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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
11/237,583	09/27/2005	Chris S. Terrill	076533-0110	7356
78855	7590	03/04/2013	EXAMINER	
Patent Capital Group 2816 Lago Vista Lane Rockwall, TX 75032			FAN, HUA	
			ART UNIT	PAPER NUMBER
			2456	
			NOTIFICATION DATE	DELIVERY MODE
			03/04/2013	ELECTRONIC

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dellagonzales@patcapgroup.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CHRIS S. TERRILL and TODD W. KIRBY

Appeal 2010-009257
Application 11/237,583
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 1-9, 11-17, 19-24, and 26-30. 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 emphasized:

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, and wherein the central web site is operable to *populate a queue of a first end user with a profile of a second end user* such that the first end user can indicate a level of interest in the second end user that triggers the first end user to be placed in an active state for the second end user, wherein *the second end user does not have an opportunity to evaluate the first end user until the first end user indicates a level of interest in the second end user that meets a predetermined threshold.*

THE OBJECTIONS AND REJECTIONS

(1) The Examiner objected to the Specification as failing to provide proper antecedent basis for the claimed subject matter. Ans. 4.¹

(2) The Examiner provisionally rejected claims 1, 2, 5-7, 11, 12, 15, 19, 20, 23, 26, and 27 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 2, 5-7, 11, 12, 15, 19, 20, 23, 26, and 27 of copending U.S. Patent

¹ Throughout this opinion, we refer to (1) the Appeal Brief (App. Br.) filed Feb. 1, 2010, (2) the Examiner's Answer (Ans.) mailed Apr. 15, 2010, and (3) the Reply Brief (Reply Br.) filed Jun. 15, 2010.

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Application No. 11/237,419 (hereinafter “‘419 Application”) in view of Weiss (US 2006/0059147 A1; published Mar. 16, 2006; filed Jul. 28, 2005), Cohen (US 2003/0191673 A1; published Oct. 9, 2003), and the Official Notice. Ans. 5-7. The Examiner provisionally rejected claims 3, 4, 8, 13, 14, 16, 21, 22, 24, and 28-30 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 11, 19, and 26 of copending ‘419 Application in view of Weiss, Cohen, and Official Notice. Ans. 7. The Examiner provisionally rejected claims 9 and 17 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 11, 19, and 26 of the copending ‘419 Application in view of Weiss, Cohen and Official Notice, as applied to claim 1, and further in view of Bertram (US 2002/0178057 A1; published Nov. 28, 2002). Ans. 8-9. 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 U.S. Patent application Nos. 11/237,584, 11/237,585, 11/237,490, 11/237,491, 11/237,582, and 11/237,418, in view of copending ‘419 Application, and further in view of Weiss, Cohen, Official Notice, and Bertram. Ans. 9.

(3) The Examiner rejected claims 1-8, 11-16, 19-24, and 26-30 under 35 U.S.C. § 103(a) as being unpatentable over Weiss, Cohen, and Official Notice. Ans. 9-17.

(4) The Examiner rejected claims 9 and 17 under 35 U.S.C. § 103(a) as being unpatentable over Weiss, Cohen, Official Notice, and Bertram. Ans. 9-17.

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). Appellants' Appeal Brief does not raise an argument against the objection to the Specification.² Regardless, 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 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.").³

THE DOUBLE PATENTING REJECTION

The Examiner rejected claims 1-31 on the ground of nonstatutory obviousness-type double patenting in view of Appellants' copending '419 Application and other references. Ans. 4-9. Appellants' Appeal Brief does not raise an argument against the

² Although Appellants' Notice of Appeal takes an appeal from the entire Final Office Action, Appellants state in their Appeal Brief that they request the "Board to focus exclusively on this issue §103 rejection." App. Br. 9.

³ 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 covers 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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double patenting rejections. Regardless, this *provisional* nonstatutory obviousness-type double patenting rejection is not yet ripe for the Board's review. Therefore, we do not reach here the Examiner's provisional double patenting rejections.

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

The Examiner acknowledges that Weiss fails to disclose triggering the first end user to be placed in an active state for the second end user, as required by claim 1. The Examiner relies upon the disclosure in Cohen regarding triggering the first user to be placed in an active state as teaching this claim limitation. Ans. 8.

