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RECORD OF ORAL HEARING

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte OMEGA PATENTS, LLC

Appeal 2022-003758
Application 90/014,675
Technology Center 3900

Oral Hearing Held: October 28, 2022

Before JOHN A. JEFFERY, MARC S. HOFF, and ERIC B. CHEN,
Administrative Patent Judges.

APPEARANCES:

ON BEHALF OF THE APPELLANT:

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The above-entitled matter came on for hearing on Friday, October 28, 2022, commencing at 1:01 p.m. at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

P R O C E E D I N G S

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1:01 p.m.

JUDGE JEFFERY: Okay, very good. Good afternoon. This is Judge Jeffery here, we have Judges Hoff and Chen joining us at the bench today. And --

JUDGE HOFF: Good afternoon.

JUDGE JEFFERY: Just a couple of housekeeping --

JUDGE CHEN: Good afternoon.

JUDGE JEFFERY: A couple of housekeeping announcements here before we get started. This is for control number re-examination 90/014,675, and for U.S. Patent 8,032,278.

And as you know, this is a video hearing, and sort of a couple of things to keep in mind during the hearing here. The first concern is your right to be heard, so if any time during the proceeding you have technical difficulties, just let the team members know who gave you the connection information and we can get those ironed out.

Second, when you're not speaking, we'd appreciate if you could mute yourself, and that way the ambient noise is minimized to make for a more accurate -- easily to make for a more accurate transcript. And also if you'd identify yourself every time you speak, that way the court reporter can prepare an accurate transcript.

And we also have the entire record in front of us on our electronic system here. We all have the -- all the pages of the briefing and the -- and all the information that was provided in connection with the briefs. And if

1 you're referring to a particular paper, just let us know what that is, the page
2 number, and we'll -- we can follow along.

3 And lastly, there may be members of the public attending -- listening
4 to the hearing, so keep that in mind.

5 So with that, you'll have 20 minutes, and you can begin whenever
6 you like.

7 MR. ABID: Thank you. Good afternoon. My name is Attorney
8 Jack Abid and I am appearing on behalf of Omega Patent, LLC in Appeal
9 Number 20220-003758. If it pleases the panel, I will begin.

10 As an initial matter, we note that Claims 2 through 3 and 12 through
11 17 have been confirmed as patentable by the examiner in this present
12 re-examination. We are here to discuss in particular the rejection of the
13 claims -- the other claims over Lowrey in view of Lightner, and for brevity
14 we will concentrate on Representative Claim 1 for this discussion.

15 Today marks the culmination of five rounds of re-examination
16 against the 278 Patent. Additionally, the 278 Patent has been involved in
17 multiple litigations, has many licenses to its -- licensees to its technology.

18 The inventor of the 278 Patent, Mr. Kenneth Flick, is a -- excuse me,
19 Mr. Kenneth Flick is a successful business man and a prolific inventor, and
20 has nearly 150 U.S. patents to his name.

21 Although this application was filed -- or this patent was filed in
22 2007, it does have a long chain of priority, going all the way back to 2000.

23 And in particular, the 278 Patent represents an extension of Mr.
24 Flick's original vehicle tracker patents. It provided a solution that customers
25 were asking for in the automotive vehicle tracker industry. There was a

1 need to install a single device readily into multiple different vehicles, and for
2 it to be operational in those vehicles.

3 So with that, I'll turn to Claim 1 of the 278 Patent, the representative
4 claim.

5 So, Claim 1 of the 278 Patent recites a multi-vehicle compatible
6 tracking unit for a vehicle comprising a vehicle data bus extending
7 throughout the vehicle.

8 The multi-vehicle compatible tracking unit comprises a vehicle
9 position determining device, a wireless communications device, a
10 multi-vehicle tracker controller for control -- cooperating with said vehicle
11 position determining device and said wireless communications device to
12 send vehicle position information. Again, this is the vehicle tracker
13 functionality.

14 Said multi-vehicle compatible controller to be coupled to release
15 vehicle data, thus for communication there over, with at least one vehicle
16 device, using at least one corresponding vehicle device code from among a
17 plurality thereof for different vehicles.

18 And it also includes a downloading interface for permitting
19 downloading of enabling data relating the -- to at least one corresponding
20 vehicle device code for use by said multi-vehicle compatible controller.

21 As noted earlier, this is the fifth re-examination of the 278 Patent.
22 And by -- and all by two related requesters, the present requester and the
23 requester's customer, CalAmp. Of course, CalAmp was also party to the
24 first litigation noted in the appeal brief, due to the requester's own product.
25 Excuse me.

