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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* BENJAMIN E. CHODROFF and  
PANKAJ S. ZANWAR<sup>1</sup>

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Appeal 2016-008387  
Application 12/765,413  
Technology Center 3600

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Before BRADLEY W. BAUMEISTER, JOSEPH P. LENTIVECH, and  
DAVID J. CUTITTA II, *Administrative Patent Judges*.

BAUMEISTER, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's  
Final Rejection of claims 1–27. App. Br. 5.<sup>2</sup> We have jurisdiction under  
35 U.S.C. § 6(b).

We affirm.

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<sup>1</sup> Appellants list International Business Machines Corporation as the real party in interest. Appeal Brief 3, filed August 31, 2015 (“App. Br.”).

<sup>2</sup> Rather than repeat the Examiner's positions and Appellants' arguments in their entirety, we refer to the above-mentioned Appeal Brief, as well as the following documents, for their respective details: the Final Action mailed January 28, 2015 (“Final Act.”); the Examiner's Answer mailed February 25, 2016 (“Ans.”); and the Reply Brief filed April 21, 2016 (“Reply Br.”).

## STATEMENT OF THE CASE

Appellants describe the present invention as follows:

At least one virtual user[] in a virtual world can be identified, wherein the at least one virtual user is within a viewable distance of at least one advertisement display point. A distance dependent advertising plan can be created for the advertisement display point that varies based on the distance between the virtual user and the at least one advertisement display point. The advertisement plan can contain different advertising content items for presenting within the advertisement display point. Different ones of the different advertising content items are presented in accordance with the advertisement plan when the virtual user is at different distances from the at least one advertisement display point. The different advertising content items can be displayed at the advertising display point in the virtual world based on the advertising plan.

Abstract.

Independent claim 1 illustrates the claimed invention:

1. A method for advertising for virtual world, the method comprising:

identifying at least one virtual user in a virtual world, wherein the at least one virtual user is within a viewable distance of at least one advertisement display point;

creating a distance dependent advertising plan for the advertisement display point that varies based on the distance between the virtual user and the at least one advertisement display point, wherein the advertisement plan contains a plurality of different advertising content items for presenting within the advertisement display point, wherein the different advertising content items to be displayed on the at least one advertisement display point change based on changes in distance of the user from the at least one advertisement display point; and

selectively displaying the plurality of different advertising content items at the advertising display point in the virtual world based on the advertising plan.

Claims 1–27 stand rejected under 35 U.S.C. § 101 as being directed to patent ineligible subject matter. Final Act. 3–4.

Claims 1–3 and 5–27 stand rejected under 35 U.S.C. § 102(b) as anticipated by Altberg (US 2008/0262910 A1; published Oct. 23, 2008). Final Act. 5–33.

Claim 4 stands rejected under 35 U.S.C. § 103(a) as obvious over Altberg and Datta (US 2007/0079331 A1; published Apr. 5, 2007). Final Act. 34–38.

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).

## THE PATENT-INELIGIBLE-SUBJECT-MATTER REJECTION

### *Findings and Contentions*

The Examiner determines that “[c]laims 1–27 are directed towards the concept of advertising in a virtual environment,” which the Examiner characterizes as an abstract idea corresponding to a fundamental economic practice. Final Act. 4. The Examiner additionally determines

The claim(s) does/do not include additional elements that are sufficient to amount to “significantly more” than the judicial exception (i.e., abstract idea) because the claims do not recite an improvement to another technology or technical field, an improvement to the functioning of the computer itself, or meaningful limitations beyond generally linking the use of an abstract idea to a particular technological environment. It should be noted the limitations of the current claims are performed by the generically recited processor. The limitations are merely instructions to implement the abstract idea on a computer and

require no more than a generic computer to perform generic computer functions that are well-understood, routine and conventional activities previously known to the industry.

