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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JUDITH H. BANK, LISA M.W. BRADLEY, and LIN SUN

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Appeal 2018-006825  
Application 13/686,275  
Technology Center 2400

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Before ELENI MANTIS-MERCADER, LARRY J. HUME, and  
SCOTT E. BAIN, *Administrative Patent Judges*.

HUME, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from the Examiner's decision rejecting claims 13–28, which are all rejections pending in the application. Appellant has canceled claims 1–12. *See* Final Act. 2. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> We use the term “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as the IBM Corporation. Appeal Br. 1.

## STATEMENT OF THE CASE<sup>2</sup>

The claims are directed to a non-chronological buffering of segments of a media file. *See* Spec. (Title). In particular, Appellant’s disclosed embodiments and claimed invention relate to:

A [system and computer-program product] that receiv[es] a request for a media file from a client system and determining, using a processor, a non-chronological ordering of a plurality of segments of the media file for buffering according to historical playback data for each of the plurality of segments of the media file. The method further includes sending a first segment of the media file, as specified by the non-chronological ordering of the plurality of segments, for buffering to the client system. The non-chronological ordering is determined prior to sending any segment of the media file to the client system.

Spec. ¶ 1.

### *Exemplary Claims*

Claims 13 and 19, reproduced below, are representative of the subject matter on Appeal (*emphases* added to contested prior-art limitations):

13. A system comprising:
  - a processor programmed to initiate executable operations comprising:
    - receiving a request for a media file from a client system;
    - determining a non-chronological ordering of a plurality of segments of the media file for buffering according to*

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<sup>2</sup> Our decision relies upon Appellant’s Appeal Brief (“Appeal Br.,” filed Nov. 9, 2017); Reply Brief (“Reply Br.,” filed June 20, 2018); Examiner’s Answer (“Ans.,” mailed Apr. 20, 2018); Final Office Action (“Final Act.,” mailed June 14, 2017); and the original Specification (“Spec.,” filed Nov. 27, 2012).

*historical playback data for each of the plurality of segments of the media file; and*

sending a first segment of the media file, as specified by the non-chronological ordering of the plurality of segments, for buffering to the client system;

wherein the non-chronological ordering is determined prior to sending any segment of the media file to the client system.

19. A system comprising:

a processor programmed to initiate executable operations comprising:

*including a reference to a media file within a Web page, wherein the media file comprises a plurality of segments; and*

*including within the reference, a parameter indicating that segments of the media file are to be buffered in a non-chronological order.*

## REFERENCES

The prior art relied upon by the Examiner as evidence is:

<b>Name</b>	<b>Reference</b>	<b>Date</b>
Errico et al. (“Errico”)	U.S. 2002/0180774 A1	Dec. 5, 2002
Bennett et al. (“Bennett”)	U.S. 2011/0106964 A1	May 5, 2011
Fleischman et al. (“Fleischman”)	U.S. 2012/0215903 A1	Aug. 23, 2012

## REJECTIONS

R1. Claims 13–28 stand rejected under the judicially-created doctrine of obviousness-type double patenting (OTDP) over claims 1–4 and 8–12 of copending application no. 14/023,534.<sup>3</sup> Final Act. 3.

R2. Claims 13–15, 18, 21, 22, and 25 stand rejected under pre-AIA 35 U.S.C. § 102(b) as being anticipated by Errico. Final Act. 5.

R3. Claims 19–20, 26, 27, and 28 stand rejected under pre-AIA 35 U.S.C. § 102(b) as being anticipated by Bennett. Final Act. 11.

R4. Claims 16 and 23 stand rejected under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over the combination of Errico and Fleischman. Final Act. 16.

R5. Claims 17 and 24 stand rejected under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over the combination of Errico and Zhang. Final Act. 21.

## CLAIM GROUPING

Based on Appellant’s arguments (Appeal Br. 9–18) and our discretion under 37 C.F.R. § 41.37(c)(1)(iv), we decide the appeal of anticipation Rejection R2 of claims 13–15, 18, 21, 22, and 25 on the basis of representative claim 13; and we decide the appeal of anticipation Rejection R3 of claims 19–20, 26, 27, and 28 on the basis of representative claim 19.

