

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICROSOFT CORPORATION and AFFIRMED NETWORKS, INC.,
Petitioner,

v.

LEMKO CORPORATION,
Patent Owner.

IPR2023-00570
Patent 9,191,980 B2

Before HUBERT C. LORIN, NEIL T. POWELL, and
FRANCES L. IPPOLITO, *Administrative Patent Judges*.

POWELL, *Administrative Patent Judge*.

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

I. INTRODUCTION

A. BACKGROUND

Microsoft Corporation and Affirmed Networks, Inc. (collectively, “Petitioner”) filed a Petition (Paper 3, “Pet.”) requesting *inter partes* review of claim 1 of U.S. Patent No. 9,191,980 B2 (Ex. 1001, “the ’980 patent”). Lemko Corporation (“Patent Owner”) filed a Preliminary Response (Paper 7, “Prelim. Resp.”).

We have authority under 35 U.S.C. § 314, which provides that an *inter partes* review may not be instituted unless the information presented in the Petition and the Preliminary Response shows that “there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. § 314(a) (2018).

After considering the Petition, the Preliminary Response, and the evidence of record, we deny Petitioner’s request to institute an *inter partes* review as to claim 1 of the ’980 patent on the ground of unpatentability presented.

B. RELATED PROCEEDING

Petitioner indicates, and Patent Owner agrees, that the ’980 patent was asserted in *Lemko Corporation v. Microsoft Corporation*, No. 3:22-cv-00363 (N.D. Tex.). Pet. 22; Paper 4, 1.

C. THE ’980 PATENT

The ’980 patent, “relates generally to controlling wireless communications.” Ex. 1001, 1:15–16. The ’980 patent explains that “[c]urrent telephone systems are expensive to deploy,” for example, where “a typical cellular system requires a mobile switching center (MSC), a base station controller (BSC), and a home location register/visitor location

register (HLR/VLR), collectively costing over two million dollars.” *Id.* at 1:31–35. According to the ’980 patent, “such a system requires a minimum of ten thousand users in order to be economically viable.” *Id.* at 1:35–37. The ’980 patent recognizes that “[m]any rural areas lack a population large enough to support the installation of such a system.” *Id.* at 1:36–37.

The ’980 patent discloses one embodiment in connection with Figure 1, reproduced below.

