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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* DAVID P. GREEN, CHRIS ROY, ROBERT A. BERGMAN,  
SCOTT M. BENOIT, JOY A. ARAI, ERIC J. BENNETT, TYSON L.  
WINTIBAUGH, DAVID ERIC SHANKS, and TOMMI ITEN

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Appeal 2013-002299  
Application 12/883,022  
Technology Center 2400

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Before ADAM J. PYONIN, JAMES W. DEJMEK, and JESSICA C.  
KAISER, *Administrative Patent Judges*.

PYONIN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134(a) from a final rejection of claims 1–21. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

STATEMENT OF THE CASE

Appellants' disclosure relates to "a user interface for use with a content delivery system." Abstract. Claims 1 and 8 are illustrative and reproduced below, with additional paragraphing:

1. A method of managing downloads, comprising:
  - presenting a user interface including one or more representations of one or more programs available for download to a device associated with the user interface;
  - receiving an input from a user via the user interface to download a first one of the programs;
  - determining a status of a download process associated with the first program, wherein the status of the download process includes a first stage in which the download process is incomplete,
    - wherein initiation of a presentation of the first program during the first stage results in the presentation being completed without delay for further downloading during the presentation,
    - wherein the status of the download process includes a second stage, and wherein initiation of the presentation of the first program during the second stage is likely to result in a download delay occurring during a first segment of the presentation;
  - in response to determining that the download process has entered the first stage, altering a first characteristic of the download progress bar to include a first indication that the download process is in the first stage; and
  - in response to determining that the download process has entered the second stage, altering the first characteristic of the download progress bar to include a second indication of the first segment of the presentation that is likely to include the download delay.

8. A tangible computer readable medium having instructions stored thereon that, when executed, cause a machine to at least:
  - present a user interface including one or more representations of one or more programs available for download to a device associated with the user interface;

receive an input from a user via the user interface to download a first one of the programs;

determine a status of a download process associated with the first program, wherein the status of the download process includes a first stage in which the download process is incomplete,

wherein an initiation of a presentation of the first program during the first stage results in the presentation being completed without delay for further downloading during the presentation,

wherein the status of the download process includes a second stage, and wherein initiation of the presentation of the first program during the second stage is likely to result in a download delay occurring during a first segment of the presentation;

in response to the download process entering the first stage, alter a first characteristic of a download progress bar to include a first indication that the download process is in the first stage; and

in response to determining that the download process has entered the second stage, alter the first characteristic of the download progress bar to include a second indication of the first segment of the presentation that is likely to include the download delay.

Claims 8–14 stand rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter. Final Action 3.

Claims 1–5, 8–12, and 15–18 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Flick (US 2008/0168516 A1; July 10, 2008), Horn (US 7,240,358 B2; July 3, 2007), and Rush (US 7,131,069 B1; Oct. 31, 2006). Final Action 5.

Claims 6, 13, and 19 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Flick, Horn, Rush, and Coburn (US 2008/0163307 A1; July 3, 2008). Final Action 11.

Claims 7, 14, 20, and 21 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Flick, Horn, Rush, and Webb (US 6,934,916 B1; Aug. 23, 2005). Final Action 12.

### ISSUES

Appellants' arguments present us with the following issues:

- A. Did the Examiner err in rejecting claims 8–14 under 35 U.S.C. § 101 for being directed to non-statutory subject matter? App. Br. 6–9.
- B. Did the Examiner err in rejecting independent claims 1, 8, and 15 under 35 U.S.C. § 103, because the cited art “does not determine or provide an indication regarding which segment of a presentation is likely to include a download delay”? App. Br 13; *see also* App. Br. 16–17, 19–20.
- C. Did the Examiner err in rejecting dependent claims 4, 11, and 17 under 35 U.S.C. § 103, because the cited art “would not determine or provide different indications of two different segments of a media presentation in which potential interruptions are likely to occur”? App. Br. 15, *see also* App. Br. 18, 21.

## ANALYSIS

We adopt the Examiner’s findings and conclusions (*see* Final Action 2–14; Ans. 2–12) as our own, and we add the following primarily for emphasis.

### *A. Claims 8–14: Statutory Subject Matter Rejection*

Regarding the above Issue A, independent claim 8, as well as dependent claims 9–14, are directed to a “tangible computer readable medium having instructions stored thereon.” Appellants argue the Examiner erred in rejecting these claims for encompassing non-statutory subject matter. Appellants assert that “tangible” and “instruction stored thereon,” as recited in claim 8, limit the scope of the claims to articles of manufacture, and thus satisfy the requirements of 35 U.S.C. § 101. App. Br. 6–9. We disagree with Appellants.

First, Appellants’ argument that a “medium storing instructions cannot reasonably be construed as a propagating signal or carrier wave” (App. Br. 8) is unpersuasive. Subsequent to the non-precedential decision in *Ex parte Hu* cited by Appellants (App. Br. 7), the Board held in a precedential decision that a recited machine-readable storage medium, having a program stored thereon, and absent an express limitation of scope to non-transitory storage media, is ineligible under § 101 because it encompasses transitory media. *Ex parte Mewherter*, 107 USPQ2d 1857, 1862 (PTAB 2013) (precedential). Accordingly, we agree with the Examiner’s finding that “instructions stored thereon,” as recited in claim 8, encompasses non-statutory subject matter.

