*, 713 F.2d 693, 696–697 (Fed. Cir. 1983) (citing *Orthopedic Equip. Co. v. All Orthopedic Appliances, Inc.*, 707 F.2d 1376, 1381–82 (Fed. Cir. 1983)). “Not all such factors may be present in every case, and one or more of these or other factors may predominate in a particular case.” *Id.*

Petitioner contends a person of ordinary skill in the art at the time of the invention “would have been a person with a bachelor’s degree in electrical engineering (or electrical and computer engineering) and a few years of experience with telephone communication system architecture, design and implementation, digitization of voice, and/or traditional relay systems.” Pet. 6 (citing Ex. 1019 ¶¶ 34–38).

Because Petitioner’s recitation of the level of skill in the art is supported by the testimony of Mr. Occhiogrosso and not disputed at this time by Patent Owner, we adopt Petitioner’s proposed level of ordinary skill for the purposes of this Decision.

C. Claim Construction

We construe claims “using the same claim construction standard that would be used to construe the claim in a civil action under 35 U.S.C.

282(b).” 37 C.F.R. § 42.100(b) (2019). Specifically, we apply the principles set forth in *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–17 (Fed. Cir. 2005) (en banc). Under that standard, the words of a claim are generally given their “ordinary and customary meaning,” which is the meaning the term would have to a person of ordinary skill at the time of the invention, in the context of the entire patent including the specification. *Phillips*, 415 F.3d at 1312–13.

Petitioner states that it applied the ordinary and customary meaning as understood by a person of ordinary skill and does not propose any specific construction for any term. Pet. 7. Petitioner additionally states “Petitioner does not believe that any of the claim terms of the ’660 Patent need be construed according to 35 U.S.C. § 112 ¶ 6,” but Petitioner notes that the terms “communication component” of claim 1 and “communication link” of claims 23 and 24 “might be argued as being subject to § 112 ¶ 6.” *Id.*

Because no express constructions are needed to resolve any dispute in this proceeding, we do not expressly construe any of the claim limitations. *See Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1017 (Fed. Cir. 2017) (noting that “we need only construe terms ‘that are in controversy, and only to the extent necessary to resolve the controversy’” (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999))).

D. Summary of Prior Art References

1. McLaughlin ’169 (Ex. 1004)

McLaughlin ’169 “relates to relay-assisted telecommunication for the hearing and speech-impaired.” Ex. 1004 ¶ 2. McLaughlin ’169 describes “a multimedia conference bridge and a ‘relay-on-demand’ technique to

facilitate relay calls,” where incoming calls are directed to a “bridge to detect if relay services are required.” *Id.* ¶ 15. “If the multimedia conference bridge detects a disparity in the party’s capabilities, e.g., a party is hearing and speaking and the other is hearing or speech-impaired, then the conference bridge automatically places a call to a relay operator.” *Id.*

McLaughlin ’169 describes that a “voice user 118 operates a voice telephone 120 to communicate with an impaired user 122,” who “may operate a text device 124 . . . [which] may include a TTY, personal computer with a web browser, PDA, or other device capable of reading or generating text data.” Ex. 1004 ¶ 31. The “hearing-impaired user 122 may operate a telephone 126 to deliver voice and read text from the text device 124,” where “text is received from a relay operator who translates the text from voice.” *Id.*

McLaughlin ’169 states that in “one embodiment, the conventional telephone 126 manages the voice while a text channel is transmitted to a separate text device.” Ex. 1004 ¶ 31. McLaughlin ’169 also states that

[i]n an alternative embodiment, the telephone 126 is embodied as a specialized telephone that manages both voice and text data. The telephone 126 provides voice and includes a display to show readable text. Some conventional telephones include an addressable display and may be incorporated into the teachings of the present invention.

Id. ¶ 32.

Figure 5, reproduced below, shows an embodiment of communication in a conference call with relay service. Ex. 1004 ¶ 9.

