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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* THOMAS RICHARD HAYNES and LIN SUN<sup>1</sup>

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Appeal 2015-000800  
Application 12/625,407  
Technology Center 2100

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Before CARLA M. KRIVAK, MICHAEL J. STRAUSS, and  
AMBER L. HAGY, *Administrative Patent Judges*.

HAGY, *Administrative Patent Judge*.

DECISION ON APPEAL  
STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's Non-Final Rejection ("Non-Final Act.") of claims 1, 4–9, 12–18, and 20–24.<sup>2</sup> We have jurisdiction over these claims under 35 U.S.C. § 6(b).

We affirm.

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<sup>1</sup> Appellants identify International Business Machines Corporation as the real party in interest. (App. Br. 2.)

<sup>2</sup> Claims 3, 11, and 19 are objected to as being dependent upon rejected base claims, but the Examiner has indicated these claims are allowable if rewritten in independent form. (Non-Final Act. 18.) These claims are, therefore, not before us. Claims 2 and 10 were canceled in an Amendment submitted with a Request for Continuing Examination on August 28, 2012.

*Introduction*

According to Appellants, “[a]spects of the present invention relate in general to the display of digitally stored time-based entries, and more particularly, to the chronological navigation among such time-based entries.” (Spec. ¶ 1.)

*Exemplary Claim*

Claim 1, reproduced below with the disputed limitations italicized, is exemplary of the claimed subject matter:

1. A method for chronologically navigating among time-based entries stored by a physical computing device comprising a processor to execute a time-based application, the method comprising:

displaying, with said computing device, a time-based entry with at least one of a forward control and a backward control;

*in response to a user selecting said forward control, displaying with said computing device a subsequent time-based entry, said subsequent time-based entry comprising a shared property with said displayed time-based entry;*

*in response to said user selecting said backward control, displaying with said computing device a previous time-based entry, said previous time-based entry comprising a shared property with said displayed time-based entry,*

*in which the shared property is assigned by a user.*

## REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Wynn	US 6,734,883 B1	May 11, 2004
Land	US 2006/0080306 A1	Apr. 13, 2006
Rosenberg	US 2008/0034047 A1	Feb. 7, 2008
Crystal	US 2009/0144642 A1	June 4, 2009

## REJECTIONS

Claim 1 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Rosenberg and Land. (Non-Final Act. 2–4.)

Claim 1 stands alternatively rejected under 35 U.S.C. § 102(b) as being anticipated by Rosenberg. (Ans. 10–12.)

Claims 4–7, 9, 12–15, 17, 18, 20, 23, and 24 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Rosenberg, Land, and Crystal. (Non-Final Act. 4–15.)

Claim 8 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Rosenberg, Land, and Wynn. (Non-Final Act. 15–16.)<sup>3</sup>

Claim 16 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Rosenberg, Land, Crystal, and Wynn. (Non-Final Act. 16–17.)<sup>4</sup>

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<sup>3</sup> Although the heading for the rejection of claim 8 in the Non-Final Office Action references anticipation under 35 U.S.C. § 102(b) (Non-Final Act. 15), the body of the rejection makes clear that the rejection is for obviousness (*id.* at 15–16), and hence the proper statutory reference is 35 U.S.C. § 103(a).

<sup>4</sup> Although the heading for the rejection of claim 16 in the Non-Final Office Action references anticipation under 35 U.S.C. § 102(b) (Non-Final Act. 16), the body of the rejection makes clear that the rejection is for

## ISSUE

Whether the Examiner erred in finding the combination of Rosenberg and Land teaches or suggests:

in response to a user selecting said forward control, displaying with said computing device a subsequent time-based entry, said subsequent time-based entry comprising a shared property with said displayed time-based entry;

in response to said user selecting said backward control, displaying with said computing device a previous time-based entry, said previous time-based entry comprising a shared property with said displayed time-based entry,

in which the shared property is assigned by a user[,]

as recited in claim 1.

