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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MICHAEL SHANE WILKINSON,
THOMAS BAUSE, ARTURO VERMOLEN,
SHEAU NG, and JOHN SULLIVAN

Appeal 2015-004613
Application 13/101,643
Technology Center 2400

Before ST. JOHN COURTENAY III, CATHERINE SHIANG, and
JOYCE CRAIG, *Administrative Patent Judges*.

CRAIG, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants¹ appeal under 35 U.S.C. § 134(a) from the Examiner's
Final Rejection of claims 1–28. We have jurisdiction under 35 U.S.C.
§ 6(b).

We affirm.

¹ According to Appellants, the real party in interest is NBCUniversal Media, LLC. App. Br. 2.

INVENTION

Appellants' invention relates to multi-tiered automatic content recognition and processing. Abstract. Claim 1 is illustrative and reads as follows, with disputed limitations shown in italics:

1. A multi-tiered automatic content recognition and processing method, comprising:

in a first tier entity, receiving, from an electronic device, electronic device data and data indicative of digital content being played on the electronic device;

analyzing, in the first tier entity, the electronic device data to identify the electronic device;

analyzing, in the first tier entity, the data indicative of the digital content to identify the digital content; and

transmitting from the first tier entity to an appropriate one of a plurality of second tier entities the identity of the electronic device and the identity of the digital content to facilitate activity between the second tier entity and the electronic device based upon the identified content and the identity of the electronic device;

wherein the electronic device, the first tier entity, and the second tier entity are all separate from one another.

REJECTIONS

Claims 1, 2, and 4–28 are rejected under 35 U.S.C. § 102(b) as anticipated by Blasko (US 2001/0049620 A1; published Dec. 6, 2001).

Claim 3 is rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Blasko and Levy (US 2004/0243634 A1; published Dec. 2, 2004).

ANALYSIS

We have considered Appellants' arguments, but do not find them persuasive of error. We agree with and adopt as our own the Examiner's findings of facts and conclusions as set forth in the Examiner's Answer and in the Final Office Action from which this appeal was taken. We provide the following explanation for emphasis.

Claims 1, 4, 6, 8–13, and 15–28

In rejecting claim 1 as anticipated by Blasko, the Examiner found Blasko discloses an evaluator 702 (the recited “first tier entity”), devices associated with user interface 712 (the recited “electronic device”), and a profile vector that contains the recited “device data” and is sent from interface 712 to evaluator 702. Ans. 3 (citing Blasko ¶¶ 113, 118, 122, 129–34). The Examiner also found evaluator 702 analyzes the profile vector to determine a MAC_ID (“to identify the electronic device”) and may also identify interest in categories of shows (“to identify the digital content”). *Id.* at 4 (citing Blasko ¶¶ 122, 129–33).

Appellants contend the Examiner erred in rejecting claim 1 because the cited portions of Blasko do not disclose the disputed limitations in claim 1, shown in italics above. App. Br. 10. In particular, Appellants argue the content identity is determined in Blasko prior to reaching the evaluator 702. *Id.* at 11. Appellants further argue that Blasko teaches away from the disputed limitations because Blasko suggests the profile vector should be generated locally in a local appliance, and thus is not determined in evaluator 702. *Id.* (citing Blasko ¶¶ 45–46).

Appellants' arguments do not persuade us of Examiner error. We agree with the Examiner that claim 1 does not require that the first tier entity *generate* the recited "electronic device data and data indicative of digital content being played on the electronic device." Ans. 4. Thus, Appellants' "teaching away" argument, which relies on where the profile vector is generated, is unpersuasive. Appellants' "teaching away" argument also fails because Appellants have not identified where Blasko actually criticizes, discredits, or otherwise discourages "in a first tier entity, receiving, from an electronic device, electronic device data and data indicative of digital content being played on the electronic device." *See In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004).

