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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/573,743	12/17/2014	Douglas Warren Robinson	RPS920140039USNP(710.362)	3738
58127	7590	09/08/2020	EXAMINER	
FERENCE & ASSOCIATES LLC			TSUI, WILSON W	
409 BROAD STREET			ART UNIT	PAPER NUMBER
PITTSBURGH, PA 15143			2178	
			MAIL DATE	DELIVERY MODE
			09/08/2020	PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DOUGLAS WARREN ROBINSON and
AARON MICHAEL STEWART

Appeal 2019-002157
Application 14/573,743
Technology Center 2100

Before ERIC B. CHEN, MICHAEL J. ENGLE, and
SCOTT RAEVSKY, *Administrative Patent Judges*.

RAEVSKY, *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 and 6–25. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Lenovo (Singapore) PTE. LTD. Appeal Br. 3.

CLAIMED SUBJECT MATTER

The claims relate to identification of a user for personalized media content presentation. Spec., Title. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A method, comprising:
 - detecting, using a sensor, one or more user characteristics associated with a user holding a remote control device;
 - identifying, using the one or more user characteristics, the user currently holding the remote control device;
 - associating, using a processor, a media device setting on another device with the user currently holding the remote control device;
 - implementing, on the another device, the media device setting responsive to determining that the one or more user characteristics associated with the user holding the remote control device have been detected for a predetermined length of time; and
 - not implementing the media device setting responsive to determining that the remote control device is moving above a predetermined threshold speed.

REFERENCES

The prior art relied upon by the Examiner is:

Braun	US 8,194,036 B1	June 5, 2012
Hilton	US 2010/0052853 A1	Mar. 4, 2010
Rigazio	US 2011/0043475 A1	Feb. 24, 2011
Sahu	US 2015/0324564 A1	Nov. 12, 2015

REJECTIONS

Claims 1, 10, 15, and 25 stand rejected under 35 U.S.C. § 112(a) as failing to comply with the written description requirement. Non-Final Act. 3.

Claims 1–4 and 6–25 stand rejected under 35 U.S.C. § 103 as obvious over Rigazio, Sahu, Hilton, and Braun. *Id.* at 4.

STANDARD OF REVIEW

We review the appealed rejections for error based upon the issues identified by Appellant and in light of the arguments and evidence produced thereon. *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential). Arguments not made are waived. *See id.*; 37 C.F.R. § 41.37(c)(1)(iv).

ANALYSIS

Rejection under § 112

The Examiner finds claims 1, 10, 15, and 25 fail to comply with the written description requirement because each of these claims “recite that the remote control device is moving above a predetermined threshold speed.” Non-Final Act. 3. The Examiner finds “the specification only provides support for the device to be moving above a threshold (paragraphs 0043 and 0044), and does not specifically recite the type of movement (such as speed).” *Id.*

Appellant contends “the claimed limitation is at least implied (and arguably expressly described)” because the Specification discloses “other sensed data (e.g., remote control is moving above a predetermined threshold) may be used to cancel a user identification event.” Appeal Br. 22–23 (citing Spec. ¶ 43). Appellant also relies on the Specification’s disclosure that “[s]imilarly, if one individual is passing a controller to another person, the controller, although it may capture user identification data associated with the passing individual, it may not act on this because . . . of the way in which

the remote control device is moving or oriented.” *Id.* at 23 (citing Spec.

¶ 44). Appellant contends,

From at least the two foregoing cited portions, it can be reasonably deduced that “predetermined threshold” clearly corresponds to a speed at which the remote control is moving. This is evidenced by not only the surrounding contextual words in the cited portions but also the practical understanding of a predetermined threshold movement of remote controllers (i.e., the passing of a remote controller between individuals).

Id.

Appellant does not persuade us of Examiner error. “[T]he test for sufficiency of support . . . is whether the disclosure of the application relied upon reasonably conveys to the artisan that the inventor had possession at that time of the . . . claimed subject matter.” *Ralston Purina Co. v. Far-Mar-Co., Inc.*, 772 F.2d 1570, 1575 (Fed. Cir. 1985) (internal quotation omitted). Our reviewing court further instructs,

The question is not whether a claimed invention is an obvious variant of that which is disclosed in the specification. . . . [And] it is “not a question of whether one skilled in the art *might* be able to construct the patentee’s device from the teachings of the disclosure Rather, it is a question whether the application necessarily discloses that particular device.”

