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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte SHEAU NG and
NAGARAJAN GOPALAKRISHNAN

Appeal 2015-005266
Application 12/635,229
Technology Center 2400

Before JOSEPH L. DIXON, MATTHEW J. McNEILL, and
SCOTT E. BAIN, *Administrative Patent Judges*.

DIXON, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants¹ appeal under 35 U.S.C. § 134(a) from a Final Rejection of claims 1–10 and 12–21 are pending. Claim 11 is cancelled. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm-in-part.

The claims are directed to a viewer-personalized broadcast and data channel content delivery system and method. Claim 1, reproduced below, is illustrative of the claimed subject matter:

¹ Appellants indicate that NBCUniversal Media, LLC is the real party in interest. (App. Br. 2).

1. A method for controlling distribution of media content, via an analysis system, comprising:

receiving data from a particular receiver of a plurality of receivers, the data being indicative of at least one of:

at least one selection by a user of the particular receiver of at least one of a plurality of content streams broadcast to the plurality of receivers without regard to selection of any particular content stream by any particular receiver;

a state of the particular receiver, a user of the particular receiver, or both;

historical program selections of the particular receiver, the user of the particular receiver, or both;

program selection listing preferences of the particular receiver, the user of the particular receiver, or both;

settings for current or future recording of program selections of the particular receiver, the user of the particular receiver, or both; and

special orders of present program offerings, future program offerings, or both, placed by the particular receiver, the user of the particular receiver, or both;

analyzing the received data to identify a time-dependent preference from the particular receiver, the time-dependent preference indicative of a preference that is valid at a particular time or time period as opposed to other times or time periods;

transmitting system configuration data configured to alter or enhance performance of the particular receiver to the particular receiver based upon the identified time-dependent preference; and

altering a system configuration of the particular receiver based upon the transmitted system configuration data and the particular time or time period.

REFERENCES

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

Cristofalo et al.	US 2002/0194589 A1	Dec. 19, 2002
Wiser et al.	US 2013/0014159 A1	Jan. 10, 2013

REJECTION

The Examiner made the following rejection:

Claims 1–10 and 12–21 stand rejected under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Cristofalo further in view of Wiser.

ANALYSIS

With respect to independent claims 1, 9, 19, and 21, Appellants set forth separate arguments for patentability. Therefore, we will address each of Appellants' groups separately.

Independent claim 1

With respect to independent claim 1, Appellants contend:

As discussed in paragraph 40 of the specification, system configuration information may be time-dependent. In one example, viewing patterns may be established in context to time, which may result in the system configuration being altered based upon time in coordination with viewing patterns. Specification, paragraph 40. Thus, claim 1 recites, *inter alia*, 1) identifying a time-dependent preference (e.g., a time-based viewing pattern) by analyzing data received from a particular receiver, 2) transmitting system configuration data configured to alter or enhance performance of the particular receiver, and 3) altering a system configuration of the particular receiver based upon the

transmitted system configuration data and the particular time or time period.

(App. Br. 9) (emphasis added). Appellants further contend that the prior art references relied upon by the Examiner:

do not appear to transmit system configuration data configured to alter or enhance performance of the particular receiver to the particular receiver based upon the identified time-dependent preference analysis,[]as recited by claim 1. (Emphasis added.) Further, because they do not transmit time-dependent system configuration data, the references certainly do not “alter[] the system configuration of the particular receiver based upon the transmitted system configuration data and the particular time or time period.”

(App. Br. 9) (emphasis added). Appellants proffer that the content of the information is different without setting forth any substantive difference in the prior art. Appellants contend that the prior art references do not “transmit system configuration data configured to alter or enhance performance of the particular receiver to the particular receiver based upon the identified time-dependent preference analysis.” (App. Br. 9).

Appellants further contend that the time-specific transmission of data from the Wisser reference does not teach the claimed invention. (App. Br. 9–12)

The Examiner finds that the Wisser reference discloses the use of time based preferences and routines of the end-user. (Ans. 16–17 (citing Wisser ¶¶ 188, 259, 346, 204, and 109)).

