UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/729,969	12/28/2012	Paul M. Nangle III	RSW920120145US1	1165

75532	7590	03/12/2018

LEE LAW, PLLC
IBM SVL IP
P.O. BOX 189
PITTSBORO, NC 27312

EXAMINER
JOHNSON, ROBERT C

ART UNIT	PAPER NUMBER
3682	

NOTIFICATION DATE	DELIVERY MODE
03/12/2018	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

docketing@leelawpllc.com
docketing_archive@leelawpllc.com

UNITED STATES PATENT AND TRADEMARK OFFICE

———————

BEFORE THE PATENT TRIAL AND APPEAL BOARD

———————

Ex parte PAUL M. NANGLE III[1]

———————

Appeal 2016-007718
Application 13/729,969
Technology Center 3600

———————

Before CAROLYN D. THOMAS, MICHAEL M. BARRY, and
MICHAEL J. ENGLE, *Administrative Patent Judges*.

THOMAS, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant seeks our review under 35 U.S.C. § 134(a) of the
Examiner's Non-Final Rejection of claims 10–25, all the pending claims in
the present application. Claims 1–9 are canceled. *See* Claims Appendix.
We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We AFFIRM.

The present invention relates generally to capturing web marketing
channel correlation information for multiple web access sessions. *See*
Abstract.

———————

[1] Appellant names International Business Machines Corporation as the real
party in interest (App. Br. 3).

Claim 10 is illustrative:

10.   A system, comprising:
a communication interface; and
a processor programmed to:
        update, based upon captured web marketing channel correlation information that identifies each marketing channel accessed by a consumer in association with an order placed by the consumer via a web sales-capable server, a respective one of a first-click accumulated statistical historical effectiveness metric, a middle-click accumulated statistical historical effectiveness metric, and a last-click accumulated statistical historical effectiveness metric of each correlated marketing channel according to whether the respective marketing channel originated a first-click web access session, originated one of at least one middle-click web access session, or originated a last-click web access session correlated with the order; and
        evaluate, for each correlated marketing channel, a historically-accumulated effectiveness of the respective marketing channel at contributing to orders over time using the updated respective one of the first-click accumulated statistical historical effectiveness metric, the middle-click accumulated statistical historical effectiveness metric, and the last-click accumulated statistical historical effectiveness metric of each correlated marketing channel.

Appellant appeals the following rejections:

R1. Claims 10–25 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1–9 of copending Application No. 14/060,154 (Non-Final Act. 3);

R2. Claims 10–25 are rejected under 35 U.S.C. § 101 because the claimed invention is directed to a judicial exception without significantly

more (*id.* at 4–6);

R3. Claims 10–14, 16–22, 24, and 25 are rejected under 35 U.S.C. § 102(b) as being anticipated by Hsiao (US 2011/0302025 A1, Dec. 8, 2011) (*id.* at 6–20); and

R4. Claims 15 and 23 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Hsiao and Latona (US 2005/0027587 A1, Feb. 3, 2005) (*id.* at 20–21).

We review the appealed rejections for error based upon the issues identified by Appellants, and in light of the arguments and evidence produced thereon. *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential).

RELATED DECISION

The Board's related decision (PTAB Appeal No. 2016-008079 (Application No. 14/060,154) (Examiner Affirmed) addresses the same or similar issues such that our decision, analysis, and findings there are adopted and incorporated by reference herein.

ANALYSIS

Double Patenting Rejection

Issue 1: Did the Examiner err in provisionally rejecting the claims under the judicially created doctrine of obviousness-type double patenting?

The Examiner provisionally rejects claims 10–25 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1–9 of copending Application No. 14/060,154 (*see* Non-Final Act. 3).

Appellant contends that "this issue is not yet ripe for consideration because the present application has not been indicated to be allowable" (App. Br. 20).

"Panels have the *flexibility* to reach or not reach provisional obviousness-type double-patenting rejections." *Ex parte Jerg*, No. 2011-000044, 2012 WL 1375142, at *3 (BPAI 2012) (expanded panel) (informative) (emphasis added). Given this flexibility, we note that arguments not made are considered waived. *See* 37 C.F.R. § 41.37(c)(1)(vii). Therefore, we *pro forma* affirm the Examiner's provisional obviousness-type double patenting rejection of claims 10–25.