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<sup>3</sup> Although the Examiner designated OTDP Rejection R1 as “provisional,” we treat the rejection as non-provisional given the issuance of the identified application on October 22, 2019 as U.S. Patent 10,454,983.

Remaining claims 16, 17, 23, and 24 in obviousness Rejections R4 and R5, not argued separately, stand or fall with the respective independent claim from which they depend.<sup>4</sup>

#### ISSUES AND ANALYSIS

In reaching this decision, we consider all evidence presented and all arguments actually made by Appellant. To the extent Appellant has not advanced separate, substantive arguments for particular claims, or other issues, such arguments are waived. 37 C.F.R. § 41.37(c)(1)(iv).

We *pro forma* affirm OTDP Rejection R1 of claims 13–28 for the reasons discussed, *infra*.

However, we agree with specific arguments made with respect to Rejections R2 through R5 of claims 13–28 and, for essentially the same reasons argued by Appellant, we do not sustain the Examiner’s rejections, as discussed, *infra*.

We highlight and address specific findings and arguments regarding claims 13 and 19 for emphases as follows.

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<sup>4</sup> “Notwithstanding any other provision of this paragraph, the failure of appellant to separately argue claims which appellant has grouped together shall constitute a waiver of any argument that the Board must consider the patentability of any grouped claim separately.” 37 C.F.R. § 41.37(c)(1)(iv). In addition, when Appellant does not separately argue the patentability of dependent claims, the claims stand or fall with the claims from which they depend. *In re King*, 801 F.2d 1324, 1325 (Fed. Cir. 1986).

1. OTDP Rejection R1 of Claims 13–28

Issue 1

Appellant does not appear to acknowledge the OTDP rejection (Final Act. 3) of claims 13–28 in either the Appeal or Reply Briefs. On this record, we see no evidence that the Examiner has withdrawn or otherwise modified the rejection made in the Final Action.

Accordingly, in view of the lack of any arguments directed to this rejection or withdrawal of the rejection by the Examiner, we *pro forma* sustain the Examiner’s rejection of these claims, and we also determine the rejection should be designated as non-provisional. *See* n.3, *supra*.

Arguments not made are waived.

2. § 102(b) Rejection R2 of Claims 13–15, 18, 21, 22, and 25

Issue 2

Appellant argues (Appeal Br. 9–13; Reply Br. 2–8) the Examiner’s rejection of claim 13 under 35 U.S.C. § 102(b) as being anticipated by Errico is in error. These contentions present us with the following issue:

Did the Examiner err in finding the cited prior art discloses a system comprising “a processor programmed to initiate executable operations” that includes, *inter alia*, “determining a non-chronological ordering of a plurality of segments of the media file for buffering according to historical playback data for each of the plurality of segments of the media file,” as recited in claim 13?

Principles of Law

Anticipation of a claim under 35 U.S.C. § 102 occurs when each claimed element and the claimed arrangement or combination of those elements is disclosed, inherently or expressly, by a single prior art reference. *Therasense, Inc. v. Becton, Dickinson & Co.*, 593 F.3d 1325, 1332 (Fed. Cir. 2010). A reference inherently discloses an element of a claim “if that missing characteristic is *necessarily* present, or inherent, in the single anticipating reference.” *Schering Corp. v. Geneva Pharms.*, 339 F.3d 1373, 1377 (Fed. Cir. 2003) (citation omitted) (emphasis added). “Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.” *Therasense*, 593 F.3d at 1332 (citing *Cont’l Can Co. USA, Inc. v. Monsanto Co.*, 948 F.2d 1264,1269 (Fed. Cir. 1991)).

