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Paper 56
Entered: March 18, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

YAMAHA CORPORATION OF AMERICA,
Petitioner,

v.

BLACK HILLS MEDIA, LLC,
Patent Owner.

Case IPR2013-00593
Patent 8,045,952 B2

Before BRIAN J. MCNAMARA, STACEY G. WHITE, and PETER P. CHEN, *Administrative Patent Judges*.

WHITE, *Administrative Patent Judge*.

FINAL WRITTEN DECISION

35 U.S.C. § 318(a) and 37 C.F.R. § 42.73

I. INTRODUCTION

Yamaha Corporation of America ("Petitioner") filed a Petition requesting an *inter partes* review of claims 9, 10, 13, and 14 ("challenged claims") of U.S. Patent No. 8,045,952 B2 (Ex. 1001, "the '952 Patent") pursuant to 35 U.S.C. §§ 311–319. Paper 1 ("Pet."). Black Hills Media, LLC ("Patent Owner") filed a Preliminary Response. Paper 14. On March 20, 2014, we instituted an *inter partes* review of claims 9, 10, 13, and 14 on three of the grounds unpatentability alleged in the Petition. Paper 22 ("Dec. to Inst."). After institution of trial, Patent Owner filed a Patent Owner's Response (Paper 34, "PO Resp."), to which Petitioner filed a Reply (Paper 38, "Reply"). Patent Owner filed a Motion to Exclude (Paper 42, "Mot. to Excl."), to which Petitioner filed an Opposition (Paper 47, "Opp. Mot. to Exclude") and Patent Owner filed a Reply (Paper 48).

A consolidated oral hearing for IPR2013-00593, IPR2013-00594, IPR2013-00597, and IPR2013-00598, each involving the same Petitioner and the same Patent Owner, was held on October 20, 2014. The transcript of the consolidated hearing has been entered into the record. Paper 53 ("Tr.").

The Board has jurisdiction under 35 U.S.C. § 6(c). In this Final Written Decision, issued pursuant to 35 U.S.C. § 318(a) and 37 C.F.R. § 42.73, we determine Petitioner has shown by a preponderance of the evidence that challenged claims 9, 10, 13, and 14 are unpatentable. Patent Owner's Motion to Exclude is dismissed as moot.

A. Related Proceedings

Petitioner indicates that the '952 Patent is at issue in *Black Hills Media, LLC v. Yamaha Corp. of America,* No. 2:13-cv-006054 (C.D. Cal.).

Pet. 2–4. In addition, Patent Owner has pending cases concerning the '952 Patent in the United States District Court for the District of Delaware and the Central District of California and an investigation before the U.S. International Trade Commission, *Certain Digital Media Devices, Including Televisions, Blu-Ray Disc Players, Home Theater Systems, Tablets and Mobile Phones, Components Thereof and Associated Software*, Inv. No. 337-TA-882 (USITC). Supplemental Mandatory Notice (Paper 55) 1–3. The '952 Patent is the subject of two other petitions for *inter partes* review.[1] *Id.* In addition, U.S. Patent No. 8,050,652 B2 is related to the '952 Patent and is the subject of three petitions for *inter partes* review.[2] *Id.*

B. The '952 Patent

The '952 Patent is directed to methods and apparatuses that allow users to receive and play audio from various sources and to assign playlists over a network to a network-enabled audio device. Ex. 1001, Abstract. The specification lists several problems with prior art systems such as the cost and technical complexity associated with listening to streaming audio over the Internet and playing songs on a PC. *Id.* at 1:52–2:12. The '952 Patent is purported to alleviate such issues "by providing a network-enabled audio device for listening to a variety of audio sources with substantially equal convenience." *Id.* at 2:15–19.

The inventive device may be used with a computer. *Id.* at 16:32–35. In that embodiment, software may be used to assign a playlist of songs to a

[1] Cases IPR2014-00740 and IPR2015-00340.
[2] Cases IPR2013-00594, IPR2014-00737, and IPR2015-00334.

network-enabled audio device. *Id.* This embodiment is illustrated in Figures 15 and 19B of the '952 Patent. Figure 15 is reproduced below:

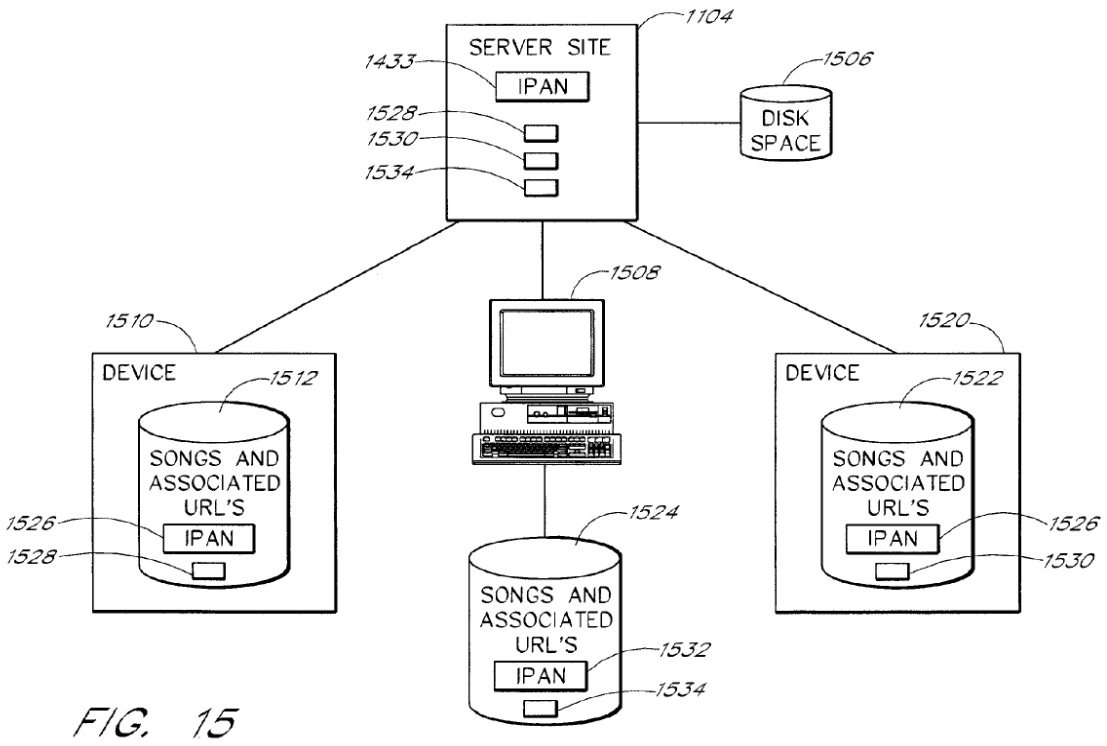


FIG. 15

Figure 15 is a block diagram illustrating the configuration between network-enabled audio devices and a stereo web site. *Id.* at 6:4–6. Figure 15 illustrates two network-enabled audio devices (1510 and 1520) connected to Internet Personal Audio Network ("IPAN") server site 1104. *Id.* at 21:40–43. Storage spaces (1512 and 1522) of network-enabled audio devices (1510 and 1520) are used to store IPAN software 1526, playlists (1528 and 1530), and associated URLs and songs within the playlist. *Id.* at 21:43–57. Server site 1104 includes IPAN software 1433 and playlists (1528 and 1530). *Id.* at 21:52–57.

Figure 19B of the ’952 Patent is reproduced below:

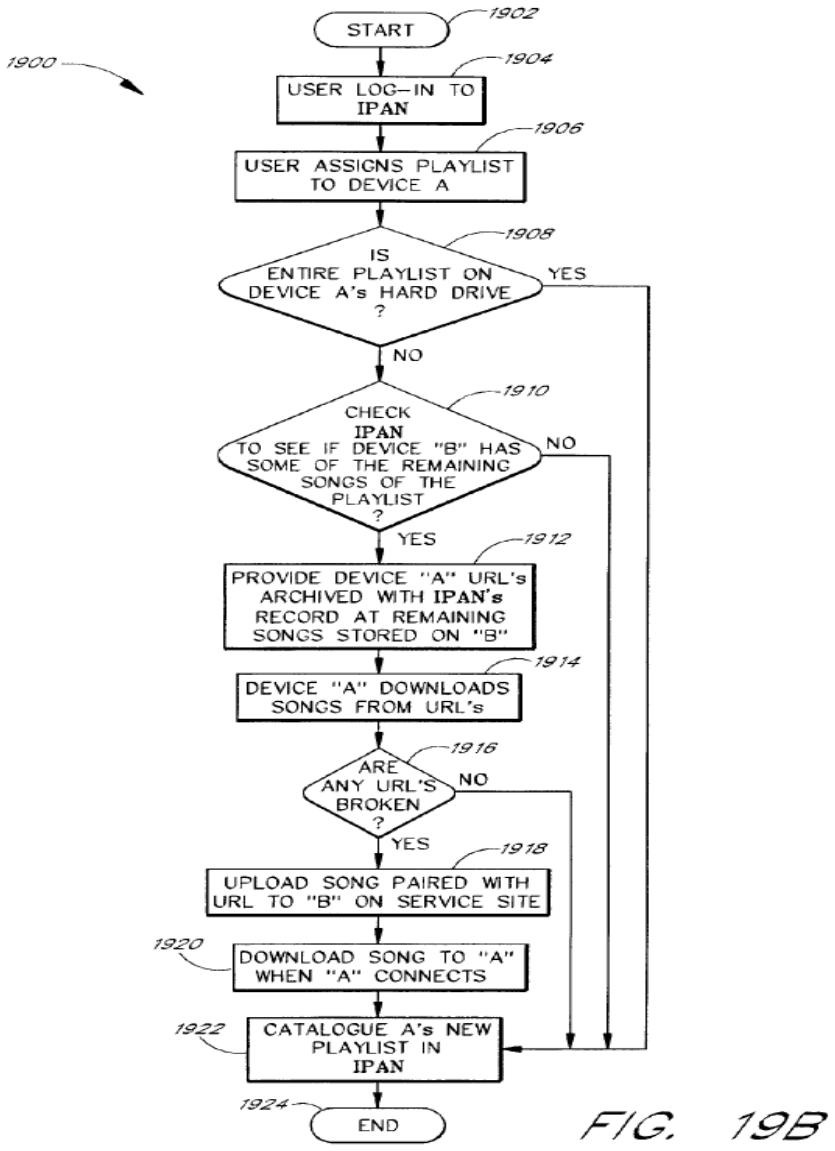


FIG. 19B

Figure 19B shows the process for assigning a playlist to a device. *Id.* at 6:60–61. At step 1908, a user assigns a playlist to first device 1510. *Id.* at 28:14–16. The system then determines if the entire playlist is stored on the hard drive of first device 1510. *Id.* at 28:20–22. If the entire playlist is not stored on the first device 1510, IPAN 1433 will formulate a list of remaining songs and check the hard drive of second device 1520 to determine whether any of the remaining songs may be found on that device. *Id.* at 28:24–30. If

any of the remaining songs is found on second device 1520, then IPAN 1433 will provide first device 1510 with URLs for those songs, and first device 1510 will attempt to download the songs from second device 1520. *Id.* at 28:30–43.

C. Illustrative Claim

Claim 9 of the '952 Patent is the sole independent claim at issue in this Petition and is illustrative of the claims at issue:

> 9. A method comprising:
>
> receiving, at an electronic device, a playlist assigned to the electronic device, the playlist identifying a plurality of songs, wherein ones of the plurality of songs are not stored on the electronic device;
>
> receiving, at the electronic device, information enabling the electronic device to obtain the ones of the plurality of songs from at least one remote source; and
>
> obtaining the ones of the plurality of songs from the at least one remote source.

D. Alleged Grounds of Unpatentability Instituted for Trial

The following table summarizes the challenges to patentability that were instituted for *inter partes* review:

Reference	Basis	Claim(s) Challenged
Berman[3]	§ 102	9, 10, 14
Berman	§ 103	13
Wolff[4]	§ 102	9, 10, 14

[3] US 6,502,194 B1, Dec. 31, 2002, filed Apr. 16, 1999 (Ex. 1012).
[4] US 7,472,353 B1, Dec. 30, 2008, filed July 31, 2000 (Ex. 1014).

II. ANALYSIS

A. Claim Interpretation

In an *inter partes* review, claim terms in an unexpired patent are given their broadest reasonable construction in light of the specification of the patent in which they appear. 37 C.F.R. § 42.100(b); *see* Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,766 (Aug. 14, 2012). Also, claim terms are given their "ordinary and customary meaning" as would be understood by one of ordinary skill in the art at the time of the invention and in the context of the entire patent disclosure. *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007).

For purposes of the Decision to Institute, we construed the terms "playlist," "playlist assigned to the electronic device," and "wherein ones of the plurality of songs are not stored on the electronic device." Dec. to Inst. 12–15. Neither party challenges our construction of the wherein phrase. Having considered whether the construction set forth in the Decision to Institute should be changed in light of evidence introduced during trial, we are not persuaded any modification is necessary. Therefore, we maintain the construction of "wherein ones of the plurality of songs are not stored on the electronic device" as "wherein at least one of the plurality of songs is not stored on the electronic device."

1. "Playlist"

In the Decision to Institute, we construed playlist to mean "a list of audio files or URLs of where the audio files were retrieved from." Dec. to Inst. 13. Patent Owner argues that the term should be construed as "a list referencing media items arranged to be played in a sequence." PO Resp. 13. Petitioner argues that Patent Owner's proposed construction is too narrow

and that the proper construction is "a list of audio files." Reply 4. We are persuaded by Petitioner's arguments.

In the Decision to Institute, we based our construction on a passage from the Specification of the '952 Patent, which defined "playlist 1528 . . . [as] a list of audio files and associated URL's of where the audio files were retrieved from." Ex. 1001, 21:63–65. Petitioner persuasively argues that the Specification and the claims reflect that the playlist and associated URLs are separate items. Reply 5–6. For example, the Specification discusses a server having "a playlist for the Device 1110" and also "maintain[ing] a list of URL's from which the device 1110 received audio files listed in the playlists." Ex. 1001, 16:67–17:6; *see also* Reply 5–6 (citing Ex. 1001, 21:63–65, 21:45–46, 21:49, 21:51–52, Fig. 15) (pointing out examples in the Specification that discuss the playlist and URLs as separate items); Ex. 2012 ¶¶ 66–71, 75–76, 81–84 (explanation by Patent Owner's declarant as to why a list of URLs is not a playlist). Thus, we are persuaded that URLs are not part of the playlist. Therefore, the broadest reasonable construction of playlist is "a list of audio files."