Rejection under § 101
Claims 10–25

Issue 2: Did the Examiner err in finding that the claims are directed to non-statutory subject matter?

The Examiner finds that "[c]laims 10–17 are directed to an abstract idea . . . of updating web marketing channel data for first click, middle-click, and last-click accumulated historical effectiveness metrics that led to conversions . . . [which] is a fundamental economic practice . . . [and] includes the abstract idea of evaluating marketing channels" (Non-Final Act. 4). The Examiner further finds that the claims "require no more than a generic computer performing functions that are well-understood, routine and conventional activities previously known in the industry" (*id.* at 5). The Examiner further finds that "[c]laims 18–25 are rejected as ineligible . . . for substantially the same reasons as claims [10]–17" (*id.*).

Appellant contends that the invention "improves computing technology itself by improving the operating platform of a web sales-capable

server to integrate accumulated statistical historical effectiveness metrics of individual marketing channels" (App. Br. 23), and is "automation that enhances computing technology itself" (*id.*). Appellant further argues the "claimed subject matter is <u>not</u> directed to economy or commerce" (*id.* at 24), "is not directed to agreements between people . . . is not directed to creating a contractual relationship . . . [and] is further not directed to mitigating risks or hedging" (*id.* at 25). Appellant also contends that the claimed invention "cannot be performed by the human mind or mentally, and is not a mental process" (*id.* at 25), and "cannot be performed by a human using pen and paper" (*id.* at 26).

We disagree with Appellant's contentions. Instead, we find that the Examiner has provided a sufficient response supported by a preponderance of evidence (Ans. 20–25). As such, we refer to, rely on, and adopt the Examiner's findings and conclusions set forth in both the Non-Final Action and the Answer. Our discussions here will be limited to the following points of emphasis.

A patent may be obtained for "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." 35 U.S.C. § 101. The Supreme Court has held that this provision contains an important implicit exception: laws of nature, natural phenomena, and abstract ideas are not patentable. *Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2354 (2014); *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972) ("Phenomena of nature, though just discovered, mental processes, and abstract intellectual concepts are not patentable, as they are the basic tools of scientific and technological work."). Notwithstanding, that a law of nature or an abstract idea, by itself, is not patentable, the application of these

concepts may be deserving of patent protection. *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1293–94 (2012). In *Mayo*, the Court stated that "to transform an unpatentable law of nature into a patent eligible *application* of such a law, one must do more than simply state the law of nature while adding the words 'apply it.'" *Id.* at 1294.

In *Alice*, the Court reaffirmed the framework set forth previously in *Mayo* "for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of these concepts." *Alice*, 134 S. Ct. at 2355. The first step in the analysis is to "determine whether the claims at issue are directed to one of those patent-ineligible concepts." *Id.* If the claims are directed to a patent-ineligible concept, then the second step in the analysis is to consider the elements of the claims "individually and 'as an ordered combination'" to determine whether there are additional elements that "'transform the nature of the claim' into a patent-eligible application." *Id.* (quoting *Mayo*, 132 S. Ct. at 1298, 1297).

In other words, the second step is to "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.'" *Id.* (brackets in original) (quoting *Mayo*, 132 S. Ct. at 1294). The prohibition against patenting an abstract idea "cannot be circumvented by attempting to limit the use . . . to a particular technological environment or adding insignificant post-solution activity." *Bilski v. Kappos*, 561 U.S. 593, 610–11 (2010) (citation and internal quotation marks omitted). The Court in *Alice* noted that "'[s]imply appending conventional steps, specified at a high level of generality,' was

not *'enough'* [in *Mayo*] to supply an 'inventive concept.'" *Alice*, 134 S. Ct. at 2357 (quoting *Mayo*, 132 S. Ct. at 1300, 1297, 1294).

Step one: Are the claims at issue directed to a patent-ineligible concept?