We note that the Appellants’ Reply Brief responds to the Examiner’s response to arguments section (Ans. 11–16) which appears to be a carryover from the Examiner’s prior office action. The Examiner’s response to arguments section responding to Appellants’ Appeal Brief is set forth at pages 16–21 of the Examiner’s Answer.

We find a single reply by Appellants to the Examiner's responses to Appellants' arguments and to the further citations proffered by the Examiner to support the Examiner's findings. (Reply Br. 3). We disagree with Appellants and agree with the Examiner's findings that the Wiser reference is concerned with determining routines and preferences of the end-user of the set top box.

Appellants generally contend advertisement playback time and content push "are simply not analogous to 'transmitting system configuration data configured to alter or enhance performance of the particular receiver to the particular receiver based upon the identified time-dependent preference analysis,' as recited by claim 1." (Reply Br. 3).

Appellants further argue:

the examiner failed to address the argument that her analysis of advertisements being analogous to configuration data is erroneous. The appellants maintain that content is entirely different than configuration data and thus the examiner's rejection is erroneous. Even if the advertisement campaign could somehow be interpreted as configuration data, which the appellants refute, there does not appear to be any disclosure that the advertisement campaign is transmitted based upon a time-dependent preference obtained through analysis of the recited received data.

(Reply Br. 4).

Appellants proffer a distinction between the configuration data and targeted content data (Reply Br. 4), yet Appellants do not provide any limiting context for the configuration data. From our review of Appellants' Specification, we find that the Specification mentions the "time-dependent preference" in only paragraph 40 of the Specification. Consequently, Appellants have not identified any limiting context to distinguish the claimed configuration data or time-dependent preference.

We further find that the Wiser reference discloses the use of “PDP Module (Predictive Delivery and Personalization) (107)” and set top box PDP 118a–c in Figure 1. While the Examiner cites to a number of paragraphs to support the Examiner’s findings and conclusion of obviousness (Ans. 5–6), we further find the Wiser reference is replete with various embodiments which predict and personalize the delivery of content and the set top box. While the Wiser reference discloses the use of the personalization and prediction generally at the set top box, the Wiser reference additionally teaches and suggests the personalization and prediction throughout the system (*see* elements 107 versus 118 a–c). (*See* Wiser ¶¶ 75, 81).

Specifically, paragraph 81 of the Wiser reference discloses:

the broadband distribution system 110 may be used to send other types of control information, content schedules, and software updates to individual receiver controllers/STBs. In still some embodiments, the receiver controllers/STBs 117 is configured to communicate with each other so that if one receiver controller/STB (e.g. 117A) received a corrupted version of a program file, the one receiver controller/STB (e.g. 117 A) can obtain an uncorrupted version or a portion of the uncorrupted program to replace or repair the corrupted version by communicating with another receiver controller/STB (e.g. 117B).

(Emphasis omitted). We find the “software updates” would be a type of configuration data. Further, in paragraph 108 (*see* between cited ¶¶ 102, 105, 109 (Ans. 6, 17)), the Wiser reference discusses the PDP which is discussed throughout the Wiser reference regarding the personalization and changes to configuration. Additionally, paragraphs 128–130 disclose the PDP module, which learns and determines preferences (some time-dependent) based upon the user viewing behavior.

We further find Figures 5 (cited Ans. 6) and 6 of the Wiser reference disclose the interaction of the content server and the set top box with the PDP module 610. We agree with the Examiner that the Wiser reference discloses many varied and interrelated embodiments with communication and preferences along with modifications of the set top box configuration with regards to the PDP module for improved or enhanced performance as it relates to the user or users. (*See* Wiser ¶¶ 74, 75, 78, 81–88, 108, 109, 119–134 (Fig. 6), 268, 269).

The Examiner cites to paragraph 269 in the Examiner’s Answer (Ans. 6) which discloses:

“Top Picks for John” list includes shows that the intelligence components of the receiver controller and/or other parts of the content delivery system has selected to present to John based on John’s preferences, habits, and routines, as well as those of other viewers. Similarly, the “John’s Channels” list includes linear and nonlinear programs categorized by channel and captured by the receiver controller for John, again based on John’s preferences, habits, and routines as well as those of other viewers.

(Wiser ¶ 269).

