

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

HOME DEPOT U.S.A., INC.,
Petitioner,

v.

H2 INTELLECT LLC,
Patent Owner

Case No. IPR2025-00480
Patent No. 8,433,296

**PETITIONER'S REQUEST FOR DIRECTOR REVIEW
PURSUANT TO 37 C.F.R. § 42.75**

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1004	U.S. Patent App. Pub. No. 2006/0149630 (“ Elliott ”).
1005	U.S. Patent App. Pub. No. 2002/0161633 (“ Jacob ”).
1006	File History of U.S. Pat. No. 11,948,171.
1007	U.S. Patent No. 6,108,650 (“ Musk ”).
1008	<i>H2 Intellect LLC v. The Home Depot, Inc., et al.</i> , Infringement Contentions, November 1, 2024.
1009	Macromedia Dreamweaver UltraDev Support Center - Defining Dynamic Content, https://web.archive.org/web/20060715033222/https://www.adobe.com/support/ultradev/content/url_parameters/url_parameters04.html (Jul. 15, 2006).
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1013	Apple launches official iPhone, iPod touch Web apps directory. https://appleinsider.com/articles/07/10/11/apple_launches_official_iphone_ipod_touch_web_apps_directory (Oct. 11, 2007).
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1017	Geofencing, Techopedia, https://www.techopedia.com/definition/14937/geofencing (last visited February 10, 2025).
1018	Jonathan P. Munson & Vineet K. Gupta, Location-Based Notification as a General-Purpose Service, Proceedings of the 2nd International Workshop on Mobile Commerce 40 (2002).

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1019	What We Do, Locating What's Important To You, Cell-Loc, http://web.archive.org/web/20030411221815/http://cellloc.com/what_locating.html (last visited February 10, 2025).
1020	Alan Cohen, "Location, Location, Location," PC Mag., available at https://books.google.com/books?id=eIvagv988JgC&pg=PA82#v=onepage&q&f=false (last visited February 10, 2025).
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Home Depot U.S.A. Inc. (“Petitioner”) requests Director Review of the decision denying institution of *inter partes* review (“IPR”) of claims 1-15 of U.S. Patent No. 8,433,296 B2 (the “’296 patent”). See Paper 15 (“Decision”).

I. INTRODUCTION

With all due respect to the members of the panel, the Board lost its way when denying institution here. The Board’s denial turned on three simple, non-technical limitations which even laymen would recognize as being disclosed or at least obvious over the prior art relied on in the Petition.

For example, the first limitation that the Board found was not disclosed in or obvious over the Petition’s prior art requires a content delivery platform which receives a request from a sponsor for advertising services to provide a “response” to that request. The context of this transaction makes clear that there will be a response to that request. This is a commercial transaction in which a first entity (the sponsor) places an order for the second entity (a content delivery platform) to provide a service (advertising) for which the first entity will be required to pay. In a commercial transaction like this, even a layperson understands that the second entity will respond to the request. Indeed, the second entity must provide a response in the form of an acceptance in order to form a contract that requires the second entity to pay for the requested service. The Board is neither required nor

expected to check its knowledge of such common transactions at the door when performing its analysis.

The Petition identified two different communications in the prior art for the claimed response. The Board rejected the first communication on the basis that it was a “sales-type communication” that was “just as likely to occur” before the request than after it. This analysis ignores (i) the context of this commercial transaction that indicates a response to the request is expected as discussed above, and (ii) that “sales-type” information provided prior to an offer is often repeated in a response to that offer for the purpose of confirmation. Likewise, the analysis ignores that a communication “just as likely” sent before a request is also “just as likely” sent in response to the request, and that a POSITA would have found it obvious to do so in view of the context of this commercial transaction.

The Board also rejected a second communication in which the content delivery platform transmits what amounts to an invoice to the sponsor, which is also a response to a sponsor’s request for services. In finding otherwise, the Board either applied an incorrect and unarticulated claim construction requiring a direct response or failed to recognize that an invoice is a response to a request even if an intervening acceptance has occurred.

As explained below, the other two determinations reached by the Board in denying the Petition are similarly erroneous. All three of these determinations are the kind of mistakes the Director should correct by vacating the Board’s decision.

