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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MATTHEW G. DYOR,
ROYCE A. LEVIEN, RICHARD T. LORD,
ROBERT W. LORD, MARK A. MALMUD,
XUEDONG HUANG, and MARC E. DAVIS

Appeal 2016–003649[1]
Application 13/601,910
Technology Center 3600

Before: ANTON W. FETTING, KENNETH G. SCHOPFER, and ROBERT J. SILVERMAN, *Administrative Patent Judges.*

FETTING, *Administrative Patent Judge.*

DECISION ON APPEAL

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[1] Appellants identify Elhwa, LLC, as the real party in interest.

STATEMENT OF THE CASE[2]

Matthew G. Dyor, Royce A. Levien, Richard T. Lord, Robert W. Lord, Mark A. Malmud, Xuedong Huang, and Marc E. Davis (Appellants) seek review under 35 U.S.C. § 134 of the Examiner's Final rejection of claims 1, 2, 5, 6, 9–13, 15–17, 19, 21–23, 26, 28, 32–36, 45–47, 51–55, 57, 60, 66, 69, 70, 90, 101, 104, 108, 116, 120, 128, 129, 391, and 392, the only claims pending in the application on appeal. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b).

The Appellants invented a way of automatically presenting commercial opportunities such as advertising based upon gestured input. Specification para. 1.

An understanding of the invention can be derived from a reading of exemplary claim 1, which is reproduced below (bracketed matter and some paragraphing added).

> 1. A method in a computing system
>
> for presenting opportunities for commercialization in conjunction with browsing and/or searching for information,
>
> the method comprising: under control of the computing system having a memory, a computer processor, a presentation device, and an input device capable of providing gesture input on the presentation device:
>
> [1] presenting via the presentation device associated with the computing system

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[2] Our decision will make reference to the Appellants' Appeal Brief filed July 13, 2015 (hereinafter "Br.") and the Examiner's Answer mailed October 23, 2015, (hereinafter "Ans."), and Final Action mailed March 11, 2015, (hereinafter "Final Act.").

one or more instances of electronic content containing information relating to a first topic in which a user has indicated an interest,

the information relating to the first topic presented as a result of a computer implemented search indicating that

the user seeks knowledge about the first topic, intends to buy something, and/or seeks additional information about the first topic;

[2] receiving, from the input device capable of providing gesture input,

an indication of a user inputted gesture that corresponds to an indicated portion of the presented electronic content,

the indicated portion of electronic content identifying a second topic related to the first topic, an object related to the first topic, and/or an action related to the first topic,

the user inputted gesture formed by a user drawing the gesture on a display of the presentation device to indicate the portion of the electronic content, the gesture approximating a circle shape, an oval shape, a closed path, or a polygon;

[3] dynamically determining, by the computer processor,

sponsor supplied content associated with an opportunity for commercialization that corresponds to at least one of the identified first topic, second topic, object, and/or action

by using a statistical model to determine a likelihood of at least one of:

a location where the user is likely to navigate to or a next topic, object, or action the user is likely to explore,

wherein the dynamically determining the sponsor supplied content comprises:

determining which content to present and one or more occasions for presenting the content;

and

charging a sponsor

based upon a likelihood the determined sponsor supplied content associated with the opportunity for commercialization will be participated in by the user

and

based upon a determined occasion of the one or more occasions;

and

[4] presenting, via the computer processor,

the determined sponsor supplied content associated with the opportunity for commercialization

in conjunction with the presented first topic and the identified second topic, object, and/or action,

therein presenting and providing an opportunity for commercialization that relates to the first topic to which the user has indicated interest in obtaining information in conjunction with the corresponding first topic and second topic, object, and/or action.

