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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte NSIXTY LLC
Patent Owner and Appellant

Appeal 2019-003777
Reexamination Control 90/014,031
Patent 9,313,456
Technology Center 3900

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

CHEN, *Administrative Patent Judge.*

DECISION ON APPEAL

Appeal 2019-003777
Reexamination Control 90/014,031
Patent 9,313,456

Pursuant to 35 U.S.C. § 134(b) and 306, Appellant¹ appeals from the final rejection of claims 1–21. We have jurisdiction under 35 U.S.C. § 6(b).

An oral hearing was held on December 2, 2019. 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. 9,313,456 B2 (“the ’456 patent”) was filed on October 1, 2017, and assigned Reexamination Control No. 90/014,031. The ’456 patent, entitled “Video Communication System and Method for Using Same,” issued April 12, 2016 to James Matthew Stephens and Matthew Berlage, based on Application No. 14/084,258, filed November 19, 2013, which is said to be a continuation of Application No. 12/688,238, filed January 15, 2010, now U.S. Patent No. 8,619,115, issued December 31, 2013, 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.)

¹ Appellant identifies the real party in interest as NSixty, LLC. (Br. 3.)

Related Litigation

The '456 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. Calif. Nov. 30, 2017). These cases have been stayed pending the outcome of this *ex parte* reexamination proceeding. (Br. 3.)

The '456 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

Independent claims 1, 12, and 17, reproduced below, are illustrative of the claimed subject matter, with disputed limitations in italics:

1. A portable kiosk system comprising:
 - an input device integrated within the *portable kiosk* configured to receive identification information associated with a user; and
 - a message-recording device integrated within the portable kiosk and configured to capture media data;
 - wherein the portable kiosk component is configured to:
 - associate the captured media data with the identification information associated with the user;* and
 - transmit, to a device connected to a communication network, the captured media data to enable access of the captured media data via the communication network.

12. A portable kiosk system comprising:
an input device integrated within the portable kiosk configured to receive identification information associated with a user; and
a message-recording device integrated within the portable kiosk and configured to capture media data;
wherein the portable kiosk component is configured to:
associate the captured media data with the identification information associated with the user; and
transmit, to a device connected to a communication network, the captured media data to enable access of the captured media data via the communication network *wherein at least one of the input device or the message-recording device comprises a mobile device.*
17. The media message communication system of claim 16, wherein the database is further configured to send the advertisement to a user entity of a *social network* based on the user identity.

REFERENCES

Name	Reference	Date
Woodworth et al.	US 7,961,212 B2	June 14, 2011
Massarsky	US 2010/0161752 A1	June 24, 2010
Belz et al.	US 7,158,175 B2	Jan. 2, 2007
Hoyt et al.	US 6,085,195	July 4, 2000
Davis et al.	US 2003/0001846 A1	Jan. 2, 2003
Zigler	US 2003/0160811 A1	Aug. 28, 2003

The Rejections

A. Claims 1–3, 5–16, and 18–21 stand rejected under 35 U.S.C. § 103 as being unpatentable over Woodworth and Massarsky.

B. Claim 4 stands rejected under 35 U.S.C. § 103 as being unpatentable over Woodworth, Massarsky, and Belz.

C. Claim 17 stands rejected under 35 U.S.C. § 103 as being unpatentable over Woodworth, Massarsky, and Davis.

D. Claims 1–16 and 18–21 stand rejected under 35 U.S.C. § 103 as being unpatentable over Hoyt, Belz, and Massarsky.

E. Claim 17 stands rejected under 35 U.S.C. § 103 as being unpatentable over Hoyt, Belz, Massarsky, and Davis.

F. Claims 1, 13, and 18 are rejected under 35 U.S.C. § 103 as being unpatentable over Zigler, Belz, and Massarsky.

OPINION

§ 103 Rejection—Hoyt, Belz, and Massarsky

Claims 1–11, 13–16, and 19–21

We are unpersuaded by Appellant’s arguments (Br. 15–17) that the combination of Hoyt, Belz, and Massarsky would not have rendered obvious independent claim 1, which includes the limitation “portable kiosk.”

