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Polsinelli -- Apple Inc. c/o Polsinelli PC Three Embarcadero Center, Suite 1350 San Francisco, CA 94111			SOMERS, MARC S	
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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* PATRICK GATES, JEREMY WERNER, ANDREW H.  
VYRROS, JOHN ANDREW McCULLOH, RICHARD FREDERICK  
WAGNER, and ERIK DANFORTH STRAHM

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Appeal 2015-002902  
Application 12/646,916  
Technology Center 2100

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Before ROBERT E. NAPPI, JOHN P. PINKERTON, and  
NABEEL U. KHAN, *Administrative Patent Judges*.

PER CURIAM.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134(a) from the rejection of claims 12 through 19 and 30 through 34. Claims 1 through 11 and 20 through 29 have been withdrawn from consideration. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

## INVENTION

Appellants' disclosed and claimed invention is directed to a method for generating media mixes where a system selects media based upon what others have in their media library. Abstract. Claim 12 is representative of the invention and reproduced below.

12. A method of creating mixes of media items from a program participant's collection of media items comprising:  
sending to a server, information describing individual media items of a program participant's collection of media items;

receiving from the server, data describing clusters of media items contained within the program participant's collection of media items, the clusters having been compiled based on an agglomeration of tracks found in hierarchically related clusters of media items in a media item inventory available to the server, the clusters of media items in the inventory having been determined based on a cluster analysis of similarity data derived from a population of program participants, wherein the similarity data indicates similarity between a first media item and a second media item based on a determined number of different program participant's media libraries that include both the first media item and the second media item; and

determining a mix of media items, the mix comprising media items selected from one of the clusters of media items contained within the program participant's collection of media items received from the server.

## REJECTIONS AT ISSUE<sup>1</sup>

The Examiner has rejected claims 12 through 14, 16 through 19, and 30 through 33 under 35 U.S.C. § 103(a) as unpatentable over Alcalde (US

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<sup>1</sup> Throughout this Decision we refer to the Appeal Brief filed August 18, 2014, Reply Brief filed January 21, 2015, Examiner's Answer mailed

2008/0021851 A1; Jan. 24, 2008) and Harbick (US 8,260,656 B1; Sept. 4, 2012). Final Act. 2–11.

The Examiner has rejected claims 15 and 34 under 35 U.S.C. § 103(a) as unpatentable over Alcalde, Harbick, and Vignoli (US 2009/0006353 A1; Jan. 1, 2009). Final Act. 11–13.

#### ANALYSIS

We have reviewed Appellants’ arguments in the Appeal Brief, the Examiner’s rejections, and the Examiner’s response to Appellants’ arguments. Appellants’ arguments have not persuaded us of error in the Examiner’s rejections of claims 12 through 19 and 30 through 34. Appellants argue the combination of Alcalde and Harbick does not teach the claim limitation directed to the similarity data indicating a similarity between a first and second media item based upon a determined number of different program participant’s media libraries that include both media items. App. Br. 7–10, Reply Br. 2–4. Specifically, Appellants assert Harbick discloses that similarity between two songs can be determined based upon comparing frequencies with which songs are played (play histories) and that play histories of other users is not the same as the media library of the other users. App. Br. 8. Appellants argue that the play history indicates a user’s indication that songs should be and have been played together, whereas the media library merely indicates that the media items are in a library and not that they have been played.

The Examiner has provided a detailed and comprehensive response to Appellants’ arguments on pages 3 through 6 of the Answer. In this

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November 21, 2014, and the Final Action mailed January 29, 2014 (“Final Act.”).

response, the Examiner finds the claim phrase “based upon” does not preclude further criteria for evaluating similarity, and that similarity based upon play history is based upon the library as the played songs are from the users’ music collections (which the Examiner equates to the media library). We have reviewed the Examiner’s response, the evidence cited by the Examiner and we concur with the Examiner’s findings and conclusions.

Appellants’ arguments in the Reply Brief, that the play history can include content other than that which is in the user’s media music collection is not persuasive of error. Reply Br. 3 (citing, col. 2, ll. 56–58; col. 4, ll. 5–8; and col. 17, ll. 65–67). The cited sections of Harbick teach that the play history can be media played or stored on devices (Harbick col. 2 ll. 65–col. 3 ll. 2). Further, Appellants’ arguments are applying a narrow interpretation of the term media library. Neither Appellants’ Specification nor the claim recites a definition of the term media library, which: a) precludes the media library from being a library of played media; or b) requires the media library to be stored on the same device. Further, we note that Harbick column 17, lines 65 through 67 teaches that the “playlists” or “play histories” don’t have to be media actually played by the user, but can be media downloaded by a user. Thus, Appellants’ arguments have not persuaded us that the Examiner erred in finding the combination of Alcalde and Harbick teaches the claim limitation directed to the similarity data indicating a similarity between a first and second media item based upon a determined number of different program participant’s media libraries that include both media items. Accordingly, we sustain the Examiner’s rejection of claim 12 and of claims 13 through 19 and 30 through 34, which Appellants have not separately argued.

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DECISION

We sustain the Examiner's rejections of claims 12 through 19 and 30 through 34 under 35 U.S.C. § 103(a).

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