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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* NSIXTY LLC  
Patent Owner and Appellant

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Appeal 2020-003003  
Reexamination Control 90/014,030  
Patent 8,619,115 B2  
Technology Center 3900

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Before JOHN A. JEFFERY, MARC S. HOFF, and ERIC B. CHEN,  
*Administrative Patent Judges.*

CHEN, *Administrative Patent Judge.*

DECISION ON APPEAL

Appeal 2020-003003  
Reexamination Control 90/014,030  
Patent 8,619,115 B2

Pursuant to 35 U.S.C. §§ 134(b) and 306, Appellant<sup>1</sup> appeals from the final rejection of claims 1–20. We have jurisdiction under 35 U.S.C. § 6(b).

An oral hearing was held on May 27, 2020. The record includes a written transcript of the oral hearing.

We AFFIRM.

## STATEMENT OF THE CASE

### *Reexamination Proceedings*

A request for *ex parte* reexamination of U.S. Patent No. 8,619,115 B2 (“the ’115 patent”) was filed on October 11, 2017, and assigned Reexamination Control No. 90/014,030. The ’115 patent, entitled “Video Communication System and Method for Using Same,” issued December 31, 2013 to James Matthew Stephens and Matthew Berlage, based on Application No. 12/688,238, filed January 15, 2010, which claims priority to Provisional Application No. 61/205,140, filed on January 15, 2009.

### *Claimed Subject Matter*

The claims are directed to a video communication system, which includes a kiosk for recording video messages created by a user and a database for storing and providing access to the video. (Abstract.)

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<sup>1</sup> 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 NSixty, LLC. (Br. 3.)

### *Related Litigation*

The '115 patent has been asserted in *NSixty v. uPost Media, Inc.*, No. 2:17-cv-2233 (D. Nev. Aug. 22, 2017) and *NSixty, LLC v. Open Air Entertainment, LLC*, No. 2:17-cv-08650 (C.D. Cal. Nov. 30, 2017). These cases have been stayed pending the outcome of this *ex parte* reexamination proceeding. (Br. 3.)

The '115 patent has also been asserted in *NSixty, LLC v. a2z, Inc.*, No. 1:17-cv-1987 (D.C. Md. July 17, 2017). This case has been terminated pursuant to a settlement agreement. (*Id.*)

### *The Claims*

Claims 1 and 2 are illustrative of the claimed subject matter, with disputed limitations in italics:

1. A video communication system comprising:  
a *portable kiosk* comprising:  
a camera configured to record a video communication;  
a network connection capable of communicating with a network; and  
a graphical user interface for inputting identification data related to a user;  
wherein said camera, network connection and graphical user interface are integrated within said portable kiosk;  
a database connected to said network, said *database configured to receive said video communication and said identification data from said kiosk and associate said video communication with said identification data*;  
a *remote access point configured to access said video communication from said database by way of a website*;

wherein said user inputs said identification data into said website to communicate with said database, and further wherein said database matches said identification data from said website with said identification data associated with said video communication to allow said user access to said video communication.

2. The system of claim 1 wherein said kiosk includes a *user identification device*.

#### REFERENCES

Name	Reference	Date
Massarsky	US 6,718,123 B1	Apr. 6, 2004
Belz et al.	US 7,158,175 B2	Jan. 2, 2007
Woodworth et al.	US 7,961,212 B2	June 14, 2011
Liwerant et al.	US 2005/0246752 A1	Nov. 3, 2005

#### *The Rejections*

A. Claims 1–7, 10, 11, 13–15, and 18–20 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Liwerant.

B. Claims 1–7, 10, 11, 13–15, and 18–20 stand rejected under 35 U.S.C. § 103 as being unpatentable over Liwerant.

C. Claims 8, 9, 12, 16, and 17 are rejected under 35 U.S.C. § 103 being unpatentable over Liwerant and Massarsky.

D. Claims 1–20 stand rejected under 35 U.S.C. § 103 as being unpatentable over Massarsky and Belz.

E. Claims 1–20 stand rejected under 35 U.S.C. § 103 as being unpatentable over Massarsky, Belz, and Woodworth.

OPINION

*§ 112(f) Claim Construction*

We are persuaded by Appellant’s argument (Br. 12–13, 15–16) that the Examiner erred in construing independent claim 1 as having means-plus-function claim limitations, pursuant to 35 U.S.C. § 112(f).<sup>2</sup>

The Examiner interpreted the limitation “database configured to receive said video communication and said identification data from said kiosk and associate said video communication with said identification data” as invoking 35 U.S.C. § 112(f). (Final Act. 7.) In particular, the Examiner found that “[b]ecause a database does not have sufficient structure to perform the [f]unctions [as claimed], the Examiner concludes that ‘database’ is a nonce term having no specific structure.” (*Id.* (emphasis omitted); *see also* Ans. 26–27.) We do not agree.