The Examiner found that the photobooth/e-mail center of Massarsky corresponds to the limitation “portable kiosk.” (Final Act. 16.) In particular, the Examiner interpreted “portable” as meaning “capable of being carried or moved about” (Ans. 6) and cited to Figure 3 of Massarsky, which

illustrates “a photo booth having a wheel” (Final Act. 16). 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 ’456 patent, which illustrates kiosk 12 as stand-alone units, are reproduced below:

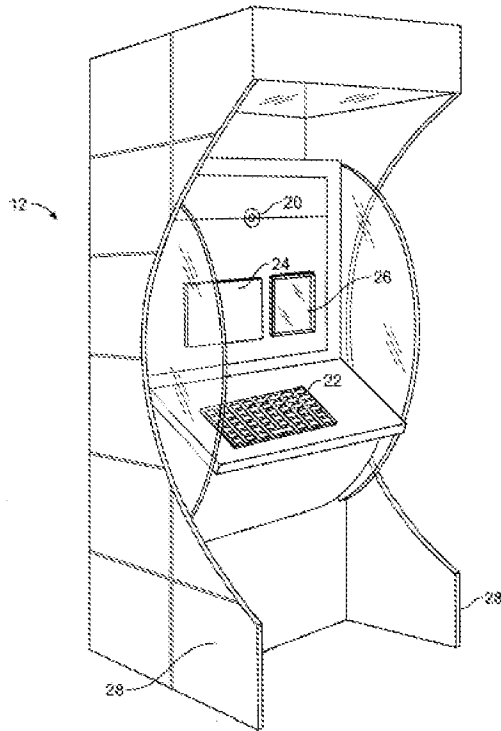


FIG. 2

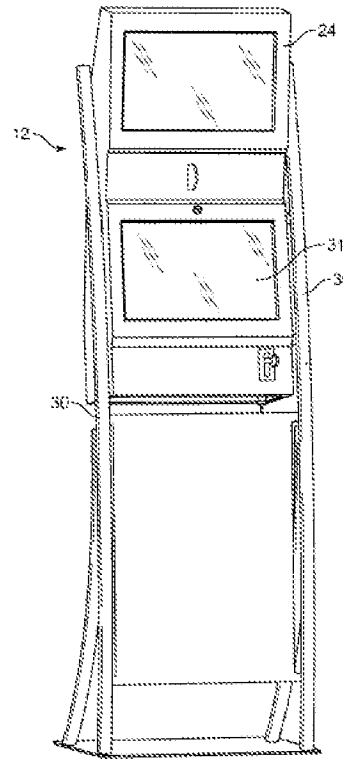


FIG. 3

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. Thus, under the broadest reasonable interpretation consistent with the Specification, we interpret “portable” as “capable of being carried or moved about,” which includes stand-alone kiosk 12 (e.g., unsecured to walls), such kiosk 12 having the approximate height of the user.

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, further includes a wheel (unlabeled). Moreover, Figure 6 of Massarsky, which illustrates two-sided station 50, is reproduced below:

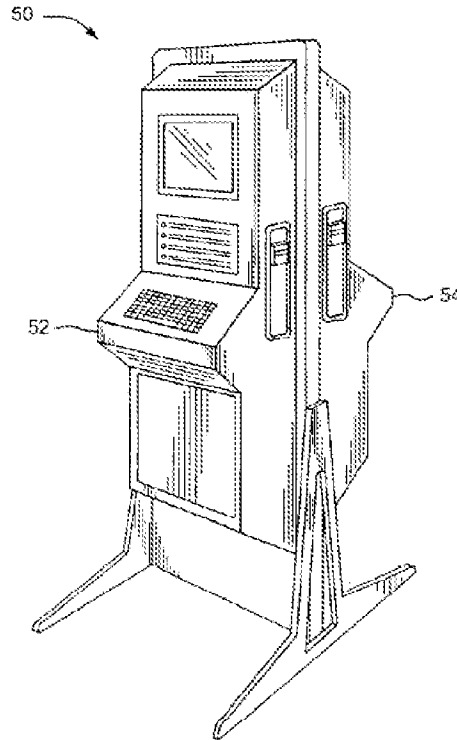


Figure 6 of Massarsky illustrates two-sided station 50 as a free standing unit, such that that height of monitor 32 (unlabeled) is approximately the height to the user (*see* Fig. 8). Thus, because Figure 3 of Massarsky illustrates that photobooth/e-mail center 10 further includes a wheel, which provides for the capability for photobooth/e-mail center 10 to be moved about, 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.”

