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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DAVID COLE EDWARDS

Appeal 2011-000601
Application 11/393,256
Technology Center 3700

Before JAMES P. CALVE, WILLIAM A. CAPP, and
SCOTT A. DANIELS, *Administrative Patent Judges*.

CALVE, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134 from the rejection of claims 1-33. App. Br. 5. Claims 34-40 are withdrawn. *Id.* We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

CLAIMED SUBJECT MATTER

Claims 1 and 25 are independent. Claim 1 is reproduced below:

1. A method for developing video games, comprising:
 - providing a context sensitive graphic user interface configured to receive input selections and provide options in response to the input selections;
 - selecting images for use in the video game;
 - selecting activities related to the video game, the activities each having a type and at least some of the activities related to the images;
 - storing data associated with the activities; and
 - executing an engine that reads the data associated with the activities and uses the images to play the video game.

REJECTIONS

Claims 1-6 and 8 are rejected under 35 U.S.C. § 102(b) as anticipated by Weiss (US 2003/0148806 A1; pub. Aug. 7, 2003).

Claims 7-18 and 20-23 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Weiss.

Claims 19, 24-30, and 32, and 33 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Weiss, Shimomura (US 6,468,161 B1; iss. Oct. 22, 2002), and Eiba (US 6,117,013; iss. Sep. 12, 2000).

Claim 31 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Weiss, Shimomura, and Takahashi (US 2003/0017863 A1; iss. Jan. 23, 2003).

ANALYSIS

Claims 1-6 and 8 as anticipated by Weiss

Regarding claim 1, the Examiner found that Weiss discloses a method of using an authoring software tool for developing video games comprising a

context sensitive graphical user interface (GUI). Ans. 4. The Examiner also found that Weiss discloses that when a designer decides to select graphics, audio clips, or video clips, the interface provides options (i.e., library data of graphics, audio clips, or video clips) to select. Ans. 9 (citing para. [0031]). The Examiner reasoned that a prior selection has to be made for a designer to initiate the next selection as the GUI sequentially provides options to the designer to solicit responses and thus each selection depends on a previous selection input by a designer. Ans. 9-10. The Examiner found that Weiss discloses selecting or creating activities (i.e., a set of instructions) related to a video game where the activities have a type and at least some of the activities are related to images because a designer uses a GUI to design visual, mechanical movement, sound graphics, and logic aspects or activities of a desired game presentation. Ans. 4 (citing paras. [0041, 0043]). The Examiner also found that Weiss assembles pre-made elements stored in libraries and the activities are produced on the fly from these library selections via instructions and relate to video games and images. Ans. 10 (citing paras. [0036, 0052]). The Examiner further found that a designer can create a game without personally inputting or writing any programming code or machine language code by using graphic files, audio clips and video clips in file formats. Ans. 10.

Appellant argues that Weiss does not disclose “a context sensitive graphical user interface” because Weiss expressly teaches that a plurality of presentation options are sequentially and interactively presented to the designer in a pre-arranged order so a designer can interactively respond to the presented options. App. Br. 12 (citing paras. [0041, 0054]). Appellant argues that claim 1 calls for a context sensitive graphic user interface to be

“configured to receive input selections and provide options in response to the input selection” whereas Weiss provides options sequentially, that is, in a prearranged order irrespective of user input and without regard to what was previously selected, and the Examiner has not shown that the options must be dependent on previous selections. App. Br. 12-13; Reply Br. 3-4.

Appellant also argues that the mere suggestion that options are presented because a prior selection was made does not necessarily teach that the options are dependent upon *what* was selected such that the graphical user interface is context sensitive. Reply Br. 4.