Patent Owner appears to agree that the playlist is a list of songs (or media items), but further argues that the construction of the term should go beyond the content of the list (*i.e.*, songs or media items) to also include the arrangement of the contents of the playlist. *See* PO Resp. 18; Ex. 2012 ¶ 31 (describing the '952 Patent's "centrally-managed playlist, identifying a plurality of songs aggregated from one or more remote sources"). Patent Owner argues that the Specification is consistent with its construction. In particular, Patent Owner points to the discussion of Figure 17B, which "illustrates the display of an audio player window 1792." PO Resp. 17

(citing Ex. 1001, 24:31–43). We are not persuaded that this Figure, depicting a constellation of buttons on an audio player and the description of the function of those buttons, defines the playlist that may be played on that device.

Patent Owner also cites a number of extrinsic references that discuss the sequencing of titles in the playlist. *Id.* at 13–15. Patent Owner's declarant, Mr. Ivan Zatkovich, supports Patent Owner's argument by stating that one of ordinary skill in the art would have understood that

> the term "playlist" denoted a list of media items (e.g., songs) to be played in a sequence, one after another as a group, without having to select individual songs for playback. Indeed, the two parts of the word itself make the meaning of the term self-evident: "play" and "list." In all cases, the operative function is "play," which means the songs will be played as a group, not individually. If the songs in a playlist must be selected and played individually, the purpose of the playlist would be lost.

Ex. 2012 ¶ 58.

Petitioner persuasively argues that this limitation as to the order of songs is a function of the device used to play the songs on the playlist and not a defining characteristic of the playlist itself.

> MR. FEHRMAN: Oh, certainly a playlist can be employed by a player to play an order depending upon the nature of the player and the software that's used to control it. But the term that's being construed is playlist, and what that is. How that playlist is used and employed is not part and parcel of the playlist, per se.

Tr. 10. Indeed, Patent Owner's counsel questioned Petitioner's declarant, Dr. V. Michael Bove, Jr., as to his "aware[ness] of *any software or digital media player that has a playlist function* that doesn't permit one to play the items in the list in a continuous fashion." PO Resp. 15–16 (citing Ex. 2016,

66:18–25) (emphasis added). Dr. Bove responded that to his recollection "all [players] will allow playing in a sequence as displayed." *Id.* at 20 (emphasis omitted). Patent Owner characterizes this exchange about the player functionality as a concession as to the definition of a playlist. *Id.* at 19–20; *see also* Reply 6–7 (emphasizing that Dr. Bove's testimony stated that "a *player* determines how songs in the list are played"). We are persuaded that the manner in which songs are played is a function of the player and not a defining feature of the playlist itself. Thus, we do not construe the term playlist to include any limitations as to the order or sequence of songs on the playlist.

2. "Playlist assigned to the Electronic Device"

In our Decision to Institute, we construed the phrase "playlist assigned to the electronic device" to mean "a list of audio files or URLs of where the audio files were retrieved from directed to a particular device selected by a user." Dec. to Inst. 14. Patent Owner argues that "assigned to the electronic device" should be construed to mean "directed to the electronic device." PO Resp. 25 (citing Ex. 2012 ¶ 85). According to its argument, "the ['952] Patent specifically contemplates that playlists are assigned without requiring user selection of a *particular* device to which the playlist is directed." *Id.* at 26 (citing Ex. 2012 ¶ 90). Patent Owner supports this argument by citing a portion of the Specification that discusses Figure 17I. *Id.* This discussion, however, does not support its argument. Figure 17I "shows a display for allowing a user to add a device to the IPAN." Ex. 1001, 6:32–33. As depicted, this is the display for adding a particular device (elements 1771 and 1772 depict the name and serial number of the device) to the network. *Id.* at Fig. 17I. Included in this display is a checkbox that allows the user to

select whether new files should be updated automatically to this specific device. *Id.* at 25:53–56. This is in accord with the passages we cited in the Decision to Institute that show the repeated description of assignment of a playlist to a particular device selected by the user. Dec. to Inst. 13 (citing Ex. 1001, 4:57–58, 22:39–40, 24:45–48, 28:16, Figs.19B, 19C$_1$). Thus, in light of the record and our construction of playlist, above, we determine that the broadest reasonable construction of "playlist assigned to the electronic device" is "a list of audio files directed to a particular device selected by a user."