1 Even with 20 years of hindsight bias and five re-examinations, both
2 the requester and its customer could not locate a single reference that
3 provided each and every feature of the 278 Patent's claims, and the requester
4 and its customer have utilized a very simple formula to provide cumulative,
5 repetitive, and harassing improper rejections.

6 The formula comprises a typical vehicle tracker, plus multi-vehicle
7 compatibility, equals the 278 Patent. In fact, the PTAB has had the
8 opportunity to review and reject one of these earlier rejections in the second
9 re-examination of the 278 Patent, which it was based upon the Chou
10 reference.

11 Here in this fifth re-examination in 27 -- of the 278 Patent, the
12 primary reference, Lowrey, is similarly deficient to the prior numerous
13 rejections attempted against the 278 Patent. Lowrey discloses yet another
14 vehicle tracker that can report GPS-enabled location to a remote user.

15 Although Lowery does not -- excuse me, does note it can be installed
16 in different vehicles, as noted in Column 7 of Lowrey, the vehicle trackers
17 configured with a schema component for a specific single vehicle. Indeed,
18 while installed in the same single vehicle a software engineer at the remote
19 station is needed to configure that schema component, to work with that
20 single vehicle.

21 As supported by the patent owner's --

22 (Simultaneous speaking.)

23 JUDGE JEFFERY: Counsel, this is Judge Jeffery here. Counsel, I
24 do have a question about the Lowrey reference there on that point there.

25 One of the things that the examiner refers to is the passage in
26 Column 4, starting around Line 60 or so, where it basically says that the

1 wireless appliance can be easily installed in nearly every vehicle with an
2 ODB 2 connector for a matter of minutes -- in a matter of minutes, and it can
3 also be *easily transferred* from one vehicle to another.

4 So, *easily transferred* from one vehicle to another. Would that in
5 and of itself be multi-vehicle compatible if I can transfer a wireless
6 appliance from say a Ford to a Chevy?

7 MR. ABID: Again, this is Jack Abid. Thank you, Judge. So, yes,
8 the examiner did point that section of Column 4 of Lowrey. And what we
9 posit and what our argument is, very similar to the prior Chou reference in
10 the second appeal, is that it too had an ODB connector and it could
11 physically be plugged into many vehicles.

12 But it wasn't operational because each vehicle has very different
13 vehicle codes, and because of that it needs further augmentation to have that
14 functionality. The -- as it was interpreted by the PTAB previously, that
15 multi-vehicle compatibility needs to be in the device at the vehicle.

16 JUDGE JEFFERY: Okay, thank -- this is Judge Jeffery here again.
17 Thank you very much, counsel, for that. I have a question about that
18 particular functionality in Column 4, sort of considered in combination if
19 you will with the functionality in Figure 2, of the Lowrey reference that
20 basically lays out in a flow chart the relevant functionality of the wireless
21 appliance here.

22 And sort of taking it from the top here in Figure 2, we have at step
23 22 the wireless appliance with the original data collection schema is
24 employed in a vehicle, and then data's collected from the vehicle and a
25 packet goes out with the data. It's sent to a computer system, a host

1 computer system, that data set -- it generates a data set that is displayed on a
2 website.

3 And in Step 30, a technician analyzes the data set to diagnose the
4 vehicle, and then in Step 33, it says based on diagnoses the technician uses
5 the website to select a new schema, and then the -- and you have an
6 incoming data packet comprising a new schema that's sent over the network,
7 and then it is transferred to the vehicle, and then the host vehicle receives the
8 packet, extracts this new data collection schema, and then you collect data
9 according to the new schema.

10 And the reason I'm sort of going through this flow chart here is my
11 understanding of your position is is that that new schema that basically is
12 selected in Step 33 and is then ultimately extracted and then used to collect
13 more vehicle data, but that updated data collection schema or new data
14 collection schema, that's for the same vehicle. Is that your position?

15 MR. ABID: Again, this is Attorney Jack Abid. Yes, Judge, that is
16 the position of patent owner.

17 JUDGE JEFFERY: Okay, this is Judge Jeffery here again. Thank
18 you very much for that.

19 So, with that, I go back to Column 4 again where it says that the
20 wireless appliance can be *easily* transferred from one vehicle to another, and
21 I'm going to go back now to Figure 2 because I wanted to ask you how that
22 functionality would be realized, if you will, in connection with Figure 2.

