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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ROBERTS S. SOLOMON

Appeal 2011-001195
Application 10/940,979
Technology Center 3600

Before, JOSEPH A. FISCHETTI, BIBHU R. MOHANTY and MEREDITH
C. PETRAVICK, *Administrative Patent Judges*.

FISCHETTI, *Administrative Patent Judge*.

DECISION ON APPEAL

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STATEMENT OF THE CASE

Appellant seeks our review under 35 U.S.C. § 134 of the Examiner's final rejection of claims 1, 2, 4-6, 9, 10, 12-16 and 18-21. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

SUMMARY OF DECISION

We AFFIRM-IN-PART.

THE INVENTION

Appellant claims a method and system for selling goods and/or services having negotiable prices over a distributed computer network such as the Internet. (Specification 1:9-11).

Claims 1 and 21, reproduced below, are representative of the subject matter on appeal.

1. An interactive, computer-implemented system for conducting a negotiating session between a customer and a simulated merchant for purchases of goods and/or services on a web site distributed over the internet, the system comprising:

storage media on which is stored merchant behavioral data representative of behavioral attributes of the simulated merchant, data relating to the on-going negotiating session between the customer and the simulated merchant, data relating to prior negotiating sessions conducted by the simulated merchant, data relating to prior negotiating sessions conducted by the customer, and product data including information relating to goods and/or services sold by the simulated merchant;

a customer interface accessible with a web browser adapted to enable the customer to input data relating to the purchase of particular goods and/or services, wherein the data input by the customer is stored within said storage media; and

a computer in communication with said storage media and said customer interface and programmed with an algorithm including commands which when executed by the computer cause the computer to:

A. receive data input by the customer and store the data input by the customer in said storage media, wherein the stored customer data includes an offer for the purchase of goods and/or services sold by the simulated merchant;

B. generate merchant responses including the simulated merchant's emotional state and a counteroffer or an acceptance of the customer's offer,

(1) wherein the algorithm is adapted to determine the simulated merchant's emotional state based on data retrieved from the storage media, including (a) an emotion vector derived from a matrix of merchant responses and customer responses, (b) the results of the merchant's last negotiating session, and (c) the results of the customer's previous negotiating sessions and

(2) wherein the algorithm is adapted to determine the counter-offer based on data retrieved from the storage media, including the divergence of the customer's offer from a predetermined expected value, (b) the response time of the customer, and (c) the traffic volume on the web site;

C. transmit the merchant response to the customer;

D. receive further data input by the customer, including data responding to the merchant response and store the further data input by the customer in said storage media; and

E. repeating steps A through D to provide an interactive negotiation between the human customer and the simulated merchant for the purchase of the particular goods and/or services until an agreement is achieved between the human customer and the simulated merchant or the negotiation is terminated;

whereby the occurrence of a sale for said particular goods and/or services at a specific price is determined as a function of customer replies to merchant responses to customer inputted data.

21. A computer-implemented method for conducting on an internet web site a negotiating session between a customer and a simulated merchant for the purchase of goods and/or services, the method comprising the steps of:

- A. storing merchant behavioral data representative of behavioral attributes of the simulated merchant, data relating to the on-going negotiating session between the customer and the simulated merchant, and data relating to prior negotiating sessions conducted by the simulated merchant;
 - B. storing product data including information relating to goods and/or services sold by the simulated merchant;
 - C. receiving data input by the human customer in connection with the negotiating session, including an offer for the purchase of goods and/or services sold by the simulated merchant;
 - D. storing data input by the customer;
 - E. providing an algorithm for generating merchant responses based on the merchant behavioral data, the product data, the data input by the customer, the data relating to the ongoing negotiating session between the customer and the simulated merchant, and the data relating to prior negotiating sessions conducted by the simulated merchant;
 - F. using the algorithm to generate a merchant response based on the merchant behavioral data, the product data, the data input by the customer, the data relating to the ongoing negotiating session between the customer and the simulated merchant, and the data relating to prior negotiating sessions conducted by the simulated merchant;
 - G. transmitting the merchant response to the customer;
 - H. receiving further data input by the customer, including data responding to the merchant response;
- repeating steps D through H to provide an interactive negotiation for the purchase of the particular goods and/or services between the human customer and the simulated merchant until an agreement is achieved between the human customer and the simulated merchant or the negotiation is terminated.

