

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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HTC CORPORATION and HTC AMERICA, INC.,  
Petitioner,

v.

ADVANCED AUDIO DEVICES, LLC,  
Patent Owner.

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Case IPR2014-01158  
Patent 8,400,888 B2

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Before SCOTT A. DANIELS, CHRISTOPHER L. CRUMBLEY, and  
GEORGIANNA W. BRADEN, *Administrative Patent Judges*.

CRUMBLEY, *Administrative Patent Judge*.

FINAL WRITTEN DECISION  
*35 U.S.C. § 318 and 37 C.F.R. § 42.73*

## I. INTRODUCTION

In this *inter partes* review trial, instituted pursuant to 35 U.S.C. § 314, Petitioner HTC Corporation and HTC America, Inc. (collectively, “HTC”) challenges the patentability of claims 1–15 of U.S. Patent No. 8,400,888 B2 (Ex. 1001, “the ’888 patent”), owned by Advanced Audio Devices, LLC (“AAD”).

We have jurisdiction under 35 U.S.C. § 6(c). This Final Written Decision, issued pursuant to 35 U.S.C. § 318(a) and 37 C.F.R. § 42.73, addresses issues and arguments raised during trial. For the reasons discussed below, we determine that HTC has met its burden to prove, by a preponderance of the evidence, that claims 1–15 of the ’888 patent are *unpatentable*.

### A. Procedural History

On July 11, 2014, HTC filed a Petition requesting *inter partes* review of claims 1–15 of the ’888 patent. Paper 1, “Pet.” AAD filed a Patent Owner’s Preliminary Response. Paper 5. In a Decision on Institution of *Inter Partes* Review (Paper 6, “Dec.”), we instituted trial on claims 1–15 based on the following grounds:

1. Whether claims 1–15 are unpatentable under 35 U.S.C. § 103 as having been obvious over the combined disclosures of Keller<sup>1</sup> and Martin;<sup>2</sup>

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<sup>1</sup> Ex. 1002, US 7,289,393 to Keller et al. (Oct. 30, 1997).

<sup>2</sup> Ex. 1003, US 5,355,302 to Martin et al. (Oct. 11, 1994).

2. Whether claims 1–15 are unpatentable under 35 U.S.C. § 103 as having been obvious over the combined disclosures of Nathan '259<sup>3</sup> and Nathan '255;<sup>4</sup> and
3. Whether claims 1–15 are unpatentable under 35 U.S.C. § 103 as having been obvious over the combined disclosures of Sound Blaster,<sup>5</sup> Lucente,<sup>6</sup> and Ozawa.<sup>7</sup>

Dec. 26.

Following institution, AAD filed a Patent Owner's Response to the Petition (Paper 14, "PO Resp."), and HTC filed a Reply (Paper 20, "Pet. Reply").

HTC supported its Petition with the Declaration of Christopher Schmandt (Ex. 1009), and submitted a Rebuttal Declaration of Mr. Schmandt (Ex. 1016) with its Reply.

With its Patent Owner Response, AAD filed the Declaration of Joseph C. McAlexander III. Ex. 2011. HTC took the cross-examination of Mr. McAlexander via deposition. Ex. 1020. AAD also submitted the testimony of Peter J. Keller, a named inventor on the '888 patent. Ex. 2018.<sup>8</sup>

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<sup>3</sup> Ex. 1004, WO 96/12259 to Nathan et al. (Apr. 25, 1996).

<sup>4</sup> Ex. 1005, WO 96/12255 to Nathan et al. (Apr. 25, 1996).

<sup>5</sup> Ex. 1006, Exhibit B, Sound Blaster 16 User Reference Manual. With Sound Blaster, HTC submits the Declaration of Kyle A. Miller, which states that Sound Blaster was publicly available "no later than the early spring of 1995." Ex. 1006 ¶ 13.

<sup>6</sup> Ex. 1007, EP 0598547 A2 to Lucente et al. (May 25, 1994).

<sup>7</sup> Ex. 1008, US 5,870,710 to Ozawa et al. (filed Jan. 22, 1997).

<sup>8</sup> Exhibit 2018 was the subject of a Motion to Seal (Paper 13), which was

AAD filed a Motion to Exclude Exhibit 1006 (Paper 23, “Mot. Exclude”), to which HTC filed an Opposition (Paper 25, “Exclude Opp.”) and AAD filed a Reply (Paper 28, “Exclude Reply”).

Oral hearing was requested by both parties, and a consolidated oral hearing involving this trial and related trials IPR2014-01154, IPR2014-01155, IPR2014-01156, and IPR2014-01157 was held on September 17, 2015. A transcript of the oral hearing is included in the record. Paper 35, “Tr.”

#### *B. The '888 Patent*

The '888 patent discloses an audio recording device that the specification terms a “music jukebox.” Ex. 1001, 1:21–22. According to the specification, existing recording devices permitted music to be recorded onto a compact disc in real time, but did not provide editing functions, the ability to store music on the recorder for making multiple copies of the disc, or the ability to customize easily the order in which tracks are recorded onto the disc. *Id.* at 2:33–67. The described music jukebox is said to address these issues, as well as permit a user to “audition” a stored audio track by listening to it before recording onto a compact disc. *Id.* at 3:27–43.

Various hardware components of the jukebox are described in the specification, including: audio inputs for receiving music in the form of analog signals (*id.* at 7:55–61); one or more data storage structures for

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granted. Paper 26. A public, redacted version of Exhibit 2018 was also filed by AAD under the same exhibit number.

storing and retrieving audio stored in digital form (*id.* at 9:15–22); and a drive for recording stored audio onto compact discs (*id.* at 13:62–64). The audio data stored in the memory permits audio tracks to be played back selectively, or “auditioned,” prior to recording. *Id.* at 4:38–47. The components of the music jukebox are contained in a housing having a display for providing information to a user, for example through a graphical user interface. *Id.* at 4:55–5:15. The housing also comprises a plurality of push buttons for controlling operation of the device. *Id.* at 5:16–42.

The specification of the ’888 patent describes the operation of the device as permitting a user to create a “session,” which is a group of sound tracks selected from a master song list. *Id.* at 15:50–52, 16:58–66. A user also may reorder the songs within a session by selecting songs and moving them up or down within the session list. *Id.* at 16:25–33. The session then can be written to a compact disc. *Id.* at 15:46–50.