Claim 10 recites two functions of a processor: (a) updating metrics based on captured data and (b) evaluating an effectiveness using the metrics. Each of these steps involve "marketing channel" information. First, middle, and last-click accumulated statistical historical effectiveness metrics are updated and a historically-accumulated effectiveness of the respective marketing channel is evaluated. This is the essence of updating collected data, and evaluating web marketing channel data.

Appellant disputes that the claimed subject matter is directed to an abstract idea, in essence because it "is not a mental process" (App. Br. 25) and "is <u>not</u> directed to economy or commerce" (*id.* at 24). However, the Examiner highlights that the claims are directed to a fundamental economic practice of updating and evaluating marketing channels (Non-Final Act. 4–5), i.e., "obtaining and comparing intangible data" (Ans. 20).

In line with the Examiner's findings, we note that information collection and analysis, including when limited to particular content, is within the realm of abstract ideas. *See, e.g., Elec. Power Grp. LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016) (holding that "collecting information, analyzing it, and displaying certain results of the collection and analysis" are "a familiar class of claims 'directed to' a patent-ineligible concept"); *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1093–94 (Fed. Cir. 2016); *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1349 (Fed. Cir. 2015); *Digitech Image Techs., LLC v. Elecs. for*

Imaging, Inc., 758 F.3d 1344, 1351 (Fed. Cir. 2014); and *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1370 (Fed. Cir. 2011). Further, claim 10 employs little more than updating and evaluating captured web channel data in association with an order placed. Similar processes have been found to be abstract ideas. *See Digitech*, 758 F.3d at 1351 (quoting *Parker v. Flook*, 437 U.S. 584, 595 (1978)); *see also In re Maucorps*, 609 F.2d 481, 482, 485–86 (CCPA 1979) (holding a method of "optimizing the organization of sales representatives" unpatentable), *cited in CyberSource*, 654 F.3d at 1371 n.2.

Because the claims are directed to information collection, updating, and evaluation of data, an abstract idea, the claims at issue are directed to patent-ineligible subject matter.

Step two: Is there something else in the claims that ensures that they are directed to significantly more than a patent-ineligible concept?

The Examiner finds that "Appellant's claimed method can be performed by a general purpose computer" (Ans. 23) and there is "no improvement[] to the functioning of the computer itself" (*id.* at 24). We agree with the Examiner.

"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].'" *Alice*, 134 S. Ct. at 2357 (brackets in original) (quoting *Mayo*, 132 S. Ct. at 1297). The prohibition against patenting an abstract idea "cannot be circumvented by attempting to limit the use of the formula to a particular technological environment or adding insignificant post-solution activity." *Bilski v. Kappos*, 561 U.S. at 610–11

(citation and internal quotation marks omitted). The recitation in claim 10 pertaining to "a processor programmed to" is analogous to the recitation of a conventional "computer" discussed in *Alice*.

Additionally, as recognized by the Federal Circuit in *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 716 (Fed. Cir. 2014), *Bilski's* "machine-or-transformation" (MoT) test can also provide a "useful clue" in the second step of the *Alice* framework. *See Bilski*, 561 U.S. at 611. Under *Bilski's* MoT test, a claimed process can be considered patent-eligible under § 101 if: (1) "it is tied to a particular machine or apparatus"; or (2) "it transforms a particular article into a different state or thing." *In re Bilski*, 545 F.3d 943, 954 (Fed. Cir. 2008) (citing *Gottschalk*, 409 U.S. at 70, 93 S. Ct. 253).

Here, Appellant contends the invention "improves computing technology itself by improving the operating platform of a web sales-capable server" (App. Br. 23). In essence, Appellant merely contends that system claim 10, and its corresponding computer program product claim 18, are tied to a computer and offer improvements to computer technology, but do not argue that the claims are involved in any type of transformation of any particular article.[2] Claim 10 merely recites a "processor programmed to" (*see* claim 10). We agree with the Examiner that claim 10 simply incorporates a generic component, i.e., a computing device, into the system to perform the abstract concept of updating and evaluating data.