The Examiner relies upon the following prior art:

O'Kelley	US 2006/0122879 A1	June 8, 2006
Hinckley	US 2008/0250012 A1	Oct. 9, 2008
Khosravy	US 2009/0319181 A1	Dec. 24, 2009
Hudson	US 2012/0044179 A1	Feb. 23, 2012
Huang	US 2012/0197857 A1	Aug. 2, 2012

Claims 1, 2, 5, 6, 9–13, 15–17, 19, 21–23, 26, 28, 32–36, 45–47, 51–55, 57, 60, 66, 69, 70, 90, 101, 104, 108, 116, 120, 128, 129, 391, and 392 stand rejected under 35 U.S.C. § 101 as directed to non–statutory subject matter.

Claims 1, 2, 5, 6, 9–13, 15–17, 19, 21–23, 26, 28, 32–36, 45–47, 51–55, 57, 60, 66, 69, 70, 90, 101, 104, 108, 116, 120, 128, 129, 391, and 392 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Huang, Hinckley, and O'Kelley.

Claims 1, 2, 5, 6, 9, 11–13, 15–17, 19, 21–23, 26, 28, 32–36, 45–47, 51–55, 57, 60, 66, 69, 70, 90, 101, 104, 108, 116, 120, 128, 129, 391, and 392 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Hudson, Hinckley, and O'Kelley.

Claims 10, 90, and 120 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Hudson, Hinckley, O'Kelley, and Khosravy.

Claims 1, 2, 5, 6, 9–13, 15–17, 19, 21–23, 26, 28, 32–36, 45–47, 51–55, 57, 60, 66, 69, 70, 90, 101, 104, 108, 116, 120, 128, 129, 391, and 392 stand rejected under the judicially created doctrine of obviousness type double patenting as claiming the patentably indistinguishable subject matter as another U.S. Patent.

ISSUES

The issues of eligible subject matter turn primarily on whether the claims recite more than abstract conceptual advice of what a computer is to provide without implementation details.

The issues of obviousness turn primarily on whether an opportunity for commercialization is sufficiently narrow to distinguish data content from data in the art.

FACTS PERTINENT TO THE ISSUES

The following enumerated Findings of Fact (FF) are believed to be supported by a preponderance of the evidence.

Facts Related to Claim Construction

01. The disclosure contains no lexicographic definition of "gesture" or "drawing."

02. The ordinary meaning of "gesture" is a motion of the limbs or body made to express or help express thought or to emphasize speech.[3]

03. The ordinary meaning of "drawing" as a verb in the context of a gesture is to make a likeness of on a surface, using mostly lines.[4]

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[3] American Heritage Dictionary, 2017 last viewed April 5, 2018. https://www.ahdictionary.com/word/search.html?q=gesture

[4] American Heritage Dictionary, 2017 last viewed April 5, 2018 https://www.ahdictionary.com/word/search.html?q=draw

Facts Related to the Prior Art

O'Kelley

04. O'Kelley is directed to electronic advertising. O'Kelley para. 3.

05. O'Kelley describes algorithms for pricing an ad and charging for it. O'Kelley paras. 37–40.

Hinckley

06. Hinckley is directed to active note taking by coupling pen-and-ink interfaces with an in situ (e.g., situated in the original, natural, or existing place or position, and the like) search facility that flows directly from content in a digital "notebook" containing one or more of ink strokes, passages of text, bitmaps and/or digital photos, other in situ searches, and hyperlinks to documents on the local store, remote shares, or the internet. Hinckley para. 5.

07. Embedding search within users' task contexts enables them to locate content without switching to "search applications," that could derail users from the creative flow of active note taking, particularly on a tablet where screen real estate is limited, text entry is slow, and keyboard shortcuts can be unavailable. In situ search also naturally affords several other key design properties, such as for example, leveraging pre-existing ink to initiate searches thereby reducing the cognitive barrier between creating ink on the page and creating queries based on that ink (e.g., users do not waste time or have to break flow by transcribing terms to a separate query box, rather they can recycle the effort of writing notes by triggering queries from already existing ink on the page);