### *C. Illustrative Claims*

Of the challenged claims, only claim 1 is independent; all other challenged claims depend, directly or indirectly, from claim 1. The challenged independent claim reads as follows:

1. An apparatus configured to store sound tracks and play the stored sound tracks for personal enjoyment, said apparatus comprising:
  - a housing containing non-volatile memory, the housing further comprising at least one touch-operable control and a touch screen display configured to be operated to cause the touch screen display to display at least one menu

relating to a library of sound tracks, wherein all of the sound tracks in the library and their names are stored in the non-volatile memory of the apparatus, wherein the at least one menu includes at least one of a list of names of sound tracks stored in the non-volatile memory of the apparatus and a list of groups of sound tracks stored in the non-volatile memory of the apparatus;

an input in the housing for receiving audio data;

audio output structure located at least partially within the housing for outputting audio signals;

wherein the at least one touch-operable control and touch screen display is configured such that at least one of the touch-operable control and the touch screen display is touchable to allow selection from the at least one menu displayed on the touch screen display;

wherein the apparatus is configured to receive audio data through the input of the apparatus, whereby sound tracks become stored in the non-volatile memory as digital data;

wherein the apparatus is configured for maintaining and selectively accessing and playing sound tracks stored in the non-volatile memory;

wherein the apparatus is configured such that at least one of the at least one touch-operable control and the touch screen display is touchable to cause the apparatus to display on the touch screen display at least one of a list of names of sound tracks and a list of groups of sound tracks wherein all of the sound tracks in the list of names of sound tracks displayed on the touch screen display are stored in the non-volatile memory of the apparatus, and wherein all of the sound tracks in the list of groups of sound tracks displayed on the touch screen display are stored in the non-volatile memory of the apparatus; and

wherein the apparatus is configured such that at least one of the at least one touch-operable control and the touch screen display is touchable to cause the apparatus to play through the audio output structure at least one of a specific sound track displayed on the touch screen display and a group of sound tracks displayed on the touch screen display, said apparatus being configured to display said list of names of sound tracks stored in the non-volatile memory of the apparatus without the apparatus having to be connected to a network service center containing the names.

*Id.* at 21:2–52.

## II. DISCUSSION

### A. Claim Construction

For purposes of our Decision to Institute, we analyzed each claim term in light of its broadest reasonable interpretation, as understood by one of ordinary skill in the art and as consistent with the specification of the '888 patent. 37 C.F.R. § 42.100(b); *see In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268, 1278–79 (Fed. Cir. 2015), *cert. granted, Cuozzo Speed Techs. LLC v. Lee*, 84 U.S.L.W. 3218 (U.S. 2016). In the Decision to Institute, we construed the term *selectively accessing* as “obtaining from a number or group by fitness or preference.” *See* Dec. 8–10 (citing 37 C.F.R. § 42.100(b)).

During the course of the trial, HTC disputed our construction of *selectively accessing*, arguing that “by fitness or preference” is found only in a single dictionary definition submitted by AAD, and is inconsistent with the broadest reasonable interpretation of the term. Pet. Reply 1–2. We disagree.

Interpreting *selectively accessing* as merely “obtaining from a number or group” would encompass, for example, random selection of sound tracks. This is inconsistent with the specification of the ’171 patent, which emphasizes the user’s choice in selecting sound tracks. *See, e.g.*, Ex. 1001, 12:3–6 (“[A]n operating system . . . enable[s] the user to focus on selection and ordering of audio material.”). We consider HTC’s proffered construction to be unreasonably broad given these disclosures. *See Microsoft Corp. v. Proxyconn, Inc.*, 789 F.3d 1292, 1298 (Fed. Cir. 2015) (“A construction that is ‘unreasonably broad’ and which does not ‘reasonably reflect the plain language and disclosure’ will not pass muster.”).

For these reasons, we see no reason to alter the constructions of the claim terms as set forth above, and we incorporate our previous analysis in the Decision to Institute for purposes of this Decision.

*B. Alleged Obviousness of Claims 1–15 Over Keller and Martin*

HTC asserts that claims 1–15 are unpatentable under 35 U.S.C. § 103 over the combined disclosures of Keller (Ex. 1002) and Martin (Ex. 1003). Pet. 18–27. Keller, issued October 30, 2007, is a parent patent of the ’888 patent, and contains a specification that is substantially similar to that of the ’888 patent. HTC contends that all limitations of the challenged claims are disclosed in Keller, except the limitation of claim 1 that recites “said apparatus being configured to display said list of names of sound tracks stored in the non-volatile memory of the apparatus without the apparatus



having to be connected to a network service center containing the names.”  
*Id.* at 19. To provide this missing limitation, HTC relies on the disclosure of Martin, which is said to teach a system for managing a plurality of jukeboxes from a central station. *Id.* According to HTC, the system of Martin includes local jukeboxes, which store the titles of songs stored in the central mass storage unit, regardless of whether the jukebox is currently connected to the central station. *Id.* at 20.

AAD contends that Keller is not prior art to the '888 patent, because the '888 patent claims priority, via a chain of applications, to application 09/111,989, filed July 8, 1998. PO Resp. 8–9. HTC argues that the '888 patent is not entitled to the 1998 filing date because, during prosecution, AAD added new matter to the claims of the '888 patent during prosecution, in an amendment dated December 6, 2012. Pet. 5. HTC identifies as new matter a limitation of claim 1: “said apparatus being configured to display said list of names of sound tracks stored in the non-volatile memory of the apparatus without the apparatus having to be connected to a network service center containing the names.” *Id.* HTC points to the fact that the specification of the '888 patent as originally filed does not use the phrase “network service center,” and speculates that the term was taken from Ozawa and added as a negative limitation during prosecution to overcome a prior art rejection over Ozawa. *Id.* at 5–6. As such, HTC contends that the claims lack written description support in the parent applications, and therefore, the earliest priority date to which these claims could be entitled is April 25, 2011, the filing date of the application which matured into the '888

patent. *Id.* at 7.

In a chain of continuation applications, a claim in a patent receives the benefit of the filing date of an earlier application in the chain, if the claim is supported by the written description of the earlier application. 35 U.S.C. §§ 112, 120. “[E]ntitlement to priority is decided on a claim-by-claim basis, and various claims may be entitled to different priority dates.” *X2Y Attenuators, LLC v. Int’l Trade Comm’n*, 757 F.3d 1358, 1366 (Fed. Cir. 2014). Thus, absent a claim of priority, parent applications may be used as prior art to claims in a later-filed child application, but only for claims that incorporate new matter. *See Santarus, Inc. v. Par Pharm., Inc.*, 694 F.3d 1344, 1352 (Fed. Cir. 2012).