Appellants further contend Blasko does not disclose the limitation "data indicative of digital content *being played on the electronic device*," recited in claim 1 (emphasis added). App. Br. 12. Appellants argue that the profile vector in Blasko contains information about multiple programs that have been watched during a "television viewing session" and, therefore, does not contain "data indicative of digital content being played on the electronic device." *Id.* In Appellants' view, an artisan of ordinary skill would understand the disputed phrase to mean "content that is *currently* being played" on the electronic device. Reply Br. 4 (emphasis added).

Appellants' arguments are unpersuasive. We agree with the Examiner that claim 1 does not expressly limit the timeframe with which the content is "being played." *See* Ans. 5. Moreover, paragraph 15 of Appellants' Specification makes clear that "playing' content on electronic devices . . . is intended to extend broadly" and that the content "may be played in real time or near real time, and or may be stored on the electronic device or elsewhere

for later playing.” Spec. ¶ 15. Thus, we are not persuaded that claim 1 is limited to “content that is currently being played,” as Appellants contend.

Appellants have not persuaded us that the Examiner’s interpretation of “being played” is unreasonable, overly broad, or inconsistent with Appellants’ Specification. Although Appellants argue the term “being” is “of the present progressive tense and indicates continuing action” (Reply Br. 4), Appellants do not address the use of “being” in the past progressive tense. Thus, Appellants have not persuaded us that the Examiner erred in interpreting the term “being” as broad enough to include at least “was being” and “is being” (*see* Ans. 5). Therefore, we agree with the Examiner’s analysis of Blasko that the vector profile contains “data indicative of digital content being played on the electronic device.”

For these reasons, we are not persuaded that the Examiner erred in finding that Blasko discloses the limitations of claim 1.

Accordingly, we sustain the 35 U.S.C. § 103(a) rejection of independent claim 1, as well as the 35 U.S.C. § 103(a) rejection of independent claims 10, 15, 19, 22, and 27, which Appellants argue are patentable for similar reasons. App. Br. 12. We also sustain the Examiner’s rejection of dependent claims 4, 6, 8, 9, 11–13, 16–18, 20, 21, 23–26, and 28, not argued separately. *Id.*

Claim 2

Claim 2 depends from claim 1 and further recites “wherein the content is identified by identification code embedded in the content.” App. Br. 20.

Appellants contend that, because Blasko discloses that information about channel selection and viewing duration ““may be available only locally at the television or STB”, Blasko appears to suggest that the

information is not embedded in the content, but instead is provided as a function of the television or set-top-box.” App. Br. 13 (emphasis omitted). Appellants further contend Blasko discloses that it may be necessary to extract programming information from other sources, which “appears at odds with an interpretation that an identification code is embedded in the content in Blasko.” *Id.*

We disagree. The Examiner found that Blasko discloses certain pieces of content-identifying information, such as program name, channel, and viewing duration, for example, are “available only locally at the television or STB,” and are used to generate the profile vector. Ans. 6. The Examiner further found that such information in Blasko is represented as “code” because it is electronic information in the form of signals and symbols used by a computer (e.g., STB) and is part of (i.e., embedded with) the content (or any part of information associated with the content) at the television or STB. *Id.* (citing Blasko ¶¶ 45, 87, 104, 121, and 125). In the Answer, the Examiner further explained the broadest, reasonable interpretations of the terms “content,” “embedded,” and “code.” Ans. 5–6. Appellants have not shown the Examiner’s interpretations of “content,” “embed,” or “code” are unreasonable, overly broad, or inconsistent with Appellants’ Specification. *See* Reply Br. 5–7.

Therefore, we agree with the Examiner's analysis of Blasko and sustain the Examiner’s rejection of claim 2.

Claim 5

Claim 5 depends from claim 1 and further recites

selecting, in the first tier entity, one of a plurality of content identification techniques based upon the electronic device data,

and wherein the digital content is identified based upon the selected content identification technique.

App. Br. 20–21. The Examiner found that using information in a profile vector listing types of television programs based on category, such as in Blasko, discloses the claimed identification technique. Ans. 7–8 (citing Blasko ¶¶ 16, 122, 125).