promoting queries as first class objects commingled with ink notes (e.g., users are allowed to indicate that a search needs to be performed, but to defer opening the search results until later, when time and attention permit), such that the resulting queries, represented by an embeddable graphical object (hereinafter also interchangeably referred to as a "breadcrumb") that can be manipulated (e.g., copied, pasted, or rearranged, etc.) just like any of the surrounding inked notes on the page; interleaving inking, searching, and gathering so that users can freely move back and forth between ink notes and search results thereby permitting users to jot notes, trigger a search, browse search results, make new margin notes, start additional searches for side-by-side comparison, or defer an ongoing search in favor of some other activity; and tightly coupling queries with application content by allowing users to incorporate individual query results into their notes (e.g., the user, through the mechanism of the breadcrumb, can drag search results directly into his or her notes for future reference or to create ad hoc arrangements of useful documents, or can pull selected parts of a document into his or her notes by taking a snapshot of it). Hinckley para. 23.

08. Artificial intelligence based systems (e.g., explicitly and/or implicitly trained classifiers) can be employed in connection with performing inference and/or probabilistic determinations and/or statistical-based determinations as in accordance with one or more aspects of the claimed subject matter as described hereinafter. The terms "inference," "infer," and variations in form thereof refer

> generally to the process of reasoning about or inferring states of the system, environment, and/or user from a set of observations as captured via events and/or data. Inference can be employed to identify a specific context or action, or can generate a probability distribution over states, for example. The inference can be probabilistic—that is, the computation of a probability distribution over states of interest based on a consideration of data and events. Inference can also refer to techniques employed for composing higher-level events from a set of events and/or data. Such inference results in the construction of new events or actions from a set of observed events and/or stored event data, whether or not the events are correlated in close temporal proximity, and whether the events and data come from one or several event and data sources. Various classification schemes and/or systems (e.g., support vector machines, neural networks, expert systems, Bayesian belief networks, fuzzy logic, data fusion engines . . .) can be employed in connection with performing automatic and/or inferred action in connection with the claimed subject matter. Hinckley para. 58.

Huang

09. Huang is directed to performing a search based on a search gesture. Huang para. 2.

10. Huang's user may perform a search on all or a portion of the displayed content simply by making a search gesture. The client device detects the search gesture, and initiates a search in response

to completion of the search gesture. The search gesture may define a region of content, and the client device formulates a search query based on the region of content defined by the search gesture. The search query may be formulated based on subject matter from the region of content and/or context information indicating a context in which the subject matter is presented. The search gesture may be the motion of a cursor controlled by a mouse or other user input device. The search gesture may include a generally circular gesture. Huang para. 3.

11. Huang's content analysis module may incorporate context information related to the displayed content, a location of the client device such as GPS data, the application and/or one or more historical actions and/or sessions of the user, and formulate the search query based on this additional information. The content analysis module may determine that based on recent email correspondence, the user is planning a trip, and may infer that the instant search is related to planning the trip. Additionally or alternatively, the content analysis module may determine that based on past email correspondences on a subject/topic and/or with another user, the user is planning a trip with another user, and may infer that the instant search is related to planning the trip. Thereupon, the content analysis module may formulate the search query based upon the region of content and/or context information related to the region of content such as information in the past email correspondences, in view of the determined intent of the user to plan the trip. Thus, in the trip example, the content

analysis module may infer that if the region of content includes a location, the user may be planning a trip to that location and may formulate the search query accordingly. Furthermore, the content analysis module may further incorporate other context information such as GPS data of the client device, a website from which the content is being served, a calendar entry that the user has open with details about a trip, or the like, to formulate the search query. Referring back to the trip example, even though the gesture does not define content relating to a particular location, the content analysis module may still determine that the search relates to planning a trip based on the fact that the website serving the content is a travel web site, or a title of the article involves travel, for example. Huang para. 45.

