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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BABAK ROBERT SHAKIB,
YURIY MUSATENKO, and ANDRII GUSHCHYK

Appeal 2018-008975
Application 14/231,644
Technology Center 2100

Before JAMES R. HUGHES, JOHN A. EVANS, and
JUSTIN BUSCH, *Administrative Patent Judges*.

BUSCH, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1–4, 7, 10–15, 17, 18, 20, 23–27, 30, and 31, which constitute all the claims pending in this application. We have jurisdiction over the pending claims under 35 U.S.C. § 6(b).

We AFFIRM IN PART.

¹ We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Google Technology Holdings LLC. Appeal Br. 3.

CLAIMED SUBJECT MATTER

Appellant's disclosure generally relates to "[t]echniques and apparatuses for highlighting media through weighting of people or contexts" to generate highlight reels based on the weightings. Spec. ¶ 5, Abstract. Claims 1, 11, and 17 are independent. Claim 1 is reproduced below:

1. A method comprising:
 - determining, at a computing device, persons in source media;
 - presenting, at the computing device, a user interface enabling selection to weight the persons determined to be in the source media, the user interface comprising a visual representation of each of the persons determined to be in the source media, the visual representation of each of the persons comprising a facial image of each of the persons and being drawn from a frame of a video or a still image of the source media, a size of the visual representation of each of the persons corresponding to a first weighting of the persons;
 - receiving, at the computing device, selection altering the first weighting of the persons, the selection comprising receiving a user gesture to alter the size of the visual representation of one of the persons, the alteration of the size of the visual representation of the one of the persons altering a corresponding weighting of the one of the persons and producing a second weighting of the persons; and
 - creating, at the computing device, a highlight reel based on the source media and the second weighting of the persons.

REJECTIONS

Claim 31 stands rejected under 35 U.S.C. § 112(b) as indefinite. Final Act. 2–3.

Claims 1–4, 7, 10, 11, 14, and 23–25 stand rejected under 35 U.S.C. § 103 as obvious in view of Morrison (US 2012/0189284 A1; July 26, 2012), Boiman (US 9,189,137 B2; Nov. 17, 2015), Kelly (US 8,484,149 B1;

July 9, 2013), and Wada (US 2009/0087037 A1; Apr. 2, 2009). Final Act. 3–19.

Claims 12 and 13 stand rejected under 35 U.S.C. § 103 as obvious in view of Morrison, Boiman, Kelly, Wada, and Mundy (US 2011/0183651 A1; July 28, 2011). Final Act. 19–20.

Claims 17, 18, 26, 27, 30, and 31 stand rejected under 35 U.S.C. § 103 as obvious in view of Morrison and Kelly. Final Act. 20–26.

Claim 20 stands rejected under 35 U.S.C. § 103 as obvious in view of Morrison, Boiman, and Kelly. Final Act. 26–28.

ANALYSIS

We have reviewed the Examiner’s rejections in light of Appellant’s arguments that the Examiner erred. In reaching this decision, we have considered all evidence presented and all arguments Appellant made. Arguments Appellant could have made, but chose not to make in the Briefs, are deemed waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).

THE REJECTION UNDER 35 U.S.C. § 112(b)

The Examiner rejects claim 31 under 35 U.S.C. § 112(b) as indefinite for failing to particularly point out and distinctly claim the subject matter Appellant regards as the invention. Final Act. 2–3. Claim 31 depends from claim 30, which depends from independent claim 17. The Examiner finds claims 17 and 30 recite “multiple contexts” and claim 31 recites “outdoor, sunny, windy or people-eating contexts,” making it unclear whether claim 31’s recited contexts are the same contexts as the “multiple contexts” recited in claims 17 and 30. The Examiner also finds claim 31 indefinite because it is unclear whether the contexts in claim 31’s clause “the sample image identifies one of the contexts” refers to the recited “multiple contexts”

recited in claims 17 and 30 or the “outdoor, sunny, windy or people-eating contexts” recited in claim 31. Final Act. 3.

