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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte EVGENIY LEYVI

Appeal 2015-006351
Application 12/525,914
Technology Center 2400

Before KRISTEN L. DROESCH, JOHN P. PINKERTON, and
NORMAN H. BEAMER, *Administrative Patent Judges*.

PINKERTON, *Administrative Patent Judge*

DECISION ON APPEAL

Appellant¹ appeals under 35 U.S.C. § 134(a) from the Examiner's Final Rejection of claims 7, 8, 10, 11, 19, 20, 24, and 30–38. Claims 1–6, 9, 12–18, 21–23, and 25–29 are canceled. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

¹ Appellant identifies Koninklijke Philips Electronics NV, as the real party in interest. App. Br. 1.

STATEMENT OF THE CASE

Introduction

Appellant's disclosed and claimed invention is generally directed to a medical information delivery system configured for operation in conjunction with an entertainment device configured to present an entertainment audio/video content datastream, which system includes means for selecting patient-specific content for insertion into the datastream. Spec. 2:11–16.²

Claims 10 and 32 are representative and reproduced below (with the disputed limitations *emphasized*):

10. A medical information delivery system comprising:
a television configured to present an entertainment audio/video content datastream;

a multiplexor configured to *insert additional content into the entertainment audio/video content datastream as one or more of (i) video displayed in a sub window, (ii) a scrolling banner, and (iii) superimposed text;*

one or more sensors configured to acquire patient physiological measurements of a patient in real time *while the patient is viewing an entertainment audio/video content datastream presented by the television;*

a selection controller configured to select patient specific content for insertion by the multiplexor into the entertainment audio/video datastream presented by the television; and

a data analyzer configured to analyze the one or more patient physiological measurements and to cause the selection controller to select patient specific medical advice content in

² Our Decision refers to the Final Office Action mailed June 25, 2014 (“Final Act.”); Appellant’s Appeal Brief filed Nov. 25, 2014 (“App. Br.”) and Reply Brief filed June 11, 2015 (“Reply Br.”); the Examiner’s Answer mailed Apr. 17, 2015 (“Ans.”); and, the original Specification filed Aug. 5, 2009 (“Spec.”).

real time in accordance with the analyzed patient physiological measurements;

wherein the one or more sensors, data analyzer, selection controller, and multiplexor are configured to present patient specific medical advice content *in real time in accordance with the analyzed patient physiological measurements on the television as one or more of (i) video displayed in a sub window, (ii) a scrolling banner, and (iii) superimposed text.*

32. A medical information delivery system comprising:

a television configured to present a multi-channel entertainment audio/video content datastream;

one or more sensors configured to acquire patient physiological measurements of a patient in real-time while the patient is viewing a channel of the multi-channel entertainment audio/video content datastream presented by the television;

a selection controller configured to cause the television to switch to a channel; and

a data analyzer configured to analyze the one or more patient physiological measurements and to cause the selection controller to *switch the channel of the multi-channel entertainment audio/video content datastream presented by the television based on the analysis of the patient physiological measurements.*

Rejections on Appeal

Claims 10, 11, 19, 20, 24, 37, and 38 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Brown (US 6,375,469 B1; issued Apr. 23, 2002) and Kehr et al. (US 2003/0036683 A1; published Feb. 20, 2003) (“Kehr”). Final Act. 4–10.

Claims 7 and 36 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Brown and Kehr, as applied to claim 10, and further in

view of Klosterman (US 2012/0266194 A1; published Oct. 18, 2012) . Final Act. 11, 17–18.

Claim 8 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Brown and Kehr, as applied to claim 10, and further in view of Kahn (US 2002/0118299 A1; published Aug. 29, 2002). Final Act. 12.

Claims 30 and 31 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Brown and Kehr, as applied to claim 10, and further in view of Ramadas et al. (US 2007/0167689 A1; published July 19, 2007) (“Ramadas”). Final Act. 13.

Claims 32–34 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Brown and Ramadas. Final Act. 14–16.

Claim 35 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Brown and Kehr, as applied to claim 10, and further in view of Dahlin et al. (US 2004/0260577 A1; published Dec. 23, 2004) (“Dahlin”). Final Act. 16–17.