23 Let's say that I start off with Step 22 with a Ford vehicle, let's say a
24 Ford car, wireless appliance with the original data collection schema
25 deployed in the vehicle. So that's deployed in my Ford car, which as I
26 understand your position is pre-installed before it even goes into the car.

1 Okay, so that's in the Ford, and then the vehicle data's collected, and
2 then the outgoing data packet goes out in Step 24, and then dropping on
3 down we have data generated Step 26, again for the Ford vehicle. And then
4 in Step 28, we display the data set, then the technician analyzes it to
5 diagnose the vehicle, in this case, the Ford.

6 Now let's say right after Step 30 the technician then moves the
7 wireless appliance to a Chevy at that point, so you have the transfer that's
8 noted in Column 4 that occurs between Step 30 and 33.

9 So now when we get to Step 33, the wireless appliance is now in a
10 Chevy car, a Chevrolet. And then Step 3 says based on the diagnosis, the
11 technician uses the website to select new schema.

12 Would that new schema apply still to the Ford even though the
13 wireless appliance is in the Chevy?

14 MR. ABID: Jack Abid for patent owner again. Your Honor,
15 unfortunately I'm not able to opine on the hypothetical technical aspect that
16 you just asked us about, but I -- what I can tell you is that on the record we
17 do have our technical expert who has stated that the way that the person of
18 ordinary skill in the art would interpret Lowrey is that particular schema is
19 operational for that one vehicle.

20 And then when it gets updated, the way it's discussed in Column 7 of
21 Lowrey, that it gets updated while it's in that same vehicle, for it is for that
22 same vehicle now. Hypothetically what would happen if you were to do
23 that, since it's not discussed in Lowrey, we're not really able to intelligently
24 opine upon that.

25 JUDGE JEFFERY: This is Judge Jeffery here. Okay. Thank you
26 for that.

1 The examiner -- the reason I ask the question is the examiner makes
2 the point that in Column 4, if you could easily transfer the wireless appliance
3 from one vehicle to another, you would have -- it would be operational once
4 you transferred it, seems to be the examiner's position, or the examiner takes
5 the opposite tact to say why would it be -- why would you have such a
6 teaching if it would be inoperative in another vehicle?

7 Isn't that a fair question?

8 MR. ABID: Again, Attorney Jack Abid for the patent owner. Your
9 Honor, we're just not certain whether it would actually work, and although it
10 is a fair question for the examiner, a person of ordinary skill in the art would
11 recognize that each of these vehicles has completely different codes.

12 And so, it is unlikely to be operational, and that was similarly
13 concluded when the PTAB reviewed the Chou reference in the second
14 re-examination that, yes, it was physically compatible because it's ODB and
15 that's a somewhat ubiquitous interface -- physical interface.

16 But the way -- once you plug in, the way you talk on the data bus is
17 completely different.

18 JUDGE JEFFERY: Okay, thank you for that, counsel. This is Judge
19 Jeffery here again. One other question I have for you is with respect to the
20 schema itself.

21 My understanding of your position, and Mr. McAlexander testifies
22 as much with respect to the schema being loaded in the wireless appliance,
23 or essentially before the appliance is installed in the vehicle, essentially that
24 the schema is itself in the appliance, and then the appliance goes into the
25 vehicle.

1 And the passage which Mr. McAlexander refers to is in Lowrey at
2 Column 6, Line -- starting around Line 62, where it says a schema specific
3 to a given type of vehicle is *typically* loaded onto the micro controller before
4 the wireless appliance is installed in the vehicle, and that refers to Step 22 of
5 Figure 2, which is the first step in that flow chart.

6 I emphasize the word “typically” there. Does that mean that it is
7 *always* loaded onto the micro controller, or does “typically” mean not
8 necessarily always, but perhaps *usually* loaded onto the micro controller? In
9 other words, is this an absolute or is this just maybe some of the time?

10 MR. ABID: Again Attorney Jack Abid for the patent owner. Your
11 Honor, again, we're unable to opine exactly how that would work, but given
12 that it doesn't explain in any further detail than this particular column -- and
13 of course, also referenced in Figure 2, saying that Lowery's is an initial
14 schema.

15 Again, “typically,” is kind of a carve out, so it's hard to put ourselves
16 in the feet -- or the shoes of the person who drafted this or a person of
17 ordinary skill in the art, but I can tell you that our technical expert has
18 review -- who was also a technical expert for the related litigation and is
19 extremely familiar with this field, went through it and thought -- and
20 concluded that it would be loaded for that initial single vehicle.

21 JUDGE JEFFERY: Judge Jeffery here. Thank you, counsel. What
22 in your opinion does the word “typically” mean in that context?

