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Table with 5 columns: APPLICATION NO., FILING DATE, FIRST NAMED INVENTOR, ATTORNEY DOCKET NO., CONFIRMATION NO.
14/748,258 06/24/2015 Mark GOODAY 63068 3217

67801 7590 11/16/2018
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EXAMINER

GAUTHIER, GERALD

ART UNIT PAPER NUMBER

2653

NOTIFICATION DATE DELIVERY MODE

11/16/2018

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MARK GOODAY¹

Appeal 2018-002611
Application 14/748,258
Technology Center 2600

Before DEBRA K. STEPHENS, DANIEL J. GALLIGAN, and
DAVID J. CUTITTA II, *Administrative Patent Judges*.

CUTITTA, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134(a) from a non-final rejection of claims 1, 5, 6, 12, 13, 15, and 22–31, which are all of the claims pending in the application.² We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ Appellant is the Applicant, Meters Music Limited, which, according to the Appeal Brief, is the real party in interest. *See* App. Br. 2.

² Claims 2–4, 7–11, 14, and 16–21 have been cancelled.

STATEMENT OF THE CASE

According to Appellant, the claims are directed to headphones having a signal level meter on the exterior surface of the headphones. Abstract.³

Claim 1, reproduced below, is representative of the claimed subject matter:

1. A headphone device, comprising:

a pair of headphone cans, each headphone can comprising a generally cup-shaped can body, the can body having a concave configuration such that a cavity is defined, the cavity being enclosed by a user contacting portion, wherein the user contacting portion is arranged in use to face internally towards the head of the user such that it presses against or sits around the ear of the user; and

a connecting band for connecting the pair of headphone cans, each headphone can being mounted to an end of the connecting band such that the user contacting portion of one headphone can is facing the user contacting portion of the other headphone can, wherein the connecting band is arranged in use to sit around the head of the user such that the headphone cans are aligned with the ears of the user,

wherein at least one or more of the headphone cans comprise:

a transducer for converting electrical signals to audio signals, the transducer being disposed within the cavity of the can body and arranged to face internally towards the head of the user such that in use the audio signals are directed towards the ear of the user; and

a needle based analogue meter for providing a visual indication of a property of the signal being input to or reproduced by the transducer in the headphone can, the meter comprising a

³ This Decision refers to: (1) Appellant's Specification filed June 24, 2015 (Spec.); (2) the Non-Final Office Action (Non-Final Act.) mailed May 16, 2017; (3) the Appeal Brief (App. Br.) filed August 29, 2017; (4) the Examiner's Answer (Ans.) mailed November 16, 2017; and (5) the Reply Brief (Reply Br.) filed January 14, 2018.

movable needle and a scale, the scale having units representative of the property of the signal, wherein the units of the scale are one of volume units (VU), peak signal level units, or sound pressure level (SPL) units,

wherein the meter is calibrated such that the sensitivity of the moveable needle to the signal being input to or reproduced by the transducer corresponds to the units of the scale, and wherein the meter is arranged on the exterior of the headphone can such that it faces outwards so as to be visible to a third party other than the wearer when being worn.

REFERENCES AND REJECTION

Claims 1, 5, 6, 12, 13, 15, and 22–31 stand rejected under 35 U.S.C. § 103 as being unpatentable over Yamashita (US 2007/0291955 A1; published Dec. 20, 2007), McKee (US 6,023,515; issued Feb. 8, 2000), and Lintz (US 2014/0112499 A1; published Apr. 24, 2014). Non-Final Act. 3–8.

Our review in this appeal is limited only to the above rejection and the issues raised by Appellant. Arguments not made are waived. *See* MPEP § 1205.02; 37 C.F.R. §§ 41.37(c)(1)(iv) and 41.39(a)(1).

ANALYSIS

“a property of the signal”

Appellant contends the Examiner erred in finding Yamashita teaches a “meter for providing a visual indication of a property of the signal being input to or reproduced by the transducer in the headphone can,” as recited in claim 1 and similarly recited in claim 24. App. Br. 10–11, 15–16; Reply Br. 2–5. Specifically, Appellant argues Yamashita

shows the sound level at which the device is set and not the sound level of the signal being input or reproduced by the transducer.

The display of Yamashita would remain the same for all parts of an audio file, even when the audio file includes beats or silent parts contrary to the claimed invention. The display of Yamashita changes only when a user changes the volume setting of the device.

Reply Br. 4; App. Br. 16 (emphasis omitted).