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THE REJECTION

The Examiner relies upon the following as evidence of unpatentability:

Brush	US 5,884,029	Mar. 16, 1999
Sloo	US 5,895,450	Apr. 20, 1999

Reynolds, "Internet News, (Internet-Based Intelligent Buying/Selling Information Services)", International Journal of Retail Distribution Management, 378(2), 9/1997.

Dworman et al., "On Automated Discovery of Models Using Genetic Programming in Game-Theoretic Contexts", Proceedings of the 28th Annual Hawaii International Convergence on System Sciences, pp. 428-438, 1/1995.

The following rejections are before us for review:

The Examiner rejected claims 1, 2, 4-6, 9, 10, 12-16, and 18-21 under 35 U.S.C. § 112(1).

The Examiner rejected claims 1, 2, 4-6, 9, 10, 12-16, and 18-21 under 35 U.S.C. § 112(2) as being indefinite.

The Examiner rejected claims 1, 2, 4-6, 9, 10, 12-16, and 18-21 under 35 U.S.C. § 103(a) as being obvious over Brush, Reynolds and Sloo.

The Examiner rejected claims 1, 2, 4-6, 9, 10, 12-16, and 18-21 under 35 U.S.C. § 103(a) as being obvious over Brush, Dworman and Sloo.

FINDINGS OF FACT

1. We adopt the Examiner's findings for claim 21 as set forth on pages 9-13 of the Answer.

ANALYSIS

35 U.S.C. 112, First Paragraph Rejection

The Examiner rejected claims 1-6, 9-10, 12-16, 18-21 as failing to comply with the written description requirement because "there is insufficient disclosure within the specification to allow one skill in the art to determine how these vectors are created." (Answer 4).

However, Appellant cites to the Specification at p. 8, line 27 - p. 9, line 26, wherein a vector value calculation is described in detail (Appeal Br. 7-8), which we find reasonably conveys to one skilled in the relevant art that Appellant, at the time the application was filed, had possession of the claimed invention.

Concerning the Examiner's further finding of insufficient disclosure for determining an emotional state (Answer 7), we find Appellant's explanation with citations to the Specification persuasive of a sufficient disclosure. That is, while we agree with the Examiner that an emotional state is a subjective term, we nevertheless find that the Specification and the claims use sufficient enough attributes ((Figs. 3, 4, p. 8, ln. 27 - p. 9, ln 19),

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(b) the results of the merchant's last negotiating session (p. 9, Ins. 24-25), and (c) the results of the customer's previous negotiating sessions (p. 9, Ins. 25-26)) to define in relative parameters of what Appellant means by an emotional state. A patent applicant is entitled to be his or her own lexicographer of patent claim terms in *ex parte* prosecution. *In re Corr*, 347 F.2d 578, 580, 146 USPQ 69, 70 (CCPA 1965).

Accordingly, we will not sustain the rejection under 35 U.S.C. 112, First Paragraph.

35 U.S.C. 112, Second Paragraph Rejection.

We will not sustain the rejection of the claims under 35 U.S.C. 112, Second Paragraph for the reasons given by the Appellants on pages 8-9 of the Brief.

The 35 U.S.C. § 103(a) Rejection.

Each of independent claims 1 and 9 require that an *algorithm is adapted to determine the simulated merchant's emotional state based on data retrieved from the storage media, including (a) an emotion vector derived from a matrix of merchant responses and customer responses, (b) the results of the merchant's last negotiating session, and (c) the results of the customer's previous negotiating sessions and*

wherein the algorithm is adapted to determine the counter-offer based on data retrieved from the storage media, including the divergence of the customer's offer from a predetermined expected value, (b) the response time of the customer, and (c) the traffic volume on the web site....

