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Loza & Loza, LLP Tyler Barrett, Esq. 305 N. Second Avenue #127 Upland, CA 91786			NILFOROUSH, MOHAMMAD A	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ANIRUDHA SHIMPI, MARK NAKADA, and
JON BUTLER

Appeal 2019-000910
Application 11/344,917
Technology Center 3600

Before NORMAN H. BEAMER, ADAM J. PYONIN, and
GARTH D. BAER, *Administrative Patent Judges*.

BAER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant¹ appeals under 35 U.S.C. § 134(a) from the Examiner’s Final rejection of claims 18–23, 28, and 29, which are all pending claims. Claims 46–51 have been withdrawn. Claims 1–17, 24–27, and 30–35 have been cancelled. Appeal Br. 2. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

BACKGROUND

A. The Invention

Appellant’s invention is directed to “delivering digital content from a central location to one or more remote locations,” in which “[a]t the remote location(s), the digital content may be previewed, viewed, or purchased by the end user.” Abstract. Independent claim 18 is representative and reproduced below, with emphasis added to disputed elements:

18. A method for distributing digital content to a user, comprising:

providing a kiosk for distributing the digital content to the user;

semi-dynamically receiving at the kiosk the digital content from an external storage device, wherein *semi-dynamically receiving the digital content includes receiving at least some of the digital content at scheduled push times in response to a determination by the external storage device that the at least some of the digital content will make efficient use of the kiosk, and subsequently receiving other of the digital content not received at the scheduled push times in substantially real-time in*

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies Mediaport Entertainment, Inc. as the real party in interest. Appeal Br. 2.

response to an individual request for the other of the digital content not received at the scheduled push times;

storing the received digital content in a storage device of the kiosk;

receiving data consisting of use instructions from a provider of the digital content, settings selected by an operator of an intermediary device between the provider and the kiosk, and a selection by the user;

generating customized digital rights management information at the kiosk using the received data;

incorporating the customized digital rights management information with the digital content at the kiosk; and

distributing the digital content including the incorporated customized digital rights management information from the kiosk to the user.

Appeal Br. 18 (Claims Appendix).

B. The Rejections on Appeal²

The Examiner rejects claims 18–23, 28, and 29 under 35 U.S.C. § 112, second paragraph, as being indefinite. Final Act. 11.

The Examiner rejects claims 18–22 and 28 under 35 U.S.C. § 103(a) as unpatentable over Kleiman (US 5,959,945; Sept. 28, 1999), Greenwood (US 5,568,181; Oct. 22, 1996), and Boyer (US 7,320,140 B1; Jan. 15, 2008). Final Act. 13.

The Examiner rejects claims 23 and 29 under 35 U.S.C. § 103(a) as unpatentable over Kleiman, Greenwood, Boyer, and Ginter (US 5,892,900; Apr. 6, 1999). Final Act. 17.

² The rejection of claims 18–23, 28, and 29 under 35 U.S.C. § 101 has been withdrawn in the Answer. See Ans. 3, Final Act. 6–11.

ANALYSIS

We have reviewed the Examiner's rejections in light of Appellant's arguments. Arguments Appellant could have made but chose not to make are waived. *See* 37 C.F.R. § 41.37(c)(1)(iv). We adopt the Examiner's findings and conclusions as our own, and add the following primarily for emphasis.

A. Indefiniteness Rejection of Claims 18–23, 28, and 29

Appellant argues that

the Examiner's own argument in the Final Office Action that "a video rental store branch periodically receiving an inventory of videos based on a determination by its headquarters of which titles **would make the most efficient use** of the store's floor space," is indeed a showing that this language is clear to a person of ordinary skill in the art.

Reply Br. 2, citing Final Act. 8 (emphasis Appellant's). Appellant contends the claim limitation, when considered in its entirety, "simply recites a step performed by the kiosk in response to an action by the external storage device." Reply Br. 3.

We do not find this argument persuasive. The Examiner finds, and we agree, that

[t]he term "efficient use" is subjective - what could be considered to be efficient according to one criterion could be considered inefficient according to another criterion.

