

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CISCO SYSTEMS, INC.,
Petitioner

v.

PORTSMOUTH NETWORK CORP.,
Patent Owner

Case No. IPR2024-00893

U.S. Patent No. 6,917,986

PATENT OWNER'S SUR-REPLY

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Patent Owner Portsmouth Network Corp. (“Patent Owner”) respectfully submits this Sur-Reply to Petitioner’s Reply (Paper 18, “Reply”) regarding U.S. Patent No. 6,917,986 (Ex. 1001, “’986 patent”).

I. INTRODUCTION

Petitioner’s Reply does not remedy the deficiencies of its Petition. Instead, Petitioner attempts to gloss over the issues raised in the Patent Owner Response (“POR”) and fails to provide a reason for why a POSA would be motivated to combine IEEE 1999 and Gai and/or an explanation for how a POSA would combine IEEE 1999 and Gai to render the challenged claims obvious. The Federal Circuit, however, has established that a Petitioner must provide evidence-supported reasoning for why and how references should be combined. Petitioner has failed to provide such reasoning. For the reasons in this Sur-Reply and in the POR, Petitioner failed to satisfy its burden of demonstrating invalidity of any of the challenged claims.

II. A POSA WOULD NOT HAVE BEEN MOTIVATED TO COMBINE IEEE 1999 WITH GAI

In its POR, Patent Owner argued that a POSA would not have been motivated to modify Gai with IEEE 1999 to send Gai’s dummy messages downstream because “Gai’s dummy messages are sent at a different time and serve a different purpose than IEEE 1999’s teardown messages.” POR at 9; *see also Apple Inc. v. INVT SPE LLC*, 851 Fed. App’x 200, *202 (Fed. Cir. Apr. 13, 2021) (finding that a POSA

would not have been motivated to combine prior art references because “[a]lthough [both prior art references] involve measuring transmission power, they do so for different reasons, on different time scales, and compare the results to different thresholds.”). While in its Reply Petitioner recognized Patent Owner’s argument, it chose to ignore it. Reply at 5 (“**the POR emphasizes differences** between Gai’s dummy messages and IEEE’s 1999’s teardown messages”) (emphasis added). Thus, Patent Owner’s argument stands unrebutted.

Instead, the Reply repeated the same vague motivation provided in the Petition—“the Petition cites IEEE 1999’s disclosure of sending teardown messages both upstream and downstream . . . solely to provide a motivation for similarly sending Gai’s dummy messages both upstream and downstream.” Reply at 4. But this ignores the fundamental differences between Gai and IEEE 1999, and the Federal Circuit’s requirement to provide evidence-supported reasoning for why a POSA would be motivated to combine the references and how a POSA would combine the references. Accordingly, Petitioner’s Reply fails to overcome the deficiencies raised in the POR, as discussed in more detail below.

A. IEEE 1999 Tear Down Messages And Gai’s Dummy Messages Function Differently

The Petition argued that “while IEEE 1999 describes the messages as ‘teardown messages,’ their function is the same as Gai’s ‘dummy messages.’” Pet. at 27. The POR rebuts this conclusion by explaining the differences between IEEE

1999's teardown messages and Gai's dummy messages. For example, Patent Owner explained that teardown messages are transmitted to tear down connections before the spanning tree is reconfigured while dummy messages are transmitted as part of the reconfiguration process once a device has successfully transitioned to a new port. POR at 8. The POR then explained that a POSA would not have modified Gai in view of IEEE 1999 because of their significant differences. POR at 8 ("Gai's dummy messages are different"); *id.* at 9 ("a POSA would not have been motivated to apply IEEE 1999's transmission of teardown messages to Gai's system **as proposed by Petitioner**") (emphasis added); *id.* at 7-8 (explaining why Petitioner's argument that "Gai could be modified to send dummy traffic downstream" fails).

Petitioner does not address these differences head on. Instead, it asserts that Patent Owner is making a bodily incorporation argument regarding incorporating IEEE 1999's tear down messages to replace Gai's dummy messages. Reply at 4-5. But this is incorrect. Patent Owner is not making a bodily incorporation argument; Patent Owner is establishing that IEEE 1999 is directed to bidirectional transmissions of a fundamentally different type of traffic—a teardown message—while Gai is directed to sending dummy messages. And thus, a POSA would not be motivated to modify Gai, which does not send dummy messages downstream, to send dummy messages downstream in view of IEEE 1999's disclosures regarding teardown messages. POR at 7; Ex. 2002 at ¶¶ 46-48.