When faced with such a prior art challenge to a claim, the burden of production—alternatively called the burden of going forward—is on the patent owner to make a claim of priority that the challenged claims are entitled to a filing date prior to the date of the alleged prior art. *See Tech. Licensing Corp. v. Videotek, Inc.*, 545 F.3d 1316, 1327 (Fed. Cir. 2008). In other words, the patent owner must come forward with evidence and argument—either in its Preliminary Response or, if trial is instituted, in its Response—showing why the challenged claim is supported by the written description of the priority application.

The ultimate burden of persuasion in an *inter partes* review, however, remains on the Petitioner to prove unpatentability by a preponderance of the evidence, and that burden never shifts to the patent owner. 35 U.S.C. § 316(e); *Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375,

1378 (Fed. Cir. 2015). Therefore, once a Patent Owner satisfies its burden of production, the burden is on Petitioner to convince the Board that the challenged claim is not entitled to the benefit of the earlier filing date. *See Dynamic Drinkware*, 800 F.3d at 1379–80.

In our Decision to Institute, we concluded that AAD had not, at that time, met its burden of production on the priority date of the '888 patent claims. Dec. 13–14. Specifically, we noted that AAD had not introduced any parent application into the record of the proceeding, and therefore, there was no evidentiary basis to support AAD's claim of priority. *Id.* During trial, however, AAD introduced several parent applications into the record, dating back to an earliest filing date of August 17, 2000. PO Resp. 9–10; *see* Exs. 2012–16. AAD contends that every one of the submitted applications contains support for the disputed claim limitation, and thus, the '888 patent claims are entitled to a priority date of no later than August 17, 2000, predating the effective date of Keller. PO Resp. 10.

We conclude that AAD has met its burden of production in establishing that claims 1–15 are entitled to a priority date before the effective date of Keller. We, therefore, turn to the question of whether HTC has met its ultimate burden of persuasion that the claims are not entitled to the August 17, 2000 filing date. Specifically, we evaluate HTC's argument that the limitation “said apparatus being configured to display said list of names of sound tracks stored in the non-volatile memory of the apparatus without the apparatus having to be connected to a network service center containing the names” is a negative limitation unsupported in the original

application. Pet. 5–6. Both parties cite *Santarus, Inc. v. Par Pharm., Inc.*, to support their contentions, but disagree whether the priority applications provide “a reason to exclude” the disputed claim limitation. PO Resp. 15–16; Pet. Reply 3–6.

The Federal Circuit recently addressed written description support for negative limitations, and what constitutes a “reason to exclude,” in *Inphi Corp. v. Netlist, Inc.*, 805 F.3d 1350 (Fed. Cir. 2015). Specifically, the court asked whether “describing alternative features—without articulating advantages or disadvantages of each feature—can constitute a ‘reason to exclude’ under the standard articulated in *Santarus*.” *Id.* at 1355. Rejecting the appellant’s argument that a specification must state the advantage of excluding a particular feature, the court held that “*Santarus* simply reflects the fact that the specification need only satisfy the requirements of § 112, paragraph 1 as described in this court’s existing jurisprudence.” *Id.* at 1356. The “reason to exclude,” therefore, may be provided by properly describing alternative features of the patented invention. *Id.* The court proceeded to analyze whether there was sufficient evidence that the patentee possessed the negative claim limitation as of the filing date. *Id.* at 1357.

In view of *Inphi*, we reject HTC’s argument that claims 1–15 are not entitled to an earlier priority date because AAD allegedly “fails to identify any teaching in the specification of any of its applications . . . that excludes a connection to a ‘network service center containing the names,’ *fails to identify any disadvantages of such a network service center*, and fails to otherwise provide a reason to exclude a network service center.” Pet. Reply

5 (emphasis added). We need not find a recitation in the originally-filed specification of any disadvantage of a network service center; rather, the proper inquiry is whether the priority application reasonably conveys that the inventor was in possession of an apparatus that could—without connecting to a network service center—display a list of names of sound tracks. We conclude that it does.

As AAD points out, the device disclosed in the priority applications includes a number of inputs, but as Mr. McAlexander testifies, none of these inputs could be used to connect to a network service center. PO Resp. 12; Ex. 2011 ¶ 65. Furthermore, the applications disclose displaying a list of names of sound tracks, which are entered into the memory of the device by the user (as opposed to being obtained from a network service center). PO Resp. 12–13. Mr. McAlexander testifies that the specifications reasonably convey to a person of ordinary skill in the art that the described apparatus could display a list of names of sound tracks without being connected to a network service center. Ex. 2011 ¶ 65. After evaluating the specifications and the expert testimony, we agree.

We, therefore, conclude that HTC has not met its burden to prove, by a preponderance of the evidence, that claims 1–15 of the '888 patent are not entitled to a priority date before the effective date of Keller. As such, HTC has not established that Keller is prior art to the '888 patent, and has not proven that claims 1–15 are unpatentable as having been obvious over Keller and Martin.

*C. Alleged Obviousness of Claims 1–15 Over Nathan '259  
and Nathan '255*

The elements of an obviousness analysis under 35 U.S.C. § 103 were set forth by the Supreme Court as follows: “the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved.” *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966). Furthermore, as a guard against hindsight reasoning, we must “withhold judgment on an obviousness challenge until [we] consider[] all relevant evidence, including that relating to the objective considerations” such as commercial success or long-felt need. *In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig.*, 676 F.3d 1063, 1079 (Fed. Cir. 2012). While we may apply “an expansive and flexible approach” to the question of obviousness, and take the sequence of the *Graham* factors in a different order depending on the particular case, “the factors continue to define the inquiry that controls.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 407, 415 (2007).

We note, at the outset, that AAD does not contest that a person of ordinary skill in the art would have combined the disclosures of Nathan '259 and Nathan '255. Tr. 80:16–24. Rather, AAD disputes HTC’s interpretation of the Nathan references, and whether a person of ordinary skill in the art would have understood them to disclose all elements of the challenged claims. PO Resp. 18. Upon review of HTC’s asserted reasons to combine the Nathan references (Pet. 29–30), Mr. Schmandt’s testimony on that point

(Ex. 1009 ¶ 119), and the lack of challenge from AAD, we find that a person of ordinary skill would have had reason to combine the Nathan references in the manner asserted.