12. Huang's search service may return one or more search results to the client device which may then present the one or more search results to the user. Additionally or alternatively, the search engine or the search service may interpret the search query and identify a task the user wants to complete (e.g., make a reservation, get directions, etc.). The search service may further interpret the search query and identify the task the user may want to complete based on context information related to the region of content. For example, the search engine or the search service may identify that the user looking for a location of a restaurant based on identifying the name of the restaurant in the search query and/or identifying the context information including a name of an application, e.g., a calendar application, from which the region of content is obtained.

> For another example, the client device may receive and/or provide recommendations and/or advertisements based on the identified task of the user. Huang para. 57.

Hudson

13. Hudson is directed to input mechanisms for user communications with a touch-sensitive device. Hudson para. 2.

14. A user may also be presented an option to redraw the second portion 814B of continuous gesture 810B. In one example, such an option may be provided with a "redraw" button presented via option list 818B. In other examples, a "redraw" option may be presented to a user via modification of a representation of a drawn/detected gesture 810B, such as causing the drawn gesture or the selected content to change in visual intensity or to flash, thereby indicating that recognizable content or functionality has not been identified by gesture processing engine 336, and enabling a user to redraw the gesture 810B or one of the first and second portions 812B, 814B of gesture 810B. Hudson para. 73.

ANALYSIS

Appellants mention the gesture limitation in arguing rejections as to each of eligible subject matter and obviousness. Thus, we begin by construing the limitation to determine its scope. Claim 1 is exemplary, and recites

> receiving, from the input device capable of providing gesture input, an indication of a user inputted gesture that corresponds to . . . the user inputted gesture formed by a user drawing the gesture on a display of the presentation

> device to indicate the portion of the electronic content, the gesture approximating a circle shape, an oval shape, a closed path, or a polygon.

The Specification does not lexicographically define gesture or drawing. The ordinary meaning of "gesture" is a motion of the limbs or body made to express or help express thought. The ordinary meaning of "drawing" as a verb in the context of a gesture is to make a likeness of on a surface, using mostly lines. FF 01–03. Thus, this limitation uses some input device that responds to motion of the limbs making some likeness of a shape such as a polygon. Conventional highlighting of text with a mouse to select text such as for copying is within this scope as the mouse or similar input is moved with the hand to make a likeness of a polygonal rectilinear shape defined by the highlighted selection. This technique dates back to the Xerox Palo Alto Research Center in the 1970's.[5]

Claims 1, 2, 5, 6, 9–13, 15–17, 19, 21–23, 26, 28, 32–36, 45–47, 51–55, 57, 60, 66, 69, 70, 90, 101, 104, 108, 116, 120, 128, 129, 391, and 392 rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter

The Supreme Court

> set forth a framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that

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[5] Tesler, *A Personal History of Modeless Text Editing and Cut/Copy-Paste, Interactions,* (last visited July-August 2012) http://worrydream.com/refs/Tesler%20-%20A%20Personal%20History%20of%20Modeless%20Text%20Editing%20and%20Cut-Copy-Paste.pdf

> claim patent-eligible applications of those concepts. First, [] determine whether the claims at issue are directed to one of those patent-ineligible concepts.[ ]If so, we then ask, "[w]hat else is there in the claims before us?[ ]To answer that question,[] consider the elements of each claim both individually and "as an ordered combination" to determine whether the additional elements "transform the nature of the claim" into a patent–eligible application. [The Court] described step two of this analysis as 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 Corp., Pty. Ltd. v CLS Bank Intl, 134 S. Ct. 2347, 2355 (2014) (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 72 (2012)).

The preamble to claim 1 recites that it is a method for presenting opportunities for commercialization in conjunction with browsing and/or searching for information. The steps in claim 1 result in presenting sponsor supplied content associated with an opportunity for commercialization. The Specification at paragraph 1 recites that the invention relates to presenting commercial opportunities such as advertising based upon gestured input. Thus, all this evidence shows that claim 1 is directed to presenting data representing opportunities, i.e. data search and retrieval.