We find Appellants’ Specification states “[f]or example, unlike conventional broadcast paradigms, the system allows for customization of control parameters, system settings, and configurations of particular systems” but Appellants’ Specification does not define any configuration data to limit the context thereof. (Spec. 46). Consequently, we find Appellants’ generalized argument regarding the claimed steps of:

transmitting system configuration data configured to alter or enhance performance of the particular receiver to the particular receiver based upon the identified time-dependent preference; and

altering a system configuration of the particular receiver based upon the transmitted system configuration data and the particular time or time period

does not show error in the Examiner's underlying factual findings and the Examiner's reasoned conclusion of obviousness of independent claim 1 and dependent claims 2–7, not separately argued.

Independent claim 9

With respect to independent claim 9, we note that the claim appears to have a number of antecedent bases issues which should be remedied in any further prosecution on the merits.²

Appellants contend that the cited prior art does not relate to determining a preference for a target-audience based upon data received from a particular subset of target-audience receivers. (App. Br. 13–14). However, the language of independent claim 9 does not perform any alteration or configuration, and the proffered distinction is in an intended use of the information which does not distinguish the claimed invention.³

² Claim 9 recites “a particular subset of target-audience receivers” and subsequently refers to “the particular receiver.” It is unclear if the method is performed with respect to each of the particular receivers and if the analysis is performed on the subset of receivers or on each of the individual particular receivers. As a result, it is unclear whether the transmitting is to the individual particular receiver or to the subset of target-audience receivers? Because Appellants merely argue the “subset” limitation (App. Br. 13–14), we limit our review to this limitation. Only those arguments actually made by the Appellants have been considered in this decision. Arguments which the Appellants could have made but chose not to make in the Briefs have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).

³ “An intended use or purpose usually will not limit the scope of the claim because such statements usually do no more than define a context in which

Additionally, the “configuration data” in claim 9 may be deemed to be non-functional descriptive material because the information is not used to perform any function in the claimed invention.⁴

The Examiner relies upon paragraphs 4, 12, 17, and 40 of the Cristofalo reference to teach and suggest the claimed limitation. (Ans. 13, 18). We agree with the Examiner that the Cristofalo reference explicitly recites that “the user profile system 306 collects information about each of the users or groups of users receiving programming from the transmission system 302.” (Cristofalo ¶ 40) (emphasis omitted). Appellants have not identified how a “particular subset of target-audience receivers” is different than a “group” or an individual receiver as taught by the Cristofalo reference. The language of independent claim 9 is broad enough to be a single receiver and the recited data is directed to “the data being indicative of at least one of at least one of” Furthermore, the recited “configuration data” is directed to a single particular receiver. Consequently, Appellants’ argument does not show error in the Examiner’s

the invention operates.” *Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corp.*, 320 F.3d 1339, 1345 (Fed. Cir. 2003). Although “[s]uch statements often . . . appear in the claim’s preamble” (*In re Stencel*, 828 F.2d 751, 754 (Fed. Cir. 1987)), a statement of intended use or purpose can appear elsewhere in a claim. *Id.*

⁴ The *informational content* of non-functional descriptive material is not entitled to weight in the patentability analysis. See *In re Lowry*, 32 F.3d 1579, 1583 (Fed. Cir. 1994) (“Lowry does not claim merely the information content of a memory. . . . Nor does he seek to patent the content of information resident in a database”). See also *Ex parte Nehls*, 88 USPQ2d 1883, 1887–90 (BPAI 2008) (precedential); *Ex parte Curry*, 84 USPQ2d 1272, 1274 (BPAI 2005) (informative) (*aff’d*, No. 06-1003 (Fed. Cir. June 12, 2006) (Rule 36)); *Ex parte Mathias*, 84 USPQ2d 1276, 1279 (BPAI 2005) (informative), *aff’d*, 191 Fed. Appx. 959 (Fed. Cir. 2006).

factual findings or the Examiner's ultimate conclusion of obviousness of independent claim 9 and its respective dependent claims 10, 12–17, and 20 not separately argued.

