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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* THOMAS J. J. STARR<sup>1</sup>

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Appeal 2018-004793  
Application 13/883,006<sup>2</sup>  
Technology Center 2400

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Before JAMES R. HUGHES, JASON J. CHUNG, and  
STEVEN M. AMUNDSON, *Administrative Patent Judges*.

HUGHES, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant seeks our review under 35 U.S.C. § 134(a) of the  
Examiner’s decision rejecting claims 1–20, which constitute all the claims

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<sup>1</sup> AT&T Intellectual Property I, L.P. (“Appellant”) is the Applicant as provided in 37 C.F.R. § 1.46 and is identified as the real party in interest. Appeal Br. 2.

<sup>2</sup> The application on appeal has an effective filing date of Oct. 14, 2015. Therefore, the Leahy-Smith America Invents Act (AIA) amendments to the U.S. Code (§§ 102, 103) are applicable. *See* MPEP § 2159.02 (9th ed. 2018) (the amended sections “apply to any patent application that contains . . . a claimed invention that has an effective filing date that is on or after March 16, 2013.”).

pending in this application. *See* Final Act. 1.<sup>3</sup> We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

*Appellant's Invention*

The invention relates generally “to communication devices for placing calls via a network” (Spec. ¶ 1). More specifically, the invention relates to articles of manufacture, communication methods, and communication devices including a communication interface “configured to facilitate a call from a user of the communication device to a communication device of a called party via a network, the call including voice communications of the user,” and one or more “imaging sensor[s] . . . configured to capture video of the user.” Spec. ¶ 14; *see* Spec. ¶¶ 32–36; Abstract.

*Representative Claim*

Independent claim 1, reproduced below, further illustrates the invention:

1. A communication device comprising:
  - a communication interface configured to facilitate a call from a user of the communication device to a remote device of a called party via a network, the call including voice communications of the user communicated to the called party during the call;
  - at least one imaging sensor configured to capture a video of the user during the call;
  - a memory that stores instructions; and

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<sup>3</sup> We refer to Appellant’s Specification (“Spec.”) filed Oct. 14, 2015; Appeal Brief (“Appeal Br.”) filed Feb. 5, 2018; and Reply Brief (“Reply Br.”) filed Apr. 5, 2018. We also refer to the Examiner’s Final Office Action (“Final Act.”) mailed Aug. 9, 2017; and Answer (“Ans.”) mailed Feb. 22, 2018.

a processor coupled to the memory, wherein responsive to executing the instructions, the processor is configured to perform operations comprising:

comparing the video of the user during the call to the voice communications of the user communicated to the called party during the call to determine if the video of the user is consistent with the voice communications;

analyzing the video of the user to determine if an identity of the user is authenticated; and

generating an indication of user authentication, responsive to determining the identity of the user is authenticated and to determining the video of the user coincides with the voice communications of the user communicated to the called party during the call;

wherein the communication interface is further configured to send the indication of the user authentication to the called party in association with the call.

Appeal Br. 18 (Claim App'x).

*Rejections on Appeal*<sup>4</sup>

1. The Examiner rejects claims 1–3, 6–13, and 16–20 under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter. *See* Final Act. 3.

2. The Examiner rejects claims 1–5, 9–15, and 19 under 35 U.S.C. § 103 as being unpatentable over Benco et al. (US 2005/0097131 A1, published May 5, 2005) (“Benco”), Hoyos et al. (US 2014/0337930 A1,

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<sup>4</sup> The Examiner includes a rejection of claim 20 as being directed to non-statutory subject matter in the Final Rejection (*see* Final Act. 2–3), but appears to withdraw this same rejection (*see* Final Act. 23–24). The Examiner does not address this ground of rejection in the Examiner’s Answer. *See* Ans. 2. We find the rejection of claim 20, as being directed to non-statutory subject matter, was included in error, and we need not address this ground of rejection.

published Nov. 13, 2014 (filed May 13, 2014)) (“Hoyos”), Kawasaki (US 2004/0143515 A1, published July 22, 2004), and Tischer et al. (US 2006/0069567 A1, published Mar. 30, 2006) (“Tischer”). *See* Final Act. 5.

3. The Examiner rejects claims 6, 8, 16, and 18 under 35 U.S.C. § 103 as being unpatentable over Benco, Hoyos, Kawasaki, Tischer, and Novack et al. (US 2006/0034287 A1, published Feb. 16, 2006) (“Novack”).

4. The Examiner rejects claims 7 and 17 under 35 U.S.C. § 103 as being unpatentable over Benco, Hoyos, Kawasaki, Tischer, Novack, and Mornhineway et al. (US 2008/0088700 A1, published Apr. 17, 2008) (“Mornhineway”).

5. The Examiner rejects claim 20 under 35 U.S.C. § 103 as being unpatentable over Benco, Hoyos, and Tischer.

#### ISSUES

Based upon our review of the record, Appellant’s contentions, and the Examiner’s findings and conclusions, the issues before us follow:

1. Did the Examiner err in concluding that Appellant’s claims were directed to patent-ineligible subject matter, without significantly more, under 35 U.S.C. § 101?

2. Did the Examiner err in finding that Benco, Hoyos, Kawasaki, and Tischer collectively would have taught or suggested “comparing the video of the user during the call to the voice communications of the user communicated to the called party during the call to determine if the video of the user is consistent with the voice communications” and “generating an indication of user authentication, responsive to determining the identity of the user is authenticated and to determining the video of the user coincides with the voice communications of the user communicated to the called party

during the call,” within the meaning of claim 1, and the commensurate limitations of claim 11?

## ANALYSIS

### *Patent-Ineligible Subject Matter*

The Examiner rejects claims 1–3, 6–13, and 16–20 as a group based on claim 1 (*see* Final Act. 3) and concludes claim 1 is directed to patent-ineligible subject because claim 1 is directed to “an abstract idea”—“comparing the video of the user to the voice communications to determine if the video of the user is consistent with the voice communications, analyzing the video of the user to determine if an identity of the user is authenticated and generating an indication of user authentication”—which “preempt[s] all methods for performing video authentication based on audio.” Final Act. 3; *see* Ans. 24–28. In the Answer, the Examiner further explains that the instant claims are not like those considered patent eligible in *McRO* (*McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299 (Fed. Cir. 2016)) because “Applicant has provided no rules for making the determination of if the video of the user coincides with the audio based on the user’s facial expressions or other criterion, simply requiring that the captured video and voice communications be ‘consistent.’” Ans. 25; *see* Ans. 24–26. The Examiner also explains that the instant claims do not “amount to significantly more than the abstract idea” because the claims only include “slight additions”—“a communications interface, an imaging sensor to capture the video, a processor and memory to carry out the recited functions[,] and an indication of the authentication result”— which are

“insufficient to amount to substantially more than the abstract idea,” in that the additions are generic computer elements. Ans. 26; *see* Ans. 27–28.

Appellant contends the Examiner erred in rejecting the claims as being directed to patent-ineligible subject matter. *See* Appeal Br. 5–9; Reply Br. 2–3. Specifically, Appellant contends (with respect to claim 1 and the other pending claims rejected under § 101) the Examiner did not establish a *prima facie* case that the claims are directed to patent-ineligible subject matter. *See* Appeal Br. 5–7. Appellant further contends the Examiner has not provided a meaningful analysis as required in the *Enfish* decision (*Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016)). *See* Appeal Br. 7–9; Reply Br. 2–3.

Under 35 U.S.C. § 101, a patent may be obtained for “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” The Supreme Court has “long held that this provision contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable.” *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014) (quoting *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (2013)).

The Supreme Court, in *Alice*, reiterated the two-step framework previously set forth in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66, 77–80 (2012), “for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts.” *Alice*, 573 U.S. at 217. Assuming that a claim nominally falls within one of the statutory categories of machine, manufacture, process, or composition of matter, the first step in the analysis is to “determine whether the claims at issue are

directed to one of those patent-ineligible concepts” (*id.*), e.g., to an abstract idea. *See Alice*, 573 U.S. at 219 (“On their face, the claims before us are drawn to the concept of intermediated settlement, *i.e.*, the use of a third party to mitigate settlement risk.”); *see also Bilski v. Kappos*, 561 U.S. 593, 611 (2010) (“Claims 1 and 4 in petitioners’ application explain the basic concept of hedging, or protecting against risk.”). Concepts determined to be abstract ideas, and thus patent ineligible include, but are not limited to, certain methods of organizing human activity, such as fundamental economic practices (*Alice*, 573 U.S. at 219–20; *Bilski*, 561 U.S. at 611); mathematical formulas (*Parker v. Flook*, 437 U.S. 584, 594–95 (1978)); and mental processes (*Gottschalk v. Benson*, 409 U.S. 63, 67 (1972)). Concepts determined to be patent eligible include physical and chemical processes, such as “molding rubber products” (*Diamond v. Diehr*, 450 U.S. 175, 191 (1981)); “tanning, dyeing, making water-proof cloth, vulcanizing India rubber, smelting ores” (*id.* at 182 n.7 (quoting *Corning v. Burden*, 56 U.S. 252, 267–68 (1853))); and manufacturing flour (*Benson*, 409 U.S. at 69 (citing *Cochrane v. Deener*, 94 U.S. 780, 785 (1876))).

In *Diehr*, the claim at issue recited a mathematical formula, but the Supreme Court held that “[a] claim drawn to subject matter otherwise statutory does not become nonstatutory simply because it uses a mathematical formula.” *Diehr*, 450 U.S. at 176; *see also id.* at 191 (“We view respondents’ claims as nothing more than a process for molding rubber products and not as an attempt to patent a mathematical formula.”). The Supreme Court continued by qualifying its findings, indicating that a claim “seeking patent protection for that formula in the abstract . . . is not accorded the protection of our patent laws, . . . and this principle cannot be

circumvented by attempting to limit the use of the formula to a particular technological environment.” *Id.* (citing *Benson* and *Flook*) (citation omitted); *see, e.g., id.* at 187 (“It is now commonplace that an *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection.”).

If the claims are not directed to an abstract idea, the inquiry ends. Otherwise, the inquiry proceeds to the second step of the *Alice* and *Mayo* framework where the elements of the claims are considered “individually and ‘as an ordered combination’ to determine whether the additional elements ‘transform the nature of the claim’ into a patent-eligible application.” *Alice*, 573 U.S. at 217 (quoting *Mayo*, 566 U.S. at 78–79). This second step is described as “a search for an ‘inventive concept’—*i.e.*, an element or combination of elements that is ‘. . . significantly more than . . . the [ineligible concept] itself.” *Id.* at 217–18 (alteration in original) (quoting *Mayo*, 566 U.S. at 72–73). “A claim that recites an abstract idea must include ‘additional features’ to ensure ‘that the [claim] is more than a drafting effort designed to monopolize the [abstract idea].’” *Alice*, 573 U.S. at 221 (quoting *Mayo*, 566 U.S. at 77). “[M]erely requir[ing] generic computer implementation[] fail[s] to transform that abstract idea into a patent-eligible invention.” *Id.*

The Court acknowledged in *Mayo* that “all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas.” *Mayo*, 566 U.S. at 71. We, therefore, look to whether the claims focus on a specific means or method that improves the relevant technology or are instead directed to a result or effect that itself is the

abstract idea and merely invoke generic processes and machinery. *See Enfish*, 822 F.3d at 1336.

The PTO recently published revised guidance on the application of § 101. USPTO’s *2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (Jan. 7, 2019) (hereinafter “2019 Revised Guidance”).

Under that guidance, we first look to whether the claim recites:

- (1) any judicial exceptions, including certain groupings of abstract ideas (i.e., mathematical concepts, certain methods of organizing human activities such as a fundamental economic practice, or mental processes) (hereinafter “Step 2A, Prong 1”); and
- (2) additional elements that integrate the judicial exception into a practical application (*see* MPEP § 2106.05(a)–(c), (e)–(h)) (hereinafter “Step 2A, Prong 2”).

Only if a claim (1) recites a judicial exception and (2) does not integrate that exception into a practical application, do we then look to whether the claim:

- (3) adds a specific limitation beyond the judicial exception that is not “well-understood, routine, conventional” in the field (*see* MPEP § 2106.05(d)); or
- (4) simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception.<sup>5</sup>

*See* 2019 Revised Guidance, 84 Fed. Reg. at 51–52, 55–56.

#### Eligibility Analysis—Revised Guidance Steps 1 and 2A, Prong 1

Turning to the first step of the eligibility analysis, “the first step in the *Alice* inquiry . . . asks whether the focus of the claims is on the specific asserted improvement in computer capabilities . . . or, instead, on a process that qualifies as an ‘abstract idea’ for which computers are invoked merely

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<sup>5</sup> Items (3) and (4) are collectively referred to as “Step 2B” hereinafter and in the 2019 Revised Guidance.

as a tool.” *Enfish*, 822 F.3d at 1335–36. “The abstract idea exception prevents patenting a result where ‘it matters not by what process or machinery the result is accomplished.’” *McRO*, 837 F.3d at 1312 (quoting *O’Reilly v. Morse*, 56 U.S. (15 How.) 62, 113 (1853)).

The Examiner determines independent claim 1 recites an abstract idea of “comparing the video of the user to the voice communications to determine if the video of the user is consistent with the voice communications, analyzing the video of the user to determine if an identity of the user is authenticated and generating an indication of user authentication.” Final Act. 3; *see* Ans. 24–28. Here, in rejecting the claims (in particular claim 1) under 35 U.S.C. § 101, the Examiner purportedly analyzed the claims using the *Mayo/Alice* two-step framework, consistent with the guidance set forth in the USPTO’s “2014 Interim Guidance on Patent Subject Matter Eligibility,” 79 Fed. Reg. 74618 (Dec. 16, 2014), in effect at the time the rejection was made, i.e., on Aug. 9, 2017. *See* Ans. 24–28. In view of the 2019 Revised Guidance, we provide our detailed patent eligibility analysis as follows.

Claim 1 recites a communication device including a number of components performing a variety of functions. The device specifically includes: (1) “a communication interface configured to facilitate a call” between the communication device and a remote device “via a network,” where the call includes “voice communications”—that is, an interface providing interconnected communication via a network, where the communication includes audio information or audio data (voice communications); (2) “at least one imaging sensor configured to capture a video of the user during the call”—that is, a video camera capturing video

data (of the user during the call); (3) “a memory that stores instructions”; (4) “a processor coupled to the memory,” which “is configured to perform operations,” including: (i-ii) “comparing the video” “to the voice communications” “to determine if the video of the user is consistent with the voice communications,” (iii) “analyzing the video” “to determine if an identity of the user is authenticated,” and (iv-v) “generating an indication of user authentication responsive to determining the identity of the user is authenticated and to determining the video of the user coincides with the voice communications”— that is, a processor that (i) compares the video and voice (audio) data, (ii) determines the video and voice data are “consistent,” (iii) analyzes the video data to authenticate (confirm the identity of) the user, (iv) determines that the video data (of the user) “coincides with” the voice data, and (v) generates an indication in response to authenticating the user and determining the video and audio data coincide; and (5) “the communication interface” “further configured to send the indication” “to the called party in association with the call”—that is, the communication interface sending the indication during the call. Claim 1 (Appeal Br. 18 (Claim App’x)); *see* Spec. ¶¶ 14, 32–37.

In summary, claim 1 recites a communication device including an interface providing interconnected voice (audio) and video communication via a network, a video imaging sensor that captures a video of a user during a particular communication session (call), memory, and a processor. The processor performs certain functions, including comparing video and voice data, determining that the video and voice data are consistent, authenticating (analyzing the video data to authenticate) the user’s identity, determining that the video data coincides with the voice data, and generating an

indication in response to the authentication and determination that the video and audio data coincide. The interface then sends the indication during the particular communication session (call). Hereinafter, we refer to this device as the “communication device.”

We conclude that claim 1 recites on its face a “device”—that is an apparatus or machine—which is a statutory category of invention (subject matter) (USPTO’s Step 1). Utilizing our interpretation of claim 1 (*supra*), we analyze whether the claim is directed to an abstract idea (USPTO’s Step 2A). Here, Appellant’s claims generally, and independent claim 1 in particular (as summarized, *supra*), recite a communication device including a processor that analyzes voice and video data to authenticate a user and determine that the voice and video data transferred during a communication session are consistent and coincide. These operations of the processor are not an abstract idea as delineated in the 2019 Revised Guidance.

As explained in 2019 Revised Guidance, abstract ideas fall within one (or more) of three groupings:

1. Mathematical concepts—mathematical relationships, mathematical formulas or equations, mathematical calculations;
2. Mental processes—concepts performed in the human mind (including an observation, evaluation, judgment, opinion); and
3. Certain methods of organizing human activity—fundamental economic principles or practices (including hedging, insurance, mitigating risk); commercial or legal interactions (including agreements in the form of contracts; legal obligations; advertising, marketing or sales activities or behaviors; business relations); managing personal behavior or relationships or interactions between people (including social activities, teaching, and following rules or instructions).

According to the 2019 Revised Guidance, “claims that do not recite [subject] matter that falls within these enumerated groupings of abstract ideas should not be treated as reciting abstract ideas,” except in rare circumstances. 2019 Revised Guidance, 84 Fed. Reg. at 53. Here, the claim does not recite mathematical calculations. Further, the processor operations analyze communication data and for this reason cannot be performed mentally and do not relate to organizing human activity. Accordingly, Appellant’s claim 1 does not recite a judicial exception (an abstract idea) (USPTO’s Step 2A, Prong 1; *see* 2019 Revised Guidance).

*Eligibility Analysis—Revised Guidance Step 2A, Prong 2*

Appellant’s claim 1 does not recite a judicial exception under Revised Guidance Step 2A, Prong 1. Therefore, we need not address whether additional elements in Appellant’s claim 1 integrate a judicial exception into a practical application of the exception under USPTO’s Step 2A, Prong 2 of the 2019 Revised Guidance. Even so, we find Appellant’s claim 1 recites a number of structural or physical elements including an interface, an imaging sensor, memory, and a processor (*supra*). These elements, in particular the processor, perform functions of analyzing voice and video data during a communication session to authenticate a user and determine if the voice and video data coincide and are consistent. *See* Spec. ¶¶ 35–37.

Appellant’s claims are similar to patent-eligible claims such as those in *McRO*, *BASCOM (BASCOM Global Internet Servs., Inc. v. AT&T Mobility LLC)*, 827 F.3d 1341 (Fed. Cir. 2016)), and *DDR Holdings (DDR Holdings, LLC v. Hotels.com, L.P.)*, 773 F.3d 1245 (Fed. Cir. 2014)) that are directed to “a specific means or method that improves the relevant technology” (*McRO*, 837 F.3d at 1314), solving a technology-based problem

(*BASCOM*, 827 F.3d at 1349–52), or performing functionality “rooted in computer technology in order to overcome a problem specifically arising in the realm of computer [technology]” (*DDR Holdings*, 773 F.3d at 1257). See MPEP § 2106.05(a)–b).

In summary, Appellant’s claim 1 does not recite an abstract idea (judicial exception), and recites structure (elements) that integrate the processor functionality into a practical application. Thus, we disagree with the Examiner that the claims are directed to an abstract idea.

*Obviousness Rejection of Claims 1–5, 9–15, and 19*

Appellant argues independent claims 1 and 11, and dependent claims 2–5, 9, 10, 12–15, and 19, together as a group with respect to the § 103 rejection. See Appeal Br. 10–13. We select independent claim 1 as representative of Appellant’s arguments with respect to claims 1–5, 9–15, and 19. 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner rejects representative independent claim 1 as being obvious over Benco, Hoyos, Kawasaki, and Tischer. See Final Act. 5–15; Ans. 28–29.<sup>6</sup> The Examiner cites Benco as teaching the structure of the communication system as well as facial recognition. See Final Act. 5–6; Ans. 28 (citing Benco ¶¶ 37–45). The Examiner cites Hoyos as describing facial recognition, matching video and voice data (see Hoyos ¶ 128), and

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<sup>6</sup> The Examiner mistakenly omits a detailed discussion of Tischer with respect to claim 1 in the Final Rejection (see Final Act. 7–8), but includes a discussion of Tischer with respect to dependent claim 2 (see Final Act. 9–10) and independent claim 11 (see Final Act. 14–15). The Examiner also clarifies the rejection and includes a discussion of Tischer in the Examiner’s Answer (see Ans. 28–29). Accordingly, for the purposes of this appeal, we incorporate the discussions of Tischer into the obviousness rejection of claim 1, and find the Examiner’s omission to be harmless error.

suggesting video facial recognition (*see* Hoyos ¶ 167). *See* Final Act. 6–8; Ans. 28 (citing Hoyos ¶¶ 28, 125, 128, 167). The Examiner further cites Kawasaki as describing a single device (mobile terminal) that includes a processor, interface, and imaging sensor and also performs authentication functions. *See* Final Act. 7–8; Ans. 28–29 (citing Kawasaki ¶ 124). The Examiner also cites Tischer as describing authentication (voice authentication) of a caller during a telephone call. *See* Final Act. 9–10, 14–15; Ans. 28–29 (citing Tischer ¶¶ 93–94).

Appellant contends that Benco, Hoyos, Kawasaki, and Tischer do not teach the disputed limitations of claim 1. *See* Appeal Br. 10–13; Reply Br. 4–8. Specifically, Appellant contends that the Examiner admits Benco, Hoyos, and Kawasaki do not describe the recited functionality being performed during a call—

the Office expressly admits that “Benco as modified by Hoyos and Kawasaki fails to disclose the authentication/comparison occurs during the course of the call such that the communications include voice communications of the user communicated to the called party during the call the video is captured during the call, the comparison of the video is to the voice of the user communicated to the called party during the call or that the indication of authentication indicates that the user is authenticated as the user communicated to the called party during the call.”

Reply Br. 5 (emphasis in original); *see* Appeal Br. 11–12; Reply Br. 4. Appellant further contends “the Office expressly relies on Tischer to disclose the video is captured during the call, and furthermore that the comparison of the video is to the voice of the user communicated to the called party during the call.” Reply Br. 5 (emphasis in original); *see* Appeal Br. 12. Appellant also contends “Tischer entirely fails to disclose

authentication operations that include comparing the video of the user during the call to the voice communications of the user communicated to the called party during the call to determine if the video of the user is consistent with the voice communications.” Appeal Br. 13; *see* Appeal Br. 12–13; Reply Br. 5–8.

We disagree with Appellant that Benco, Hoyos, Kawasaki, and Tischer do not teach the disputed features of claim 1. The Examiner provides a detailed explanation how Benco, Hoyos, and Kawasaki teach or suggest the disputed features of Appellant’s claim 1 with the exception of explicitly teaching that the recited functionality occurs during a communication session (a call)—that is, “captur[ing] a video of the user during the call,” “comparing the video of the user during the call to the voice communications . . . during the call,” “determining if the video of the user is consistent with the voice communications,” “analyzing the video of the user to determine if an identity of the user is authenticated,” and “determining the video of the user coincides with the voice communications of the user . . . during the call” (Claim 1 (Appeal Br. 18 (Claim App’x))). *See supra*. The Examiner explains that Tischer describes authentication occurring during a call and, accordingly, teaches the functionality (described in Benco, Hoyos, and Kawasaki) occurring during a call. *See supra*. We adopt as our own: (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken (Final Act. 5–15), and (2) the reasons set forth by the Examiner in the Examiner’s Answer (Ans. 28–29) in response to Appellant’s Appeal Brief. We concur with the findings and conclusions reached by the Examiner, and we address specific findings, conclusions, and arguments for emphasis as follows.

Initially, Appellant misconstrues the Examiner's rejection. As delineated above, in that the Examiner does not cite Tischer for teaching authentication, comparing video and voice communications, or determining if user video is consistent with voice communications, contended by Appellant. *Compare* Final Act. 7–8 and Ans. 28–29, *with* Appeal Br. 12–13 and Reply Br. 5.

Secondly, based on the misconstruction of the rejection, Appellant contends for the first time in the Reply Brief that “Tischer cannot be . . . properly applied to the combination of Benco, Hoyos and Kawasaki to render claim 1 as obvious” (Reply Br. 6) because Tischer “would require an impermissible change in the principle of operation . . . [of] Hoyos” (Reply Br. 8). *See* Reply Br. 5–8. This argument is, again, based on a misunderstanding of the Examiner's rejection and, in any event, is waived because it is untimely. Appellant's combinability arguments (*supra*) were not made in the Appeal Brief, but could have been, and are not responsive to any new evidence set forth by the Examiner in the Answer. Absent a showing of good cause why the arguments could not have been presented in the Appeal Brief, which Appellant did not provide, Appellant's arguments are untimely and deemed waived. We need not consider these arguments raised for the first time in the Reply Brief. *See Ex parte Nakashima*, 93 USPQ2d 1834, 1837 (BPAI 2010) (Informative); *Ex parte Borden*, 93 USPQ2d 1473, 1477 (BPAI 2010) (Informative); 37 C.F.R. § 41.37(c)(1)(iv).

We agree with the Examiner's findings (*see* Final Act. 5–8; Ans. 28–29) that Benco, Hoyos and Kawasaki describe the features and functionality of the recited communication device, and that Tischer describes comparing

data and authentication operations occurring during a communication session (*see* Final Act. 9–10, 14–15; Ans. 28–29). Accordingly, we also agree with the Examiner’s conclusion that the combination of Benco, Hoyos, Kawasaki, and Tischer teaches or at least suggests performing the recited functionality during a communication session (a call).

Appellant fails to appreciate the collective teachings of Benco, Hoyos, Kawasaki, and Tischer. Contrary to Appellant’s arguments, “[t]he test for obviousness is not whether the features of a secondary reference may be *bodily incorporated* into the structure of the primary reference . . . . Rather, the test 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) (emphasis added). Here, Appellant argues the references individually and does not address the specific arguments set out by the Examiner. The references cited by the Examiner must be read, not in isolation, but for what each fairly teaches in combination with the prior art as a whole. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986) (one cannot show non-obviousness by attacking references individually where the rejections are based on combinations of references).

We find that it would have been within the skill of an ordinarily skilled artisan to combine the known communication-device features and functionality (as taught by Benco and Kawasaki) with the video-authentication techniques and matching of voice and video data as taught by Hoyos, all occurring during a communication session as taught by Tischer. *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007) (“[I]f 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 unless its actual application is beyond his or her skill.”). We are not persuaded that combining the respective familiar elements of the cited references in the manner proffered by the Examiner would have been “uniquely challenging or difficult for one of ordinary skill in the art” at the time of Appellant’s invention. *Leapfrog Enters., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1162 (Fed. Cir. 2007) (citing *KSR*, 550 U.S. at 418).

Thus, a preponderance of the evidence demonstrates Benco, Hoyos, Kawasaki, and Tischer teach or suggest the disputed features of Appellant’s representative claim 1. Appellant does not persuade us of error in the Examiner’s obviousness rejection of the claim. In the Appeal Brief, Appellant did not separately argue independent claim 11, or dependent claims 2–5, 9, 10, 12–15, and 19. *See* Appeal Br. 10–13. In the Reply Brief, however, Appellant presents for the first time arguments with respect to dependent claim 10. *See* Reply Br. 8–9. Appellant’s argument with respect to claim 10 is waived because it is untimely. Accordingly, we affirm the Examiner’s obviousness rejection of representative claim 1, independent claim 11, and dependent claims 2–5, 9, 10, 12–15, and 19, not separately argued with particularity (*supra*).

*Obviousness Rejections of Claims 6–8, 16–18, and 20*

Appellant does not provide separate arguments with respect to dependent claims 6–8 and 16–18. *See* Appeal Br. 13–15 and Reply Br. 10–11. Appellant also does not separately argue with particularity independent claim 20. Appellant simply reiterates the same arguments made with respect to claim 1. *See* Appeal Br. 16 and Reply Br. 12. Accordingly, we affirm the

Appeal 2018-004793  
Application 13/883,006

Examiner's obviousness rejections of claims 6–8, 16–18, and 20 for the same reasons as claim 1 (*supra*).

#### CONCLUSION

Appellant has shown that the Examiner erred in rejecting claims 1–3, 6–13, and 16–20 under 35 U.S.C. § 101.

Appellant has not shown that the Examiner erred in rejecting claims 1–20 under 35 U.S.C. § 103.

#### DECISION

We have affirmed at least one ground of rejection with respect to each claim on appeal. Accordingly, we affirm the Examiner's rejection of claims 1–20. *See* 37 C.F.R. § 41.50(a)(1).

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). *See* 37 C.F.R. § 41.50(f).

AFFIRMED