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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JUSTIN EARL BALLARD

Appeal 2019-000004
Application 14/633,232
Technology Center 2600

Before ST. JOHN COURTENAY III, KALYAN K. DESHPANDE, and
CATHERINE SHIANG, *Administrative Patent Judges*.

SHIANG, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant¹ appeals under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1–8 and 13–20, which are all the claims pending and rejected in the application.² We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

¹ We use “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies Charter Communications Operating, LLC as the real party in interest. Appeal Br. 3.

² The Examiner objects to claims 9–12 for being dependent from a rejected independent claim, but such claims are allowable if rewritten in independent form. Final Act. 11. Therefore, the objection of claims 9–12 is not before us.

STATEMENT OF THE CASE

Introduction

The present invention relates to “audio volume control and, more particularly but not exclusively, automatically stabilizing a volume of different audio streams/contents to predefined boundary levels which may be requested by a user.” Spec. 1:4–6.

According to a first aspect of the invention, a method (performed by an electronic device) comprising: setting minimum and maximum threshold volumes defining respective minimum and maximum acceptable volumes for audio signals; buffering an audio signal for a predefined time interval from an audio stream; determining whether the buffered audio signal has volume peaks exceeding the maximum threshold volume and has volume valleys falling below the minimum threshold volume; calculating a volume adjustment for the buffered audio signal using a predefined algorithm for modifying a volume corresponding to the buffered audio signal, so that by applying the calculated volume adjustment, the volume corresponding to the buffered audio signal including the determined one or more of volume peaks and valleys is limited by the maximum and minimum threshold volumes during the predefined time interval; and providing the buffered audio signal modified according to the calculated volume adjustment to a playout device for playing out the audio stream.

Spec. 1:24–2:8. Claim 1 is exemplary:

1. A method, performed by an electronic device, the method comprising:
 - setting minimum and maximum threshold volumes defining respective minimum and maximum acceptable volumes for audio signals;
 - buffering an audio signal for a predefined time interval from an audio stream;
 - determining whether the buffered audio signal has volume peaks exceeding the maximum threshold volume and

has volume valleys falling below the minimum threshold volume;

calculating a volume adjustment for the buffered audio signal using a predefined algorithm for modifying a volume corresponding to the buffered audio signal, so that by applying the calculated volume adjustment, the volume corresponding to the buffered audio signal including determined volume peaks exceeding the maximum threshold volume being attenuated to a level below the maximum threshold volume during the predefined time interval, and the volume corresponding to the buffered audio signal including determined volume valleys below the minimum threshold volume level being amplified to a level above the minimum threshold volume during the predefined time interval; and

providing the buffered audio signal modified according to the calculated volume adjustment to a play-out device for playing out the audio stream;

wherein said electronic device is configured to process said audio signal to provide a corresponding sequence of buffered audio signals modified according to respective calculated volume adjustments.

References and Rejection³

Claims Rejected	35 U.S.C. §	References
1–8, 13–20	103	Tracey (US 2013/0272543 A1; published October 17, 2013), Walden (US 5,130,665; issued July 14, 1992)

³ Throughout this opinion, we refer to the (1) Final Office Action dated November 3, 2017 (“Final Act.”); (2) Appeal Brief dated April 5, 2018 (“Appeal Br.”); and (3) Examiner’s Answer dated July 26, 2018 (“Ans.”).

ANALYSIS

Obviousness

On this record, and based upon a preponderance of the evidence, we find the Examiner did not err in rejecting claim 1, for the reasons discussed *infra*.

We disagree with Appellant's arguments, and we adopt the Examiner's findings and conclusions in (i) the action from which this appeal is taken and (ii) the Answer that are consistent with our analysis below.

I

Appellant argues Tracey does not teach “determining . . . volume valleys falling below the minimum threshold volume,” as recited in claim 1. *See* Appeal Br. 9–13. In particular, Appellant argues “the portion of Tracey cited . . . refers to discarding loudness values likely to be associated with silence rather than ‘determining volume values falling below the minimum threshold volume’ as claimed.” Appeal Br. 9–10 (original emphases omitted). Appellant contends “Tracey unambiguously does not pertain to minimum volume levels” and the “Examiner seems to be improperly applying a ‘not necessarily clear’ standard to negate a lack of support for her position.” Appeal Br. 10, 12 (original emphases omitted). Appellant asserts

the term “loudness” is at every instance in Tracey directed toward notions of whether or not a signal is too loud rather than not loud enough; namely, whether the signal exhibits a loudness level above a maximum loudness level or threshold loudness level etc.. There is not one single instance within Tracey where minimum volume levels are considered or processed or even relevant to the disclosed purpose or embodiments in any way.

Appeal Br. 11 (original emphases omitted).

The “not necessarily clear” standard seems to be used by the Examiner to improperly grasp at some notion that a “target loudness level” consistently discussed within Tracey as pertaining to maximum or peak volume may somehow also pertain to a target minimum volume level.

Appeal Br. 12.