Because of these differences a POSA would not have been motivated to modify Gai in view of IEEE 1999 and thus the Board should conclude that the challenged patent is patentable. *See Tinnus Enterprises, LLC v. Telebrands Corp.*, 846 F.3d 1190, 1207 (Fed. Cir. 2017) (“[W]e cannot say that the district court committed a clear or obvious error when it found insufficient motivation to combine these disparate references.”); *LKQ Corp. v. GM Global Tech. Operations LLC*, 102 F.4th 1280, 1300 (Fed. Cir. 2024) (“the more different the overall appearances of the primary reference versus the secondary reference(s), the more work a patent challenger will likely need to do to establish a motivation to alter the primary prior art design in light of the secondary one and demonstrate obviousness without the aid of hindsight.”).

B. Petitioner's Assertion that Patent Owner Ignored Petitioner's Vague and General Assertions of Motivations to Combine is Incorrect

The Reply also argues that “the POR ignores IEEE 1999’s teaching that the network reconfiguration process can advantageously be accelerated by sending messages both upstream and downstream.” Reply at 6. Not so. The POR directly responds by explaining how the IEEE 1999’s network configuration process¹

¹ Petitioner uses the phrase “network configuration process” without any factual support. The process described in IEEE 1999 uses “tear down messages” to

functions, explaining how the network configuration process in Gai functions, and then analyzing and concluding that the two processes are different. POR at 7-9. These differences establish that a POSA would not have been motivated to modify Gai based on a generalized statement about bidirectionally sending messages in the IEEE 1999, which, again, is fundamentally different. POR at 8-9; Ex. 2002 at ¶ 48.

For example, Patent Owner explained that “IEEE 1999’s teardown messages are transmitted to host computers to tear down connections.” POR at 8. In stark contrast, Gai’s dummy messages are sent to other devices in the network (not a host computer), so that these other devices “learn to utilize the new forwarding port, rather than the failed port, when directing messages to these entities.” *Id.* To further illustrate, IEEE 1999 teardown messages are used to inform host computers that a network is unstable and that “particular connections have been torn down.” *Id.* Conversely, Gai’s dummy messages are transmitted “as part of the reconfiguration process and only transmitted once a device has already successfully transitioned to a new forwarding port.” *Id.* Lastly, IEEE 1999’s tear down messages are sent before the spanning tree is reconfigured and before each switch begins forwarding traffic, which is the complete opposite of when Gai’s dummy messages are transmitted. *Id.* at 8 (“Gai is clear that its dummy multicast messages are transmitted as part of the

reestablish connections that were torn down in a network. POR at 8.

reconfiguration process and only transmitted once a device has already successfully transitioned to a new forwarding port.”).

Well-established law requires “some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (internal citations omitted). Combining disparate teachings from different references simply because they are “directed to the same art or same techniques” is insufficient. *Microsoft Corp. v. Enfish, LLC*, 662 Fed. App’x 981, 990 (Fed. Cir. Nov. 30, 2016); *ActiveVideo Networks, Inc. v. Verizon Commc’ns, Inc.*, 694 F.3d 1312, 1327 (Fed. Cir. 2012) (finding “a conclusory statement that a [POSA] would have known, based on the ”modular” nature of the claimed components, how to combine any of a number of references . . . is not sufficient and is fraught with hindsight bias.”); *Arendi S.A.R.L. v. Apple, Inc.*, 832 F.3d 1355, 1362 (Fed. Cir. 2016) (references to “common sense” ... cannot be used as a wholesale substitute for reasoned analysis and evidentiary support). Here, Petitioner’s showing that other art sends teardown messages² (which are functionally different than dummy messages) downstream and that it may be

² Indeed, the Examiner during prosecution of the ’986 Patent reviewed U.S. Patent Nos. 5,307,353 to Yamashita and U.S. Patent Nos. 6,246,667 to Ballintine, which both teach sending messages downstream.

advantageous to do so, without explaining why a POSA would have been motivated to *modify Gai* to do so, is insufficient. *In re Magnum Oil Tools Int'l, Ltd.*, 829 F.3d 1364, 1379 (Fed. Cir. 2016) (finding motivation from different prior-art combinations insufficient to demonstrate obviousness);^{3,4} *In re Nuvasive, Inc.*, 842 F.3d at 1384-85 (reversing the PTAB for failing to articulate a motivation to combine prior art references)