Ans. 4. Appellant's agreement with the Examiner that "efficient use" could refer to floor space usage with respect to inventory illustrates the subjective nature and flexibility of the phrase "efficient use." The claimed "determination by the external storage device that the at least some of the

digital content will make efficient use of the kiosk” might refer to maximizing cost efficiency or download speed efficiency, or minimizing memory used by the kiosk, or something else. Appellant points to nothing in the disclosure that would assist one skilled in the art in understanding the phrase. *See* Appeal Br. 8–9, Reply Br. 2–3.

Accordingly, we sustain the Examiner’s indefiniteness rejection of independent claim 18, and dependent claims 19–23, 28, and 29.

B. Obviousness Rejections of Claim 18–23, 28, and 29

Appellant argues that

Kleiman expressly states that the “OSC [Operations Service Center] periodically broadcasts to all locations a list of new songs available for distribution,” while the “Personal Jukebox downloads the list of new songs,” “determines the users’ demand,” and “then determines which new titles are convenient to download.”

Reply Br. 4, citing Kleiman 8:62–9:20. Appellant contends that “[s]uch teachings suggest that the personal jukebox itself determines which content to download.” Reply Br. 4.

We are not persuaded by this argument. The Examiner finds, and we agree, that

Kleiman discloses that the central storage location can periodically transmit songs that are determined to generate the most sales, or “Top Performers”, and songs that generate another portion of the sales, or “Average Performers”, to the jukeboxes without any requests from the jukeboxes, and that this transmission can occur at programmable periods, such as twice a month.

Ans. 7, citing Kleiman 10:18–40. The Examiner further finds, and we agree, that “Kleiman also discloses that the central storage location or operation

service centers can provide content based on demand from the jukeboxes” (Ans. 7, citing Kleiman 6:41–59, 7:5–25), and thus

Kleiman discloses receiving at least some of the digital content at scheduled push times in response to a determination by the external storage device that the at least some of the digital content will make efficient use of the kiosk.

Ans. 7. Appellant does not address the Examiner’s detailed findings.

Appellant further argues that Greenwood explicitly discloses that both the scheduled playback and the immediate playback options are both in response to a request from the station 17. As a result, Greenwood et al. fails to disclose, teach, or suggest two different mechanisms for the digital content the scheduled push times and the digital content of the substantially real-time transfers.

Reply Br. 4.

We are not persuaded by this argument. The Examiner finds, and we agree, with regard to the claimed “semi-dynamic[]” digital content receipt that is “not received at the scheduled push times,”

Greenwood discloses content can be requested for either immediate playback or scheduled for future playback. If the content is requested for immediate playback, a preface of the content is immediately transferred while the rest of the content is transferred during playback of the preface, and if the content is requested for future playback, it is downloaded to the local cache at a convenient time prior to the requested playback time.

Ans. 7–8, citing Greenwood Fig. 2; 1:34–60, 1:66–2:3; 2:13–17; 3:15–23; 4:9–35, 43–55, 5:29–60, 7:3–40. The Examiner further finds, and we agree, that under Kleiman’s and Greenwood’s combined teachings, “the limitation that the content be received in response to a determination by the external storage device is addressed by Kleiman.” Ans. 8. Appellant attacks the

references individually. “[O]ne cannot show non-obviousness by attacking references individually where . . . the rejections are based on combinations of references.” *In re Keller*, 642 F.2d 413, 426 (CCPA 1981). Appellant also does not address the Examiner’s detailed findings regarding Kleiman’s and Greenwood’s combination as teaching or suggesting the claim limitation.

Accordingly, we sustain the obviousness rejection of independent claim 18, as well as dependent claims 19–22 and 28 not argued separately, and dependent claims 23 and 29 not argued separately with particularity. *See* Appeal Br. 15, Reply Br. 6.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
18–23, 28, 29	112, ¶ 2	Indefiniteness	18–23, 28, 29	
18–22, 28	103(a)	Kleiman, Greenwood, Boyer	18–22, 28	
23, 29	103(a)	Kleiman, Greenwood, Boyer, Ginter	23, 29	
Overall Outcome			18–23, 28, 29	

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