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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
12/749,177	03/29/2010	James P. Lester	P46302C	6593
106503	7590	10/26/2016	EXAMINER	
AEON Law/Intel Adam Philipp c/o CPA Global 900 2nd Avenue South, Suite 600 Minneapolis, MN 55402			JOSHI, SURAJ M	
			ART UNIT	PAPER NUMBER
			2447	
			NOTIFICATION DATE	DELIVERY MODE
			10/26/2016	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JAMES P. LESTER and ALEXANDER J. KIRK

Appeal 2015-005099
Application 12/749,177
Technology Center 2400

Before MAHSHID D. SAADAT, JOYCE CRAIG, and
STEVEN M. AMUNDSON, *Administrative Patent Judges*.

AMUNDSON, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants¹ seek our review under 35 U.S.C. § 134(a) from a final rejection of claims 1–3 and 6–17, i.e., all pending claims. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

¹ According to Appellants, the real party in interest is Intel Corporation.
App. Br. 3.

STATEMENT OF THE CASE

The Invention

According to the Specification, “[t]he invention relates to electronic media delivery, and more particularly, to interactive delivery of electronic media over a network to a group of users.” Spec. ¶ 2.² For example, “a media server maintains a playlist of media files to broadcast, and requests for media must satisfy certain restrictive criteria to be added to the playlist.” Abstract. If the requested media satisfies “a set of restrictive criteria, the media server will seamlessly schedule the requested media for later broadcasting to the clients.” Spec. ¶ 9.

Representative Claim

Independent claim 1 exemplifies the subject matter of the claims under consideration and reads as follows, with italics identifying the limitations at issue in claim 1:

1. A computer implemented method of interactively delivering media over a computer network from a media server to a plurality of clients, the method comprising:

generating a playlist that defines a plurality of media files in an order, the playlist satisfying a set of restrictive criteria, the playlist having been defined by a first client among the plurality of clients;

sequentially transmitting the media files as defined by the playlist over the computer network to the plurality of clients, which media files are to be rendered in real time by the plurality of clients;

² This decision uses the following abbreviations: “Spec.” for the Specification, filed March 29, 2010; “Final Act.” for the Final Office Action, mailed July 8, 2014; “App. Br.” for the Appeal Brief, filed December 2, 2014; “Ans.” for the Examiner’s Answer, mailed February 10, 2015; and “Reply Br.” for the Reply Brief, filed April 10, 2015.

while transmitting the media files, receiving a request from one of the plurality of clients other than the first client among the plurality of clients to add a media file to the playlist; and

while transmitting the media files, scheduling the requested media file into the playlist if the updated playlist would satisfy the restrictive criteria, whereby the media files are transmitted to each of the plurality of clients according to the updated playlist.

App. Br. 32 (Claims App.).

The Prior Art Supporting the Rejection on Appeal

Dwek	US 6,248,946 B1	June 19, 2001
Dunning et al. (“Dunning”)	US 2002/0082901 A1	June 27, 2002
Lapcevic	US 7,756,743 B1	July 13, 2010 (filed June 21, 2000)

The Rejection on Appeal

Claims 1–3 and 6–17 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Dunning, Dwek, and Lapcevic. Final Act. 3–12; App. Br. 11, 15; Ans. 2–11.

ANALYSIS

We have reviewed the rejection of claims 1–3 and 6–17 in light of Appellants’ arguments that the Examiner erred. For the reasons explained below, we disagree with Appellants’ assertions regarding error by the Examiner.

The Rejection of Claims 1 and 2 Under 35 U.S.C. § 103(a)

Appellants argue that no reference “teach[es] or suggest[s] a user-defined channel which is edited by a user other than the original user who created the user-defined channel and that the edited user-defined channel is

then sent to both users and rendered in real time.” App. Br. 17; *see id.* at 16. Appellants then address each reference and seek to distinguish it from the claimed subject matter. *Id.* at 17–30.

