

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

KIA CORP.,
TOYOTA MOTOR CORP.,

Petitioners,

v.

EMERGING AUTOMOTIVE, LLC,
Patent Owner.

Case IPR2024-00981
U.S. Patent No. 9,365,188

**PATENT OWNER EMERGING AUTOMOTIVE LLC'S
REQUEST FOR DIRECTOR REVIEW**

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EX2005	VentureBeat, <i>Toyota is testing a Smart Key Box that makes it easier to share your car with strangers</i> (Oct. 31, 2016)
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EX2031	Patent Owner's Hearing Demonstratives

Patent Owner Emerging Automotive LLC respectfully requests that the Director review and vacate the Final Written Decision, Paper 36 (the “FWD”), in this *inter partes* review proceeding. *See* 37 CFR § 42.75.

I. INTRODUCTION

In this proceeding, the Board based its decision on supposed functionality of a prior art reference that does not exist in that reference. The Board’s findings are not grounded in what the reference actually says but instead rely on what the Board found “may” occur or determined “it appears” could happen, including analyzing what is not precluded by the reference instead of what is taught or disclosed. The claims at issue here pertain to the issuance of electronic automotive keys and require that vehicle use conditions be included in a request to generate an electronic automobile key (“e-key”), and that those use restrictions be assigned to the e-key when it is generated. After Patent Owner affirmatively established that each of the use restrictions identified in the prior art specification (the Kleve reference) was set *after* the e-keys were issued, and therefore could not have been included in the request to generate or generation of the e-key, the Board found that “it appears” that one potential use restriction, not identified in the specification, “is inserted” at an unspecified time prior to the enumerated step in which the e-keys are created. But a cursory review of the speculative language that the Board used to describe what *might* happen (and when) makes it apparent that Kleve does not disclose or render obvious the challenged claims of U.S. Patent 9,365,188 (“the ’188 Patent”). Because the Board based its decision on

mistakes (*i.e.*, the incorrect assumption) of material facts and abused its discretion by hypothesizing about undisclosed functionality of the asserted art, Patent Owner respectfully requests that the Director intervene and vacate the FWD.

II. THE RECORD FOR REVIEW

The '188 Patent claims recite the use of cloud services to issue electronic automotive keys (e-keys) that include conditions of use that restrict use of a vehicle. The '188 Patent has three independent claims, which all include the equivalent of claim elements 1(a) and 1(b). EX1001, claims 1(a)-(b), 16(a)-(b), 19(a)-(b). Claim element 1(a), the first step of the claimed methods, requires a vehicle owner to request an e-key from a server that includes, “*with the request to the server for the e-key*, a condition of use of the vehicle set by the vehicle owner.” *Id.*, claims 1(a), 16(a), 19(a) (emphasis added). Thereafter, at method step 1(b), the server generates the e-key, which is “assigned *with [or associated with] the condition of use* of the vehicle.” *Id.*, claims 1(b), 16(b), 19(b) (emphases added). Then, use data for the vehicle is transmitted to and analyzed at a server to determine whether the vehicle is being operated in violation of a condition of use specified in element 1(a) and which was assigned with the e-key in element 1(b). *See, e.g., id.*, claim 1(c)-(g). As disclosed and claimed, this system can be used to issue multiple keys for the same vehicle with different use restrictions, allowing an owner to effectively monitor and control how multiple users, each of whom simultaneously possess a valid e-key for the same

vehicle, use that vehicle. *See, e.g.*, EX1001, Fig. 18, Fig. 29.

The Board found that Kleve discloses the aspects of element 1(a) and 1(b) at issue here. FWD, 28-36. Kleve discloses use of e-keys, but it is undisputed that there is no express disclosure of either (1) a request to generate an e-key that includes “a condition of use of the vehicle set by the vehicle owner” or (2) an e-key generated by a server, “the e-key being assigned [or associated with] the condition of use” as recited in claim elements 1(a) and 1(b). Accordingly, Petitioners rely on the opinion of their expert, Dr. Almeroth, who extrapolates from other disclosures in Kleve to opine that a request “may” include certain information, or what a POSITA would have understood. For example, Dr. Almeroth opines that “Kleve discloses that a vehicle owner *may* set conditions of use of the vehicle, which are part of the request for generating the virtual key” (EX1003, ¶118 (emphasis added)) or “[i]n my opinion, a POSITA would have understood that the rental agreement restrictions [which Dr. Almeroth opined are *always* agreed before the e-key was generated but admitted in deposition was not correct] are [] sent with the request in order that the generated virtual key can be associated with such restrictions, which allows the restrictions to be monitored and enforced.” EX1003, ¶¶119-20 (emphasis added); EX2030, Almeroth Depo. Tr., 26:8-27-28:1 (admitting “always” does not “encompass[] all embodiments” but only “in that embodiment”).