A claim limitation that does not use the term “means” or “step” will trigger the rebuttable presumption that 35 U.S.C. § 112, sixth paragraph, does not apply. *Personalized Media Commc’ns, LLC v. ITC*, 161 F.3d 696, 703–04 (Fed. Cir. 1998). The presumption is overcome when “the claim term fails to ‘recite sufficiently definite structure’ or else recites ‘function without reciting sufficient structure for performing that function.’” *Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1348 (Fed. Cir. 2015) (en banc). “The standard is whether the words of the claim are understood by

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<sup>2</sup> The Examiner’s error was harmless, because the interpretation of independent claim 1 as containing means-plus-function limitations was not applied to the prior art rejections.

persons of ordinary skill in the art to have a sufficiently definite meaning as the name for structure.” *Id.* at 1349.

One technical definition of “database” is “[a] file composed of records, each containing fields together with a set of operations for searching, sorting, recombining, and other functions.” MICROSOFT® COMPUTER DICTIONARY 141 (5th ed. 2002). Likewise, the Federal Circuit has recognized the term “database” is defined as “[a]ny electronically-stored collection of data.” Alan Freedman, *The Computer Glossary* 86 (9th ed. 2001); *accord In re Comiskey*, 554 F.3d 967, 981 (Fed. Cir. 2009) (citing this definition from an earlier edition).

The ’115 patent discloses the following:

The kiosk 12 is further configured to communicate with the database 14. For example, the kiosk may upload video communications to the database 14 and receive instructions or messages from the database 14. It is understood that video communications may include audio files, video files, text files, other type of electronic media files, or any combination thereof. *The database 14 may receive video communications and corresponding message data from the kiosk 12 and store the video communications based on the corresponding message data.*

(Col. 2, ll. 24–33 (emphasis added).)

In view of the disclosure in the ’115 patent of conventional database 14 for storing electronic media files (e.g., audio, video, or text), Appellant has not claimed the “database” as specialized hardware requiring special programming. Rather, Appellant has claimed a general purpose “database” which functions conventionally “to receive . . . and associate” data in the form of “video communication” and “identification data.” Thus, it is not necessary for Appellant to disclose more structure than the general purpose

database, which functions “to receive and associate” data. *See In re Katz Interactive Call Processing Patent Litig.*, 639 F.3d 1303, 1316 (Fed. Cir. 2011) (functions such as “processing,” “receiving,” and “storing” that can be achieved by any general purpose computer without special programming do not require disclosure of more structure than the general purpose processor that performs those functions).

Accordingly, we are persuaded by Appellant’s arguments that “one of skill in the art would know that the ’115 Patent uses the term ‘database’ in its ordinary meaning and that this ordinary meaning itself connotes structure” (Br. 12) and “the ’115 Patent uses the term ‘database’ consistent with its ordinary meaning under the broadest reasonable interpretation standard as would be understood by a person skilled in the art” such that “[t]his meaning of a database defines structure in and of itself” (*id.* at 13).

Thus, we do not agree with the Examiner’s interpretation that the limitation “database configured to receive said video communication and said identification data from said kiosk and associate said video communication with said identification data” invokes 35 U.S.C. § 112(f).

The Examiner further interpreted the limitation “remote access point configured to access said video communication from said database by way of a website” as invoking 35 U.S.C. § 112(f). (Final Act. 9.) In particular, the Examiner found that “[b]ecause a remote access point does not have sufficient structure to perform the [f]unctions [as claimed], the Examiner concludes that ‘remote access point’ is a nonce term having no specific structure.” (*Id.* (emphasis omitted); *see also* Ans. 29–31.) Again, we do not agree.



