

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SONY INTERACTIVE ENTERTAINMENT LLC,
Petitioner

v.

QUANTUM IMAGING LLC,
Patent Owner

IPR2023-00954
Patent 8,458,028

PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW

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TABLE OF ACRONYMS

Acronym	Description
FWD	Final Written Decision (Paper 62)
Trans.	Hearing Transcript (Paper 60)
Slides	Patent Owner’s Demonstratives (Paper 55) <u>NOTE: The citation to a “Slide” in this Request is a citation to the evidence and papers excerpted and cited on such Slide.</u>
Sur-Reply	Patent Owner’s Corrected Sur-Reply to Petitioner’s Reply (Paper 44)
Reply	Petitioner’s Reply to Patent Owner’s Response (Paper 30)
POR	Patent Owner’s Response to Petition (Paper 23)
Angles	U.S. Patent No. 5,933,811 (Ex. 1007)

PO requests Director review of the FWD because Panel made erroneous factual findings of material consequence—contrary to undisputed evidence—that the prior art Angles’s two embodiments are “predictable variations.” In doing so, Panel misapplied the holding of *Boston Scientific*, devised a fresh narrative never advanced by Petitioner, and disregarded undisputed evidence that a PHOSITA would not be motivated to combine the Angles’s embodiments. Panel also improperly expanded Claim 1’s scope beyond its plain language by fixating on a single page of the prosecution history and dismissing a wealth of contrary evidence. Panel’s error stems from a flawed application of claim construction principles, while ignoring the long-settled law that different words must mean different things.

I. PANEL’S ERRONEOUS FINDINGS REGARDING ANGLES’S TWO EMBODIMENTS NECESSITATE DIRECTOR REVIEW

Petitioner’s obviousness analysis relied on mixing and matching features from Angles’s Figs.1 and 9. PO repeatedly pointed out a glaring deficiency: Petitioner never provided evidence—from Angles or its expert—showing a PHOSITA would be motivated to combine Figs.1 and 9. Sur-Reply, 2. Petitioner *never* argued these embodiments were predictable variations *nor* invoked *Boston Scientific*. Instead, in Reply—and in response to PO’s deficiency challenge—Petitioner switched gears: “the claims are met by the Fig. 1 embodiment” alone. Reply, 4.

Without evidentiary support, Panel, citing *Boston Scientific*, concluded Angles’s two embodiments are “predictable variations” requiring “no leap of

inventiveness.” FWD, 30. Comparing disclosures located 7 pages apart, Panel stated that “the express descriptions of the embodiments in Angles which recognizes that the two systems are mostly the same.” *Id.* 32. This finding clashes with Panel’s acknowledgment that “Dr. Medvidovic provides detailed descriptions of the[ir] differences.” *Id.* 31. Panel then compared Angles 7:57-8:17 with 21:53-60 to deem the two embodiments compatible, calling them “direct versus indirect” versions of the same system. *Id.* 33. Panel based its “findings on the similarities in the structure, including Angles using the same reference numerals in both figures,” and offered one “express example,” *id.*, 33-34 (citing Angles 21:55–65):

We find nothing in Angles that would suggest that a [PHOSITA] would not understand that content provider 14 could offer on-line games such as interactive car races in the embodiment of Figure 1, or that content provider 14 could integrate customized advertisements into the offering in the embodiment of Figure 1.

A. No evidence of motivation to combine Angles’s embodiments exists.

It is the bedrock principle of obviousness analysis that, for “combining multiple embodiments from a single reference, or selecting from large lists of elements in a single reference, there must be a motivation to make the combination and a reasonable expectation that such a combination would be successful, otherwise a skilled artisan would not arrive at the claimed combination.” *In re Stepan*, 868 F.3d 1342, 1345-46 (Fed.Cir.2017); *In re Kotzab*, 217 F.3d 1365, 1370 (Fed.Cir.2000).

Boston Scientific and its progeny have not abolished the requirement to show

motivation to combine. Rather, *Boston Scientific* merely provides that, if there is evidentiary support showing two embodiments are “predictable variations,” the motivation to combine them is presumed. *See* 554 F.3d 982, 991-92 (Fed.Cir.2009). Of course, petitioners must still explain why those variations are predictable—and back it up with evidence, whether from the prior art or expert testimony.

