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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ERIC COHEN-SOLAL and MICHAEL LEE

Appeal 2016-007350
Application 13/818,103¹
Technology Center 3600

Before NINA L. MEDLOCK, BRUCE T. WIEDER, and
ROBERT J. SILVERMAN, *Administrative Patent Judges*.

WIEDER, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the Examiner's rejection of claims 1–14, 16–18, and 20.² We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ According to Appellants, the real party in interest is Koninklijke Philips N.V. (Appeal Br. 2.)

² Claims 19 and 21 were cancelled in an Amendment filed November 24, 2015, which was entered by the Advisory Action mailed December 11, 2015.

CLAIMED SUBJECT MATTER

Appellants' claimed invention "relates to clinical informatics and more particularly to assigning cases to be evaluated to one or more case evaluators." (Spec. 1.)

Claims 1, 12, and 20 are the independent claims on appeal. Claim 1 is illustrative. It recites:

1. A method, comprising:
assigning, using a configured processor, cases to be evaluated by a plurality of case evaluators based on corresponding case profiles for the cases and a plurality of dynamic evaluator profiles for the plurality of evaluators, wherein a dynamic evaluator profile for each evaluator includes information mined from a set of case evaluation reports produced by each corresponding evaluator.

REJECTIONS

Claims 1–14, 16–18, and 20 are rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter.

Claim 9 is rejected under 35 U.S.C. § 112(b) as indefinite.³

Claims 1–4, 7, 8, 10–14, 16, 17, and 20 are rejected under 35 U.S.C. § 102(b) as anticipated by Nekrich (US 2008/0292152 A1, pub. Nov. 27, 2008).

Claims 5 and 9 are rejected under 35 U.S.C. § 103(a) as unpatentable over Nekrich and Jones (US 6,516,324 B1, iss. Feb. 4, 2003).

Claims 6 and 18 are rejected under 35 U.S.C. § 103(a) as unpatentable over Nekrich and Evertsz (US 2002/0194019 A1, pub. Dec. 19, 2002).

³ The rejection of claims 6 and 18 under 35 U.S.C. § 112(b) was withdrawn. (Answer 3.)

ANALYSIS

The § 101 rejection of claims 1–14, 16–18, and 20

“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.” 35 U.S.C. § 101. Section 101, however, “contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable.” *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2354 (2014) (quoting *Assoc. for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (2013)).

Alice applies a two-step framework, earlier set out in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012), “for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts.” *Alice*, 134 S. Ct. at 2355.

Under the two-step framework, it must first be determined if “the claims at issue are directed to a patent-ineligible concept.” *Id.* If the claims are determined to be directed to a patent-ineligible concept, then the second step of the framework is applied to determine if “the elements of the claim . . . contain[] an ‘inventive concept’ sufficient to ‘transform’ the claimed abstract idea into a patent-eligible application.” *Id.* at 2357 (citing *Mayo*, 566 U.S. at 72–73, 79).

With regard to step one of the *Alice* framework, the Examiner determines that the abstract idea in independent claims 1 and 12 is “assigning cases to be evaluated based on case profiles and evaluator profiles, the evaluator profiles including information mined from case

evaluation reports.” (Final Action 3–4, emphasis omitted.) The Examiner also determines that the abstract idea in claim 20 is “assigning cases to be evaluated based on case profiles and radiologist profiles, the radiologist profiles including information mined from case evaluation reports which include statistical information about cases corresponding to the radiologist.” (*Id.* at 4, emphasis omitted.)

Appellants argue that “the courts have declined to define abstract ideas, other than by example” and that “[t]he Office Action offers no comparison by example.” (Appeal Br. 7.) Moreover, Appellants argue, “[t]he case studies, the case reports, the mined information from the case reports, are not abstract ideas.” (*Id.*)

We are not persuaded of error. Under step one of the *Alice* framework, we “look at the ‘focus of the claimed advance over the prior art’ to determine if the claim’s ‘character as a whole’ is directed to excluded subject matter.” *Affinity Labs of Texas, LLC v. DIRECTV, LLC*, 838 F.3d 1253, 1257 (Fed. Cir. 2016) (quoting *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016)).