Appellants contend the Examiner erred in finding Blasko discloses “digital content is identified,” as claim 5 requires. App. Br. 14. Appellants specifically argue that “categorizing or determining transactional types is not analogous to identifying digital content.” *Id.* In Appellants’ view, identifying content as a comedy, as disclosed in Blasko, is insufficient to identify content because the plain meaning of “identify” is “to know and say who someone is or what something is.” *Id.* at 15 (citing <http://www.merriam-webster.com/dictionary/identify>). Appellants further argue that Blasko does not disclose “a plurality of content identification techniques,” as recited in claim 5. *Id.* at 14. Appellants point to the content identification techniques described in paragraph 16 of the Specification in support of their arguments. *Id.*

Appellants’ arguments do not persuade us of error. We agree with the Examiner that Blasko discloses a plurality of content identification techniques.” Final Act. 7–8 (citing Blasko ¶¶ 113, 118, 122–124, 134). We also agree with the Examiner that the non-exhaustive list of examples of content identification techniques set forth in Appellants’ Specification do not limit claim 5. *See* Ans. 7. The Examiner found, and we agree, that Appellants’ Specification identifies embedded code as a means to identify content. *Id.* (citing Spec. ¶ 16). For the reasons discussed above with regard to claim 2, on this record, we are not persuaded that the Examiner erred in

finding that identifying content as a comedy based on electronic information in the form of signals and symbols in a profile vector (embedded code).

Moreover, we are not persuaded that the dictionary definition of “identify” that Appellants provide precludes identifying digital content as a comedy, as the definition does not require particular identifying information, such as a name. In any event, the *currently dated* dictionary definitions cited by Appellants are not credible evidence for our analysis.

For these reasons, we sustain the Examiner’s rejection of claim 5.

Claims 7 and 14

Claim 7 depends from claim 1 and further recites “selecting the appropriate one of the plurality of second tier entities based upon the identity of the digital content.” App. Br. 21.

Appellants contend that, in claim 1, the content identity and device identity is transmitted to “one of a plurality of second tier entities” “to facilitate activity between the second tier entity and the electronic device based upon the identified content and the identity of the electronic device.” Appellants argue that Blasko discloses no activity that is facilitated between either correlation server 708 or advertisement server 710 and the electronic device (e.g., TV). App. Br. 16. Appellants further argue, as they did for claims 2 and 5, discussed above, that identifying content as comedy is not sufficient to meet the recited “identity of the digital content.” *Id.* at 17.

We are not persuaded the Examiner erred. We are not persuaded that advertisement server 710’s determination of appropriate advertisements for interface 712, based in part on identified content, is insufficient to disclose the disputed limitation in claim 1. Appellants have not persuaded us that the broad language of claim 1 precludes the type of activity identified by the

Examiner. Additionally, we are not persuaded the Examiner erred in finding Blasko teaches “identity of the digital content,” recited in claim 7, for the reasons set forth above for claims 2 and 5.

For these reasons, we sustain the Examiner’s § 102(b) rejection of claim 7, as well as the Examiner’s § 102(b) rejection of claim 14, which Appellants argue is patentable for similar reasons. App. Br. 16.

Claim 3

Claim 3 depends from claim 1 and further recites “wherein the content is identified by a digital watermark.” App. Br. 20. The Examiner found that Levy teaches the recited digital watermark. Final Act. 15.

In arguing that claim 3 is patentable, Appellants rely on the arguments made for claim 1. *Id.* at 18. Because we do not find those arguments persuasive, for the reasons discussed above, we also sustain the Examiner’s rejection of claim 3.

Reply Brief

To the extent Appellants advance new arguments in the Reply Brief not in response to a shift in the Examiner’s position in the Answer, we note arguments raised in a Reply Brief that were not raised in the Appeal Brief or are not responsive to arguments raised in the Examiner’s Answer will not be considered except for good cause. *See* 37 C.F.R. § 41.41(b)(2).

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DECISION

We affirm the decision of the Examiner rejecting claims 1–28.

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