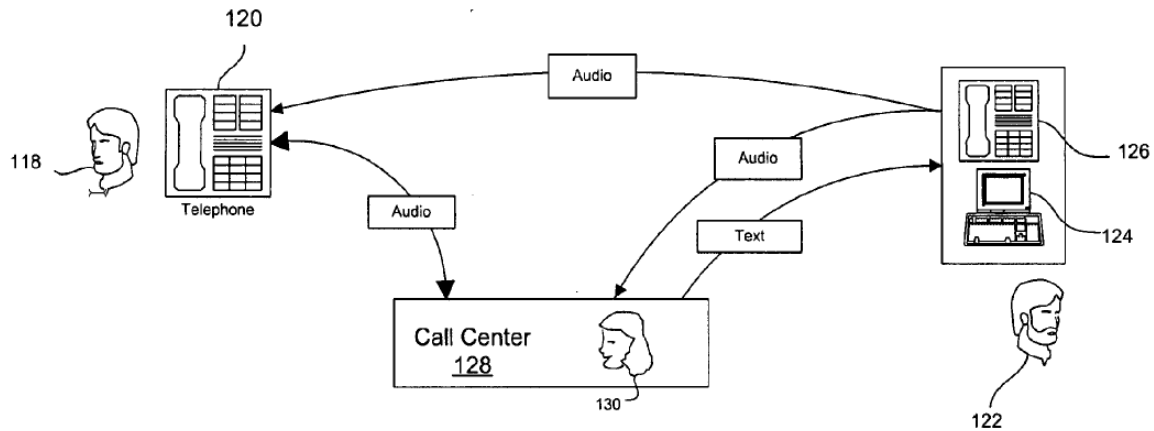


Figure 5 depicts voice user 118 connected with audio communications to call center 128 and to hearing-impaired user 122, with operator 130 at call center 128 also connected to hearing-impaired user 122 by audio and text communications between the call center and telephone 126 and computer 124 of hearing-impaired user 122. *Id.* ¶ 56.

McLaughlin '169 claims priority to and states that it incorporates McLaughlin '795 by reference. Ex. 1004, code (60), ¶ 1.

2. *McLaughlin '795 (Ex. 1005)*

McLaughlin '795 is a provisional patent application made up of a 121-page collection of notes, white papers, and other disclosures relating to TTY services. *See* Ex. 1005. Among other things, McLaughlin '795 describes “[r]elay mediated voice/text calls,” involving voice participant A, hard of hearing participant B, and relay operator C. *Id.* at 120.⁸ McLaughlin '795 states that participant A may use a VoIP phone, analog phone, PBX phone, or “wireless ‘cell’ phone.” *Id.* at 121. Participant B “requires a full duplex or 2-way audio device, and also requires a text display.” *Id.* Participant B’s audio device “can be any of the types of devices discussed

⁸ References to page numbers in Exhibit 1005 refer to the page numbers added by Petitioner.

above available to participant A,” and examples of Participant B’s text devices include “(a) a text [display] on a phone, (b) a computer screen where the computer is running a program (like the NTS client), browser, etc., (c) a PDA or other wireless device with a display, (d) a TTY or ITU modem device.” *Id.*

3. *Engelke (Ex. 1009)*

Engelke “relates to systems to assist telephone communications by those persons who are deaf, hard of hearing, or otherwise have impaired hearing capability.” Ex. 1009 ¶ 3. Engelke states its system “is intended to take advantage of two developments in the field of assisted telephone services, the personal interpreter and the re-voicing relay.” *Id.* ¶ 18. The “personal interpreter” is

a small portable device capable of delivering, with the support of a relay, text to a deaf user of any human conversation occurring in the presence of the personal interpreter. The personal interpreter is set up to connect telephonically to a relay, transmit spoken words to the relay, and then display for the assisted user the text of the words transmitted over the telephone connection to the relay.

Id. ¶ 19. The personal interpreter “is preferably wired to a cellular telephone 20 included within the case of the personal interpreter 10.” *Id.* ¶ 22.