First, Appellant argues “the examiner contends that the specification does not clearly define a ‘portable kiosk,’ and then turns directly to an online dictionary to define the term ‘portable’ as ‘capable of being moved’ without ever referring to the specification.” (Br. 15.) However, Appellant argues, “[c]laim construction should have begun with the specification, which describes the portable kiosk in Figures 2–3 and column 5, lines 4–14.” (*Id.*) As discussed previously, in view of the ’456 patent, we interpret the term “portable kiosk” as including an unsecured stand-alone kiosk 12, as illustrated in the Figures 2 and 3. Also discussed previously, stand-alone kiosk 12, as illustrated in Figure 2 of the ’456 patent, is similar in dimensions to two-sided station 50 of Massarsky, as illustrated Figure 6. Accordingly, the limitation “portable kiosk” is broad enough to encompass two-sided station 50 of Massarsky. A side-by-side comparison of Figure 2 of the ’456 patent (left) and Figure 6 of Massarsky (right) is reproduced below:

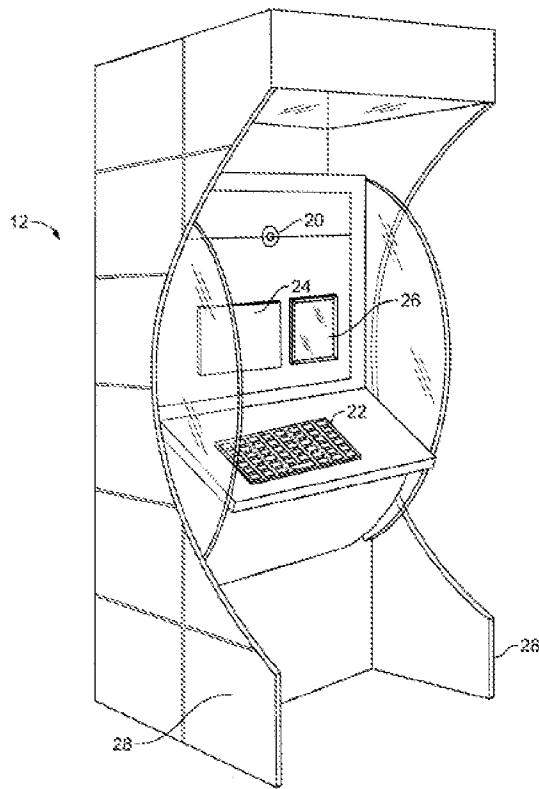


FIG. 2
(‘456 patent under reexamination)

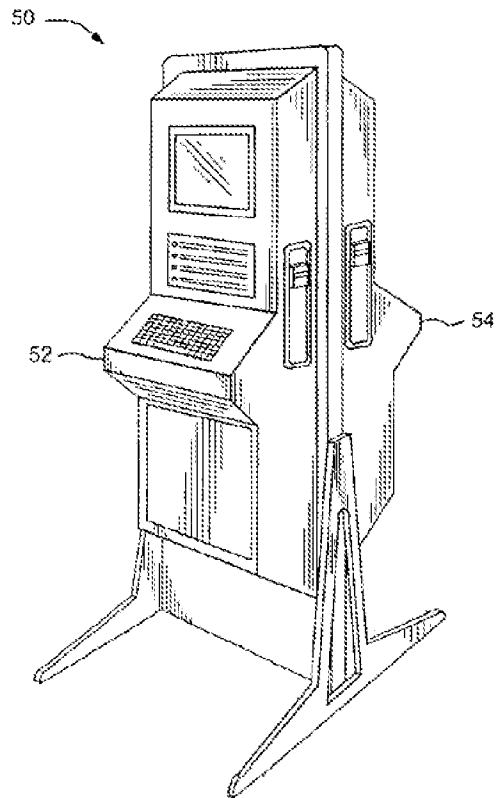


FIG. 6 of Massarsky

Second, Appellant argues that “[i]t [claim construction] should continue with other intrinsic evidence, such as the prosecution history” and “[t]he prosecution histories of the [related] ’115 and ’456 patents shows that the claims were amended from ‘kiosk’ to a ‘portable kiosk’ to distinguish the inventions from shopping mall-type kiosks and other non-portable kiosks.” (Br. 15.) Accordingly, Appellant argues that following:

Massarsky’s mall booth/center 10 is a disclaimed “public kiosk.” It has both an email station 14 and a photobooth station 12. It does not disclose a “portable kiosk.” Massarsky shows a very large stationary photobooth/center 10. This center 10 is installed at a mall. While the wheel may allow for movement during installation or to plug this public kiosk into an outlet, the wheel is not material to the term “portable kiosk.”