Independent claim 19

With respect to independent claim 19, Appellants contend that the Examiner has not shown the prior art teaches or suggests the “opt-in” limitation, which is not recited in the language of claims 1–3. (App. Br. 14–15). The Examiner summarily refers to the rejection of claims 1–3 in the statement of the rejection (Final Act. 11), and we agree with the Appellants that claims 1–3 do not include an “opt-in” limitation. In the Response to Arguments section of the Examiner's Answer, the Examiner attempts to buttress the lack of a substantive statement of rejection by referring to paragraph 44 of the Cristofalo reference. (Ans. 18–19; *see also* Final Act. 14). We note that the Examiner did not mention paragraph 44 in the rejection of claims 1–3, but does mention paragraph 44 in the Response to Arguments section of the Final Office Action. (Final Act. 14). Consequently, the Examiner has not addressed the language of independent claim 19, but merely attempts to patch the clear failure in the prosecution. In the response to arguments section of the Examiner's Answer, the Examiner additionally identifies the Wiser reference regarding a viewer selection screen. We find the Examiner had not previously addressed this portion of the Wiser reference with regards to claim 19 nor claims 1–3 the Final Office Action.

Appellants argue that paragraph 44 of the Cristofalo reference and Figure 29 of the Wiser reference do not disclose or suggest an “opt-in” functionality where the transmission only occurs “when the setting of the

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particular receiver is set to opt-in.” (Reply Br. 4–5). We agree with Appellants and find the Examiner’s treatment of claim 19 falls short of setting forth factual findings directed to the express language recited in independent claim 19 because the Examiner has not set forth an express rejection addressing all the limitations of the claim. As a result of the Examiner’s piecemeal analysis of the proffered distinction, the Examiner has not addressed the “opt-in” limitation as it relates to the claimed transmission. As a result, we cannot sustain the rejection of claim 19 and its respective dependent claims.

Independent claim 21

Appellants contend that the Examiner has not shown the prior art to teach or suggest the claimed step of:

transmit[ting] system configuration data configured to alter operation of a second particular receiver to the second particular receiver based upon the identified preference from the first particular receiver, such that the operation of the second particular receiver is altered to behave similarly to an operation of the first particular receiver.

(App. Br. 16; Reply Br. 5). The Examiner relies upon paragraph 41 of the Cristofalo reference and the Examiner generally speculates that the data storage unit:

may be remotely accessed, may be provided with the transmission system 302, with the user profile system 306, with the media object creators 308, or at any other location in the programming system 300, [0041], Fig. 3. It means that the stored data in the storage within the user profile can provide the setting/configuration data to a receiver to a different location such that the receiver in the second location behaves similarly to the receiver in the original location.

(Ans. 20) (emphasis omitted).

Appellants contend that “Cristofalo’s disclosure of various locations for a data storage device does not teach or even suggest such a receiver-mimicking feature.” (Reply Br. 5). We agree with Appellants that the Examiner has not shown that either the Cristofalo or Wisser reference teaches or suggests the claimed invention. As a result, we cannot sustain the rejection of independent claim 21.

Dependent Claims 8 and 18

Appellants elect to argue claims 8 and 18 together, and Appellants present similar arguments advanced with respect to independent claim 21. (App. Br. 17–19).

The Examiner further finds paragraphs 96 and 97 of the Cristofalo reference and paragraph 230 of the Wisser reference teach the limitations of claims 8 and 18. (Ans. 20–21). We note that the language of dependent claims 8 and 18 are of differing scope (claim 8 recites “configuration data” and claim 18 recites “data”). We select dependent claim 18 as the representative claim for the group and address Appellants’ arguments thereto. 37 C.F.R. § 41.37(c)(1)(iv). We agree with the Examiner that paragraph 230 of the Wisser reference discloses making suggestions to a second user from the first particular user.

As a result, Appellants’ argument does not show error in the Examiner’s rejection of representative dependent claim 18 and dependent claim 8 not separately argued.

CONCLUSIONS

The Examiner did not err in rejecting independent claims 1 and 9 and their respective dependent claims 2–8, 10, 12–18, and 20 under 35 U.S.C.

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§ 103(a), but the Examiner erred in rejecting independent claims 19 and 21 under 35 U.S.C. § 103(a).

DECISION

For the above reasons, we sustain the Examiner's rejection of claims 1–10, 12–18, and 20 under 35 U.S.C. § 103(a), but we reverse the Examiner's rejection of claims 19 and 21 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-IN-PART