Finally, Petitioner uses the '986 patent claims, requiring sending dummy messages both upstream and downstream, as a starting point for showing motivation: “the Petition cites IEEE 1999’s disclosure of sending teardown messages both upstream and downstream . . . solely to provide a motivation for similarly sending

³ Nor is it sufficient to rely on general motivations like achieving faster or better networks without more. *See ActiveVideo*, 694 F.3d at 1327-28 (holding “the motivation to combine would be because you wanted to build something better” as insufficient evidence to support a determination of obviousness).

⁴ The fact that a POSA would know that dummy messages are capable of being sent downstream is also insufficient to establish a motivation to combine. *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1367 (Fed. Cir. 2016) (“Even if a person of skill would have this knowledge, it does not necessarily follow that such an artisan would have any motivation to combine the prior art in this manner”).

Gai's dummy messages both upstream and downstream." Reply at 4. But, again, sending messages downstream is not discussed in Gai, which as Petitioner itself recognizes is only directed to upstream communications. *Id.* at 9-10. Further, courts have explicitly rejected the use of the claims themselves as a starting point for analyzing obviousness. *Insite Vision Inc. v. Sandoz, Inc.*, 783 F.3d 853, 859 (Fed. Cir. 2015) ("In considering motivation in the obviousness analysis, the problem examined is not the specific problem solved by the invention.") (*citing In re Kahn*, 441 F.3d 977, 988 (Fed.Cir.2006)); ("Defining the problem in terms of its solution reveals improper hindsight in the selection of the prior art relevant to obviousness.") (*citing Monarch Knitting Mach. Corp. v. Sulzer Morat GmbH*, 139 F.3d 877, 881 (Fed.Cir.1998)). So too here, the Board should reject Petitioner's impermissible use of hindsight bias to establish a motivation to combine.

C. Petitioner's Reliance on the Institution Decision as Establishing Obviousness is Misplaced

Petitioner relies heavily on the Board's Institution Decision to support its argument that it would be obvious to modify Gai in view of IEEE 1999. *See, e.g.*, Reply at 2 ("the POR never disputes the ID's conclusion"); *id.* at 4 ("In the ID, the Board correctly credited that "a POSITA would apply the teaching from IEEE 1999 that sending messages for reconfiguring the network after a link failure both upstream and downstream can reduce the network downtime to the rapid reconfiguration process in Gai."); *id.* at 5 ("the Board correctly rejected Patent

Owner's argument in the ID.''). But the Federal Circuit has already found that reliance on the Board's preliminary findings is improper to establish obviousness:

Contrary to [Juniper's] assertions, the Board is not bound by any findings made in its Institution Decision. At that point, the Board is considering the matter preliminarily without the benefit of a full record. The Board is free to change its view of the merits after further development of the record, and should do so if convinced its initial inclinations were wrong. To conclude otherwise would collapse these two very different analyses into one, which we decline to do. If those determinations were somehow binding with respect to the Board's final decision, as [Juniper] urges, the patentee's appeal rights as to that second determination would be close to illusory. [Juniper's] argument also fails to appreciate that there is a significant difference between a petitioner's burden to establish a "reasonable likelihood of success" at institution, and actually proving invalidity by a preponderance of the evidence at trial.

Trivascular, Inc. v. Samuels, 812 F.3d 1056, 1068 (Fed. Cir. 2016) (emphasis added). Accordingly, Petitioner's reliance on the Board's initial determination when granting institution fails to establish that Petitioner has met its burden in establishing that a POSA would have found it obvious to modify Gai in view of IEEE 1999.

III. GAI IN VIEW OF IEEE 1999 DOES NOT RENDER THE CHALLENGED INDEPENDENT CLAIMS OBVIOUS

A. Petitioner Failed To Meet Its Burden That The Prior Art Teaches The Claim Limitation Requiring Sending Downstream Messages From An Edge Switch To An Access Switch

Claim limitation 1[e] recites: sending dummy traffic from the edge switch over the second link to the one or more access switches, so as to cause each of the one or more access switches to modify its respective database responsive to the

second port being in the active state. In responding to the POR's argument, Petitioner misses the point. The POR explained that both Gai and IEEE 1999 fail to teach sending dummy traffic downstream and that Petitioner failed to establish that the combination of Gai and IEEE 1999 teaches or renders claim limitation 1[e] obvious. POR at pp. 10-11. In response, Petitioner focuses on the fact that the Petition relies on Gai's dummy messages and not on IEEE 1999's teardown messages for this limitation. But this argument fails to establish that the proposed limitation discloses claim limitation 1[e].