23 MR. ABID: Again, this is Attorney Jack Abid for the patent owner.
24 Again I'm at a bit of a loss on how to opine about “typically.” I mean, I
25 guess the way -- whether and how relevant my interpretation of it would be,
26 but I would conclude that -- I mean, I would just give it a layperson's

1 interpretation and I would probably rely on the -- also the input of our
2 technical expert for that interpretation, and that it is loaded onto there and
3 must be there.

4 JUDGE JEFFERY: Judge Jeffery here. Thank you very much,
5 counsel, for that.

6 I have another question for you that goes to the secondary
7 considerations in evidence that was -- you know, we have several arguments
8 directed to various secondary considerations of non-obviousness, and it's my
9 understanding that the evidence that's relied on in that regard essentially is
10 the same evidence that was used in the -- in connection with the second
11 re-examination of the 278 Patent.

12 And -- but the examiner in the answer says that he didn't have -- that
13 it's not of record, and therefore he's giving the evidence, at least with respect
14 to the licensing commercial success and copying evidence, that the jury -- in
15 connection with the jury verdict, that that is given little weight by the
16 examiner.

17 And then in your reply brief, you basically point out that that was
18 improper to do that. The first question is is that evidence of record in the
19 second re-examination but not here?

20 MR. ABID: Again, Attorney Jack Abid for the patent owner. Your
21 Honor, yes, the -- in the second re-exam, we entered our date of record the
22 entire trial transcript, including all exhibits -- well, not all exhibits. To be
23 more precise, as I recall, the exhibit listing and the final order, the jury
24 verdict, pretty much anything of relevance in that particular litigation, was
25 introduced in the second.

1 And then of course, when determining SNQ for this fifth re-exam,
2 the examiner did thoroughly review the second re-examination to make sure
3 this was an SNQ, but -- although we disagree, he did review. And so he had
4 an opportunity to do that.

5 JUDGE JEFFERY: This is Judge Jeffery here. Thank you, counsel,
6 for that. My next question is why wasn't that same evidence provided from
7 the second re-examination provided here, given that the same arguments and
8 same bases were relied upon in this re-examination?

9 MR. ABID: Well, we didn't think it was absolutely necessary. I
10 believe this was a new -- this statement from the examiner was after we had
11 the right to introduce -- admit new evidence. And we already had the -- both
12 jury verdicts, the final order, the PTAB decision from the second re-exam.

13 There was a lot of periphery evidence already in the record and we
14 didn't feel it was necessary to burden the record again with,
15 like -- with -- excuse me -- with 1,000 pages of transcript from a litigation
16 where we have the dispositive findings from the judge, from the jury, the
17 PTAB.

18 I mean, we really had all that on the record, so we didn't think it was
19 necessary if the examiner had come out after the first office action and said I
20 need this in the record here, we would happily have done so, and it, you
21 know, arguably is part of the record because it's in the second re-exam.

22 JUDGE JEFFERY: Judge Jeffery here. Thank you very much,
23 counsel. So, providing that ref -- all the evidence again in this record
24 would've essentially have been cumulative in a sense because the examiner
25 had already considered that very evidence presumably in finding the
26 substantial new question of patentability here in this proceeding.

1 And the examiner in other parts of the answer indicates that the
2 examiner considered our decision in the second re-examination, so that also
3 touched on the persuasiveness of the secondary considerations evidence that
4 we had considered.

5 So presumably then the reason why the evidence wasn't provided
6 here in this re-examination was because it would've been just essentially
7 repetitive or cumulative to that which was already considered. Is that a fair
8 statement?

9 MR. ABID: Again, Attorney Jack Abid for the patent owner. Yes.

10 JUDGE JEFFERY: Judge Jeffery here again. Thank you very
11 much, counsel. Those are all the questions that I have. If the panel has any
12 other questions -- and we're basically out of time here, but if there are any
13 further questions, we can entertain them now.

14 JUDGE CHEN: This is Judge Chen and I have no questions.

15 JUDGE HOFF: No further questions, thank you.

16 JUDGE JEFFERY: Okay, Judge Jeffery here again. Well, the
17 hearing -- we're out of time, so we'll go ahead and adjourn the hearing and
18 the case is submitted. Thank you, counsel, for your arguments and time and
19 I appreciate your patience here during the video hearing. So, we are now off
20 the record.

21 (Whereupon, the above-entitled matter went off the record at 1:25
22 p.m.)

Appeal 2022 003758
Application 90/014,675

THIRD PARTY REQUESTER

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