## ANALYSIS

We have reviewed the Examiner's rejections in light of Appellants' arguments the Examiner has erred. We disagree with Appellants' conclusions 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 (Non-Final Act. 2–17) and (2) the reasons set forth by the Examiner in the Examiner's Answer in response to Appellants' Appeal Brief. (Ans. 2–12.) We concur with the conclusions reached by the Examiner, and we highlight the following for emphasis.<sup>5</sup>

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obviousness (*id.* at 16–17), and hence the proper statutory reference is 35 U.S.C. § 103(a).

<sup>5</sup> Only those arguments made by Appellants have been considered in this Decision. Arguments Appellants did not make in the Briefs have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).

A. *Claim 1*

1. *The Examiner Did Not Err in Finding the Prior Art Teaches or Suggests “. . . shared property is assigned by a user”*

The Examiner finds Rosenberg teaches the limitations of claim 1, except the Examiner finds “**Rosenberg** does not appear to explicitly teach that said subsequent time-based entry comprising a shared property with said displayed time-based entry; said previous time-based entry comprising a shared property with said displayed time-based entry, in which the shared property is assigned by a user.” (Non-Final Act. 3.) The Examiner then finds:

[I]n the same field of the invention, **Land** teaches . . . *said subsequent time-based entry comprising a shared property with said displayed time-based entry* (fig. 2, pars. 33-37, a pressing a next button 124 causes a system to display a next thumbnail image from a group of thumbnail images that are relevant to a thumbnail image currently displayed, for example, relevant to a word “sail” 106); *said previous time-based entry comprising a shared property with said displayed time-based entry* (fig. 2, pars. 33-37, a pressing a back button 120 causes a system to display a previous thumbnail image from the group of thumbnail images that are relevant to the thumbnail image currently displayed, for example, relevant to a word “sail” 106), *in which the shared property is assigned by a user* (fig. 2, pars. 33-37, the word “sail” 106 is assigned/typed/entered by a user).

(Non-Final Act. 3 (emphases added).)

Appellants argue the Examiner’s findings regarding Land are in error because, according to Appellants, Land fails to teach “the shared property is *assigned by a user.*” (App. Br. 11 (emphasis added).) In particular, Appellants argue Land teaches queries to a search engine for a database that “return images that are *relevant to the indicated text.*” (*Id.*) Appellants further argue “it is *the search engine that has assigned the shared property*

(i.e., the term ‘sail’) as a means to display a number of related images. *The user did not do this*. Instead, the user simply selects a word for the search engine to look up and react to.” (App. Br. 11–12 (emphasis added).)

Appellants provide no support for the assertion that the search engine, and not the user, “assigns” the shared property in Land. Notably, in making this contention, Appellants do not offer a construction of “assigned.” The Examiner, however, concludes the term “assigned” is reasonably construed as meaning “‘typed’, ‘entered’, ‘selected’, or ‘indicated.’” (Ans. 5; *see also* Ans. 4 (citing definitions from vocabulary.com, onelook.com, and tresaurus[sic, thesaurus].com).) Thus, the Examiner has construed the phrase “in which the shared property is assigned by a user” in claim 1 as meaning the shared property has been “typed,” “entered,” “selected,” or “indicated” by the user. Appellants do not challenge the Examiner’s construction.

We agree the Examiner’s construction is reasonable in light of the Specification. Appellants’ Specification states “[t]hrough the user interface, a user may assign tags (208) to a calendar entry (202). A tag (208) may be assigned to indicate a particular property associated with the calendar entry (202).” (Spec. ¶ 36.) Thus, the Specification teaches that a user may “assign” a particular property to be associated with an entry by, e.g., selecting the property and typing it into a user interface. The Examiner’s construction is also consistent with the teachings of Land. Land discloses images are searched based on “metadata” associated with the images. (Land ¶ 28.) The “metadata” may include “an image identification number, author, original date that image of subject matter was captured, location and *descriptive title*.” (Land ¶ 42 (emphasis added).) Land also discloses the

image database that is searched may reside on the user's "local drive, e.g., a hard disk, floppy disk . . . ," etc. (Land ¶ 49.) Although Land does not disclose who associated the images with metadata to allow the searching (such as the "descriptive title"), it is at least obvious that images residing on a user's own hard drive could have been associated with metadata by the user.