Engelke describes both one-line and two-line captioned telephone service. Ex. 1009 ¶¶ 37–39. In one-line captioned telephone service, a hearing user communicates through a telephone line with a relay, which converts the hearing user’s voice to text and transmits both the text and the hearing user’s voice to an assisted user’s captioned telephone device. *Id.* ¶

37. In two-line captioned telephone service, the assisted user has two telephone lines, as shown in Engelke's Figure 5, reproduced below:

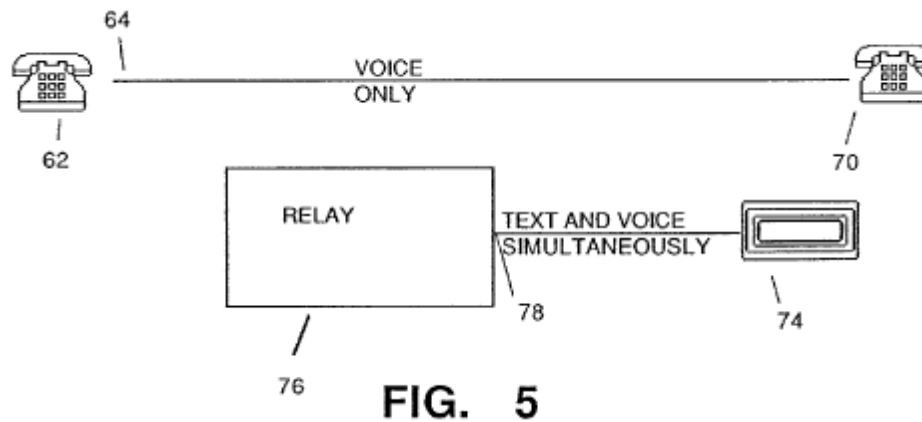


Figure 5 illustrates two-line captioned telephone service, in which telephone 62 of the hearing user and telephone 70 of the assisted user are connected by telephone line 64. *Id.* ¶ 38. The voice of the hearing user is transferred through captioned telephone device 74 to telephone line 78 to be transmitted to relay 76. *Id.* Relay 76 converts the voice of the hearing user to text, which is transmitted via telephone 78 to captioned telephone device 74 for display to the assisted user. *Id.* ¶ 39.

E. Grounds 1–4

The Petition combines Grounds 1–4 into one claim chart providing a claim-by-claim, limitation-by-limitation comparison of claims 1–21, 23–38, 41, and 43–45 to both McLaughlin '169 and McLaughlin '795, with citations to Mr. Occhiogrosso's testimony as support. Pet. 22–37.

Each of independent claims 1, 25, and 38 includes limitations relating to a hearing-assisted user using a wireless mobile device having voice communications. Our analysis of Grounds 1–4 focuses primarily on these limitations, which we find dispositive for Grounds 1–4.

1. *The “wireless mobile device” limitations*

As noted above, McLaughlin ’169 incorporates McLaughlin ’795 by reference. Below we first address the references’ disclosures individually, followed by discussion of the references’ teachings as incorporated by reference.

a) *McLaughlin ’169*

In the Petition’s claim chart, Petitioner states that McLaughlin ’169 “discloses a telephone (telephone 126) of a hearing assisted user (impaired user 122)” (Pet. 22 (citing Ex. 1004 ¶ 30, Fig. 5)) and “mobile phone (telephone 126)” (Pet. 23–24 (citing Ex. 1004 ¶¶ 31–32)). But the cited portions of McLaughlin ’169 state only that telephone 126 is a “conventional telephone 126” in one embodiment (Ex. 1004 ¶ 31) and a “specialized telephone” in an alternative embodiment (Ex. 1004 ¶ 32). Paragraph 30 of McLaughlin ’169 mentions “wireless devices,” stating “[t]he network 116 provides communication between telephones, facsimile machines, TTY, wireless devices, and the like,” but Petitioner does not adequately explain how that, Figure 5, or other disclosures in McLaughlin ’169 supports Petitioner’s assertion that McLaughlin ’169 “discloses” a “mobile phone.”