ANALYSIS

We have reviewed the Examiner’s rejections in light of Appellant’s arguments in the Briefs and are not persuaded the Examiner has erred. Unless otherwise noted, we adopt as our own the findings and reasons set forth by the Examiner in the Office Action from which this appeal is taken (Final Act. 4–18) and in the Examiner’s Answer (Ans. 3–8), and we concur with the conclusions reached by the Examiner. For emphasis, we consider and highlight specific arguments as presented in the Briefs.

Rejection of Claim 10³ under § 103(a)

Regarding claim 10, Appellant argues the Office Action conflates the two different embodiments of Brown—“the web page embodiment for which *spatial* overlaying is used, versus the television embodiment in which *temporal* splicing is used”—to teach a multiplexor configured to insert additional content into a television entertainment datastream “as one or more of (i) video displayed in a sub window, (ii) a scrolling banner, and (iii) superimposed text” and present patient specific medical advice content in real time on the television “as one or more of (i) video displayed in a sub window, (ii) a scrolling banner, and (iii) superimposed text.” App. Br. 10–12; Reply Br. 3. With respect to the Examiner’s finding that a person of ordinary skill in the art would appreciate that the word “preferably” in Brown’s description of the television embodiment does not exclude other alternative embodiments, Appellant argues “the mere insertion of the word ‘preferably’ does not provide *enabling* disclosure for the modification of Brown contemplated by the Examiner.” Reply Br. 3–4. Appellant further argues Kehr fails to disclose acquiring patient physiological measurements in real time “while the patient is viewing an entertainment audio/video datastream presented by the television” and the television of Kehr functions as a user interface for the medical monitoring device, rather than for presenting an entertainment datastream. App. Br. 12–13; Reply Br. 5.

We are not persuaded by Appellant’s arguments that the Examiner erred. The Examiner finds, and we agree, that in the web page embodiment,

³ We decide the rejection of claims 10, 11, 19, 20, 24, 37, and 38, which are rejected under the first-stated ground of rejection, on the basis of representative claim 10. See 37 C.F.R. § 41.37(c)(1)(iv).

Brown teaches the composite of the entertainment content and health content is displayed “preferably in a spatial composite,” with the health content in sub-windows. Ans. 3–4 (citing Brown Fig. 2, col. 3, ll. 1–5, col. 4, ll. 51–55). The Examiner also finds, and we agree, Brown teaches, in the embodiment with television programming as the source of entertainment, “the composite is *preferably* a temporal composite.” *Id.* at 4 (citing Brown, col. 8, ll. 55–57). The Examiner further finds that one of ordinary skill in the art would appreciate that a preferred alternative does not exclude other alternatives. *Id.* at 4. In other words, the Examiner finds, and we agree, Brown’s preference for a temporal composite in the television programming embodiment does not exclude the use of Brown’s spatial composite in the television programming embodiment. Thus, we are not persuaded by Appellant’s argument that the Examiner conflates the web page and television embodiments of Brown.

We also are not persuaded by Appellant’s argument that Brown does not provide an enabling disclosure for the modification of Brown contemplated by the Examiner. *See* Reply Br. 4. Here, claim 10 stands rejected as being obvious over Brown and Kehr, and the proper standard under 35 U.S.C. § 103(a) 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). Furthermore, under § 103, “a reference need not be enabled; it qualifies as a prior art, regardless, for whatever is disclosed therein.” *Amgen, Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1357 (Fed. Cir. 2003).

We also are not persuaded by Appellant’s arguments that Kehr fails to teach acquiring patient physiological measurements in real time “while the

patient is viewing an entertainment audio/video datastream presented by the television” because the television of Kehr functions as a user interface for the medical monitoring device, rather than for presenting an entertainment datastream. These arguments attack the teachings of Kehr individually, whereas the rejection is based on the combined teachings of Brown and Kehr. App. Br. 12–13; Reply Br. 5. “Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references.” *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). The relevant inquiry is whether the claimed subject matter would have been obvious to those of ordinary skill in the art in light of the combined teachings of the references. *See In re Keller*, 642 F.2d at 425. Here, the Examiner relies on Brown as teaching acquiring patient physiological measurements while the patient is viewing entertainment content. Ans. 4 (citing Brown, col 5, l. 1–col. 6, l. 22, col. 7, ll. 1–39). The Examiner relies on Kehr as teaching

one or more monitors and sensors acquire and analyze patient physiological measurements of a patient in real time [citing Kehr ¶¶ 59–68, 85, 228] to select and provide in real-time the patient-specific medical advice content, emergency action or medical advertisements in accordance with the patient’s in-real-time analyzed measurements as prompted messages [citing Kehr ¶¶ 86–68, 171, 180, 319–320].

