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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MAURITIUS A.R. SCHMIDTLER, JAN W. AMTRUP,
STEPHEN MICHAEL THOMPSON, and ANTHONY SARAH

Appeal 2015-007039
Application 13/655,267
Technology Center 2100

Before MICHAEL J. STRAUSS, CATHERINE SHIANG, and
JOHN F. HORVATH, *Administrative Patent Judges*.

STRAUSS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from a rejection of claims
1–21. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

THE INVENTION

The claims are directed to organizing data sets. Spec., Title. Claim 1, reproduced below with a disputed limitation emphasized in *italics*, is representative of the claimed subject matter:

1. A method for detecting limits to the quality in a dynamic organization process, comprising:

receiving user input affirming, negating, or modifying organization of a plurality of data elements during or after an organization process;

determining a quality of the organization based on the user input;

determining a stability in decisions made during the organization of the plurality of data elements;

monitoring the quality and the stability;

determining that the organization has reached a limit concerning at least one of the quality and stability of the organization by evaluating the at least one of the quality and stability of the organization over a period of time or number of cycles; and

outputting an indication of the determination to at least one of a user, a system and another process.

REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Zhang	US 5,832,182	Nov. 3, 1998
Shimogori	US 2006/0080299 A1	Apr. 13, 2006

REJECTION

The Examiner rejected claims 1–21 under 35 U.S.C. §103(a) as being unpatentable over Shimogori and Zhang. Final Act. 3–8.^{1,2}

APPELLANTS' CONTENTIONS

1. “The Rejection of Claim 1 Fails to Allege and Establish the Third Element of *Prima Facie* Obviousness, as the Record is Devoid of Any Theory Why a Skilled Artisan Would Reasonably Expect the Proposed Combination of the Art to Succeed.” App. Br. 7–9.
2. “Since the Rejection of Claim 1 Does Not Explain How Combining Shimogori and Zhang Would Enable a Skilled Artisan to Determine Useful Patterns In Resulting Clusters, No Skilled Artisan Would Reasonably Expect to Achieve that Benefit.” App. Br. 9–12.
3. “The Rejection of Claim 1 Fails the First Element of *Prima Facie* Obviousness Because the Art of Record Neither Teaches nor Suggests All the Features of Appellants' Claims.” App. Br. 12–18.

¹ The rejection of claim 12 under 35 U.S.C. § 101 has been withdrawn. Advisory Action mailed October 2, 2014.

² Although the Examiner does not separately address independent claims 12 and 13 in the Final Office Action, because these claims stand rejected along with independent claim 1 under 35 U.S.C. §103(a) as being unpatentable over Shimogori and Zhang (Final Act. 1 and 3) and because the limitations recited in independent Beauregard claim 12 and apparatus claim 13 parallel those recited in method claim 1, for purposes of this appeal we treat claims 12 and 13 as having been rejected for the reasons set forth in connection with corresponding method claim 1.

ANALYSIS

We have reviewed the Examiner's rejections in light of Appellants' arguments the Examiner has erred. We disagree with Appellants' conclusions. We adopt as our own (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken (Final Act. 3–8) and (2) the reasons set forth by the Examiner in the Examiner's Answer in response to Appellants' Appeal Brief (Ans. 2–6) and concur with the conclusions reached by the Examiner. We highlight the following for emphasis.

In connection with contention 1, Appellants argue the rejection is improper because the Examiner has failed to articulate a reason why the skilled artisan would reasonably expect the proposed combination to result in success. App. Br. 8. We disagree. Establishing *prima facie* obviousness requires showing that one of ordinary skill in the art would have had a reason or suggestion to modify or combine the prior art and *either* predictability *or* a reasonable expectation of success. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). Here, because the relevant field of endeavor is predictable, the Examiner was not required to make a specific finding regarding a reasonable expectation of success. Furthermore, the “determination of obviousness ‘does not require absolute predictability of success [A]ll that is required is a reasonable expectation of success.’” *Brown & Williamson Tobacco Corp. v. Phillip Morris Inc.*, 229 F.3d 1120, 1125 (Fed. Cir. 2000) (quoting *In re O'Farrell*, 853 F.2d 894, 903–904 (Fed. Cir. 1988)). Appellants do not present persuasive argument or objective evidence to demonstrate that one with ordinary skill in the art would not have had a reasonable expectation of success in combining the teachings of

Shimogori and Zhang. Accordingly, contention 1 is not persuasive of Examiner error.

In connection with contention 2, Appellants argue the Examiner’s rationale for combining Shimogori and Zhang is deficient because it does not include an “explicit analysis persuasively demonstrating why a skilled artisan would be reasonably motivated to attempt the proposed combination and/or modification of the art of record.” App. Br. 11. We find this argument unpersuasive. The Examiner has provided a reason for combining the references, i.e., to achieve, as disclosed by Zhang, “clustering of data from large databases [functions] to determine useful patterns therein.” Final Act. 5; *see also* Zhang, col. 1, ll. 10–14. Appellants do not present persuasive argument or objective evidence to demonstrate that one with ordinary skill in the art would not have combined the teachings of Shimogori and Zhang. Instead, Appellants merely provide attorney argument challenging whether one skilled in the art would have understood “what distinguishes ‘useful’ from ‘not useful’” with respect to datasets. App. Br. 11–12. We find such attorney arguments and conclusory statements, which are unsupported by factual evidence, to be entitled to little probative value. *In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997); *In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984). Attorney argument is not evidence. *In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974). Nor can such argument take the place of evidence lacking in the record. *Meitzner v. Mindick*, 549 F.2d 775, 782 (CCPA 1977).

