UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICROSOFT CORPORATION,
Petitioner

v.

UNILOC 2017 LLC
Patent Owner

Case No. IPR2020-00023
U.S. Patent 6,467,088 B1

PATENT OWNER'S NOTICE OF APPEAL

via P-TACTS
Patent Trial and Appeal Board

Via Express Mail
Director of the United States Patent and Trademark Office
c/o Office of the General Counsel
P.O. Box 1450
Alexandria, VA 22313-1450

via CM/ECJ
United States Court of Appeals for the Federal Circuit

Pursuant to 35 U.S.C. §§ 141 and 142 and 37 C.F.R. §§ 90.2 and 90.3, Patent Owner Uniloc 2017 LLC ("Patent Owner") hereby provides notice that it appeals to the United States Court of Appeals for the Federal Circuit from the Final Written Decision entered July 28, 2023 (Paper 35, attached as Exhibit A) and from all underlying findings, orders, decisions, rulings, and opinions, including without limitation, the institution decision entered in IPR2020-0023.

In accordance with 37 C.F.R. § 90.2(a)(3)(ii), Patent Owner states that the issues for appeal include, but are not limited to: the Patent Trial and Appeals Board ("Board")'s determinations in the institution decision that there is a reasonable likelihood that claims 1-4, 6-14, and 16-21 of the '088 patent are unpatentable and the Board's subsequent determination that claims 1-4, 6-14, and 16-21 of the '088 patent are unpatentable; the Board's consideration and analysis of the expert testimony, prior art, and other evidence in the record; and the Board's factual findings, conclusions of law, or other determinations supporting or relating to the above issues – including constitutionality of the appointment of PTAB judges.

Pursuant to 35 U.S.C. § 142 and 37 C.F.R. § 90.2(a), this Notice is being filed with the Director of the United States Patent and Trademark Office. Simultaneous with this submission, a copy of this Notice is being filed with the Patent Trial and Appeal Board. In addition, a copy of this Notice, along with the required docketing fees, is being filed with the Clerk's office of the United States Court of Appeals for the Federal Circuit.

DATED: September 29, 2023

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CERTIFICATE OF SERVICE

The undersigned certifies that, in addition to being filed electronically through the Patent Trial and Appeal Board's P-TACTS system, the foregoing Notice of Appeal was filed by Priority Mail Express on September 29, 2023 with the Director of the United States Patent and Trademark Office, at the following address:

Director of the United States Patent and Trademark Office
c/o Office of the General Counsel
P.O. Box 1450
Alexandria, VA 22313-1450

The undersigned certifies that a copy of the foregoing Notice of Appeal, along with the required docket fee, was filed on the below date, with the Clerk's Office for the United States Court of Appeals for the Federal Circuit through the Court's CM/ECF filing system.

The undersigned certifies service pursuant to 37 C.F.R. § 42.6(e) of a copy of this Notice of Appeal by electronic mail on the below date, on the counsel of record for Petitioner:

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EXHIBIT A

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Paper 35
Date: July 28, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICROSOFT CORPORATION,
Petitioner,

v.

UNILOC 2017 LLC,
Patent Owner.

IPR2020-00023
Patent 6,467,088 B1

Before MIRIAM L. QUINN, AMANDA F. WIEKER and SCOTT RAEVSKY, *Administrative Patent Judges*.

RAEVSKY, *Administrative Patent Judge*.

JUDGMENT
Final Written Decision on Remand
Determining All Challenged Claims Unpatentable
35 U.S.C. §§ 114, 318

I. INTRODUCTION

This case is on remand from the United States Court of Appeals for the Federal Circuit to address the patentability of claims 1–4, 6–14, and 16–21 of U.S. Patent No. 6,467,088 B1 ("the '088 patent"), owned by Uniloc 2017 LLC ("Patent Owner"). *Microsoft Corp. v. Uniloc 2017 LLC*, No. 2021-2039 (Fed. Cir. Oct. 20, 2022) (nonprecedential).

For the reasons discussed below, we determine that Petitioner has proven by a preponderance of the evidence that claims 1–4, 6–14, and 16–21 of the '088 patent are unpatentable.

II. BACKGROUND

A. The '088 Patent and Illustrative Claim

The '088 patent is directed to techniques for upgrading or reconfiguring software and/or hardware components in electronic devices. Ex. 1001, 1:6–9. According to the '088 patent, prior art software update techniques fail to avoid potential conflicts and thus ensure compatibility because they do not account for interdependencies of the resources required by the desktops or the files resident in the remote devices. *Id.* at 1:41–45, 1:52–56, 1:65–2:3, 2:10–14.

The '088 patent solves this problem by providing a list or listing that indicates "which of a set of software components supported by [a reconfiguration] manager 10 are known to work well together or are otherwise compatible." *Id.* at 3:36–42. For instance, Figure 1 of the '088 patent, reproduced below, illustrates reconfiguration manager 10 that

"includes a listing 16 of known configurations, and a repository 18 of software components." *Id.* at 3:27–29.