Kleve discloses use restrictions, such as “speed, global position coordinates, or

load weight restrictions,” that a vehicle owner can set at the beginning of a rental term, which is after e-keys have been generated. EX1004, ¶¶ [0040], [0043], [0051], [0075]. Patent Owner disputed that Kleve disclosed (or rendered obvious) either limitation 1(a) or 1(b) because, among other reasons, Kleve’s use restrictions cannot be “initially set” by the owner until the rental period actually begins (for example, at step 214 in Figure 2), which is after the e-keys have already been generated (at step 210). Paper 16, Patent Owner Response (“Response”), 13-17; *see also* EX1004, Fig. 2 (steps 210, 214), ¶ [0043]. Hence, the disclosed conditions of use could not have been included in the request to generate the e-key or assigned to the e-key when it was generated. *Id.*

In the FWD, the Board agreed with Patent Owner that Kleve discloses setting restrictions *after* the virtual key has been distributed:

We note Patent Owner’s citations to Kleve’s Figures 2 and 5 to indicate control restrictions are added after the distribution of a virtual key. PO Resp. 12–13. We agree with Patent Owner that the vehicle owner in Kleve can set user restrictions at the beginning of the rental term (as shown in step 214 of Figure 2), which is after the distribution of the virtual key (in step 210).

FWD, 29 (emphasis added). Yet, the Board was “unpersuaded” that a vehicle owner cannot “*set some restrictions*” prior to distribution of the keys so that the restrictions can be included in the request for e-keys and assigned to the e-keys when generated.

Id. (emphasis added).¹

But Patent Owner had demonstrated that every use restriction explicitly identified in Kleve is set at step 214 after the e-keys were already generated. Paper 16, Response, 8-21, 26-43. Petitioners abandoned any reliance on the use restrictions disclosed in Kleve on Reply. Paper 24, Petitioners' Reply ("Reply"). And ultimately the Board's decision in the FWD focuses *exclusively* on a purported use restriction, a so-called "rental start period" restriction, that does not appear in Kleve, the Petition, or the Almeroth declaration. The Board postulates this "rental start period" restriction "is included" before e-keys are generated, albeit without reference to any particular enumerated step:

Contrary to Patent Owner's position, it appears that a rental start period is included prior to step 210, whereas restrictions that can be monitored separately (such as vehicle weight, speed, or geographic area of use) are set at step 214. See Ex. 1004, Fig. 2; ¶¶ 40–41, 43.²

FWD, 30. But nowhere does Kleve suggest including a "rental start period" restriction

¹ Petitioner bears the burden of proof of demonstrating that a claim element is actually disclosed in the prior art (*In re Magnum Oil Tools Int'l, Ltd.*, 829 F.3d 1364 (Fed. Cir. 2016)), and thus, a Patent Owner's alleged failure to prove that an element is not there is not sufficient grounds to find disclosure.

² This is not the only sentence in which the Board speaks in speculative terms about when this purported restriction might be set. The Board also finds that: "[b]ased on Kleve's teaching of 'monitor[ing] the vehicle for the entire rental period' . . . Kleve's rental period restriction *may* be assigned prior to the start of the rental period in order to monitor usage for the entire period. See Ex. 1004 ¶¶ 38–39." *Id.*, 30 (emphasis added).

in association with the e-key, much less in an unidentified step before 210, when the e-keys are generated. EX1004, Paper 16, Response, 8-21; Paper 30, Patent Owner Sur-Reply (“Sur-Reply”), 4-17. Critically, because the “rental start period” restriction is the *only* purported restriction that the Board found “appears” to be “included” before step 210, the step when the e-keys are issued, the propriety of the Board’s FWD rises or falls entirely based on this purported restriction. FWD, 30. Because this restriction does not exist—and even if it did, there is no disclosure as to when or how it is set—the Board’s decision must be vacated as an abuse of discretion and because it is based on mistakes of material fact.