One technical definition of “access point” is “a transceiver [in a wireless LAN (local area network)] that connects the LAN to a wired network.” MICROSOFT® COMPUTER DICTIONARY 14 (5th ed. 2002). A “transceiver,” which is “short for a transmitter/receiver,” is defined as “a device that can both transmit and receive signals” and “connects a computer to the network.” (*Id.* at 527.)

The '115 patent discloses the following:

The database 14 may allow stored video communications to be remotely accessed. For example, video communications stored on the database 14 may be accessible through a website 16. In an embodiment, a user 17 may retrieve a stored video communication from the database 14 by inputting a portion of the message data related to the desired video communication into the website 16.

(Col. 2, ll. 48–54.)

The database 14 may send information related to the video communication and message data to a user. For example, the database 14 may send an email containing a web link to the website 16 to the email address provided by a user. By activating the web link, a user may stream, download, or otherwise access the video communication. The database 14 may also send a text message or email web link to a cell phone, allowing the cell phone user to access the video communication.

(Col. 3, ll. 8–16.)

Additionally, the database may grant access to the video communications by sending a web link via email that allows the video communication to be streamed to a computer, viewed on a cell phone, downloaded, or otherwise accessed.

(Col. 5, l. 67 to col. 6, l. 3.)

In view of the disclosure in the '115 patent of a conventional cell phone or a conventional computer receiving video communications from database 14, Appellant has not claimed the “remote access point” as specialized hardware requiring special programming. Rather, Appellant has claimed a general purpose “remote access point,” which functions conventionally to “access said video communication from said database.” Thus, it is not necessary for Appellant to disclose more structure than the remote access point, which functions to “access said video communication from said database.” *See Katz*, 639 F.3d at 1316.

Accordingly, we are persuaded by Appellant’s arguments that “one of skill in the art would know that the term remote access point is the device or point of remote access, e.g., remote computers, cell phones, PDAs, mobile devices, and other electronic devices” (Br. 15) and “the '115 Patent uses the term ‘remote access point’ consistent with its ordinary meaning under the broadest reasonable interpretation standard as would be understood by a person skilled in the art” and “[t]his meaning of a remote access point defines structure in and of itself” (*id.* at 16).

Thus, we do not agree with the Examiner’s interpretation that the limitation “remote access point configured to access said video communication from said database by way of a website” invokes 35 U.S.C. § 112(f).

§ 103 Rejection—*Massarsky and Belz*

Claims 1 and 3–20

We are unpersuaded by Appellant’s arguments (Br. 31) that the combination of Massarsky and Belz would not have rendered obvious independent claim 1, which includes the limitation “graphical user interface.”

The Examiner found that Figure 5D of Massarsky, which illustrates monitor 32 for entering a code for retrieving the user’s photographic image, corresponds to the limitation “graphical user interface.” (Ans. 74–75.) In particular, the Examiner found that “Figs. 5C and 5D of Massarsky show graphical user interfaces” and “Massarsky teaches a graphical user interface for inputting identification data related to a user because the Photo ID Number is an identification data related to a user and because a graphical user interface is used for inputting identification.” (*Id.* at 74.) We agree with the Examiner’s findings.

Figure 1 of Massarsky illustrates photobooth/e-mail center 10, which includes “E-mail station 14 . . . fitted with keyboard 38 for entering the code and any other information” (col. 4, ll. 53–54) and monitor 32 (col. 5, ll. 21–24). Massarsky explains that “[i]n response to a prompt displayed on monitor 32, the user enters the code . . . printed on the photograph printed at the photobooth using keyboard 38” (col. 5, ll. 65–67) and “once a user accesses the web site of the web server, they are prompted to enter the code, corresponding to the digitized photograph” (col. 6, ll. 21–23). Because Figure 5D of Massarsky illustrates monitor 22 displaying a web site with

graphical images and dialog boxes for the entry of codes, Massarsky teaches the limitation “graphical user interface.”

Appellant argues the following:

The Office Action appears to suggest that modification of Massarsky [sic] to substitute a graphical user interface would be inherent. Inherency is not shown by what may occur or by what is possible. Moreover, the Office Action has not provided any basis in fact and/or technical reasoning to reasonably support the determination.

(Br. 31.) Contrary to Appellant’s arguments, the Examiner also cited to Figure 5D of Massarsky for teaching the limitation “graphical user interface.” (Ans. 74.) Other than a conclusory statement that “the Office Action has not provided any basis in fact and/or technical reasoning to reasonably support the determination,” Appellant has not provided any persuasive arguments or evidence as to why the Examiner’s findings with respect to Massarsky are erroneous.