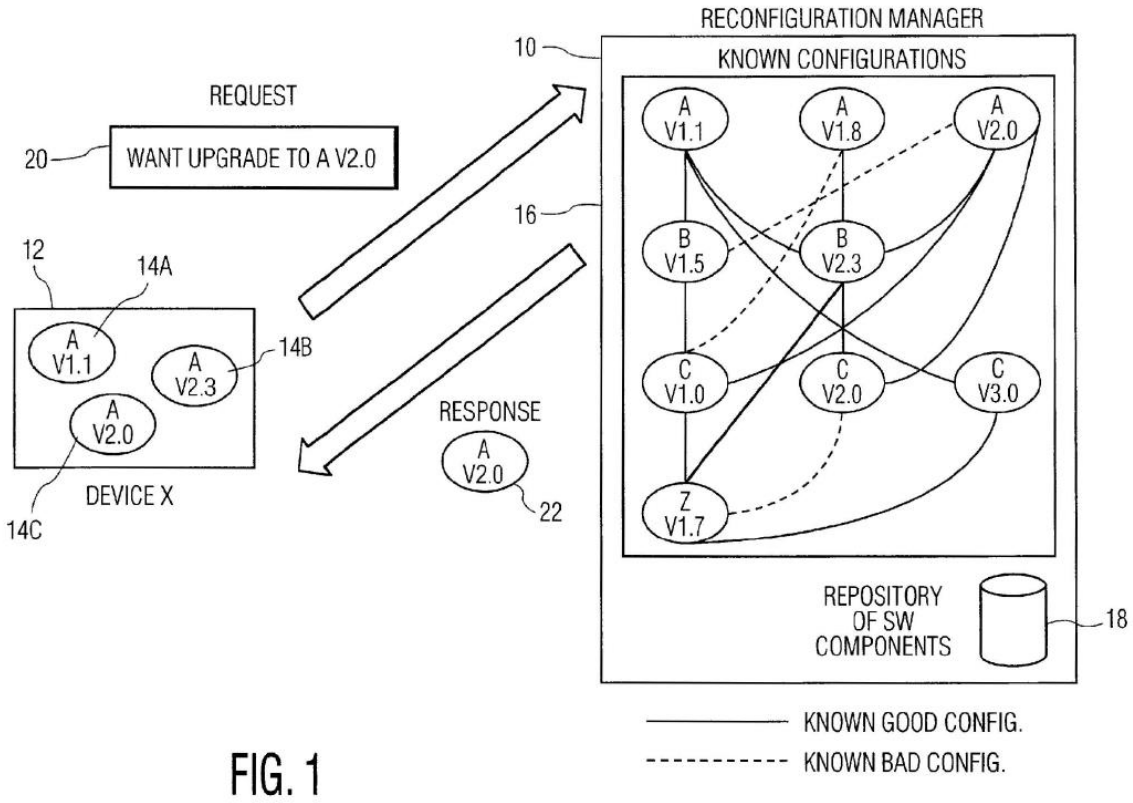

FIG. 1

Figure 1 illustrates reconfiguration manager 10 interacting with electronic device 12, also referred to as "Device X." *Id.* at 3:14–16. When reconfiguration manager 10 receives a request for an upgrade from Device X, the request indicates that the device wants to upgrade to version 2.0 of software component A and includes a list of the components currently on the device, i.e., version 1.1 of component A, version 2.0 of

component C, and version 2.3 of component B. *Id.* at 4:12–19.[1] Reconfiguration manager 10 processes the request, and if appropriate, delivers the requested version 2.0 of software component A. *Id.* at 4:22–26. Processing the request involves generating a potential upgrade configuration that will satisfy the received request, and searching through a set of known "bad" configurations. *Id.* at 4:62–66. A known "bad" configuration is indicated in Figure 1 as a dashed line between components that are not compatible. *Id.* at 3:58–61. For example, "[t]he pair including version 1.8 of component A and version 1.0 of component C is an example of a known bad configuration." *Id.* at 3:61–63.

If the upgrade configuration corresponds to a bad configuration, the reconfiguration manager "attempts to find a set or sets of potential upgrade configurations from a set of known good configurations." *Id.* at 4:67–5:3. A known "good" configuration is indicated in Figure 1 by a solid line between a given pair of components indicating that the components work well together or are otherwise compatible. *Id.* at 3:52–55.

Challenged claim 1, reproduced below, is illustrative of the challenged claims:

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[1] Although Fig. 1 depicts device 12 having three versions of software component A (labels 14A–C), the description of Fig. 1 indicates these are different versions of components A, B, and C, respectively. Ex. 1001, 3:20–24.

> 1. A processor-implemented method for controlling the reconfiguration of an electronic device, the method comprising the steps of:
>
> receiving information representative of a reconfiguration request relating to the electronic device;
>
> determining at least one device component required to implement the reconfiguration request;
>
> comparing the determined component and information specifying at least one additional component currently implemented in the electronic device with at least one of a list of known acceptable configurations for the electronic device and a list of known unacceptable configurations for the electronic device; and
>
> generating information indicative of an approval or a denial of the reconfiguration request based at least in part on the result of the comparing step.

Ex. 1001, 6:43–59. We refer to the steps of claim 1 as the receiving step, the determining step, the comparing step, and the generating step, respectively.

B. Trial Background

Microsoft Corporation ("Petitioner") filed a Petition (Paper 2, "Pet.") requesting *inter partes* review of claims 1–4, 6–14, and 16–21 of the '088 patent. The Petition asserts that the claims are unpatentable on the following grounds (Pet. 3–4), which are supported by a declaration by John Villasenor (Ex. 1003):

Claims Challenged	35 U.S.C. §[2]	References/Basis
1–4, 6–14, 16–21	§ 103	Apfel,[3] Lillich,[4] Todd[5]
9, 19	§ 103	Apfel, Lillich, Todd, Pedrizetti[6]
1–3, 9–13, 19–21	§ 103	Apfel, Lillich
1, 3, 4, 6–11, 13, 14, 16–21	§ 103	Apfel, Todd

We instituted review on all grounds presented. Paper 7 ("Institution Decision"). During the trial, Patent Owner filed a Patent Owner Response (Paper 10, "PO Resp.") but did not submit expert testimony. Petitioner then filed a Reply (Paper 11), accompanied by a second declaration by John Villasenor (Ex. 1016). Patent Owner then filed a Sur-Reply (Paper 13, "Sur-Reply"). We heard oral argument on January 15, 2021, a transcript of which appears in the record (Paper 19).

C. Final Written Decision and Federal Circuit Appeal

We issued a Final Written Decision determining that Petitioner had not proven by a preponderance of evidence that claims 1–4, 6–14, and 16–21 are unpatentable. Paper 20 at 32–33 ("Final Decision" or "Final

[2] The Leahy-Smith America Invents Act ("AIA"), Pub. L. No. 112-29, 125 Stat. 284, 285–88 (2011), revised 35 U.S.C. § 103 effective March 16, 2013. The '088 patent was filed June 30, 1999, so we apply pre-AIA § 103. Ex. 1001, code (22).
[3] U.S. Patent No. 5,974,454, filed as Exhibit 1004.
[4] U.S. Patent No. 5,613,101, filed as Exhibit 1005.
[5] U.S. Patent No. 5,867,714, filed as Exhibit 1006.
[6] U.S. Patent No. 6,151,708, filed as Exhibit 1007.

Dec."). Petitioner filed a Notice of Appeal of the Final Decision with the United States Court of Appeals for the Federal Circuit. Paper 21.

On October 20, 2022, the Federal Circuit issued a decision in the appeal vacating our Final Decision as to all challenged claims and remanding for further proceedings. *Microsoft*, slip. op. at 7. The Federal Circuit also reversed the Board's "apparent construction" that "narrow[ed] the determining and comparing steps to a certain order." *Id.*

The Federal Circuit issued its mandate on November 28, 2022.

D. Remand Proceedings

After the Federal Circuit mandate issued, the parties proposed a procedure and schedule on remand. Paper 24, 2. Subsequently, we issued an order with a remand briefing schedule permitting the parties to address the impact of the Federal Circuit's opinion but not permitting the parties to introduce new evidence. *Id.* The parties then filed the following briefing: Petitioner's Remand Brief (Paper 32, "Pet. Remand Br."), Patent Owner's Remand Brief (Paper 31, "PO Remand Br."), Petitioner's Remand Response (Paper 34, "Pet. Remand Resp. Br."), and Patent Owner's Remand Reply (Paper 33, "PO Remand Reply Br.").

III. ANALYSIS

A. Principle of Law

Petitioner bears the burden to demonstrate unpatentability. *Dynamic Drinkware, LLC v. Nat'l Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015). A claim is unpatentable as obvious if "the differences between the

subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007) (quoting 35 U.S.C. § 103(a)). We resolve the question of obviousness based on underlying factual determinations, including: (1) the scope and content of the prior art; (2) any differences between the prior art and the claims; (3) the level of skill in the art; and (4) when in evidence, objective indicia of nonobviousness.[7] *See Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966). We apply these principles to the Petition's challenges.

B. Level of Ordinary Skill in the Art

We apply the following assessment of the level of ordinary skill in the art: a person of ordinary skill in the art ("POSITA") "would have had a Bachelor's Degree in Electrical Engineering, Computer Science, or a related subject, and one or more years of experience working with configuring hardware and software components in electronic devices," and "[l]ess work experience may be compensated by a higher level of education, such as a Master's Degree, and vice versa." Final Dec. 7–8.