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(Br. 17.) Initially, Appellant has not presented any evidence that photobooth/e-mail center 10 must be located in “public” or in a “mall,” particularly when Massarsky is silent with respect to the location of such photobooth/e-mail center 10. Moreover, even if Appellant is correct that the photobooth/e-mail center 10 must be located in “public” or in a “mall,” Appellant has not explained how the location of such photobooth/e-mail center 10 is relevant to portability. As found by the Examiner, the presence of the wheel, as illustrated in Figure 3 of Massarsky, facilitates moving photobooth/e-mail center 10, and accordingly, such photobooth/e-mail center 10 is “portable.”

Last, Appellant argues the following:

The original Examiner understood that the specification defines the term “portable kiosk” as not a standard kiosk or a public kiosk, and as kiosk that requires more than the ability to be moved with a wheel. We know this because the original Examiner cited U.S. Pat. Pub. No. 2002/0106620 to Barnum during prosecution, which identifies wheels 120. The original USPTO Examiner then allowed the ’456 Patent to issue because these wheels did not make Barnum’s kiosk a “portable kiosk,” even though Barnum was movable.

(Br. 16.) A review of the original prosecution history for Application No. 14/084,258 indicates that Barnum was cited on form PTO-892 (“Notice of References Cited”), in which the original Examiner stated “[t]he prior art made of record and not relied upon is considered pertinent to applicant’s disclosure.” (Final Act. 4, mailed Sept. 9, 2015.) In other words, the original Examiner did not provide any reasons for allowing the original claims over Barnum. Accordingly, Appellant’s argument that “[t]he original USPTO Examiner then allowed the ’456 Patent to issue because these

wheels did not make Barnum’s kiosk a ‘portable kiosk,’ even though Barnum was movable” is unsupported by the prosecution history.

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

We are also unpersuaded by Appellant’s arguments (Br. 13) that the combination of Hoyt, Belz, and Massarsky would not have rendered obvious independent claim 1, which includes the limitation “associate the captured media data with the identification information associated with the user.”

The Examiner found that the website of Belz for providing digital printing services for user accounts, corresponds to the limitation “associate the captured media data with the identification information associated with the user.” (Ans. 4.) We agree with the Examiner’s findings.

Belz relates to “a digital camera to receive and display information from the Internet.” (Col. 1, ll. 19–20.) In the “Background of the Invention” section, Belz explains the existence of web sites (e.g., “OFOTO” at www.ofoto.com) that “enable a user to upload a group of digital images for sharing with others over the Internet, and for providing digital printing services.” (Col. 2, ll. 1–4.) Moreover, Belz explains that “[t]his site [OFOTO] permits a user to obtain an account using his e-mail address as the account name, and to provide a password and address information” and then, “[t]he user can . . . upload a group of images.” (Col. 2, ll. 4–7.) Because Belz explains that a user e-mail is used to create an account before images can be uploaded to the OFOTO web site, such that that uploaded images are

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linked the user e-mail, Belz teaches the limitation “associate the captured media data with the identification information associated with the user.”

Appellant argues that “[t]he Board should find claims 1–12 patentable over the rejections . . . for the independent reason that [the] examiner’s only citation for the above recited term is to Woodworth.” (Br. 13.) However, the Examiner also cited to Belz for teaches the limitation “associate the captured media data with the identification information associated with the user.” (Ans. 4.) Appellant does not provide any persuasive evidence or arguments as to why the Examiner’s findings with respect to Belz are erroneous.

Thus, we agree with the Examiner that the combination of Hoyt, Belz, and Massarsky would have rendered obvious independent claim 1, which includes the limitation “associate the captured media data with the identification information associated with the user.”

