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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CARLOS MUNOZ-BUSTAMANTE

Appeal 2015-007605
Application 12/712,747¹
Technology Center 2600

Before ST. JOHN COURTENAY III, JENNIFER L. McKEOWN,
and NORMAN H. BEAMER, *Administrative Patent Judges*.

BEAMER, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134(a) the Examiner's Final Rejection of claims 1–3, 6–12, and 15–22. Claims 4, 5, 13, and 14 are cancelled. We have jurisdiction over the pending rejected claims under 35 U.S.C. § 6(b).

We affirm.

¹ Appellant identifies Lenovo (Singapore) PTE. LTD., as the real party in interest. (App. Br. 3.)

THE INVENTION

Appellant's disclosed and claimed invention is directed to facial recognition systems implemented for access control purposes. (Abstract.) Claim 1, reproduced below, is illustrative of the subject matter on appeal:

1. An apparatus comprising:
 - one or more processors; and
 - a program storage device tangibly embodying a program of instructions executable by the one or more processors, the program of instructions comprising:
 - computer readable program code configured to prompt a user for image data;
 - computer readable program code configured to capture an image of the user;
 - computer readable program code configured to process the image;
 - computer readable program code configured to determine if the image matches reference image data, wherein the reference image data corresponds to a previously obtained non-standard facial pose image of the user; and
 - computer readable program code configured to grant access to the apparatus responsive to a match between the image captured and the previously obtained nonstandard facial pose image of the user.

REJECTIONS

The Examiner rejected claims 1–3, 6–12, and 15–19 under 35 U.S.C. § 102(b) as being anticipated Bakis et al. (US Pat. No. 6,219,639 B1, issued Apr. 17, 2001).² (Final Act. 3–9.)

² The Examiner has withdrawn the rejection of claim 20 under 35 U.S.C. § 102(b) over Bakis. (Ans. 2.)

The Examiner rejected pending claims 1–3, 6–12, and 15–22 under 35 U.S.C. § 103(a) as being unpatentable over Zhang (CN 1940806 A, pub. Apr. 4, 2007) and Furuyama et al. (US 2002/0152390 A1, pub. Oct. 17, 2002). (Final Act. 10–19.)

ISSUES ON APPEAL

Appellant’s arguments in the Briefs present the following issues:³

Issue One: Whether the Examiner erred in finding Bakis anticipates 1–3, 6–12, and 15–19. (App. Br. 14–15.)

Issue Two: Whether the Examiner erred in finding the combination of Zhang and Furuyama teaches or suggests the independent claim 1 limitation, “the reference image data corresponds to a previously obtained non-standard facial pose image of the user,” and the similar limitation recited in independent claims 10 and 19. (App. Br. 15–17.)

Issue Three: Whether the Examiner erred in finding the combination of Zhang and Furuyama teaches or suggests the claim 20 limitation, “wherein the determining if the image matches reference image data comprises using the previously obtained non-standard facial pose image alone.” (App. Br. 17.)

³ Rather than reiterate the arguments of Appellant and the findings of the Examiner, we refer to the Appeal Brief (filed July 21, 2014, corrected Sept. 2, 2014); the Reply Brief (filed Aug. 17, 2015); the Final Office Action (mailed Jan. 17, 2014); and the Examiner’s Answer (mailed June 17, 2015) for the respective details.

ANALYSIS

We have reviewed the Examiner's rejections in light of Appellant's arguments the Examiner erred. With respect to the obviousness rejections, we disagree with Appellant's arguments, and we adopt as our own (1) the pertinent findings and reasons set forth by the Examiner in the Action from which this appeal is taken (Final Act. 10–19) and (2) the corresponding findings and reasons set forth by the Examiner in the Examiner's Answer in response to Appellant's Appeal Brief (Ans. 5–8). We concur with the applicable conclusions reached by the Examiner, and emphasize the following.

*Issue One*⁴

The Examiner's rejection of claims 1–3, 6–12, and 15–19 under 35 U.S.C. § 102(b) as being anticipated by Bakis is incorrectly directed to versions of the claims that were amended prior to the Final Action. (*Cf.* Final Act. 3–9, *with* 9/30/2013 Amendment, pp. 2–7.) “[T]he examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability.” *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). In this instance, the Examiner has not met the burden of showing Bakis anticipates the pending claims, given that the Final

⁴ Regarding the anticipation rejection, *see* 37 C.F.R. § 41.39(a)(1) (“An examiner’s answer is deemed to incorporate all of the grounds of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory action and pre-appeal brief conference decision), unless the examiner’s answer expressly indicates that a ground of rejection has been withdrawn.”). Therefore, this rejection is under our jurisdiction under 35 U.S.C. § 6(b), even though the anticipation rejection is directed to an incorrect version of the claims.

