



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
11/273,770	11/14/2005	Benjamin Thomas Verschueren	164453-1 (NBCU:0082)	5625
12640	7590	02/12/2013	EXAMINER	
NBCUniversal Media, LLC c/o Fletcher Yoder, P.C. PO Box 692289 Houston, TX 77269-2289			LANGHNOJA, KUNAL N	
			ART UNIT	PAPER NUMBER
			2427	
			MAIL DATE	DELIVERY MODE
			02/12/2013	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BENJAMIN THOMAS VERSCHUEREN,
MICHAEL ANDREW WOELLMER, STEPHEN JOHN
ANGELOVICH, DAVID BRET RABINOWITZ, SARA
DAWN DORASKI, and MONIQUE ANN ROY¹

Appeal 2010-007044
Application 11/273,770
Technology Center 2400

Before ERIC B. CHEN, BRYAN F. MOORE, and LARRY J. HUME,
Administrative Patent Judges.

HUME, *Administrative Patent Judge.*

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134(a) of the Final rejection of claims 1-31. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ The Real Party in Interest is General Electric Company. (App. Br. 2.)

STATEMENT OF THE CASE ²

The Invention

Appellants' invention is directed to a schedule management system and method and, more particularly, to a system and method for generating an advertising schedule for use in an advertising medium. Spec. ¶ [0001].

Exemplary Claims

Claim 1 is an exemplary claim representing an aspect of the invention which is reproduced below (*emphasis* added):

1. A method for generating an advertising schedule, the method comprising:

automatically generating an advertisement schedule based on an inventory of available advertising slots characterized by a projected audience and one or more scheduling criteria for each advertisement to be scheduled.

Claim 2 is an exemplary claim representing an aspect of the invention which is reproduced below (*emphasis* added):

2. The method of claim 1, ***wherein the inventory of available advertising slots is on one or more broadcast networks.***

² Our decision refers to Appellants' Appeal Brief ("App. Br.," filed Nov. 12, 2009); Reply Brief ("Reply Br.," filed Mar. 30, 2010); Examiner's Answer ("Ans.," mailed Feb. 4, 2010); Final Office Action ("FOA," mailed May 12, 2009); and the original Specification ("Spec.," filed Nov. 14, 2005).

Claim 13 is an exemplary claim representing an aspect of the invention which is reproduced below (*emphasis* added):

13. A system for generating an advertising schedule, the system comprising:

a data source;

one or more computers connected to the data source, wherein the one or more computers are configured to execute one or more applications related to the generation of an advertising schedule; and

a network connecting the one or more computers and the data source, *wherein the one or more applications executed on the one or more computers interact with the data source to automatically generate the advertising schedule based on an inventory of available advertising slots characterized by a projected audience and one or more scheduling criteria for each advertisement to be scheduled.*

Prior Art

The Examiner relies upon the following prior art in rejecting the claims on appeal:

Kubler	US 2004/0158865 A1	Aug. 12, 2004
Eldering	US 7,331,057 B2	Feb. 12, 2008

Rejections on Appeal

1. Claims 1, 5-11, 13-14, 18-24, 26-28, and 30-31 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Kubler. Ans. 3.

2. Claims 2-4, 12, 15-17, 25, and 29 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Kubler in view of Eldering. Ans. 6.

ISSUES AND ANALYSIS

We have reviewed the Examiner's rejections in light of Appellants' arguments that the Examiner has erred. We disagree with Appellants' conclusions with respect to the claims on appeal, and we adopt as our own (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken and (2) the reasons and rebuttals set forth by the Examiner in the Examiner's Answer in response to Appellants' Arguments. However, we highlight and address specific findings and arguments regarding claims 1, 2, 4, and 13 for emphasis as follows.