As recognized by the Supreme Court, "the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention." *See Alice*, 134 S. Ct. at 2358–59 (concluding claims

---

[2] *Alice* also confirmed that if a patent's systems claims are no different in substance from its method claims, they will rise and fall together. 134 S. Ct. at 2360. The same was true of the *Alice* patent's media claims. *Id.*

"simply instruct[ing] the practitioner to implement the abstract idea of intermediated settlement on a generic computer" not patent eligible); *see also Ultramercial*, 772 F.3d at 715–16 (holding claims merely reciting an abstract idea of using advertising as currency as applied to particular technological environment of the Internet are not patent eligible); and *Dealertrack, Inc. v. Huber*, 674 F.3d 1315, 1333–34 (Fed. Cir. 2012) ("[s]imply adding a 'computer aided' limitation to a claim covering an abstract concept, without more, is insufficient to render [a] claim patent eligible" (internal citation omitted)). Limiting such an abstract concept of "updating and evaluating marketing channels" to generic components, such as computer-implemented, does not make the abstract concept patent-eligible under 35 U.S.C. § 101.

In addition, we note Appellant's claims are neither rooted in computer technology as outlined in *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257–58 (Fed. Cir. 2014) (cautioning that "not all claims purporting to address Internet-centric challenges are eligible for patent"), nor do they seek to improve any type of computer capabilities, such as a "self-referential table for a computer database" outlined in *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1336–37 (Fed. Cir. 2016). Instead, Appellant's independent claims 10 and 18 are directed to a patent-ineligible abstract concept and do not recite something "significantly more" under the second prong of the *Alice* analysis. "Indeed, the claim language here provides only a result oriented solution, with insufficient detail for how a computer accomplishes it. Our law demands more." *Intellectual Ventures I LLC v. Capital One Fin. Corp.*, 850 F.3d 1332, 1342 (Fed. Cir. 2017).

Thus, we sustain the Examiner's rejection of claims 10 and 18 as well as respective dependent claims 11–17 and 19–25 under 35 U.S.C. § 101 as being directed to non-statutory subject matter in light of *Alice* and its progeny. For the foregoing reasons, Appellant's contentions are unpersuasive as to error in the rejection under 35 U.S.C. § 101.

Rejection under § 102(b) under Hsiao
Claims 10, 17, 18, and 25

Issue 3: Did the Examiner err in finding that Hsiao discloses first, middle, and last-click web access sessions, as set forth in claim 10?

Appellant contends that Hsiao "is different from and does not factually disclose separate accumulated statistical historical effectiveness metrics (first-click, middle-click, and last-click) associated with each of a set of marketing channels" (App. Br. 35) because "the disclosed conversion paths of the Hsiao reference factually disclose a single web access session" (*id.* at 36). Appellant further contends that "[t]he cited 'keywords' . . . of the Hsiao reference are fundamentally different from web marketing channels" (App. Br. 37).

The Examiner finds "that like Appellant's claimed invention Hsiao teaches analyzing conversion cycles over multiple user sessions for correlations related to conversions and measuring the performance for first-clicks, last-clicks, or middle-clicks" (Ans. 4) (emphasis omitted) (citing Hsiao ¶¶ 46–47, 67, 76–78, 398–99). This is because "Hsiao teaches analyzing a conversion cycle that can be measured and/or constrained by time or actions and can span multiple user sessions" (*id.* at 6) (emphasis omitted) (citing Hsiao ¶¶ 56, 77, 405–06, 411–15, 420, 437). We agree with the Examiner.

11

We refer to, rely on, and adopt the Examiner's findings and conclusions set forth in the Answer. Our discussions here will be limited to the following points of emphasis.

For example, Hsiao discloses a system for providing conversion path performance measures and reports whereby "user interactions include any presentation of content to a user and any subsequent affirmative actions or non-actions" (¶ 46). In Hsiao, "[u]ser interaction measures can include one or more of time lag measures (i.e., measures of time from one or more specified user interactions to a conversion), . . . [and] user interaction paths (i.e., sequences of user interactions that occurred prior to the conversion)" (¶ 47). Further, Hsiao discloses that "every subsequent page request to the same server will include the cookie for that server. . . . [T]he use of cookies allows an external service . . . to track particular actions and status of a user over multiple sessions" (¶ 56), "[t]he conversion cycle can be measured and/or constrained by time or actions and can span multiple user sessions" (¶ 77), and user interaction data "can be drawn from multiple sources," such as "an analytics apparatus that tracks user interactions with web pages" (¶ 411).

