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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CHRIS S. TERRILL and TODD W. KIRBY

Appeal 2010-006761
Application 11/237,419
Technology Center 2400

Before SCOTT R. BOALICK, JAMES B. ARPIN, and
TRENTON A. WARD, *Administrative Patent Judges*.

WARD, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1, 3, 5-11, 13, 15-19, 21, 23-26, 28, and 30-31. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

Appellants' claimed invention relates to providing online dating features in a network environment. *See* Abstract. Claim 1 is illustrative with certain disputed limitations italicized:

1. An apparatus for providing a feature in a network environment, comprising:

a central web site operable to interface with one or more end users and to manage information related to one or more of the end users, wherein the central web site includes an interest rating component that allows one or more of the end users to indicate a level of interest in one or more of the other end users, wherein the interest rating component is provided as a graphical illustration that reflects a slider bar to be used by one or more of the end users in order to make selections or designations about potential dating candidates, and wherein *if the slider bar is moved in one direction, indicating a low level of interest for a particular candidate, then the particular candidate is moved to an inactive state where a relationship between two of the end users does not continue.*

THE OBJECTIONS AND REJECTIONS

(1) The Examiner objected to the Specification as failing to provide proper antecedent basis for the claimed subject matter. Ans. 3.¹

(2) The Examiner provisionally rejected claims 1, 3, 5-7, 11, 13, 15, 19, 21, 23, 26, and 28 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-7, 11-15, 19-23, and 26-29 of copending Application No. 11/237,583 (“583 Application”). Ans. 3-4. The Examiner

¹ Throughout this opinion, we refer to (1) the Appeal Brief (App. Br.) filed Sept. 24, 2009, (2) the Examiner's Answer (Ans.) mailed Dec. 24, 2009, and (3) the Reply Brief (Reply Br.) filed Feb. 24, 2010.

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provisionally rejected claims 10, 17, 25, and 31 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 4, 14, 22, and 29 of copending '583 Application in view of Weiss (US 2006/0059147 A1; published Mar. 16, 2006; filed Jul. 28, 2005) as applied to claim 8 above and further in view of Cohen (US 2003/0191673 A1; published Oct. 9, 2003). Ans. 5. The Examiner provisionally rejected claims 4, 14, 22, and 29 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 4, 14, 22, and 29 of copending '583 Application in view of Weiss and Official Notice. Ans. 6. The Examiner provisionally rejected claims 1-31 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over the claims of the following set of copending applications 11/237,584, 11/237,585, 11/237,490, 11/237,491, 11/237,582, 11/237,418, in view of copending '583 Application, Weiss, the Official Notice, and Cohen. Ans. 6-7.

(3) The Examiner rejected claims 1, 3, 5-11, 13, 15-19, 21, 23-26, 28 and 30-31 under 35 U.S.C. § 103(a) as being unpatentable over Weiss, the Official Notice, and Cohen. Ans. 7-14.

THE OBJECTION TO THE SPECIFICATION

The Examiner objected to the Specification as failing to provide proper antecedent basis for the claimed subject matter. Ans. 3 (citing 37 C.F.R. § 1.75(d)(1) and MPEP § 608.01). The Examiner's objection to the Specification is reviewable by petition under 37 C.F.R. § 1.181 and is not within the jurisdiction of the Board. *See Ex Parte Nancy C. Frye*, 94 USPQ2d 1072, 1078 (BPAI 2010) ("The

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Examiner's objections to the drawings and refusal to enter an amendment are reviewable by petition under 37 C.F.R. § 1.181 and are thus not within the jurisdiction of the Board.”).²

THE DOUBLE PATENTING REJECTION

The Examiner provisionally rejected claims 1-31 on the ground of nonstatutory obviousness-type double patenting in view of Appellants' copending '583 Application and other references. Ans. 3-7. This *provisional*, nonstatutory obviousness-type double patenting rejection is not yet ripe for the Board's review. Therefore, we do not reach the Examiner's provisional double patenting rejections to claims 1-31.

THE OBVIOUSNESS REJECTION OVER WEISS, THE OFFICIAL NOTICE, AND COHEN

The Examiner acknowledges that Weiss fails to disclose that if the slider bar is moved in one direction to indicate a low level of interest, then the particular candidate is moved to an inactive state where a relationship between two of the end users does not continue, as required by claim 1. The Examiner relies upon the combination of

² We note that shortly after the Examiner mailed the Examiner's Answer setting forth this objection to the Specification, the Director of the United States Patent and Trademark Office issued a notice stating that, if the broadest reasonable interpretation of a claim drawn to a computer readable medium cover signals *per se*, the claim must be rejected under 35 U.S.C. § 101 as covering non-statutory subject matter. *See Subject Matter Eligibility of Computer Readable Media*, 1351 Off. Gaz. Pat. Office 212 (Feb. 23, 2010).

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Weiss with the teachings of the Official Notice taken and Cohen, in concluding that the claim would have been obvious. Ans. 8.

Appellants argue that Weiss fails to teach or suggest indicating a low level of interest for a particular candidate. App. Br. 13-14.

Furthermore, Appellants argue that the Official Notice and Cohen are insufficient for teaching or suggesting an apparatus for indicating a low level of interest for a particular candidate and for moving the candidate to an inactive state, such that the relationship between the two end users does not continue. App. Br. 15-17.

ISSUE

Under § 103, has the Examiner erred in rejecting claim 1 by finding that the cited references collectively would have taught or suggested an apparatus for indicating a low level of interest for a particular candidate, then the candidate is moved to an inactive state, and the relationship between the two end users does not continue?