C. Claim Construction

In an *inter partes* review proceeding, a claim of a patent is construed using the same standard used in federal district court, "including construing the claim in accordance with the ordinary and customary meaning of [the]

[7] The parties have not provided any such evidence in this proceeding.

claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent." 37 C.F.R. § 42.100(b) (2019).

There are no claim construction issues on remand. We apply the Federal Circuit's instruction that we must avoid "narrow[ing] the determining and comparing steps to a certain order." *Microsoft*, slip. op. at 7.

D. Asserted Obviousness over Apfel, Lillich, and Todd

Petitioner contends, *inter alia*, that claims 1–4, 6–14, and 16–21 would have been obvious over the combination of Apfel, Lillich, and Todd. Pet. 32–64; *see also infra* Section III.E (addressing the combination of Apfel, Lillich, Todd, and Pedrizetti). In the alternative, Petitioner argues that (1) claims 1–3, 9–13, and 19–21 would have been obvious over Apfel and Lillich (Ground 3), or that (2) claims 1, 3, 4, 6–11, 13, 14, and 16–21 would have been obvious over Apfel and Todd (Ground 4). *Id.* at 69–72.

Before addressing the merits of Grounds 1 and 2, we first address the Petition's alternative grounds.

Claim 1 recites in part,

> comparing the determined component and information specifying at least one additional component currently implemented in the electronic device with *at least one of a list of known acceptable configurations* for the electronic device *and a list of known unacceptable configurations* for the electronic device.

Ex. 1001, 6:51–56 (emphasis added). Similar limitations are found in independent claims 11 and 21. *Id.* at 7:56–62, 8:57–62. In our Final Decision, we observed that Petitioner argues this limitation requires a

comparison with *both* a list of known acceptable configurations and a list of known unacceptable configurations, because of the claim's conjunctive "at least one of." Final Dec. 28 (citing Pet. 23–25). The Petition's two alternative grounds address a potential disjunctive construction of this limitation, "namely as covering only a comparison to 'a list of known acceptable configurations' ***or*** a comparison to 'a list of known unacceptable configurations.'" Pet. 70.

Our Final Decision did not address these alternative grounds because Petitioner's conjunctive interpretation was "undisputed on the full record." Final Dec. 28. This interpretation remains undisputed on remand. *See generally* PO Remand Br. Thus, we only address Petitioner's ground alleging unpatentability of claims 1–4, 6–14, and 16–21 over the combination of Apfel, Lillich, and Todd and do not reach Petitioner's alternative grounds.

1. Overview of Apfel

Apfel is concerned with "[i]nstalling and updating a software program module component." Ex. 1004, code (57). In particular, Apfel describes a system for automatically updating a software program module component stored on a computer, as shown in Figure 3 reproduced below.

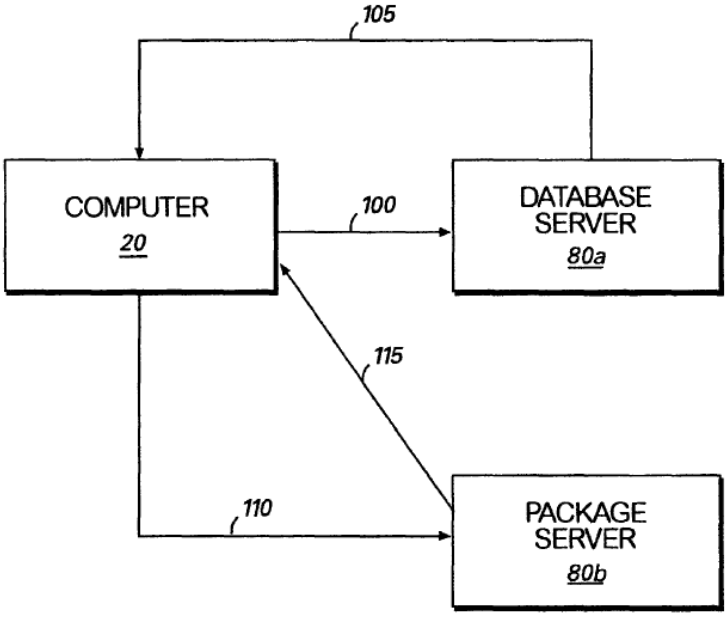


Figure 3 of Apfel illustrates a system including computer 20, database server 80a, and package server 80b. *Id.* at 6:36–37. Computer 20 requests an upgrade by sending query 100 to database server 80a. *Id.* at 6:39–40. If an upgrade is available, then database server 80a will send back response 105 that includes the Uniform Resource Locator (URL) of the upgrade package. *Id.* at 6:63–65. After computer 20 receives response 105 including the URL of the upgrade package, computer 20 will send query 110 to package server 80b at the URL of the update package. *Id.* at 7:4–8. Package server 80b will send update package 115 to computer 20, and computer 20 will then install the update package 115. *Id.* at 7:8–10. The servers are responsible for assessing whether an upgrade is available and whether it should be downloaded based on the information sent by computer 20. *Id.* at 7:13–16.

2. Overview of Lillich

Lillich describes a "method and apparatus for verifying compatibility between components of a system[,] which share a client-provider relationship." Ex. 1005, code (57). Figure 1 of Lillich is reproduced below.

