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docketing@mtiplaw.com
llinardakis@mtiplaw.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte SAGI ILTUS and ELI BIRGER

Appeal 2018-009191
Application 14/609,654
Technology Center 2400

Before ST. JOHN COURTENAY III, LARRY J. HUME, and
PHILLIP BENNETT, *Administrative Patent Judges*.

HUME, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant,¹ Sagi Iltus, et al., appeals from the Examiner's decision rejecting claims 1–23, which are all claims pending in the application. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

¹ We use the word “Appellant” to refer to “Applicants” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Vonage Network LLC. App. Br. 3.

STATEMENT OF THE CASE²

The Invention

Appellant's disclosed and claimed inventions relate to "to systems and methods for buffering and playback of audio when recovering from a dropped or redirected telephone conversation." Spec. ¶ 1.

Exemplary Claim

Claim 1, reproduced below, is representative of the subject matter on appeal (*emphases* added to contested limitations):

1. A computer implemented method for replaying buffered audio of a telephone call via a media relay, comprising:

buffering, by the media relay, audio data associated with a telephone call when the media relay detects that a quality of an established data connection decreases below a first threshold quality measure;

playing, by the media relay, the buffered audio data from a buffer;

determining, by the media relay, that the quality of the established data connection exceeds a second threshold quality measure; and

replaying, by the media relay, the audio data from the buffer, wherein replaying the audio comprises modifying a playback rate of the buffered audio data during playback.

² Our Decision relies upon Appellant's Appeal Brief ("App. Br.," filed April 16, 2018); Examiner's Answer ("Ans.," mailed July 26, 2018); Final Office Action ("Final Act.," mailed Mar. 30, 2017); and the original Specification ("Spec.," filed Jan. 30, 2015).

Prior Art

Chen et al. (“Chen”)	US 6,665,751 B1	Dec. 16, 2003
Salomons	US 2007/0143800 A1	June 21, 2007
Lingafelt et al. (“Lingafelt”)	US 8,331,545 A1	Dec. 11, 2012
Rosenberg	US 2016/0182191 A1	June 23, 2016

Rejections on Appeal

R1. Claims 1–3, 7–10, 12–14, 18–21, and 23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Rosenberg and Lingafelt. Final Act. 3.

R2. Claims 4–6 and 15–17 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Rosenberg, Lingafelt, and Chen. Final Act. 17.

R3. Claims 11 and 22 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Rosenberg, Lingafelt, and Salomons. Final Act. 22.

CLAIM GROUPING

Based on Appellant’s arguments (App. Br. 6–10), we decide the appeal of obviousness Rejection R1 of claims 1–3, 7–9, 12–14, 18–20, and 23 on the basis of representative claim 1. We address separately argued claims 10 and 21, *infra*. We address remaining claims 4–6, 11, 15–17, and 22 in obviousness Rejections R2 and R3, not argued separately, *infra*.³

³ “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).

ISSUES AND ANALYSIS

In reaching this decision, we consider all evidence presented and all arguments actually made by Appellant. We do not consider arguments Appellant could have made, but chose not to make in the Briefs so that we deem any such arguments as waived. 37 C.F.R. § 41.37(c)(1)(iv).

As discussed below, we agree with particular arguments Appellant made with respect to claims 10 and 21. However, we disagree with Appellant's arguments with respect to claim 1 and claims grouped therewith, and we incorporate herein and adopt as our own: (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken, and (2) the reasons and rebuttals set forth in the Examiner's Answer in response to Appellant's arguments. We incorporate such findings, reasons, and rebuttals herein by reference unless otherwise noted. We highlight and address specific findings and arguments regarding claims as follows.

1. § 103 Rejection R1 of Claims 1–3, 7–9, 12–14, 18–20, and 23

Issue 1

Appellant argues (App. Br. 6–10) the Examiner's rejection of independent claim 1 under 35 U.S.C. § 103 as being obvious over the combination of Rosenberg and Lingafelt is in error. These contentions present us with the following issue:

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).

