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Paper 10
Entered: July 26, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FACEBOOK, INC. and INSTAGRAM LLC,
Petitioner,

v.

SKKY, LLC,
Patent Owner.

Case IPR2017-00685
Patent 9,203,870 B2

Before KARL D. EASTHOM, WILLIAM V. SAINDON, and CHRISTOPHER PAULRAJ, *Administrative Patent Judges*.

SAINDON, *Administrative Patent Judge*.

DECISION
Granting Institution of *Inter Partes* Review
37 C.F.R. § 42.108

I. INTRODUCTION

Petitioner requests an *inter partes* review of claims 8 and 10–14 of U.S. Patent No. 9,203,870 B2 (Ex. 1001, "the '870 patent"). Paper 2 ("Petition" or "Pet."). Patent Owner filed a Preliminary Response to the Petition. Paper 8 ("Prelim. Resp.").

This Decision is made under 35 U.S.C. § 314, which provides that an *inter partes* review may not be instituted "unless . . . there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition." Upon consideration of the Petition and Patent Owner's Preliminary Response, we institute an *inter partes* review on all challenged claims of the '870 patent.

Our factual findings and conclusions at this stage of the proceeding, including claim constructions, are preliminary and are based on the evidentiary record developed thus far. This is not a final decision as to the patentability of claims for which *inter partes* review is instituted. Our final decision will be based on the record as fully developed during trial.

A. Related Matters

The parties indicate that the '870 patent is at issue in the following district court case: *Skky, LLC v. Facebook, Inc.*, No. 16-cv-00094 (D. Minn., filed Jan. 15, 2016). Pet. 1; Paper 4, 2. The parties also indicate that the several PTAB proceedings, including *inter partes* reviews and covered business method reviews, relate to this case. *See* Pet. 1; Paper 4, 2–3. Additionally, in *Skky, Inc. v. MindGeek, s.a.r.l.*, 859 F.3d 1014 (Fed. Cir. 2017), the Federal Circuit affirmed the Board's final written decision in

IPR2014-01236 determining that certain claims of U.S. Patent 7,548,875, to which the '870 patent claims priority, were unpatentable as obvious.

B. The '870 Patent

The '870 patent describes delivering audio and/or visual files to an electronic device. Ex. 1001, Abstract, 1:19–21. Specifically, the '870 patent discloses delivering the audio or visual files, such as songs or films, from one or more servers to the electronic device. *Id.* at 1:63–2:2. The system employs an orthogonal frequency-division multiplex ("OFDM") modulation technique for data transmission. *Id.* at 16:57–17:39.

C. Challenged Claims

Petitioner challenges claims 8 and 10–14, of which claim 8 is independent. Claim 8 is reproduced below.

> 8. A method for distributing electronic content over a cellular network to a user operating a cellular phone, the method being executable by a computer system that includes server hardware and a database, the method comprising:
> providing for the transmission to the cellular phone by orthogonal frequency-division multiplex (OFDM) modulation of a database of electronically accessible data files, each data file being subject to a copyright owner;
> receiving, by the computer system, a selection from the cellular phone corresponding to at least one of the data files;
> providing for the transmission of, by the computer system and in response to the received selection, a portion of the selected data file to the cellular phone electronic device;
> receiving, by the computer system, a request for the data file for which the portion was provided to the cellular phone electronic device; and
> providing for the transmitting, by the computer system, of the requested data file to the cellular phone, said cellular phone including a digital signal processor configured to receive the

data file over a cellular network by orthogonal frequency-division multiplex (OFDM) modulation.

D. Prior Art and Asserted Grounds

Petitioner asserts that claims 8 and 10–14 of the '870 patent are unpatentable under 35 U.S.C. § 103 on the following grounds:

References	**Claims Challenged**
Rolf,[1] Fritsch,[2] and Gatherer,[3] Frodigh,[4] and Hacker[5]	8 and 12–14
Rolf, Fritsch, Gatherer, Frodigh, Hacker, and Bell[6]	10 and 11
Rolf, Fritsch, Gatherer, Hacker, O'Hara,[7] Tagg,[8] and Pinard[9]	8 and 12–14
Rolf, Fritsch, Gatherer, Hacker, Bell, O'Hara, Tagg, and Pinard	10 and 11

[1] U.S. Patent No. 7,065,342, issued June 20, 2006 (Ex. 1003).

[2] U.S. Patent No. 6,233,682, issued May 15, 2001 (Ex. 1004).

[3] Alan Gatherer et al., *DSP-Based Architectures for Mobile Communications: Past, Present and Future*, 38:1 IEEE Communications Magazine 84–90 (2000) (Ex. 1005).

[4] U.S. Patent No. 5,726,978, issued Mar. 10, 1998 (Ex. 1006).

[5] Scot Hacker, *MP3 The Definitive Guide* (O'Reilly & Assoc., pub., 2000) (Ex. 1062).

[6] U.S. Pat. App. Pub. No. 2002/0065826, published May 30, 2002 (Ex. 1068).

[7] Bob O'Hara and Al Petrick, *IEEE 802.11 Handbook, A Designer's Companion* (1999) (Ex. 1061).

[8] U.S. Patent No. 8,996,698 B1, filed Nov. 3, 2000, issued Mar. 31, 2015 (Ex. 1060).

[9] U.S. Patent No. 5,815,811, issued Sept. 29, 1998 (Ex. 1025).

Petitioner also relies on the declaration of Tal Lavian, who holds a Ph.D. in computer science, specializing in networking and communications (Ex. 1002 ¶ 1).

II. ANALYSIS

A. Claim Construction

We interpret the claims of an unexpired patent using the broadest reasonable interpretation in light of the specification of the patent. 37 C.F.R. § 42.100(b). Under that standard, a claim term generally is given its ordinary and customary meaning, as would be understood by one of ordinary skill in the art in the context of the entire disclosure. *See In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007). Although our claim interpretation cannot be divorced from the specification, *see Microsoft Corp. v. Proxyconn, Inc.*, 789 F.3d 1292, 1298 (Fed. Cir. 2015) (quoting *In re NTP, Inc.*, 654 F.3d 1279, 1288 (Fed. Cir. 2011)), we must be careful not to import limitations from the specification that are not part of the claim language, *see SuperGuide Corp. v. DirecTV Enterprises, Inc.*, 358 F.3d 870, 875 (Fed. Cir. 2004). Any special definition for a claim term must be set forth in the specification with reasonable clarity, deliberateness, and precision. *See In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994).

Petitioner proposes a construction for "cellular network" in claim 8. Pet. 6–7. Patent Owner opposes Petitioner's construction for "cellular network" and proposes its own construction for "processing," a term that does not appear in the challenged claims. Prelim. Resp. 5–7. Based on our analysis of the disputed issues for this proceeding, as set forth below, we conclude that only the term "cellular network" requires construction at this

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