*1. Disclosures of the Nathan References*

The primary dispute between the parties on the Nathan references is over what the references actually disclose. According to HTC, the jukebox systems described in the Nathan systems permit purchase and download of songs from a remote server, into a master song list stored locally on the jukebox. Pet. 27–28. A user may then select songs from the master song list into a queue; after the songs are played, they are deleted from the queue, but not the local storage. *Id.* By contrast, AAD asserts that the jukeboxes of Nathan permit users to purchase the right to play a song only once; when the songs are downloaded, they are immediately added to the queue, then deleted from local storage immediately after they are played. PO Resp. 18–19. According to AAD, therefore, a user of the Nathan system has no control over the order of songs in the queue other than the order in which the songs were purchased. *Id.* at 22. Nor does Nathan, in AAD’s reading, provide any library distinct from the queue. *Id.* at 30 (“The queue is *not* a subset of an internal music library; the queue *is* the music library.”) (citing Ex. 2011 ¶ 62).

In our Decision to Institute, we determined that the record at that time did not support AAD’s interpretation of the Nathan references. Rather, we concluded that “it appears that Nathan ’259 discloses deleting songs from

the *queue* once they are played, not from the music library altogether.” Dec. 19 (“[w]hen the selection has been reproduced in its entirety, it is removed from the queue file” (quoting Ex. 1004 ¶ 86)). We also determined that the record supported the conclusion that Nathan ’259 discloses a “new selection acquisition mode” (“NSAM”) for ordering and downloading new music onto the jukebox. Dec. 14; Ex. 1004 ¶¶ 64–73. A “selection graphics screen” then permits a user to add these newly acquired songs to a queue for playback. Ex. 1004 ¶ 74. We concluded that Nathan ’259 appeared to describe a master song list to which songs are added via the NSAM, as well as the ability to create a queue of songs selected from the master song list using the selection graphics screen. Dec. 14.

AAD’s Response contends that our interpretation of Nathan ’259 was in error (PO Resp. 24–25), and Mr. McAlexander testifies in support of AAD’s interpretation of the reference. Ex. 2011 ¶¶ 32–63. AAD raises several issues regarding the disclosure of Nathan ’259, which it contends are inconsistent with HTC’s interpretation of the reference.

First, AAD asks why, if songs are not deleted entirely from the device immediately following playback, Nathan ’259 does not disclose some sort of “delete” function so that users can clear songs from the memory. PO Resp. 25–28. HTC responds by noting that Nathan ’259, as a patent document, likely is focused on the novel aspects of the disclosed device as opposed to known functions such as deleting files. Pet. Reply 13.

Prior art references are evaluated according to what they would disclose to a person of ordinary skill in the art. *See Sundance, Inc. v.*



*DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1361 n.3 (Fed. Cir. 2008). As such, the fact that a reference is silent regarding a particular feature only signifies exclusion of that feature if a person of ordinary skill would understand silence to imply exclusion. AAD provides no compelling evidence this is the case with Nathan '259. Mr. McAlexander, AAD's expert, testifies that there is no disclosure of a delete function in Nathan '259, but does not state that he, or any other person of ordinary skill, would interpret this silence to imply that a delete function is excluded. Ex. 2011 ¶ 62. Furthermore, we note that Nathan '255 explicitly discloses a manual delete function for removing little-known titles. Ex. 1005 ¶ 7. Therefore, we do not find the absence of an explicit "delete function" in Nathan '259 to imply that the Nathan jukebox does not have such a common and known function.

Second, AAD notes that Nathan '259 discloses a system having as little as 32 megabytes of RAM, and asks why such a small amount of memory is contemplated if a local music library is stored. PO Resp. 25–26. HTC responds by noting that the 32 megabyte capacity is a minimum, and Nathan '259 puts no upper limit on the number of songs that can be stored. Pet. Reply 13. Furthermore, HTC notes that Nathan '255 discloses that its device may store a "minimum of 350 to 400 titles." *Id.* (citing Ex. 1005 ¶ 7). We consider HTC's interpretation on this point to be persuasive, and do not find the disclosure of a 32 megabyte minimum memory capacity to be inconsistent with our understanding of the Nathan references.

Third, AAD points out a passage in Nathan '259 that states that a button “allows validation of the selection or selections for initiating their introduction into the queue,” (Ex. 1004 ¶ 74) and argues that “validation” refers to purchase of a song. PO Resp. 28–29. Therefore, under AAD’s theory, purchase of a song results in immediate addition to the queue. *Id.* HTC contends that such an interpretation would render Nathan '259’s two modules redundant, as there would be no reason to have both a “new selections acquisition module” (“NSAM”) and a “selection graphics screen,” if songs are directly added from the NSAM to the queue. Pet. Reply 11–12. We agree with HTC, and additionally note that Nathan '259 uses the word “validate” in other contexts meaning “to confirm.” Ex. 1004 ¶ 75 (“validates his choice”), ¶ 114 (“validates the credit card”). We, therefore, interpret “validation of the selection” in paragraph 74 of Nathan '259 to refer to confirming that a song will be added to the queue, rather than purchase of a song.

At oral argument, AAD discussed these issues, and raised several other questions regarding the disclosure of Nathan '259 which had not been raised previously in briefing. Tr. 53–54. Even if we were to consider such arguments properly raised,<sup>9</sup> we do not find them persuasive. Based on our

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<sup>9</sup> “A party may . . . only present [at oral hearing] arguments relied upon in the papers previously submitted. No new evidence or arguments may be presented at the oral argument.” *Office Patent Trial Practice Guide*, 77 Fed. Reg. 48,756, 48,768 (Aug. 14, 2012).

review of the Nathan references, in light of the expert testimony, our interpretation of the Nathan disclosures has not changed.

We find that Nathan '259 discloses a jukebox that permits the downloading of song tracks via its NSAM. Ex. 1004 ¶¶ 64, 73 (“The display of FIG. 9 allows the user to access the new selections acquisition mode in connection with the NSAM module. . . . Button (1038) allows ordering of the selection which is then downloaded according to the above described mode.”). A different “selection graphics screen” shows the songs that have been downloaded, permits the user to sort the songs according to different criteria, and gives the user the ability to add songs to a queue. *Id.* ¶ 74 (“Button (124) allows validation of the selection or selections for initiating their introduction into the queue or their immediate and successive performance if the queue is empty.”). Contrary to AAD’s argument, we see no reason to conclude that when a file is purchased and downloaded, it is immediately added to the queue, and deleted from local memory immediately after it is played. Nor do we find that the Nathan systems only permit the order of the queue to be determined by purchase order, as opposed to the order in which the songs are selected from the library of all downloaded songs.