Accordingly, we sustain the rejection of independent claim 1 under 35 U.S.C. § 103. Claims 2–11 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 2–11 under 35 U.S.C. § 103, for the same reasons discussed with respect to independent claim 1.

Independent claims 13, 18, and 19 recite 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 claims 13, 18, and 19, as well as dependent claims 14–16, 20, and 21, for the same reasons discussed with respect to claim 1.

Claim 12

We are unpersuaded by Appellant’s arguments (Br. 19–20) that the combination of Hoyt, Belz, and Massarsky would not have rendered obvious independent claim 12, which includes the limitation “wherein at least one of the input device or the message-recording device comprises a mobile device.”

The Examiner found that the photobooth/e-mail center 10 of Massarsky corresponds to the limitation “wherein at least one of the input device or the message-recording device comprises a mobile device.” (Final Act. 19.) In particular, the Examiner found that “Massarsky teaches the kiosk include wheels or castors” with a citation to Figure 3. (*Id.*) We agree with the Examiner’s findings.

Independent claim 12 recites the following: (i) “an *input device integrated within the portable kiosk*”; (ii) “a *message-recording device integrated within the portable kiosk*”; and (iii) “wherein at least one of the *input device or the message-recording device comprises a mobile device*” (emphases added). Thus, claim 12 requires either the “input device” or the “message recording” to be a “mobile device,” which is “integrated within the portable kiosk.”

One relevant plain meaning of “integrate” is “to unite with something else” or “to incorporate into a larger unit.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 608 (10th ed. 1999). Such definition is consistent with the Specification of the ’456 patent describes the following:

The message-recording device 20 may further include a sound-recording component such as a microphone or other sound-receiving device. The sound-recording component may

be *integrated with or separate* from the visual recording component.

(Col. 4, ll. 4–11.) Thus, under the broadest reasonable interpretation consistent with the Specification, we interpret “integrated” as to unite with something else or to incorporate into a larger unit. Applying this claim interpretation, claim 12 requires the “mobile device” to be united or incorporated into “the portable kiosk” to form a larger unit.

With respect to the claim limitations “input devices,” “message recording devices,” and “mobile device,” the ’456 patent further describes the following:

The *input device* may include a keyboard 22, mouse, touch screen monitor, microphone, scanner, USB port, voice recognition, or any other means for inputting data.

(Col. 4, ll. 34–36 (emphasis added).)

The *message-recording device 20* may include a visual recording component such as a camera, video camera, or web camera.

(Col. 3, ll. 55–57 (emphasis added).)

The *message-recording device 20* may further include a sound-recording component such as a microphone or other sound-receiving device. . . . The *message-recording device 20* may also include a keyboard 22, graphical user interface 31 such as a touch screen monitor, or other known components for receiving text from a user.

(Col. 4, ll. 4–11 (emphases added).)

Many cell phones, PDAs [personal digital assistants], and other electronic devices provide a convenient and direct way of communicating a photo or video message to an individual. For example, many cell phones are equipped with digital cameras for recording photos or videos. Additionally, many phones

allow an electronic photo or video file to be sent to another cell phone via a text or an email or uploaded directly to the Internet. (Col. 1, ll. 42–48.) While the '456 patent provides numerous examples for both “input device” and “message recording devices,” not all such devices can be used for a “mobile device,” such as cell phones or PDAs, due to size limitations. Thus, we interpret “the input device or the message-recording device comprises a mobile device” as devices appropriately sized for mobile device, for example, as smaller-scale keyboard, touch screen monitor, camera, or video camera.

As discussed previously, because Figure 3 of Massarsky illustrates photobooth/e-mail center 10 having a wheel, which provides for the capability for photobooth/e-mail center 10 to be moved about, Massarsky teaches the limitation “portable kiosk.” Also discussed previously, 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.” Massarsky further explains that “E-mail station 14 also is fitted with keyboard 38 for entering the code and any other information” (col. 4, ll. 53–54) and “[t]he [photobooth] station [12] also includes video camera 18 for taking the digitized photograph of the user” (col. 4, ll. 34–35). Because Massarsky explains that email station 14 includes keyboard 38 and photobooth station 12 includes video camera 18, Massarsky teaches the limitations “input device” and “message recording devices,” respectively. While Massarsky does not teach the limitation “the input device or the message-recording device comprises a mobile device,” it would have been obvious to one of ordinary skill in the art to modify the dimensions of

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keyboard 38 and video camera 18. Where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device. *See Gardner v. TEC Sys., Inc.*, 725 F.2d 1338, 1345 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 830 (1984).