Second, regarding “tangible,” Appellants rely on *In re Nuijten* as support for the argument that “tangible” connotes patentable subject matter, because the Court, while holding that transitory signals were not patentable, relied on definitions that “address ‘articles’ of ‘manufacture’ as being ***tangible*** articles or commodities” (App. Br. 6 (citing *In re Nuijten*, 500 F.3d 1346, 1356 (Fed. Cir. 2007))). However, a statement that articles of manufacture are tangible does not support the proposition that all tangible things are articles of manufacture. Accordingly, we are not persuaded the Examiner erred in finding the broadest reasonable interpretation of a “tangible” medium includes non-statutory transitory signals (Final Action 4; Ans. 2–3).

Further, the Specification, as cited by Appellants, provides only a non-limiting list of examples of storage devices and types of computer readable digital media, including “any other suitable media.” *See* Reply Br. 4–5 (citing Spec. ¶¶ 28, 59). Thus, the Specification does not limit a “tangible computer readable medium having instructions stored thereon” to non-transitory media. We sustain the 35 U.S.C. § 101 rejection of claims 8–14.

*B. Independent Claims 1, 8, and 15: Obviousness Rejection*

Regarding the above Issue B, Appellants argue the Examiner “does not address or consider . . . a segment that is likely to include a download delay.” App. Br. 12. Particularly, Appellants contend “the system of Horn makes a binary. . . determination of whether uninterrupted playback is possible” rather than showing segments with delays (Reply Br. 8, *see also* App. Br. 11–15), and Rush discloses “breakpoints,” which are “not

indicative of whether an interruption will occur or when (in a corresponding presentation) an interruption will occur” for different “piece[s] of content” (App. Br. 14).

We find Appellants’ arguments unpersuasive because they fail to address the Examiner’s rejection, which is based on “the combination of the given references.” Ans. 9. Nonobviousness cannot be established by attacking the references individually when the rejection is predicated upon a combination of prior art disclosures. *See In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). Here, the Examiner finds, and we agree, Flick teaches “a download status bar” and teaches “the client determines the amount of media content that is needed for uninterrupted playback based upon the average download rate.” Final Action 5–6; *see also* Ans. 4–5.

The Examiner further finds Horn teaches “a process of determining a download stage based on the download rate, playback rate, and the amount of data stored at the receiver . . . [indicating] the segment of the content wherein playback will be delayed for downloading.” Ans. 8; *see also* Final Action 6 (citing Horn col. 25, ll. 13–27). We agree with the Examiner that Horn thus “shows the segment of the content where playback will be delayed” because Horn teaches determining which content blocks (i.e., segments) are likely to have interrupted playout. Ans. 5 (citing Horn Fig. 11).

The Examiner also finds, and we agree, Rush teaches a “progress bar that changes from one color to the next based on when the progress bar expression reaches particular thresholds.” *See* Ans. 7; Final Action 7–8. The Examiner relies on a combination of these as teaching the argued limitation. Ans. 5 (combining Flick, Horn, and Rush “brings about a

progress bar that changes color when the user may facilitate uninterrupted playback and when a segment of the presentation is likely to include a download delay”). We agree with the Examiner that the combination of Flick, Horn, and Rush teaches or suggests a download progress bar with “a second indication of the first segment of the presentation that is likely to include the download delay” as recited in claim 1.

Accordingly, we sustain the Examiner’s § 103(a) rejection of independent claim 1, and the rejection of independent claims 8 and 15 which recite substantially similar limitations.

*C. Dependent Claims 4, 11, and 17: Obviousness Rejection*

Regarding the above Issue C, Appellants argue the Examiner erred in rejecting dependent claim 4, because the “combined system of Horn and Rush would **not** determine or provide different indications of two different segments of a media presentation in which potential interruptions are likely to occur.” App. Br. 15. Instead, the combination “would only provide a color change when a download amount for uninterrupted playback was achieved.” *Id.*

Appellants do not persuade us the Examiner erred because Rush teaches at least three color indications (Final Action 9 (citing Rush col. 6, ll. 25–44)) and Horn teaches determining segments of a presentation that may have delays (Final Action 9; Horn Fig. 11 (showing presentation blocks with likely interruptions)). Appellants’ argument about the combined teachings of Horn, and Rush (App. Br. 15), therefore, does not fully address the teachings of the references as found by the Examiner. Because we agree with those findings, we are not persuaded the Examiner erred.

Accordingly, we sustain the Examiner's § 103(a) rejection of dependent claim 4, and the rejection of dependent claims 11 and 17 which recite substantially similar limitations.

#### CONCLUSION

Appellants have not persuaded us the Examiner erred in rejecting claims 8–14 under 35 U.S.C. § 101. Appellants have not persuaded us the Examiner erred in rejecting claims 1, 4, 8, 11, 15, and 17 under 35 U.S.C. § 103. Remaining dependent claims 2, 3, 5–7, 9, 10, 12–14, 16, and 18–21 are not argued separately with respect to the 35 U.S.C. § 103 rejections. *See* App. Br. 12, 17, 20. Accordingly, we sustain the rejections of claims 1–21 under 35 U.S.C. § 103. *See* 37 C.F.R. § 41.37(c)(1)(iv).

#### DECISION

We affirm the Examiner's rejections of claims 1–21.

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

ACP