II. LEGAL STANDARD

“Director Review may be requested in a proceeding under part 42 of 37 C.F.R. where the Board’s decision on institution under 35 U.S.C. §§ 135, 314, or 324 . . . implicates potential (a) abuse of discretion, (b) important issues of law or policy, (c) erroneous findings of material fact, or (d) erroneous conclusions of law.” USPTO, *Director Review Process* § 5.A; see also *id.* § 2.B (last modified March 18, 2025), <https://www.uspto.gov/patents/ptab/decisions/director-review-process>. “An abuse of discretion is found if the decision: (1) is clearly unreasonable, arbitrary, or fanciful; (2) is based on an erroneous conclusion of law; (3) rests on clearly erroneous fact finding; or (4) involves a record that contains no evidence on which the Board could rationally base its discretion.” *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1367 (Fed. Cir. 2016) (quoting *Bilstad v. Wakalopulos*, 386 F.3d 1116, 1121 (Fed. Cir. 2004)).

III. BACKGROUND

Petitioner filed its Petition requesting an IPR of claims 1-15 of the ’296 patent. Paper 1 (“Pet.”); EX1001. The Board issued its Decision on October 20, 2025.

“The purpose of the ’296 invention is to provide content to a mobile device based on location.” Decision at 3 (citing EX1001, Abstract). For its first ground, the Petition relied upon obviousness in view of Elliot and Jacob. Pet. at 1. Elliott generally relates to systems and methods for delivering advertisements to mobile devices. Decision at 9 (citing EX1004, ¶3, ¶9). Jacob “discloses an advertising system based on a user’s location, such that advertisements delivered to a device away from its home area are different from those delivered when the device is at home.” Decision at 11 (citing EX1005, Abstract, ¶4).

IV. LIMITATION [1.E] “PROVIDING THE SPONSOR A RESPONSE TO THE REQUEST”

The Board erred by failing to consider that the Elliot-Jacob combination discloses *or* renders obvious this limitation. Pet. at 30. Jacob describes the service provider “provid[ing] some assurance to prospective advertisers that their advertisements will be delivered to preferred recipients.” EX1005, ¶26. The Petition made the common-sense assertion that it would have been obvious for a POSITA to modify Elliot to notify advertisers that its requested location-based advertisements would run. That is, after the sponsor requested “to obtain an interest” in a selected area (e.g., Jane’s Pancake House reserves City B for holiday themed advertisements), Jacob suggests that the service provider would provide a response to that request, i.e., “provide some assurance . . . that their advertisements will be delivered to preferred recipients” (in City B). Pet. at 30-31 (quoting

EX1005, ¶26); EX1002, ¶125 (expert witness stating the same). This is a straightforward argument: of course there is going to be a response to a request in a commercial transaction like this.

Though the Board rejected Petitioner’s arguments because “Petitioner’s arguments do not show that the Elliot/Jacob combination *discloses* limitation [1.e]” (Decision at 16 (emphasis added)), the Board’s reasoning was wrong as a matter of law. The Board stated that the “assurance” sent by Jacob’s service provider “describes a sales-type communication from the advertising intermediary to the advertiser, which would be just as likely to occur *before* the advertiser requests to obtain an interest in a selected one of a plurality of geographic areas.” Decision at 15.

But the Board failed to consider whether Jacob *suggested* to a POSITA to add a communication assuring advertisers “that their advertisements will be delivered to preferred recipients” *after* they reserved a location.¹ In fact, the Board conceded that the assurance-communication is “just as likely to occur” after the advertisers request an interest as before. Decision at 15. And it is well-settled that where “a person of ordinary skill would have two predictable choices for when [a]

¹ This is not impermissible gap-filling by the expert because Jacob literally discloses a communication.