1. Anticipation Rejection of Claims 1, 5-11, 26-28, 30, and 31

Issue 1

Appellants argue (App. Br. 6-9; Reply Br. 4-6) that the Examiner's anticipation rejection of claim 1 under 35 U.S.C. § 102(b) over Kubler is in error. These contentions present us with the following issue:

Issue 1: Did the Examiner err in finding that Kubler discloses Appellants' claimed method for generating an advertising schedule that includes, *inter alia*, "automatically generating an advertisement schedule based on an inventory of available advertising slots characterized by a projected audience and one or more scheduling criteria for each advertisement to be scheduled," as recited in claim 1?

Analysis

We agree with the Examiner's finding that Kubler discloses "automatically generating an advertisement schedule based on an inventory of available advertising slots characterized by a projected audience and one

or more scheduling criteria for each advertisement to be scheduled,” as recited in claim 1. Ans. 3 and 9-10.

Further, and while we generally agree with Appellants’ contention that “the present application teaches automatic generation of an advertisement schedule based on an inventory of available advertising slots characterized by a projected audience and one or more scheduling criteria for each advertisement to be scheduled” (App. Br. 7 (*emphasis* in original)), we agree with the Examiner’s finding that Kubler discloses this limitation, and thus anticipates claim 1. Ans. 3 and 9-10.

Based upon their Specification, Appellants correctly contend that:

[T]he “inventory” of the present application *may be* defined as available advertising slots in one or more advertising networks and one or more broadcast mediums. Similarly, in a non-limiting example, the “scheduling criteria” of the present application *may be* defined as a criteria generated based on a desired number of audience members having one or more desired demographics attributes, one or more of the viewing trends, advertising rate, or projected ratings. Furthermore, the “projected audience” of the present application *includes at least one of* the television viewers, radios listeners, and internet users.

App. Br. 8 (*emphasis* added) (citing Spec. ¶¶ [0023] - [0029]). In addition, Appellants also correctly contend that:

[S]cheduling criteria taught by the present application *may include* a criteria generated based on a desired number of audience members having *one or more* desired demographics attributes, *one or more* of the viewing trends, advertising rate, or projected ratings. The support for Appellants’ arguments may be found in paragraph [0024] of the present application.

App. Br. 8 (*emphasis* added) (citing Spec. ¶ [0024]). There is no requirement in the above-cited portions of the Specification to interpret that the conditional terms (e.g., “may include” or that more than one (attributes or trends)) are required by the claims. Therefore, we find that Appellants’ arguments are not commensurate with the scope of the claims, as Appellants argue limitations that are not present in the claims on appeal.

We particularly agree with the Examiner that Kubler creates an advertising schedule based on input received from motion picture theaters, and that Kubler teaches that advertising agents #1 to ad agent #n can view all the schedule slots and pre book advertising space, and are connected to clearing house 10. In addition, as the Examiner points out, Kubler’s processor 16 is programmed to create an advertising display schedule based on input received from the ad agents, and which is distributed via internet to the individual theaters. Ans. 9-10 (citing Kubler Figs. 1 and 3, and ¶¶ [0033]-[0041] and [0097]). We agree with the Examiner, and find that at least the portion of Kubler cited by the Examiner teaches or suggests the limitation “automatically generating an advertisement schedule based on an inventory of available advertising slots characterized by a projected audience and one or more scheduling criteria for each advertisement to be scheduled,” as recited in claim 1.

In further support of the Examiner’s claim interpretation, we agree with the Examiner’ additional findings regarding Kubler’s disclosure:

Theater systems collect[] real-time data to determined how well the criteria was met. All the collected data can include tickets sold, tactic viewing, predicted eye ball count, minutes before feature, genre match, actual demographic matches, predicted

demographic matches, etc. . . Based on the degree of match the advertiser is credited for lack of predicted results or pays the theater a bonus for exceeding results

Furthermore, appellant argues that projected audience and one or more scheduling criteria is not met by Kubler et al. The examiner respectfully disagrees. The data collected in real-time from theaters include predicted eye ball count, actual demographic matches and predicted demographic matches, wherein advertisers prebook advertising space based on criteria at a specific price and either get credited or pays the theater a bonus for exceeding results based on how well the criteria was met

Ans. 10 (citing Kubler Figures 1 and 3; ¶¶ [0032]-[0041]). We find that claim 1 reads on this disclosure and the previously cited portions of Kubler, *supra*.