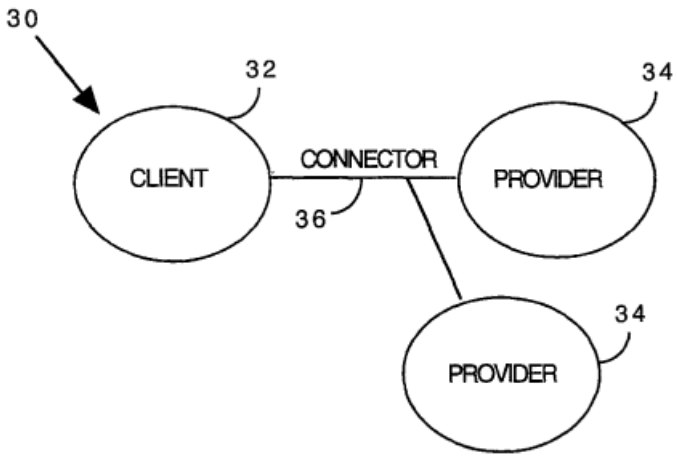


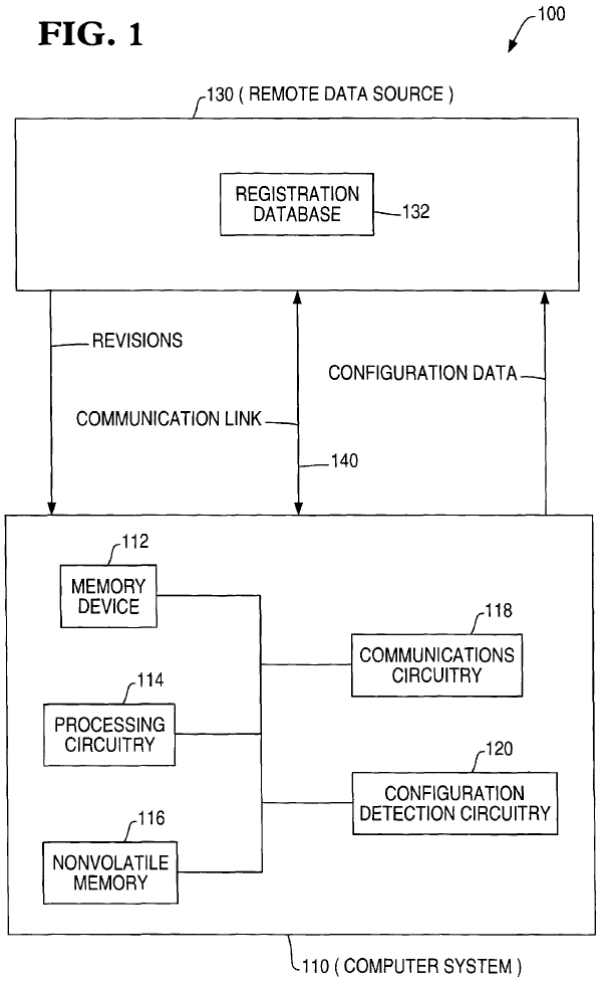
FIG. 1

Figure 1 of Lillich is a symbolic, simplified block diagram of system 30. *Id.* at 5:28. As shown in Figure 1, "[s]ystem 30 may be hardware, software, or a combination thereof, and includes client 32 and provider 34 connected by . . . connector 36 such that information from the client and provider can be compared." *Id.* at 6:7–10. Lillich further describes a connector for connecting, at runtime, the client to the implementation provider to determine compatibility between the client and the implementation provider. *Id.* at 4:28–32. "Compatibility checks are performed between a client and available versions of the provider(s), implementation providers, with which it has been linked." *Id.* at 4:32–35.

3. Overview of Todd

Todd describes "a system for detecting and avoiding faults stemming from conflicts in hardware and/or software configurations in a computer system." Ex. 1006, code (57). Figure 1 of Todd is reproduced below.

FIG. 1



In Figure 1 of Todd, system 100 includes computer system 110 and remote data source 130. Computer system 110 includes configuration detection circuitry 120 responsible for obtaining data pertaining to at least a portion of the current hardware and software configuration of computer

system 110. *Id.* at 6:42–46. Configuration detection circuitry 120 determines the hardware and software configuration automatically by polling hardware components and cataloging software components to create a list of current configuration data setting forth the components that comprise computer system 110. *Id.* at 6:50–55. Remote data source 130 contains a database of software revisions that may be communicated to computer system 110 as a function of its current configuration data. *Id.* at 12:1–8. Diagnostic and analytic processes within remote data source 130 analyze the current configuration data of computer system 110 to identify conflicts. *Id.*

4. Independent Claim 1

a. Pre-appeal Final Written Decision

In the Final Decision, we determined that the combination of Apfel, Lillich, and Todd does not disclose or suggest the comparing step of the independent claims. Final Dec. 15–26. We reasoned that although "Apfel's database server does perform a comparison," this comparison is "between the information presented in the query and the lookup table," so there is no "'determined component' in Apfel's query." *Id.* at 18. We further found that "Apfel lacks detail sufficient to explain that the database lookup involves further comparing the resulting newer version component with the query information that identifies currently installed components . . . with a known list of acceptable configurations." *Id.* at 19. We also found that Apfel does not inherently or implicitly disclose this comparison. *Id.* at 20, 23–26. We further determined that Petitioner's reliance on Lillich does not

cure Apfel's deficiency because Petitioner does not rely on Lillich "for teaching the comparison that includes the (a) determined component." *Id.* at 27. Accordingly, we determined that Petitioner had not proven the unpatentability of claims 1–3, 6, 7, 12–14, 16–18, and 20 by a preponderance of evidence. *Id.* at 29.

b. Federal Circuit Decision

The Federal Circuit found that the Board's conclusion that Apfel did not disclose the comparing step lacked substantial evidence. *Microsoft*, slip op. at 3. The court determined that the Board "erred in its factual finding regarding Apfel because it overlooked a passage that specifically discloses assessing the compatibility of available upgrades." *Id.* at 3–4. This passage of Apfel states:

> The servers are responsible for assessing whether an upgrade is available and whether it should be downloaded based on the information sent by computer 20. For example, even if an upgrade is available, it *should not be downloaded* if the computer 20 already has the upgrade or if the upgrade is *somehow incompatible* with computer 20.

Id. (quoting Ex. 1004, 7:13–19). The court found that the Board's description of this passage, that "Apfel would not allow the download of a version . . . that is *incompatible* with computer 20," "contradicts its conclusion that 'Apfel's database lookup only determines that a new upgrade is available—not that there is a known *compatible* upgrade available.'" *Id.* at 4 (citing Final Dec. 16–17).

The court further found that the following Apfel passage also appears to contradict the Board's conclusion that Apfel does not disclose a comparing step:

> At decision step 427, it is determined whether there is an upgrade package for the Web Authoring Components program module. In the exemplary embodiment, the database server 80a uses the information received in the HTTP query at step 415 to determine if an upgrade package is available, such as by a database lookup. Different update packages may be provided for different version combinations, different operating systems, and different languages. Thus, the database server 80a maintains a database of upgrade packages and corresponding configurations which should result in their download.

Id. at 4–5 (citing Ex. 1004, 9:30–40). The Federal Circuit explained that this passage, "although not explicitly referring to a compatibility check, recognizes that different update packages correspond, for example, to different operating systems, and that a database of the different configurations is maintained to guide downloads." *Id.* at 4. The court focused on the following sentence from this passage—"[d]ifferent update packages may be provided for different version combinations, different operating systems, and different languages." *Id.* at 5 (citing Ex. 1004, 9:36–38). This passage, according to the court, "suggests a form of compatibility assessment to find the correct upgrade package." *Id.*

The court further stated that "[t]he Board also erred when it concluded that Apfel did not disclose the comparing step because [Apfel] did not perform the determining and comparing steps in a certain order required by the disputed claims." *Id.* (citing Final Dec. 18–19, 21). The court found that

"the Board misconstrued the claims to require . . . two separate acts in a certain order." *Id.* at 5–6. Instead, the court found that "the claim cannot require that the steps be performed in the order written, but rather allows for the determining and comparing steps to be part of a single process." *Id.* at 7. This is because "[a]ny construction that would narrow the determining and comparing steps to a certain order is not supported by either the claim language or the specification." *Id.* Thus, the court reversed the Board's "apparent construction." *Id.*

The court concluded, "[b]ecause the Board erred in concluding that Apfel does not perform the claimed 'comparing' step and implicitly relied on an improper claim construction, we vacate the Board's decision and remand for further proceedings consistent with this opinion." *Id.*

c. Disputed Issues on Remand

On remand, the parties address the following issues: whether Apfel discloses the comparing step, and whether Petitioner set forth a sufficient rationale to combine the references. We present our analysis of claim 1 in the order of the recited limitations, beginning with the receiving step.