Appellant attempted to amend claim 31 on September 11, 2017, after the Examiner issued the Final Rejection. *See* Appeal Br. 14. The Examiner did not enter Appellant’s attempted amendment. Advisory Act. 1 (mailed Sept. 27, 2017). Appellant argues the rejection of claim 31 under 35 U.S.C. § 112(b) should be reversed based on Appellant’s amendment submitted on September 11, 2017. Appeal Br. 14. The Examiner explained that “[t]he after-final amendment was a substantive amendment that modifies the scope and meaning of the claims,” whereas only after-final amendments that cancel claims, adopt Examiner’s *suggestions*, remove issues for appeal, or require only cursory Examiner review are entered as a matter of right. Ans. 25–26 (citing MANUAL OF PATENT EXAMINING PROCEDURE (MPEP) § 714.13(II)). Appellant refers to the MPEP’s statement that “amendments that adopt Office suggestions should be entered” and argues “Appellant adopted the Office’s suggestions as contained on pages 2 and 3 of the June 16, 2017, Final Office Action.” Reply Br. 2 (citing MPEP 714.13).

If an applicant believes an examiner improperly refused to enter an amendment, the applicant may file a petition to the Director. 37 C.F.R. § 1.127. We do not decide such issues on appeal. Moreover, contrary to Appellant’s argument, the cited portions of the Final Action merely state the basis for the rejection of claim 31 under 35 U.S.C. § 112 and explain how the Examiner is interpreting the claims for purposes of analyzing the claim with respect to prior art. Final Act. 2–3. The Final Action does not provide an Examiner-suggested amendment. Final Act. 2–3.

Appellant argues the merits of the indefiniteness rejection only with respect to claim 31 as recited in Appellant’s amendment submitted on September 11, 2017. Appellant does *not* argue the merits of claim 31 *as pending before us*. For these reasons, we affirm the Examiner’s rejection of claim 31 under 35 U.S.C. § 112(b) as indefinite.

THE REJECTIONS UNDER 35 U.S.C. § 103

The Examiner finds the combination of Morrison, Boiman, Kelly, and Wada teaches or suggests every limitation recited in claims 1–4, 7, 10, 11, 14, and 23–25. Final Act. 3–19. The Examiner finds the combination of Morrison and Kelly teaches or suggests every limitation recited in claims 17, 18, 26, 27, 30, and 31. Final Act. 20–26. The Examiner finds the combination of Morrison, Boiman, Kelly, Wada, and Mundy teaches or suggests every limitation recited in claims 12 and 13. Final Act. 19–20. The Examiner finds the combination of Morrison, Boiman, and Kelly teaches or suggests every limitation recited in claim 20. Final Act. 26–28.

Of particular relevance to this Appeal, the Examiner finds Kelly teaches or suggests (1) “the visual representation of each of the persons . . . being drawn from a frame of a video or a still image of the source media, a size of the visual representation of each of the persons corresponding to a first weighting of the persons” recited in claim 1, (2) “the visual representation of each of the two or more persons . . . being drawn from a frame of a video or a still image of the audiovisual media, a size of the visual representation of each of the two or more persons corresponding to a first weighting of the two or more persons” recited in claim 11, and (3) “the visual representation of each of the multiple contexts . . . being drawn from a frame of a video or a still image of the source media, a size of the visual

representation of each of the multiple contexts corresponding to a first weighting of the multiple contexts” recited in claim 17 (collectively the “visual representation drawn from the source media” limitations). Final Act. 6 (citing Kelly 11:47–63, Fig. 7), 14, 21–22. For the reasons discussed below, we disagree with the Examiner’s finding that Kelly teaches or suggests the visual representation drawn from the source media limitations recited in claims 1, 11, and 17 when these limitations are properly construed.

When rejecting claims for obviousness, the Examiner must show that each and every limitation of the claim is described or suggested by the prior art or would have been obvious based on the knowledge of those of ordinary skill in the art or the inferences and creative steps a person of ordinary skill in the art would have employed. *In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988); *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007).