The Specification provides evidence as to what the claimed invention is directed. In this case, the Specification discloses that the invention “relates to clinical informatics and more particularly to assigning cases to be evaluated to one or more case evaluators.” (Spec. 1.) Claim 1 recites “assigning . . . cases to be evaluated by a plurality of case evaluators based on . . . case profiles . . . and . . . evaluator profiles.”

Although we and the Examiner describe, at different levels of abstraction, to what the claims are directed, it is recognized that “[a]n abstract idea can generally be described at different levels of abstraction.”

Apple, Inc. v. Ameranth, Inc., 842 F.3d 1229, 1240 (Fed. Cir. 2016). That need not and, in this case does not, “impact the patentability analysis.” *See id.* at 1241. Indeed, the Examiner’s inclusion of particular content, i.e., limiting claim 20 to radiology related content, in describing the abstract idea of claim 20 (Final Action 4), does not change our analysis. *See Elec. Power Grp.*, 830 F.3d at 1353 (“[W]e have treated collecting information, including when limited to particular content (which does not change its character as information), as within the realm of abstract ideas.”).

The Examiner analogizes to the abstract idea in *SmartGene, Inc. v. Advanced Biological Laboratories, SA*, 555 F. App’x 950 (Fed. Cir. 2014). (Answer 4–5.) *SmartGene* involved the abstract idea of generating advisory information for a therapeutic treatment regimen based on patient information and a knowledge base of expert rules for evaluating and selecting a treatment regimen. *SmartGene*, 555 F. App’x at 951–52. Like *SmartGene*, the claims here, involving assignment of cases based on case profiles and evaluator profiles, are claims to a process that can be performed entirely in the human mind. “[W]e have treated analyzing information by steps people go through in their minds, or by mathematical algorithms, without more, as essentially mental processes within the abstract-idea category.” *Elec. Power Grp.*, 830 F.3d at 1353. Additionally, “we have recognized that merely presenting the results of abstract processes of collecting and analyzing information, without more (such as identifying a particular tool for presentation), is abstract as an ancillary part of such collection and analysis.” *Id.* at 1354.

Appellants also argue that the claims are not directed to an abstract idea because they “do not ‘tie up’ the assignment of cases nor do they tie up

the mining of information.” (Appeal Br. 7.) We understand this to be an argument that the claims are patent-eligible because they do not preempt every application of the abstract idea. We do not find this argument persuasive of error.

Preemption is not a separate test.

To be clear, the proper focus is not preemption *per se*, for some measure of preemption is intrinsic in the statutory right granted with every patent to exclude competitors, for a limited time, from practicing the claimed invention. *See* 35 U.S.C. § 154. Rather, the animating concern is that claims should not be coextensive with a natural law, natural phenomenon, or abstract idea; a patent-eligible claim must include one or more substantive limitations that, in the words of the Supreme Court, add “significantly more” to the basic principle, with the result that the claim covers significantly *less*. *See Mayo* 132 S. Ct. at 1294 [566 U.S. at 72–73].

CLS Bank Int’l v. Alice Corp. Pty. Ltd., 717 F.3d 1269, 1281 (Fed. Cir. 2013) (Lourie, J., concurring), *aff’d*, 134 S. Ct. 2347 (2014). Moreover, “[w]here a patent’s claims are deemed only to disclose patent ineligible subject matter under the *Mayo* framework, as they are in this case, preemption concerns are fully addressed and made moot.” *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015). In other words, “preemption may signal patent ineligible subject matter, [but] the absence of complete preemption does not demonstrate patent eligibility.” *Id.*

In view of the above, we are not persuaded that the Examiner erred in determining that the claims are directed to an abstract idea.

Step two of the *Alice* framework has been described “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*, 134 S. Ct. at 2355 (citing *Mayo*, 566 U.S. at 72–73).

The Examiner determines that

[t]he claims do not include additional elements that are sufficient to amount to significantly more than the judicial exception because the additional elements . . . amount to no more than a recitation of . . . generic computer structure that serves to perform generic computer functions . . . and functions that are well-understood, routine, and conventional activities previously known to the pertinent industry (i.e., assigning, updating, generating, storing).

(Final Action 4–5, emphasis omitted.)