Thus, we agree with the Examiner that the combination of Massarsky and Belz would have rendered obvious independent claim 1, which includes the limitation “graphical user interface.”

We are further unpersuaded by Appellant’s arguments (Br. 32) that the combination of Massarsky and Belz would not have rendered obvious independent claim 1, which includes the limitation “portable kiosk.”

The Examiner found that photobooth/e-mail center 10 of Massarsky corresponds to the limitation “portable kiosk.” (Final Act. 21.) In particular, the Examiner interpreted “portable” as meaning “capable of being carried or moved about” (*id.* at 11) and cited to Figure 3 of Massarsky, which illustrates e-mail station 14 of photobooth/e-mail center 10 “with a

wheel, making center 10 portable” (*id.* at 21). We agree with the Examiner’s findings.

Independent claim 1 recites a “*portable* kiosk” (emphasis added). One relevant plain meaning of “portable” is “capable of being carried or moved about.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 907 (10th ed. 1999). Moreover, the Specification of the ’456 patent describes the following:

As illustrated in FIGS. 2 and 3, *the kiosk 12 may be a stand-alone unit.* With reference to FIG. 2, the components of the kiosk 12 may be contained within a body 28. Alternatively, as shown in FIG. 3, the components of the kiosk 12 may be connected to a leg assembly 30. It will be understood, however, that the kiosk 12 may be supported in any manner. For example, *the kiosk 12 may be mounted or secured* to a wall, post, or other stable portion of the venue. In addition, *the kiosk 12 may be portable such as installed in a vehicle, or configured as a mobile unit.*

(Col. 5, ll. 4–13 (emphases added).)

In an embodiment, *the message-recording device 20 includes a digital video camera, a microphone, and a keyboard. . . . The kiosk 12 may include a display 24 to allow the user to watch or review the video communication during or after it is recorded.*

(Col. 4, ll. 14–21 (emphases added).) Figures 2 and 3 of the ’115 patent, which illustrates kiosk 12 as stand-alone units, are reproduced below:

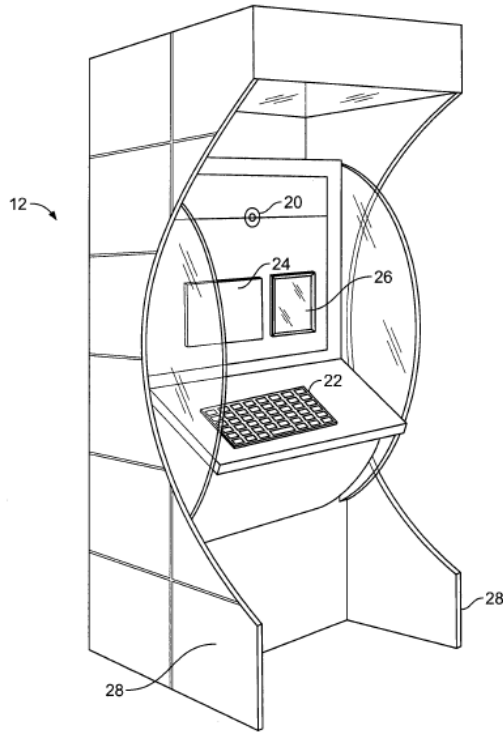


FIG. 2

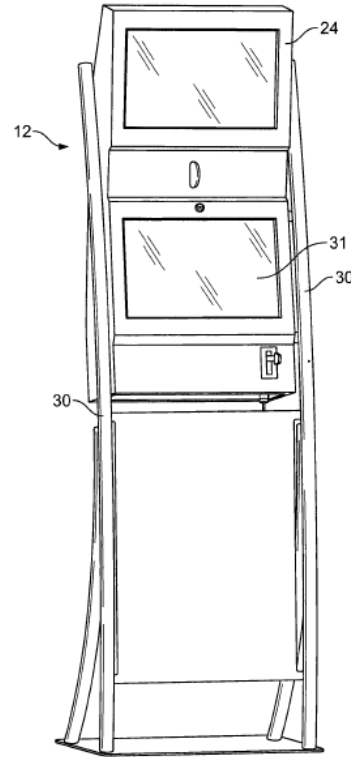


FIG. 3

As illustrated in Figures 2 and 3, the height of message-recording device 20 (e.g., digital video camera) or display 24, which allows a user to watch a video communication, can be approximated as the height of the user.<sup>3</sup> Thus, under the broadest reasonable interpretation consistent with the '115 patent, we interpret “portable” as “capable of being carried or moved about,” which