*Id.*

In the Examiner’s Answer, the Examiner similarly describes the inventive concept as “merely displaying advertisements within a virtual world.” Ans. 33, 35. The Examiner reasons “the Appellants are merely incorporating the real-world method (i.e.,) advertising to users) into a virtual world.” *Id.*

Appellants acknowledge that conventional advertising uses fixed billboards—both in the real world and the virtual world—to present advertisements to passing potential customers. App. Br. 12. Appellants also acknowledge that “[s]ome advertisement spaces rotate an advertisement on a timer.” *Id.* (citing Spec. ¶ 3). Appellants argue, *inter alia*, though,

[The claims] require[] a distance dependent advertising plan for an advertising display point that varies based on a distance between a virtual user and at least one advertising display point. This is a significant and meaningful limitation of the claims, which is beyond the “general idea of advertising in a virtual environment[,]” as reasoned by the Examiner.] Further, the claims include the meaningful limitation of displaying different advertising content at the advertising display point based on changes of the distance that the virtual user is from the advertising display point. This is clearly a meaningful limitation that is beyond the general concept of “advertising in a virtual environment.[”]

App. Br. 34.

According to Appellants, no known virtual advertising previously included the technological improvement of a distance dependent advertising innovation. Reply Br. 23–24. Appellants also argue

a virtual environment (Per DDR HOLDINGS) is by definition an artificially created environment that requires computing equipment for implementation. It is not an abstract idea – in the context defined by Alice/CLS Bank because it did not exist outside a computing space “for decades[,]” as was asserted to be the case for the abstract concept of hedging. For the reasons stated above, the first prong fails—and the 101 rejection should be withdrawn as a result.

App. Br. 33.

*Principles of Law*

In determining whether the claims set forth patent eligible subject matter under 35 U.S.C. § 101, we first must determine whether the claims at issue are directed to laws of nature, natural phenomena, or abstract ideas. *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 714 (Fed. Cir. 2014). In considering whether a claim is directed to an abstract idea, we acknowledge, as did the Supreme Court, that “all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas.” *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 71 (2012). We, therefore, look to whether the claims focus on a specific means or method that improves the relevant technology or are instead directed to a result or effect that itself is the abstract idea and merely invoke generic processes and machinery. *See Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1336 (Fed. Cir. 2016).

If the claims are directed to an abstract idea, we then must consider whether the claim contains an element or a combination of elements that is sufficient to transform the nature of the claim into a patent-eligible application. *Ultramercial*, 772 F.3d at 714; *Alice Corp. Pty. Ltd. v. CLS Bank Int’l.*, 134 S. Ct. 2347, 2355 (2014).

In applying step two of the *Alice* analysis, we must “determine whether the claims do significantly more than simply describe [the] abstract method” and thus transform the abstract idea into patentable subject matter. We look to see whether there are any “additional features” in the claims that constitute an “inventive concept,” thereby rendering the claims eligible for patenting even if they are directed to an abstract idea. Those “additional features” must be more than “well-understood, routine, conventional activity.”

*Intellectual Ventures I LLC v. Erie Indem. Co.*, 850 F.3d 1315, 1328 (Fed. Cir. 2017) (citations omitted).

“[C]laims [that] merely require generic computer implementation[] fail to transform [an] abstract idea into a patent-eligible invention.” *Id.* (first and fourth alterations in original) (quoting *Alice*, 134 S. Ct. at 2357).

#### *Analysis*

Appellants’ arguments are only partially persuasive. In determining that the claims are directed to an abstract idea, the Examiner characterizes the claimed invention too generally because the Examiner did not take into account the distance-based dynamic aspect of the advertising. The Examiner also characterizes the claimed invention too narrowly by interpreting the abstract idea as encompassing advertising in the virtual world. The claimed invention is more accurately characterized as being directed to displaying different advertising content at an advertising display point based on changes of the distance that the content viewer is from the advertising display point.

Even when the invention is properly characterized in this manner, though, the claimed invention still is reasonably characterized as being directed to an abstract idea. This is because such distance-based dynamic advertising can be practiced by a human holding up a first paper or

cardboard sign when a content viewer is at a first distance and holding up a second sign with a different message or font size when a content viewer is at a second distance. As such, the claimed abstract idea entails a method of organizing human activity (*see* MPEP § 2106.04(a)(2) Part (II)), and more particularly, a concept relating to advertising, marketing, and sales activities or behaviors. *See* FEBRUARY 2018: ELIGIBILITY QUICK REFERENCE SHEET *IDENTIFYING ABSTRACT IDEAS* (PART 1) (available at <https://www.uspto.gov/sites/default/files/documents/ieg-qrs.pdf>).