Appellants disagree and argue that “[a]ssigning cases based on actual experience is not a well-understood, routine or conventional activity previously known to the industry.” (Appeal Br. 8.)

We do not find this argument persuasive of error. Appellants appear to argue that the abstract idea itself was not well-understood, routine or conventional. But the inquiry at step two of *Alice* goes to whether the claim contains an “inventive concept.” *Alice*, 134 S. Ct. at 2357. That is, “[a] claim that recites an abstract idea must include ‘additional features’ to ensure ‘that the [claim] is more than a drafting effort designed to monopolize the [abstract idea].’” *Id.*, quoting *Mayo*, 566 U.S. at 77. The Examiner found that the functions that the processor performs, not the abstract idea, “are well-understood, routine, and conventional activities previously known to the pertinent industry (i.e., assigning, updating, generating, storing).” (Final Action 5, emphasis omitted.) *See also Berkheimer v. HP Inc.*, 881 F.3d 1360, 1368 (Fed. Cir. 2018). Appellants do

not persuasively argue that there is a dispute regarding whether operation of the claimed processor was well-understood, routine, or conventional. Indeed, the Specification discloses use of generic “processors, computers, workstations, or the like.” (Spec. 4.)

Regardless, Appellants seek to analogize the claimed invention to the claims in *Diamond v. Diehr*, 450 U.S. 175 (1981). Appellants argue that in *Diehr*, the claims were directed to patent-eligible subject matter because the claimed “improvement used software fed by actual temperatures measured inside the device feed to recalculate the [rubber] cure time.” (Appeal Br. 8.) Appellants argue that this is analogous to the present application “because the software replaces a predefined fixed static process that includes a general domain of expertise, availability, and preferences [0004] with a process, which receives information of the actual experience of an evaluator reading cases.” (*Id.* at 8–9.)

We disagree. The claims in *Diehr* were directed to “a process for curing synthetic rubber.” *Diehr*, 450 U.S. at 187. Unlike Appellants’ claims, the claimed steps in *Diehr* included “installing rubber in a press, closing the mold, constantly determining the temperature of the mold [at a location closely adjacent to the molding cavity], constantly recalculating . . . , and automatically opening the press at the proper time.” *Id.* In view of the above, we do not find Appellants’ argument persuasive of error.

In view of the above, we are not persuaded that the Examiner erred in rejecting claim 1 under § 101. Claims 2–14, 16–18, and 20 are not separately argued and fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The § 112(b) rejection of claim 9

Claim 9 recites: “The method of any of claim 1, further comprising: assigning a case to the corresponding evaluator based on a highest frequency of cases of a type previously worked on by the corresponding evaluator between the plurality of evaluators, and the type corresponds to the assigned case.”

The Examiner concludes that “[t]he claim is unclear and thus indefinite because the Examiner cannot tell what the claim is attempting to state.” (Final Action 11.) Appellants do not argue in response to this rejection. Therefore, we summarily affirm this rejection.

The § 102(b) rejection of claims 1–4, 7, 8, 10, and 11

“[A]n invention is anticipated if the same device, including all the claim limitations, is shown in a single prior art reference. Every element of the claimed invention must be literally present, arranged as in the claim.”

Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1236 (Fed. Cir. 1989).

If the prior art reference does not expressly set forth a particular element of the claim, that reference may still anticipate if that element is ‘inherent’ in its disclosure. To establish inherency, the extrinsic evidence “must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill.” *Continental Can Co. v. Monsanto Co.*, 948 F.2d 1264, 1268, 20 U.S.P.Q.2d 1746, 1749 (Fed. Cir. 1991). “Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.” *Id.* at 1269, 948 F.2d 1264, 20 U.S.P.Q.2d at 1749 (quoting *In re Oelrich*, 666 F.2d 578, 581, 212 U.S.P.Q. 323, 326 (C.C.P.A. 1981)).

In re Robertson, 169 F.3d 743, 745 (Fed. Cir. 1999).

Appellants argue that “Nekrich [sic] does not disclose, suggest, or imply profiles which include information mined from a set of case evaluation reports.” (Appeal Br. 10.)