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<sup>3</sup> In general, patent drawings are not to scale. *See Hockerson-Halberstadt, Inc. v. Avia Group Int'l*, 222 F.3d 951, 956 (Fed. Cir. 2000) (“[I]t is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue.”). However, because the function of kiosk 12 is to permit users to record themselves with various backgrounds, we can infer that the height of kiosk 12 is approximately the height of the user.

includes stand-alone kiosk 12 (e.g., unsecured to walls), such kiosk 12 having the approximate height of the user, as illustrated in Figures 2 and 3.

Massarsky relates to “a combination photobooth/e-mail center [10] adapted to take a digitized photograph of a user at a first station . . . and to transmit the photograph via electronic mail.” (Col. 1, ll. 7–10.) Figure 1 of Massarsky illustrates photobooth/e-mail center 10, having photobooth station 12 and e-mail station 14 (col. 4, ll. 23–27), which includes monitor 32 for displaying the digitized photograph or for e-mail (col. 5, ll. 22–25). Figure 3 of Massarsky, which illustrates a cross-sectional photobooth/e-mail center 10, and further includes a wheel (unlabeled), is reproduced below:

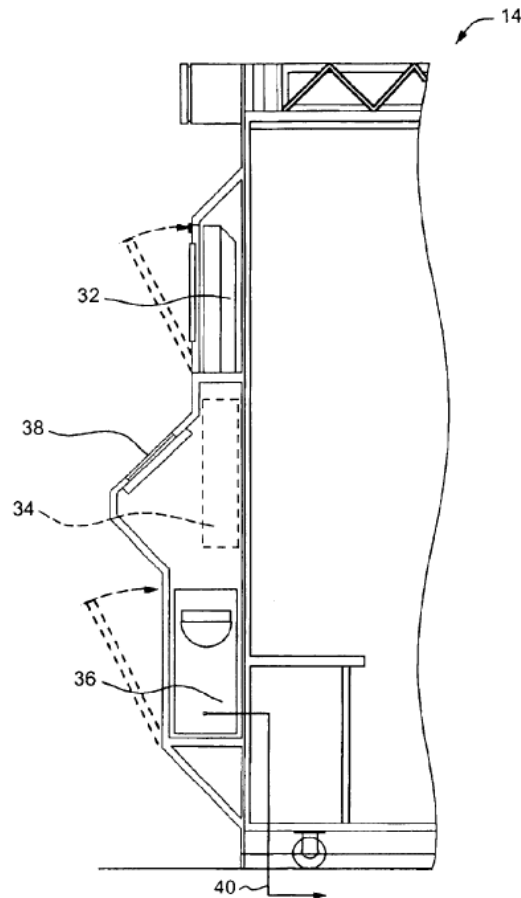


FIG. 3

Figure 3 of Massarsky illustrates e-mail station 14 as a free standing unit, such that that height of monitor 32 is approximately the height to the user (*see Fig. 8*).

Moreover, Figure 6 of Massarsky, which illustrates two-sided station 50, is reproduced below:

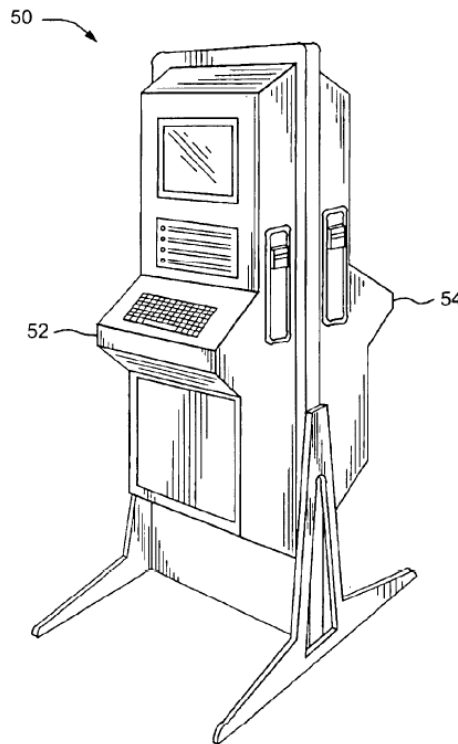


Figure 6 of Massarsky illustrates two-sided station 50 as a free standing unit, such that height of monitor 32 (unlabeled) is approximately the height to the user (*see Fig. 8*).