As an initial matter, when construing claim terminology during prosecution before the Office, claims are to be given their broadest reasonable interpretation consistent with the Specification, 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). However, the broadest *reasonable* interpretation differs from the broadest *possible* interpretation. *In re Smith Int’l, Inc.*, 871 F.3d 1375, 1383 (Fed. Cir. 2017). The correct inquiry in giving a claim term its broadest reasonable interpretation in light of the specification is “an interpretation that corresponds with what and how the inventor describes his invention in the specification, *i.e.*, an interpretation that is ‘consistent with the specification.’” *Smith*, 871 F.3d at 1382–83 (quoting *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997)).

The Examiner finds “the phrase ‘drawn from’ is interpreted broadly to refer to almost any kind of connection or relationship” and, in the context of Morrison, Kelly’s visual representation (i.e., bar graphs) “can relate to, describe and/or represent[]” people or contexts “and aspects of source media in” Morrison. Final Act. 6, 14, 22. As discussed below, we find the Examiner’s construction of “drawn from” to be unreasonably broad and inconsistent with how one of ordinary skill in the art would understand the phrase in light of the Specification.

We look to the Specification to interpret the phrase “drawn from.” The Specification describes exemplary methods and interfaces for weighting people and contexts identified in source media. Spec. ¶¶ 91–105, Figs. 13–16. The Specification discloses exemplary graphical user interfaces including images of the people identified in the source media that can be used to select a weighting for each person. *See* Spec. ¶¶ 93, 95, Fig. 14. The Specification discloses that, although the people are “shown in line drawing, these images 1406 for each person can be thumbnails showing each person’s face *pulled from* source media (even the source media to be highlighted), avatars, or other identifiers.” Spec. ¶ 95 (emphasis added); *see* Spec. ¶ 95, 103 (“Thus a slider or size having an image of a sun and trees can be used to enable selection to alter weightings for outdoor scenes and so forth.”), Figs. 14–16. The Specification also provides an exemplary “size-based weighting interface” that “presents an image for each of the persons in the highlight reel or preview, each of the images representing each person’s face and having a size corresponding to the person’s weighting in the highlight reel.” Spec. ¶ 99, Figs. 15–16.

Although each of the disclosed embodiments merely provide examples, they are instructive when evaluating how a person of ordinary skill would interpret terms recited in the claims. We agree with the Examiner's underlying point that the broad claim language and open-ended exemplary nature of the Specification leads to a broad construction of much of the claim. In particular, a "visual representation of each of the persons" is broad enough to encompass any image in a graphical user interface that stands in for (i.e., represents) that person in the interface.

The claim language, however, more specifically recites that the representation comprises "a facial image" and is "drawn from a frame of a video or a still image of the source media." As noted above, the Specification discloses that the images representing the people in the interface are shown in line drawing, but "can be thumbnails showing each person's face *pulled from source media* . . . , avatars, or other identifiers" provides additional context for the claimed "visual representation . . . comprising a facial image of each of the persons and being drawn from a frame of a video or a still image of the source media." In light of this disclosure, we find a person of ordinary skill would have understood that the visual representation "being drawn from a frame of a video or a still image of the source media" means that the recited visual representation is an image excerpted (i.e., "pulled") from a video or still image, as opposed to merely a graphical element that *represents* that person or context.

Kelly discloses, in relevant part, a graphical user interface with rectangles depicting the weight of various factors, where the weight is the product of an importance value and a rating value. Kelly 11:47–63, Fig. 7. Thus, the two sides of the rectangle represent the importance and rating

values of a particular factor and the area within the rectangle provides a visual depiction of the weighting of that factor. Kelly 11:47–63, Fig. 7. Dragging the corner of a rectangle allows a user to modify the importance and/or rating values and see a visualization of how that affects the weighting (i.e., area) of the factors. Kelly 11:47–12:10.

The Examiner’s broad construction of “drawn from” encompasses any connection or relationship. Given this construction, the Examiner finds Kelly teaches or suggests the visual representations drawn from source media limitations because Kelly discloses graphical user interfaces having bar graphs representing the different factors a user can weight. Final Act. 6 (citing Kelly 11:47–63, Fig. 7); Ans. 27 (citing Kelly 11:58–12:3, Fig. 7). However, given our interpretation of the claims, the Examiner’s findings are problematic. In particular, the Examiner’s rejection is based on a discussion of representations of factors that are not taken from images or videos and, therefore, is different than the claimed “visual representation . . . being drawn from a frame of a video or a still image of the source media.”