Claims that focus on data collection, analysis, and display, and that do not recite any particular inventive technology for performing those functions, are directed to an abstract idea. *Elec. Power Grp., LLC v. Alstom S.A.,* 830 F.3d 1350, 1353–54 (Fed. Cir. 2016) (Holding that claims focused on "collecting information, analyzing it, and displaying certain results of the

collection and analysis" are in "a familiar class of claims 'directed to' a patent ineligible concept."); *see also In re TLI Commc'ns LLC Patent Litig.*, 823 F.3d 607, 611 (Fed. Cir. 2016); *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1093–94 (Fed. Cir. 2016). Claim 1, unlike the claims found non-abstract in prior cases, uses generic computer technology to perform data entry, analysis, and presentation and does not recite an improvement to a particular computer technology. *See, e.g.*, *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1314–15 (Fed. Cir. 2016) (Finding claims not abstract because they "focused on a specific asserted improvement in computer animation."). As such, claim 1 is directed to the abstract idea of entering, analyzing, and presenting data.

The remaining claims merely describe parameters for such analysis and presentation. We conclude that the claims at issue are directed to a patent-ineligible concept.

The introduction of a computer into the claims does not alter the analysis at Mayo step two:

> the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention. Stating an abstract idea "while adding the words 'apply it'" is not enough for patent eligibility. Nor is limiting the use of an abstract idea "'to a particular technological environment.'" Stating an abstract idea while adding the words "apply it with a computer" simply combines those two steps, with the same deficient result. Thus, if a patent's recitation of a computer amounts to a mere instruction to "implement[t]" an abstract idea "on . . . a computer," that addition cannot impart patent eligibility. This conclusion accords with the preemption concern that undergirds our §101 jurisprudence. Given the ubiquity of computers, wholly generic computer implementation is not generally the sort of "additional feature[e]" that provides any "practical assurance that the

> process is more than a drafting effort designed to monopolize the [abstract idea] itself."

Alice Corp. Pty. Ltd., 134 S. Ct. at 2358 (citations omitted).

"[T]he relevant question is whether the claims here do more than simply instruct the practitioner to implement the abstract idea[] on a generic computer." *Alice Corp. Pty. Ltd.,* 134 S. Ct. at 2359. They do not.

Taking the claim elements separately, the function performed by the computer at each step of the process is purely conventional. Using a computer to retrieve, analyze, and present data amounts to electronic data query and retrieval—one of the most basic functions of a computer. The limitation of receiving a user inputted gesture by drawing on the screen is not a technological limitation, but a recitation of conventional use of a genus of well-known input devices, and is no more than abstract conceptual advice to use such a device. All of these computer functions are well-understood, routine, conventional activities previously known to the industry. In short, each step does no more than require a generic computer to perform generic computer functions.

Considered as an ordered combination, the computer components of Appellants' method add nothing that is not already present when the steps are considered separately. Viewed as a whole, Appellants' method claims simply recite the concept of data search and retrieval as performed by a generic computer. To be sure, the claims recite doing so by advising one to have a user indicate some portion of presented data of interest and select and present some other content based on that, charging for the presentation along the way. But this is no more than abstract conceptual advice on the

parameters for such data search and retrieval and the generic computer processes necessary to process those parameters, and do not recite any particular implementation.

The method claims do not, for example, purport to improve the functioning of the computer itself. Nor do they effect an improvement in any other technology or technical field. The Specification spells out different generic equipment and parameters that might be applied using this concept and the particular steps such conventional processing would entail based on the concept of data search and retrieval under different scenarios. They do not describe any particular improvement in the manner a computer functions. Instead, the claims at issue amount to nothing significantly more than an instruction to apply the abstract idea of data search and retrieval using some unspecified, generic computer. Under our precedents, that is not enough to transform an abstract idea into a patent-eligible invention. *See Alice Corp. Pty. Ltd.* 134 S. Ct. at 2360.