## *2. Analysis of Obviousness Over Nathan '259 and Nathan '255*

### *a. Claim 1*

There is no dispute between the parties that the Nathan references disclose several of the elements found in claim 1. We find that Nathan '259

discloses a housing (“box,” Ex. 1004 ¶ 46); non-volatile memory (“RAM,” *id.* ¶ 51); an audio output structure (“stereo audio output,” *id.* ¶ 42); an input for receiving audio data (“telecommunications interface,” *id.* ¶ 3); and at least one touch-operable control (“a set of buttons,” *id.* ¶ 46). AAD does not contest these elements.

Furthermore, the combination of Nathan ’259 and Nathan ’255 discloses a touch screen display in the housing, configured to be operated to display at least one menu relating to a library of sound tracks. As AAD recognizes, Nathan ’255 discloses a touchscreen display within its housing for controlling the jukebox. Ex. 1005 ¶ 24; PO Resp. 42. The touchscreen is a 14 inch “Intelli Touch” screen that “allows display of various selection data used by the customers.” Ex. 1005 ¶ 24. Mr. Schmandt, HTC’s expert and a founder of the MIT Media Lab with more than thirty years of experience in the media technology field, testifies that “[a] person skilled in the art would be motivated to implement the touch screen disclosed in Nathan 255 on the LCD display . . . taught by Nathan 259, to allow more intuitive control of the jukebox.” Ex. 1009 ¶¶ 12, 13, 127. We, therefore, conclude that it would have been obvious to include the touchscreen of Nathan ’255 in the housing of Nathan ’259, to display the modules of Nathan ’259 such as the selection graphics screen. *See* Ex. 1004 ¶ 74. The display in the housing would be capable of displaying at least one menu relating to a library of sound tracks, as required by claim 1.

AAD also argues that the references do not disclose selectively accessing and playing songs in memory. PO Resp. 30, 41. To support this

argument, AAD relies on its interpretation of Nathan as permitting only “single-play” downloads of songs, with immediate introduction of downloaded songs into a queue that cannot be selectively accessed. *Id.* As discussed above, we do not find this interpretation of Nathan ’259’s disclosure to be the correct one.

Given our finding that Nathan ’259 discloses the ability to select songs to download to local storage, followed by the ability to select songs for introduction into a queue, we find that the Nathan references disclose the ability to selectively access songs stored in memory. The songs downloaded into Nathan’s local memory become “songs stored in memory,” and the selection of songs into a queue is “selectively accessing” those songs. This satisfies our construction of *selectively accessing*, originally proposed by AAD, of “obtaining from a number or group by fitness or preference.” *See supra*, Section II.A.

For these reasons, we find that the combination of Nathan ’259 and Nathan ’255 teaches or suggests each limitation of claim 1. AAD’s arguments to the contrary are not persuasive.

*b. Dependent Claims*

AAD does not separately contest the obviousness of dependent claims 2–15 over the combined Nathan references. These claims recite additional features such as a headphone jack (claims 2, 5), an amplifier (claim 3), a touch-operable control or touchscreen touchable to power the apparatus on and off (claim 9), and the like. We find that these additional elements are taught or suggested by the combination of Nathan ’259 and Nathan ’255,

and therefore do not patentably distinguish over the independent claims.

We, therefore, conclude that HTC has met its burden of showing that each element of challenged dependent claims 2–15 is taught or suggested by the combination of Nathan '259 and Nathan '255. As discussed above, we also find that a person of ordinary skill in the art would have had reason to combine the Nathan references.

### 3. *Objective Indicia of Nonobviousness*

Factual inquiries for an obviousness determination include secondary considerations based on evaluation and crediting of objective evidence of nonobviousness. *See Graham*, 383 U.S. at 17. Notwithstanding what the teachings of the prior art would have suggested to one of ordinary skill in the art at the time of the invention, the totality of the evidence submitted, including objective evidence of nonobviousness, may lead to a conclusion that the challenged claims would not have been obvious to one of ordinary skill in the art. *In re Piasecki*, 745 F.2d 1468, 1471–72 (Fed. Cir. 1984). Secondary considerations may include any of the following: long-felt but unsolved needs, failure of others, unexpected results, commercial success, copying, licensing, and praise. *See Graham*, 383 U.S. at 17; *Leapfrog Enters., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1162 (Fed. Cir. 2007); *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Drilling USA, Inc.*, 699 F.3d 1340, 1349, 1355 (Fed. Cir. 2012).

To be relevant, evidence of nonobviousness must be commensurate in scope with the claimed invention. *In re Kao*, 639 F.3d 1057, 1068 (Fed. Cir.

2011) (citing *In re Tiffin*, 448 F.2d 791, 792 (CCPA 1971)); *In re Hiniker Co.*, 150 F.3d 1362, 1369 (Fed. Cir. 1998). In that regard, in order to be accorded substantial weight, there must be a nexus between the merits of the claimed invention and the evidence of secondary considerations. *In re GPAC Inc.*, 57 F.3d 1573, 1580 (Fed. Cir. 1995). “Nexus” is a legally and factually sufficient connection between the objective evidence and the claimed invention, such that the objective evidence should be considered in determining nonobviousness. *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387, 1392 (Fed. Cir. 1988). The burden of showing that there is a nexus lies with the patent owner. *In re Paulsen*, 30 F.3d 1475, 1482 (Fed. Cir. 1994); *Demaco*, 851 F.3d at 1392.

AAD argues that the “clear commercial success” of the invention claimed in the ’888 patent demonstrates its nonobviousness, notwithstanding the disclosures of the Nathan references. PO Reply 52–54. To demonstrate this alleged commercial success, AAD submits the testimony of Peter Keller, supported by a number of confidential licenses which are said to have generated more than \$10,000,000 of gross revenue. *Id.* Mr. Keller describes the “AAD Family of Patents,” which includes the ’888 patent, other related United States Patents, and foreign counterparts. Ex. 2018 ¶¶ 5, 8. Mr. Keller testifies that, for each licensee, he ensured that “at least one commercial product sold” was covered by “at least one claim of at least one patent” of the family. *Id.* ¶ 11.