For Dwek, Appellants note that the Examiner cites (1) a portion of column 10 concerning changes to a user-defined channel and (2) a portion of column 11 concerning shared-channel playback and streaming. App. Br. 17–18; *see id.* at 25. Appellants contend that by citing those two portions of Dwek the Examiner improperly conflates “i) a change to a playlist made by the person who created the playlist with ii) a request to change a playlist made by someone else.” *Id.* at 18–19; *see id.* at 25; *see also* Reply Br. 4–5. Appellants also contend that those two portions are “unrelated” and that Dwek does not “affirmatively teach” that changes to a user-defined shared channel will upload and propagate to users currently listening to the shared channel. App. Br. 24–25, 30; *see* Reply Br. 5–6, 7–8.

In addition, Appellants assert that in Dwek only the creator of a user-defined channel can change that channel. App. Br. 20–23, 25; Reply Br. 5. Appellants point out that Dwek Figure 3B depicts the interface for a user-defined channel and that interface includes an “edit” button permitting the creator to modify the user-defined channel. *Id.* at 21–22. Appellants then point out that Dwek Figure 3C depicts the interface for a shared channel and, in contrast to the Figure 3B interface, the Figure 3C interface lacks an “edit” button. *Id.* at 22–23.

For Dunning, Appellants concede that Dunning teaches that a first user may create a channel or playlist that the first user may share with a second user. App. Br. 26. But Appellants argue that Dunning—like

Dwek—does not disclose that the second user has the ability to modify the channel or playlist created by the first user. *Id.*

For Lapcevic, Appellants assert that the Examiner wrongly relies on Lapcevic for the “real time” features recited in the claims because Lapcevic describes a “highly manual” process that provides weekly updates. App. Br. 26–28. Appellants also assert that Lapcevic does not teach a “client” according to the claims that requests a playlist change. *Id.* at 27. In particular, Appellants contend that the Application defines a “client” as a “computer” and, in contrast, “facility personnel” in Lapcevic gather “user input” concerning future content and utilize the “user input” to provide information to a “central network computer” that generates a new or updated playlist in some unspecified manner. *Id.* at 27–28.

In response, the Examiner explains that the combination of references teaches the claimed subject matter, in particular, (1) Dunning teaches the use of restrictive criteria for playlists, (2) Dwek teaches a user-defined playlist that the playlist’s creator may share with others and real-time streaming of a shared playlist to multiple users, and (3) Lapcevic teaches that a user other than the playlist’s creator may request a playlist change. Ans. 13–14.

In reply, Appellants do not address the combined teachings of the references and instead dispute that a particular reference discloses a particular feature. Reply Br. 3–8. As an example, Appellants contend that “[n]either DUNNING nor DWEK dealt with interactive, real time playlists.” *Id.* at 7. As another example, Appellants contend that Lapcevic lacks “a real time aspect” because it concerns a “relatively old system” where playlist changes occur through a manual process spread “across days, weeks, or even months.” *Id.* at 6–7.

In addition, Appellants argue that the Answer presents a “different analysis” for Dwek and Lapcevic than the Final Office Action and that the Answer “does not squarely address” the claim language. Reply Br. 3–4. Appellants also argue that Dwek and Dunning teach away from the claimed subject matter. Reply Br. 5, 7.

We agree with the Examiner that the combination of references teaches the claimed subject matter. Ans. 13–14; *see id.* at 2–11; Final Act. 2–12. In essence, Appellants address the references individually, e.g., asserting that each does not teach or suggest a second user requesting a change to a channel or playlist created by a first user where the second user makes the request during media-file transmission or broadcasting. App. Br. 16–30; Reply Br. 3–8. For instance, Appellants argue that the Examiner wrongly relies on Lapcevic for the “real time” features recited in the claims. App. Br. 26–28. But the Examiner relies on Dwek for the “real time” features. Final Act. 2–3, 5–6; Ans. 4–5, 13–14.

Where a rejection rests on a combination of references, an appellant cannot establish nonobviousness by attacking the references individually. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). Moreover, “the test for combining references is not what the individual references themselves suggest but rather what the combination of disclosures taken as a whole would suggest to one of ordinary skill in the art.” *In re McLaughlin*, 443 F.2d 1392, 1395 (CCPA 1971); *see In re Keller*, 642 F.2d 413, 425 (CCPA 1981). Appellants do not address what the combination of references “taken as a whole would suggest to one of ordinary skill in the art” and, therefore, have not established Examiner error. App. Br. 16–30; Reply Br. 3–8.