The Board separately abused its discretion, and based its decision on mistakes of material fact, when it made explicit findings that are contrary to Petitioners’ concessions and admissions. At oral argument, Petitioners admitted that “Kleve is not – it’s not a model of clarity on [whether the e-key generated by the server includes any condition of use, or not].” Paper 35, Hearing Tr., 63:13-18. In view of this concession, Petitioners affirmatively disavowed any reliance on a “condition of use” being a part of the e-key: “*That is not our position.*” *Id.*, 63:13-18 (emphases added). Instead, Petitioners argued that Kleve clearly discloses a “server check” for the start of the rental period, which they asserted is enough to meet the claims. *Id.*

But the Board just ignored Petitioners’ admissions and concessions. The Board found that Kleve “teaches the rental start period is part of the e-key” and that the

distribution of a virtual key includes a rental period, specifically “the start of the rental period.” FWD, 29-30. And the Board took this a step further. The Board relied on Petitioners’ abandoned position to credit Petitioners’ expert opinion that Kleve also meets element 1(a) because the request for the e-key must have included that condition of use in order for the e-key to include a condition of use. *Id.*, 31. This is sophistry and relies on erroneous material facts, as even Petitioners conceded at oral argument. The FWD should be vacated.

III. ARGUMENT

A. As to the alleged “condition of use,” Petitioners recognized the problem with Dr. Almeroth’s testimony and abandoned it, arguing instead about what Kleve “does not preclude.”

For alleged disclosure of “the request includes a condition of use of the vehicle as set by the user via the user account” of element 1(b), the Petition did not rely on what Kleve actually discloses or teaches, but instead on what its expert *said* “Kleve discloses.” Pet. 15-16 (“*Kleve discloses that a Vehicle Owner’s request may set conditions of use of the vehicle via the owner’s user profile. Ex. 1003, ¶¶118-123.*”), (“*Kleve discloses that the agreed conditions are sent with the request to generate a virtual key. Ex. 1003, ¶120.*”).

In response, Patent Owner systematically showed each of these expert assertions was wrong, and in fact, was refuted by the reference itself. Paper 16, Response, 26-56. Kleve does not disclose any “request [that] includes a condition of

use.” *Id.*, 1-60. Instead, Kleve’s system gives “the Owner continued control of the vehicle with the use of vehicle restriction limits initially set by the Owner at the beginning of the rental term,” not at any time prior. EX1004, ¶ [0043] (emphasis added); Paper 16, Response, 13-17.³ Of course, as a matter of common sense, the e-keys must be generated before the rental term begins. This is exactly what Kleve discloses, and thus, the keys are generated before owner restrictions are set. EX1004, Fig. 2 (step “210 - distribute virtual key,” step “212 – sent to vehicle, website, or nomadic device,” and step “214 – set user restrictions”); *id.*, ¶¶ [0043] (“allowing the Owner continued control of the vehicle with the use of vehicle restriction limits initially set by the Owner at the beginning of the rental term”), [0075] (“restrictions assigned by the vehicle owner at the start of the rental period”); *see also* Paper 16, Response, 4-21, 26-43. With regard to each of the restrictions identified in Kleve, Patent Owner demonstrated that they were all set *after* the e-keys are generated. Paper 16, Response, 12-20, 29-41.

In Reply, Petitioners still offered no disclosure from Kleve that any “request includes a condition of use” or that the generated e-key is assigned or associated with a condition of use; no longer relied on any expert testimony; and dropped each of the alleged “restrictions” that in Kleve could only be “initially set by the Owner at the

³ The Board’s FWD confirms that this is correct. FWD, 30 (“restrictions that can be monitored separately (such as vehicle weight, speed, or geographic area of use) are set at step 214 [after the e-keys are issued]. See Ex. 1004, Fig. 2; ¶¶ 40–41, 43.”).

beginning of the rental term.” EX1004, ¶ [0043]; Paper 24, Reply. Far from pointing to any disclosure, Petitioners argued instead that Kleve’s “teachings, however, ***do not preclude setting at least the rental period*** in advance to ensure the virtual key is only operable during the rental period.” Paper 24, Reply, 1-2 (emphases added). Of course, what Kleve “does not preclude” does not satisfy Petitioners’ burden under 35 U.S.C. § 316(e). Moreover, neither Petitioners nor the Board ever explained why Kleve’s server would need to re-receive in a “request” the very “rental period” it already knows. Paper 30, Sur-Reply, 1-13.