In cases in which the proffered evidence of commercial success is licenses, rather than sales of products embodying the invention, there is a

danger that the licenses may have been taken only because they were cheaper than defending an infringement suit. *See EWP Corp. v. Reliance Universal Inc.*, 755 F.2d 898, 908 (Fed. Cir. 1985). In such situations, nexus between the commercial success and the patent cannot be inferred; rather, “affirmative evidence of nexus” is required. *Iron Grip Barbell Co. v. USA Sports, Inc.*, 392 F.3d 1317, 1324 (Fed. Cir. 2004). In other words, a patent owner must demonstrate “a nexus between the *merits of the invention* and the licenses of record”; otherwise the licenses are to be accorded little weight. *In re GPAC*, 57 F.3d at 1580 (emphasis added).

HTC notes that each of the licenses listed by Mr. Keller includes at least two patents that explicitly claim a compact disc recorder, an element not present in the claims of the ’888 patent. Pet. Reply 24. HTC also contends that AAD fails to demonstrate any link between the invention of the ’888 patent and the taking of the license; for example, AAD provides no apportionment of revenues to show the amount attributable to the ’888 patent, as opposed to the other members of the licensed family. *Id.*

We agree with HTC that the evidence provided by AAD does not establish a sufficient link between the merits of the invention claimed in the ’888 patent and the taking of the licenses. Although Mr. Keller notes that some of the provided licenses were taken in situations where there was no pending litigation against the licensee (Ex. 2004 ¶ 9), he does not address whether litigation had been *threatened* against those parties. We, therefore, cannot determine whether the licenses reflect the commercial value of the invention claimed in the ’888 patent, or whether they were taken merely to



avoid the cost of litigation, either pending or threatened. Absent a persuasive showing of nexus, AAD's evidence of licensing fails to establish commercial success.

We conclude that the evidence of objective indicia of nonobviousness is insufficient to overcome the evidence of obviousness over the combined Nathan references.

#### *4. Conclusion on Obviousness*

For the foregoing reasons, HTC has proven by a preponderance of the evidence that Nathan '255 and Nathan '259 teach all elements of challenged claims 1–15, and that a person of ordinary skill in the art would have had reason to combine the disclosures. Furthermore, we conclude that such a combination would have been within the level of ordinary skill in the art, as evidenced by the prior art of record. We, therefore, conclude that claims 1–15 would have been obvious at the time of the invention, and thus are unpatentable under 35 U.S.C. § 103.

#### *D. Alleged Obviousness of Claims 1–15 Over Sound Blaster, Lucente, and Ozawa*

We instituted trial to determine whether claims 1–15 would have been obvious over the combined disclosures of Sound Blaster, Lucente, and Ozawa, finding persuasive HTC's unchallenged analysis in its Petition of how the elements of the challenged claims are taught by the references. Dec. 20–21, 25. In so doing, we noted that AAD did not dispute the alleged disclosures of the references, but instead disputed that Sound Blaster

qualified as prior art to the '888 patent, and argued that a person of ordinary skill in the art would have not combined the references. *Id.* at 21. In its Response, AAD again does not address the disclosures of the references, and instead argues that the references are not combinable because the combined teachings would produce an inoperable device. PO Resp. 43–52. According to AAD, to combine Sound Blaster with the teachings of Lucente would require a substantial reconstruction and redesign of the elements in Lucente. *Id.* at 45–48. Thus, AAD concludes that the combination of Sound Blaster and Lucente, regardless of the addition of Ozawa, would not have rendered the challenged claims obvious. *Id.* at 51–52. In addition, AAD moved to exclude Exhibit 1006 (Miller Declaration, Miller CV, and the Sound Blaster reference). Mot. Exclude 1.

Sound Blaster discloses audio software with a graphical user interface designed for organizing and playing back audio files. Ex. 1006, 2-1.<sup>10</sup> Sound Blaster also discloses the ability to group sound tracks into playlists. *Id.* at 2-20–2-28, Fig. 2-8.

Lucente discloses a “pen-based computer with an integral flat panel display and digitized screen.” Ex. 1007, 1:3–4. The housing of Lucente includes an audio input and output, processor, and memory. *Id.* at 12:2–13, 7:39–49. According to HTC, the hardware of Lucente is capable of running the Sound Blaster software. Pet. 43.

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<sup>10</sup> HTC did not add page numbers to the Sound Blaster reference, as required by our Rules. *See* 37 C.F.R. § 42.63(d)(2)(i). We refer to the page numbers of the original Sound Blaster manual when citing the reference.

Ozawa discloses a portable audio device that can download music from a network service center and save audio files to a hard drive in the device. Ex. 1008, 4:48–53. The Ozawa device has push-button controls on its face for controlling the operation of the device, such as playing and pausing music. *Id.* at 5:30–33.

At oral hearing, AAD’s counsel did not concede that Sound Blaster, Lucente, and Ozawa disclose all elements of the claims if combined, but acknowledged that AAD’s briefs had provided no argument on that point. Tr. 90–91. Specifically, AAD did not provide any evidence or testimony contrary to the evidence and testimony provided by Petitioner regarding the disclosures of Sound Blaster, Lucente, and Ozawa. Our Scheduling Order in this case cautioned AAD that “any arguments for patentability not raised in the [Patent Owner Response] will be deemed waived.” Paper 7, 3. The Board’s Trial Practice Guide, furthermore, states that the Patent Owner Response “should identify all the involved claims that are believed to be patentable *and state the basis for that belief.*” *Office Patent Trial Practice Guide*, 77 Fed. Reg. 48,756, 48,766 (Aug. 14, 2012) (emphasis added). As the Board has stated, our governing statute and Rules “clearly place some onus on the patent owner, once trial is instituted, to address the material facts raised by the petition as jeopardizing patentability of the challenged claims.” *Johnson Health Tech Co. v. Icon Health & Fitness, Inc.*, Case IPR2013-00463, slip op. at 12 (PTAB Jan. 29, 2015) (Paper 41). By addressing only the combination of the references, AAD conveyed to the Board and HTC that the only bases for its belief that the challenged claims are patentable

were (i) whether Sound Blaster and Lucente were combinable and (ii) whether Sound Blaster is admissible.

