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TARGET BRANDS, INC. 1000 NICOLLET MALL, TPS-3165 MINNEAPOLIS, MN 55403			WHITAKER, ANDREW B	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte GREGORY M. NATIONS, CHAD R. GOURLEY,
SARAH JELLISON, SARAH PETERSON, STEPHEN HOPF

Appeal 2014-009360
Application 13/339,164
Technology Center 3600

Before HUBERT C. LORIN, BIBHU R. MOHANTY, and
BRADLEY B. BAYAT, *Administrative Patent Judges*.

BAYAT, *Administrative Patent Judge*.

DECISION ON APPEAL¹

STATEMENT OF THE CASE

Appellants² appeal under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 1, 2, 4–12, and 15–20. We have jurisdiction under 35 U.S.C. § 6(b).

¹ Our decision references Appellants' Appeal Brief ("Appeal Br.," filed Mar. 20, 2014) and Reply Brief ("Reply Br.," filed Aug. 20, 2014), the Examiner's Answer ("Ans.," mailed July 2, 2014), and the Final Office Action ("Final Act.," mailed Sept. 6, 2013).

² Appellants identify Target Brands, Inc. as the real party in interest. App. Br. 3.

SUMMARY OF DECISION

We REVERSE and enter a NEW GROUND OF REJECTION.

THE INVENTION

Claim 1, reproduced below, is illustrative of the subject matter on appeal.

1. A computer storage medium having computer executable instructions that when executed by a processor cause the processor to perform steps comprising:

determining that a user who has requested that a list of reviews be displayed is the same user who had previously submitted a review in the list of reviews; and

concurrently displaying the review submitted by the user and at least one additional review from another user so as to visually highlight and distinguish the review submitted by the user relative to the at least one additional review in response to the determination that the user who submitted the review is the same user who requested that the list of reviews be displayed.

THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Hunt	US 8,271,338 B2	Sept. 18, 2012
Beroukhim	US 2012/0246584 A1	Sept. 27, 2012

Yelp. [www.yelp.com]. 1 Jan. 2006 _Internet Archive_
[<http://web.archive.org/web/20060101020515/www.yelp.com/fmd>]
(hereinafter “Yelp”).

The following rejections are before us for review:

1. Claims 1, 2, 4, 6–12, 15–18, and 20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hunt and Yelp.
2. Claims 5 and 19 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hunt, Yelp, and Beroukhim.

ANALYSIS

Independent claim 1 requires, *inter alia*, “concurrently displaying the review submitted by the user and at least one additional review from another user so as to visually highlight and distinguish the review submitted by the user relative to the at least one additional review . . .” (Appeal Br. 13, Claims App.).

The Examiner finds the claimed “concurrently displaying” two reviews disclosed in Figure 8 of Hunt (Ans. 2–3). According to the Examiner, “Fig. 8 shows an array of users’ ratings of items (i.e. visually distinguishing), the array including columns of items and rows of users” (Ans. 11 (citing Hunt, col. 10, ll. 56–67)).

Appellants dispute this finding (Appeal Br. 8–11; Reply Br. 1–3). We are persuaded by Appellants’ arguments.

A rejection based on § 103 clearly must rest on a factual basis. The Examiner has the initial duty of supplying the factual basis for the rejection and may not resort to speculation, unfounded assumptions, or hindsight reconstruction to supply deficiencies in its factual basis. We have reviewed the cited portions of Hunt, and we see no disclosure that array 800 of Figure 8 is displayed. On the contrary, array 800 contains “ratings and prediction

data 912 for at least reference users 814 and active users of recommendation system 904” (Hunt, col. 18, ll. 37–38) and “may be maintained in a volatile memory, such as random access memory (RAM), to reduce access times” (Hunt, col. 17, ll. 57–65). Although Hunt discloses that “it is desirable to display data that indicates an estimate of how the particular user would rate the particular item” (Hunt, col. 18, ll. 55–60), we see no disclosure of displaying array 800.

Thus, we fail to see, and the Examiner does not adequately explain, how Hunt discloses “concurrently displaying” two reviews as required by claim 1.

Accordingly, we do not sustain the rejection of independent claim 1 as obvious over Hunt and Yelp. Independent claims 9 and 17 similarly require concurrently displaying two reviews and the Examiner’s findings regarding this limitation are also deficient as in claim 1. For the same reasons, we do not sustain the rejections of dependent claims 2, 4–8, 10–12, 15, 16, and 18–20. *Cf. In re Fritch*, 972 F.2d 1260, 1266 (Fed. Cir. 1992) (“dependent claims are nonobvious if the independent claims from which they depend are nonobvious”).

NEW GROUND OF REJECTION

Claims 1, 2, 4–12, and 15–20 are rejected under 35 U.S.C. § 101 as being directed to 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. *Id.* at 2355.

Taking independent claims 1, 9, and 17 as representative of the claims on appeal, the claimed subject matter is directed to a method of organizing and displaying information. Organizing and displaying information is a method of organizing human activity and/or fundamental economic practice. As such, it is an abstract idea. *See American Needle, Inc. v. Zazzle Inc.*, No. 2016-1550, 2016 WL 6647774 (mem) (Fed. Cir. Nov. 10, 2016) (affirming district court holding that “providing a visual aide to purchasing over the internet” is an abstract idea).

Step two of the *Alice* framework is “a search for an ‘inventive concept’ — i.e., an element or combination of elements that is ‘sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.’” *Alice*, 134 S. Ct. at 2355 (quoting *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 132 S. Ct. 1289).

In that regard, we see nothing in the subject matter claimed that transforms the abstract idea of organizing and displaying information into an inventive concept.

The computer storage medium of claim 1 includes instructions for performing two steps of identifying a user (“determining . . .”), and concurrently displaying the user’s review so as to visually highlight and distinguish it from other reviews. Claim 9 is directed to a system that

performs similar steps. Claim 17 is directed to a method of performing similar steps.

All of the claim limitations are well-understood, routine, conventional activities previously known to the industry. The determining step is a known information gathering operation for identifying a user and thus adds little to patentably transform the abstract idea of organizing and displaying information. Providing a web server and client that display and highlight information are also well-known, conventional practices. Accordingly, the recited claim limitations, both individually and as an ordered combination, fail to transform the nature of the claims into a patent-eligible application.

For the foregoing reasons, we find that claim 1 covers subject matter that is judicially-excepted from patent eligibility under § 101. The other independent claims – system claim 9 and method claim 17 parallel claim 1 – similarly cover claimed subject matter that is judicially-excepted from patent eligibility under § 101. The dependent claims describe various information displaying schemes which do little to patentably transform the abstract idea.

Therefore, we enter a new ground of rejection of claims 1, 2, 4–12, and 15–20 under 35 U.S.C. § 101.

DECISION

The Examiner's rejections under 35 U.S.C. § 103(a) are reversed.

Claims 1, 2, 4–12, and 15–20 are newly rejected.

NEW GROUND

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b). 37 C.F.R. § 41.50(b) provides “[a] new ground of rejection pursuant to this paragraph 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).

REVERSED; 37 C.F.R. § 41.50(b)