In other words, Hsiao discloses a conversion path that can track various types of interactions with web marketing channels (i.e., affirmative actions such as purchases and non-actions such as no purchases) of the user over multiple web sessions, i.e., by using cookies to track particular actions over multiple sessions. Thus, contrary to Appellant's contentions (*see* App. Br. 16–17), the disclosed conversion path in Hsiao is not limited to a single web access session, but clearly can span multiple web sessions over time and many types of interactions (i.e., affirmative actions or non-actions) within

those sessions. Therefore, we find that the claimed *web marketing channel correlation information that identifies each marketing channel accessed by a consumer in association with an order placed by the consumer via a web-sales-capable server* reads on Hsiao's aforementioned conversion cycle.

The Examiner further finds that the "targeting keywords in ad groups cause presentation of the first clicked ad in a conversion path [and] [t]his first clicked ad is part of the marketing channel that leads to a conversion . . . [and] can also present middle click and last click ads in the conversion path" (Ans. 10) (citing Hsiao ¶¶ 56, 67, 77, 385, 399). We agree with the Examiner.

For example, Hsiao discloses that keywords cause presentation of advertisements prior to a conversion and contribute to measuring the conversion cycle (*see* ¶¶ 66–69). Furthermore, as noted *supra*, Hsiao clearly discloses that "[t]he conversion cycle [itself] can be measured and/or constrained by time or actions and can span multiple user sessions" (¶ 77), i.e., originate from discrete and different web access sessions. Specifically, Hsiao discloses that:

> if an advertiser is provided data specifying that, on average, the time from a converting user's . . . first exposure to an advertisement[, i.e., first click] to a conversion is 20 days, the advertiser can use this data to infer an amount of time that users spend researching alternative sources prior to converting

(¶ 81). In other words, Hsiao looks collectively at multiple sessions from a user's first visit to a last visit, including researched alternative sources, in determining the conversion cycle.

Thus, we find unavailing Appellant's aforementioned contention that the disclosed web access session of the Hsiao reference is a single web access session, given the disclosures highlighted *supra*.

Accordingly, we sustain the Examiner's anticipation rejection of independent claims 10 and 18, and dependent claims 17 and 25, which Appellant argues are patentable for similar reasons (*see* App. Br. 57–60).

Claims 11 and 19

Appellant contends that the Examiner's rejection "provides no citations to any evidence" for the claimed "capturing . . . the web marketing channel correlation information" (App. Br. 42).

In response, the Examiner finds that "Hsiao teaches using cookies to capture data over multiple web access sessions" (Ans. 11) (emphasis omitted). We agree with the Examiner.

For example, Hsiao discloses that "every subsequent page request to the same server will include the cookie for that server [and] [t]he cookie can store a variety of data . . . to track particular actions and status of a user over multiple sessions" (¶ 56). In other words, Hsiao captures web channels over multiple sessions by storing cookies for sites visited by the user.

Thus, we find unavailing Appellant's contention that Hsiao fails to capture web marketing channel correlation information, given the aforementioned disclosures. Accordingly, we affirm the rejection of claims 11 and 19.

Claims 12 and 20

Appellant contends that "[t]he rejection appears to omit any consideration of Appellant's claimed 'statistical marketing attribution correlation model' . . . [because] [n]o model has been alleged or factually cited within the evidence of record" (App. Br. 48).

We agree with Appellant that the Examiner is silent as to any "statistical marketing attribution correlation model" being used in the cited art (*see* Ans. 11–12; *see also* Final Act. 9–10 (citing Hsiao ¶¶ 73–76, 80–81, with the entire explanation consisting of "the keywords are attributed to the conversions that they led to")). Here, the Examiner merely highlights Hsiao's teachings related to a database and records contained therein. No mention of where the claimed "model" is found in Hsaio is mentioned in the Examiner's findings for claims 12 and 20.[3] An Examiner cannot entirely ignore any limitation in a claim while determining whether the subject matter of the claim would have been anticipated or obvious. *In re Wilson*, 424 F.2d 1382, 1385 (CCPA 1970).