McLaughlin ’169 cannot anticipate the challenged claims at least because it does not disclose the limitations requiring a wireless mobile device. Petitioner does not allege that, at the time of invention of the ’660 patent, a person of ordinary skill “would at once envisage” a wireless mobile device in the system of McLaughlin ’169 as arranged in the claim. *Cf. Microsoft Corp. v. Biscotti, Inc.*, 878 F.3d 1052, 1069 (Fed. Cir. 2017) (analyzing evidence cited in an anticipation argument to determine whether a person of ordinary skill would have at once envisaged a disputed element).

The Petition instead just states that McLaughlin '169 “discloses” a mobile phone with insufficient explanation. Pet. 22.

The Petition also lacks adequate explanation regarding how Petitioner contends the challenged claims would have been obviousness in view of McLaughlin '169. In fact, Petitioner does not specifically address single-reference obviousness regarding a mobile phone and McLaughlin '169. *See* Pet. 22. We will not surmise what Petitioner *could* have written. *See SAS Institute Inc. v. Iancu*, 138 S.Ct. 1348, 1355 (2018) (“in an inter partes review the petitioner is master of its complaint,” “it’s the petitioner . . . who gets to define the contours of the proceeding”).

b) McLaughlin '795

Petitioner asserts that McLaughlin '795 “discloses an audio device of the hearing assisted user (participant B) as a wireless mobile phone device (mobile phone), such as a wireless cell phone, that is only wirelessly linked to other communication devices within the communication system.” Pet. 22 (citing Ex. 1005 p. 121). As cited by Petitioner, McLaughlin '795 states that a “hearing/speaking participant A will typically use a phone or other audio device.” Ex. 1005 p. 121. McLaughlin '795 further states “[t]he phone could be on a phone extension from a PBX or key type phone system, or could be a wireless ‘cell’ phone. Any type of audio device can be used, including computers with microphones and speakers, or a phone headset/handset connecting to a computing device.” Ex. 1005 p. 121.

Describing a “hard of hearing participant B,” McLaughlin '795 states that participant B “requires a full duplex or 2-way audio device, and also requires a text display for showing incoming text characters. The audio device can be any of the types of devices discussed above available to

participant A. The text device can be any device capable of receiving incoming text sent by [a relay operator,] participant C.” Ex. 1005 p. 121.

Although McLaughlin ’795 states that hard-of-hearing participant B could use any type of audio device listed for participant A, including a “wireless ‘cell’ phone,” the Petition does not adequately explain how McLaughlin ’795 discloses a wireless cell phone in combination with the remaining claim elements arranged as in the claim. Specifically, claim 1 separately recites “a wireless mobile device that includes . . . a mobile device display” and “an appliance including a display configured to display text captions . . . wherein the appliance is independent of the mobile device.” For the mobile device display, the Petition cites McLaughlin ’795’s disclosure of a “display on a phone itself.” Pet. 23 (citing p. 120; quoting p. 121). That language, however, describes a text display for providing closed captioning, separate from McLaughlin ’795’s list of audio devices:

The audio device can be any of those types of devices discussed above available to participant A. The text device can be any device capable of receiving incoming text sent by participant C. Examples of text devices include: (a) a text diisplay [sic] on a phone, (b) a computer screen . . . , (c) a PDA or other wireless device with a display, (d) a TTY or ITU modem device.

-- It is noted in particular that a *display on a phone itself* is an attractive choice in Call Type 1. The hard of hearing person B can answer a phone call, and *on the phone itself* see ‘*closed captioning*’ of the incoming voice sounds.

Ex. 1005 p. 121 (underline and italics added).

The Petition cites the italicized passage for the recited “wireless mobile display” (Pet. 23) and the underlined passage for the recited “appliance including a display configured to display text captions” (Pet. 23–24). Both passages are examples of what McLaughlin ’795’s describes as a

“text display,” yet the Petition ascribes McLaughlin ’795’s text displays to two different claim elements. Pet. 23–24.