Did the Examiner err in finding the cited prior art combination teaches or suggests “[a] computer implemented method for replaying buffered audio of a telephone call *via a media relay*,” because the prior art combination allegedly does not teach or suggest use of a “media relay,” within the meaning of claim 1 (emphasis added)?

Analysis

Regarding the disputed limitations of claim 1, Appellant contends “[t]he buffer servers of Rosenberg are not the media relays of Appellant[’s] independent claim 1.” App. Br. 6.

Appellant further argues:

[A] media relay is a term of art and identifies a specific piece of equipment in an IP telephony system. In fact, the USPTO has established the term “media relay” as well known in the art as to its form and function. Specifically, U.S. Patent No. 7796620B2, filed March 20, 2008 and titled, “Method, Terminal, and MediaRelay for Establishing a Multi-Media Connection”, defines such form and function. In addition, Appellant[’s] Specification frames what a media relay is and what it does.

Id.

Appellant alleges that Rosenberg’s “buffer server is NOT the media relay of an IP telephony system, but rather a specific additional piece of equipment dedicated to buffering VoIP packets for a specific client device.” App. Br. 7. Appellant further contends, “[i]n the cited art, the buffer servers are not the media servers of Appellant[’s] invention. The buffer servers do not receive call setup signaling and therefore are not the media servers of an IP telephony network, nor are they the media servers of Appellant[’s] invention.” App. Br. 8.

We are not persuaded by Appellant’s arguments. Contrary to Appellant’s contentions, the cited sections of the Specification do not provide an explicit definition of the claim term “media relay,” a term we note was added to the claims during prosecution. To the contrary, Appellant’s Specification merely describes their invention as “replaying buffered audio” (Spec. ¶ 4) including an “audio buffering module.” Spec. ¶ 5; *see also* Spec. ¶¶ 6, 15, 44, 47, 49.⁴ We are not persuaded by Appellant’s arguments because they do not point to an explicit definition of the disputed “media relay” that would render the Examiner’s claim construction overly broad, unreasonable, or inconsistent with the Specification.⁵ Under the broadest reasonable interpretation standard, despite Appellant’s argument, we conclude that Rosenberg’s buffering and buffer server is not precluded from the scope of the disputed claim term “media relay” of claim 1.⁶ Ans. 7–8, citing Rosenberg, Fig. 4, par. 35, 43.

We agree with the Examiner’s factual findings and legal conclusion that “[f]undamentally, the issues [in] question hinge[] on the claim interpretation of media relay” (Ans. 3) and, “[b]ased on the interview record and the prosecution record, applicant/appellant interprets the media relay as

⁴ Appellant cites the Specification for support of the “buffering, by the media relay,” and “playing, by the media relay” limitations. App. Br. 3 (citing Spec. ¶¶ 4, 15, 41–43, 48) (“SUMMARY OF CLAIMED SUBJECT MATTER”).

⁵ Because “applicants may amend claims to narrow their scope, a broad construction during prosecution creates no unfairness to the applicant or patentee.” *In re ICON Health & Fitness, Inc.*, 496 F.3d 1374, 1379 (Fed. Cir. 2007) (citation omitted).

⁶ We give the claims their broadest reasonable interpretation consistent with the Specification. *See In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

a well understood term have well understood definition in the art [as well as in] the appeal brief, the applicant/appellant’s interpretation is wholly based on functional language.” *Id.* We agree with the Examiner’s interpretation because, for example, the Specification discloses “a method for replaying buffered audio of a telephone call, comprises buffering audio data associated with a telephone call when a quality of an established data connection decreases below a first threshold quality measure.” Spec. ¶ 4.