We further determine under the second prong of the *Alice* inquiry that implementing this abstract idea with computers in a virtual network fails to transform the abstract idea into a patent-eligible invention. *Alice*, at 2357. Appellants do not provide sufficient evidence that the abstract idea is implemented in a manner that improves the virtual universe computing. The invention instead appears to implement the invention using generic computer components in their conventional manner. Appellants even acknowledge that advertising with (albeit fixed) billboards in the virtual world was conventional. App. Br. 12.

We also are unpersuaded by Appellants' argument that no known virtual advertising previously included the technological improvement of a distance dependent advertising innovation. Reply Br. 23–24. This argument conflates the inquiry of whether the idea was previously known with the separate inquiry of whether the invention is directed to an abstract idea. The former inquiry pertains to whether the invention is patentable under 35 U.S.C. §§ 102 and 103. The latter inquiry pertains to whether the invention is patent eligible under § 101.

Accordingly, Appellants have not persuaded us of error in the Examiner's ultimate determination that claim 1 is directed to a patent ineligible abstract idea. Nor do Appellants persuade us that those dependent claims that were separately argued (*see* App. Br. 34–35) add any meaningful limitations that would constitute significantly more than an abstract idea:

Appellants separately argue that “[c]laim 2 includes meaningful limitations of computing a group distance in addition to a user’s distance, where the advertising plan is based on both the user’s distance and the computed group distance.” *Id.* This argument is unpersuasive because taking into account additional viewers when determining which of plural signs to display, also is a determination that can be made by a human holding plural signs. As such, the additional limitations of claim 2 merely make the abstract idea of claim 1 more complex, but no less abstract.

Appellants separately argue that “[c]laim 4 includes meaningful limitations of extracting a charge rate from the advertising plan, which is based on the distance of the user from the advertising point, which is a meaningful limitation distinct from the abstract idea.” *Id.* at 35. This argument is unpersuasive because determining the rate to charge for advertising constitutes a concept relating to agreements between people or performance of financial transactions. *See* FEBRUARY 2018: ELIGIBILITY QUICK REFERENCE SHEET *IDENTIFYING ABSTRACT IDEAS* (PART 1), “**FUNDAMENTAL ECONOMIC PRACTICES**” Manual of Patent Examining Procedure, MPEP § 2106.04(a)(2) Part (I). As such, the additional limitations of claim 4, together with the limitations of claim 1, may constitute a combination of abstract ideas, but this combination of abstract ideas is no less abstract.

Appellants separately argue that “[c]laim 9 includes a meaningful limitation that the advertising plan includes different display types of a slide, banner, and video.” App. Br. 35. This argument is unpersuasive because using conventional computer display means to display an advertising message does not add significantly more to the abstract idea of claim 1.

Appellants separately argue that “[c]laim 10 changes display types based on distance.” *Id.* This argument is unpersuasive because this invention also has a real world analog that can be performed by a human holding signs or objects. For example, a person could hold up a large sign for potential customers that are far away and alternatively pass out a brochure to potential customers who are in close proximity. Furthermore, the decision to first use one conventional type of computer display according to its conventional manner of use and subsequently use another type of conventional computer display in a conventional manner does not add significantly more to the abstract idea.

Appellants separately argue that “[c]laim 12 defines how a group distance is an aver[age] or weighted average.” *Id.* This argument is unpersuasive because this additional limitation, like the limitations of claim 2, merely make the abstract idea of claim 1 more complex, but no less abstract.

Appellants separately argue that “[c]laim 14 requires viewable distance rules, rotation time rules, and group distance rules.” *Id.* This argument is unpersuasive because additionally printing out the rules or guidelines that govern the sign-holding decision-making process also can be performed by a human with pencil and paper. As such, the human analog is not less abstract. Furthermore, extracting and applying these viewing rules

in a virtual universe merely entails using computers to perform ordinary display functions in a conventional manner. Performing the method of claim 14, then, as well as the method of claim 3 from which the former claim depends, does not add significantly more to the abstract idea of claim 1.

For the foregoing reasons, we sustain the Examiner's rejection of claims 1–27 under 35 U.S.C. § 101.

### THE PATENTABILITY REJECTIONS

#### *Claims 1, 5, 8, 11, 12, 14, and 17*

Appellants argue that the Final Rejection is very vague, ambiguous and challenging to discern because the Rejection cites almost fifty different paragraphs of Altberg, paragraphs that provide disjointed teaching. App. Br. 11; *see also id.* at 17–18. Appellants contend that such broad citing of the reference effectively constitutes citation of the entirety of Altberg.