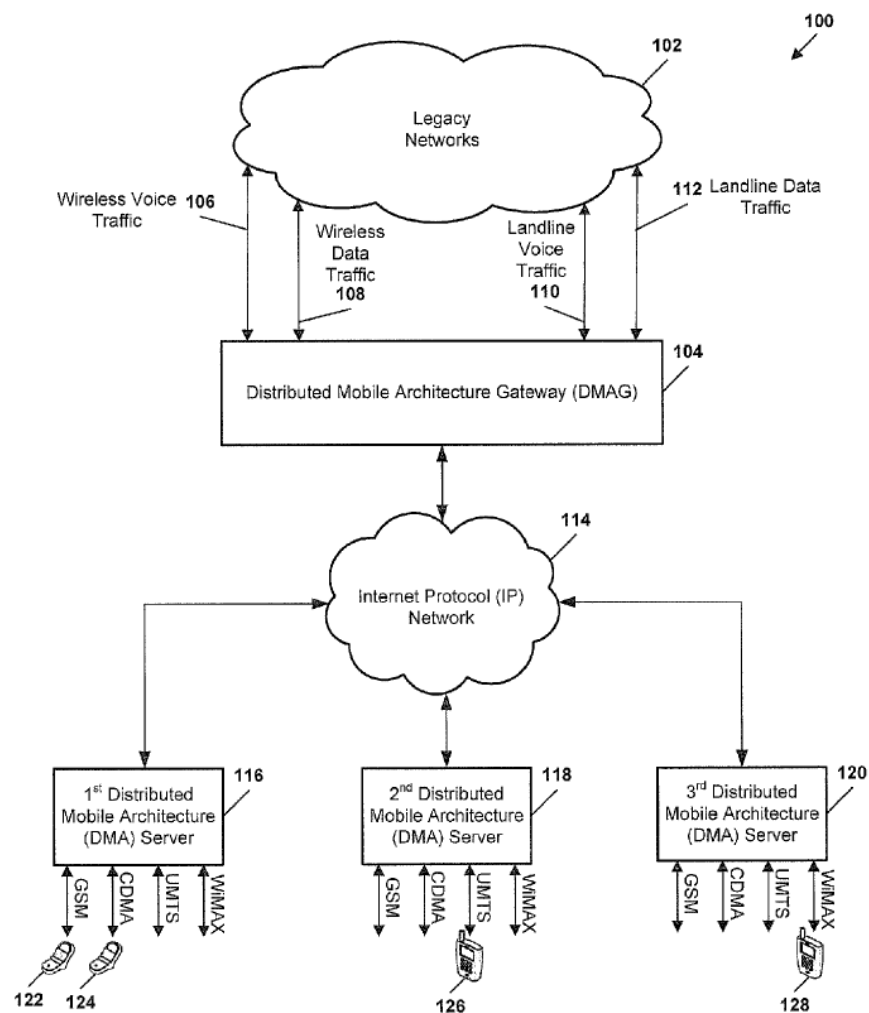


FIG. 1

“[Figure] 1 is a block diagram of . . . a system to control wireless communications.” *Id.* at 1:46–47.

Figure 1 shows system 100, which includes “legacy networks 102 coupled to a distributed mobile architecture gateway (DMAG) 104.” *Id.* at 2:33–35. “[L]egacy networks 102 may include one or more wide-area wireless communication networks, one or more landline communication networks, one or more local area networks (LANs), one or more wireless local area networks (WLANs), or any combination thereof.” *Id.* at 2:35–40. DMAG 104 allows communication between legacy networks 102 and wireless communication devices:

DMAG 104 routes voice traffic and data traffic between the one or more legacy networks 102 and one or more wireless communication devices via one or more distributed mobile architecture (DMA) servers, such as a first representative DMA server 116, a second representative DMA server 118, and a third representative DMA server 120. In FIG. 1, the DMAG 104 routes voice traffic and data traffic between the one or more legacy networks 102 and a first representative wireless communication device 122, a second representative wireless communication device 124, third representative wireless communication device 126, and a fourth representative wireless communication device 128.

Id. at 2:45–50. “For example, a call originating at the first wireless communications device 122 may be routed via the first DMA server 116 to the legacy networks . . . via the DMAG 104.” *Id.* at 4:47–50. The ’980 patent further describes such a process as follows:

A call is received from a first mobile device at a base transceiver station (BTS) interface of a first distributed mobile architecture (DMA) server. The call is associated with a destination device. The first DMA server determines that a first distributed mobile architecture gateway (DMAG) supports communication with the destination device based on registration data stored at the first

DMA server. Voice information associated with the call is converted to packet data. The packet data is routed to the destination device via the first DMAG.

Id. at code (57).

D. CLAIM 1

Independent claim 1 is reproduced below. Consistent with the Petition, a carriage return and bracketing are added to assist in referring to the claim elements. Pet. 9–21.

1. [1.1] A method, comprising:
 - [1.2] receiving a first call from a first mobile device at a first base transceiver station (BTS) interface of a first distributed mobile architecture (DMA) server, wherein the first call is associated with a destination device;
 - [1.3] determining that a first distributed mobile architecture gateway (DMAG) supports communication with the destination device based on registration data stored at the first DMA server, wherein the registration data indicates that the destination device is not within a wireless coverage area associated with the first DMA server, and
 - [1.4] wherein the first DMAG is communicatively coupled to a plurality of DMA servers including the first DMA server;
 - [1.5] converting first voice information associated with the first call to first packet data; and
 - [1.6] routing the first packet data to the destination device via the first DMAG.

Ex. 1001, 18:37–54.

E. ASSERTED GROUND OF UNPATENTABILITY

Petitioner challenges the patentability of claim 1 of the '980 patent on the following ground (Pet. 2):

Claim Challenged	35 U.S.C. §	Reference/Basis
1	103 ¹	Waylett ²

In support of its challenge, Petitioner also relies on the Declaration of James Proctor. Ex. 1003. Patent Owner relies on the Declaration of Todor Cooklev, Ph.D. Ex. 2001.

II. ANALYSIS

A. LEVEL OF ORDINARY SKILL

Petitioner defines the person of ordinary skill in the art as follows:

As of 2008, a person of ordinary skill in the art . . . of the '980 patent's field would have had a bachelor's degree in electrical engineering, computer engineering or an equivalent, as well as two years of industry experience related to telecommunications networks.