Action is directed to incorrect versions of those claims, and therefore we *pro forma* reverse this rejection.

Issue Two

In finding Zhang and Furuyama teach or suggest the limitation at issue, the Examiner relies on the disclosure in Zhang of a computer login system with an expression identifying function which first compares the live camera image of a user's face to stored pre-captured facial images in order to authorize access, and then further compares the user's particular facial expression to the stored images to determine a user login desktop theme. (Final Act. 11; Zhang pp. 1–2.)

Appellant argues:

Zhang teaches that the user may make any input (make any face) and simply log in. Zhang then uses expression specific data to choose a desktop theme. That is, Zhang only works if all the user's expressions may be used to log in to the computer. In fact, Zhang does not require any specific expression for log in.

(App. Br. 16.) To the contrary, Zhang specifically discloses comparing the image currently captured by a camera to stored images, and if there is no match, the “user is blocked [to] log on to the computer.” (Zhang p. 2.) Moreover, the stored images are of facial expressions that are used to invoke various desktop themes. (*Id.*) This at least teaches or suggests that the stored images are “nonstandard facial pose image[s] of the user,” as required by the claims. (Ans. 7–8.)

Furthermore, we agree with the Examiner, “there is no specific definition of a non-standard facial pose given in the applicant's specification, but it states that it can take a wide variety of forms.” (Ans. 5;

see Spec. ¶¶ 32, 35.)⁵ During prosecution claims are given their broadest reasonable interpretation in light of the Specification, *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997). Indeed, the Specification describes: “[t]his disclosure has been presented for purposes of illustration and description but is not intended to be exhaustive or limiting.” (Spec. ¶ 50.) Under the broadest reasonable interpretation, we determine that the Examiner has not erred in finding the facial expressions taught in Zhang are “nonstandard facial pose[s]” as claimed. Therefore, we sustain the Examiner’s obviousness rejection of claims 1, 10, and 19.

Issue Three

Appellant argues “Zhang teaches a system that works with many user expressions, not a single one alone,” in contravention of the claim 20 requirement of “determining if the image matches reference image data comprises using the previously obtained non-standard facial pose image alone.” (App. Br. 17.) However, we agree with the Examiner, “the embodiment of Zhang of only using one facial expression as reference image

⁵ In the event of further prosecution of this application, we leave it to the Examiner to consider whether the pending claims should be rejected under 35 U.S.C. § 112, second paragraph, as being indefinite. Specifically, it appears the claim language “nonstandard facial pose image” is a subjective term of degree, subject to plural plausible interpretations under a broad but reasonable interpretation. *See Ex parte Miyazaki*, 89 USPQ2d 1207, 1211 (BPAI 2008) (precedential). Claim scope cannot depend solely on the unrestrained, subjective opinion of a particular individual purported to be practicing the invention. *See Datamize LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1350 (Fed. Cir. 2005); *see also* MPEP § 2173.05(b)(IV). Although the Board is authorized to reject claims under 37 C.F.R. § 41.50(b), no inference should be drawn when the Board elects not to do so. *See* MPEP § 1213.02.

data to logon to the computer would apply” — thus, teaching or suggesting this claim requirement. (Ans. 8.)

CONCLUSION

For the reasons stated above, we do not sustain the anticipation rejections of claims 1–3, 6–12, and 15–19.

In addition, for the reasons stated above, we sustain the obviousness rejections of independent claims 1, 10, 19, and 20. We also sustain the obviousness rejections of claims 2, 3, 6–9, 11, 12, 15–18, 21, and 22, which rejections are not argued separately with particularity. (App. Br. 13.)

DECISION

We affirm the Examiner’s obviousness rejection of claims 1–3, 6–12, and 15–22.⁶

We reverse the Examiner’s anticipation rejection of claims 1–3, 6–12, and 15–19.

Because we have affirmed at least one ground of rejection with respect to each claim on appeal, the Examiner’s decision is affirmed. *See* 37 C.F.R. § 41.50(a)(1).

⁶ In the event of further prosecution, we leave the following § 101 issue to the consideration of the Examiner: we note independent claim 19 is directed to “a computer readable storage medium having computer readable program code embodied therewith. . . .” This raises the question under 35 U.S.C. § 101 of whether the phrase “computer readable storage medium” is broad enough to cover non-statutory signals per se. *See Ex parte Mewherter*, 107 USPQ2d 1857 (BPAI May 8, 2013) (precedential-in-part).

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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