Petitioner argues that “[t]he POR does not dispute that, if Gai's dummy messages are sent downstream, Gai meets every limitation of the independent claim.” Reply at 2-3. But this point is irrelevant and incorrect. It is undisputed that Gai does not disclose sending dummy messages downstream. POR at 13-14. Nor does IEEE 1999 disclose sending dummy messages downstream. *Id.* The argument is also wrong, because even if Gai's messages are sent downstream (which they are not), Petitioner failed to meet its burden of showing that other recited limitations are met, such as the limitation “to cause the second bridge to modify its database responsive to the second port being in the active state.” POR at 14. Moreover, the argument is misleading, because it assumes that the limitation of the independent claims can be met without providing the requisite motivation to combine. They cannot.

As discussed above, Petitioner has failed to explain how IEEE 1999 would be combined with Gai to satisfy the claim limitation. *Personal Web Techs.*, 848 F.3d at 993-94 (vacating and remanding where inadequate explanation of how a combination worked). Further, even if there were a motivation to combine (which there is not), if a POSA were to incorporate IEEE 1999's technique of sending teardown messages downstream, the references themselves still did not teach the element of "sending dummy traffic from the edge switch over the second link to one or more access switches, so as to cause each of the one or more access switches to modify its respective database responsive to the second port being in the active state." Ex. 1001 at 11:8-10; *see also iRobot Corp. v. SharkNinja Operating LLC*, 2024 WL 3687981, at *10 (Fed. Cir. Aug. 7, 2024) ("The Board further noted that even if a person of ordinary skill in the art were to incorporate Jones's avoid feature into Jeon, the references themselves still did not teach the element of avoiding signals emitted from the base station.").

So here, Petitioner appears to proffer a commonsense argument that because IEEE 1999 messages are sent downstream, a POSA could simply send Gai's dummy messages downstream too. Reply at 2-4. But the Federal Circuit has rejected similar arguments when they are unsupported by evidence and reasoned explanation. *Arendi S.A.R.L. v. Apple Inc.*, 832 F.3d 1355, 1363 (Fed. Cir. 2016) ("Although such common sense' [arguments] can be invoked, even potentially to supply a limitation

missing from the prior art, [they] must still be supported by evidence and a reasoned explanation.”). For example, Petitioner provides no explanation for how a POSA would incorporate IEEE 1999’s disclosure of sending teardown messages to host computers to terminate connections going through a faulty link to modify Gai’s dummy messages that are sent upstream so that “other devices within the network learn to utilize the new forwarding port, rather than the failed port, when directing messages to these entities.” Reply at 8, 13-14. Further, Petitioner also fails to explain how a POSA would incorporate IEEE 1999’s disclosures regarding sending teardown messages to modify Gai’s dummy messages that are sent upstream, “to cause the second bridge to modify its database responsive to the second port being in the active state.” *Id.* at 14. At bottom, the record lacks “any explanation as to how or why [IEEE 1999’s disclosures regarding teardown messages and Gai’s sending of dummy messages upstream] would be combined to produce the claimed invention.” *Trivascular*, 812 F.3d at 1066. Accordingly, Petitioner fails to establish that this limitation is met.

B. The Independent Claims Are Patentable

The Reply arguments apply to independent claims 1, 12, 13, and 24. Reply at 6-7. Therefore, for the reasons explained above, Petitioner failed to meet its burden of showing that Gai in view of IEEE 1999 renders the independent claims unpatentable.