system would transmit [particular] information,” *both choices* are obvious for the § 103 analysis. *CRFD Rsch., Inc. v. Matal*, 876 F.3d 1330, 1347 (Fed. Cir. 2017); *Uber Techs., Inc. v. X One, Inc.*, 957 F.3d 1334, 1340 (Fed. Cir. 2020) (“[W]here an ordinary artisan would be left with two design choices each of these two design choices is an obvious combination.” (cleaned up) (quoting *ACCO Brands Corp. v. Fellowes, Inc.*, 813 F.3d 1361, 1367 (Fed. Cir. 2016))); *see also In re Applied Materials, Inc.*, 692 F.3d 1289, 1298 (Fed. Cir. 2012) (“A reference must be considered for everything that it teaches, not simply the described invention or a preferred embodiment.”). By failing to consider Petitioner’s obviousness argument and limiting its analysis to what the combination “discloses” and ignoring the context of this transaction, the Board committed reversible legal error. *CRFD Rsch.*, 876 F.3d at 1348-49 (reversing board decision for “failure to perform a proper obviousness analysis” in ignoring what a reference suggested).²

The Board also erred by failing to appreciate Elliot’s inherent disclosure of a response. The Petition argued that Elliot’s advertising intermediary tracks a “response rate” and uses it to “adjust the amount charged to a particular

² Though the Board states “the proposed combination does not teach or suggest elements [1.a] and [1.e]” (Decision at 13, 16, 19), its actual analysis falls short and only discusses explicit disclosure and elides “suggestion” entirely.

advertiser.” Pet. at 29-30 (quoting EX1004, ¶24). That means the intermediary sends the advertiser an invoice for the request. That invoice must be sent after (and in response to) the request, because “without the reservation request, there would be no advertisement for tracking the response rate.” Pet. at 30.

The Board rejected Petitioner’s argument because “even if there were ‘a message communicating the response rate’ . . . it would be a separate, later communication for the purpose of charging the advertiser.” Decision at 15. The Board also relied on Figure 3 of Elliot which “appear[s] to indicate” that “the advertising intermediary does *not* respond to the advertiser’s communication sending ‘advertis[ing] and targeting data.’” Decision at 15 (quoting EX1004, Fig. 3, ¶¶27-28).

But that decision ignores the undisputed construction. Petitioner construed “response” broadly, and Patent Owner adopted Petitioner’s construction. See Decision at 7; Paper 8 at 12. In particular, Petitioner proposed that the “response” can be “indirect,” as long as it comes “after the request.” Pet. at 7. The invoice is a “response” to an advertiser’s request to target a geographic location even if it is an indirect one that follows an earlier direct response. By analogy, when a customer dines at a restaurant, they request a meal by placing an order with the server. After the meal is served and consumed, the restaurant provides a bill (invoice) to the customer. The bill may not be a direct “response” to the initial order in the sense of

confirming the order, but it is indisputably an indirect response to the customer's request for service. The act of sending the bill is a necessary step that acknowledges and responds to the customer's use of the restaurant's services (initiated by the diner's "request"). Likewise, the advertising intermediary "responds" to the request by the advertiser to use intermediary's services by following up with an invoice once it renders its services; thus, the invoice is a "response" to the request to advertise in a particular location, even if it is an indirect response.

The Board relied on Figure 3 from Elliot as evidence that Elliot does not disclose a response to the sponsor's request. Yet, Figure 3 is a non-limiting example embodiment of "an interaction"—it does not define every interaction between the advertiser and the advertising intermediary (as evidenced by the fact that it does not include the response rate communication or invoice). *See Applied Materials*, 692 F.3d at 1298 ("A reference must be considered for everything that it teaches, not simply the described invention or a preferred embodiment."). And, critically, the Petition does not rely on Figure 3 to show the claimed response. *See* Pet. at 29-31.

The Board committed a reversible error of fact and law by failing to recognize that Elliot discloses and renders obvious a "response" to the sponsor. *See Arista Networks, Inc. v. Orckit Corp.*, IPR2024-01238, Paper 10 at 2 (Acting

Director June 12, 2025) (granting director review to determine whether the board improperly construed a term and “whether the Board properly considered Petitioner’s argument that [a prior art reference] teaches this limitation”); *Cisco Sys., Inc. v. Portsmouth Network Corp.*, IPR2024-00954, Paper 9 at 2 (Acting Director Mar. 13, 2025) (similar).

V. LIMITATION [1.A] “REGISTERING A PLURALITY OF APPLICATION PROGRAMS”

The Board erred by failing to consider that Elliot “renders obvious” this limitation. Pet. at 15. The Board purports to have adopted Petitioner’s construction of registering, which is “something akin to ‘enrolling,’ *i.e.*, recording identifying information for the application that facilitates providing content to and/or tracking the usage of the application.” Decision at 16 (quoting Pet. at 7).