Appellants correctly contend that “Kubler teaches creation of advertisement schedule based upon received bookings or *inputs* from ad agents.” Reply Br. 5 (*emphasis* in original) (citing Kubler Fig. 3 and ¶ [0097]). However, we disagree with Appellants that “Kubler fails to disclose automatic generation of [an] advertising schedule” (Reply Br. 5), for the reasons discussed above.

Accordingly, Appellants have not persuaded us of any error in the Examiner’s characterization of the cited art and related claim construction. Therefore, we sustain the Examiner’s anticipation rejection of claim 1. For essentially the same reasons argued by the Examiner with respect to independent claim 1, and lacking any specific and substantive arguments by Appellants for the patentability of independent claims 26, 30, and 31 (*see* App. Br. 11-12; Reply Br. 10), we affirm the Examiner's anticipation

rejection of claims 26, 30, and 31, which recite the disputed limitations in commensurate form. As Appellants have not provided separate arguments with respect to dependent claims 5-11 and 27-28, we similarly sustain the Examiner's anticipation rejection of these claims under 35 U.S.C. § 102(b).

Observations Regarding Potential Unpatentability Under §103

We decline to reverse the anticipation rejection of claim 1 for the reasons stated above. Although not dispositive to our Decision in this case, and assuming, *arguendo*, that Kubler does not disclose *automatic* generation of an advertising schedule as argued by Appellants and as variously recited in independent claims 1, 26, 30, and 31, we note that it is generally obvious to automate a known manual procedure. Our reviewing court stated in *Leapfrog Enterprises Inc. v. Fisher-Price Inc.*, 485 F.3d 1157 (Fed. Cir. 2007) that one of ordinary skill in the art would have found it obvious to combine an old electromechanical device with electronic circuitry “to update it using modern electronic components in order to gain the commonly understood benefits of such adaptation, such as decreased size, increased reliability, simplified operation, and reduced cost. . . . The combination is thus the adaptation of an old idea or invention . . . using newer technology that is commonly available and understood in the art.” *Id.* at 1162.

If Appellants were assumed to be correct in their contention that Kubler does not anticipate claim 1 (a contention with which we specifically do not agree), it could be argued that it would be obvious to automate a known manual advertisement scheduling approach using the inputs recited in claim 1, and as commensurately recited in claims 13, 26, 30, and 31.

In re Venner provides further support for the proposition that automation of a manual process would be obvious. *See In re Venner*, 262 F.2d 91, 94 (CCPA 1958) (Appellant argued that claims to a permanent mold casting apparatus for molding trunk pistons were allowable over the prior art because the claimed invention combined “old permanent-mold structures together with a timer and solenoid which automatically actuates the known pressure valve system to release the inner core after a predetermined time has elapsed.”). The court held that broadly providing an automatic or mechanical means to replace a manual activity which accomplished the same result is not sufficient to distinguish over the prior art. In this case, Appellants’ Background Section of the Specification discloses:

The availability of information within the above subsystems is distributed among a number of functions and throughout different stages of the broadcast process. In addition, the function driven processes mentioned above, are domain specific and may not function in an integrated fashion. Optimization is generally possible only within a particular functional group rather than across the broadcast system as a whole, leading to a limited ability to efficiently plan, manage and place billable content within a broadcast schedule. This may result in a partitioning and isolation of information between the different function driven processes that comprise the broadcast system ***and may require manual intervention to enable a smooth process flow between the subsystems of such a system.***

Spec. ¶ [0006] (***emphasis*** added). Arguably this and the preceding portions of Appellants’ Specification teaches a known, ***non-automated*** prior art method of developing an “advertisement schedule based on an inventory of available advertising slots characterized by a projected audience and one or

more scheduling criteria for each advertisement to be scheduled.”

