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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte SHARON M. GUTEN, PATRICIA A. TAYLOR, and
SONIA A. ALEMAGNO

Appeal 2014-001064¹
Application 12/701,890²
Technology Center 3600

Before HUBERT C. LORIN, BRADLEY B. BAYAT, and
TARA L. HUTCHINGS, *Administrative Patent Judges*.

HUTCHINGS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner’s final rejection of claims 1–18. We have jurisdiction under 35 U.S.C. § 6(b).

¹ Our decision references Appellants’ Appeal Brief (“App. Br.,” filed Apr. 5, 2013) and Reply Brief (“Reply Br.,” filed Oct. 24, 2013), and the Examiner’s Answer (“Ans.,” mailed Sept. 26, 2013), Advisory Action (“Adv. Act.,” mailed Nov. 20, 2012), and Final Office Action (“Final Act.,” mailed Aug. 6, 2012).

² Appellants identify GOJO Industries, Inc. as the real party in interest. App. Br. 1.

We REVERSE and enter a NEW GROUND OF REJECTION pursuant to our authority under 37 C.F.R. § 41.50(b).

CLAIMED INVENTION

Appellants' claimed invention "relates to the establishment and maintenance of good hand hygiene practices in institutional environments, by facilitating individuals' improvement in such practices." Spec. 1:3–10.

Claim 1, reproduced below, is the sole independent claim and representative of the subject matter on appeal:

1. An online method for improving individual hand hygiene practices within an institution, comprising:
 - individually interconnecting a participant's internet communication device with a program manager, said program manager having a processing unit and software for interactive communication with the participant, the participant being an employee of said institution;
 - uniquely logging said participant into said interactive communication;
 - sequentially engaging in a plurality of sessions of self-assessment by said participant of hand hygiene practices and development of hand hygiene self-improvement plans based thereon, said sessions being controlled by said program manager;
 - and
 - effecting communications between said program manager and said participant between said sessions to implement said hand hygiene self-improvement plans.

REJECTIONS

Claims 1–16 are rejected under 35 U.S.C. § 103(a) as unpatentable over Bennett (US 2008/0177836 A1, pub. July 24, 2008), and Institute for Healthcare Improvement, *How-to Guide: Improving Hand Hygiene, A Guide*

for Improving Practices among Health Care Workers, available at www.IHI.org (2007) (hereinafter “Reference U”).

Claims 17 and 18 are rejected under 35 U.S.C. § 103(a) as unpatentable over Bennett, Reference U, and Pessó (US 2005/0282126 A1, pub. Dec. 22, 2005).

ANALYSIS

Independent claim 1 and dependent claims 2–16

We are persuaded by Appellants’ argument that the Examiner erred in rejecting claim 1 under 35 U.S.C. § 103(a) because Bennett does not teach or suggest “sequentially engaging in a plurality of sessions of self-assessment by said participant of hand hygiene practices and development of hand hygiene self-improvement plans based thereon,” as recited in claim 1. App. Br. 4–8.

Bennett describes a system and method for managing health and wellness programs of an organization. Bennett ¶ 24. The functional modules include an administrative module, a primary contact module, and a participant module. *Id.* ¶ 26, Fig. 3. Figure 5 of Bennett shows the functionality of the primary contact module. *See* Bennett, Fig. 5, ¶¶ 28–40. As shown in Figure 5, the primary contact module allows a primary contact, such as an administrator of the organization’s health and wellness program, to send a link to a survey to one or more employees, seeking perceptions and attitudes of one or more of the health and productivity categories. *See id.* ¶¶ 29–31. The survey results are aggregated and assessed, and one or more health and wellness programs are designed and delivered to the organization based upon the survey results. *Id.* ¶¶ 31–33; Fig. 5.