Nekrich discloses systems and methods for processing radiology images including “means for selecting an image analyst by comparing the image information with the profile information” of analysts. (Nekrich ¶ 57.) Nekrich discloses that the profile information of each analyst includes “Peer reviewed evaluations,” “Real-time data of case turn-around time for specific examinations,” and “Case log” information. (*Id.* ¶ 54 and Table III.) In view of the above, we agree with the Examiner’s findings that:

The profile information includes “Quality assurance” information such as “Peer reviewed evaluations” and “Case log” as described in Table III and its accompanying paragraphs. This is interpreted as mined information. Evaluations are reports produced by radiologists [see Nekrich, Para. 0009], i.e., an evaluation of the image by a radiologist embodied in a report. This is what one skilled in the art would interpret as a report. Thus peer reviewed evaluations are information mined from a set of case evaluation reports produced by the radiologist (evaluator).

(Answer 11.)

Nonetheless, Appellants argue that

Nekrich does not disclose definitions of peer reviewed evaluations or quality assurance parameters An interpretation that the Peer review [sic] evaluations parameter is a flag that indicates that an analyst is board certified in the U.S. and is willing to double check or peer review the case is a reasonable interpretation consistent with the specification, and with one that those skilled in the art would reach. An interpretation that the peer review [sic] evaluations parameter is

mined from evaluation reports produced by an evaluation is not a broadest reasonable interpretation.

(Reply Br. 7.)

We are not persuaded of error. As an initial matter, we note that Appellants' argument is directed to "peer review evaluations." (*Id.*) But Table III recites "Peer reviewed evaluations." Thus, Appellants' proposed interpretation is for a term materially different from that disclosed in *Nekrich*. For example, the term "peer review evaluations" arguably could refer to a willingness to perform such evaluations in the future, while the term "peer reviewed evaluations" refers to evaluations that have already been performed. We also note that Table III of *Nekrich* includes under the heading of "Radiologist demographics" a separate entry for "Board certification." Also, Table III lists "Peer reviewed evaluations," i.e., a plurality of such evaluations. Appellants do not persuasively argue why one skilled in the art would understand this to refer to a singular flag indicating Board certification and a willingness to double check a case, as opposed to its plain meaning of "Peer reviewed evaluations."

Nor do Appellants persuasively argue why basing the assignment of cases on information from a radiologist's profile, including taking into consideration information from peer reviewed evaluations, is not reasonably construed as basing the assignment of cases on information including information mined from case evaluation reports. (*See Nekrich* ¶ 57.)

Appellants also argue that "*Nekrick* [sic] is silent from where or how any information is received." (Appeal Br. 10.) But claim 1 is also silent as to where or how "case evaluation reports" are received. (*See Claim 1.*) Claim 1 merely recites that case evaluation reports are "produced by each

corresponding evaluator,” i.e., that evaluation reports are produced by evaluators.

Appellants further argue that Nekrich discloses use of static information and that claim 1 recites “a plurality of dynamic evaluator profiles.” (Appeal Br. 10–11; *see also* Reply Br. 6.) But Appellants do not persuasively argue why the Examiner erred in finding “that both the ‘Peer reviewed evaluations’ and ‘Case log’ are dynamic (i.e, changing) variables.” (Answer 13.) Nor do Appellants persuasively argue why the Examiner erred in finding that “a person having ordinary skill in the art would interpret peer reviewed evaluations for quality assurance purposes to be an ongoing process.” (*Id.*)

In view of the above, we are not persuaded that the Examiner erred in rejecting claim 1 under § 102(b). Claims 2–4, 7, 8, 10, and 11 depend from claim 1 and are argued together with claim 1. Thus, for the reasons discussed, we do not find the above arguments of Appellants persuasive of error in the rejection of claims 2–4, 7, 8, 10, and 11.

The § 102(b) rejection of claim 3

Appellants present an additional, separate argument regarding claim 3.

Claim 3 recites: “The method of claim 1, further comprising: updating at least one case assignment in response to at least one of a change in the case profiles, or a change in a dynamic evaluator profile.”

Appellants argue that “Nekrich offers a radiologist a choice of two cases in an assignment. The choice is not an update in assignment, rather an initial assignment.” (Appeal Br. 12.)