Pet. 3 (citing Ex. 1003 ¶ 55). Petitioner also asserts that “[a]dditional graduate education . . . could substitute for professional experience, or significant experience in the field could substitute for formal education.” *Id.*

¹ The Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (“AIA”), amended 35 U.S.C. § 103. Because the challenged claims of the '980 patent have an effective filing date before the effective date of the applicable AIA amendments, we refer to the pre-AIA version of 35 U.S.C. § 103 throughout this Decision.

² Waylett et al., U.S. Patent No. 8,184,603 B2, issued May 22, 2012 (Ex. 1005, “Waylett”).

Patent Owner states that it “applies Petitioners’ definition of a person of ordinary skill in the art (‘POSITA’)” “[f]or the purpose of this preliminary response only.” Prelim. Resp. 14.

Petitioner’s undisputed definition of a person of ordinary skill in the art appears reasonable and is consistent with the prior art. We adopt Petitioner’s definition for our analysis in this Decision. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001) (the prior art may reflect an appropriate level of skill in the art).

B. CLAIM CONSTRUCTION

In an *inter partes* review proceeding, a claim of a patent is construed using the same standard used in federal district court, including construing the claim in accordance with the ordinary and customary meaning of the claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent. 37 C.F.R. § 42.100(b) (2020). According to the applicable standard, claim terms “are generally given their ordinary and customary meaning” as understood by a person of ordinary skill in the art in question at the time of the invention. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed. Cir. 2005) (en banc) (citations omitted).

Petitioner does not submit a construction for any claim language. Pet. 5–6. Patent Owner submits constructions for certain claim terms. Prelim. Resp. 17–22.

For the reasons explained below, deciding whether Petitioner has demonstrated a reasonable likelihood of prevailing on at least one claim does not require us to construe any claim language expressly. Accordingly, we do not. *See Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999) (“[O]nly those terms need be construed that are in

controversy, and only to the extent necessary to resolve the controversy.”); *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1017 (Fed. Cir. 2017) (applying *Vivid Techs.* in the context of an *inter partes* review).

C. OBVIOUSNESS ASSERTION

A patent claim is unpatentable under 35 U.S.C. § 103(a) if the differences between the claimed subject matter and the prior art are such that the subject matter, as a whole, “would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including: (1) the scope and content of the prior art; (2) any differences between the claimed subject matter and the prior art; (3) the level of ordinary skill in the art; and (4) when in evidence, objective evidence of nonobviousness.³ *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966).

“In an [*inter partes* review], the petitioner has the burden from the onset to show with particularity why the patent it challenges is unpatentable.” *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1363 (Fed. Cir. 2016) (citing 35 U.S.C. § 312(a)(3) (requiring *inter partes* review petitions to identify “with particularity . . . the evidence that supports the grounds for the challenge to each claim”)). This burden of persuasion does not shift to Patent Owner, except in limited circumstances not present here.

³ Patent Owner does not present objective evidence of nonobviousness.

See Dynamic Drinkware, LLC v. Nat'l Graphics, Inc., 800 F.3d 1375, 1378 (Fed. Cir. 2015) (discussing the burden of proof in *inter partes* review).

1. *Overview of Waylett*

Waylett relates to communication systems and shows one example in Figure 5, reproduced below. Ex. 1005, 1:25–26, 9:13–14.