These arguments do not apprise us of error in the Examiner’s findings that Weiss discloses a context sensitive GUI by disclosing an interface that provides options such as library data of graphics, audio clips, and video clips when a designer selects graphics or audio or video clips. Ans. 9 (citing para. [0031]). Nor do these arguments persuade us of error in the Examiner’s findings that Weiss discloses a GUI that presents options in a sequential order in response to a previous user selection. Ans. 9-10. Appellant does not dispute this finding except to argue that such a selection “does not necessarily teach that the options are dependent upon what was selected such that the graphical user interface is context sensitive.” Reply Br. 4. Claim 1 is not so limited and we decline to read such a limitation into claim 1. Weiss also discloses that in response to a designer’s selection of valid presentation options at step 93, the selected options and the components that they require are assembled and presented to the designer as utility library 60, presentation library 61, audio library 63, video library 64, and graphics library 65. *See* paras. [0054-0055]; figs. 2, 3A, 3B.

Appellant also argues that Weiss teaches that instructions are created to establish the flow of a game and the Examiner misinterpreted “creating instructions” with “selecting activities related to the video game, the activities each having a type and at least some of the activities related to the images.” App. Br. 14-15. Appellant argues that Weiss does not disclose that the instructions or activities created by the instructions have a type and are related to the images because paragraph [0036] of Weiss teaches that the game data player presents a sequence of instructions that control operation of the gaming device and paragraph [0052] teaches that game data collector stores game files that include a sequence of game instructions that control operation of a game data player. Reply Br. 5-6. These arguments do not persuade us of error in the Examiner’s findings that Weiss selects activities related to a video game such as various scripts, graphics, audio clips, and video clips and some of the activities relate to images for the video game. Ans. 4, 9-10, *see* Weiss, para. [0031]. Once these desired game design files are created by a designer’s selections, authoring computer 11 transfers the game design files to game data collector 15, which converts the game design files to a set of instructions that correspond to each operation required to play the newly designed game. Weiss, paras. [0032-0033].

Claims 2 and 3

Claims 2 and 3 depend from claim 1 and recite that the data associated with the activities contain no programming code (claim 2) and no machine language code (claim 3). The Examiner found that Weiss discloses activities that contain no programming or machine language code by teaching that the authoring system allows a designer to design a game without inputting or writing any programming or machine language code and the graphic files,

audio clips and video clips are in file formats such as gif, jpeg, mp3, or avi that are not programming language. Ans. 4-5 (citing paras. [0027, 0031]), 10.

Appellant argues that the Examiner has not established where Weiss teaches that graphics, audio clips and video clips comprise no programming code or machine language code as recited in claims 2 and 3. App. Br. 16. Appellant also argues that although Weiss discloses that a designer need not know computer programming to select the various script, graphics, audio clips, and video clips to be used in the game, Weiss contains no express or inherent teaching that data associated with the alleged activity does not include programming or machine language code. App. Br. 17-18. These arguments do not persuade us of error in the Examiner's finding that Weiss discloses data associated with activities such as graphics, audio clips, and video clips in file formats such as gif, jpeg, mp3, or avi and these files are not programming language or machine language code.

Claim 4

Appellant argues that Weiss does not disclose “storing data associated with the activity in a frame of an action file” as recited in claim 4. App. Br. 19. We agree with the Examiner that Weiss discloses that each set of game design files is compiled to form plural game data file sets corresponding to frames in an action file that are used to play a game. Ans. 5 (citing paras. [0018-0019]); 10-11. Appellant does not provide a lexicographic definition of “frame” in the Specification or cite a commonly understood meaning of “frame” that distinguishes the claimed frame from the game design files of Weiss. *See In re Gleave*, 560 F.3d 1331, 1334 (Fed. Cir. 2009) (a reference need not satisfy an *ipsissimis verbis* test).

Claims 5 and 8

Appellant also argues that Weiss does not disclose that storing each related activity in a different frame of the action file and storing different activities in frames of other action files as recited in claim 5. App. Br. 20-21. This argument does not persuade us of error in the Examiner's finding that Weiss discloses that sets of game design files are compiled to form a plurality of game data file sets and these files correspond to different frames. Ans. 5, 11 (citing Para. [0019]).