The Examiner answers that “[c]ases are assigned to radiologists (evaluators) and that is all that the claim requires.” (Answer 14.) The Examiner further answers that “Nekrich teaches that a radiologist’s profile may be updated [Nekrich Para. 0056, 0057, 0083].” (*Id.* at 15.) Additionally, the Examiner answers that “Nekrich thereafter teaches that the queue (the assignment) can be changed according to this information [Nekrich, Para. 0057]. This is interpreted as updating an assignment based on the radiologist’s profile.” (*Id.*)

Nekrich discloses that “[t]he user interface preferably only displays cases for which the radiologist is qualified The user interface also may permit the radiologist to establish or change their preferences for the types of cases that they will receive, as described herein.” (Nekrich ¶ 83.) Specifically, Nekrich discloses that “the system is configured so that the radiologist still has access to the demographics of the remaining cases so that the radiologist may change their profile to broaden or narrow their selectivity.” (*Id.* ¶ 56.) In short, Nekrich discloses updating a radiologist’s profile. But, we are persuaded that the portions of Nekrich relied on by the Examiner do not expressly or inherently disclose “*updating* at least one case *assignment* in response to” a change in a case profile or a dynamic evaluator profile.

Therefore, we will reverse the rejection of claim 3 under § 102(b).

The § 102(b) rejection of claim 4

Appellants present an additional, separate argument regarding claim 4.

Claim 4 recites: “The method of claim 1, further comprising:
updating a dynamic evaluator profile for at least one evaluator in response to

a case evaluation report produced by the at least one evaluator becoming available for mining.”

The Examiner finds that Nekrich

teaches that the analyst profile information includes a Quality Assurance portion which includes peer reviewed evaluations (interpreted as information mined from a current set of case evaluation reports) of the analyst. This is interpreted to be continually updated based on evaluations completed by the analyst The Examiner notes that the Applicant has provided no timeframe with respect to the updating feature

(Final Action 14, citing Nekrich Table III and ¶¶ 53, 54.)

Appellants disagree and argue that “[t]he disclosures of Nekrich do not relate profile information to produced case evaluation reports.” (Appeal Br. 12.)

However, as discussed above, Table III specifically lists “Peer reviewed evaluations” as included in the profile information for the radiologists. Thus, Nekrich relates evaluator profile information to evaluations and the evaluator’s profile is updated with the updated “Peer reviewed evaluation.” In view of the above, we are not persuaded that the Examiner erred in rejecting claim 4 under § 102(b).

The § 102(b) rejection of claim 11

Appellants present an additional, separate argument regarding claim 11.

Claim 11 recites: “The method of claim 1, further comprising: generating an electronic schedule based on the case assignment, wherein the schedule is employed by the evaluators to evaluate the cases.”

The Examiner finds that Nekrich “teaches that a queue (interpreted as a schedule) is created for each radiologist and that the studies are placed in/on the radiologist’s docket based on the queue.” (Final Action 16, citing Nekrich ¶¶ 32 and 57.)

Nekrich discloses that “to determine the most appropriate analyst to review [an] image[,] . . . a docket, or caseload of the individual analyst can be reviewed by the system.” (Nekrich ¶ 57.) Appellants argue that “[r]eviewing a docket or caseload is not generating a schedule.” (Appeal Br. 15.) But Appellants acknowledge that Nekrich discloses “means for queuing the image information.” (Nekrich ¶ 32; Appeal Br. 14.) Regardless, Appellants further argue that “[i]nterpreting a queue as a schedule is not reasonable even in a broadest reasonable interpretation.” (Reply Br. 12.)

Appellants’ Specification discloses that “FIGURE 2 illustrate [sic] a method for assigning cases to be evaluated to one or more evaluators” (Spec. 2.) The Specification further discloses, with reference to Figure 2, “[a]t 208, an electronic schedule mapping the cases to the assigned radiologist is created” and that “[a]t 210, the radiologists evaluate the resulting images based on the schedule.” (*Id.* at 6.) In view of this disclosure, we agree with the Examiner that a broadest reasonable interpretation of the term “schedule,” as used in Appellants’ Specification, includes a queue of cases assigned to a radiologist.