As for Appellants' assertions seeking to distinguish Lapcevic based on a "client" according to the claims differing from a change requester according to Lapcevic, those assertions disregard the Specification's disclosure as well as the claim language. While claim 1 refers to a "client" or multiple "clients," claim 2 refers to a "user" or multiple "users." App. Br. 32–33 (Claims App.). Appellants admit that "Claim 2 contains language equivalent to Claim 1 for the purpose of this Appeal." *Id.* at 12. Moreover, the Specification explains that a "client" may comprise (1) "a system owned by a user capable of receiving media over a network, such as a personal computer," or (2) "another device equipped to receive and play media, such as a cellular telephone or a personal digital assistant (PDA)." Spec. ¶ 20. So the Specification broadly describes a "client" as a user-operated device capable of receiving media.

Lapcevic discloses a user-operated device capable of receiving media that requests a playlist change. In particular, Lapcevic teaches that users can provide input regarding future content through a kiosk or a computer, e.g., "any computer suitable to access the Internet." Lapcevic 4:8–12, 4:19–25, 7:67–8:2, Fig. 1 (kiosks 44, computers 46 and 47); *see also id.* 5:29–32, 7:39–40.

As for Appellants' contentions concerning the cited portions of columns 10 and 11 in Dwek being "unrelated" and the failure of Dwek to "affirmatively teach" that changes to a user-defined shared channel will upload and propagate to users currently listening to the shared channel, those contentions disregard the principle that a prior-art reference must be considered in its entirety for what it fairly teaches to one skilled in the art. *See In re Fracalossi*, 681 F.2d 792, 794 n.1 (CCPA 1982).

Also, an obviousness analysis “need not seek out precise teachings directed to the specific subject matter of the challenged claim” because the analysis “can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). “A person of ordinary skill is also a person of ordinary creativity, not an automaton.” *Id.* at 421.

Here, based on the cited portions of columns 10 and 11 in Dwek, a person of ordinary skill would appreciate that changes to a user-defined shared channel should propagate to users who subsequently access that channel. *See* Dwek 10:60–67, 11:23–32; *see also* Final Act. 2–3, 6; Ans. 4–5.

As for Figures 3B and 3C in Dwek, they “show a preferred embodiment of a user interface” Dwek 5:34–35. They do not restrict the concepts disclosed in Dwek. *See id.* 18:7–16.

As for Appellants’ teaching-away arguments, they do not respond to any arguments in the Answer. Appellants present them for the first time in the Reply Brief. Such arguments “will not be considered by the Board” unless an appellant shows good cause. *See* 37 C.F.R. § 41.41(b)(2); *see also Ex parte Borden*, 93 USPQ2d 1473, 1475 (BPAI 2010) (“informative”) (discussing procedural difficulties with belated arguments). Here, Appellants have not shown good cause for belatedly presenting their teaching-away arguments. Thus, those arguments are deemed waived.

Accordingly, Appellants’ arguments have not persuaded us that the Examiner erred in rejecting claims 1 and 2 for obviousness based on Dunning, Dwek, and Lapcevic. Hence, we sustain the rejection.

The Rejection of Claim 3 Under 35 U.S.C. § 103(a)

In the Final Office Action, the Examiner states, “The limitations of Claim 3 are rejected in the analysis of Claim 1 above, and the claim is rejected on that basis.” Final Act. 7. Appellants contend that independent method claim 3 “contains different language” than claim 1 and that the rejection of claim 1 did not address that different language. App. Br. 12–13. In particular, Appellants assert that the rejection of claim 1 did not address claim 3’s requirement regarding “the restrictive criteria including a set of channel preferences unique between at least two channels.” *Id.* at 13.