(1) Receiving step

Claim 1 requires receiving information representative of a reconfiguration request relating to the electronic device. Petitioner asserts that Apfel teaches this receiving step because it describes a "database server receiving a reconfiguration (upgrade) request for software resident on a computer, which includes the information necessary to determine whether an

appropriate upgrade is available." Pet. 35–37. We agree that Apfel teaches this limitation.

Apfel teaches that the computer sends a query to the database server. Ex. 1004, 6:38–40. This query, Apfel states, "includes all the information regarding computer 20 that the database server 80a needs to determine if an upgrade is available and, if an upgrade is available, to determine the location of the upgrade package." *Id.* 6:49–53. More specifically, Apfel describes the HTTP query as including information such as the version of the program module component to be upgraded, the platform that the program module component is running on, and the language of the program module component. *Id.* at 2:27–35, 9:1–9. Thus, the database server receives from the computer a communication, specifically an HTTP query, which constitutes the recited "reconfiguration request" that relates to the computer as it provides specific information about the configuration of the computer, such as the platform the software is running on and the language of the program. This query is representative of a "reconfiguration request" because based on its content, the server is configured to determine whether an upgrade is available for that computer, i.e., the computer's configuration would be updated. Patent Owner presents no argument regarding the receiving step. *See generally* PO Resp.

We determine that Petitioner has shown by a preponderance of the evidence that Apfel teaches the receiving step.

(2) Determining step

The claim requires determining at least one device component required to implement the reconfiguration request. Petitioner relies on Apfel as teaching this limitation because the Apfel database server uses the received HTTP request from the previous step to perform a database lookup to determine if an upgrade package is available. Pet. 37–38; Ex. 1004, 6:49–53, 8:53–55, 9:30–35. We agree that Apfel teaches the determining step. Apfel's database server uses the information received in the HTTP query to determine if an upgrade package is available using the database lookup. Ex. 1004, 9:30–35. Thus, Apfel determines the device component required to implement the reconfiguration request because the lookup results in identifying an available upgrade package. Patent Owner presents no argument regarding the determining step. *See generally* PO Resp.

We determine that Petitioner has shown by a preponderance of the evidence that Apfel teaches the determining step.

(3) Comparing step

As noted above, Petitioner argues that during trial, the parties only disputed whether the prior art satisfied the claimed comparing step, and the Federal Circuit answered that question in the affirmative. Pet. Remand Br. 1–4. Petitioner highlights the court's statement that "[t]he Board found that Apfel did not disclose the comparing step. That conclusion lacks substantial evidence." *Id.* at 3. Petitioner further highlights the court's statements that Apfel, at column 9, lines 30–40, "suggests a form of compatibility

assessment" and that Apfel, at column 7, lines 13–19, "specifically references incompatibility," thus "render[ing] the Board's conclusion that Apfel does not disclose a compatibility check lacking in substantial evidence." *Id.* Petitioner adds, "[g]iven the Federal Circuit's finding that Apfel discloses the claimed 'comparing,' the only issue on remand is whether the prior art satisfies the other claimed elements." *Id.* at 4. Petitioner argues that, because Patent Owner did not challenge those other elements during trial, the Board should find for Petitioner for the reasons set forth in the Petition, consistent with the Board's findings in the Institution Decision. *Id.*

Patent Owner contends that the court's determination that Apfel requires a comparing step does not require that the comparing step include the recited "information specifying at least one additional component." PO Remand Br. 2. According to Patent Owner, a proper reading of Apfel shows that the first passage relied upon by the court, *see* Ex. 1004, 7:13–19, provides a high-level overview of a two-assessment process. *Id.* Patent Owner argues that these two assessments are (1) a determination of whether an upgrade is available, and (2) an assessment of the compatibility of the determined upgrade. *Id.* Patent Owner contends that the second passage relied upon by the court, *see* Ex. 1004, 9:30–40, provides a detailed explanation of the first assessment. *Id.* According to Patent Owner, "[t]he second assessment of [Ex. 1004, 7:13–19] makes clear that a compatibility determination is distinct from determining an upgrade, thus demonstrating that the second passage does not include a compatibility determination." *Id.*

at 2–3. Thus, Patent Owner contends that Apfel provides no "indication of the information or determination involved in the compatibility determination, demonstrating that Apfel utterly fails to disclose the comparing recitations of the independent claims." *Id.* at 3.

Petitioner responds that "[t]he Court did not remand for the Board to overturn the Court's determination that Apfel teaches the 'comparing' step," yet that is what Patent Owner's remand brief requests. Pet. Remand Resp. Br. 1. Petitioner contends that "the mandate rule forecloses reconsideration of issues implicitly or explicitly decided on appeal," including whether Apfel discloses the comparing step. *Id.* at 2 (citing *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1364 (Fed. Cir. 2008)). In Petitioner's view, "Patent Owner's remand brief ignores the determination of the Court, rehashes the same Apfel passages already carefully considered by the Court, and seeks a different outcome." *Id.* at 3. Petitioner asserts that Patent Owner takes out of context the court's statement that "the Board failed to explain why [Afpel at Ex. 1004, 7:13–19] did not disclose the required compatibility check," as this statement is not an instruction for the Board to revisit the issue. *Id.* Petitioner argues that no exception to the mandate rule applies here because no new evidence has been presented and because Patent Owner does not argue that the court's opinion was clearly erroneous or that a change in applicable law has occurred. *Id.* at 5 (citing *Banks v. United States*, 741 F.3d 1268, 1276 (Fed. Cir. 2014)).

Patent Owner responds that Petitioner mischaracterizes the court's opinion as finding that Apfel discloses the comparing step. PO Remand

Reply Br. 1. Patent Owner argues that Petitioner "disregards that the Court's opinion specifically stated that the Board's Final Written Decision . . . 'failed to explain *why* this passage from Apfel did not disclose the required compatibility check.'" *Id.* (citing Ex. 1004, 7:13–19). According to Patent Owner, its opening brief "provides the explanation, which the Court stated was absent from the Final Written Decision, as to why col. 7, lines 13–19 of Apfel fails to disclose the required compatibility check," and "Petitioner's Remand Brief fails to provide any alternative explanation." *Id.* at 1–2.

Turning to our analysis, we find Petitioner's arguments more persuasive. Specifically, we agree that the Federal Circuit already determined that Apfel teaches or suggests the comparing step. *Microsoft*, slip op. at 3–7. Whether Apfel discloses the comparing step was a close question during trial, and the Federal Circuit reached a different conclusion on appeal. The Federal Circuit's opinion and the evidentiary record compel us to conclude that Apfel teaches or suggests the comparing step.

We start with the Petition. As noted above, the claimed comparing step requires comparing (1) the determined component and (2) information specifying at least one additional component currently implemented in the electronic device with a list of acceptable and a list of unacceptable configurations. In our analysis of the determining step we found that Apfel teaches identifying the available upgrade package using the database lookup, and, therefore, the "determined component" of the comparing step is the available upgrade package. *See also* Pet. 37–38 (citing, e.g., Ex. 1004,

9:30–35 ("the database server 80a uses the information received in the HTTP query at step 415 to ***determine if an upgrade package is available, such as by a database lookup***")).