Moreover, we are also not persuaded by Appellant’s citation to Patent No. 7,796,620 B2 to Elwell, because this reference does not provide an explicit definition of the disputed “media relay” term.⁷

Accordingly, Appellant has not provided sufficient evidence or argument to persuade us of any reversible error in the Examiner’s reading of the contested limitations on the cited prior art.

Therefore, we sustain the Examiner’s obviousness rejection of independent claim 1, and grouped claims 2, 3, 7–9, 12–14, 18–20, and 23, which fall therewith. *See Claim Grouping, supra.*

2. Obviousness Rejection R1 of Claims 10 and 21

Claim 10 recites:

The method of claim 1, *wherein the buffer size is based on historic disconnection statistics at a current location* and based on telemetry data including at least one of call duration, average quality, packets lost, whether a call was disconnected and reconnected, or a reconnection time.

Claims App’x (emphasis added).⁸

⁷ Although not presented during prosecution, we have reviewed the Elwell reference and attach a Form PTO-892 to enter this reference in the record.

Appellant argues the cited references do not teach or suggest the disputed limitation “wherein a buffer size is based on historic disconnection statistics at a current location,” as recited in dependent claims 10 and 21.

App. Br. 10. Specifically, Appellant argues:

Rosenberg and Lingafelt are silent as to determining a buffer size. As such, Rosenberg and Lingafelt are further silent with respect to using any type of historic disconnection statistics and further fail to discuss calculating a buffer size. Rosenberg and Lingafelt teach buffering based on current packet loss between a client device and its buffer server. As such, the cited art, neither alone nor in combination teaches determining a buffer size based on historic disconnection statistics at a current location.

Id.

The Examiner finds Rosenberg teaches this limitation. Final Act. 8, citing Rosenberg Fig. 4, par. 35. In response to Appellant’s arguments, the Examiner notes that “determining a buffer size” is not recited in the rejected claims. Ans. 6.

We find Appellant’s arguments persuasive. We disagree with the Examiner because we do not find the cited portions of Rosenberg teach or suggest the disputed limitation of “the buffer size is based on historic disconnection statistics at a current location.” Claim 10.

Therefore, for essentially the same reasons argued by Appellant, we reverse the Examiner’s rejection R1 of dependent claims 10 and 21.

⁸ In the event of further prosecution, we invite the Examiner’s attention as to whether the recitation in claim 10 of “*the* buffer size” has proper antecedent basis under 35 U.S.C. § 112(b).

3. Rejections R2 and R3 of Claims 4–6, 11, 15–17 and 22

In view of the lack of any substantive or separate arguments directed to obviousness Rejection R2 of dependent claims 4–6 and 15–17 under § 103(a) (*see* App. Br. 10–11), and Rejection R3 of dependent claims 11 and 22 (*see* App. Br. 11) we sustain the Examiner’s rejections of these claims, as they fall with their respective independent claims. *See* 37 C.F.R. § 41.37(c)(1)(iv).

CONCLUSION

The Examiner erred with respect to obviousness Rejection R1 of dependent claims 10 and 21, and we do not sustain the rejection. The Examiner did not err with respect to obviousness Rejection R1 of claims 1–3, 7–9, 12–14, 18–20, and 23, R2 of claims 4–6 and 15–17 and R3 of claims 11 and 22 under 35 U.S.C. § 103(a) over the cited prior art combinations of record, and we sustain these rejections.

DECISION SUMMARY

Claims Rejected	Basis	Affirmed	Reversed
1–3, 7–10, 12–14, 18–21, 23	R1: § 103 Rosenberg, Lingafelt	1–3, 7–9, 12–14, 18–20, 23	10 and 21
4–6, 15–17	R2: § 103 Rosenberg, Lingafelt, Chen	4–6, 15–17	
11 and 22	R3: § 103 Rosenberg, Lingafelt, Salomons	11 and 22	

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Claims Rejected	Basis	Affirmed	Reversed
Overall Outcome		1-9, 11-20, 22, 23	10 and 21

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-IN-PART