McLaughlin ’795 does not describe a system having two separate text displays, and the Petition does not reconcile McLaughlin ’795’s disclosure with the fact that the claim expressly recites two separate displays. Instead, the Petition’s assertions amount to picking and choosing elements from McLaughlin ’795. As cited by the Petition, McLaughlin ’795 does not disclose all claim elements arranged as in the claims, as required for anticipation.⁹

In fact, Petitioner does not reconcile the requirement for two separate display elements in either the anticipation context or in the context of obviousness. As with McLaughlin ’169, the Petition lacks adequate explanation regarding the asserted single-reference obviousness ground based on McLaughlin ’169.

c) McLaughlin ’169’s Incorporation by Reference

As noted above, McLaughlin ’169 incorporates McLaughlin ’795 by reference, and McLaughlin ’795 mentions a wireless cell phone, while McLaughlin ’169 does not. Even with the incorporation by reference,

⁹ We also note that the Petition provides only a conclusory statement that McLaughlin ’795 satisfies the limitation “independent of any user action to associate the mobile device and the appliance subsequent to the call being received, receive text originating at the relay” of claim 1. Pet. 26–27 (citing Ex. 1005 p. 120; Ex. 1019 ¶¶ 70–71). Neither the Petition nor Mr. Occhiogrosso adequately explains how McLaughlin ’795 satisfies that claim element. In fact, McLaughlin ’795 expressly describes initiating relay services after a call is answered: “If relay services are not needed, then the present invention will allow the call to proceed, but if relay services are needed, then the invention will ‘conference’ a relay operator into the call on an as-needed basis.” Ex. 1005 p. 122.

though, anticipation requires more than a showing of all claim elements within the four corners of a reference. *Net MoneyIn*, 545 F.3d at 1369. Anticipation requires all elements arranged as in the claim without the need to pick and choose elements from different disclosures (*id.*), but the lack of explanation in the Petition again requires picking and choosing different elements from different disclosures.

Although McLaughlin '795 mentions a “wireless ‘cell’ phone,” the Petition cites McLaughlin 169’s disclosure that “telephone 126 . . . includes a display.” Pet. 23 (citing Ex. 1004 ¶ 32). The cited paragraph 32 of McLaughlin '169, however, expressly states “[i]n an alternative embodiment, the telephone 126 is embodied as a specialized telephone that manages both voice and text data.” Not only is this “alternative embodiment” distinct from the “conventional telephone” described in paragraph 31, there is no explanation of how these disclosures would be compatible with the “wireless ‘cell’ phone” that is generically mentioned in McLaughlin '795, and it is unclear from the Petition whether the incorporation by reference of McLaughlin '795’s wireless cell phone would take the place of the “specialized telephone” of paragraph 32 or the “conventional telephone” of paragraph 31. Moreover, the Petition does not explain how the combination of references discloses or teaches the separate requirements of a “wireless mobile display” and an “appliance including a display configured to display text captions . . . independent of the mobile device.”

To any extent that the Petition’s mention of “a mobile device [second] display” (*e.g.*, Pet. 23) is intended to argue that nothing in claim 1 forecloses the possibility that text captions can be displayed on both the mobile display

device and the appliance's display (a) the Petition does not adequately make that argument, and (b) the Petition does not cite evidence suggesting that either reference teaches displaying text captions on two different devices. No evidence supports an argument that McLaughlin '169, including the disclosure of McLaughlin '795 by reference, anticipates claim 1 by disclosing a system displaying text captions on two separate displays, and Petitioner does not argue that such a system would have been obvious. Moreover, to the extent that Petitioner relies on Mr. Occhiogrosso's testimony to fill in holes or make up for the lack of explanation in the Petition, such a strategy would amount to incorporation by reference, and our rules do not allow parties to incorporate arguments into a petition by reference. 37 C.F.R. § 42.6(a)(3); *see Boston Scientific Neuromodulation Corp. v. Nevro Corp.*, 813 F. App'x 572, 582 (Fed. Cir. May 29, 2020) (affirming the Board's decision to exclude portions of an expert declaration where missing elements were only addressed in the expert declaration as an attempt to incorporate arguments by reference) (unpublished); *General Access Solutions, Ltd. v. Sprint Spectrum L.P.*, 811 F. App'x 654, 657 (Fed. Cir. May 11, 2020) (explaining that the prohibition on incorporation by reference prevents the Board from being forced to "play archeologist with the record" and search for arguments that might have been made outside of the parties' briefing) (citation omitted) (unpublished).