ANALYSIS

On this record, we see no error in the Examiner's obviousness rejection of claim 1. The Examiner finds that Weiss discloses that "the user may be provided a slider bar, a drop-down menu ... that allows the user to indicate an overall rating for a candidate." Ans. 7 (citing Weiss, ¶ [0055]). Furthermore, the Examiner finds that Weiss teaches the claimed limitation of indicating a level of interest in another end user by disclosing that the user may be provided with a slider bar that enables rating of the candidate with an overall subjective compatibility value. Ans. 7-8 (citing Weiss, ¶ [0055]).

Appellants argue that Weiss fails to provide a "graphical illustration depicting a level of interest." App. Br. 14 (emphasis

omitted). Appellants' argument is contrary to the disclosure of Weiss relied upon by the Examiner. *See* Ans. 7-8 (citing Weiss, ¶ [0055]). For example, Weiss discloses that "the user may be provided a slider bar that enables rating of the candidate with an overall subjective compatibility value, such as 'excellent,' 'good,' 'fair,' and so forth." Weiss, ¶ [0055]. Thus, Weiss teaches a graphical illustration of a slider bar indicating a level of interest as excellent, good, or fair. *Id.*

Appellants additionally argue that the feedback compatibility disclosed in Weiss is not equivalent to Appellants' claimed "level of interest" because compatibility feedback for a candidate could be "good," while the overall interest is low. App. Br. 14. We are not persuaded of error by Appellants' arguments because the portions of Weiss relied upon disclose that "the user may be provided a slider bar ... that allows the user to indicate an *overall rating for a candidate.*" Weiss, ¶ [0055] (emphasis added). We see no error in the Examiner's conclusion that Weiss' disclosure of an "overall rating for a candidate" teaches or suggests the claimed "level of interest" in one or more of the other end users. *See* Ans. 7-8.

Appellants argue that the Examiner takes Official Notice of three elements in claim 1, namely "[1] if the slider bar is moved in one direction, indicating a low level of interest for a particular candidate, [2] then the particular candidate is moved to an inactive state [3] where a relationship between two of the end users does not continue." App. Br. 15. (quoting claim 1) (emphasis omitted). Contrary to the Appellants' arguments, the Examiner does not take Official Notice for all three claim elements, but only takes Official Notice for the first element regarding a slider bar moving in one

direction to indicate a low level of interest for a particular candidate.

Ans. 8. The Examiner states that “official notice is taken here that it is a common practice at the time of invention to move the slide bar to one direction to indicate a poor preference.” Ans. 8. We are not persuaded of error in the Examiner taking Official Notice of common practice regarding this claim limitation. In fact, Weiss teaches a slider bar that can be moved to indicate an overall rating for a candidate; thus, we do not find error in the Examiner’s finding that it was common practice at the time of the invention to move a slider bar to indicate a poor preference. Weiss, ¶ [0055].

As to the Cohen reference, Appellants argue that they are “at a loss, as to how to even begin to attack this passage because it contains nothing relevant to the three identified missing elements.” App. Br. 16. Other than this general assertion, Appellants fail to provide any arguments as to why the Examiner’s findings with respect to Cohen are deficient.

Nevertheless, we note that the Cohen reference is directed to the same field as the Appellants’ invention, an online dating service. *See* Cohen, ¶ [0001]. The Examiner cites Cohen’s disclosure of “prompting the users to indicate whether they had interest in each other” and adding a user to a two-way match list such that the users know whether to continue a relationship with another user. Ans. 8 (Cohen, ¶ [0050-51]). Based on this disclosure, the Examiner finds that Cohen implies that if there is no mutual interest, the user will not be added to the two-way match list and will be moved to an inactive state such that a relationship does not continue, similar to the requirements of claim 1. Ans. 8. In view of the cited disclosures

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from Cohen, we are not persuaded of error in the Examiner's conclusion that Weiss, in view of the Official Notice, and further in view of Cohen would render obvious the following limitations of claim 1: "if the slider bar is moved in one direction, indicating a low level of interest for a particular candidate, then the particular candidate is moved to an inactive state where a relationship between two of the end users does not continue."

Appellants further argue that even if all of the limitations of the claims were disclosed in the cited prior art references, the claims cannot be obvious because the Examiner failed to provide "some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." App. Br. 17-18 (quoting *KSR Int'l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1741 (2007)). Despite Appellants' arguments, the Examiner provides a sufficiently articulated reasoning for each combination. With respect to the Official Notice, the Examiner finds that one of skill in the art would have been motivated to provide a slider bar to indicate poor performance to improve the user friendliness of the application. Ans. 8. With respect to Cohen, the Examiner finds that Cohen is properly combinable because it would provide a mechanism for two compatible individuals to talk in real-time, and decide whether there was "chemistry" between them and whether they should invest more time in continuing the relationship. Ans. 8-9 (Cohen, ¶ [0050-51]). We are not persuaded that these combinations lack some rational underpinning to support the legal conclusion of obviousness.

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We sustain the Examiner's rejection of claim 1 and claims 3, 5-11, 13, 15-19, 21, 23-26, 28, and 30-31, not separately argued with particularity.

ORDER

We find the Board does not have jurisdiction to review the Examiner's objection to the Specification. We do not reach the Examiner's *provisional* double patenting rejections to claims 1-31. The Examiner's decision rejecting claims 1, 3, 5-11, 13, 15-19, 21, 23-26, 28, and 30-31 under § 103 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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