In our Decision to Institute, we concluded that HTC had made a threshold showing that Sound Blaster, Lucente, and Ozawa taught all the limitations of the challenged claims, sufficient for us to conclude that there was a reasonable likelihood that HTC would prevail in showing that the challenged claims were obvious over the combined references. Dec. 25. We must now determine whether the preponderance of the evidence of record supports a finding of obviousness. 35 U.S.C. § 316(e). Given AAD's waiver of argument that the combination of references does not teach all elements of the challenged claims, the record now contains the same arguments and evidence on that point as it did at the time of our Decision to Institute. After careful consideration of the entire record, including the Petition, Patent Owner's Response, and all evidence submitted by the parties, we find that the preponderance of the evidence of record supports a finding that HTC has set forth how all limitations of the challenged claims are taught by Sound Blaster, Lucente, and Ozawa. Pet. 47–60; Ex. 1009 ¶¶ 184–221 (Schmandt declaration). We, therefore, turn to the two remaining issues on this ground of unpatentability: AAD's Motion to Exclude Sound Blaster, and whether a person of ordinary skill would have had reason to combine Sound Blaster, Lucente, and Ozawa.

*1. Motion to Exclude Exhibit 1006*

Exhibit 1006 contains two related documents: (1) the Declaration of Kyle A. Miller, attesting to the public availability of the Sound Blaster reference; and (2) the Sound Blaster reference itself. Mr. Miller testifies that Sound Blaster is a copy of a Sound Blaster 16 User Reference Manual he received during the course of his employment at Creative Labs, “no later than the early spring of 1995.” Ex. 1006 ¶ 19. According to Mr. Miller, his employer provided him with commercial versions of Creative Labs’ most popular products, including the Sound Blaster 16 Audio Card. *Id.* ¶ 12. Mr. Miller testifies that the product he received included the User’s Manual, and would have been the same documentation provided to a commercial purchaser of the product. *Id.* ¶ 14.

AAD moves to exclude Exhibit 1006 on several grounds. Mot. Exclude 1. Pursuant to our Rules, a motion to exclude evidence must be filed to preserve any previously-made objections to evidence. 37 C.F.R. § 42.64(c). The motion must identify where in the record the objections were made, and must explain the objections. *Id.*

We note that AAD does not identify where in the record its objections to evidence were made prior to their being the basis of the Motion to Exclude, in violation of Rule 42.64(c). Indeed, the Board is aware of AAD’s prior objections only because they were quoted in HTC’s opposition to the Motion to Exclude. For this reason, AAD’s Motion is procedurally deficient, and may be denied on this basis alone.

Even if we were to overlook the procedural deficiency of the motion itself, we would not exclude Exhibit 1006. First, AAD argues that the Miller Declaration is hearsay. Mot. Exclude 3–5. It does not appear that AAD previously made this objection, as required by our Rules. According to HTC, the only hearsay-based objection made by AAD was that Exhibit B (the Sound Blaster reference itself) did not satisfy the business records exception to the hearsay rule. Exclude Opp. 2. Furthermore, even if AAD had preserved such an objection, we do not consider the Miller Declaration to be hearsay, as it is not an out-of-court statement. In an *inter partes* review, direct testimony is typically provided via affidavit, with cross-examination taken via deposition. 37 C.F.R. § 42.53(a). In this respect, testimony via affidavit before the Board is distinguishable from affidavits submitted in District Court cases cited by AAD, such as *Hilgraeve, Inc. v. Symantec Corp.*, 271 F. Supp. 2d 964 (E.D. Mich. 2003). See *Polaris Wireless, Inc. v. TruePosition, Inc.*, Case IPR2013-00323, slip op. 41 (PTAB Nov. 3, 2014) (Paper 62).

Second, AAD objects to the copyright date on the Sound Blaster reference as hearsay. Mot. Exclude 5–7. Again, AAD has not established that it previously made such an objection, other than the general objection to “Exhibit B” as not being within the business records exception. This is insufficient to put HTC on notice that AAD was specifically objecting to the copyright date of the reference as hearsay. See 37 C.F.R. § 42.64(b)(1) (“The objection must identify the grounds for the objection with sufficient particularity to allow correction in the form of supplemental evidence.”). In

any event, we consider the exclusion of the copyright date to be moot, as we do not rely on the copyright date to reach our determination that Sound Blaster was publicly available. Mr. Miller’s testimony that Sound Blaster was publicly available rests on his personal recollection, and merely cites the copyright date as corroboration for that recollection. Ex. 1006, Miller Decl., ¶ 17.

Third, AAD contends that Sound Blaster is not within the business records exception to the hearsay rule. Mot. Exclude 8. While it does appear that AAD previously made this objection, the Motion does not cite to where in the record the objection was made, as required by our Rule 42.64(c). Nevertheless, the application of a hearsay exception is irrelevant, as Sound Blaster is not offered for a hearsay purpose. As a prior art reference, Sound Blaster is offered to show what information it would have conveyed to a person of ordinary skill in the art; the truth of the contents of Sound Blaster is not relevant to this inquiry. *See Joy Techs., Inc. v. Manbeck*, 751 F. Supp. 225, 233 n.2 (D.D.C. 1990), *aff’d*, 959 F.2d 226 (Fed. Cir. 1992); *see EMC Corp. v. Personal Web Techs., LLC*, Case IPR2013-00085, slip op. at 66 (PTAB May 15, 2014) (Paper 73) (“[A] prior art document submitted as a ‘printed publication’ under 35 U.S.C. § 102(b) is offered simply as evidence of what it described, not for proving the truth of the matters addressed in the document.”).

Finally, AAD seeks to exclude Sound Blaster as not authenticated, as there is no evidence to authenticate the reference “except the inadmissible Miller Declaration.” Mot. Exclude 8 (emphasis omitted). We have not

found the Miller Declaration to be inadmissible, however. To authenticate an item of evidence, a party must “produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a). The Miller Declaration provides sufficient evidence to support the finding that Sound Blaster is what HTC contends it to be: a document distributed to the public with the commercially available version of the Sound Blaster 16 Audio Card.

For these reasons, even if AAD’s Motion to Exclude were procedurally proper, we would not exclude Exhibit 1006, including the Sound Blaster reference, from the record.