B. Level of Ordinary Skill in the Art

Petitioner proposes that the level of ordinary skill in the art is "at least a bachelor's degree in computer science or electrical engineering, and at least one year of practical experience with networked multimedia." Ex. 1002 ¶ 8. Patent Owner's proposal is similar, requiring a person with "a bachelor's degree in computer science or electrical engineering or its equivalent and 1–2 years of practical experience with media file sharing." PO Resp. 9–10 (citing Ex. 2012 ¶¶ 26–29). We find this dispute between the parties to be of little value. An express definition of the level of ordinary skill is not required in all situations, as the level of ordinary skill in the art can be reflected in the cited prior art references. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001) ("the absence of specific findings on the level of skill in the art does not give rise to reversible error where the prior art itself reflects an appropriate level and a need for testimony is not shown.") (internal quotations omitted); *In re GPAC Inc.*, 57 F.3d 1573, 1579 (Fed. Cir. 1995). Neither party has provided a sufficient explanation as to

how their specific proposal regarding the level of ordinary skill (and in particular the importance of the inclusion or exclusion of "at least") changes the analysis in this case. We find the level of ordinary skill in the art to be reflected in the cited references, and we determine that no express statement of the level of ordinary skill in the art is required.

C. Anticipation by Berman (Ex. 1012)

Petitioner alleges that claims 9, 10, and 14 of the '952 Patent are unpatentable under 35 U.S.C. § 102 over Berman. Pet. 15–21.

For the reasons discussed below, we conclude that Petitioner has proved by a preponderance of the evidence that claims 9, 10, and 14 are anticipated by Berman.

1. Overview of Berman (Ex. 1012)

Berman is directed to a playback unit that retrieves audio data from a remote server and plays songs that have been selected by the user. Ex. 1012, Abstract. An embodiment of Berman's playback unit is depicted in Figure 1, which is reproduced below.

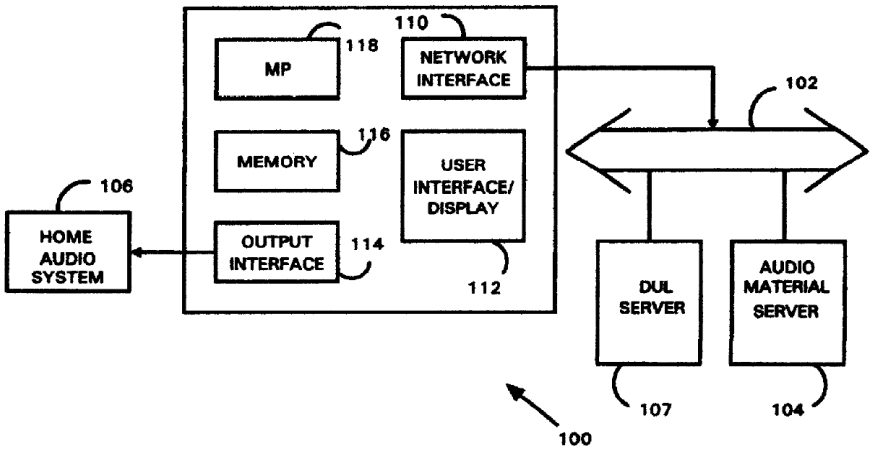


FIG. 1

Figure 1 is a block diagram of Berman's playback unit 100. Ex. 1012, 4:17–19. Playback unit 100 receives audio material from audio material server

104, and access rights to this material are controlled by Directory and User List ("DUL") server 107. *Id.* at 4:51–53, 4:63–65. Playback unit 100 includes network interface 110 that facilitates communication with the servers over the Internet. *Id.* at 5:11–14. Memory 116 temporarily stores audio for playback and processing. *Id.* at 6:6–8. In certain embodiments, the user may record a song to memory. *Id.* at 8:4–6.

The operation of the playback unit is illustrated in Figures 3 and 4, which are reproduced below:

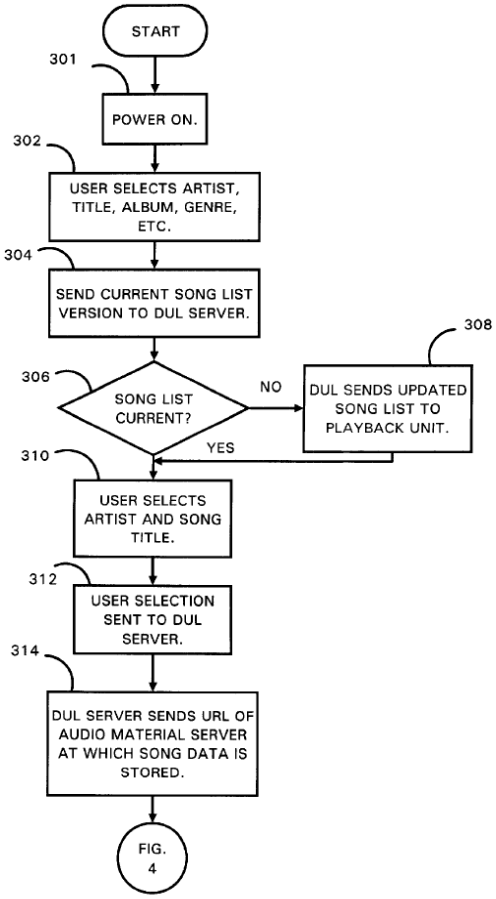


FIG. 3

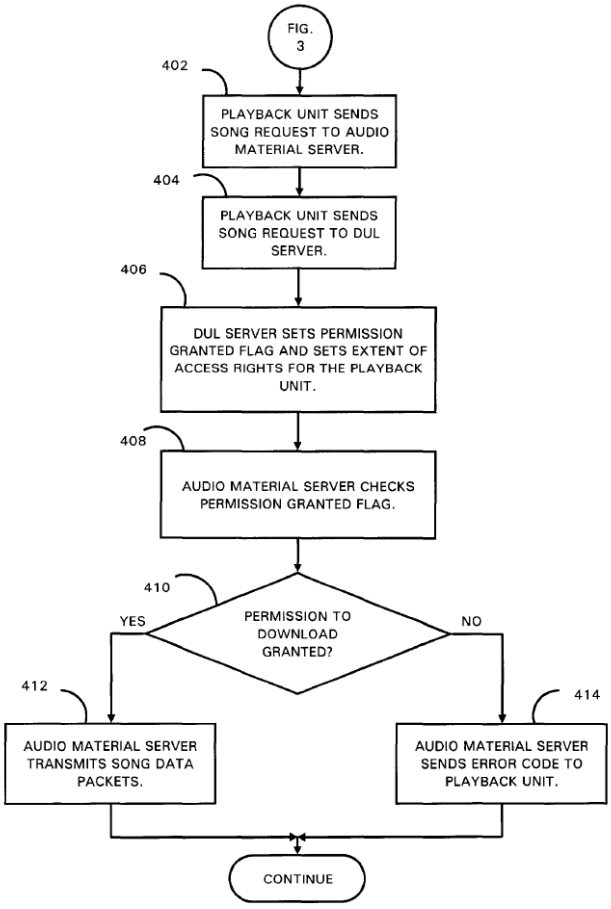


FIG. 4

Figures 3 and 4 are processing flow diagrams depicting the steps executed to request and receive audio material. Ex. 1012, 4:22–25. At step 302, the user selects a music category or type of song. *Id.* at 6:64–7:4. The playback unit

then contacts the DUL server to confirm that the playback unit's song list is up to date. *Id.* at 7:4–6, Fig. 3 (step 304). If the song list is not up to date, the DUL server will send an updated song list to the device. *Id.* at 7:14–19, Fig. 3 (steps 306 and 308). The user selects a song from the song list. *Id.* at 7:22–24. The DUL server then sends playback unit 100 the network address or URL for the requested song. *Id.* at 7:30–41. Playback unit 100 then uses that URL to obtain the requested sound file or streaming audio from the appropriate audio material server. *Id.* at 1012, 7:41–45, 8:32–34, Fig. 4 (steps 402 and 412).

2. Analysis

Petitioner argues that Berman discloses every limitation of claim 9. Pet. 15–18. Specifically, Petitioner argues that Berman discloses a playback unit that receives a song list from the DUL server. Pet. 17 (citing Ex. 1012, Fig. 3 (step 308)); *see also id.* at 10:23–28 (describing song list packet sent to playback unit with a user ID "to confirm that the updated song list information was sent to and received by the correct playback unit"). Petitioner also asserts that the songs identified in the song list are stored on audio material server 104, and, thus, the songs are not stored on the playback unit. *Id.* at 18 (citing Ex. 1012, 4:51–52). The playback unit receives URLs for songs on the song list from the audio material server. *Id.* (citing Ex. 1012, Fig. 3 (step 314), 7:22–54). Finally, Petitioner asserts that the playback unit obtains songs from the audio material server. *Id.* (citing Ex. 1012, Fig. 4 (step 412), 8:31–34). We agree with Petitioner's arguments regarding the disclosures of Berman.

Patent Owner asserts that Berman's "song list" is not a "playlist" as recited by claim 9. PO Resp. 33–40. As discussed above in Section II.A.1,

we reject Patent Owner's proposed construction and construe "playlist" to mean "a list of audio files." Patent Owner describes Berman's song list as "a catalog of all available songs," and, thus, it falls within our construction of playlist. *See id.* at 36. Patent Owner also argues that Berman's song list does not reflect a list of songs selected for playback on a device. *Id.* at 37–38. This, however, is not required by our construction. Even if it were required, Berman does disclose some song selection by the user. Claim 15 of Berman discloses the user "selecting an available music category" and the system "sending a current song list version for the selected music category." Ex. 1012, 17:60–67. At Oral Hearing, Patent Owner's counsel described this claim language from Berman as "loose wording" that did not have any meaning. Tr. 50:6–25 ("MR. ENGELLENNER: I don't think it has any meaning. It's just describing, perhaps loosely, what's going on in that function there."). The reference's disclosures are what they are, and we see no reason to disregard them as "loose wording." Berman's song list falls squarely within our construction of playlist, and, thus, we do not find Patent Owner's arguments persuasive. For the foregoing reasons, we determine that Petitioner has demonstrated by a preponderance of the evidence that independent claim 9 is unpatentable over Berman.