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The Examiner rejected the independent claims using two alternative combinations, Brush/Reynolds/Sloo and/or Brush/Dworman/Sloo, to meet the claim limitations. (Answer 10-13). In support of a finding of obviousness for the required emotion vector in the prior art, the Examiner found that “**Brush** discloses that the emotions/behavior of the merchant are based on the interactions with a customer and possible merchant reactions in response to that interaction.” (Answer 17).

However, we do not find that the discussion in Brush of customer/merchant interaction to identify emotion characteristics amounts to the required vector based on a matrix of merchant responses to portray a merchant’s emotional state which is the mechanism by which the characteristic is calculated. Also, there are no findings in the combinations proposed by the Examiner as to how Brush either alone or in combination discloses or makes obvious, *determining the counter-offer based on data retrieved from the storage media, including the divergence of the customer's offer from a predetermined expected value, (b) the response time of the customer, and (c) the traffic volume on the web site.*

Accordingly, we will not sustain the rejections of independent claims 1 and 9.

Since claims 2, 4-6, 10, 12-16, and 18-20 depend from one of claims 1 and 9, and since we cannot sustain the rejection of claims 1 and 9, the rejection of the dependent claims likewise cannot be sustained.

Claim 21 does not require the vector limitation set forth above. Instead, claim 21 merely sets forth a list of five different types of data which are inputted into algorithm to obtain merchant responses as follows:

- a. merchant behavioral data,
- b. data relating to the on-going negotiating session between the customer and the simulated merchant,
- c. data relating to prior negotiating sessions conducted by the simulated merchant;
- d. product data relating to prior negotiating sessions conducted by the simulated merchant;
- e. customer input data input by the human customer in connection with the negotiating session, including an offer for the purchase of goods and/or services sold by the simulated merchant.

The Examiner has made finding as to each of these data types as disclosed in the proposed combinations made under 35 U.S.C. § 103(a). (Answer 9-13).

In response, the Appellant merely argues with respect to claim 21 that “Examiner failed to identify any alleged teaching or suggestion in the cited art of determining a merchant's emotional state based on all five parameters.” (Appeal Br. 14).

We disagree with Appellant, first because claim 21 does not require determining a merchant's *emotional state* and, second, merely pointing out differences between the prior art and the claim does not establish

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nonobviousness. *Dann v. Johnston*, 425 U.S. 219, 230 (CCPA 1976). The issue is “whether the difference between the prior art and the subject matter in question ‘is a differen[ce] sufficient to render the claimed subject matter unobvious to one skilled in the applicable art.’” *Dann*, 425 U.S. at 228 (citation omitted).

Furthermore, absent a showing that the content of the data has functional significance as required by the claim, we find that the only difference in content being that the data is derived from different sources which the Examiner has shown with the prior art (Answer, 9-13), and hence find the claimed data to be nonfunctional descriptive material. Nonfunctional descriptive material cannot render nonobvious an invention that would have otherwise been obvious. *In re Ngai*, 367 F.3d 1336, 1339 (Fed. Cir. 2004). According we will sustain the rejection of independent claim 21

CONCLUSIONS OF LAW

We conclude the Examiner did err in rejecting claims 1, 2, 4-6, 9, 10, 12-16, and 18-21 under 35 U.S.C. § 112(1).

We conclude the Examiner did err in rejecting claims 1, 2, 4-6, 9, 10, 12-16, and 18-21 under 35 U.S.C. § 112(2) as being indefinite.

We conclude the Examiner did not err in rejecting claim 21 under 35 U.S.C. § 103(a).

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We conclude the Examiner did err in rejecting claims 1, 2, 4-6, 9, 10, 12-16, and 18-20 under 35 U.S.C. § 103(a).

DECISION

AFFIRMED-IN-PART.

MP