During prosecution, claims must be given their broadest reasonable interpretation when reading claim language in light of the specification as it would be interpreted by one of ordinary skill in the art. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). Under this standard, we interpret claim terms using “the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant’s specification.” *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

Analysis

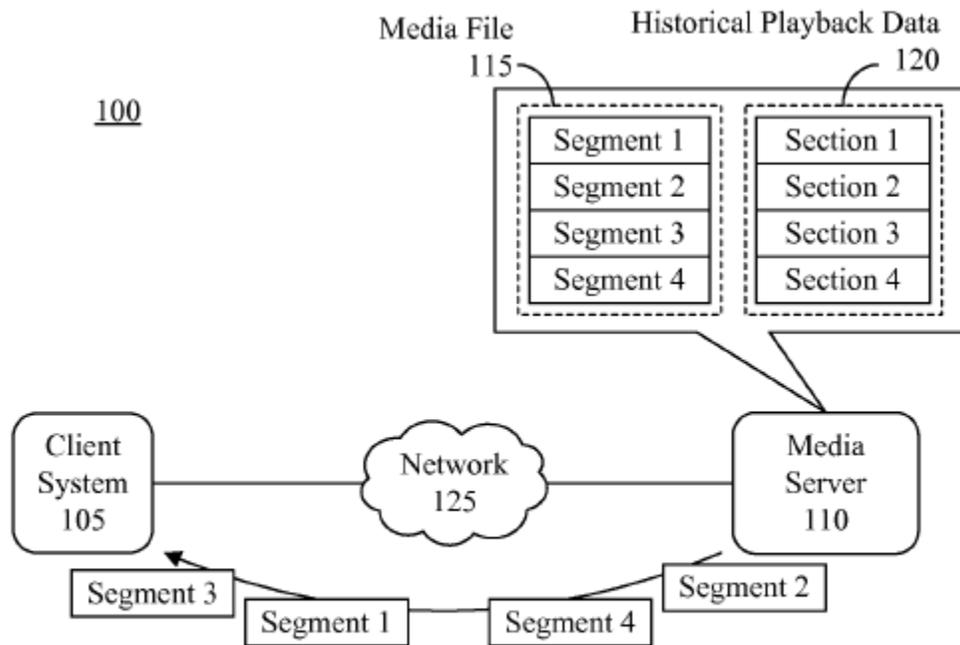
The Examiner finds Errico's disclosure of a summary presentation of a plurality of segments of a media file sufficiently discloses a portion of the contested limitation, i.e., the summary presentation of Errico is offered as disclosing "non-chronological ordering of a plurality of segments of the media file for buffering," and further finds Errico's original video discloses the claimed "historical playback data." Final Act. 6; *see also* Ans. 15–17.

As a matter of claim construction, the Examiner concludes "[c]hronological buffering presumes uninterrupted and continuous playing of the media file from start to finish, which effectively orders the segments chronologically 1–4 for buffering," and "the presence of gaps (i.e., missing segments) deviates from the natural order of buffering of the media file, and presents interruptions to the continuous playing of the media file. These gaps might be interpreted by the client system as jumps or skips within the media file," and "[t]herefore, the Examiner submits that a 'summary presentation' is a 'non-chronological ordering' of a plurality of segments of a media file." Ans. 16.

With respect to the recitation of "historical playback data," we turn to the Specification for context.

[0026] Historical playback data 120 specifies information for each of the various segments, i.e., segments 1-4, of media file 115. In illustration, and as pictured in FIG. 1, historical playback data 115 includes different sections denoted as sections 1–4. Section 1 of historical playback data 120 specifies historical playback data for segment 1 of media file 115. Section 2 specifies historical playback data for segment 2. Section 3 specifies historical playback data for segment 3. Section 4 specifies historical playback data for segment 4.

Spec. ¶ 26



**FIG. 1**

Appellant's Figure 1 illustrates an exemplary computing environment for playback of media files. Spec. 2.

Paragraph 27 of the Specification provides further description relating to historical playback data 120:

[0027] Historical playback data 120 can specify a variety of different types of information relating to media file 115. Historical playback data 120 can be specified on a per-segment basis. In one example, historical playback data 120 includes consumption data. Consumption data indicates how users consumed, e.g., viewed or listened to, media file 115. Consumption data can be specified as statistical information and can indicate, for example, which users viewed a given segment of media file 115, which users skipped (e.g., did not view) a given segment of media file 115, where users stopped consuming (e.g., viewing or listening to) a particular segment of media file 115, where users started fast forwarding within a

segment of media file 115, stopped fast forwarding within a segment of media file 115, which segments of media file 115 were viewed more than one time, or the like.

Spec. ¶ 27.

Appellant’s Figure 4 illustrates historical playback data in the form of statistical information associated with various media file segments.