We sustain the rejection of claims 1-6 and 8.

Dependent claims 7-18 and 20-23 as unpatentable over Weiss

Claims 10-18 recite various activity types such as a launch, a damage, a go to, an if action to self, a delete, a delete self, a reload, a bonus, and a picture. Claims 20-23 recite that selecting activities comprise identifying an absolute position at which a character is to appear (claim 20), identifying a delta position where the character should move to (claim 21), specifying a layer where a character is to appear (claim 22), and specifying a relative size of a character in a video game (claim 23). The Examiner found that Weiss discloses various scripts for game play, graphics, audio clips, and video clips and that the claimed activity types are a matter of design choice that is well within the level of ordinary skill and yield predictable results. Ans. 6, 11.

Appellant argues that Weiss does not provide any disclosure of the features recited in claims 10-18 and 20-23 and therefore, the Examiner's reliance on design choice does not establish that these features are obvious. App. Br. 24-33. We agree. The Examiner's determination that claims 10-18 and 20-23 are obvious as a matter of design choice is not supported by a rational underpinning. The Examiner has not adequately explained how the

disclosure in Weiss of scripts for game play, graphics, audio clips, and video clips renders obvious the claimed selectable types and selecting activities. Appellant discloses that the features perform particular functions. *See Spec.* 16-20, paras. [0065-0070]; *see also In re Chu*, 66 F.3d 292, 298-99 (Fed. Cir. 1995) (design choice is appropriate when an applicant fails to set forth any reason why differences between a claimed invention and the prior art result in a different function). We do not sustain the rejection of claims 10-18 and 20-23. Appellant does not present argument for the separate patentability of claims 7-9. Therefore, we sustain the rejection of those claims.¹

Claims 19, 24-30, 32, and 33 unpatentable over Weiss, Shimomura, Eiba

Claim 25 recites a tool for developing video games comprising a context sensitive graphical user interface for creating activities related to game play at least some pre-rendered in 3-dimensional images. Appellant argues that Shimomura and Eiba do not provide disclosures that cure the deficiencies of Weiss for claim 1. App. Br. 33-34. Appellant argues that claims 19 and 24 are allowable due to their dependency from claim 1, and claims 26-30, 32, and 33 are allowable due to their dependency from claim 25. App. Br. 34. As we sustain the rejection of claim 1, these arguments are not persuasive. We sustain the rejection of claims 19, 24-30, 32, and 33.

¹ *See In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011) (noting with approval the Board's practice of requiring an appellant to identify alleged error in the examiner's rejection and "[t]he panel then reviews the obviousness rejection for error based upon the issues identified by appellant, and in light of the arguments and evidence produced thereon."); 37 C.F.R. § 41.37(c)(1)(vii).

Claim 31 unpatentable over Weiss, Shimomura, and Takahashi

Appellant argues that Shimomura and Takahashi do not remedy the deficiencies of Weiss as to claim 25, from which claim 31 depends. App. Br. 35. As we sustain the rejection of claim 25, there are no deficiencies for Shimomura and Takahashi to cure. We sustain the rejection of claim 31.

DECISION

We AFFIRM the rejection of claims 1-6 and 8 under 35 U.S.C. § 102(b) as anticipated by Weiss.

We AFFIRM the rejection of claims 7-9 under 35 U.S.C. § 103(a) as unpatentable over Weiss.

We REVERSE the rejection of claims 10-18 and 20-23 under 35 U.S.C. § 103(a) as unpatentable over Weiss

We AFFIRM the rejection of claims 19, 24-30, 32, and 33 under 35 U.S.C. § 103(a) as unpatentable over Weiss, Shimomura, and Eiba.

We AFFIRM the rejection of claim 31 under 35 U.S.C. § 103(a) as being unpatentable over Weiss, Shimomura, and Takahashi.

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).

AFFIRMED-IN-PART

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