Bennett’s primary contact module also provides e-learning to the primary contact. *Id.* ¶ 40, Fig. 5. If the primary contact terminates a session before completion, the test may be resumed where the primary contact left off upon resumption. *Id.* ¶ 40. The participant module allows a user to complete a survey describing his or her view of the health and productivity climate of the organization. *Id.* ¶ 41. E-learning functions in Bennett are only described with respect to the primary contact module. *See id.*

The Examiner relies on Bennett at Figure 5 and paragraphs 33 and 40 as disclosing the argued limitation. Final Act. 4. Specifically, the Examiner finds that “[p]aragraph [33] discloses that designed web-based health promotions [are] delivered to and assessed by the employees” via a survey link and login information. Adv. Act. 2. And the Examiner reasons that “[t]he surveys sent to the employees may be [an] E-Learning online test used to survey the users’ knowledge (paragraph 40)” and “[t]he various tests may be stored and re-accessed later, and the user’s progress may be tracked over multiple sessions.” *Id.*

However, we agree with Appellants that e-learning in Bennett is described with reference to the primary contact module, not the participant module, as required by claim 1. Moreover, even assuming *arguendo* that Bennett suggests that the participant has access to an e-learning module, Bennett does not teach or suggest that the primary contact would develop the health and wellness plan based on participant engagement in e-learning. Accordingly, the relied upon paragraphs fail to adequately support the Examiner’s finding that Bennett discloses “sequentially engaging in a plurality of sessions of self-assessment by said participant . . . development

of hand hygiene self-improvement plans based thereon, said sessions being controlled by said program manager,” as recited in claim 1.

In view of the foregoing, we do not sustain the Examiner’s rejection of independent claim 1 under 35 U.S.C. § 103(a). For the same reasons, we also do not sustain the Examiner’s rejection of dependent claims 2–16.

Dependent claims 17 and 18

Claims 17 and 18 ultimately depend from independent claim 1. The Examiner’s rejection of claims 17 and 18 based on *Pesso*, in combination with *Bennett* and *Reference U*, does not cure the deficiency in the Examiner’s rejection of claim 1. Therefore, we do not sustain the Examiner’s rejection of claims 17 and 18 under 35 U.S.C. § 103(a).

New Ground of Rejection

We enter the following new ground of rejection pursuant to our authority under 37 C.F.R. § 41.50(b).

Non-Statutory Subject Matter

Alice Corp. Pty. Ltd. v. CLS Bank Int’l, 134 S. Ct. 2347 (2014) identifies a two-step framework for determining whether claimed subject matter is judicially-excepted from patent eligibility under §101. According to *Alice* step one, “[w]e must first determine whether the claims at issue are directed to a patent-ineligible concept,” such as an abstract idea. *Alice Corp.*, 134 S. Ct. at 2355. Taking claim 1 as representative of the claims on appeal, the claimed subject matter is directed to self-improvement. Self-improvement is a fundamental building block of human nature, akin to a law of nature. As such, it is directed to an abstract idea.

Step two is a search for an “inventive concept” — an element or combination of elements sufficient to ensure that the claim amounts to

“significantly more” than the abstract idea itself. *Id.* We see nothing in the subject matter claimed that transforms the abstract idea of self-improvement into an inventive concept. Given that the correlation between health and hygiene is notoriously well-known, narrowing the objective for self-improvement to “individual hand hygiene practices within an institution” (claim 1) is not patentably transformative. And the information-gathering system that is employed, as claimed, is well-known. Any internet-capable general-purpose computer available at the time the application was filed would have satisfied the information-gathering system as claimed; that is, one comprising: (a) an “internet communication device with a program manager, said program manager having a processing unit and software for interactive communication”; (b) a capability of “unique logging”; (c) the program manager controlling sequential sessions whereby information is gathered; and (d) a capability of communicating information based on said gathered information via the program manager. We see nothing in the Specification that would suggest otherwise. The discussion therein describes giving a series of online presentations (e.g., quizzes) via a general purpose computer. *See* Spec. 9–14.

Therefore, we enter a new ground of rejection of claims 1–18 under 35 U.S.C. § 101.

DECISION

The Examiner’s rejections of claims 1–18 under 35 U.S.C. § 103(a) are reversed.

We enter a NEW GROUND OF REJECTION of claims 1–18 under 35 U.S.C. § 101, pursuant to our authority under 37 C.F.R. § 41.50(b).

37 C.F.R. § 41.50(b) provides that “[a] new ground of rejection . . . shall not be considered final for judicial review.” 37 C.F.R. § 41.50(b) also provides that the Appellants, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the Examiner.

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same record.

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).

REVERSED; 37 C.F.R. § 41.50(b)