Claims 10 and 14 of the '952 Patent depend from claim 9. Petitioner also asserts that these claims are anticipated by Berman. Pet. 15–20. Petitioner's arguments and evidence are persuasive as to these dependent claims. *See* Dec. to Inst. 19–20. Patent Owner does not assert any additional arguments regarding the patentability of claims 10 and 14. PO Resp. 40. We determine that Petitioner has demonstrated by a

preponderance of the evidence that dependent claims 10 and 14 are unpatentable over Berman.

In summary, Patent Owner's arguments are unpersuasive to overcome the evidence presented by Petitioner that claims 9, 10, and 14 are anticipated by Berman. Based on the foregoing, we determine that Petitioner has proven by a preponderance of the evidence that claims 9, 10, and 14 are unpatentable as anticipated by Berman.

D. Obviousness over Berman (Ex. 1012)

Petitioner asserts that claim 13 of the '952 Patent would have been rendered obvious by the teachings of Berman. Pet. 34–35. Claim 13 depends from 9 and adds further limitations regarding the useage of web sites, which is not disclosed expressly by Berman. Petitioner asserts that it would have been obvious to one of ordinary skill in the art to use a web site as a remote source in place of Berman's servers. Pet. 20–21. Dr. Bove supports Petitioner's argument by testifying that "[i]t would have been well known to one of ordinary skill in the art in 2000 that music files could be provided by a Web server. As one example, the MP3.com music server site launched in 1997." Ex. 1002 ¶ 19. We credit Dr. Bove's testimony and find Petitioner's arguments to be persuasive. Patent Owner does not proffer any additional arguments directed to the patentability of claim 13. PO Resp. 40. We determine that Petitioner has demonstrated by a preponderance of the evidence that dependent claim 13 would have been obvious over Berman.

E. Anticipation by Wolff (Ex. 1014)

Petitioner alleges that claims 9, 10, and 14 of the '952 Patent are unpatentable under 35 U.S.C. § 102 over Wolff. Pet. 29–33.

For the reasons discussed below, we conclude that Petitioner has proved by a preponderance of the evidence that claims 9, 10, and 14 are anticipated by Wolff.

1. Overview of Wolff (Ex. 1014)

Wolff is directed to a system and method for organizing and retrieving multimedia objects. Ex. 1014, Abstract. A remote controller is provided that allows users to retrieve media objects including "Moving Picture Expert Group (MPEG) video[], MPEG audio Layer-3 (MP3), music compact discs (CD), etc." *Id.* at 3:19–25. In one embodiment, the remote controller is a Personal Digital Assistant ("PDA") that allows users to select remotely media objects from a Network Access Appliance ("NAA"). *Id.* at 3:25–30. The remote controller sends one or more URLs or media items to the NAA, and the NAA plays each item in order. *Id.* at 3:61–64. The user may create a playlist containing a plurality of songs and upload that playlist from the remote controller to the server and that playlist may be examined by the NAA. *Id.* at 8:16–33. In addition, a remote controller can send a playlist to another remote controller or another user. *Id.* at 8:59–63. The NAA may have memory to store media, but if the media is not stored in memory, the NAA will retrieve the requested selection from a server. *Id.* at 3:34–41, 5:28–32. Wolff's system may include a plurality of NAAs and servers. *Id.* at Fig. 1. Each user of the remote controller has a personalized server to keep track of all services associated with the remote controller. *Id.* at 4:40–43. The personalized server may keep a copy of each media item, or the media objects may be located at different sites in the network. *Id.* at 4:51–53, 4:62–64.

2. Analysis

Petitioner contends that Wolff discloses every element of claim 9 of the '952 Patent. Pet. 29–33. Specifically, Petitioner asserts that Wolff discloses using a remote controller to create a playlist. Pet. 31–32 (citing Ex. 1014, Fig. 1, 4:37–64, 7:62–8:34). Petitioner argues that Wolff discloses uploading the playlist to the personalized server. *Id*. Petitioner also argues that Wolff discloses a playlist assigned to each NAA. *Id*. at 32 (citing Ex. 1014, 8:31–33). In addition, Petitioner maintains that the songs in the playlist are associated with resource identifiers that enable the NAA to obtain the songs from servers. *Id*. (citing Ex. 1014, 3:30–41, 4:29–36, 4:58–64, 8:16–33).