Elliot describes a system that delivers content to applications on a mobile device. EX1004, ¶18 (“Advertising content is typically provided over the network 108 after the application is installed on the mobile device”). Elliot further describes that the “application distributor” (*i.e.*, the system that distributes “both applications and advertisements over a network”) provides “a portion of its advertising revenue” to the “application provider” (*i.e.*, the app’s developer). EX1004, ¶13, ¶18. The Petition argued that a POSITA would find it obvious to register the application with the content-delivery system to facilitate revenue sharing. Pet. at 16-17 (“Elliot discloses or renders obvious registering a plurality of application

programs”; “Elliott disclos[ing] that the application provider receives revenue from sponsors . . . indicates [to a POSITA] that the mobile application was registered or enrolled”; “a POSITA would have understood that Elliott’s disclosure of the application distributor 102 receiving the mobile applications from application providers 112 indicates registering the mobile applications” (underline emphases added)); *see also id.* at 18 (“[A] POSITA would have understood to include and *render obvious* registering the application with the application distributor 102” (emphasis added)). As a simple matter of logic and common sense, the application distributor 102 would keep some information about the applications it is distributing—even if it is as simple as the file names of those applications—in order to facilitate distributing them and sharing revenue. Petitioner’s construction adopted by the Board requires nothing more. Indeed, it is hard to imagine how applications would be distributed or revenue shared without such basic information.

The Board rejected Petitioner’s arguments because Elliot’s content provider “does not *necessarily* need to keep a registry of the applications supplied to calculate the advertising revenue due to the provider,” so “the fact that Elliott discloses revenue sharing does not mean that it *inherently discloses* ‘registering a plurality of application programs.’” Decision at 18 (second emphasis added); *see*

also id. (agreeing with Patent Owner “that registration is not *necessary* for revenue distribution” (emphasis added)).

But the Board failed to consider whether Elliot’s revenue sharing *indicated* or *suggested* registering (i.e., recording some identifying information about) the applications with the content delivery system. The Petition never argued that Elliot’s system *must* register applications to provide revenue, *contra* Decision at 17-18, but only that such a course of action would be obvious to a POSITA. A common sense way to enable the provision of revenue to application developers is to “record” the application’s “identifying information” within the system. See *PlaSmart, Inc. v. Kappos*, 482 Fed. App’x 568, 574 (Fed. Cir. 2012) (reversing board decision for “rel[ying] only on minor distinctions between the prior art and the claimed invention” and ignoring the petitioner’s argument that the claimed element “would have been a common sense alternative design choice and reasonably obvious to one of ordinary skill in designing” a similar system).

By failing to consider Petitioner’s obviousness argument and limiting its analysis to what Elliot “*necessarily*” and “*inherently* discloses,” the Board committed legal error. *CRFD Rsch.*, 876 F.3d at 1348-49.

More fundamentally, the Board did not apply Petitioner’s construction. The Board opined “[a]s long as an application distributor knows who an application provider is and how many times it has distributed one of that provider’s

applications, it does not *necessarily* need to keep a registry of the applications supplied to calculate the advertising revenue due to the provider.” Decision at 18. This logic is faulty because a distributor cannot “know how many times it has distributed one of that provider’s applications” without “recording identifying information for the application that facilitates providing content to and/or tracking the usage of the application,” which constitutes registering under Petitioner’s construction that the Board purported to adopt.

VI. LIMITATION [1.A] “THE PLURALITY OF REGISTERED APPLICATION PROGRAMS ARE EACH ASSOCIATED WITH AT LEAST ONE APPLICATION PROGRAM TYPE”

The Board erred by failing to consider that Elliot, alone or combined with general knowledge of a POSITA and Patent Owner’s infringement contentions, would render this limitation obvious and that Elliot itself discloses this limitation. Pet. at 18-20.

Elliot teaches that different “types of mobile applications exist, including games, shopping applications, social networking applications, mapping applications, etc.” EX1004, ¶18. Thus, every application within the Elliot system belongs, by definition, to a particular type—application A is either a “shopping application,” “social networking application,” or “mapping application,” etc., and so are applications B, C, and D, and so on. These are all different types of applications. Elliot also describes targeting a specific application program type, “a

video game,” for advertising, further indicating that Elliot recognizes that each application belongs to a particular type (or that a POSITA would find it obvious to modify Elliot so). Pet. at 18 (quoting EX1004, ¶14).