B. Kleve does not disclose a request to generate an e-key that includes a “rental start period” restriction “set by the owner via the owner’s account” or generating the key with a “rental start date” restriction.

Neither the Petition nor the Almeroth declaration include the phrase “rental start period” or otherwise discuss setting the start of the rental period with regard to Kleve.⁴ While both mention “rental period,” the only parameter that the Petition or the Almeroth declaration contend is either monitored, or potentially set, is the rental period end date, because Kleve only discloses how rental ***expiration*** is addressed. *See, e.g.*, Paper 1, Petition, 15-16, 18 (“rental period”), 19 (“end of time restriction,” “end of the rental period”); 21 (“rental period is soon to expire”), 22 (“rental period expired”); EX1003, ¶¶ 99, 118, 120, 124, 128, 130, 138.

⁴ In contrast, with regard to Mottla, Petitioners discuss Mottla’s “alerts ... about reservation start and end times.” Paper 1, Petition, 62; EX1003, ¶ 38.

It is not surprising that Petitioners did not rely on the “rental start period” because it is not discussed or disclosed in Kleve. Yet, the sole alleged “condition of use” that the Board contends meets element 1(a) and 1(b) is “rental start period.” FWD, 29-30 (Board was “unpersuaded” that a vehicle owner cannot “*set some restrictions*”: “[c]ontrary to Patent Owner’s position, it appears that a rental start period is included prior to step 210, whereas restrictions that can be monitored separately (such as vehicle weight, speed, or geographic area of use) are set at step 214. See Ex. 1004, Fig. 2; ¶¶ 40–41, 43”). But critically, the Board never contends that the “rental period start restriction” is set by the owner via the owner’s account. EX1001, claims 1(a), 16(a), 19(a). On this basis alone, the FWD must be vacated.

This is not an inadvertent omission. The Temporary User initiates the rental event, which is when the rental starts. For example, with regard to Figure 7, Kleve provides that “[o]nce the Temporary User initiates the rental event, the system *detects a rental time start at step 706*.” EX1004, ¶ [0075]; Paper 30, Sur-Reply, 17-20. Similarly, in explaining Figure 6, Kleve again describes the start of the rental period as an event occurring after the keys are issued, without the need for any monitoring, and without reference to any alleged “rental start period” in an e-key—because none exists:

At step 604, the vehicle Owner may then generate a virtual key based on a password generated by the vehicle Owner that may include a matrix barcode or a code word that the Temporary User may enter/send to the vehicle when ready to

begin the rental term.

EX1004, ¶ [0069]; Paper 30, Sur-Reply, 15-16. Likewise, with regard to Figure 5, once the Temporary User has been confirmed via the user's "matched" credentials, the rental period has "commenced" and the owner is notified. EX1004, Fig. 5, ¶ [0066]; Paper 16, Response, 8-12; Paper 30, Sur-Reply, 20-22. Put simply, the start of the rental period is something that just happens at some point after the keys are issued. *Id.* It is not set by the owner as required in 1(a). It is not a "restriction" included within the e-key, and need not be monitored. Instead, the opposite is true: rental commencement is the triggering event for subsequent monitoring for compliance with actual use restrictions set by the owner. EX1004, ¶¶ 40-43, Fig. 2, step 214.

C. The Board's reasoning as to why a "start of rental period" restriction *might* exist or *is not precluded* is flawed.

The Board's sole justification for its finding "it appears" that a "rental start date" restriction is apparently set in Kleve before the e-key is requested rests on two related statements indicating that Kleve monitors conditions during the "entire" or a "given" rental period. FWD, 29-30; EX1004, ¶¶ [0039], [0054]. But as explained above, there is no need to include or assign the start of the rental period to monitor usage for the entire period. Paper 16, Response, 8-21; Paper 30, Sur-Reply, 9-10. Instead, monitoring use starts after the rental starts, which Kleve discloses happens either when the keys are issued or later in time—definitely not before. *E.g.*, EX1004, Fig. 7, ¶ [0075] (vehicle detects start time when Temporary User initiates rental event); Paper

16, Response, 8-21; Paper 30, Sur-Reply, 9-20, 22-23. Thus, in at least the cases cited by the Board, rental start period cannot be included in the keys. *Id.* And critically, there is no use at all before the rental starts, so there is nothing to monitor.