Additionally, the Examiner acknowledges that Weiss and Cohen fail to disclose that the second end user does not have an opportunity to evaluate the first end user until the first end user indicates a level of interest in the second end user that meets a predetermined threshold. The Examiner takes Official Notice, however, that this was a known practice in concluding that claim 1 would have been obvious. Ans. 9.

Appellants argue that Weiss fails to teach or suggest indicating a level of interest for a particular candidate. App. Br. 10-11. Furthermore, Appellants argue that the Official Notice and Cohen are insufficient to teach or suggest that the second end user does not have the opportunity to evaluate the first end user until the first end user indicates a level of interest in the second end user that meets a predetermined threshold, as required by claim 1. App. Br. 12-13.

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 level of interest for a particular candidate and that the second end user does not have the opportunity to evaluate the first end user until the first end user indicates a level of interest in the second end user that meets a predetermined threshold?

ANALYSIS

On this record, we see no error in the Examiner's obviousness rejection of claim 1. The Examiner finds that Weiss discloses a system that may "prompt the user to rate or evaluate candidates on a candidate list." Ans. 10 (quoting Weiss, ¶ [0055]).

Appellants argue that Weiss's feedback compatibility does not teach Appellants' claimed "level of interest" because compatibility feedback for a candidate could be "good," while the overall interest is low. App. Br. 11. 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. 9-10.

Appellants argue that the cited prior art fails to teach that the second end user does not have an opportunity to evaluate the first end user until the first end user indicates a level of interest in the second

end user that meets a predetermined threshold App. Br. 12. The Examiner takes Official Notice that it was common practice for a website, such as a company's Human Resources ("HR") website, to be unable to evaluate a candidate for a position until that candidate has first indicated a level of interest in the company, such as submitting a resume indicating an interest in the company. Ans. 11. Thus, the Examiner finds that the company, the second end user, can only evaluate the candidate, the first end user, after the candidate indicates a level of interest in the company that meets a predetermined threshold. *Id.*

Appellants argue that the cited prior art fails to teach precluding the second end user from evaluating "when a first end user has not rated a second end user *highly enough*." App. Br. 12. Appellants' arguments, however, are not commensurate with the scope of the claim, as claim 1 does not require that the interest level is "high enough," but rather merely requires that "a level of interest in the second end user" meet "a predetermined threshold." App. Br. 16. The Examiner finds that a company's HR website, relied upon in the Official Notice, meets the predetermined threshold by defining two levels of interest, i.e., either interested or not interested. Ans. 11. Under the broadest reasonable interpretation, we do not find error in the Examiner's conclusion that the predetermined threshold could be either interested or not interested.

Appellants further argue that the other systems relied upon by the Examiner "explain a dual system in which end users are simultaneously rating one another: regardless of whether there is a negative response from the first end user." App. Br. 12. Contrary to

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Appellants' arguments, the HR website system, which the Examiner relied upon in support of the Official Notice, does not permit end users to simultaneously rate one another, but only allows the company to evaluate the candidate once an interest level has been shown by the candidate. *See* Ans. 11. Accordingly, we are not persuaded of error in the Official Notice taken by the Examiner.

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. 14 (quoting *KSR Int'l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1741 (2007)). Despite Appellants' arguments, we conclude that the Examiner provides a sufficiently articulated reasoning for each combination. With respect to Cohen, the Examiner finds that Cohen, which is also directed to online dating systems, is properly combinable because it would provide a mechanism for two compatible individuals to talk in real-time, decide whether there was "chemistry" between them and whether they should therefore invest in more time in getting to know one another further. Ans. 10 (Cohen, ¶ [0050-51]). With respect to the Official Notice, the Examiner finds that one of skill in the art would have been motivated to apply such a mechanism to the dating system in order to efficiently match two users, by guaranteeing that the second user received the list of first users who have already indicated a certain level of interest in the second user. Ans. 11. We conclude that these combinations have some rational underpinning supporting the legal conclusion of obviousness.

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We sustain the Examiner's rejection of claim 1, and claims 2-9, 11-17, 19-24, and 26-30, 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. The Examiner's decision rejecting claims 1-9, 11-17, 19-24, and 26-30 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

rwk