We point out that our reviewing court has set forth the standard for determining the sufficiency of an Examiner's rejection:

[T]he PTO carries its procedural burden of establishing a prima facie case when its rejection satisfies 35 U.S.C. § 132, in “notify[ing] the applicant . . . [by] stating the reasons for [its] rejection, or objection or requirement, together with such information and references as may be useful in judging of the propriety of continuing the prosecution of [the] application.” That section “is violated when a rejection is so uninformative that it prevents the applicant from recognizing and seeking to counter the grounds for rejection.”

*In re Jung*, 637 F.3d 1356, 1362 (Fed. Cir. 2011) (citations omitted) (alterations in original). Appellants' additional arguments regarding the anticipation rejection (App. Br. 12–27), discussed below, indicate that

Appellants understand the rejection at least sufficiently enough for the requirements of § 132 to be satisfied.

Furthermore, the authority of the Board under 35 U.S.C. § 6 is limited to reviewing adverse decisions of patent examiners. If Appellants believe the rejection needs to be clarified, petitions to the Director are available under 37 C.F.R. § 1.181 to require an examiner to clarify an official action in accordance with 37 C.F.R. § 1.104. “[P]etitionable matters should be addressed before an appeal reaches the Board.” *Ex Parte Frye*, 94 USPQ2d 1072, 1078 (BPAI 2010).

Turning to the substance of the rejection, Appellants argue the Examiner erred in finding Altberg anticipates claim 1. App. Br. 18–20. According to Appellants, the Examiner erred in relying on paragraph 75 of Altberg to teach the claim language

creating a distance dependent advertising plan for the advertisement display point that varies based on the distance between the virtual user and the at least one advertisement display point, wherein the advertisement plan contains a plurality of different advertising content items for presenting within the advertisement display point, wherein the different advertising content items to be displayed on the at least one advertisement display point change based on changes in distance of the user from the at least one advertisement display point,

as well as the claim language “selectively displaying the plurality of different advertising content items at the advertising display point in the virtual world based on the advertising plan.” App. Br. 18 (citing claim 1).

Appellants argue that paragraph 75 merely discloses changing the advertising content on a virtual bulletin board “during a prior [period] of time,” and that the advertising content can change per

events, such as “when an avatar passes by the board, or when an event around the board changes.” *Id.* at 19, 20 (citing Altberg ¶ 75).

Appellants argue that, at best, this disclosure may set forth a mere possibility that the content can change based upon distance, but that such a possibility is insufficient to constitute the explicit or inherent disclosure necessary for supporting an anticipation rejection. App. Br. 19.

We agree that paragraph 75 of Altberg, alone, does not support an anticipation rejection, but the Examiner relies upon more than paragraph 75 in rejecting claim 1. For example, the Examiner additionally cites, *inter alia*, to paragraphs 69–80 and 95–110 of Altberg as disclosing the disputed distance-based dynamic advertising. Final Act. 6. These passages of Altberg include the following disclosure:

In one embodiment, a virtual object can sense (see or listen) the surrounding conditions and present advertisements that may be of interest to the nearby avatars. For example, a virtual world may be configured to broadcast public conversations of avatars to nearby objects and/or avatars (e.g., in voice and/or text). Thus, a virtual object can be configured to listen to, or observe, the conversations of nearby avatars, determine topics of interest to the avatars, and present relevant advertisements.

In one embodiment, *the set of nearby avatars are determined based on a distance in the virtual world.* Since the avatars may move dynamically in the virtual world, *the avatars in the listening range of the virtual object may change dynamically as the positions of the avatars in the virtual world are changed continuously.*

.....

In one example, the virtual bulletin board **(103)** includes an image of a real bulletin board with an image layer dynamically overlaid on an advertisement surface of the real bulletin board; while the real bulletin board may show a static advertisement, the image layer overlaid on the real bulletin board can be used to show a dynamic advertisement which can change over time, or based on the circumstance near the bulletin board in the virtual world.

Altberg ¶¶ 78, 79, 95 (emphasis added).

These passages indicate that the virtual bulletin board displays a default advertisement. Altberg ¶ 95. This default advertisement dynamically changes when avatars move within a predetermined distance. *Id.* ¶¶ 78, 79. As such, the cited passages of Altberg disclose the disputed claim language.