Appellant argues “Kelly does not describe or show actual persons nor does it disclose or teach photographic-like representations of those users as described in and consistent with the application disclosure.” Appeal Br. 29. Although Appellant’s argument imprecisely describes what the claims require, we ultimately agree with the issue Appellant raises. In fact, because the Examiner construed these limitations differently than we did, the Examiner does not make a finding that these limitations are taught by Kelly. *See* Final Act. 7; Ans. 27–28. Therefore, in light of our construction, we agree with Appellant that Kelly fails to teach or suggest the visual representation drawn from the source media limitations.

Given the Examiner's construction and finding that Kelly teaches these limitations under the Examiner's broad construction, the Examiner made no findings that any of the additionally cited references teach or suggest these limitations. Because we find (i) the Examiner's construction of "drawn from" to be unreasonably broad and inconsistent with the Specification, (ii) the Examiner's finding that Kelly teaches these limitations in light of our construction to be in error, and (iii) the Examiner's lack of findings that any other cited disclosure teaches or suggests these limitations, we are persuaded the Examiner erred. Because this error is dispositive of the rejection under 35 U.S.C. § 103, we need not address other issues raised by Appellant's arguments.

Thus, constrained by the record before us, we do not sustain the Examiner's rejection of: (1) independent claims 1 and 11 and claims 2–4, 7, 10, 14, and 23–25, which depend therefrom and incorporate the respective limitations, as obvious in view of Morrison, Boiman, Kelly, and Wada; (2) claims 12 and 13, which depend from claim 11 and incorporate the respective limitation, as obvious in view of Morrison, Boiman, Kelly, Wada, and Mundy; (3) independent claim 17 and claims 18, 26, 27, 30, and 31, which depend from claim 17 and incorporate the respective limitation, as obvious in view of Morrison and Kelly; and (4) claim 20, which depends from claim 17 and incorporates the respective limitation, as obvious in view of Morrison, Kelly, and Boiman.

Notably, our decision is based only on the rejection before us. The Examiner's rejection was based on a construction with which we do not agree. Accordingly, the Examiner has not had an opportunity to make findings with respect to how additional portions of the cited references may

teach or suggest the visual representation drawn from the source media limitations when construed consistently with the Specification. The Patent Trial and Appeal Board is a review body, rather than a place of initial examination. Therefore, we do not determine here whether the claims are unpatentable over the cited prior art, but merely with respect to the specific rejections on appeal. We leave it to the Examiner to ascertain the appropriateness of any further rejections based on these or other references.² Although we are authorized to enter a new ground of rejection, our decision not to enter a new ground of rejection should not be considered an indication regarding the appropriateness of further rejection or allowance of the non-rejected claims. *See* MPEP § 1213.02 (9th ed. Rev. 08.2017, Jan. 2018).

CONCLUSION

Claims Rejected	35 U.S.C. §	References/Basis	Affirmed	Reversed
31	112(b)	Indefinite	31	
1-4, 7, 10, 11, 14, 23-25	103	Morrison, Boiman, Kelly, Wada		1-4, 7, 10, 11, 14, 23-25
12, 13	103	Morrison, Boiman, Kelly, Wada, Mundy		12, 13
17, 18, 26, 27, 30, 31	103	Morrison, Kelly		17, 18, 26, 27, 30, 31
20	103	Morrison, Boiman, Kelly		20
Overall Outcome			31	1-4, 7, 10-15, 17, 18, 20, 23-27, 30, 31

² For example, because the Examiner relied on Kelly to teach the visual representations drawn from source media limitations, the Examiner has not explained whether aspects of Wada may teach these limitations and, if so, why and how a person of ordinary skill in the art would have combined such teachings with the other cited teachings to arrive at the claimed invention.

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TIME PERIOD FOR 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). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED IN PART