Appellant has not persuaded us of error, because Appellant’s arguments are not directed to the Examiner’s specific findings. The Examiner finds—and Appellant does not dispute—Walden teaches “determining . . . volume valleys falling below the minimum threshold volume.” *See* Final Act. 4; Walden 2:29–31 (“*When the level of the audio signal applied to the inlet port 24 is less than the level set by the minimum level control 28 . . . , the volume controller 14 is enabled and increases the level of the control signal applied to the amplifier gain control port 20 thereby to increase the gain of the amplifier*”) (emphasis added). Therefore, the Examiner does not rely on Tracey to disclose that claim limitation.⁴

Further, we determine that Appellant’s arguments (Appeal Br. 9–13) are unpersuasive because Appellant does not provide sufficient objective evidence to support such arguments. *See In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997) (“attorney argument [is] not the kind of factual evidence that is required to rebut a prima facie case of obviousness”); *Meitzner v.*

⁴ To the extent Appellant is arguing the Examiner is precluded from modifying Tracey’s method to include Walden’s minimum threshold volume, because Tracey does not disclose “process[ing] minimum volume levels” (Appeal Br. 12), that argument is unpersuasive. *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418–19 (2007) (“If the claim extends to what is obvious, it is invalid under § 103” and “the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.”).

Mindick, 549 F.2d 775, 782 (CCPA 1977) (“Argument of counsel cannot take the place of evidence lacking in the record.”).

II

Appellant contends the “deficiencies of Tracey are not cured by the teachings of Walden.” Appeal Br. 14 (original emphasis omitted).

First, Appellant argues:

The teachings of Walden cannot be operably applied to those of Tracey, and any combination would still not provide the claimed invention. For example, even if a *continuous* amplification increase/decrease of Walden was used within the context of Tracey, the segments of Tracey would necessarily become so small as to avoid improper amplification (avoid signals above a max and below a min within a time interval) that Tracey would operate in a substantially continuous mode. This is precisely the type of problem solved by the claimed invention.

Appeal Br. 14.

The above arguments are unpersuasive because they are not directed to the Examiner’s proposed combination, which does not include “a *continuous* amplification increase/decrease of Walden” (Appeal Br. 14). *See In re Keller*, 642 F.2d 413, 425 (CCPA 1981) (the test for obviousness is not whether a secondary reference’s features can be bodily incorporated into the structure of the primary reference).

Second, Appellant advances attorney arguments about various features of Walden and argues such features are “[i]n contrast to the claimed invention.” Appeal Br. 14. Appellant’s attorney arguments are unpersuasive, because Appellant does not provide sufficient objective evidence to show Walden indeed includes such features. *See Geisler*, 116 F.3d at 1470; *Meitzner*, 549 F.2d at 782. In any

event, Appellant's arguments are unpersuasive because they are not directed to the Examiner's proposed combination, which does not include the various features argued by Appellant. *See Keller*, 642 F.2d at 425.

III

Appellant contends:

Tracey does NOT disclose or suggest at least the following limitations of claim 1:

. . . whether the buffered audio signal has volume peaks exceeding the maximum threshold volume and has . . . ;

calculating a volume adjustment for the buffered audio signal using a predefined algorithm for modifying a volume corresponding to the buffered audio signal, so that by applying the calculated volume adjustment, the volume corresponding to the buffered audio signal including determined volume peaks exceeding the maximum threshold volume being attenuated to a level below the maximum threshold volume during the predefined time interval, and the volume corresponding to the buffered audio signal including determined volume valleys below the minimum threshold volume level being amplified to a level above the minimum threshold volume during the predefined time interval;

Appeal Br. 9 (original emphases omitted).

We disagree. The above limitations include the term "minimum threshold volume," which we already discussed in Section I above: because *Walden* teaches the claimed "minimum threshold volume," Tracey does not need to teach that claim term again. To the extent Appellant is arguing the remaining limitations (other than the claimed "minimum threshold volume") separately, Appellant's general arguments are insufficient to show Examiner error. *See* 37 C.F.R. § 41.37(c)(1)(iv) ("A statement which merely points out what a claim recites will not be considered an argument for separate

patentability of the claim.”); *see also In re Lovin*, 652 F.3d 1349, 1357 (Fed. Cir. 2011) (holding that “the Board reasonably interpreted Rule 41.37 to require more substantive arguments in an appeal brief than a mere recitation of the claim elements and a naked assertion that the corresponding elements were not found in the prior art”).

Because Appellant has not persuaded us the Examiner erred, we sustain the Examiner’s rejection of independent claim 1.

For similar reasons, we sustain the Examiner’s rejection of claims 2–8 and 13–20, because Appellant does not advance separate substantive arguments regarding those claims. *See* 37 C.F.R. § 41.37(c)(1)(iv).

CONCLUSION

We affirm the Examiner’s decision rejecting claims 1–8 and 13–20 under 35 U.S.C. § 103.

DECISION SUMMARY

Claims Rejected	35 U.S.C. §	References	Affirmed	Reversed
1–8, 13–20	103	Tracey, Walden	1–8, 13– 20	

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