If Elliot left any doubt, the Petition also relied on what was “well-known” to a POSITA—an advertisement delivery system in the prior art (Levkovitz) explicitly described “a first ad server 150 may serve content items directed for presentation *using a first type of applications* 176 (e.g., games), whereas a second ad server 150 may serve content items directed for presentation using *a second type of applications* 176 (e.g., utility applications).” Pet. at 19 (emphasis added) (quoting EX1011, ¶99); EX1002, ¶110. The Petition also relied on Patent Owner’s infringement contentions which construed “application program types” as applications executing on a consumer mobile device and Home Depot’s hdPhone. Pet. at 19 (citing EX1015 at 6-10). The Petition argued that each application, by virtue of its compatibility with one device or another, would automatically be associated with an application type. Pet. at 19-20; EX1002, ¶¶111-12. Thus, if Elliot alone did not disclose associating each application with an application program type, a POSITA would have found it obvious to combine it with “well-known” prior art systems that did so or recognize that each application is inherently associated with a particular mobile device/application program type.

The Board (along with Patent Owner) only addressed the argument that Elliot disclosed this limitation and ignored Petitioner’s arguments regarding combination with “well-known” elements in the prior art and Patent Owner’s infringement contentions. The Board determined only that “Elliot does not disclose” that each application is associate with a program type because Elliot’s “broad statements are not a disclosure that *each* of the plurality of registered applications in Elliott is ‘associated with at least one application program type,’ as claim 1 requires.” Decision at 18-19; *see also* Paper 8 at 18.

The Board’s Decision is error for at least two reasons. *First*, by recognizing that different application types exist and targeting advertisements to particular types (e.g., “a video game”), Elliot *does* disclose that each application is associated with an application type. As discussed, every application in Elliot’s system is inherently classified by or associated with a particular application type (i.e., it is either a map, a game, a news app, or a sports app, etc.) The limitation does not require anything more (e.g., it does not demand that the content delivery system explicitly label each application as belonging to this type or the other).

Second, the Board disregarded Petitioner’s remaining obviousness arguments. It is well-settled that “the background knowledge, creativity, and common sense of the person of ordinary skill” can all be used as the “source of reasons to combine or modify prior art references to achieve the patented

invention.” *Plantronics, Inc. v. Aliph, Inc.*, 724 F.3d 1343, 1354 (Fed. Cir. 2013).

The Board failed to consider that it would have been obvious to combine Elliot with “well-known” techniques in the prior art. As embodied by Levkovitz, content-delivery systems had long targeted advertisements at particular “type[s] of applications” such as “games” and “utility applications.” Pet. at 19 (quoting EX1011, ¶99).

It is also indisputable that a claim cannot be twisted “like ‘a nose of wax,’ in one way to avoid [invalidity] and another to find infringement.” *Data Engine Techs. LLC v. Google LLC*, 10 F.4th 1375, 1381 (Fed. Cir. 2021) (alteration in original) (quotations omitted) (quoting *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1351 (Fed. Cir. 2001)). The Board committed reversible error by failing to consider Patent Owner’s infringement contentions and Petitioner’s argument—that directly stems from Patent Owner’s contentions—that *each* application is inherently associated with a particular mobile device/application program type.

By misconstruing Elliot’s disclosures and failing to consider Petitioner’s remaining obviousness arguments, the Board committed reversible errors of fact and law.

VII. CONCLUSION

Petitioner requests that the Director reverse the denial of institution.

Date: November 18, 2025

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CERTIFICATE OF COMPLIANCE

Petitioner certifies that this brief includes 15 pages, as measured by Microsoft Word, exclusive of the table of contents, the table of authorities, the certificate of service, the certificate of word count, and the index of exhibits.

This Request for Director Review complies with the general format requirements of 37 C.F.R. § 42.24(a) and has been prepared using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

The undersigned certifies pursuant to 37 C.F.R. §§ 42.6(e) that on November 18, 2025 a true and correct copy of this brief and any new exhibits was served by emailing a copy of same to the following:

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