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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte STEVEN MICHAEL HANNING

Appeal 2018-003193[1]
Application 14/853,289
Technology Center 2100

Before ERIC B. CHEN, MICHAEL J. STRAUSS, and
MICHAEL M. BARRY, *Administrative Patent Judges*.

BARRY, *Administrative Patent Judge.*

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134(a) from a final rejection of claims 1–16, which are all the pending claims. App. Br. 1; Final Act. 1. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

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[1] "Stryker Corporation . . . is the real party in interest." App. Br. 1.

Introduction

"The present invention relates to a surgical process, and in particular to a method of creating a surgical operative note during a specific surgical procedure on a patient." Spec. ¶ 2.

Independent claim 1 is illustrative of the claims:

> 1. A method of creating a surgical operative note during a specific surgical procedure on a patient, the method comprising:
>
> creating surgical checklists for a plurality of surgical procedures before initiation of the surgical procedure;
>
> creating an index of image specific annotations for the specific surgical procedure before initiation of the surgical procedure;
>
> obtaining an electronic template;
>
> inserting one of the surgical checklists into the electronic template associated with the specific surgical procedure on the patient;
>
> obtaining an image of the patient;
>
> inserting the image of the patient into the electronic template; and
>
> using a voice command to associate at least one of the image specific annotations with the image of the patient in the electronic template and to insert the at least one of the image specific annotations into the electronic template adjacent the image.

App. Br., Claims App'x 1.

Rejections & References

Claims 2, 6–12, 15, and 16 stand rejected under 35 U.S.C. § 112(b) as indefinite. Final Act. 5.

Claims 1, 2, 7, 9, 13, and 15 stand rejected under 35 U.S.C. § 103 as unpatentable over Robbins (US 2014/0006943 A1; Jan. 2, 2014) and Mahesh (US 2009/0130641 A1; May 21, 2009). Final Act. 6–12.

Claims 3–6, 8, and 10–12 stand rejected under 35 U.S.C. § 103 as unpatentable over Robbins, Mahesh, and Green (US 8,050,938 B1; Nov. 1, 2011). Final Act. 12–16.

Claims 14 and 16 stand rejected under 35 U.S.C. § 103 as unpatentable over Robbins, Mahesh, and Qian (US 2005/0197567 A1; Sept. 8, 2005). Final Act. 16–17.

ANALYSIS

Appellant waives unmade arguments. 37 C.F.R. § 41.37(c)(1)(iv) ("The arguments shall explain why the examiner erred as to each ground of rejection contested by appellant. . . . [A]ny arguments or authorities not included in the appeal brief will be refused consideration by the Board for purposes of the present appeal."); *Cf. In re Baxter Travenol Labs.*, 952 F.2d 388, 391 (Fed. Cir. 1991) ("It is not the function of this court to examine the claims in greater detail than argued by an appellant . . . .").

The 35 U.S.C. § 112(b) Rejection

The Examiner determines claims 2 and 7 are indefinite under 35 U.S.C. § 112(b) because "each of these claims includes a limitation '***directly*** inserting' free text 'at a location in the electronic template ***spaced*** from the at least one of the image specific locations'." Final Act. 5 (also rejecting claims 6, 8–12, 15, and 16 based on dependency from claim 2 or 7). The Examiner determines "'directly' is a relative term which renders the claim indefinite" because it "is not defined by the claim, the specification does not

provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention." *Id.* The Examiner determines "spaced" is indefinite because it "does not appear to be a known term of art and is not defined in the present specification of the claims." *Id.*

Appellant contends the Examiner errs because under the correct standard — "If the language of the claim is such that a person of ordinary skill could not interpret the metes and bounds of the claim so as to understand how to avoid infringement, a rejection of the claim under 35 U.S.C. § 112(b) . . . would be appropriate" — the disputed claim limitations are definite. *See* App. Br. 4–5 (quoting MPEP § 2173.02).

We disagree with the Examiner that "spaced" as recited in claim 2 is ambiguous because "spaced from the at least one of the image specific annotations" can mean "spaced in either (1) time or (2) distance." Ans. 6. The methods of claims 2 and 7 recite inserting text "at a location . . . spaced from," which definitely uses the term "spaced" with reference to distance, not time.