Appellant argues the following:

Claim 12 is patentable over these rejections because the examiner's construction is unreasonably broad and no reference discloses a mobile device (e.g., a mobile communication device, such as a mobile telephone handset, tablet computer, Personal Digital Assistant, or the like) as would have been understood by a person of ordinary skill in the art at the time of invention.

(Br. 19.) Similarly, Appellant argues that “[t]he examiner unreasonably construed a ‘mobile device’ of the portable kiosk to encompass the entire kiosk of Massarsky” and “[t]his contradicts the claim language itself and basic tenants of claim construction.” (Br. 20.) However, as discussed previously, independent claim 12 requires both the “input device” and the “message recording,” either of which is a “mobile device,” to be “integrated within the portable kiosk,” and thus, the “mobile device” is united or integrated with the “portable kiosk” as a larger unit. Accordingly, Appellant has not demonstrated that the Examiner's citation to Figure 3 of Massarsky for a “mobile device” is in error.

Thus, we agree with the Examiner that the combination of Hoyt, Belz, and Massarsky would have rendered obvious independent claim 12, which includes the limitation “wherein at least one of the input device or the message-recording device comprises a mobile device.”

Accordingly, we sustain the rejection of independent claim 12 under 35 U.S.C. § 103.

§ 103 Rejection—Hoyt, Belz, Massarsky, and Davis

We are unpersuaded by Appellant’s arguments (Br. 21–22) that the combination of Hoyt, Belz, Massarsky, and Davis would not have rendered obvious dependent claim 17, which includes the limitation “social network.”

The Examiner found that the web site of Belz for uploading and sharing digital images corresponds to the limitation “social network.” (Ans. 7–8.) We agree with the Examiner’s findings.

As discussed previously, Belz explains the existence of web sites (e.g., “OFOTO” at www.ofoto.com) that “enable a user to upload a group of digital images for sharing with others over the Internet, and for providing digital printing services.” (Col. 2, ll. 1–4.) Because Belz explains that the OFOTO web site permits users to upload digital images for sharing with others over the Internet, Belz teaches the limitation “social media.”

Appellant argues that “a social network, under the broadest reasonable interpretation, is a social networking service or website used to build social networks between users” and “Belz’s November 30, 2001 filing predates Facebook, MySpace, and YouTube.” (Br. 22.) Thus, Appellant argues, “[c]laim 17. . . recites a ‘social network,’ and no combination of references discloses the aspects recited therein.” (*Id.*) However, Appellant’s arguments are not commensurate in scope with claim 17, because the claim does not recite any specific social network, such as Facebook, MySpace, or YouTube. Even if we apply Appellant’s claim construction, the limitation

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“social network” is broad enough to encompass the “OFOTO” web site of Belz, which permits users to upload digital images for sharing with others over the Internet.

Thus, we agree with the Examiner that the combination of Hoyt, Belz, Massarsky, and Davis would have rendered obvious dependent claim 17, which includes the limitation “social network.”

Accordingly, we sustain the rejection of dependent claim 17 under 35 U.S.C. § 103.

Remaining § 103 Rejections

We do not reach the additional cumulative rejections of claims 1–21 under 35 U.S.C. § 103 as being unpatentable over various combinations of Woodworth, Massarsky, Belz, Davis, and Zigler. Affirmance of the obviousness rejection based on various combinations of Hoyt, Belz, Massarsky, and Davis discussed previously renders it unnecessary to reach the remaining obviousness rejections, as claims 1–21 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 1–16 and 18–21 under 35 U.S.C. § 103 over Hoyt, Belz, and Massarsky is affirmed.

The Examiner’s decision rejecting claim 17 under 35 U.S.C. § 103 over Hoyt, Belz, Massarsky, and Davis is affirmed.

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DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	References	Affirmed	Reversed
1-16, 18-21	103	Hoyt, Belz, Massarsky	1-16, 18-21	
17	103	Hoyt, Belz, Massarsky, Davis	17	
Overall Outcome			1-21	

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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