For the "additional component" portion of the comparing step, Petitioner points to "five different components that make up the configuration for the requesting computer." *Id.* at 39–40 (citing Ex. 1004, 8:39–46, 53–66; Ex. 1003 ¶ 82). This additional information is provided in the upgrade request itself, Petitioner argues, and includes "the version of the Web Authoring Components program module 37a, the version of a HTML converter in the word processor program module 37, the version of the word processor program module 37, the localization language, and the type of operating system on computer 20." *Id.* at 40 (citing Ex. 1004, 8:39–46, 53–66; Ex. 1003 ¶ 82) (emphasis omitted). We agree with Petitioner that Apfel's query includes "additional information" that the database server uses during the lookup process. This additional information includes, for example, the version of the Web Authoring Components program module and the version of the word processor program module in the current computer configuration. Ex. 1004, 8:39–46, 53–66.

As for the recited "comparing," Petitioner argues that Apfel discloses "comparing" the determined component and additional component with a list of "known acceptable configurations" by "describing maintaining and performing a lookup against a database of upgrade packages and corresponding configurations which '***should*** result in their download,' as well as configurations that '***require*** a [particular] upgrade package.'" *Id.* at

41–42 (citing Ex. 1004, 9:30–42; Ex. 1003 ¶ 83). This description, Petitioner argues, "inherently describes comparing the information provided in the request for an upgrade and the additional system information . . . against a list of known acceptable configurations." *Id.* at 42. Alternatively, Petitioner contends that Apfel's teaching "implicitly suggests maintaining such 'known good' configuration information in some form so that a determination can be made which update package URL (if any) to send to the requesting computer." *Id.* (citing Ex. 1003 ¶ 85).

The Petition further argues that Apfel discloses "comparing" with a list of "known unacceptable configurations" by teaching that "***even if an upgrade is available, it should not be downloaded*** if the computer 20 already has the upgrade or ***if the upgrade is somehow incompatible with computer 20***." *Id.* at 45 (citing Ex. 1004, 7:13–19; Ex. 1003 ¶ 90). In view of this disclosure, Petitioner asserts that it would have been obvious to determine incompatibility according to information previously received about known unacceptable configurations because this is "one of a limited number of solutions for determining incompatibility." *Id.* at 45–46 (citing Ex. 1003 ¶ 91).

As we note above, the Federal Circuit stated that a certain passage in Apfel (Ex. 1004, 9:30–40) "at a minimum, suggests a form of compatibility assessment to find the correct upgrade package." *Microsoft,* slip op. at 5. The Federal Circuit found relevant that Apfel's disclosure of "[d]ifferent update packages may be provided for different version combinations, different operating systems, and different languages" suggests a

compatibility assessment. *See id.* (citing Ex. 1004, 9:36–38). We also note that Dr. Villasenor testifies that Apfel inherently or implicitly discloses comparing with a list of known acceptable configurations as follows:

> In describing maintaining and performing a lookup against a database of upgrade packages and corresponding configurations which "should result in their download," as well as configurations that "require a [particular] upgrade package," Apfel inherently describes comparing the information provided in the request for an upgrade and the additional system information – including information specifying other components – against a list of known acceptable configurations, i.e., "configurations for the electronic device comprising sets of multiple components previously determined to work well together or be otherwise compatible." Alternatively, even were it not considered to be inherently disclosed, Apfel's teaching implicitly suggests maintaining such "known good" configuration information in some form so that a determination can be made which update package URL (if any) to send to the requesting computer.

Ex. 1003 ¶ 85.

The Federal Circuit also found relevant that another passage in Apfel (Ex. 1004, 7:13–19) "specifically references incompatibility." *Microsoft*, slip op. at 5. Apfel explicitly teaches that "even if an upgrade is available, it should not be downloaded if the computer 20 already has the upgrade or if the upgrade is somehow incompatible with computer 20." Ex. 1004, 7:16–19. Further as to the "incompatibility" issue, Dr. Villasenor testifies that

> It would have been obvious to one of ordinary skill in the art in view of Apfel's disclosure to use the received information about requested upgrades and additional information specifying other components and system configuration to determine

> incompatibility according to information previously received about, e.g., known unacceptable configurations, or "configurations for the electronic device comprising sets of multiple components that have been previously determined as not compatible." This is one of a limited number of solutions for determining incompatibility, and one that would have been understood by a POSITA . . . .

Ex. 1003 ¶ 91. It is important to note that Apfel specifically describes making a comparison between the HTTP query and the database lookup table. Ex. 1004, 12:45–48. In other words, the database server compares the information in the query with entries in the database table. Based on the evidence cited in the Petition and adhering to the statements made in the Federal Circuit's decision as described above, Apfel then teaches or suggests comparing the determined component (the available update package) and information in the query (currently implemented in the electronic device) with a list of known acceptable configurations and with a list of known unacceptable configurations.[8] Specifically, with regard to the comparison with a list of known acceptable configurations (i.e., compatibility check), Apfel suggests a form of compatibility assessment to find the correct upgrade package as described in column 9, lines 30–40. And with regard to the comparison with a list of known unacceptable configuration (i.e.,

[8] "[A] lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest." *Designing Health v. Erasmus*, 226 F. App'x 976 (Fed. Cir. 2007) (quoting FCC *v. Pottsville Broad. Co.*, 309 U.S. 134, 140–41 (1940)). By determining that it was error for us to conclude that Apfel does not perform the comparing step, we are foreclosed to find otherwise.

incompatibility check), Apfel teaches that "even if an upgrade is available, it should not be downloaded if the computer 20 already has the upgrade or if the upgrade is somehow incompatible with computer 20. Ex. 1004, 7:13–19.

Accordingly, we conclude that Petitioner has shown, by a preponderance of the evidence, that Apfel alone teaches or suggests that the database server's lookup, in the process of determining whether an upgrade package is available, performs both a compatibility check and an incompatibility check. *See also* Ex. 1003 ¶¶ 85 (opining that Apfel suggests maintaining a list of "known good" configuration information in some form so that a determination can be made which update package URL (if any) to send to the requesting computer), 90 (opining that it would have been obvious to a person of ordinary skill in the art that to determine incompatibility, Apfel must use information previously received about incompatibility).

Patent Owner's arguments to the contrary are unavailing because they are premised on a mistaken belief that the Federal Circuit did not determine that Apfel teaches or suggests the comparing step. Patent Owner's contention is based on one passage of the opinion that it takes out of context. *See* PO Resp. Br. 1. That passage refers to the Board's Final Written Decision having "failed to explain *why* this passage from Apfel did not disclose the required compatibility check." *Id.*; *Microsoft*, slip op. at 4. We agree with Petitioner that this statement is not an instruction for the Board to revisit the issue of whether Apfel discloses the comparing step. Pet. Remand Resp. Br. 3. Rather, as Petitioner correctly explains, the court's

opinion instructs us how that passage and others in Apfel teach or suggest the compatibility check, and that it was therefore error to conclude that Apfel does not perform the comparing step. *Id.*; *Microsoft*, slip op. at 3–5.