Therefore, although the issue of obviousness is not before us, even assuming that it is not anticipated, automating the advertising schedule in the manner presently claimed would be obvious.

2. Anticipation Rejection of Claims 13-14 and 18-24

Issue 2

Appellants argue (App. Br. 9-11; Reply Br. 6-9) that the Examiner’s anticipation rejection of claim 13 under 35 U.S.C. § 102(b) over Kubler is in error. These contentions present us with the following issue:

Issue 2: Did the Examiner err in finding that Kubler discloses Appellants’ claimed system for generating an advertising schedule, which, in addition to the commensurate limitation addressed in *Issue 1, supra*, additionally recites, *inter alia*, “one or more computers connected to the data source, wherein the one or more computers are configured to execute one or more applications related to the generation of an advertising schedule,” as recited in claim 13?

Analysis

We find that claim 13 stands or falls with our determination regarding Issue 1 in connection with claim 1, *supra*, as well as Issue 2, identified above. We agree with the Examiner’s finding that Kubler discloses “one or more computers connected to the data source, wherein the one or more computers are configured to execute one or more applications related to the generation of an advertising schedule,” as recited in claim 13. Ans. 11-13.

Appellants contend that:

[A]lthough the theaters T1 to Tn [of Kubler] are configured to book advertising slots or send messages, the theaters are incapable of executing applications for automatically generating an advertising schedule as disclosed in claim 13.

In contrast, the present application discloses that the **one or more computers and the data sources are connected via a network**, thereby resulting in a centralized system for automated generation of the advertising schedule [as disclosed in claim 13].

. . . .

. . . [T]he clearing house 10 of Kubler including **a processor 16, source of still video advertisements 14, input output port 18, display schedule RAM 20 and RTC 24** is not similar to the **centralized data source 12** of the present application. More particularly, the data source **is a common data repository** configured for constant feedback and update of information within various functional groups, by *centrally managing the information shared by various functional groups* i.e. by the one or more computers [of the present application].

App. Br. 10 (**emphasis** in original) (citing Kubler ¶ [0027] and citing Spec. ¶ [0022]). We disagree with Appellants' contentions that argue limitations not present in the claims, such that Appellants' arguments are not commensurate with the scope of the claims.

Further, in this regard, we agree with the Examiner's findings that:

[Random Access Memory] RAM 34 of T1-Tn stores the display schedule data received from the clearing house 10, [and] has a bidirectional connection to processor 32. Another RAM 38, which stores video advertisements received from clearing house 10 in electronic form, also has a bidirectional connection to processor 32. Processor 32 forwards time stamp messages to a local real time clock 36, which is synchronized to RTC 24

Processor 32 retrieves video advertisements in electronic form from RAM 38 in accordance to the display schedule under the control of local RTC 24 and feeds them to a digital projector or image injector for interleaving with the feature motion picture program being displayed . . . , [which] reads on claimed “one or more application[s] executed on the one or more computers interacting with data source”. Therefore, Kubler et al reads on [the] claimed limitation.

Ans. 12-13 (citing Figs. 1-3, and 5; ¶ [0029]).

Accordingly, Appellants have not persuaded us of any error in the Examiner’s characterization of the cited art and related claim construction, and we sustain the Examiner’s anticipation rejection of claim 13. As Appellants have not provided separate arguments with respect to dependent claims 14 and 18-24, we similarly sustain the Examiner’s anticipation rejection of these claims under 35 U.S.C. § 102(b).