Boston Scientific held that combining two embodiments disclosed “adjacent” to each other in the prior art does not require “a leap of inventiveness” if the record shows those embodiments are “predictable variations” of each other. *Id.* Contrary to Panel’s interpretation, the Court did not merely rely on “the same reference numerals” in two figures, (FWD, 34 n.9); instead, it provided a clear rationale for why “the stent in figure 3B” would benefit from the same two coating layers if applied to the adjacent “stent in figure 4.” 554 F.3d at 991. Here, however, Panel gives no explanation for why a PHOSITA would combine Angles’s Figs.1 and 9.

Panel also cited *Paice v. Ford Motor* to justify its conclusion that combining Angles’s embodiments requires no leap of inventiveness. FWD, 31. But that decision is inapplicable here because the Court explicitly noted that “Dr. Davis’s expert report supported the Board’s conclusion” that the two prior art embodiments were predictable variations. 681 Fed. Appx. 904, 917-18 (Fed.Cir.2017). In contrast, Petitioner provided no expert testimony to support Panel’s conclusion.

For the prior art to show that its embodiments are predictable variations, it must include “express statements provid[ing] substantial evidence” that the two embodiments are equivalent. *GUI Global Products, Ltd. v. Samsung Electronics Co.*, 2024 WL 1564694, *3-*4 (Fed.Cir. April 11, 2024). In *GUI Global*, the Federal Circuit relied on the prior art’s explicit statement that its “embodiments may be used singly and/or by being combined together” to conclude they were “obvious variations.” *Id.* Here, there is no such statement. Panel’s attempt to tie together Angles’s Figs.1 and 9 simply because both refer to “consumer computer” and “advertisement provider computer” does not meet that standard. Panel’s string of inferences and speculation does not amount to substantial evidence supporting a finding that Angles’s embodiments are “mostly the same,” (FWD, 32), notably in view of Panel’s acknowledgement that “Dr. Medvidovic provides detailed descriptions of the differences.” *Id.* 31.

Contrarily (*see* FWD, 32-34), Angles’s labeling of its embodiments offers strong evidence that Angles never intended them to be combined. Specifically, Angles designates Fig.1 as its “preferred” embodiment and Fig.9 as an “alternative.” On similar facts, the Board previously held that *Boston Scientific* is inapplicable:

We are not persuaded that Petitioner’s reliance on *Boston Scientific* overcomes its **lack of explanation** for how or why one of ordinary skill in the art would have combined the two disparate embodiments of Herr. As discussed *supra*, **Herr’s disclosure indicates that the different steam sources are alternative embodiments, rather than embodiments that can be used simultaneously.**

Nat'l Env. Prods. v. Dri-Steem Corp., IPR2014-01502, Paper 13, 11 (April 3, 2015).

Finally, Panel based its conclusion that Angles's two embodiments are compatible on an erroneous factual finding. It cited disclosure for Fig.9 and, without substantial evidence, asserted that the same features appear in Fig.1: "We find nothing in Angles that would suggest that a [PHOSITA] would not understand ... that content provider 14 could integrate customized advertisements into the offering in the embodiment of Figure 1." FWD, 33.

First, Panel revealed its erroneous application of the law. By framing its analysis this way, Panel assumed that Angles's two embodiments are compatible and that a motivation to combine them was established, then looked only for contrary evidence in Angles. But the law does not provide a rebuttable presumption of motivation to combine. Instead, the Petitioner—or Panel acting *sua sponte*—must present substantial evidence showing a motivation to combine. Neither did.

Second, Panel's finding that a PHOSITA would understand "content provider 14 could integrate customized advertisements into the offering in the embodiment of Figure 1" is factually incorrect, as shown by Angles's own disclosure and Dr. Medvidovic's un rebutted testimony.¹ Neither Panel nor Petitioner disputes that Fig.1's content provider does not communicate—directly or indirectly—with the

¹Petitioner's expert never opined that Angles's Fig.1 teaches integration into content provider's offerings, such as online games.

advertisement provider. Instead, the content provider merely sends “the electronic page” to the consumer computer, while “the advertisement provider computer [] selects an appropriate customized advertisement” and “sends” it to “the consumer computer.” Per Angles, “the consumer computer 12 merges the electronic page 32 and customized advertisement 30”—not the content provider, as Panel supposed. By ignoring this express teaching, Panel abused its discretion and made an erroneous finding of material fact. Nor did it explain how a PHOSITA would be motivated to have Fig.1’s content provider integrate advertisements when no communication exists between the advertisement provider and content provider.