Patent Owner argues that Wolff does not disclose or suggest "receiving, at an electronic device, a ***playlist*** assigned to the electronic device, the playlist identifying a plurality of songs." PO Resp. 46. According to Patent Owner, this asserted ground fails because "[r]ather than sending a playlist to the NAA, the remote controller merely sends the 'resource identifier' (e.g., URL) 'to request the NAA . . . to play the media object associated with the resource identifier.'" *Id.* at 47. We agree with Patent Owner's assertion that sending a URL is insufficient to anticipate the claimed playlist. *See* Ex. 2012 ¶ 133. Wolff, however, describes a "scrollable list" of media objects on a remote controller from which users may make selections to create a "play list containing the user['s] favorite songs." Ex. 1014, 8:7–22. The remote controller and personalized server are synchronized and the play list is updated. *Id.* at 8:23–26. The NAA then examines the stored playlist and accesses and stores any media objects in order to allow the user to play the playlist without having to wait for

individual media items to be downloaded. *Id.* at 8:27–35. Patent Owner's expert Mr. Zatkovich testifies that "there is no indication in Wolff that its play list that is stored in the personalized server (110) is transferred to or received by the NAA, for the purpose of examination or otherwise." Ex. 2012 ¶ 123. This statement, however, is contradicted by Wolff's claim 16 that explicitly states that "the controller sends one play list to the appliance to request the one play list be played by the appliance." Ex. 1014, 10:35–37; Tr. 85:8–15. Patent Owner argues that the language of Wolff's claim 16 is "short hand to refer to the media objects ultimately played by the appliance . . . [and that] one skilled in the art would appreciate that the songs indicated by the play list are received and played, but a play list itself . . . is not received by the NAA." PO Resp. 52 (citing Ex. 2012 ¶ 130). Here again, we are not persuaded by Patent Owner's argument that we ignore the plain language of the reference. Wolff specifically discusses URLs, media objects, and playlists. We see no reason to believe that Wolff's explicit reference to a playlist in claim 16 should be construed as anything other than a playlist. Thus, we do not find Patent Owner's arguments to be persuasive. For the foregoing reasons, we determine that Petitioner has demonstrated by a preponderance of the evidence that independent claim 9 is unpatentable over Wolff.

Claims 10 and 14 depend from claim 9. Petitioner also asserts that these claims are anticipated by Wolff. Pet. 29–33. Petitioner's arguments and evidence are persuasive as to these dependent claims. *See* Dec. to Inst. 24–25. Patent Owner does not assert any additional arguments regarding the patentability of claims 10 and 14. PO Resp. 53. We determine that

Petitioner has demonstrated by a preponderance of the evidence that dependent claims 10 and 14 are unpatentable over Wolff.

F. Patent Owner's Motion to Exclude

Patent Owner filed a Motion to Exclude Evidence (Paper 42), to which Petitioner responded (Paper 47) and on which Patent Owner filed a Reply (Paper 48). Patent Owner's motion seeks to exclude Exhibits 1019, 1020, and 1023 as hearsay, irrelevant, lacking foundation, and prejudicial pursuant to Federal Rules of Evidence ("FRE") 802, 401, 402, and 403. Mot. to Excl. 1. Patent Owner also seeks to exclude Exhibit 1022 as irrelevant, lacking foundation, and prejudicial pursuant to FRE 613(b), 401, 402, and 403. *Id.* Patent Owner's Reply on its motion also requests to exclude and expunge Exhibit 1025, which is a declaration of counsel submitted by Petitioner. Opp. Mot. to Excl. 4–5.

The moving party has the burden of proof to establish that it is entitled to the request relief. 37 C.F.R. § 42.20(c), 42.62(a). Exhibits 1019, 1020 and 1023 were submitted by Petitioner as extrinsic evidence in support of its proposed construction of "playlist." Reply 6–10. Our construction of playlist is based on intrinsic evidence and we do not rely upon any of these Exhibits. The motion, therefore, is *dismissed* as moot as to these Exhibits.

Exhibit 1022 was submitted by Petitioner to support its proposal for level of ordinary skill in the art. As stated in Section II. D, our determination as to the level of ordinary skill in the art is informed by relevant case law authority, and we do not rely on Exhibit 1022. The motion to exclude is dismissed as moot for this Exhibit and as to the related Exhibit 1025 as well.

III. CONCLUSION

We conclude Petitioner has demonstrated by a preponderance of the evidence that:

1. Claims 9, 10, and 14 are unpatentable under 35 U.S.C. § 102 as anticipated by Berman; and
2. Claim 13 is unpatentable under 35 U.S.C. § 103 as obvious over Berman.
3. Claims 9, 10, and 14 are unpatentable under 35 U.S.C. § 102 as anticipated by Wolff.

IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that, based on a preponderance of the evidence, claims 9, 10, 13 and 14 of the ’952 Patent are unpatentable;

FURTHER ORDERED that, Patent Owner’s Motion to Exclude is dismissed as moot.

FURTHER ORDERED that, because this is a Final Written Decision, parties to the proceeding seeking judicial review of the decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

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