3. Unpatentability Rejection of Claims 2-4, 12, 15-17, 25, and 29

Issue 3

Appellants argue (App. Br. 16-18) that the Examiner’s unpatentability rejection of claim 2 under 35 U.S.C. § 103(a) over Kubler in view of Eldering is in error. These contentions present us with the following issue:

Did the Examiner err in finding that Appellants’ method of claim 2 is unpatentable over the combination of Kubler with Eldering because “the Examiner has not shown objective evidence of the requisite motivation or suggestion to modify or combine the cited references to reach the present claims,” as required by *KSR*?

Analysis

We agree with the Examiner's finding that "[Kubler] is silent with respect to available slots [] 'on one or more broadcast networks,' [but] Eldering teaches available slots 'is on one or more broadcast networks.'" Ans. 6-7 (citing Eldering Fig. 2; Col. 7:41-65). We further agree with the Examiner's conclusion "that one of ordinary in the skill of art at the time the invention was made [would be motivated] to modify Kubler by specially providing available slots is on one or more broadcast networks for the purpose of allowing the advertiser to reach the same number of subscribers as by purchasing a group of available slots." Ans. 14.

We further agree with the Examiner's clarification in the "Response to Arguments" section that Eldering Fig. 2 teaches that:

[A] combination of avails and subavails are available on different channels (i.e. [a] broadcast network) for advertisers to buy in order to reach . . . [a] large . . . audience . . . [In combining] Kubler et al and Eldering et al, the combination is directed towards buying an advertisement space in order to reach [a] large audience. Therefore, the combination teaches [the] claimed limitation [regarding an] inventory of available advertising slots in . . . one or more broadcast networks/mediums.

Ans. 15 (citing Eldering Abstract, Col. 5:20-30, and Col. 8:1-8).

In *KSR*, the Court stated "[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007).

When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill. . . . [A] court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.

Id. at 417.

Finally, we note that the U.S. Supreme Court has held that “[t]he obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation, or by overemphasis on the importance of published articles and the explicit content of issued patents.” *Id.* at 419. Instead, the relevant inquiry is whether the Examiner has set forth “some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (cited with approval in *KSR*, 550 U.S. at 418).

We disagree with Appellants and find that the Examiner has met his burden by providing an articulated reason with a rational underpinning for combining Kubler with Eldering, as cited, *supra*. Appellants make similar arguments against the Examiner’s stated basis for motivation to combine Kubler with Eldering with respect to dependent claims 4 and 17. App. Br. 18-19. Similarly, Appellants’ arguments that the Examiner failed to meet his burden under *KSR* for establishing a prima facie case for unpatentability of these claims are not persuasive.

Further, Appellants have not rebutted the Examiner's clarification of the stated basis for the motivation to combine in the Answer, and merely state in the Reply Brief that "[r]ejected claims 2-4, 12, 15-17, 25 and 29 are directly or indirectly dependent on . . . one of the independent claims 1, 13 and 26[,] and are believed to be allowable for at least the same reasons as discussed above with reference to claims 1, 13 and 26." Reply Br. 10. Accordingly, Appellants have not convinced us of any error in the Examiner's characterization of the cited art and related claim construction, so that we sustain the Examiner's unpatentability rejection of dependent claim 2. As Appellants have not provided separate arguments with respect to dependent claims 3, 4, 12, 15-17, 25, and 29, we similarly sustain the Examiner's unpatentability rejection of these claims under 35 U.S.C. § 103(a).

CONCLUSIONS

(1) The Examiner did not err with respect to the anticipation rejection of claims 1, 5-11, 13-14, 18-24, 26-28, and 30-31 under 35 U.S.C. § 102(b) over Kubler, and the rejection is sustained.

(2) The Examiner did not err with respect to the unpatentability rejection of claims 2-4, 12, 15-17, 25, and 29 under 35 U.S.C. § 103(a) over Kubler in view of Eldering, and the rejection is sustained.

DECISION

The decision of the Examiner to reject claims 1-31 is affirmed.

Appeal 2010-007044
Application 11/273,770

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2011).

AFFIRMED

msc