Indeed, the Board’s analysis of these claim elements is more akin to creative writing than a reasoned conclusion based on actual disclosures, as evidenced by the following Board justification regarding the alleged “rental state period” restriction:

We do not agree with Patent Owner’s position that Kleve fails to teach a way for the parties’ agreed-upon conditions to be included in the set up or distribution of an e-key. See PO Resp. 8. . . . Although Kleve’s system allows the Temporary User to purchase additional rental time and the system may update the new rental period end time restriction, such allowances does not negate the fact that Kleve teaches the rental start period is part of the e-key and allows a Temporary User to access the rental vehicle and remotely start the vehicle. See *id.* ¶¶ 39, 43.

FWD, 30 (emphasis added). Neither of paragraphs 39 or 43 mentions a “rental start period” nor suggests any impact on allowing access to the rental vehicle. EX1004, ¶¶ [0039], [0043]. And Kleve doesn’t disclose “remotely start[ing] the vehicle” either. EX1004.

Finally, and fatally, the Board affirmatively concluded that the “rental start period” is included in and distributed with the e-key, to enable “the keyless drive system ... during the *given rental period*” and “to monitor usage for *the entire period*.” FWD, 30 (emphasis added). But at oral argument, Petitioners admitted that Kleve does not actually disclose inclusion of any “condition of use,” including rental

start period, *in the e-key*. Paper 35, Hearing Tr., 63:13-18. Indeed, Petitioners disavowed any reliance on their prior contention that the e-keys include a “condition of use.” *Id.*

Instead, Petitioners pointed to Kleve’s “clear” disclosure of a server check to determine if an e-key is within the start of the server period: “there is [clearly] a server check to see if that rental period, if that key is within that rental period.” Paper 35, Tr., 63:13-18. Given that Kleve discloses using this server check to confirm whether a key meets the Board’s “rental start period” restriction, there is no need for the key to contain the “rental start period” restriction to monitor during the entire period or during a given period, and the Board’s circular argument collapses under its own faulty logic. Indeed, the disclosure of a “server check” proves there was no reason for any owner’s “request” to include a rental period. Paper 30, Sur-Reply, 1-13.

IV. THE BOARD’S ABUSE OF DISCRETION AND ERRONEOUS FINDINGS OF FACT WARRANT VACATING THE FWD.

Requests for Director Review can be made with regard to “decisions presenting (a) an abuse of discretion, ... [or] (c) erroneous findings of material fact.”⁵ In this case, the Board’s FWD presents both. *See, e.g., Sierra Wireless, ULC, et. al. v. Sisvel S.P.A.*, 130 F.4th 1019, 1022-1024 (Fed. Cir. 2025) (vacating Board’s Final Written Decision and remanding, concluding that the Board’s fact finding was not supported by

⁵ See <https://www.uspto.gov/patents/ptab/decisions/director-review-process#DRP>.

substantial evidence because the Board ignored Petitioner’s concessions about what was and was not disclosed); *Koninklijke Philips N.V. v. Quectel Wireless Sols. Co. Ltd.*, No. 2023-1896, 2024 WL 3983189, at *2-4 (Fed. Cir. 2024) (vacating Board’s Decision and remanding because the Board’s analysis was “too conclusory” and failed to adequately address arguments raised); *Provisur Techs., Inc. v. Weber, Inc.*, 50 F.4th 117, 123-24 (Fed. Cir. 2022) (vacating Board’s Final Written Decision and remanding, finding Board failed to adequately address how asserted art teaches or suggests specific limitations). While it is more common for the Director to reverse and remand than to reverse and vacate, here the Board was transparent about its methodology and there is only one possible result if its conclusions are rejected. Because the only alleged condition of use that the Board found meets the claim elements, “rental start period” restriction, does not exist, Petitioners cannot meet its burden on remand. The FWD should be reversed and vacated.

V. CONCLUSION

For all the reasons detailed above, the FWD should be vacated.

Dated: January 8, 2026

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FEE PAYMENT AUTHORIZATION

Please charge all fees required for this submission, including any additional fees that may be incurred, to Deposit Account No. 606715. The undersigned authorizes the United States Patent and Trademark Office to debit the specified deposit account for the amounts due in connection with this filing.

/Brenda Entzminger/

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CERTIFICATE OF SERVICE

Petitioners have consented to e-mail service in this proceeding. Pursuant to 37 C.F.R. §42.6, the undersigned certifies that on January 8, 2026, a copy of the foregoing document was served by email upon the following counsel at the below email addresses:

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