As such, we reverse the rejection of claims 12 and 20 under 35 U.S.C. § 102(b) as being anticipated by Hsiao.

Claims 13, 14, 21, and 22

In rejecting claim 13, the Examiner finds Hsiao discloses "user interaction data can be tracked by a cookie that is usable to correlate web

---

[3] Although the Examiner fails to address the "model" limitation for claims 12 and 20, the Examiner made separate findings for the "model" in claims 16 and 24 (*see* Ans. 15) which Appellant failed to rebut. In case of further prosecution, the Examiner should consider making similar findings for claims 12 and 20.

access sessions" (Non-Final Act. 10 (citing Hsiao ¶¶ 419–20)). Appellant contends the Examiner errs because "[t]he cited disclosure of a cookie [in Hsiao] is factually different from creating a session correlation data structure within a memory" (App. Br. 50) because "using different cookies directly [] does not factually disclose a single unified session correlation data structure that is separate from a cookie" (*id.* at 51).

Although the Examiner points out, and we agree, that "Hsiao teaches that the user interaction data can be tracked by a cookie" (Ans. 13, citing Hsiao ¶¶ 421–22) (emphasis omitted), the Examiner is silent about where or how Hsiao teaches creating "a session correlation data structure," as set forth in claim 13. We agree with Appellant that by themselves, Internet "cookies" do not disclose creating the "session correlation data structure," as recited.

Here, the Examiner's findings are silent as to any such data structure (*see* Ans. 12–13). As noted *supra,* an Examiner cannot entirely ignore any limitation in a claim while determining whether the subject matter of the claim would have been anticipated or obvious. As such, we reverse the rejection of claims 13 and 21 under 35 U.S.C. § 102(b) as being anticipated by Hsiao. Because this issue is also dispositive regarding our reversal of dependent claims 14 and 22, which depend from claims 13 and 21 respectively, we need not address Appellant's separate arguments regarding claims 14 and 22 (App. Br. 52–54).

Accordingly, the anticipation rejection of claims 13, 14, 21, and 22 is reversed.

Claims 16 and 24

Regarding claim 16's "statistical marketing attribution correlation model," the Examiner finds that Hsiao "teaches the creation of a campaign performance report that provides the same factual data as the model required by Appellant's claims" (Ans. 15 (citing Hsiao ¶¶ 73–76)) and Hsiao also "teaches statistical measures . . . [and] a histogram" (*id.*, citing Hsiao ¶¶ 121–22, 173, 179)). Similar findings were made for claim 24.

Although Appellant contends in the Appeal Brief that in Hsiao the "generation of a <u>report</u> is factually different from creation of a 'model' as required by Appellant's claims, and is different from creation of a statistical marketing attribution correlation model" (App. Br. 56) (emphasis added), Appellant's Reply Brief fails to rebut the Examiner's additional findings in the Answer regarding Hsiao's disclosed "statistical measures" and does not explain how or why this is distinguishable from the claimed model (*see* Reply Br. 15–16).

Appellant's Specification indicates that "[t]he statistical marketing attribution correlation model may be created to incorporate a statistically-accumulated marketing channel attribution metric" (¶ 15). In other words, the claimed "model" reads on statistical measures being performed. The Examiner has directed our attention to the fact that Hsiao discloses providing "statistical measures of the measure of time between the reference user interaction and the associated conversions" (*see* ¶ 121). The measures "can be used to generate a time lag distribution" that may be represented by a histogram (Hsiao ¶ 122). Moreover, "the time lag type control 326 provides user options to display conversion information from the 'first impression,' from the 'first click,' or from the 'last click' (Hsiao ¶ 130). Thus, even if

17

Hsiao's *report* is distinguishable from the claimed model, as argued by Appellant, such contentions fail to explain how the claimed model distinguishes over Hsiao's disclosure of generating statistical measures and histograms.