Accordingly, having considered Petitioner's arguments in light of the evidence of record, we determine Petitioner has not satisfied its burden to show a reasonable likelihood that it would prevail in any of Grounds 1–4.

F. Grounds 5–8

Petitioner’s Grounds 5–8 include either McLaughlin ’169 or McLaughlin ’795 as a primary reference in combination with August or Michaelis, and Grounds 5–8 address only dependent claims 22, 39, 40, and 42. Petitioner’s citations of secondary references do not address the deficiencies addressed above in Petitioner’s arguments regarding the independent claims.

Accordingly, for the same reasons addressed above, we determine Petitioner has not satisfied its burden to show a reasonable likelihood that it would prevail on any of grounds 5–8.

G. Grounds 9–12

Each of Grounds 9–12 includes Engelke as the primary reference either alone (Ground 9) or in combination with additional references (Grounds 10–12). The Petition includes a claim-by-claim, limitation-by-limitation claim chart for each of Grounds 9–12, with citations to Mr. Occhiogrosso’s testimony as support. Pet. 44–60.

Unlike Grounds 1–8, which are deficient in addressing the limitation for a wireless phone, Petitioner explains how Engelke describes a wireless phone. *Id.* at 44–45. Thus, we focus on other limitations. Each of independent claims 1, 25, and 38 includes limitations relating to a hearing-assisted user associating with an appliance “independent of any user action subsequent to [a] call being received.” Our analysis focuses on those limitations, which we find dispositive for Grounds 9–12.

1. The “independent of any user action” limitations

As noted above, independent claim 1 recites “independent of any user action to associate the mobile device and the appliance subsequent to the call

being received, receive text originating at the relay.” For this limitation, Petitioner argues that Engelke discloses associating the appliance (cited as Engelke’s personal interpreter 74) with the assisted user’s telephone 70 independent of any user action subsequent to the call being received “because any such action to associate the telephone 70 and the personal interpreter 74 may take place prior to the call being received.” Pet. 47 (citing Ex. 1009 ¶¶ 38, 39, 42; Ex. 1019 ¶ 144).

As cited by Petitioner, paragraph 38 of Engelke describes hardware setup, teaching physically placing a microphone near an assisted user’s phone. Paragraph 39 states, in part,

if the assisted user decides captioning would be helpful to his or her understanding of the conversation, the captioning service can be added while the call is in progress. To add the captioning service, the assisted user simply has the [personal interpreter 74] dial the relay over the second telephone line.

Ex. 1019 ¶ 144 (quoting Ex. 1009 ¶ 39). And paragraph 42 states: “The captioned telephone feature would be activated by a button or key, which would cause the unit to dial a pre-selected relay and set up a captioning session, *whether or not a call on the other line is yet in progress.*” Ex. 1009 ¶ 42 (emphasis added). According to Mr. Occhiogrosso,

a person of ordinary skill in the art would have understood that the assisted user could push the button disclosed in [paragraph 42 of Engelke] and thus *establish the link to the relay (relay 76) before answering* or placing a call. In that context, there would be no action by the assisted user to associate the mobile phone (telephone 70) and the appliance/computer device (personal interpreter 74) *after the answering of the call*, both because the microphone is placed near the mobile phone (telephone 70) before the call has come in or is answered, and *because the button is pushed to get captions before the call is answered.*

Ex. 1019 ¶ 144 (citing Ex. 1009 ¶ 42) (emphasis added).

