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THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 32

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LARRY W. BURTON, TODD D. POSTON,
MARTIN F. JORDY and MICHAEL R. SLAWSON

MAILED

Appeal No. 94-0580
Application 07/738,111¹

JUL 31 1995

PAT & TM OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

ON BRIEF

Before HARKCOM, Vice Chief Administrative Patent Judge, CARDILLO
and FLEMING, Administrative Patent Judges.

FLEMING, Administrative Patent Judge.

DECISION ON REQUEST FOR RECONSIDERATION

Appellants request that we reconsider our decision dated January 4, 1995, with respect to 1) Matt is inapplicable as a 35 U.S.C. § 102(b) reference because it has a publication date less than one year prior to the filing date of the application at issue and 2) the decision fails to consider difference between the invention and the applied art.

¹ Application for patent filed July 30, 1991.

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As to the first point, the Appellants argue that the Publication date of Matt, European Patent Application 0386482, is September 12, 1990 which is less than a year to the filing date of the application at issue. We note that this is correct. However, this does not change the fact that the reference remains properly rejected under 35 U.S.C. § 102 under paragraphs (a) or (e). Therefore, the our affirmation of the rejection under 35 U.S.C § 102 is proper.

As to the second point, Appellants argue that Matt does not teach a group of subscribers in the building shown in Figure 1 and as claimed in Matt's claim 1. Therefore, Appellants conclude that Matt does not teach the limitation of the claimed "distributing means" as recited in Appellants' claim 1 because the demultiplexing is done outside the premises..

However, as pointed out in the decision, we did not rely on the embodiment of Matt's claim 1 and Figure 1. We relied on an alternative embodiment, the embodiment taught in Matt's claim 7 and shown in Figure 10. As stated in the decision, Matt discloses that the demodulating and demultiplexing are done on the premises. Appellants argue for the first time the limitations of claims 11 and 13. However, as pointed out in the decision, Appellants did not argue claims 11 and 13 separately. Thus, we found that claims 11 and 13 stand or fall with claim 1.

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Thus, we find that the rejection of claims 1, 11, and 13 under 35 U.S.C. § 102 as being anticipated by Matt is proper.

Appellants argue that claim 12 is a "newly-asserted obvious rejection ... as being unpatentable over Matt in view of Gavrilovich". However, the Board wishes to point out that this rejection was properly before the Board and the Appellants had an opportunity to argue or amend. Appellants now argue that Gavrilovich does not teach freestanding power supplies based upon a dictionary definition of freestanding. However, this new argument was not present in the Appellants' brief allowing the Examiner an opportunity to respond. Therefore, we do not find it proper for us to consider this argument at this point of the appeal.

We have reviewed our decision in the light of the contents of the Request for Reconsideration. However, we do not find any reason to withdraw our decision.

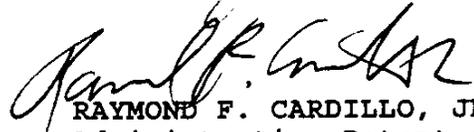
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Appellants' request for reconsideration is denied.

DENIED



GARY V. HARKCOM, Vice Chief)
Administrative Patent Judge)



RAYMOND F. CARDILLO, JR.)
Administrative Patent Judge)



MICHAEL R. FLEMING)
Administrative Patent Judge)

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