Lockwood v. Am. Airlines, Inc., 107 F.3d 1565, 1572 (Fed. Cir. 1997) (quoting *Jepson v. Coleman*, 314 F.2d 533, 536 (CCPA 1963)). Further, “one cannot disclose a forest in the original application, and then later pick a tree out of the forest and say here is my invention.” *Purdue Pharma L.P. v. Faulding Inc.*, 230 F.3d 1320, 1326 (Fed. Cir. 2000). Rather, the Specification must provide some guides or “blaze marks” that disclose the claimed invention “specifically, as something appellants actually invented.”

Ariad Pharm., Inc. v. Eli Lilly & Co., 598 F.3d 1336, 1348 (Fed. Cir. 2010);
Purdue, 230 F.3d at 1326.

Here, the Specification does not “necessarily disclose” the claimed threshold speed. *See Lockwood*, 107 F.3d at 1572. We agree with the Examiner’s finding that the Specification’s “moving above a predetermined threshold” could refer to any movement, such as position, height, distance, orientation, vector, or angle. Ans. 3. There are doubtless other types of movements that could be compared to a threshold, although the Specification describes none. *See, e.g.*, Spec. ¶¶ 43–44. Given the numerous possible types of movement that can be compared with a threshold and the Specification’s lack of examples of *any* type of movement to compare with a threshold, we determine the Specification does not disclose a threshold speed.²

We therefore sustain the Examiner’s § 112 rejection.

Rejection under § 103

Appellant contends,

the Office has not articulated a reason why a person skilled in the art would combine the prior art references, does not have adequate evidentiary basis for such a finding, and has not provided a satisfactory explanation for the motivation to

² Though not directly tied to a “threshold,” the Specification does disclose “*accelerometer data indicates the remote is being repositioned.*” Spec. ¶ 44 (emphasis added). Appellant did not refer to the accelerometer as supporting its claim limitation, and thus any argument that it does is waived. Nevertheless, absent further detail regarding the accelerometer output, we find that one of ordinary skill in the art would have considered an accelerometer to measure *acceleration*, not speed.

combine finding that includes an express and rational connection with the evidence presented.

Appeal Br. 23–24 (citing *In re NuVasive, Inc.*, 842 F.3d 1376, 1382 (Fed. Cir. 2016)). Appellant further contends that the Examiner’s motivation to combine “amount[s] to nothing more than a series of conclusory statements.” *Id.* at 24.

The Examiner finds one of ordinary skill in the art would have modified Rigazio with Sahu because “[t]he combination would have allowed Rigazio et al[.] to have ‘avoided ping-ponging of user’s profiles each time a different user touches the user device . . . by implementing a hysteresis timer.’” Non-Final Act. 6–7. The Examiner then finds one of ordinary skill in the art would have modified Rigazio and Sahu with Hilton because “[t]he combination would have allowed Rigazio et al[.] and Sahu et al[.] to have allowed a user of [a device] to gain access to programming/settings of an electronic device/set-top box . . . without having to remember different passwords using biometric data.” *Id.* at 7–8. Finally, the Examiner finds one of ordinary skill in the art would have modified these three references with Braun because “[t]he combination would have allowed Rigazio et al[.], Sahu et al[.] and Hilton to have helped control the sensitivity usage of a device (Braun et al[.], column 1, lines 452-45) such that unintentional movements [can be ignored].” *Id.* at 8.

Appellant does not persuade us of Examiner error. Appellant’s citation to *In re NuVasive* is inapposite because that case dealt with an appeal from an *inter partes* review proceeding. *NuVasive*, 842 F.3d at 1379. *Inter partes* review and *ex parte* appeals involve different burdens. In *inter partes* review, a petitioner must prove unpatentability by a preponderance of the evidence. 35 U.S.C. § 316(e). In *ex parte* appeals, if the Examiner

establishes a prima facie case, the burden shifts to Appellant to rebut the Examiner's prima facie case. *See* Manual of Patent Examining Procedure ("MPEP") § 2142. We find the Examiner here established a prima facie case by articulating rationales to combine each reference. *See* Non-Final Act. 6–8. Appellant's argument that the Examiner failed to articulate a rationale to combine does not rebut this prima facie case.