Third, only Angles’s Fig.9 can “integrate” advertisements into a content provider’s offering. Indeed, Angles identifies this integration by the content provider as an advantage absent from Fig.1.

Fig. 9 allows the customized advertisements 30 to be *incorporated directly into the content provider’s offerings*. Thus, *in addition to integrating the customized advertisements 30 in to an electronic page 32, the content provider computer 14 can integrate the customized advertisements 30 into offerings such as on-line games*

Slides, 74. Panel cites no disclosure indicating that Fig.1 also permits integrating advertisements into electronic pages—or into an online game.

Nor could it, because Petitioner’s expert testified that “[i]f you are integrating customized advertisements into virtual reality environments or billboards, for example, that integration has to occur inside the game code.” *Id.* 106. In Fig.9, the

advertisement travels from the advertisement provider computer to the content provider computer, where the game code resides, allowing integration into game billboards. *Id.* 70. In contrast, in Fig.1, the advertisement and electronic page are sent separately to the consumer computer, which merely “combines” them in a displayable form. *Id.* 65-68. Assuming Fig.1’s electronic page is an online game, Panel does not explain how this advertisement could be integrated into the game code that remains on the content provider’s system.

Fourth, Angles’s own disclosure shows Fig.1 is not equipped for integration, as it consistently uses the terms “combine” or “merge”—never “integrate.” Slides, 66-69. This is because, as Petitioner’s expert explained, integration must occur in the game code on the content provider’s computer. Yet, in Fig.1, the advertisement is never sent there. Even Judge Mayberry, the FWD’s author, acknowledged that “[w]hen you’re executing a game application, when you’re executing any application, you can’t do something into the code.” Trans. 46:11-15.

Panel abused its discretion by overlooking substantial evidence that contradicts its finding that “content provider 14 could integrate customized advertisements into the offering in the embodiment of Figure 1,” (FWD, 33), a key premise of its ultimately flawed conclusion that a PHOSITA would be motivated to combine Angles’s Figs.1 and 9.

II. PANEL’S SCOPE-BROADENING INTERPRETATION OF CLAIM 1 NECESSITATES DIRECTOR REVIEW

Limitation 1[A] recites a “locally executed game application that is accessible at [a] primary electronic device.” In Petition, Petitioner relied on Angles’s disclosure of online games running in a web browser, asserting that “an online game accessible over the Internet and a consumer browser module running on the consumer computer can be a locally executed game application.” Pet. 22. In Response, PO argued that the claim expressly requires the game application to be “accessible at” the user’s device, whereas Petitioner’s analysis concerns an online game “accessible over the Internet,” not “accessible at” the device. POR, 18-25. PO further showed that Petitioner and its expert conflated “locally executed” and “accessible at,” despite well-settled principles requiring different phrases in a claim to have distinct meanings. Indeed, Petitioner’s counsel openly admitted equating the two: “[I]f a game application is locally executed at a primary electronic device, that game application is accessible at that device.” Trans. 10:19-24.

For the first time in Reply, Petitioner claimed Angles’s web browser, when used to play online games, meets the “locally executed game application accessible at the user’s device.” Reply 14. Petitioner repeated this position with full force at the Oral Hearing. Trans. 16:7-18:7. To support its new theory, Petitioner focused on a single page from the prosecution history depicting a TerraZones storyboard—not an actual game application—in Microsoft Internet Explorer, arguing that “the TerraZones web browser is not only a game application, but is also locally executed

and accessible at the electronic device running the web browser.” Reply, 8.

PO countered with ample evidence from the prosecution history and specification, corroborating that the claimed game application cannot be an online or web-browser-based game. Further, under *EmeraChem Holdings v. Volkswagen Grp. of Am.*, 859 F.3d 1341, 1348 (Fed.Cir.2017), PO repeatedly asked Panel for permission to submit rebuttal evidence—especially since Petitioner first raised this argument for the first time in Reply. Panel denied this request. Sur-Reply, 4.

In the FWD, Panel ignored PO’s evidence and relied almost exclusively on that single page from the prosecution history, concluding that “the position taken by the applicant concerning the TerraZones storyboard is consistent with Petitioner’s position—a browser resident on a primary electronic device executing a game from a website makes the game application accessible at the primary electronic device.” FWD, 41. Panel’s determination is based on four errors:

A. Panel reached an erroneous legal conclusion by impermissibly broadening Claim 1’s scope, straying from the Claim’s text.