Figure 3 of Nekrich further describes the “means for queuing the image information” disclosed in paragraph 32. In relevant part, Figure 3 discloses that Nekrich’s system matches image information received from a medical facility to profile information from image analysts, and selects at

least one analyst. If the image is considered urgent, the system places that image information into an “Urgent Queue” and transmits the image to the selected at least one analyst. (See Nekrich Fig. 3.) In other words, an electronic queue mapping the cases to the assigned radiologist is created and the radiologist evaluates the resulting images based on that queue.

In view of the above, we are not persuaded that the Examiner erred in rejecting claim 11 under § 102(b).

The § 102(b) rejection of claims 12–14, 16, and 17

Claim 12 recites:

12. A system, comprising:
 - a case profile repository that stores case profiles for cases to be evaluated;
 - a dynamic evaluator profile repository that stores dynamic evaluator profiles for evaluators available to evaluate the cases, and the dynamic evaluator profiles for each evaluator includes information mined from a set of case evaluation reports previously evaluated by each corresponding evaluator; and
 - a processor configured to generate a signal indicative of an assignment of the cases to the evaluators based on the case profiles and the dynamic evaluator profiles.

As with claim 1, Appellants argue that “Nekrich [sic] is silent from where or how any information is received, except for entry by the Radiologist through the user interface.” (Appeal Br. 16.) But claim 12, like claim 1, is silent as to where or how “case evaluation reports” are received. (See Claim 12.) Claim 12 merely recites that case evaluation reports are “previously evaluated by each corresponding evaluator,” i.e., that evaluation reports were evaluated by evaluators.

Appellants also argue that “Nekrich does not disclose any aspects of data mining, rather only online entry by a user [0083], which is not data mining.” (Reply Br. 12.)

We are not persuaded of error. The online entry referred to in paragraph 83 of Nekrich states that “[t]he user interface also may permit the radiologist to establish or change their preferences for the types of cases that they will receive” (Nekrich ¶ 83.) Nekrich describes sorting parameters for radiologists as including “license status, hospital privilege, subspecialty, and radiologist preferences, among others.” (*Id.* ¶ 31.) Under the heading “Analyst Preferences,” Nekrich refers to the possibility that a radiologist “has a preference for evaluating certain types of cases.” (*Id.* ¶ 47.) Nekrich does not treat “Peer reviewed evaluations” as part of a radiologist’s preferences. Nor do Appellants persuasively argue why “Peer reviewed evaluations” in a radiologist’s profile should be considered a “preference” that would be part of online entry by a user. (*See* Reply Br. 12; *see also* Nekrich ¶ 83.) It is the disclosure of “Peer reviewed evaluations,” not preferences, that the Examiner relies on in finding that Nekrich discloses information mined from evaluation reports. (*See, e.g.*, Answer 25.)

Appellants also argue that “Nekrich does not disclose, suggest, or imply information from produced reports. At best, Nekrich only considers the number of cases not yet reviewed or backlog [0057]. Backlog cases are not produced case. The information of Nekrich is not from produced reports.” (Appeal Br. 13.)

As an initial matter, we note that claim 12 does not refer to “produced reports.” Rather, it refers to “case evaluation reports previously evaluated by each corresponding evaluator.” Appellants do not persuasively argue

why Nekrich's disclosure of "Peer reviewed evaluations" associated with a radiologist does not disclose, suggest, or imply information from case evaluation reports previously evaluated that have been peer reviewed.

Appellants present an additional argument with regard to claim 17. Claim 17 recites: "The system of claim 12, wherein the signal represents an electronic schedule." Appellants argue that "[r]eceiving image information, queuing the imaging information and receiving profile information is not generating an electronic schedule." (Appeal Br. 17.) However, for the reasons discussed above with regard to claim 11, we do not find this argument persuasive of error.

The § 102(b) rejection of claim 20

Independent claim 20 contains language similar to that in claim 1. Appellants' arguments with regard to claim 20 are similar to, and a subset of, the arguments made with regard to claim 1. Therefore, for the reasons discussed above with regard to claim 1, we are not persuaded that the Examiner erred in rejecting claim 20 under § 102(b).

The § 103(a) rejection of claim 5

Claim 5 recites: "The method of claim 1, wherein the cases are assigned based on evaluator actual experience according to the mined information which includes a frequency of cases worked on by each corresponding evaluator."