Ans. 4.

Appellant has not provided persuasive evidence or arguments to rebut these findings and, therefore, we agree with them and adopt them as our own. For these reasons, and based upon a preponderance of the evidence, we are not persuaded the Examiner erred in (1) finding the combined teachings of Brown and Kehr teach or suggest the disputed limitations of

claim 10 and (2) concluding that the combination of Brown and Kehr renders the subject matter of claim 10 obvious under 35 U.S.C. § 103(a). Accordingly, we sustain the Examiner's rejection of claim 10, as well as independent claim 24, and dependent claims 11, 19, 20, 37, and 38, which are not argued separately. *See* App. Br. 14. For the same reasons discussed *supra* regarding claim 10, we also sustain the Examiner's rejections of claims 7, 8, 30, 31, 35, and 36, which are not separately argued and for which reversal is urged for the reasons argued with respect to claim 10. *Id.* at 17–18.

Rejection of Claim 32 under § 103(a)

In the Appeal Brief, Appellant argues Ramadas does not mention a television or a multi-channel entertainment audio/video content datastream, much less switching a channel of the datastream presented by the television. App. Br. 15. Appellant argues that “Ramadas fairly suggests modifying the flow of content presented by the entertainment device in response to a measured physiological state[, b]ut changing the channel of a television . . . does not merely modify the flow content—rather, it changes the content entirely, to a different channel.” *Id.* at 16.

We are not persuaded by Appellant's arguments the Examiner has erred. First, Appellant's arguments are not persuasive because they attack Ramadas individually, whereas the Examiner relies on the combined teachings of Brown and Ramadas. *See In re Merck*, 800 F.2d at 1097. The Examiner finds Brown teaches a television, a multichannel datastream, a selection controller to switch channels of the datastream presented by the television, and a data analyzer to analyze the one or more patient physiological measurements and to cause the selection controller to select

medical content in accordance with the analyzed patient physiological measurements to be presented while the patient is viewing a channel of the datastream. *See* Final Act. 14. The Examiner finds Ramadas teaches acquiring physiological measurements of a patient in real-time by one or more sensors to determine the emotional state or the physiological condition of the user/patient and to alter a channel having gentle contents or exciting contents in accordance with the current physiological measurements of the user/patient. *Id.* at 14–15 (citing Ramadas ¶¶ 17, 20, 21). Appellant has not provided persuasive evidence or arguments to rebut these findings and, therefore, we agree with them and adopt them as our own. We also agree with the Examiner that the combination of Brown and Ramadas teaches or suggests the disputed limitation of claim 32 because the teaching of Ramadas of changing the content flow of a multi-media playback device based on the inferred emotional state of the user at least suggests changing the channel of the datastream of the television of Brown based on the analysis of the patient physiological measurements. The Supreme Court guides: the “combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR Int’l v. Teleflex, Inc.*, 550 U.S. 398, 416 (2007). 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*, 550 U.S. at 420–21. This reasoning is applicable here. Thus, we find a preponderance of the evidence supports the Examiner’s finding that the *combined* teachings of Brown and Ramadas would have taught or suggested the disputed limitation of claim 32. Because we are not persuaded of error regarding the Examiner’s legal conclusion of

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obviousness, we sustain the Examiner's rejection of claim 32. We also sustain the rejection of claim 33 which is not argued separately. In regard to claim 34, Appellant's arguments regarding the limitation reciting a multiplexor to insert content into the datastream "as one or more of (i) video displayed in a sub-window, (ii) a scrolling banner, and (iii) superimposed text," are the same as those presented in regard to claim 10. For the same reasons stated *supra* regarding claim 10, we also sustain the Examiner's rejection of claim 34.

DECISION

We affirm the Examiner's rejections of claims 7, 8, 10, 11, 19, 20, 24, and 30–38 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