Panel disregarded the clear claim language requiring the game application (i.e., the game code) be accessible at the user’s device. While Panel acknowledged that “game application” in Claim 1 is narrower than “application” in Claim 7, (FWD, 19-22), it effectively equated “game application” with a browser, stating that “[t]hrough the use of a browser, the game application is accessible at the user’s computer through that computer’s connection to the content provider computer over

a network, such as the internet.” *Id.* 42. Implicit in that statement is a concession that Angles’s game application is actually accessible over the internet through a browser, yet Panel concludes the online game is accessible at the user’s computer simply because the browser is accessible at that device.

The claim, however, does not require the browser to be accessible at the user’s device—it requires the game application to be accessible thereat. Under Panel’s interpretation, “accessible at” is the same as “accessible over,” “accessible from,” or “accessible to.” Indeed, Panel focused on “accessible” alone, ignoring the “at” preposition. *Id.* 27 (“[T]he term ‘accessible’ does not require the game application to be entirely held at the primary electronic device.”). This glosses over the fact that “at” qualifies “accessible” to a specific location. Different prepositions convey different meanings—otherwise the claim language is changed.

Contrary to Panel’s assertion that “[w]e do not discern anything about the meaning of accessible from other claims,” (*Id.* 24), a quick comparison of the two independent claims reveals the applicant’s careful use of distinct prepositions. In Claim 1, the game application is “accessible at” the user’s device, whereas Claim 7 recites “applications that are accessible to said primary electronic device.” The phrase “accessible at” pinpoints a specific location where the game resides, while “accessible to” is broader, indicating a device can access the game whether it physically hosts the code or connects over a network. By overlooking the distinction

between “accessible at” in Claim 1 and “accessible to” in Claim 7, Panel impermissibly broadened Claim 1’s scope to match that of Claim 7.

Additionally, Claim 7 states, “at least one customized web page at a secondary electronic device, accessed over said computerized network by said primary electronic device.” By Panel’s reasoning, that limitation becomes almost interchangeable with saying “the customized web page is accessible at the primary electronic device.” But the applicant plainly knew how to draft claims covering a game application “accessible over said computerized network,” as in Claim 7. Panel erred by failing to give proper effect to “at” in Claim 1, (*see* FWD, 24), effectively rewriting the claim to fit its preferred interpretation—an approach counter to blackletter law of claim construction.

B. Panel abused its discretion by ignoring contrary evidence in favor of a lone snippet from the prosecution history.

Panel disregarded a wealth of evidence from both the specification and prosecution history contradicting its broadened reading of Claim 1. *First*, the specification distinguishes game applications from a web browser. In Fig.1, akin to online games, the game application 4 resides on the primary device 2, while the browser 16 resides on the user’s device 14. The specification explains that “the user is accessing the game application through a local web browser with the game application being stored on a remote site on the network,” (Ex.1001, 6:43-45), never stating that the game application is “accessible at” the user’s device. Yet Panel

concluded otherwise, merely because the browser is on the user’s device. Fig.1 shows the game application is separate from the browser and Claim 1 requires that the game application—not other applications—be accessible at the user’s device.²

Second, as PO explained, the specification provides numerous examples where a game application is “accessible at” a device by actually residing on that device. Slides, 27. Panel brushed these aside, reasoning that, by amending the original claims to replace “held at” with “accessible at,” the applicant broadened Claim 1’s scope to cover online games. *See* FWD, 26-27. For support, Panel cited a trimmed version of a remark by PO’s counsel, concluding that “‘accessible at’ is not the same as ‘held at,’ but instead captures scope not captured by ‘held at.’” *Id.* Yet Panel never identified what this “additional scope” might be.

As PO’s counsel explained, “accessible at” is broader than “held at” only in that it covers not just physical media, but also digital storage “internally on the memory of the device.” Trans. 61:6-19. In 2002, “‘held’ suggested physical media (CD-ROM, floppy disk, DVD-ROM),” while the specification also contemplates digital storage. *Id.* Moreover, Panel overlooked that the applicant replaced “held at” with “accessible at” in Claim 1 and simultaneously replaced “held at” with “accessible to” in Original Claim 21 (now Claim 7). *Compare* Ex.1003, 503, with

²Both experts agreed that only ‘028 Patent’s Fig.2 comports with Claim 1’s language. POR, 21 (citing Ex.2005, ¶¶43-49), 22 n.2. At the Oral Hearing, Petitioner’s counsel conceded this by mapping Claim 1 to Fig.2. Trans. 8:15-9:10.