## 2. *Combinability of References*

HTC contends that a person of ordinary skill in the art would have had reason to combine Sound Blaster, Lucente, and Ozawa. Pet. 46–47. First, HTC argues that the references pertain to personal computing devices with similar hardware, for similar purposes of reproducing audio. *Id.* at 46. In addition, HTC argues the devices of Lucente and Ozawa are directed to portable devices, and HTC asserts that a person of ordinary skill in the art would have combined the software of Sound Blaster with these devices to “improv[e] multimedia user experience.” *Id.*

To the contrary, AAD argues that combining Sound Blaster with Lucente would have been outside the level of ordinary skill at the time of the invention. PO Resp. 43. AAD first focuses on hardware incompatibilities between the tablet computer of Lucente and the software of Sound Blaster.



*Id.* AAD argues that “[t]he amount of skill required to make the Lucente device compatible with the Sound Blaster software would substantially exceed the level of ordinary skill.” *Id.* Mr. McAlexander testifies that modification of the Lucente computer to run Sound Blaster would include such drastic steps as “redesign of the battery and thermal management within the housing to provide the designed battery operating time while preventing overheating of the internal circuits” (Ex. 2011 ¶ 25) and redesign of the “entire interface structure of the Sound Blaster 16 audio card . . . from an ISA configuration to a different bus standard, including firmware re-write to conform to the different bus protocol” (*id.* ¶ 27).

Mr. McAlexander also testifies that the Sound Blaster software required a Windows 3.1 operating system, which allegedly was incompatible with the “pen-based computer” disclosed in Lucente. *Id.* ¶ 28. For example, Mr. McAlexander points out Lucente’s recitation of the ability to rotate the display to permit either right-handed or left-handed operation, and states that such a functionality was not provided in Windows 3.1. *Id.* ¶ 30.

In response, HTC argues that AAD focuses too heavily on the physical combinability of the devices disclosed in the references, as opposed to whether the teachings of the references would be combined. Pet. Reply 20–21. HTC submits the testimony of Mr. Schmandt, who testifies that a person of ordinary skill in the art would have recognized that the functionality of the Sound Blaster software (such as storing and managing audio files, including making playlists) would provide similar benefits in a portable touchscreen computer, such as the one described in Lucente. Ex.

1009 ¶ 181. The disclosures of Sound Blaster and Lucente, according to Mr. Schmandt, would allow a person of ordinary skill in the art to construct a device as claimed in the '888 patent. Ex. 1016 ¶ 52. Mr. Schmandt also addresses Mr. McAlexander's opinion that a person of ordinary skill in the art would have been unable to combine the computer of Lucente with the software of Sound Blaster, and testifies that a person of ordinary skill would have both the knowledge and a reason to combine the teachings of these references. *Id.* ¶¶ 54–65.

In our view, HTC's proposed analysis better comports with the "expansive and flexible approach" to obviousness set forth by the Supreme Court in *KSR*. "The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference." *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). Our inquiry is, therefore, not "whether the references could be physically combined but whether the claimed inventions are rendered obvious by the teachings of the prior art as a whole." *In re Etter*, 756 F.2d 852, 859 (Fed. Cir. 1985) (en banc).

Based on the combination of references proposed by HTC, Mr. Schmandt testifies that a person of ordinary skill in the art would have recognized the advantages of Sound Blaster's *functionality*, and sought to incorporate those features into Lucente. Ex. 1009 ¶ 181 ("a person of ordinary skill in the art would be motivated to combine a system with the flexibility, portability, and ease of use of Lucente with the audio management capabilities of Sound Blaster"); *id.* at ¶ 183 ("it would be

obvious to design a system with physical (e.g. push-button) controls to carry out the various *functions* designed by Sound Blaster, particularly in view of Lucente and Ozawa”) (emphasis added). The record reflects that such a modification would not have been outside the level of ordinary skill, which both experts define similarly. Ex. 1009 ¶ 25 (Schmandt: at least a bachelor’s degree in electrical engineering, computer science, or equivalent, and 1–3 years of experience in designing and programming consumer electronic devices); Ex. 2007 ¶ 8 (McAlexander: bachelor’s degree in electrical engineering or computer engineering, and at least two years of experience in the design of audio systems). This level of skill is also reflected by the prior art of record. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001). AAD’s focus on whether the Sound Blaster hardware sound card could be installed on the Lucente device, or whether the Sound Blaster software could run on Lucente’s operating system, ignores that a person of ordinary skill is a “person of ordinary creativity, not an automaton.” *KSR*, 550 U.S. at 421.

Based on the foregoing, we conclude that it would not have been outside the level of ordinary skill in the art, as defined by both experts, to modify the device of Lucente to have the functionality described in Sound Blaster—including grouping and ordering songs—as well as the ability to download songs as described in Ozawa. We, therefore, find that a person of ordinary skill in the art would have had reason to combine the disclosures of Sound Blaster, Lucente, and Ozawa, and would have had a reasonable expectation of success in doing so.

*3. Objective Indicia of Nonobviousness*

As discussed above, we have considered AAD's evidence of objective indicia of nonobviousness, but conclude that the evidence is insufficient to support a conclusion of nonobviousness.

*4. Conclusion on Obviousness*

For the foregoing reasons, HTC has proven by a preponderance of the evidence that Sound Blaster, Lucente, and Ozawa teach all elements of challenged claims 1–15, and that a person of ordinary skill in the art would have had reason to combine the disclosures. Furthermore, we conclude that such a combination would have been within the level of ordinary skill in the art, as evidenced by the prior art of record. We, therefore, conclude that claims 1–15 would have been obvious at the time of the invention, and thus are unpatentable under 35 U.S.C. § 103.

III. CONCLUSION

We conclude that HTC has demonstrated, by a preponderance of the evidence, that claims 1–15 of the '888 patent are unpatentable under 35 U.S.C. § 103, as having been obvious over the following combinations of prior art references:

Claims 1–15: Nathan '259 and Nathan '255; and

Claims 1–15: Sound Blaster, Lucente, and Ozawa.

HTC has not demonstrated, by a preponderance of the evidence, that claims 1–15 are unpatentable under 35 U.S.C. § 103 as having been obvious over Keller and Martin.

IV. ORDER

Accordingly, it is

ORDERED that claims 1–15 of U.S. Patent No. 8,400,888 B2 are *unpatentable*;

FURTHER ORDERED that Patent Owner’s Motion to Exclude is *denied*;

FURTHER ORDERED that, pursuant to 35 U.S.C. § 318(b), upon expiration of the time for appeal of this decision, or the termination of any such appeal, a certificate shall issue canceling claims 1–15 in U.S. Patent No. 8,400,888 B2; and

FURTHER ORDERED that, because this is a final 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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Patent No. 8,400,888 B2

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