Thus, because Figure 3 of Massarsky illustrates that e-mail station 14 further includes a wheel, which provides for the capability for e-mail station 14 to be moved about, and as a free standing unit with the height of the user, Massarsky teaches the limitation “portable kiosk.” Alternatively, because Figure 6 illustrates two-sided station 50 as a free standing unit with the



height of the user, such that two-sided station 50 is capable of being carried or moved about, Massarsky teaches the limitation “portable kiosk.”

Appellant argues the following:

Massarsky describes a center 10 that has both an email station 14 and a photobooth station 12. . . . The Office Action alleges that FIG. 3 of Massarsky shows a wheel. The specification is silent regarding the alleged wheel. Further, with or without a wheel, Massarsky does not disclose, teach, or suggest a portable kiosk as properly construed: “a freestanding or supported unit that houses components for recording, storing and communicating a video communication and provides those components to the public, and is light enough, rugged enough, and free enough of encumbering external connections to be carried by a user.”

Rather, Massarsky shows a large photobooth/center 10. (Br. 32.) However, Appellant’s proposed construction contains subjective language, for example, “light enough, rugged enough, and free enough . . . to be carried by a user,” such that one of ordinary skill in the art would be unable to ascertain the scope of the claim. Even if we adopt the claim construction proposed by Appellant, other than the conclusory statement that “Massarsky does not disclose, teach, or suggest a portable kiosk,” Appellant has provided an insufficient explanation to adequately distinguish the limitation “portable kiosk” over photobooth/e-mail center 10 of Massarsky.

Appellant further argues the following:

Massarsky shows a large photobooth/center 10. This center 10 is installed at a mall . . . . This is the same type of publicly installed system of Woodworth and Wasilewski. The Patent Owner addressed this very issue in a response date August 15, 2013. The examiner, as evidenced by the Notice of Allowance, agreed that one of skill in the art would know that such large booths installed at malls would not qualify as a

Appeal 2020-003003  
Reexamination Control 90/014,030  
Patent 8,619,115 B2

“portable kiosk.” Moreover, having a wheel would not make such a booth a “portable kiosk.”

(Br. 32.)

A review of the original prosecution history of the '115 patent, assigned Application No. 12/688,238, indicates that Appellant argued the following:

Woodworth specifically recites that network terminals may be located at a “public kiosk.” [A] public kiosk commonly refers to a booth or stationary setup located at a venue such as a mall. In fact, cell phone carriers such as Verizon, the owner of the cited application, commonly setup such kiosks in malls and other sale areas. *This type of stationary public kiosk is they referenced in Woodworth and differs from a portable kiosk.* Further, Wasilewski teaches an ATM machine. *By nature, ATM machines are designed to not be portable but stationary, so that the contents cannot be taken.*

(Response to Office Action 7, filed Aug. 15, 2013 (emphases added).) In the Notice of Allowance, mailed August 20, 2013, the Examiner was silent with respect to both Woodworth and Wasilewski. Thus, Appellant’s argument that “[t]he examiner, as evidenced by the Notice of Allowance, agreed that one of skill in the art would know that such large booths installed at malls would not qualify as a ‘portable kiosk’” (Br. 32), is unsupported by the prosecution history. Instead, Appellant previously argued that neither a “stationary public kiosk” nor an “ATM machine” is considered “portable” and the Examiner did not provide any commentary with respect to Woodworth and Wasilewski. Moreover, Massarsky is silent with to photobooth/e-mail center 10 being described as either “large” or being located at a “mall.”

Thus, we agree with the Examiner that the combination of Massarsky and Belz would have rendered obvious independent claim 1, which includes the limitation “portable kiosk.”

Accordingly, we sustain the rejection of independent claim 1 under 35 U.S.C. § 103. Claims 3–13 depend from claim 1, and Appellant has not presented any additional substantive arguments with respect to these claims. Therefore, we sustain the rejection of claims 3–13 under 35 U.S.C. § 103, for the same reasons discussed with respect to independent claim 1.