We determine Petitioner has not satisfied its burden with respect to this limitation, as the evidence does not support Petitioner's arguments. To the contrary, Engelke plainly describes an assisted user taking action after *receiving* a call (e.g., after the phone begins to ring), even if those actions can be taken before *answering* the call (e.g., the user picks up the phone and begins to speak to the caller). In paragraph 39, Engelke describes a "single line" embodiment in which "for an incoming call, the call must [be] directed through the relay to the assisted user *at the beginning of the call.*" Ex. 1009 ¶ 29 (emphasis added). Engelke also describes that "[f]or a two-line captioned telephone call, however, the call can be started as a normal telephone communication session, without the relay or the captioning. Then, if the assisted user decides captioning would be helpful . . . , the captioning service *can be added while the call is in progress.*" Ex. 1009 ¶ 39 (emphasis added).

Both scenarios of paragraph 39 plainly describe action by the assisted user *subsequent* to a call being received, and we are not persuaded on this record that paragraph 42 supports a different reading. Describing the two-line captioned telephone call depicted in Figure 5 (as also described in paragraphs 38 and 39), Engelke only describes that an assisted user can dial a pre-selected relay to set up a captioning session, "whether or not a call on the other line is *yet in progress.*" Ex. 1009 ¶ 42 (emphasis added). Consistent with paragraph 39, and inconsistent with Petitioner's arguments, the sentence immediately following the cited portion of paragraph 42 states that "[t]he voice signals *incoming on the first telephone line* from the

hearing user would be transferred electronically to the telephone line to the relay.” Ex. 1009 ¶ 42.

In other words, in both paragraphs 39 and 42, Engelke teaches that an assisted user may set up a captioning session after receiving a call, when “voice signals [are] incoming,” “whether or not a call on the other line is yet in progress.” Ex. 1009 ¶ 42. Engelke does not teach or reasonably suggest that an assisted user would activate “a button or key, which would cause the unit *to dial a pre-selected relay and set up a captioning session*” before *receiving* an incoming call. Ex. 1009 ¶ 42 (emphasis added).

Mr. Occhiogrosso’s testimony similarly evidences action by an assisted user subsequent to receiving an incoming call, even if such action is taken prior to *answering* the call. As quoted above, Mr. Occhiogrosso states that a person of ordinary skill would have understood that an assisted user “could push the button . . . and thus establish the link to the relay (relay 76) *before answering* or placing a call.” Ex. 1019 ¶ 144 (emphasis added). Similarly, Mr. Occhiogrosso states that there would be no action by the assisted user to associate the mobile phone and personal interpreter “after the answering of the call . . . because the button is pushed to get captions before the call is answered.” Ex. 1019 ¶ 144. Mr. Occhiogrosso’s testimony regarding action “before answering” a call does not support Petitioner’s argument that Engelke teaches or suggests the limitation of claim 1 that requires “independent of any user action to associate the mobile device and the appliance *subsequent to the call being received*, receive text originating at the relay.”

Petitioner relies on the same evidence and arguments for equivalent limitations of independent claims 25 and 38 (Pet. 50 (addressing claim 25

with reference to claim 1), 52 (addressing claim 38 with reference to claim 1)), and Petitioner does not allege that any of the secondary references addresses these limitation (*see* Pet. 47–60).

Accordingly, having considered Petitioner’s arguments in light of the evidence of record, we determine Petitioner has not satisfied its burden to show a reasonable likelihood that it would prevail in any of Grounds 9–12.

III. CONCLUSION

For the reasons set forth above, we determine that Petitioner has not demonstrated a reasonable likelihood of prevailing with respect to at least one claim of the ’660 patent. Accordingly, we do not institute an *inter partes* review.

IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that, pursuant to 35 U.S.C. § 314, no *inter partes* review is instituted as to any claim of the ’660 patent.

IPR2020-01215
Patent 10,469,660 B2

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