We agree with the Examiner, however, that the meaning of "directly" in "directly inserting the free text into the electronic template," is indefinite because it is susceptible to multiple plausible interpretations. *See* Ans. 4–5 (identifying multiple plausible meanings for directly such as "in close relational proximity," "without any intervening agency or instrumentality," or "at once" (citing *Webster's Third New Int'l Dictionary* 641 (1967); *Ex parte Miyazaki*, 89 USPQ2d 1207, 1211 (BPAI 2008) (precedential))). We disagree with Appellant that claim 2's limitation of "wherein directly inserting the free text into the electronic template occurs during the specific

surgical procedure" defines the term "directly." App. Br. 5 ("Directly therefore means not at a later time, but during the specific surgical procedure."). As the Examiner responds, and we agree, the wherein clause limits when "directly inserting" occurs, without defining "directly." Ans. 5.

Accordingly, we sustain the Examiner's 35 U.S.C. § 112(b) rejection of claims 2, 6–12, 15, and 16.

The 35 U.S.C. § 103 Rejections

Independent Claim 1

Appellant argues the Examiner errs in finding Robbins teaches or suggests "obtaining an image of the patient" (App. Br. 7–9), "using a voice command" (App. Br. 9–10), and inserting image annotations "adjacent the image" (App. Br. 10–11), as recited. These arguments are unpersuasive.

Robbins discloses creating a checklist template for a surgical procedure that includes "image data" (Robbins ¶ 53), and thus teaches or suggests "obtaining an image of the patient," as recited. *See* Ans. 7–9; Final Act. 6–7. Robbins discloses using speech recognition to accept voice inputs "which may be a command" (Robbins ¶ 102), and thus teaches or suggests "using a voice command," as recited. *See* Ans. 9–10; Final Act. 7. Artisans of ordinary skill also would have understood Robbins teaches or suggests inserting annotations "adjacent the image," as recited, because Robbins discloses (a) displaying annotations adjacent non-image checklist data and (b) that checklist data may be an image. *See* Ans. 10–12 (citing Robbins ¶¶ 33, 141, Fig. 6C); Final Act. 7.

Accordingly, we sustain the 35 U.S.C. § 103 rejection of claim 1.

Dependent Claims 2 and 13

Claim 2 depends from claim 1 and recites, *inter alia*, "dictating information related to the specific surgical procedure during the specific surgical procedure," and "transferring the dictated information into free text." App. Br., Claims App'x 1–2. Appellant argues the Examiner errs in finding Robbins discloses "transferring the dictated information into free text." App. Br. 12–13. This argument is unpersuasive. We agree with the Examiner that Robbins teaches or suggests this limitation by disclosing use of voice recognition to capture "speech input, which may be a command, a response to a question or query, or may itself be a question or query," that is "converted to text." *See* Ans. 13–14 (quoting Robbins ¶ 102); *see also* Robbins ¶ 108 (disclosing use within an operating room (e.g., during a procedure such as a surgery)).

Accordingly, we sustain the 35 U.S.C. § 103 rejection of claim 2.

Appellant also separately argues claim 13, which depends from claim 1 and recites "obtaining the image of the patient comprises capturing a live image of the patient during the specific surgical procedure." App. Br., Claims App'x 4. This argument is unpersuasive. We agree with the Examiner that Mahesh's disclosure that practitioners of its invention "may view and study the recorded images as they are recorded" (Mahesh ¶ 28), in combination with the disclosure of Robbins, renders obvious the subject matter of claim 13. *See* Final Act. 12.

Accordingly, we sustain the 35 U.S.C. § 103 rejection of claim 13.

Remaining Claims

With respect to the 35 U.S.C. § 103 rejections of claims 3–12 and 14–16, Appellant offers no arguments substantively separate from those for

claims 1, 2, and 13 (*see* App. Br. 13–14, 15–18), and, accordingly, we also sustain the 35 U.S.C. § 103 rejections of claims 3–12 and 14–16.

DECISION

We affirm the rejection of claims 2, 6–12, 15, and 16 under 35 U.S.C. § 112(b).

We affirm the rejection of claims 1–16 under 35 U.S.C. § 103.

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