Appellant also contends one of ordinary skill in the art would not have looked to Braun to arrive at the claimed embodiments. Appeal Br. 25.

Appellant argues:

the subject matter in Braun is primarily focused on controlling the movement of a cursor on a display screen. . . . Applicant respectfully submits that identifying a speed at which a user's finger or a stylus is moving across a trackpad and thereafter determining whether or not to ignore that motion depending on the speed *is completely unrelated* to the physical movement of a remote controller (e.g., the passing of a remote controller between two or more individuals, etc.).

Id. (emphasis added). This appears to be a non-analogous art argument.

Appellant contends that Braun's trackpad sensor "is completely unrelated to the physical movement of a remote controller," which presumably refers to teachings of one of the other references in the combination. This argument is unpersuasive because it does not analyze the tests for analogous art:

Two separate tests define the scope of analogous prior art: (1) whether the art is from the same field of endeavor, regardless of the problem addressed and, (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved.

In re Bigio, 381 F.3d 1320, 1325 (Fed. Cir. 2004) (internal citation omitted).

As Appellant does not address either of these tests, Appellant's argument is

unpersuasive. Even if Braun was in a different field of endeavor, Appellant has not sufficiently explained why its teachings regarding “filtering out movements above a frequency threshold” would not have been reasonably pertinent to the particular problem of identifying a user for personalized media content presentation, with which the inventors were involved. *See* Braun 15:4.

Appellant also contends the combined references fail to teach or suggest all the claim limitations, specifically, “not implementing the media device setting responsive to determining that the remote control device is moving above a predetermined threshold speed.” Appeal Br. 25. Appellant contends this limitation is “readily distinguishable from the teachings of Braun that . . . relate to the gathering and utilization of motion data with respect to movement of a user’s finger or stylus on a trackpad input device.” *Id.* at 26 (citing Braun, Abstr., Fig. 2). Appellant further contends, “determining whether a remote control device is moving above a predetermined threshold speed is very different from determining how fast an input device is moving on a trackpad.” *Id.* Appellant also contends,

the cited portions of Braun do not disclose that responsive to determining that the remote control device is moving above a predetermined threshold speed, media device settings are not implemented on another device. Rather, Braun appears to disclose filtering out unintentional movements on a display screen operatively coupled to the trackpad device (e.g., a laptop, etc.).

Id.

The Examiner finds that Sahu discloses “not implementing the media device setting respons[ive] to determining that the remote control device [has been sensed as used] above a predetermined threshold.” Non-Final

Act. 6 (emphasis omitted) (citing Sahu ¶ 28). The Examiner finds Braun “teaches the device is sensed to be *moving* above a predetermined threshold *speed*.” *Id.* at 8 (citing Braun 15:2–6). In other words, the Examiner relies on Sahu for the disputed limitation except for the terms “moving” and “speed,” for which the Examiner relies on Braun.

Appellant only addresses the teachings of Braun but concedes that Braun teaches “identifying a *speed* at which a user’s finger or a stylus is *moving* across a trackpad.” Appeal Br. 25 (emphasis added). This is precisely what the Examiner relies on Braun for. Non-Final Act. 8. But Appellant ignores the Examiner’s findings that Sahu teaches the remainder of the disputed limitation. Appellant’s arguments attacking the references in isolation do not persuasively rebut the underlying factual findings made by the Examiner, which are based upon the combined teachings and suggestions of the cited references. One cannot show non-obviousness by attacking references individually, where the rejections are based on combinations of references. *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

For these reasons, we sustain the Examiner’s § 103 rejection.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 10, 15, 25	112(a)	Written Description	1, 10, 15, 25	
1–4, 6–25	103	Rigazio, Sahu, Hilton, Braun	1–4, 6–25	
Overall Outcome			1–4, 6–25	

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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