Independent claim 14 recites limitations similar to those discussed with respect to independent claim 1, and Appellant has not presented any additional substantive arguments with respect to these claims. We sustain the rejection of claim 14, as well as dependent claims 15–20, for the same reasons discussed with respect to claim 1.

### Claim 2

We are also unpersuaded by Appellant’s arguments (Br. 33) that the combination of Massarsky and Belz would not have rendered obvious dependent claim 2, which includes the limitation “wherein said kiosk includes a user identification device.”

The Examiner found that electronic database 44 of Belz, which is accessible for authorized users for accessing digital photographs on web 30, corresponds to the limitation “wherein said kiosk includes a user identification device.” (Final Act. 24.)

Belz explains that “electronic database 44 also provides long-term storage of the uploaded images for each user” and “stored images are

accessible (e.g. viewable) via the Internet by authorized users.” (Col. 6, ll. 28–31.) Because Belz explains that electronic database 44 is only available to “authorized users,” Belz teaches the limitation “wherein said kiosk includes a user identification device.”

Appellant argues the following:

[T]he Office Action already cites Belz’s computer for the authentication limitations recited in claim 1, thus, it cannot also be an identification device. If it were, that would mean that claim 2 does not provide any further limits to claim 1. This violates the doctrine of claim differentiation.

(Br. 33.)

However, the Examiner cited to column 5, lines 7–11 of Massarsky and alternately, cited to column 2, lines 1–12 of Belz for teaching the limitation “wherein said user inputs said identification data into said website to communicate with said database, and further wherein said database matches said identification data from said website with said identification data associated with said video communication to allow said user access to said video communication,” as recited in claim 1. (Final Act. 23.) In other words, the Examiner cited to the username and password for the “OFOTO” website of Belz for the limitations of claim 1 (*id.*) and cited to electronic database 44 of Belz for the limitations of claim 2 (*id.* at 24). Other than a conclusory statement that the Examiner’s findings “violate[] the doctrine of claim differentiation,” Appellant has not adequately explained how the doctrine of claim differentiation is applicable.

Thus, we agree with the Examiner that the combination of Massarsky and Belz would have rendered obvious dependent claim 2, which includes the limitation “wherein said kiosk includes a user identification device.”

Appeal 2020-003003  
Reexamination Control 90/014,030  
Patent 8,619,115 B2

Accordingly, we sustain the rejection of dependent claim 2 under 35 U.S.C. § 103.

*Other Pending Rejections*

We do not reach the additional cumulative rejections of claims 1–20 under 35 U.S.C. §§ 102(b) and 103 as being anticipated or unpatentable over various combinations of Liwerant, Massarsky, Belz, and Woodworth. Affirmance of the obviousness rejection based on Massarsky and Belz discussed previously renders it unnecessary to reach the remaining obviousness rejections, as all of claims 1–20 have been addressed and found unpatentable. *Cf. In re Gleave*, 560 F.3d 1331, 1338 (Fed. Cir. 2009) (not reaching additional obviousness rejections).

CONCLUSION

The Examiner’s decision rejecting claims 1–20 under 35 U.S.C. § 103 over Massarsky and Belz is affirmed.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1-7, 10, 11, 13-15, 18-20	102(b) <sup>4</sup>	Liwerant		
1-7, 10, 11, 13-15, 18-20	103 <sup>5</sup>	Liwerant		
8, 9, 12, 16, 17	103 <sup>6</sup>	Liwerant, Massarsky		
1-20	103	Massarsky, Belz	1-20	
1-20	103 <sup>7</sup>	Massarsky, Belz, Woodworth		
<b>Overall Outcome</b>			1-20	

REQUESTS FOR EXTENSIONS OF TIME

Requests for extensions of time in this *ex parte* reexamination proceeding are governed by 37 C.F.R. § 1.550(c). See 37 C.F.R. § 41.50(f).

AFFIRMED

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<sup>4</sup> Cumulative rejection.  
<sup>5</sup> Cumulative rejection.  
<sup>6</sup> Cumulative rejection.  
<sup>7</sup> Cumulative rejection.

Appeal 2020-003003  
Reexamination Control 90/014,030  
Patent 8,619,115 B2

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