Appellants further argue, with regard to Land:

It would be unreasonable to say that the user had assigned any such property to any of those images. *The user had never seen or had any contact with the returned images* at the time when the user selected the term "sail" to be a search query term. Whatever property the images had that identified with the search term "sail," they had that property intrinsically before the user initiated the search.

(Reply Br. 5 (emphasis added).) Although we agree with Appellants that the searched images in Land intrinsically had the identified property "before the user initiated the search," this point undercuts Appellants' argument that, in Land, it is the "*search engine that has assigned the shared property*" to the images. (App. Br. 11.) A search engine does not "assign" properties to the objects it searches, but instead searches existing metadata associated with those objects for properties matching a query. (*See*, Land ¶¶ 29, 42, 49). Moreover, Appellants point to no basis in Land to support their contention that the images searched by the user were "never seen" by the user previously and had not, for example, been associated by the user with the necessary metadata to be located by the search engine. This is especially so in the case where, as we note above, the images searched reside on the user's hard drive. (Land ¶ 49.) Thus, Appellants' conclusory contention amounts to unsupported attorney argument, which is entitled to little probative value.

*In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997); *In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984). In short, we are not persuaded of error in the Examiner’s finding Land teaches or suggests a user has “assigned” a “shared property” to the images being searched.

2. *The Examiner Did Not Err in Finding Land is Analogous Art*

Appellants also challenge the Examiner’s combination of Rosenberg and Land by arguing “Land is not analogous art to Rosenberg.” (App. Br. 13.) In particular, Appellants assert “Land is directed to inserting images into a document” while Rosenberg is directed to a “functionally rich timeline bar” that allows “*calendar events*” to be “viewed and managed from within the *e-mail window*.” (App. Br. 14.)

A reference must be from an analogous art to be available for use in a section 103(a) rejection. “Whether a reference in the prior art is ‘analogous’ is a fact question.” *In re Clay*, 966 F.2d 656, 658 (Fed. Cir. 1992) (citing *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1568 n.9 (Fed. Cir. 1987)). Two criteria have evolved for answering the question: “(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.” *Clay*, 966 F.2d 656 at 658–59 (citing *In re Deminski*, 796 F.2d 436, 442 (Fed. Cir. 1986); *In re Wood*, 599 F.2d 1032, 1036 (CCPA 1979)). “A reference is reasonably pertinent if, even though it may be in a different field from that of the inventor’s endeavor, it is one which, because of the matter with which it deals, logically would have commended itself to an inventor’s attention in

considering his problem.” *Id.* at 659. To qualify as analogous art under the second criterion, a prior art reference need not “be reasonably pertinent to *each and every* problem with which an inventor is involved; reasonable pertinence to a single such problem suffices.” *Ex parte Gaechter*, 65 USPQ2d 1690, 1692 (BPAI 2002).

As the Examiner finds, and we agree:

Both Rosenberg and Land teach the system that can retrieve the previous or subsequent data that are relevant to the currently display data. The only difference between Rosenberg and Land is the type of data. The data retrieved in Rosenberg is the string of calendar events and the data retrieved in Land is the images. The Examiner asserts that Land is analogous art to Rosenberg in terms of retrieving of the data relevant to the indicated or selected data.

(Ans. 6.) We, thus, concur with the Examiner’s finding that Land is analogous art and, as such, is available for use in a section 103(a) rejection.