As the court did, in fact, decide that Apfel teaches or suggests the comparing step, we agree with Petitioner that the mandate rule forecloses our reconsideration of that issue. Pet. Remand Resp. Br. 2; *Amado*, 517 F.3d at 1364 (determining that "the mandate rule forecloses reconsideration of issues implicitly or explicitly decided on appeal"). We also agree with Petitioner that no exception to the mandate rule applies here; nor does Patent Owner argue as such. Pet. Remand Resp. Br. 5. Thus, Patent Owner's arguments contending that Apfel does not disclose the comparing step are unavailing.

Regardless, Patent Owner's implication that Apfel does not disclose "information specifying at least one additional component" is unpersuasive. *See* PO Remand Br. 2. As we note above, for the "additional component" element of the comparing step, Petitioner points to "five different components that make up the configuration for the requesting computer." Pet. 39–40 (citing Ex. 1004, 8:39–46, 53–66; Ex. 1003 ¶ 82). This additional information is provided in the upgrade request itself, Petitioner argues, and includes "the version of the Web Authoring Components program module 37a, the version of a HTML converter in the word processor program module 37, the version of the word processor program module 37, the localization language, and the type of operating system on computer 20." *Id.* at 40 (citing Ex. 1004, 8:39–46, 53–66; Ex. 1003 ¶ 82)

(emphasis omitted). Patent Owner does not squarely address Petitioner's arguments on this claim element, which are persuasive and supported by record evidence.[9]

Accordingly, we determine that Petitioner has shown by a preponderance of the evidence that Apfel alone teaches or suggests the comparing step.

(4) Generating step

The claim requires generating information indicative of an approval or denial of the reconfiguration request, based at least in part on the result of the comparing step. The Petition states that Apfel generates an approval because it issues an "UPDATE" message when an appropriate upgrade is available. Pet. 49. The Petition also states that Apfel generates a denial because it issues a "NOUPDATE" message when an appropriate update is not available. *Id.* More particularly, Petitioner points out that Apfel's server sends a response to the computer using an "UPDATE" message that includes the Uniform Resource Locator (URL) of the upgrade package. *Id.* (citing Ex. 1004, 6:63–65, 9:30–32, 9:40–42, 10:7–13). If the lookup results in no upgrade available, then Apfel returns an HTTP message that includes the key word "NOUPDATE" followed by an encoded date. Ex. 1004, 9:40–47. We agree that Apfel teaches the generating step. The two "UPDATE" and

[9] We also find Patent Owner's other arguments for the comparing step unpersuasive but need not address them in detail. We agree with Petitioner that Patent Owner merely rehashes the same Apfel passages already carefully considered by the court. Pet. Remand Resp. Br. 3.

"NOUPDATE" messages are "information indicative of an approval or denial of the reconfiguration request, i.e., the HTTP request for an upgrade that includes a query. And these two messages are generated after completion of the lookup procedure, which includes performing the compatibility and incompatibility checks as described above. Patent Owner does not present argument regarding this limitation. *See generally* PO Resp. Accordingly, we determine that Petitioner has shown by a preponderance of the evidence that Apfel teaches the comparing step.

(5) Rationale to Combine

Patent Owner's Remand Reply Brief argues that Petitioner is incorrect that the only issue on remand is whether Apfel teaches the comparing step because, during trial, Patent Owner argued that the Petition failed to provide sufficient motivation to combine Apfel with Lillich and/or Todd. PO Remand Reply Br. 3–4 (citing Paper 10 ("PO Resp.") 26–27; Paper 13 ("Sur-reply"), 20–21). As the Final Decision did not reach this argument, because we found the comparing step issue to be dispositive, Patent Owner contends that we must reach it now. *Id.* at 4. We agree with Patent Owner that we must decide this issue.

Before getting to Petitioner's arguments, we address the relevance of Lillich and Todd to the asserted challenges of unpatentability. The Petition states that Lillich expressly describes checking for compatibility between client programs and provider programs by determining appropriate ranges of versions of providers which may be used to execute a given client. Pet. 42–43. Petitioner proposes to modify Apfel's "lookup" to consider the

version numbers of the various components to determine whether there is compatibility between those components and the requested update. *Id.* at 44. Because we have concluded above that Apfel alone teaches or suggests all the limitations of claim 1, we do not need to rely on a combination of Apfel with Lillich's teachings. Likewise, Petitioner relies on Todd as teaching further details of the incompatibility check (*Id.* at 46–48) for which we have relied exclusively on Apfel, as stated above. Consequently, there is no need for us to assess the strength of Petitioner's rationale to combine arguments with respect to claim 1. *See Realtime Data, LLC v. Iancu*, 912 F.3d 1368, 1373 (Fed. Cir. 2010) (determining that the Board has no obligation to find a motivation to combine when it relies on the teachings of a single reference in a combination of references). However, because Petitioner relies on Lillich or Todd for certain limitations recited in dependent claims and out of an abundance of caution, we address Petitioner's reasons-to-combine arguments and evidence.

We begin by summarizing Petitioner's rationale to combine Apfel, Lillich, and Todd. Regarding Apfel and Lillich, Petitioner argues that a POSITA would have understood that Apfel's techniques are intended for use "over a distributed computer network" and would therefore be enhanced by Lillich's disclosures. Pet. 27–28 (citing Ex. 1004, 1:10–11). Lillich, Petitioner argues, highlights the potential for incompatibilities that can result from adding a "new component or an upgrade of an existing component." *Id.* at 28 (citing Ex. 1005, 1:33–34). Petitioner therefore contends, "[i]ncorporating the teachings of Lillich into Apfel therefore provides the

POSITA with information about methods to perform network-based updates in a manner ensuring that the update will not cause the system to be inaccurate or inoperative." *Id.* (citing Ex. 1003 ¶ 61).

As for Todd, Petitioner argues that while Todd discloses communication over a network like Apfel, "it focuses more specifically on ways to identify and avoid conflicts and the resulting faults arising due to incompatibilities among components within a system." *Id.* at 29. Petitioner asserts that "the disclosures in Todd help to ensure that an update is compatible with other components on the computer." *Id.* at 30. Petitioner concludes that "[i]ncorporating the teachings of Todd into Apfel therefore provides the POSITA with information about methods to perform network-based updates in a manner ensuring compatibility." *Id.* (citing Ex. 1003 ¶ 66).

Moreover, Petitioner also sets forth a rationale to combine all three references together, including that the combination of their complementary methods would have merely involved the application of known techniques to improve Apfel's described methods for a similar purpose, namely to ensure that the computer's upgraded configuration is appropriate. *Id.* at 30–32 (citing Ex. 1003 ¶¶ 68–71).

We find Petitioner's detailed rationale to combine, summarized above, persuasive and supported by the record evidence. In contrast, the Patent Owner Response sets forth a conclusory attorney argument against the combination. Namely, Patent Owner argues that the Petition fails to sufficiently articulate a motivation to combine for the following reason:

> The teachings of Apfel are directed to automated, ongoing upgrades to one specific computer application. By contrast, Lillich and Todd are directed to entirely different endeavors of ensuring compatibility of one particular computer component with another particular computer component, and detecting and avoiding conflicts in computer systems, respectively.