As to the structural claims, they

> are no different from the method claims in substance. The method claims recite the abstract idea implemented on a generic computer; the system claims recite a handful of generic computer components configured to implement the same idea. This Court has long "warn[ed] . . . against" interpreting § 101 "in ways that make patent eligibility 'depend simply on the draftsman's art.'

Alice Corp. Pty. Ltd. 134 S.Ct at 2360.

We are not persuaded by Appellants' argument that Appellant's independent claims are not directed to an abstract idea. App. Br. 14–16. As

we find supra, these claims involving data collection, analysis, and display are directed to an abstract idea. *Id.; see also Elec. Power Grp.*, 830 F.3d at 1353–54.

We are not persuaded by Appellants' argument that Appellant's independent claims recite significantly more than any alleged abstract ideas. App. Br. 16–18. Appellants contend that

> many actions of the independent claims perform operations that are not abstract and mere conventional computer operations, taking advantage of the computer based search and computational technology: for example, presenting electronic content and receipting gestured input thereon, dynamically determining sponsor supplied content (related to the gestured input) using a statistical model, and presenting it in conjunction with the topics/objects/actions to which the user has indicated interest. These steps describe a computer implemented user interface that cannot be performed manually. Thus, the operations of claim clearly recite significantly more than an abstract idea.

Id. Appellants do not say why these actions are not abstract and so the contention is conclusory. As we find supra, the claims do not recite how the gesture input is implemented but only advises one to use such an input. The claims similarly do no more than advise one to use some statistical model. Appellants do not purport to have invented a particular statistical model or gesture input.

Appellants further contend that "computers cannot perform these operations 'out of the box,' without specific, specialized configuration and programming by one of skill in the art." *Id.* As the claim do not recite how such programming is implemented, this contention is unpersuasive.

> The patents claim systems including menus with particular features. They do not claim a particular way of programming or designing the software to create menus that have these features, but instead merely claim the resulting systems. Essentially, the claims are directed to certain functionality—here, the ability to generate menus with certain features. Alternatively, the claims are not directed to a specific improvement in the way computers operate.

Apple, Inc. v. Ameranth, Inc., 842 F.3d 1229, 1240 (2016).

Claims 1, 2, 5, 6, 9–13, 15–17, 19, 21–23, 26, 28, 32–36, 45–47, 51–55, 57, 60, 66, 69, 70, 90, 101, 104, 108, 116, 120, 128, 129, 391, and 392 rejected under 35 U.S.C. § 103(a) as unpatentable over Huang, Hinckley, and O'Kelley

Appellants' major problem with the art is that the independent claims do little more than accept some portion of text that is displayed and retrieve related text. The only somewhat specific techniques recited are selecting input with a device such as a mouse and using a statistical model to select output, each of which is notoriously known. Huang does this much including the use of gesture input and arguably using a statistical model, although the Examiner applies Hinkley for that. The Examiner also applies O'Kelley for charging for the service. The remainder of the limitations recites the nature of the input and output data, which is discernable only in the human mind, and accorded no patentable weight. *See In re Bernhart*, 417 F.2d 1395, 1399 (CCPA 1969).

We are not persuaded by Appellants' argument that Hinckley does not teach determining the content to present through use of a statistical model. App. Br. 21–24. As the Examiner finds,

> Huang teaches inferring (i.e. guessing or predicting information the user is likely interested in) a user's interest based on several factors (i.e. inputs) like GPS data, previous location data, different gestures, weights, and context within the gesture and then providing that inferred information to the user based on the several above factors. . . .
>
> Hinckley is directed towards providing search results based on a user initiated search through a gesture. Hinckley goes on to teach that artificial intelligence base systems can be used to determine inference of probabilistic determinations. This inference results in the construction of new events or actions from previous user data or a set of observed data from one or more data and event sources.