3. *The Examiner Did Not Rely on Impermissible Hindsight*

Appellants further argue the Examiner’s combination of Rosenberg and Land is in error because it is based on “hindsight reconstruction.” (App. Br. 14.) In particular, Appellants assert:

[N]either Rosenberg nor Land suggests that the email application of Rosenberg could include the ability to display a “subsequent time-based entry ***comprising a shared property with said displayed time-based entry.***” (Claim 1) (emphasis added). It appears, therefore, that the Office Action has gleaned information solely from [sic, from] Appellant’s [sic, Appellants’] specification to reconstruct the described system therein.

(*Id.*) Appellants also argue “that which is imported from Land to Rosenberg by the Answer is the idea of navigating through images in a search result. If the timeline bar taught by Rosenberg were instead used to scan through

images in a search result, that would completely change the purpose and function of what Rosenberg describes.” (Reply Br. 7.)

We first disagree with Appellants’ unduly narrow reading of the cited references and the Examiner’s findings, which assume the Examiner’s findings are premised on bodily incorporating the teachings of Land into Rosenberg. As noted above, the Examiner finds the ordinarily skilled artisan would have combined the teachings of these references in the manner recited in the claims. (*See* Ans. 6.) “The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference . . . . Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art.” *In re Keller*, 642 F.2d 413, 425 (CCPA 1981) (citations omitted). We further note the artisan is not compelled to blindly follow the teaching of one prior art reference over the other without the exercise of independent judgment. *See Lear Siegler, Inc. v. Aeroquip Corp.*, 733 F.2d 881, 889 (Fed. Cir. 1984). Rather, as the Supreme Court has explained, the skilled artisan would “be able to fit the teachings of multiple patents together like pieces of a puzzle” because the skilled artisan is “a person of ordinary creativity, not an automaton.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 420–21 (2007). Here, Appellants have not demonstrated that the Examiner’s proffered combination would have been “uniquely challenging or difficult for one of ordinary skill in the art.” *Leapfrog Enters., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1162 (Fed. Cir. 2007) (citing *KSR*, 550 U.S. at 418).

We also disagree the Examiner has engaged in improper hindsight reconstruction. The Examiner has provided an articulated reason for

combining Rosenberg and Land that includes a rational underpinning. (*See* Ans. 7.) In particular, the Examiner finds, and we agree:

Land teaches a search engine that creates search criteria for a query from the text, which is indicated or selected by the user, and retrieves a number of images by using a metadata associated with the indicated text that is relevant to the user indicated/selected text. The system of a client enables a forward or backward navigation of the images by using a back button 120 and a next button 124 such that the metadata results for the relevant images based on the indicated/entered text can be sequentially displayed in the forward or backward direction (Land, pars. 28, 33-37, 42, 49, and 52).

Therefore, [i]t is obvious to apply the concept of retrieving the metadata associated with the indicated or entered text taught by the Land on the system of Rosenberg such that the timeline bar can retrieve[] the metadata results from the database and display the previous or next string of calendar events that are relevant to the string of calendar events currently displayed by using the previous or next button that allows a user to easily retrieve the previous or the subsequent calendar event associated with the currently displayed calendar event.

(Ans. 7.)

For the foregoing reasons, we are not persuaded of error in the Examiner's 35 U.S.C. § 103(a) rejection of claim 1 as unpatentable over the combination of Rosenberg and Land, and we, therefore, sustain that rejection.

B. *Alternative Rejection of Claim 1 under 35 U.S.C. § 102(b)*

In a new ground of rejection of claim 1 made in the Answer, the Examiner rejects claim 1 under 35 U.S.C. § 102(b) as anticipated by Rosenberg alone. (Ans. 10–12.) Specifically, the Examiner finds “**Rosenberg** teaches a timeline bar embedded within an e-mail window that

displays string of calendar events in a content area of the timeline bar and allows the user to navigate a previous or subsequent string of calendar events *relevant to the currently displayed calendar events*, and this information of the calendar events is provided or entered by the user.” (Ans. 11–12 (emphasis added).)

