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EXAMINER
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ITAY KATZ and AMNON SHENFELD

Appeal 2018-006572
Application 15/096,674
Technology Center 2600

Before JOHNNY A. KUMAR, JASON J. CHUNG, and NORMAN H. BEAMER, *Administrative Patent Judges*.

KUMAR, *Administrative Patent Judge*.

DECISION ON APPEAL[1]

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[1] Appellants have filed related Appeals in copending applications — U.S. Patent Application No. 14/345,592; U.S. Patent Application No. 15/060,533; U.S. Patent Application No. 15/090,527; U.S. Patent Application No. 15/256,481; and U.S. Patent Application No. 15/144,209. Br. 3.

STATEMENT OF CASE

Appellants[2] appeal under 35 U.S.C. § 134(a) from a Final Rejection of claims 57–76. Claims 1–56 have been cancelled. Br. 36. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

Illustrative Claim

Illustrative claim 57 under appeal reads as follows:

> 57. An augmented reality device, comprising:
> at least one processor configured to:
> receive, from an image sensor, image information associated with a real world scene;
> detect, in the image information, a predefined hand gesture performed by a user; and
> cause a video or audio recording to be tagged based, at least in part, on the detection.

Rejections on Appeal

Claims 57, 58, 61–63, and 74 provisionally rejected on the ground of nonstatutory double patenting as being unpatentable over claims 57–61, 68, 74, and 78 of copending Application No. 15090527 (reference application). Final Act. 4.[3]

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[2] Appellants identify eyeSight Mobile Technologies Ltd., as the real party in interest (Br. 2).

[3] Arguments are not presented for this provisional rejection. Therefore, we affirm the Examiner's rejection *pro forma*. Except for our ultimate decision, this rejection of these claims is not discussed further herein.

Claims 57–61 and 63–76 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Ota (US 20130050069) in view of Vadhavana et al. (US 20120062602). Final Act. 7.

Claim 62 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Ota (US 2013/0050069 A1; Feb. 28, 2013) in view of Vadhavana et al. (US 2012/0062602 A1; Mar. 15, 2012) in view of Chau (US 2009/0147991 A1; June 11, 2009). Final Act. 17.

Appellants' Contentions

1. Appellants contend that the Examiner erred in rejecting claim 57 under 35 U.S.C. § 103 because:

> *Vadhavana* fails to disclose "cause a video or audio recording… to be tagged based, at least in part, on the detection [of a predefined hand gesture performed by a user]"

Br. 11–14. (emphasis omitted).

> *Vadhavana's* rendered map is not tagged "based, at least in part, on the detection [of a predefined hand gesture performed by a user]"

Br. 14–16. (emphasis omitted).

2. Appellants contend that the Examiner erred in rejecting claim 61 under 35 U.S.C. § 103 because:

> *Ota* fails to disclose "record[ing]… video information or audio information associated with a time prior to the detected predefined hand gesture" and "based… on the detection or detection of a second predefined hand gesture"

Br. 19–21. (emphasis omitted).

> *Vadhavana* also fails to disclose "record[ing]… video information or audio information… based, at least in part, on the detection or detection of a second predefined hand gesture"

Br. 21–22. (emphasis omitted).

> *(i)* *Vadhavana* fails to disclose "record[ing]… video information or audio information" and
> *(ii)* Video information or audio information is not "based, at least in part, on the detection or detection of a second predefined hand gesture"

Br. 22–24. (emphasis omitted).

3. Appellants contend that the Examiner erred in rejecting claims 62 under 35 U.S.C. § 103 because:

> A. *Chau* fails to disclose "wherein the time is a predefined amount of time defined by the user" and
> B. *Chau* fails to disclose "a predefined amount of time" prior to detection of a predefined hand gesture[]

Br. 24–26. (emphasis omitted).

4. Appellants contend that the Examiner erred in rejecting claim 64 under 35 U.S.C. § 103 because:

> A. *Ota* fails to disclose "captur[ing] a frame from the video information in response to the detected predefined hand gesture" and
> B. *Vadhavana* fails to disclose "captur[ing] a frame from the video information in response to the detected predefined hand gesture"

Br. 27–34. (emphasis omitted).

Issue on Appeal

Did the Examiner err in rejecting claims 57–76 as being obvious?

ANALYSIS

We have reviewed the Examiner's rejections in light of Appellants' arguments that the Examiner has erred. We disagree with Appellants' conclusions. Except as noted herein, we adopt as our own; (1) the findings and reasons set forth by the Examiner in the action from which the appeal is taken (Final Act. 7–23), and (2) the reasons set forth by the Examiner in the Examiner's Answer (Ans. 2–9) in response to the Appellants' Appeal Brief. We concur with the conclusions reached by the Examiner. We highlight the following.

As to Appellants' above contention 1, they are unpersuasive because they are not directed to the Examiner's specific determination. *See* Final Act. 7–10. Instead, Appellants attack references individually for lacking a teaching for which the Examiner relied on a combination of references to show. It is well established that one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. *See In re Keller*, 642 F.2d 413, 426 (CCPA 1981); *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). The effect of Appellants' argument is to raise and then knock down a straw man rejection of claim 57 that was never made by the Examiner, in that the Examiner did not rely solely on the one reference as argued. In other words, Appellants argue against Examiner's findings that were never made. This form of argument is inherently unpersuasive to show Examiner error. Our reviewing court requires that references must be read, not in isolation, but for what they fairly teach in combination with the prior art as a whole. *Merck*, 800 F.2d at 1097.

> The Examiner finds, and we agree,
>
> Ota teaches detecting a predefined gesture performed by the user ([0045]: "the user interaction system 100 can identify one or more gestures being performed by the user's hand, such as selecting, pushing, grabbing, moving, dragging, attempting to enlarge, or other such actions").
>
> . . .
>
> Vadhavana clearly discloses detecting user's input on touch screen that displays a content (see [0041] - [0042]). The content includes various sources (live media, geo-tagged data, etc.) and/or services (music service, video service, social networking service, etc.) (see [0032]). Therefore, it would be obvious that Vadhavana's touch screen device is capable of causing a video recording to be tagged based on the detection of a gesture.

Ans. 2–4 (emphasis omitted).

As to Appellants' contentions 2 through 4 regarding claims 61, 62, and 64 (Br. 19–34), the Examiner has rebutted each of those arguments supported by sufficient evidence. (Ans. 4–9). Therefore, we adopt the Examiner's findings and underlying reasoning, which are incorporated herein by reference. We see no error in these unrebutted findings.

Accordingly, we sustain the Examiner's § 103 rejection of claims 57, 61, 62, and 64, as well as the remaining claims not separately argued.

We observe no Reply Brief is of record to rebut the Examiner's findings and responses to Appellants' arguments about the disputed features. Therefore, in the absence of persuasive rebuttal evidence or argument to persuade us otherwise, we adopt the Examiner's findings and underlying reasoning, which are incorporated herein by reference. Consequently, we sustain the rejection of claims 57–76.

DECISION

We affirm the Examiner's rejections of claims 57–76 as being unpatentable under 35 U.S.C. § 103(a).

We summarily affirm the Examiner's provisional rejection of claims 57, 58, 61–63, and 74 on the ground of nonstatutory obviousness-type double patenting.

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