We are not persuaded. The Examiner finds (Non-Final Act. 3–4), and we agree, Yamashita’s “wireless headphone” having “a sound volume display unit 5” placed on the exterior of the wireless headphone (Yamashita ¶ 25, Fig. 1), teaches a “meter for providing a visual indication of a property of the signal being input to or reproduced by the transducer in the headphone can.”

Appellant’s argument that Yamashita’s “set volume” is not a property of the signal reproduced by the headphones (App. Br. 16; Reply Br. 2–5) is not commensurate with the scope of the claims. The claims do not define or limit what “a property of the signal” is, and in particular, do not preclude a set volume level signal property. The set volume level of Yamashita, even if set by a device, establishes the loudness of the signal being reproduced, and, as such, the set volume level is a signal property. Indeed, Appellant’s Specification confirms that a set volume level is a property of a signal being reproduced by headphones. The Specification describes that “any third party can quickly and easily check the volume being input to the headphones . . . If the *volume level* is unsuitable . . . it may then be *adjusted externally*,” i.e., set. Spec. 4:28–5:12 (emphasis added). As the Appellant points out, Yamashita’s headphones display a “current sound volume level” that may be adjusted externally. Reply Br. 3 (citing Yamashita ¶¶ 7, 30). As such, consistent with Appellant’s Specification, Yamashita’s set volume level teaches a signal property.

Accordingly, we are not persuaded the Examiner erred in finding Yamashita teaches a “meter for providing a visual indication of a property of the signal being input to or reproduced by the transducer in the headphone can,” as recited in claim 1 and similarly recited in claim 24.

Improper Combination

Appellant contends the Examiner improperly combined Yamashita and Lintz. App. Br. 17–20; Reply Br. 5–6. Specifically, Appellant argues “the Examiner has failed to provide any reasoning as to why the prior art documents would be combined.” App. Br. 17–18 (emphasis omitted). Appellant further argues “Yamashita teaches against the combination with Lintz.” *Id.* at 20 (emphasis omitted). Still further, Appellant argues the combination “would change the principle of operation of Yamashita.” App. Br. 20; *see* Reply Br. 6 (emphasis omitted).

We are not persuaded. As discussed *supra*, we agree with the Examiner’s finding that Yamashita teaches headphones with an externally arranged volume meter. Non-Final Act. 2–3. We also agree with the Examiner’s finding that Lintz’s “needle-based analog VU meter[]” (Lintz ¶ 61) teaches “a needle based analogue meter for providing a visual indication of a property of the signal being input to or reproduced” (Non-Final Act. 5).

Although Appellant argues that the Examiner does not provide any reasoning for the combination (App. Br. 17–18), the Examiner articulates reasoning for the combination of Yamashita and Lintz that is supported by rational underpinning. Specifically, the Examiner states the combination “modif[ies] Yamashita” by “[u]sing [the] VU meter of Lintz instead of”

Yamashita's meter. Ans. 4. That is, the Examiner "substitute[es] . . . one element for another known in the field" (*KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007)), specifically, an analog meter for a digital meter.

Furthermore, the Examiner states that substituting an analog meter for a digital meter that "changes the look of the meter" is "a design choice" that allows "the user to easily observ[e] the real time changing of the input signal." Ans. 4, 8.

We agree with the Examiner that it is rational to substitute analog and digital meters in order to choose between known manners of representing signal information. The modification is no more than the predictable use of prior-art elements according to their established functions. *KSR*, 550 U.S. at 417 ("if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious."). Furthermore, Lintz supports the Examiner's conclusion that it is obvious to use either a digital or analog meter because Lintz describes that both analog and digital meters can be used to represent signals. Lintz ¶ 61 ("The audio production console 10 disclosed herein may use said analog meters, or more preferably may represent the positioning of the needle in a digital environment, such as on an LCD or comparable digital display.").

Further, Appellant's argument that "Yamashita teaches against the combination with Lintz" (App. Br. 20) (emphasis omitted) is not persuasive. To teach away, a reference must "criticize, discredit, or otherwise discourage the solution. *In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004). Appellant, however, has not identified where Yamashita criticizes, discredits, or otherwise discourages substituting an analog meter for a digital meter.