Furthermore, we observe that “[a]s long as some motivation or suggestion to combine the references is provided by the prior art taken as a whole, the law does not require that the references be combined for the

reasons contemplated by the inventor” (*In re Beattie*, 974 F.2d 1309, 1312 (Fed. Cir. 1992)) and all the utilities or benefits of the claimed invention need not be explicitly disclosed by the prior art references to render the claim unpatentable under section 103 (*see In re Dillon*, 919 F.2d 688, 692, 696 (Fed. Cir. 1990) (en banc), *cert. denied*, 500 U.S. 904 (1991)). *See also In re Kemps*, 97 F.3d 1427, 1430 (Fed. Cir. 1996) (“the motivation in the prior art to combine the references does not have to be identical to that of the applicant to establish obviousness”).

Contrary to Appellants’ contention 2, we find the Examiner has provided articulated reasoning with rational underpinnings sufficient to justify the legal conclusion of obviousness. Final Act. 4–5; *see also In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006). Therefore, Appellants’ assertion the references were improperly combined is not persuasive of error and accordingly, the Examiner has properly relied upon the combination of Shimogori and Zhang in formulating the disputed rejections under 35 U.S.C. § 103(a).

In connection with contention 3, Appellants argue the prior art fails to teach or suggest determining a quality of the organization based on user input affirming, negating, or modifying organization of a plurality of data elements. App. Br. 12–18. According to Appellants

[T]he broadest reasonable interpretation of “determining a quality of the organization” as recited in claim 1 requires that the “quality” include some measure describing performance [of] the dynamic organization process, which may include any reasonable measure of performance that would be understood by one having ordinary skill in the art upon reading Appellant’s descriptions.

App. Br. 15. Appellants identify a number of *possible* metrics disclosed in the Specification for measuring the performance of the organization process, but nonetheless argue that claim 1 does not “requir[e] any of those specific metrics.” *Id.* at 14–15.

The Examiner responds by finding

[T]he classification correction [according to Shimogori], if needed, is being done based on the user input. The user operation on the classification is being done to determine the correctness of the property items. It is also understood that the “correctness” or “correction instruction”, as thought [sic., taught] by Shimogori, can be analogous to the “quality”. And also as shown in Shimogori the correction is done based on the user operation by the input device to add/delete the property item or change the property item name. As it is being interpreted from the claim [1] limitation, “determining the quality of an organization based on the user input” is disclosed by the Shimogory reference.

Ans. 5.

We are not persuaded the Examiner’s interpretation is improper. We decline to adopt Appellants’ interpretation that determining the disputed quality of the organization limitation requires calculating some measure describing performance of the dynamic organization process. Such an interpretation would be based on non-limiting examples disclosed in the Specification (see, e.g., Appeal Br. 15³) and adopting such a limited interpretation would improperly import those limitations into the claims. *E-Pass Techs., Inc. v. 3Com Corp.*, 343 F.3d 1364, 1369 (Fed. Cir. 2003) (claims must be interpreted “in view of the specification” without importing limitations from the

³ “Appellant neither requests nor consents to reading claim 1 as requiring any of those specific metrics [disclosed in the Specification].” App. Br. 15.

specification into the claims unnecessarily.) Although Appellants argue the Specification discloses determining the organizational quality *requires* some measure describing performance of the dynamic organization process, the Specification's disclosure is *permissive* rather than required: "In the context of the present description, the quality of the organization *may* include any measure of performance of the dynamic organization process." Spec. ¶ 69 (emphasis added). Accordingly, we find, under a broad but reasonable standard, the Examiner's interpretation of determining the disputed quality of organization limitation is consistent with the Specification. Therefore, we further agree with the Examiner in finding Shimogori's correctness or correction instruction teaches or suggests determining the disputed quality of organization based on user input as required by claim 1. Appellants do not persuasively argue or explain why Shimigori's acceptance of the data organization does not disclose determining the organization is of a high quality, and Shimigori's correction of the data organization does not disclose determining the organization is of a poor quality. Furthermore, we agree with the Examiner in finding the determination is based on the user input. *See* Ans. 5–6.

For the reasons discussed *supra*, we are unpersuaded of Examiner error. Accordingly, we sustain the rejection of independent claim 1 and, for the same reasons, the rejection of independent claims 12 and 13 under 35 U.S.C. §103(a) as being unpatentable over Shimogori and Zhang, together with the rejection of dependent claims 2–11 and 14–21 which are not argued separately.

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DECISION

We affirm the Examiner's decision to reject claims 1–21.

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