The Examiner finds that

Nekrich teaches that the radiologist profile includes both fellowship training (interpreted as actual experience) and quality assurance information in the form of peer reviewed evaluations

and case log information (both interpreted as mined information . . .). The queueing [sic] (assignment) of cases is based on both these items of information. Thus the case is queued based on the fellowship training (actual experience) according to the quality assurance information (mined information).

(Answer 16–17.)

Appellants disagree and argue that “fellowship training does not disclose, suggest, or imply information mined from a set of case evaluation reports.” (Appeal Br. 13.)

Claim 5 recites, in relevant part, that “the cases are assigned based on evaluator actual experience *according to* the mined information.”

(Emphasis added.) The term “according to” includes “1: in conformity with[;] 2: as stated or attested by[; and] 3: depending on.” *According to*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/according%20to> (last visited June 20, 2018). The Examiner, however, does not sufficiently explain why the disclosure in Nekrich of assigning cases based on actual experience *and* quality assurance information teaches assigning cases based on actual experience *according to* quality assurance information.

Therefore, we are persuaded that the Examiner erred in rejecting claim 5 under § 103(a).

The § 103(a) rejection of claims 6 and 18

Claim 6 recites: “The method of claim 1, wherein the cases are assigned based on at least one of: a rate of the corresponding evaluator reaching a positive finding, a likelihood of the corresponding evaluator

arriving at a correct diagnosis, or an unseen type of case for the corresponding evaluator.”

The Examiner finds “studies are assigned to radiologists based on certain factors” and that Evertsz teaches monitoring a radiologist’s success rate in the diagnosis. (Final Action 21.) Therefore, the Examiner determines, it would have been obvious

to have modified the method of assigning studies to radiologists based on a number of factors of Nekrich so as to have included that one of the factors is the success rate of the radiologist in diagnosing patients, in accordance with the teaching of Evertsz, in order to provide for an efficient means to assign cases to certain radiologists.

(*Id.* at 21–22.)

Appellants disagree and argue that “Evertsz does not disclose, suggest, or imply assigning cases based on the infiltrated cases or in-service monitoring statistics.” (Appeal Br. 14.)

We are not persuaded of error. The test for obviousness is not what any one reference would have suggested, but rather what the *combined teachings* would have suggested to one of ordinary skill in the art. *See In re Keller*, 642 F.2d 413, 426 (CCPA 1981). The Examiner relies on Nekrich *in combination* with Evertsz. (*See* Final Action 21–22.)

Appellants also argue that “modifying the peer reviewed evaluations of Nekrich . . . impermissibly modifies a principle of operation.” (Appeal Br. 14; *see also* Reply Br. 11.)

Evertsz discloses a method and system for “screening of medical cases [where] known proven positive and/or known proven normal cases are inserted in the flow of cases during the screening.” (Evertsz, Abstract.) In

particular, Evertsz discloses that “[t]he in-service monitoring statistic is indicative of the radiologist’s performance.” (*Id.* ¶ 69.)

Simply including the statistical information of Evertsz in the multiple factors listed in Table III of Nekrich, i.e., adding this information to the profile information of the radiologists, does not change the principle of operation of Nekrich, that is, “selecting an image analyst by comparing the image information with the profile information” of analysts. (*See* Nekrich ¶ 57.) Therefore, we are not persuaded that the Examiner erred in rejecting claim 6 under § 103(a).

Claim 18 contains similar language to claim 6 and Appellants make similar arguments. (*See* Appeal Br. 18.) Therefore, for similar reasons, we are not persuaded that the Examiner erred in rejecting claim 18 under § 103(a).

DECISION

The Examiner’s rejection of claims 1–14, 16–18, and 20 under 35 U.S.C. § 101 is affirmed.

The Examiner’s rejection of claim 9 under 35 U.S.C. § 112(b) is summarily affirmed.

The Examiner’s rejection of claims 1, 2, 4, 7, 8, 10–14, 16, 17, and 20 under 35 U.S.C. § 102(b) is affirmed.

The Examiner’s rejection of claim 3 under 35 U.S.C. § 102(b) is reversed.

The Examiner’s rejections of claims 6, 9, and 18 under 35 U.S.C. § 103(a) are affirmed.

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The Examiner's rejection of claim 5 under 35 U.S.C. § 103(a) is reversed.

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