Accordingly, we affirm the Examiner's rejection of claims 16 and 24.

Rejection under § 103(a) under Hsiao and Latona
Claims 15 and 23

Issue 4: Did the Examiner err in finding that the combined cited art teaches or suggests assigning a prorated portion, as set forth in claims 15 and 23?

Regarding "assign[ing] a prorated portion of revenues generated by the order to each correlated marketing channel" as recited in claims 15 and 23, Appellant contends that "spending revenue ('revenue spent') is factually different from Appellant's claimed assigning prorated portion of revenues 'to' marketing channels that originated completely different web access 'sessions' that contributed over time to an order" (App. Br. 62). Appellant further contends that "[t]here is no disclosure within the Latona reference as cited of any correlation between the advertisements" (*id.* at 63) and "[t]he term 'prorate' does not appear to exist within the Latona reference" (*id.*).

In response, the Examiner finds that Latona "teaches correlating the advertisements by comparing their relative effectiveness to each other, including the revenue generated by each advertisement" (Ans. 18) (emphasis omitted) (citing Latona ¶¶ 38–41) and "the Hsiao reference does factually disclose Appellant's claimed first-click, middle-click, and last-click

accumulated statistical historical effectiveness metrics" (*id.* at 18–19). We agree with the Examiner.

The Examiner is relying on the *combined* teachings of Hsiao and Latona to teach or suggest the claimed assigning a prorated portion of revenues to each of the first, middle, and last-click metrics. For example, Latona teaches looking at the effectiveness of advertisements and ascertaining which advertisements realize the most revenue per impression (*see* ¶ 37). In Latona, "[e]ach advertisement is associated with . . . a description of the incentive, . . . the revenue realized (e.g., an aggregation of all revenues realized through all impressions rendered or some subset thereof" (¶ 38) and an advertisement (AD1) "is associated with a revenue sharing incentive" (¶ 39). In other words, Latona assigns a prorated portion of revenues, i.e., revenue sharing incentive, to each correlated marketing channel. The ordinary and usual meaning of "prorated" is to divide. *See Merriam-Webster's Collegiate Dictionary,* p.944 (9th ed. 1990). Here, Latona is clearly dividing the revenues among the advertisements, i.e., marketing channels.

Further, as noted *supra,* Hsiao teaches a conversion path that can track various types of interactions (i.e., affirmative action such as purchases and non-actions such as no purchases) of the user over multiple web sessions. Specifically, Hsiao discloses that "[t]he conversion cycle [itself] can be measured and/or constrained by time or actions and can span multiple user sessions" (¶ 77), i.e., originate from discrete and different web access sessions. In other words, Hsiao looks collectively at multiple sessions from a user's first visit to a last visit, including researched alternative sources, in determining the conversion cycle. The Examiner further determines "it

would have been obvious . . . to modify the system of Hsiao . . . to assign a prorated portion of revenues, as taught by Latona, in order to increase the amount of money spent on advertisements associated with user conversions" (Non-Final Act. 21 (citing Hsiao ¶ 81)).

Therefore, we agree with the Examiner that the combined teachings of Hsiao and Latona teaches or suggests the claimed assigning a prorated portion of revenues, as set forth in claims 15 and 23. Furthermore, Appellant's argument against Latona separately from Hsiao does not persuasively rebut the combination made by the Examiner. One cannot show non-obviousness by attacking references individually, where the rejections are based on combinations of references. *In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986); *In re Keller*, 642 F.2d 413, 425–26 (CCPA 1981).

Accordingly, we sustain the Examiner's obviousness rejection of claims 15 and 23.

DECISION

We reverse the Examiner's § 102(b) rejection of claims 12–14 and 20–22.

We affirm the Examiner's provisional double patenting rejection of claims 10–25.

We affirm the Examiner's § 101 rejection of claims 10–25.

We affirm the Examiner's § 102(b) rejections of claims 10, 11, 16–19, 24, and 25.

We affirm the Examiner's § 103(a) rejection of claims 15 and 23.

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