IV. PETITIONER FAILS TO EXPLAIN HOW OR WHY A POSA WOULD MODIFY GAI IN VIEW OF IEEE 1999 TO RENDER THE DEPENDENT CLAIMS OBVIOUS

Petitioner's arguments concerning the independent claims are the same arguments for the dependent claims. See Reply at 7 ("the downstream-related arguments presented for these dependent claims fail for the same reasons discussed above."). Thus, for this reason alone, Petitioner's arguments fail for the same reasons Patent Owner explained above. *Supra* section III.C.⁵

Concerning dependent claims 6 and 18, Petitioner concludes "in view of the motivation from IEEE 1999 to send dummy messages downstream as well as upstream upon detecting a link, Gai's backbone switch would execute its built-in capability to do exactly that: send dummy messages both upstream and downstream." Reply at 8. First, Petitioner's conclusory statement that there is a motivation fails. As mentioned above, Petitioner fails to meet its burden of showing the existence of any motivation to combine IEEE 1999 and Gai. *Supra* section II. Second, there is no explanation as to how IEEE 1999 would be combined with Gai to "execute its build-in capability to . . . send dummy messages both upstream and

⁵ "Dependent claims 2-3, 6-11, 14-15, and 18-23 are non-obvious based on Petitioner's failure to establish obviousness of the underlying independent claims from which they depend." POR at 19.

downstream.” See *Trivascular*, 812 F.3d at 1066 (“must still be careful not to allow hindsight reconstruction of references . . . without any explanation as to how or why [Gai’s dummy messages and IEEE 1999’s tear down messages] would be combined to produce the claimed invention.”).

Patent Owner also argued that Gai does not disclose sending data frames originating at the edge switch while having source addresses corresponding to other network entities to the access switches via the edge switch. POR at 20. The Reply responds by arguing “this argument ignores Gai’s disclosure.” Reply at 8. Not so. Patent Owner references Gai’s disclosures directly and argues that “Gai itself does not disclose sending data frames.” POR at 20. The Reply fails to identify any disclosure in the prior art teaching the “data frames” limitation of dependent claims 6 and 18. To the extent Petitioner is arguing that “dummy multicast messages [that] carry the source address of each entity” meet the “data frames” limitations of dependent claims 6 and 18, Petitioner fails to meet its burden of showing how and why this disclosure satisfies these limitations. To the extent Petitioner is arguing Gai can be modified by IEEE 1999 to meet the “data frames” limitation, Petitioner failed to meet its burden of showing there was a motivation to combine (*supra* section II) and failed to show how or why Gai’s dummy messages would be combined with IEEE 1999 to teach the “data frames” limitation. At bottom, Petitioner fails to meet its burden of showing the combination of Gai and IEEE 1999 meet dependent claims

6 and 18.

V. Gai in View of IEEE 1999 and Further in View of Jain Does Not Render Obvious Claims 4, 5, 16, and 17

Dependent claims 4, 5, 16, and 17 are valid based on Petitioner's failure to establish obviousness of the underlying independent claims from which they depend. Reply at 16. Moreover, Petitioner failed to show there was a motivation to combine, because, as Patent Owner argued, Gai already describes a solution to the problem Petitioner raised regarding why a POSA would be motivated to modify Gai in view of IEEE 1999 and further in view of Jain. POR at 17. Petitioner ignores this and instead uses impermissible hindsight to argue "the Petition argued that Jain's technique would have been obvious to use in the switch that sends Gai's dummy messages – as claims 4, 5, 16, and 17 require." Reply at 10 (emphasis added). See *Sensonic, Inc. v. Aerosonic Corp.*, 81 F.3d 1566, 1570 (Fed. Cir. 1996) ("The invention must be viewed not after the blueprint has been drawn by the inventor, but as it would have been perceived in the state of the art that existed at the time the invention was made."). Therefore, because Petitioner fails to meet its burden of establishing a motivation to combine, Petitioner fails to meet its burden of showing that the combination of Gai in view of IEEE 1999 and further in view of Jain render dependent claims 4, 5, 16, and 17 obvious.

VI. CONCLUSION

For the reasons stated in POR and above, Petitioner has failed to carry its burden to establish that any of the claims of the '986 Patent are invalid over the prior art. The claims should be upheld as patentable.

Date: July 10, 2025

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CERTIFICATION UNDER 37 C.F.R. § 42.24(d)

This Response complies with 37 C.F.R. § 42.24(b)(2). As calculated by the “Word Count” feature of Microsoft Word 2010, it contains 3,659 words, excluding the words contained in the following: Table of Contents, Table of Authorities, List of Exhibits, Certification Under 37 C.F.R. § 42.24(d), and Certificate of Service.

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies service of PATENT OWNER'S SUR-REPLY on the counsel of record for the Petitioner by filing this document through the P-TACTS platform on July 10, 2025 and served a true and correct copy of the foregoing by electronic mail on the following counsel:

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