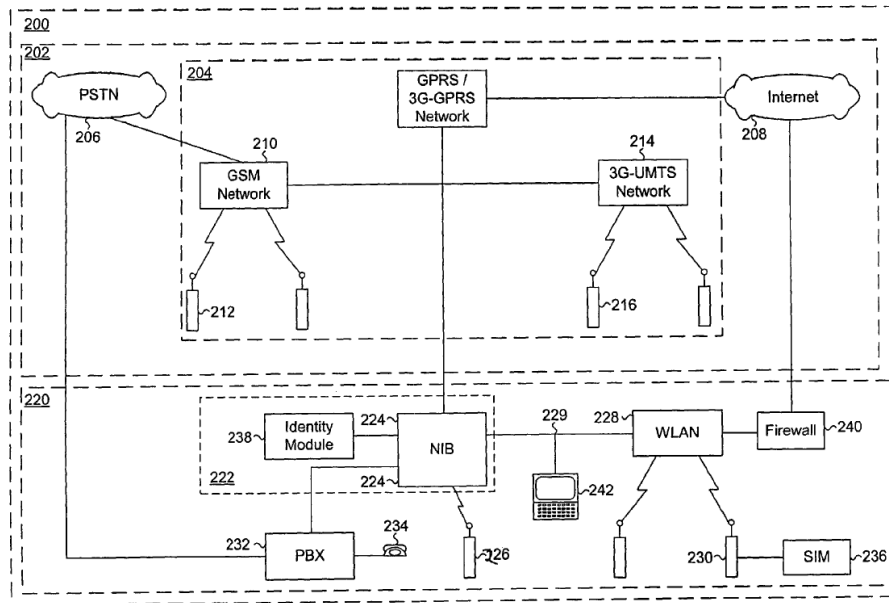


FIG. 5

Figure 5 shows communication system 200, which includes public network 202, private cellular network 222, and WLAN 228. *Id.* at 22–36.

Private cellular network 222 “includes at least one WAVEXchange™ (WXC) or a Network-In-A-Box™ (NIB 224) commercially available from interWAVE Communications Inc., of Menlo Park, Calif.” *Id.* at 9:36–40. “NIB 224 includes a MSC, a BSC, and a BTS in a single enclosure.” *Id.* at 9:41–42.

Waylett explains that WLAN 228 allows UEs 230 to communicate with other portions of communication system 200:

WLAN 228 is coupled to the public network 202 through the NIB 224 and is adapted to enable voice and data communication

between the private UEs 230 and the private mobile stations 226, public mobile stations 212, public UEs 216, PBX telephones 234, and telephones (not shown) coupled to the PSTN 206 and/or the Internet 208. Access points (not shown in this figure) of the WLAN 228 can be coupled to the NIB 224 through a wired local area network (LAN 229), such as an Ethernet, 100Base T, Fast Ethernet or Gigabit Ethernet, or through a wireless or radio-link (not shown).

Id. at 9:47–56.

Additionally, communication system 200 may include identity module 238 coupled to NIB 224:

In yet another embodiment, the private network 220 further includes an identity module 238 coupled to NIB 224, and having at least one identifier or virtual identifier stored therein that can be permanently or temporarily associated with one or more private UEs 230, to enable the private UE to communicate with the public network 102 and/or the private cellular network 222 via the WLAN 228.

Id. at 10:31–37.

Waylett explains the following regarding WLAN 228's configuration:

The WLAN 228 can include one or more separate and discrete networks each using one of a number of different protocols including IEEE 802.11 standards (802.11), and ETSI standards for BRAN, such as HiperLAN or HiperMAN. These standards serve to ensure the interoperability of wireless communications equipment operating in the same spectrum but manufactured by different manufacturers.

Id. at 11:23–29.

2. Discussion

In asserting obviousness of claim 1 over Waylett, Petitioner first argues that “Waylett discloses” limitation 1.1, explaining that Waylett discloses a method of enabling UEs to communicate with a private network. Pet. 9. Petitioner then contends that “Waylett discloses and/or renders

obvious” limitations 1.2 and 1.3. *Id.* at 9–16. Petitioner asserts that “Waylett, in combination with a POSITA’s knowledge” renders obvious each of limitations 1.4, 1.5, and 1.6. *Id.* at 16–21.

Patent Owner counters that Petitioner’s challenge fails for multiple reasons. Prelim. Resp. 23. For example, Petitioner argues that “Waylett does not teach or suggest . . . a plurality of DMA servers connected by peer-to-peer connections.” *Id.* Patent Owner also argues that “Waylett does not teach or suggest . . . a DMA gateway (DMAG) communicatively coupled to a plurality of DMA servers.” *Id.* Additionally, Patent Owner argues that “Waylett does not teach or suggest . . . registration data that ‘indicates that the destination device is not within a wireless coverage area associated with the first DMA server.’” *Id.*

Having reviewed the parties’ arguments and evidence, we do not find Petitioner has provided sufficiently persuasive evidence and arguments with respect to limitation 1.3’s requirement that “the registration data indicates that the destination device is not within a wireless coverage area associated with the first DMA server.” We turn now to a detailed discussion of that issue.

a) Limitation 1.3: “the registration data indicates that the destination device is not within a wireless coverage area associated with the first DMA server”

Limitation 1.3 recites “determining that a first distributed mobile architecture gateway (DMAG) supports communication with the destination device based on registration data stored at the first DMA server, wherein the registration data indicates that the destination device is not within a wireless coverage area associated with the first DMA server.” Ex. 1001, 16:42–47. Petitioner cites Waylett’s WLAN 228 as disclosing limitation 1.3’s

“distributed mobile architecture gateway” and Waylett’s NIB 224 as disclosing limitation 1.3’s “first DMA server.” Pet. 10–11. Petitioner cites Waylett’s private UE 230 as disclosing limitation 1.3’s “destination device.” *Id.* at 11.