We agree these findings, which are not addressed or rebutted by Appellants, are supported by Rosenberg. For example, Rosenberg teaches “DISPLAY OF ALL CALENDAR EVENTS *ASSOCIATED WITH THE PARTICULAR DATE AND THE USER*.” (Rosenberg Fig. 3 (emphasis added).) Rosenberg further teaches scrolling, forward and backward, through entries associated with a particular date. (Rosenberg Figs. 1, 2; ¶¶ 23–25, 38.) Calendar entries associated with a particular date share at least the common property of date, and this shared property is “assigned by a user” where the user has entered the calendar events, as the Examiner correctly finds. (Ans. 11–12.)

We, therefore, agree with the Examiner’s findings in rejecting claim 1 under 35 U.S.C. § 102(b) as anticipated by Rosenberg, and summarily sustain the Examiner as Appellants have not addressed this rejection.

C. *Claims 4–9, 12–18, and 20–24*

In their Appeal Brief, Appellants do not present separate substantive arguments for claims 4–9, 12–18, or 20–24. Rather, Appellants either reiterate or incorporate by reference the arguments presented for claim 1. (App. Br. 17–21.) Therefore, for the reasons stated above with regard to the Examiner’s 35 U.S.C. § 103(a) rejection of claim 1, we also sustain the Examiner’s 35 U.S.C. § 103(a) rejection of claims 4–9, 12–18, and 20–24.

In their Reply Brief, Appellants raise an additional argument regarding claim 9, arguing that “[Crystal] does not teach the subject matter missing from Rosenberg and Land. Beyond merely noting that metadata can comprise a tag, Crystal does not teach or suggest the idea of a shared property among a set of time-based entries,” as recited in claim 9. (Reply Br. 9.) Not only is Appellants’ piecemeal challenge to Crystal an improper attack that fails to address the Examiner’s combination of references (*see In re Keller*, 642 F.2d 413, 425 (CCPA 1981)), but we find nothing in the Examiner’s Answer that would have prompted this new argument raised by Appellants for the first time in the Reply Brief. Indeed, the Examiner’s discussion in the Answer regarding claim 9 does not mention Crystal (*see* Ans. 7–8); rather, the Examiner’s discussion of Crystal is provided only in the Non-Final Office Action. (*See* Non-Final Act. 9–10.) Therefore, Appellants’ new argument regarding claim 9 should have been raised in the opening brief, and its untimely and unjustified inclusion in Appellants’ Reply Brief does not warrant our consideration. *Optivus Tech., Inc. v. Ion Beam Appl’ns S.A.*, 469 F.3d 978, 989 (Fed. Cir. 2006) (argument raised for the first time in the reply brief that could have been raised in the opening brief is waived); *accord Ex parte Borden*, 93 USPQ2d 1473, 1473–74 (BPAI 2010) (informative opinion) (absent a showing of good cause, the Board is not required to address an argument newly presented in the reply brief that could have been presented in the principal brief on appeal).

DECISION

For the above reasons, the Examiner's rejections of claims 1, 4–9, 12–18, and 20–24 are affirmed.<sup>6</sup>

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

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<sup>6</sup> Should there be further prosecution with respect to any of claims 17–22, the Examiner should consider whether these claims (which recite “a computer readable storage medium”) cover transitory media, which is not patent eligible. *See Ex parte Mewherter*, 107 USPQ2d 1857, 1862 (PTAB 2013) (precedential) (holding that “those of ordinary skill in the art would understand the claim term ‘machine-readable storage medium’ would include signals *per se*,” and where “the broadest reasonable interpretation[]” of a claim “covers a signal *per se*,” the claim “must be rejected under 35 U.S.C. § 101 as covering non-statutory subject matter”) (citing *In re Nuijten*, 500 F.3d 1346, 1356–57 (Fed. Cir. 2007)).