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Segment	Time	Statistical Information
1	0-1	Introduction; 40% watched from 0 to 20 seconds; 50% watched from 20 seconds to 1 minute; 76% of viewers liked.
2	1-2	Topic 1; 90% of social network watched; 70% of all watched; 40% liked, 20% loved, 10% disliked.
3	2-3	Topic 2; 100% of social network watched; 95% of all watched; 73% liked, 5% enjoyed.
4	3-4	Topic 3; 20% of social network watched; 50% of all watched; 23% enjoyed, 14% indifferent.
5	4-5	Summary; 80% of social network watched; 98% of all watched; 13% found redundant.
6	5-6	Credits; 95% of users watching stopped watching at 5:10; 90% did not comment.

**FIG. 4**

“FIG. 4 is a table illustrating an example of historical playback data for a media file.” Spec. ¶ 11.

Appellant argues Errico’s disclosure is deficient in anticipating claim 13 because paragraph 32 of Errico teaches “[t]he system may include a set of selectors 58 that permits the user to select which portions of the video should be included in the summarized presentation.’ Consequently,

the ordering is based upon user-preferences — not historical playback data.”

Appeal Br. 10 (citing Errico ¶ 32). Appellant further contends:

[T]he Examiner's analysis fails to appreciate the difference between “the media file” and “historical playback data for each of the plurality of segments of the media file.” The already existent, original video is neither “historical” data nor “playback” data. As admitted by the Examiner “the order is based upon user-preferences.” To the extent that “the user preferences are still directed to the already existent, original file,” the “already existent, original file” corresponds to the claimed “the media file.”

Appeal Br. 12.

In the Answer, the Examiner continues to read the claimed “historical playback data” onto Errico’s original video data. Ans. 17 (“Errico clearly shows and discloses determining a non-chronological ordering (summary presentation) of a plurality of segments of the media file for buffering according to historical playback data (original video data) for each of the plurality of segments of the media file. . . . [and a]s indicated herein, original video data refers to data taken from the original video, such as the interesting events, highlights, plays, key frames, events, and themes).

Even assuming that the Examiner’s interpretation of “non-chronological ordering” comports with the broadest reasonable interpretation standard in light of the Specification as described above, a finding which we do not necessarily agree or find necessary to reach, we disagree with the Examiner’s finding that Errico’s “original video data,” as identified by the Examiner, reasonably discloses the claimed “historical playback data.” In light of the Specification, we conclude the recited historical playback data relates to viewing statistics of various segments of the media file, and not

characteristics of events shown in the media file, e.g., sporting event highlights, as in Errico. *See* Errico Figs. 5, 6.

Therefore, based upon the findings above, on this record, we are persuaded of at least one error in the Examiner's reliance on the cited prior art to disclose the disputed limitation of claim 13, such that we determine error in the Examiner's resulting finding of anticipation. Independent claim 21 recites limitations of commensurate scope, and we do not sustain the rejection of claim 21. We also do not sustain the anticipation rejection of dependent claims 14, 15, 18, 22, and 25 which variously depend from and stand with claims 13 and 21. *See* Claim Grouping, *supra*.

3. § 102(b) Rejection R3 of Claims 19, 20, and 26–28

Issue 3

Appellant argues (Appeal Br. 14–15; Reply Br. 9–10) the Examiner's rejection of claim 19 under 35 U.S.C. § 102(b) as being anticipated by Bennett is in error. These contentions present us with the following issue:

Did the Examiner err in finding the cited prior art discloses a system comprising “a processor programmed to initiate executable operations comprising” “including a reference to a media file within a Web page . . . including within the reference, a parameter indicating that segments of the media file are to be buffered in a non-chronological order,” as recited in claim 19?

Analysis

The Examiner finds Bennett's disclosure in Figure 4A, and associated disclosure in the Specification, that request 80, generated by media player 20, discloses the contested limitation, i.e., “a parameter indicating that

segments of the media file are to be buffered in a non-chronological order.”

Final Act. 12.