Ans. 72 (citations omitted). Such inferences are described as based upon statistical models, among other tools. FF 08. Appellants contend that the specific content is not dynamically determined "sponsor supplied content associated with an opportunity for commercialization that corresponds to at least one of the identified first topic, second topic, object, and/or action" or content determined "to present and different [one or more] occasions for presenting the content." App. Br. 23; *see also* Ans. 72. These limitations are broad enough to encompass the cited prior art.

For example, Huang performs a search that results in content related to the search text content. This is generally what any text search does. As to the content being associated with an opportunity for commercialization that corresponds to the search text, almost any search result is associated with an opportunity for commercialization, particularly when the result includes an ad as in Huang. Such an ad would also be sponsor-supplied. As to determining occasions to present the content, Huang determines occasions based on inferred tasks, among other bases.

We are not persuaded by Appellants' argument that the combination of Huang with Hinckley is motivated by nothing short of improper hindsight. App. Br. 24–25. The Examiner applies Hinckley primarily as evidence of the notoriety of using statistical models to select search results. As such, it is merely evidence of what one of ordinary skill already knew, and the ubiquity of the use of such models provides sufficient motivation. More than that, Hinckley is similar to Huang in using gesture inputs for search selections, and so provides more potential implementations for Huang' search results.

We are not persuaded by Appellants' argument that O'Kelley does not teach charging a sponsor based upon a likelihood and based upon a determined occasion of the one. App. Br. 25–28. Again, this is a very broad limitation. The limitation is "charging a sponsor based upon a likelihood the determined sponsor supplied content associated with the opportunity for commercialization will be participated in by the user and based upon a determined occasion of the one or more occasions." The limitation does not recite or narrow the implementation or manner of such basis. The pertinence of search results is directly related to a likelihood the determined sponsor supplied content associated with the opportunity for commercialization will be participated in by the user. This is because the likelihood of a user doing something with the results is based on the pertinence, and any activity by a user is an opportunity for commercialization. The opportunity is limited only by the creativity of the one looking for the opportunity.

We are not persuaded by Appellants' argument that the combination of O'Kelley to Huang and Hinckley is motivated by nothing short of improper hindsight. App. Br. 28–29. Appellants contend that neither Huang nor

Hinckley mention charging for advertising. But the Examiner applies O'Kelley for charging for this. Huang describes advertisements as being among its search results. So O'Kelley is only evidence of the notoriety of charging for such ads.

We are not persuaded by Appellants' argument that, as to claim 19, the art fails to describe determining the sponsor supplied content associated with an opportunity for commercialization in advance of receiving an indication of the gestured input. App. Br. 29–30. Appellants contend that the Examiner has assumed with impermissible hindsight that any opportunity to display results is by definition an opportunity for commercialization. *Id.*; *see also* Final Action 34–35. The Examiner finds that the keywords used for finding search results are both determined in advance and are such opportunities. We agree with the Examiner. By definition, keywords stored for use in searches are determined in advance of a search, and an opportunity is just that, an opportunity. There is too much commercialization of search platforms today to argue that one of ordinary skill would not see opportunity for commercialization of search results.

We are not persuaded by Appellants' argument that, as to claim 21, the art fails to describe determining the sponsor supplied content associated with an opportunity for commercialization by retrieving the content from a storage device associated with the computing system. App. Br. 30–31. Appellants again contend the lack of opportunity for commercialization of search results, which is equally unpersuasive here.

We are not persuaded by Appellants' argument that, as to claim 22, the art fails to describe dynamically determining the sponsor supplied content

associated with the opportunity for commercialization in near real-time after receiving the user inputted gesture. App. Br. 31–32. Appellants again contend the lack of opportunity for commercialization of search results, which is equally unpersuasive here.