In the Answer, the Examiner determines that the combination of references used to reject claim 1 teaches “the restrictive criteria including a set of channel preferences unique between at least two channels.” Ans. 12. More specifically, the Examiner finds that: (1) Dunning teaches streaming different jukebox track selections (channels) “subject to various constraints/definitions (restrictive criteria),” such as different music genres (e.g., rock versus country/western); and (2) “Dwek further improves upon Dunning” by teaching “shared unique channels also subject to restrictive criteria,” i.e., restrictive criteria corresponding to preferences “unique to each individual user, and thus unique between at least two channels.” Ans. 12 (citing Dunning ¶¶ 86, 119; Dwek 10:60–67, Fig. 3B, Fig. 3C).

Regarding the combination of references used to reject claim 3, Appellants argue that the Examiner has “never described how two different, unique, user preferences are integrated” into one channel or playlist that “is sent to both users” during media-file transmission or broadcasting. Reply Br. 10. But claim 3 does not require integrating different “restrictive criteria” into one channel or playlist. App. Br. 33 (Claims App.). Rather,

claim 3 requires that different “restrictive criteria” apply to the different channels. *Id.*; *see* Spec. ¶ 32 (stating that “distinct sets of restrictive criteria may beneficially help to maintain the logical character or category of each channel”).

As the Examiner explains, if user A defines channel A employing user A’s unique preferences and user B defines channel B employing user B’s unique preferences, different “restrictive criteria” apply to the different channels. *See* Ans. 12. Those “restrictive criteria” correspond to “a set of channel preferences unique between at least two channels” as recited in claim 3.

Appellants argue that (1) “neither DWEK nor DUNNING imagine real time interaction with the playlist, as it is being streamed” and (2) “LAPCEVIC did not include a real time component.” Reply Br. 11. Although Appellants include those arguments in the Reply Brief section concerning claim 3, those arguments do not relate to claim 3’s requirement regarding “the restrictive criteria including a set of channel preferences unique between at least two channels.”

As discussed above, the Examiner relies on Dwek for the “real time” features recited in the claims. Final Act. 2–3, 5–6; Ans. 4–5, 13–14. Dwek explains that “[a] user may edit an existing user-defined channel,” for example, by modifying “the musical preferences for the user-defined channel.” Dwek 10:60–67. That explanation does not limit an editor-user to a creator-user or place any restrictions on when an editor-user may change a user-defined channel. *Id.* Additionally, that explanation does not indicate that any delay occurs before changes become effective once an editor-user changes a user-defined channel. *Id.* Appellants do not contend that

changing a user-defined channel in real time provides some surprising or unexpected advantage. App. Br. 13–30; Reply Br. 3–12. Nor have Appellants presented any evidence demonstrating that the modification would have been “uniquely challenging or difficult for one of ordinary skill in the art.” *See Leapfrog Enters., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1162 (Fed. Cir. 2007).

Appellants further argue that Lapcevic “was fundamentally not addressed to the question of how to reconcile potentially conflicting user demands with respect to one user-created playlist.” Reply Br. 11. But claim 3 does not include any requirement regarding “reconcil[ing] potentially conflicting user demands with respect to one user-created playlist.” App. Br. 33 (Claims App.). Thus, Appellants’ argument is not commensurate in scope with claim 3.

Accordingly, Appellants’ arguments have not persuaded us that the Examiner erred in rejecting claim 3 for obviousness based on Dunning, Dwek, and Lapcevic. Hence, we sustain the rejection.

The Rejection of Claims 6–17 Under 35 U.S.C. § 103(a)

Claims 6–12 depend directly or indirectly from claim 1; claims 13–14 depend directly from claim 2; and claims 15–17 depend directly from claim 3. App. Br. 33–35 (Claims App.). Appellants do not present any separate patentability arguments for any dependent claims. App. Br. 12–31; Reply Br. 2–12. Because Appellants do not argue the dependent claims separately, we sustain the obviousness rejection of the dependent claims for the reasons applicable to the independent claims. *See* 37 C.F.R. § 41.37(c)(1)(iv).

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DECISION

We affirm the Examiner's decision to reject claims 1–3 and 6–17.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED