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Table with 5 columns: APPLICATION NO., FILING DATE, FIRST NAMED INVENTOR, ATTORNEY DOCKET NO., CONFIRMATION NO.
13/093.036 04/25/2011 Darren C. SMITH MJS-723-3064 7949

27562 7590 01/24/2019
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Table with 1 column: EXAMINER

DUCKWORTH, JIANMEI F

Table with 2 columns: ART UNIT, PAPER NUMBER

2179

Table with 2 columns: NOTIFICATION DATE, DELIVERY MODE

01/24/2019

ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DARREN C. SMITH

Appeal 2018-005541¹
Application 13/093,036
Technology Center 2100

Before JAMES R. HUGHES, ERIC S. FRAHM, and
JOHN A. EVANS, *Administrative Patent Judges*.

FRAHM, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ According to Appellant, Nintendo Co. Ltd. is the real party in interest (App. Br. 3).

STATEMENT OF THE CASE

Introduction

Appellant appeals under 35 U.S.C. § 134(a) from a final rejection of claims 1–3, 10, 11, 13, 15, and 20–23. Claims 4–9, 12, 14, and 16–18 have been canceled. Claims 19 and 24–35 are allowable (*see* Final Act. 24–27). Therefore, only claims 1–3, 10, 11, 13, 15, and 20–23 are before us on appeal. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

Appellant’s Disclosed Invention

Appellant discloses a method for accessing a web page to present online content to users by detecting cues (claim 1), a system having a processor to perform the method (claim 10), and a non-transitory computer readable medium storing a program executed on the processor to perform the method (claim 13) (Title; Abs.; Spec. ¶¶ 2, 3). The cues can be audio cues (Spec. ¶¶ 13, 32) or radio frequency identification (RFID) cues (Spec. ¶¶ 14, 33), and can be contained in a television program or song (Spec. ¶ 13).

Exemplary Claims

Claims 1, 10, and 13 are independent, and each recite accessing a web page in response to detecting a cue contained in received audio. The detected cue “comprises one or more first tones followed by one or more second tones,” and “the one or more first tones identify the one or more second tones as comprising cue information” (claims 1, 10, 13). An understanding of the invention can be derived from a reading of exemplary claims 1 and 23, which are reproduced below with *emphases* added:

Claim 1. A method of accessing a web page using a handheld computing device being carried by a user, comprising:
receiving, using a microphone of the handheld computing device, audio output from speakers for electronic equipment, wherein the audio output includes content for listening by a user and one or more cues different from the content;

detecting, by a processor of the handheld computing device, *a cue from the one or more cues in the received audio output*;

when the cue is detected while a game is being played on the handheld computing device, changing an aspect of the game being played in response to the detecting; and

when the cue is detected while a game is not being played on the handheld computing device:

determining, by the processor accessing specified data associating cues with web addresses, a web address based on the detected cue; and

automatically connecting to a web page using the web address,

wherein the detected cue comprises one or more first tones followed by one or more second tones, and wherein the one or more first tones identify the one or more second tones as comprising cue information.

Claim 23. A method according to claim 1, wherein the frequencies at which the one or more cues are arranged are *in the lower or higher ends of the audio frequency range extending from 20 Hz to 20 kHz.*

The Examiner's Rejections

(1) The Examiner rejected claims 1, 3, 10, 11, 15, and 20 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Philyaw (US 6,636,896 B1; issued Oct. 21, 2003), Tomes (US 2005/0222846 A1; published Oct. 6, 2005), and Lindahl (US 2010/0088100 A1; published April 8, 2010). Final Act. 3–14.

(2) The Examiner rejected claim 2 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Philyaw, Tomes, Lindahl, and Vandermeijden (US 2004/0132431 A1; published July 8, 2004). Final Act. 15.

(3) The Examiner rejected claim 13 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Philyaw, Tomes, Lindahl, and Vandermeijden. Final Act. 15–21.

(4) The Examiner rejected claim 21 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Philyaw, Tomes, Lindahl, and Andersen (US 2003/0066089 A1; published April 3, 2003). Final Act. 21–22.

(5) The Examiner rejected claim 22 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Philyaw, Tomes, Lindahl, and Barker (US 2003/0126461 A1; published July 3, 2003). Final Act. 22–23.

(6) The Examiner rejected claim 23 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Philyaw, Tomes, Lindahl, and Sutton (US 2006/0281543 A1; published Dec. 14, 2006). Final Act. 23–24.

Issues on Appeal

Based on Appellant’s arguments in the briefs (App. Br. 9–17; Reply Br. 2–9) in light of the Examiner’s response to Appellant’s arguments in the Appeal Brief (Ans. 23–35), the following two principal issues are presented on appeal:

(1) Did the Examiner err in rejecting claims 1, 3, 10, 11, 13, 15, and 20 under 35 U.S.C. § 103(a) as being unpatentable over the base combination of Philyaw, Tomes, and Lindahl because the combination fails to teach or suggest detecting “cues” used for “accessing a web page,”

“wherein the detected cue comprises one or more first tones followed by one or more second tones, and wherein the one or more first tones identify the one or more second tones as comprising cue information,” as recited in representative claim 1?

(2) Has Appellant shown the Examiner erred in rejecting dependent claim 23 for obviousness over Philyaw, Tomes, Lindahl, and Sutton?

ANALYSIS

We have reviewed the Examiner’s rejections in light of Appellant’s arguments in the Appeal Brief (App. Br. 9–17) and the Reply Brief (Reply Br. 2–9) that the Examiner has erred. We disagree with Appellant’s arguments.

Representative Claim 1

We disagree with the Appellant’s conclusions as to representative independent claim 1. With regard to claim 1, 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. 3–9), and (2) the reasons set forth by the Examiner in the Examiner’s Answer in response to the Appellant’s Appeal Brief (Ans. 2–7 and 23–32). We highlight and amplify certain teachings and suggestions of the references as follows.

With regard to claim 1, the Examiner relies on Philyaw (*see* Final Act. 5 citing Philyaw cols. 26, 27) as teaching audio cues in the form of tones as recited in claim 1, and not Tomes and/or Lindahl. Philyaw’s tones meet the requirements of claim 1 as to being detected and being different from other audio content (e.g., audio output in the form of a song), therefore we agree with the Examiner’s findings in this regard (that Philyaw’s tones

teach the recited cues). We also agree with the Examiner (*see* Final Act. 5–6; Ans. 3–4, 25–26) that Philyaw’s two audio tones (i.e., cues) in the form of an unencoded audio portion 2602 and an encoded audio portion 2604 meet the disputed limitation at the end of claim 1, namely “wherein the detected cue comprises one or more first tones followed by one or more second tones, and wherein the one or more first tones identify the one or more second tones as comprising cue information.” *See* Philyaw col. 26, l. 42–col. 27, l. 56.

The Examiner then relies on Tomes as teaching a handheld computing device carried by a user (*see* Final Act. 6 and Ans. 4 citing Tomes ¶ 8), and Lindahl as teaching suitable actions being taken based on a game playing state or contextual information (*see* Final Act. 7 and Ans. 5–6 citing Lindahl ¶¶ 6, 7, 9, 60, 62). Again, we agree with the Examiner’s findings in this regard.

In sum, we agree with the findings made by the Examiner with regard to the individual references (Final Act. 3–9; Ans. 2–7), and we also agree with the Examiner’s finding (Final Act. 6–9; Ans. 4–7, 23–32) that it would have been obvious to combine Philyaw’s cues/tones with Tomes handheld computing device and Lindahl’s suitable actions taken based on a game playing state or contextual information. Further, Appellant has not explicitly disputed the Examiner’s combinability findings as being improper or unreasonable.

We note that each reference cited by the Examiner must be read, not in isolation, but for what it fairly teaches in combination with the prior art as a whole. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986) (finding one cannot show non-obviousness by attacking references

individually where the rejections are based on combinations of references). In this light, Appellant's arguments as to representative independent claim 1 (App. Br. 9–12; Reply Br. 2–6) concerning the individual shortcomings in the teachings of Philyaw, Tomes, and Lindahl are not persuasive, and are not convincing of the non-obviousness of the claimed invention set forth in representative independent claim 1. Specifically, Appellant's arguments premised on the voice commands of Tomes and/or Lindahl are not persuasive, since the Examiner relies upon Philyaw's tones as the cues, and not the voice commands of Tomes and/or Lindahl.

The Examiner has relied upon the *combination* of Philyaw, Tomes, and Lindahl as teaching or suggesting the method of accessing web pages using detected cues in audio content as recited in claim 1. Based on the foregoing, Appellant's contentions as to the individual references are not persuasive of Examiner error with regard to representative claim 1.

Appellant's contentions (App. Br. 13–14; Reply Br. 6–7) that the Examiner's obviousness determination as to claim 1 is hinged upon impermissible hindsight are unpersuasive, as Appellant's arguments in this regard are premised on the false assumption that one of ordinary skill in the art would have replaced Philyaw's RF tones with the voice commands of Tomes and/or Lindahl. To the contrary, and as stated above, the Examiner relies on Philyaw for the recited tones (i.e., cues in the form of audio or RF tones), and Tomes and Lindahl for other salient limitations of claim 1.

In view of the foregoing, we sustain the Examiner's obviousness rejection of representative claim 1, as well as claims 3, 10, 11, 15, and 20 grouped therewith.

Claim 13 Separately Argued

With regard to independent claim 13 separately argued (*see* App. Br. 15–16), Appellant makes similar arguments concerning the “cue” limitations as presented for claim 1, and adds that Vandermeijden fails to cure the deficiencies of the base combination. Appellant does not dispute the Examiner’s reliance on Vandermeijden (*see* Vandermeijden ¶ 22) as teaching the provision of an alert in response to obtaining access to a website, as recited in claim 13 (*see* Final Act. 19; Ans. 17). For the same reasons provided for claim 1 discussed *supra*, we also find Appellant’s arguments for claim 13 unpersuasive. In view of the foregoing, we also sustain the Examiner’s obviousness rejection of claim 13.

Claim 23 Separately Argued

With regard to dependent claim 23 separately argued, we agree with the Examiner’s conclusion that the combination of Philyaw, Tomes, Lindahl, and Sutton teaches or suggests cues arranged in low or high frequencies of the audio range extending from 20 Hz to 20 kHz as recited (*see* Final Act. 23–24; Ans. 32–34). Appellant’s arguments that (i) Philyaw, Tomes, and/or Lindahl would not operate properly with Sutton (*see* App. Br. 14–15); and (ii) the Examiner relies on voice commands, and not tones, as teaching the recited cues (Reply Br. 7–8), are unpersuasive because Philyaw (*see* col. 27, ll. 53–56) discloses cues in the form of a tone arranged “within the audible range” (col. 27, ll. 54–55).

In view of the foregoing, Appellant has not shown the combination of applied references teaches or suggests “the frequencies at which the one or more cues are arranged are in the lower or higher ends of the audio frequency range extending from 20 Hz to 20 kHz,” as recited. Further,

Appellant's argument that Sutton would not work properly with the base combination of Philyaw, Tomes, and Lindahl is not persuasive, in that the disputed features are taught by Philyaw, Tomes, and Lindahl. The PTAB may rely on less than all of the references applied by the Examiner in an obviousness rationale without designating it as a new ground of rejection. *In re Boyer*, 363 F.2d 455, 458 n.2 (CCPA 1966) (citing *In re Bush*, 296 F.2d 491, 496 (CCPA 1961)). Finally, Appellant has not disputed the Examiner's motivation and rationale provided as to the combination of Philyaw, Tomes, and Lindahl (*see* Final Rej. 6–9; Ans. 4–7, 30–32).

In view of the foregoing, we sustain the Examiner's rejection of claim 23.

Obviousness Rejections of Claims 2, 21, and 22

Based on Appellant's failure to address the Examiner's prima facie case of obviousness as to (i) claim 2 over the base combination of Philyaw, Tomes, and Lindahl, further in view of Vandermeijden; (ii) claim 21 over the same base combination further in view of Andersen; and (iii) claim 22 over the same base combination further in view of Barker, Appellant has failed to show that the Examiner erred in determining that the base combination taken with any of Vandermeijden, Andersen, or Barker teaches or suggests the subject matter recited in claims 2, 21, and/or 22.

Accordingly, no issue is presented as to these rejections, and we summarily sustain the Examiner's obviousness rejections of claims 2, 21, and 22. *See* 37 C.F.R. § 41.37(c)(1)(iv) (requiring a statement in the briefs as to each ground of rejection presented by Appellant for review and stating that arguments not presented in the briefs will be refused consideration).

CONCLUSIONS

(1) The Examiner did not err in rejecting claims 1, 3, 10, 11, 13, 15, and 20 under 35 U.S.C. § 103(a) as being unpatentable over the base combination of Philyaw, Tomes, and Lindahl because the combination teaches or suggests detecting “cues” used for “accessing a web page,” “wherein the detected cue comprises one or more first tones followed by one or more second tones, and wherein the one or more first tones identify the one or more second tones as comprising cue information,” as recited in representative claim 1.

(2) The Examiner did not err in rejecting claim 13 as being unpatentable under 35 U.S.C. § 103(a) because the base combination for the same reasons provided as to representative claim 1 regarding the disputed “cues” limitation.

(3) Appellant has not shown the Examiner erred in rejecting claim 23 as being unpatentable under 35 U.S.C. § 103(a) over the base combination taken with Sutton, because the base combination teaches or suggests “the frequencies at which the one or more cues are arranged are in the lower or higher ends of the audio frequency range extending from 20 Hz to 20 kHz,” as recited.

(4) Appellant has not shown the Examiner erred in rejecting (i) claim 2 over the base combination of Philyaw, Tomes, and Lindahl, further in view of Vandermeijden; (ii) claim 21 over the same base combination further in view of Andersen; and (iii) claim 22 over the same base combination further in view of Barker.

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DECISION

The Examiner's rejections of claims 1–3, 10, 11, 13, 15, and 20–23 under 35 U.S.C. § 103(a) are affirmed.

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