508. By using “accessible at” in Claim 1 instead of “accessible to,” the applicant plainly reserved Claim 1’s narrower scope, excluding online or web-based games—contrary to Panel’s conclusion.

Third, Panel relied solely on a single page of the prosecution history that does not even show a locally executed game application, while disregarding pages that do. FWD, 25. Invoking page 123, Panel concluded that Claim 1 covers “a game application [that] is accessible at a web page over the internet and run from a local browser.” *Id.* Yet the claim requires the game to be “accessible at” the user’s device—not at a webpage hosted on a server. Thus, even if Panel’s interpretation of page 123 were correct, it would not apply to Claim 1. By fixating on that solitary storyboard example, Panel improperly broadened Claim 1 beyond its plain language. *Lemelson v. United States*, 3 Cl.Ct. 161, 166 (1983) (“[T]he prosecution history of the patents would not serve to expand the scope of the claims, but only to narrow them.” (citing *Cutter Labs. v. Lyophile-Cryochem*, 179 F.2d 80 (9th Cir.1949))).

Moreover, Panel ignored pages 125–131, which actually show a locally executed game application (the Cronos Demo), (Slides, 44, 51-55), which Petitioner never disputed, and its expert agreed. *Id.* 49. Those pages show no Microsoft Internet Explorer or any browser at all, contradicting Panel’s view that “a browser resident on a primary electronic device” is executing the game from a website. FWD, 41. If Panel’s premise were correct, Cronos Demo would have to run in a browser—yet the prosecution history shows otherwise.

C. Panel deprived PO of due process by disallowing PO's rebuttal evidence, warranting Director review as important issues of law/policy.

Panel based its decision on incomplete information. PO repeatedly sought permission to submit rebuttal evidence that the Microsoft Internet Explorer on page 123 does not depict “a landing page for a website,” (FWD, 25, 40). Sur-Reply, 4. Panel denied that request, even though Petitioner first raised this argument in Reply. Then, at the Oral Hearing, Panel admonished PO for not producing the very evidence it had barred. Trans. 57:15-58:13. Undeterred, PO argued—without being able to submit supporting materials—that page 123 shows the applicant viewing local files and folders using Internet Explorer’s “web view” feature, which allowed users to enhance folder displays with graphics. Sur-Reply, 8-9. This is supported by the browser’s offline status and the local file address in title bar. *Id.*

Although Panel acknowledged that “the storyboard includes images taken from a local file” and was “offline,” (FWD, 24-25), and that “the files that the applicant chose for the storyboard that was presented to the Office to characterize the invention during appeal were located locally on a computer,” (*Id.* 40), it speculated that “the invention was [not] intended to be operated locally.” *Id.* 40. If the applicant’s storyboard files were indeed local, that undermines any conclusion that those images show “a game application [that] is accessible at a web page over the internet and run from a local browser.” *Id.* 25. Panel then further speculated—again without support—that “the local file address is merely an artifact of printing

the storyboard to submit to the Office,” (*Id.*), a rationale that defies logic: printing a webpage does not transform its URL into a local file path.

D. Panel made erroneous finding of material fact that a web browser is a locally executed game application accessible at the user’s device.

Panel’s finding that “a browser resident on a primary electronic device executing a game from a website makes the game application accessible at the primary electronic device,” (FWD, 41), relies on flawed reasoning, as Judge Mayberry made clear during the Oral Hearing: “once I sit down at computer 12 and access that game on content provider computer 14 through my browser, my browser becomes the game application that is recited in the claim,” and “my browser is now the game application, and because my browser resides on my computer 12, it is accessible at computer 12, as recited in the claim.” Trans. 16:15-21; 17:17-18-8.

Put plainly, Panel treated a web browser as a game application simply because the game can be played in it. Under that logic, a web browser would also be a word processor if you open one online, and a YouTube video if you press play. Slides, 33-34; Sur-Reply, 10. Panel declined to formally construe “game application,” instead adopting an interpretation so broad it morphed any browser into a game application—contrary to the plain meaning that a game application is an application that is a game. A web browser is not.

III. CONCLUSION

PO requests that Director grant this Request, and reverse Panel’s FWD.

Date: January 6, 2025

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