Addressing limitation 1.3’s registration data, Petitioner cites Waylett’s disclosure of identity module 238 with “at least one identifier or virtual identifier stored therein that can be . . . associated with one or more private UEs 230” and “subscriber identification and security information.” *Id.* at 13 (citing Ex. 1005, 10:32–35, 10:46–47). Petitioner contends that “[a] POSITA would understand that the identifiers and/or the subscriber and security information is the claimed ‘*registration data*.’” *Id.*

Petitioner also contends that “Waylett renders obvious ‘*wherein the registration data indicates that the destination device is not within a wireless coverage area associated with the first DMA server*.’” *Id.* at 15. In support, Petitioner argues the following:

For example, Waylett discloses a WLAN with distinct and separate network access points operating with different network protocols, such as “IEEE 802.11 standards (802.11), and ETSI standards for BRAN such HiperLAN or HiperMAN.” Ex. 1005, 11:23-26. A POSITA would understand that different network protocols have different wireless coverage areas. Ex. 1003, ¶ 98. A POSITA would have found it obvious to include a WLAN with at least one different wireless coverage area than the NIB, for example as taught by Waylett “to ensure the interoperability of wireless communications equipment operating in the same spectrum but manufactured by different manufacturers.” Ex. 1005, 11:26-29; Ex. 1003, ¶ 98.

Id. at 15–16.

Patent Owner counters that Petitioner does not show the data in Waylett’s identity module 238 “indicates that the destination device is not

within a wireless coverage area associated with the first DMA server.” Prelim. Resp. 31–33. Patent Owner argues that Petitioner does not support its assertion that “a POSITA would understand different network protocols have different wireless coverage areas.” *Id.* (citing Pet. 15; Ex. 1003 ¶ 98; Ex. 2001 ¶ 82). Patent Owner also argues that Petitioner does not and could not “explain how Waylett’s Identity Module data indicates that a destination device is not within a wireless coverage area.” *Id.* at 32. Patent Owner contends that a person of ordinary skill in the art would have understood Waylett’s identity module 238 includes “SIM-type identity data . . . used to identify static information about a device, such as its identity, but not the device’s current location.” *Id.* Patent Owner concludes that “Waylett cannot render obvious [claim 1].” *Id.* at 33.

We agree with Patent Owner that Petitioner has not provided sufficiently persuasive evidence and arguments regarding limitation 1.3’s requirement that the “registration data indicates that the destination device is not within a wireless coverage area associated with the first DMA server.” Petitioner’s support for its arguments about using different coverage areas for different protocols is weak, at best. Pet. 15. Neither Petitioner nor Mr. Proctor cites objective supporting evidence or provides an apparent reason for the statement that “[a] POSITA would understand that different network protocols have different wireless coverage areas.” Pet. 15; Ex. 1003 ¶ 98. Similarly, Petitioner and Mr. Proctor do not explain persuasively their suggestion that Waylett’s disclosure of different protocols “ensur[ing] the interoperability of wireless communications equipment operating in the same spectrum but manufactured by different manufacturers” somehow relates to different coverage areas for different protocols. Pet. 15; Ex. 1003

¶ 98. On the whole, Petitioner does not sufficiently support its assertion that it would have been “obvious to include a WLAN with at least one different wireless coverage area than the NIB.” Pet. 15. Moreover, even if Petitioner did demonstrate obviousness of providing different coverage areas, Petitioner does not persuasively explain how that would address limitation 1.3’s requirement for “registration data indicat[ing] that the destination device is not within a wireless coverage area associated with the first DMA server.” *Id.*

III. CONCLUSION

For the foregoing reasons, Petitioner has not demonstrated a reasonable likelihood of prevailing on its assertion that claim 1 would have been obvious over Waylett. Accordingly, we do not institute an *inter partes* review.

IV. ORDER

In consideration of the foregoing, it is:

ORDERED that the Petition is *denied* as to all challenged claims of the ’980 patent and no trial is instituted.

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