PO Resp. 26. In so arguing, Patent Owner essentially contends that because Lillich and Todd are directed to different endeavors from Apfel, Petitioner did not sufficiently articulate a motivation to combine.

Prior art is not limited to references directed to the same endeavor. At most, the law requires prior art to be *analogous* to the claimed invention. "The scope of the prior art includes all analogous art." *Donner Tech., LLC v. Pro Stage Gear, LLC*, 979 F.3d 1353, 1359 (Fed. Cir. 2020). "Two separate tests define the scope of analogous prior art: (1) whether the art is from the same field of endeavor, regardless of the problem addressed and, (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved." *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004). To the extent Patent Owner raises a non-analogous art argument, Patent Owner misconstrues the first prong of the *Bigio* test to require the references to be analogous to each other instead of to the challenged patent, and Patent Owner omits any discussion of the second prong. *Cf. Sanofi-Aventis Deutschland GmbH v. Mylan Pharms. Inc.*, 66 F.4th 1373, 1380 (Fed. Cir. 2023) ("Because Mylan argued that de Gennes is analogous to another prior art reference and not the challenged patent, Mylan did not meet

its burden to establish obviousness . . . ."). Thus, we find Patent Owner's argument unavailing.[10]

Patent Owner further argues that at most, Petitioner proposes one modification to Apfel based on Lillich alone and another modification to Apfel based on Todd alone, and does not propose a modification to Apfel based on both Lillich and Todd. PO Resp. 27. Patent Owner further contends that Petitioner fails to address the incompatibilities between Lillich and Todd that "would arise at least from the relatively distinct natures of Lillich's locally implemented mechanism versus Todd's network-based system." *Id.*

Petitioner disagrees with Patent Owner's characterization of the Petition as presenting Lillich and Todd only as alternatives, as the Petition sets forth a motivation to combine all three references. Reply 26 (citing Pet. 30–32). We agree—Patent Owner's assertion that Petitioner proposes only separate modifications of Apfel/Lillich and Apfel/Todd is inconsistent with the Petition. As we noted above, Petitioner sets forth a rationale to combine all three references together, including that the combination of these references' complementary methods would have merely involved the

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[10] Elsewhere, Patent Owner also asserts that Lillich could not be incorporated into Apfel "without changing fundamental principles of operation, notwithstanding their vastly different solutions to distinguishable problems, and Lillich's requirement that the components being verified must already be implemented locally within the same computer system." PO Resp. 24. We find this argument vague and equally conclusory, and do not address it further.

application of known techniques to improve Apfel's described methods for a similar purpose, namely to ensure that the computer's upgraded configuration is appropriate. Pet. 30–32 (citing Ex. 1003 ¶¶ 68–71). Patent Owner's further argument that "Petitioner fails to address the incompatibilities" between Lillich and Todd is conclusory and similar to its previous argument against the rationale to combine discussed above, and is unavailing for similar reasons.

d. Summary as to Claim 1

For the reasons stated above, we determine that Petitioner has proven by a preponderance of the evidence that claim 1 would have been obvious over Apfel. Moreover, we determine that all the limitations of claim 1 are disclosed by the combination of Apfel, Lillich, and Todd and that sufficient motivation to combine exists for the combination of Apfel, Lillich, and Todd. Therefore, we determine claim 1 would also have been obvious over Apfel, Lillich, and Todd.

5. Independent Claims 11 and 21

Petitioner raises similar arguments for independent claims 11 and 21 as for claim 1. Pet. 32–64. Patent Owner likewise raises similar arguments for these claims. PO Resp. 13–27. The evidence and arguments Petitioner presents are persuasive, by a preponderance of the evidence, for similar reasons with respect to claim 1, that claims 11 and 21 would have been obvious over Apfel.

6. Dependent Claims 2–4, 6–10, 12–14, and 16–20

Petitioner contends that dependent claims 2–4, 6–10, 12–14, and 16–20 would have been obvious over the combination of Apfel, Lillich, and Todd. Pet. 52–64. Petitioner provides a detailed analysis explaining where the combination of Apfel, Lillich, and Todd discloses the additional limitations in these dependent claims, which Patent Owner does not contest. Based on our review of the full record, we determine that Petitioner has shown by a preponderance of the evidence that the combination of Apfel, Lillich, and Todd would have rendered obvious claims 2–4, 6–10, 12–14, and 16–20. *Cf. LG Elecs., Inc. v. Conversant Wireless Licensing S.A.R.L.*, 759 F. App'x 917, 925 (Fed. Cir. 2019) (nonprecedential) ("The Board is not required to address undisputed matters or arguments about limitations with which it was never presented.") (internal quotation omitted).

E. Asserted Obviousness over Apfel, Lillich, Todd, and Pedrizetti

Petitioner argues that Pedrizetti teaches the limitations recited in claims 9 and 19. Pet. 64–70. Patent Owner does not argue the patentability of claims 9 and 19 apart from their parent independent claims. Petitioner provides a detailed analysis explaining where the combination of Apfel, Lillich, Todd, and Pedrizetti discloses the additional limitations in these dependent claims, which Patent Owner does not contest. Petitioner also provides reasoning with a rational underpinning to combine Pedrizetti with Apfel, Lillich, and Todd, and we agree with Petitioner's reasoning. *Id.* at 64–66. Based on our review of the full record, we determine that Petitioner has shown by a preponderance of the evidence that the combination of

Apfel, Lillich, Todd, and Pedrizetti would have rendered obvious claims 9 and 19. *LG Elecs.*, 759 F. App'x at 925.

IV. CONCLUSION[11]

In summary:

Claims	35 U.S.C. §	Reference(s)/Basis	Claims Shown Unpatentable	Claims Not Shown Unpatentable
1–4, 6–14, 16–21	103	Apfel, Lillich, Todd	1–4, 6–14, 16–21	
9, 19	103	Apfel, Lillich, Todd, Pedrizetti	9, 19	
1–3, 9–13, 19–21	103	Apfel, Lillich[12]		
1, 3, 4, 6–11, 13, 14, 16–21	103	Apfel, Todd[13]		

[11] Should Patent Owner wish to pursue amendment of the challenged claims in a reissue or reexamination proceeding subsequent to the issuance of this decision, we draw Patent Owner's attention to the April 2019 *Notice Regarding Options for Amendments by Patent Owner Through Reissue or Reexamination During a Pending AIA Trial* Proceeding. *See* 84 Fed. Reg. 16,654 (Apr. 22, 2019). If Patent Owner chooses to file a reissue application or a request for reexamination of the challenged patent, we remind Patent Owner of its continuing obligation to notify the Board of any such related matters in updated mandatory notices. *See* 37 C.F.R. § 42.8(a)(3), (b)(2).

[12] We do not reach this ground because, as we explain above, Petitioner only relies upon this ground based on an alternative claim construction, which we do not adopt.

[13] We do not reach this ground for the same reason as in the previous footnote.

Overall Outcome			1–4, 6–14, 16–21	

V. ORDER

Accordingly, it is hereby:

ORDERED that claims 1–4, 6–14, and 16–21 of the '088 patent have been proven to be unpatentable; and

FURTHER ORDERED because this is a Final Written Decision, parties to this proceeding seeking judicial review of the Decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

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