We are not persuaded by Appellants' argument that, as to claim 23, the art fails to describe determining that the electronic content relates to a live event. App. Br. 32–33. The Examiner finds that what the content relates to is unworthy of patentable weight for being non-functional. We agree. *See Bernhart*, 417 F.2d at 1399, App. Br. 32–33. Appellants again contend the lack of opportunity for commercialization of search results, which is equally unpersuasive here.

We are not persuaded by Appellants' argument that, as to claim 28, the art fails to describe presenting the determined sponsor supplied content associated with the opportunity for commercialization in conjunction with identified first topic, second topic, object, and/or action with a time lag after the gestured input has been received. App. Br. 33–34. The Examiner finds

> Hudson goes on to teach that content like advertisements may not be provided after a user gesture for example if a user has to redraw a gesture (see paragraph 0073). The Examiner interprets this time (e.g. the redraw time) under broadest reasonable interpretation to include a time lag between the user gesture and providing content.

Ans. 103. We agree.

Claims 1, 2, 5, 6, 9–13, 15–17, 19, 21–23, 26, 28, 32–36, 45–47, 51–55, 57, 60, 66, 69, 70, 90, 101, 104, 108, 116, 120, 128, 129, 391, and 392 rejected

under 35 U.S.C. § 103(a) as unpatentable over Hudson, Hinckley, and O'Kelley

Appellants present the same arguments as in the first art rejection.

Claims 10, 90, and 120 rejected under 35 U.S.C. § 103(a) as unpatentable over Hudson, Hinckley, O'Kelley, and Khosravy

These claims are dependent on the claims in the first art rejection.

Claims 1, 2, 5, 6, 9–13, 15–17, 19, 21–23, 26, 28, 32–36, 45–47, 51–55, 57, 60, 66, 69, 70, 90, 101, 104, 108, 116, 120, 128, 129, 391, and 392 provisionally rejected under the judicially created doctrine of obviousness type double patenting as claiming the patentably indistinguishable subject matter as another U.S. Patent

This provisional rejection is uncontested.

CONCLUSIONS OF LAW

The rejection of claims 1, 2, 5, 6, 9–13, 15–17, 19, 21–23, 26, 28, 32–36, 45–47, 51–55, 57, 60, 66, 69, 70, 90, 101, 104, 108, 116, 120, 128, 129, 391, and 392 under 35 U.S.C. § 101 as directed to non–statutory subject matter is proper.

The rejection of claims 1, 2, 5, 6, 9–13, 15–17, 19, 21–23, 26, 28, 32–36, 45–47, 51–55, 57, 60, 66, 69, 70, 90, 101, 104, 108, 116, 120, 128, 129, 391, and 392 under 35 U.S.C. § 103(a) as unpatentable over Huang, Hinckley, and O'Kelley is proper.

The rejection of claims 1, 2, 5, 6, 9–13, 15–17, 19, 21–23, 26, 28, 32–36, 45–47, 51–55, 57, 60, 66, 69, 70, 90, 101, 104, 108, 116, 120, 128, 129, 391, and 392 under 35 U.S.C. § 103(a) as unpatentable over Hudson, Hinckley, and O'Kelley is proper.

The rejection of claims 10, 90, and 120 under 35 U.S.C. § 103(a) as unpatentable over Hudson, Hinckley, O'Kelley, and Khosravy is proper.

The provisional rejection of claims 1, 2, 5, 6, 9–13, 15–17, 19, 21–23, 26, 28, 32–36, 45–47, 51–55, 57, 60, 66, 69, 70, 90, 101, 104, 108, 116, 120, 128, 129, 391, and 392 under the judicially created doctrine of obviousness type double patenting as claiming the patentably indistinguishable subject matter as another U.S. Patent is uncontested.

DECISION

The rejection of claims 1, 2, 5, 6, 9–13, 15–17, 19, 21–23, 26, 28, 32–36, 45–47, 51–55, 57, 60, 66, 69, 70, 90, 101, 104, 108, 116, 120, 128, 129, 391, and 392 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). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2011).

AFFIRMED