“As can be seen in FIG. 4A, the media player 20 generates a request 80 for segmented media packets from a particular media file source 70 and transmits the request to the media file source 70 via network 40 using a URL and/or IP address for the media file source 70. The request 80 can be a request for the entire media file (i.e., all media packets) or a request for a portion or portions of the media file (i.e., a list or grouping of media packets). . . . These requests can be generated in order or out of order (*i.e.*, the media player 20 can request media packets #10-#15 and then subsequently send a request for media packets #5-#9))

*Id.* (quoting Bennett ¶ 38) (italics omitted).

In response, Appellant argues “nothing within the Examiner’s analysis establishes that buffering, in a non-chronological order, is based upon a parameter stored in a reference within a Web page.” Appeal Br. 14.

We agree with Appellant’s contention, and further note that Bennett appears to be silent on any disclosure of using a parameter included within a reference to a media file within a web page to indicate non-chronological buffering of segments of a media file, in the context of claim 19.

We turn to the Specification for such context. For example, although we do not import limitations from the Specification into the claims, we note the Specification discloses:

[0089] In another aspect, an order of segments of a media file can be specified directly within the request provided for the media file. As an illustration, consider a Web page that references a link, i.e., a hyperlink, for a media file. A parameter can be included with the link that facilitates the specification of an ordering of segments to be buffered for the media file. For

example, a parameter such as “&buffer” can be provided as a query string parameter.

[0090] In one aspect, the parameter can be specified as “&buffer=bufferArray”. The array “bufferArray” can be specified according to the following format:

bufferArray=<0,20, 120, 180,60, 120,240,300,300,310,20,60,310,360>

The values indicate that the first segment of the media file to be buffered is second 0 to second 20. The next segment of the media file to be buffered is from second 120 to second 180. The subsequent segments to be buffered, which are given by pairs of start and end times, are, in (non-chronological) order: 60-120; 240-300; 300-310; 20-60; 310-360.

Spec. ¶¶ 89, 90.

Contrary to the Examiner’s findings, we find Bennett discloses nothing similar to the scheme disclosed and claimed by Appellant, i.e., “including a reference to a media file within a Web page . . . . [and] including within the reference, a parameter indicating that segments of the media file are to be buffered in a non-chronological order.”

Therefore, based upon the findings above, on this record, we are persuaded of at least one error in the Examiner’s reliance on the cited prior art to disclose the disputed limitation of claim 19, such that we determine error in the Examiner’s resulting finding of anticipation. We also do not sustain the anticipation rejection of dependent claims 20, 26, 27, and 28 which stand with claim 19. *See Claim Grouping, supra.*

4. § 103(a) Rejections R4 and R5 of Claims 16, 17, 23, and 24

In light of our reversal of the rejection of independent claims 13 and 21, *supra*, we also reverse obviousness Rejections R4 and R5 under § 103(a) of claims 16, 17, 23, and 24, which variously and ultimately depend

from claims 13 and 21. On this record, the Examiner has not shown how the additionally cited Fleischman and Zhang references overcome the aforementioned deficiencies with Errico, as discussed above regarding anticipation Rejection R2 of independent claims 13 and 21.

Therefore, we do not sustain the Examiner's obviousness Rejections R4 and R5 of claims 16, 17, 23, and 24.

### CONCLUSIONS

(1) Appellant provides no evidence or argument that the Examiner erred in rejecting claims 13–28 in OTDP Rejection R1, and we *pro forma* sustain the rejection.

(2) The Examiner erred with respect to anticipation Rejections R2 and R3 of claims 13–15, 18–22, and 25–28 under 35 U.S.C. § 102(b), and we do not sustain the rejections.

(3) The Examiner erred with respect to obviousness Rejections R4 and R5 of claims 16, 17, 23, and 24 under 35 U.S.C. § 103(a) over the cited prior art combinations of record, and we do not sustain the rejections.

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

DECISION SUMMARY

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Basis / References</b>	<b>Affirmed</b>	<b>Reversed</b>
13–28		OTDP	13–28	
13–15, 18, 21, 22, 25	102(b)	Anticipation Errico		13–15, 18, 21, 22, 25
19–20, 26, 27, 28	102(b)	Anticipation Bennett		19–20, 26, 27, 28
16, 23	103(a)	Obviousness Errico, Fleischman		16, 23
17, 24	103(a)	Obviousness Errico, Zhang		17, 24
<b>Overall Outcome</b>			13–28	

FINALITY AND RESPONSE

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