Furthermore, Appellant’s argument that “[w]ith the amended display Yamashita is not able to control and synchronize between the devices as desired” (App. Br. 20) is unpersuasive as it is supported only by attorney argument, which “cannot take the place of evidence.” *In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974). Appellant does not adequately explain why or provide evidence that substituting one known manner of displaying audio information for another would render Yamashita inoperable or change Yamashita’s principle of operation. Furthermore, as discussed *supra*, Lintz describes that it is within the ordinary artisan’s skill to substitute analog and digital meters. Lintz ¶ 61. Appellant also argues the Examiner’s cited motivation (“to enable the user to easily observ[e] the real time changing of the input signal” (Ans. 4, 8)) “is based on hindsight” because “[t]he Examiner failed to show why Yamashita would be interested in observing real time changing of the input signal.” We find this argument unpersuasive of Examiner error. The Federal Circuit has “[held] that while an analysis of obviousness always depends on evidence that supports the required *Graham* factual findings, it also may include recourse to logic, judgment, and common sense available to the person of ordinary skill that do not necessarily require explication in any reference or expert opinion.” *Perfect Web Techs., Inc. v. InfoUSA, Inc.*, 587 F.3d 1324, 1329 (Fed. Cir. 2009); *see also Nat’l Steel Car, Ltd. v. Canadian Pacific Ry., Ltd.*, 357 F.3d 1319, 1337 (Fed. Cir. 2004) (“It has long been the law that the motivation to combine need not be found in prior art references, but equally can be found ‘in the knowledge generally available to one of ordinary skill in the art.’” (quoting *In re Jones*, 958 F.2d 347, 351 (Fed. Cir. 1992))).

Accordingly, we are not persuaded the Examiner erred by improperly combining Yamashita, McKee, and Lintz.

Objective Indicia of Non-Obviousness

Appellant contends the claims are non-obvious based on Andy Boxall's article, "Meters By Ashdown OV-1: Our First Take" ("First Take"). App. Br. 20–22; Reply Br. 6–7. In particular, Appellant argues the article "praises the claimed meter," "indicates that the [external] meter is special," and "acknowledges the benefit of the claimed" external meter. App. Br. 20–21.

We have carefully considered Appellant's evidence of non-obviousness, but we are not persuaded the Examiner erred in concluding the claims are obvious. Appellant first highlights the article's praise of "headphones with an active VU meter." First Take, 2–3. "Evidence that the industry praised a claimed invention or a product that embodies the patent claims weighs against an assertion that the same claimed invention would have been obvious." *Apple Inc. v. Samsung Elecs. Co.*, 839 F.3d 1034, 1053 (Fed. Cir. 2016); accord *Institut Pasteur & Universite Pierre Et Marie Curie v. Focarino*, 738 F.3d 1337, 1347 (Fed. Cir. 2013) ("[I]ndustry praise . . . provides probative and cogent evidence that one of ordinary skill in the art would not have reasonably expected [the claimed invention]."). While we acknowledge that industry praise weighs against a finding of obviousness, here, the claims do not recite an "active VU meter." Instead, claim 1, for example, recites "a needle based analogue meter." See Appeal Br. 23. As such, the allegedly non-obvious active VU meter Appellant relies on is not reflected in the claim language and thus Appellant fails to demonstrate the

industry praise directed toward an “active VU meter” is relevant to the claimed invention. That is, here, Appellant has not established that “the industry praised [the] claimed invention or a product that embodies the patent claims.” *Apple Inc.*, 839 F.3d at 1053. Furthermore, the benefits of an external meter discussed by the article — the external meter “can be used by onlookers to judge whether the volume is too loud” and the external meter provides “visual excitement” (*id.* at 3–4) — are benefits Yamashita provides. Yamashita’s sound volume display unit 5 is an external meter (*see* Fig. 1) that displays “the sound volume or the like” (Yamashita ¶ 26); thus, it follows that an onlooker would be able to judge whether the volume is too loud and that the meter provides visual excitement. As such, the allegedly non-obvious benefits to an external meter that Appellant relies on are found in the prior art and do not persuade us the claims are non-obvious.

Accordingly, we are not persuaded the Examiner erred in concluding the claims are obvious. We, therefore, sustain the 35 U.S.C. § 103 rejection of independent claims 1 and 24, as well as the 35 U.S.C. § 103 rejection of dependent claims 5, 6, 12, 13, 15, 22, 23, and 25–31, which are not argued separately. *See* App. Br. 22.

DECISION

For the reasons above, we affirm the Examiner’s decision rejecting claims 1, 5, 6, 12, 13, 15, and 22–31.

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. § 41.50(f).

AFFIRMED