Altberg additionally teaches that the advertising can change dynamically based upon an avatar touching or interacting with the bulletin board of the virtual world. Altberg ¶ 100. Touching the bulletin board requires reducing the distance from the avatar to the bulletin board to zero.

This passage, too, then, discloses the recited distance-based dynamic advertising limitations of claim 1. It is irrelevant that this aspect requires functionality specifically based upon touching, as opposed to being based merely on distance. Claim 1 does not preclude creating an advertising plan and displaying advertising content in a manner that additionally is dependent on touch, as well as distance.

For the foregoing reasons, Appellants have not persuaded us of error in the anticipation rejection of independent claim 1. Accordingly, we sustain the anticipation rejection of that claim, as well as claims 5, 8, 11, 12, 14, and 17, for which Appellants either set forth similar arguments or do not provide separate substantive arguments. *See* App. Br. 24–29.

*Claims 2 and 18*

Claim 2 reads as follows:

2. The method as claimed in claim 1, further comprising:  
    computing the user's distance to the advertising display point; and  
    searching for the advertisement plan based on the user's distance from the advertisement display point.

Appellants argue that the claim language is not taught by Altberg's disclosure of paragraphs 75, 80, and 95. App. Br. 20–22. This argument is unpersuasive because it does not address Altberg's additional teachings, such as those discussed in the preceding section in relation to claim 1.

Accordingly, we sustain the anticipation rejection of claim 2, as well as claim 18, which is not argued separately. *See* App. Br. 29.

*Claim 3*

Claim 3 reads as follows:

3. The method as claimed in claim 1, further comprising:  
    extracting a set of predefined rules for the user's distance from the advertisement plan;  
    applying the set of predefined rules on the one or more advertising content items for the advertisement display point.

Appellants argue that the claim language is not taught by Altberg's disclosure of paragraphs 75, 80, and 95. App. Br. 22–23. This argument is unpersuasive because it does not address Altberg's additional teachings, such as those discussed in relation to claim 1.

*Claims 4 and 19*

Claim 4 reads as follows:

4. The method as claimed in claims 1, further comprising:  
    extracting a charge rate from the advertisement plan for the one or more advertising content items for the advertisement

display point, wherein the charge rate is based on the distance of the user from the advertisement display point; and

updating charge accounts of an advertising sponsor of the one or more advertising content items with the charge rate and the set of predefined rules.

The Examiner finds that Altberg generally teaches extracting a charge rate for advertisements and updating charge accounts, as recited in claim 4 (Final Act. 34–36 (citing Altberg ¶¶ 16, 62, 63, 311, 420–23)), but does not teach that the charge rate is based on the distance of the user from the advertisement display point (*id.* at 35). The Examiner finds that “Datta teaches a system in which advertisements are presented to game users within their virtual environment[, and c]ertain objects within the video game are tagged for advertisement delivery.” Final Act. 36. The Examiner more specifically finds that whether the system registers an avatar’s view or “impression” of the advertisement, and therefore whether the system charges the advertiser for the advertisement placement, depends on both whether the avatar has an unobstructed view of the advertisement and how far away the avatar is from the advertisement. *Id.* at 36–37 (citing Datta ¶¶ 72–74, 80, 105–23). The Examiner further concludes that it would have been obvious to implement a distance-dependent pricing scheme for Altberg’s system. *Id.* at 38.

Appellants first argue that the cited teachings of Datta fail to overcome the deficiencies of Altberg because the teachings do not teach charging a rate depending on distance from a display point. App. Br. 23.

This argument is unpersuasive because Datta does teach that an advertising impression is generated when the avatar is within an impression area that is defined by a specified surface vector/distance 1040, as well as by

a pair of viewing angles  $\Theta_i$ ,  $\Theta_r$ . Datta ¶¶ 111, 115; Figs. 9, 10. Because a charge occurs when the avatar is within the specified surface vector/distance and no charge occurs when the avatar is beyond this distance, Datta reasonably can be interpreted as teaching a distance-based charge rate, as claimed.

Appellants next argue that the Examiner’s “stated motivation ‘obvious to try’ fails [because t]here are an unlimited number of ways to advertise, where there is no explicit list that one of ordinary skill would repetitively try. The motivation is a nonce motivation that fails to satisfy the ‘obvious to try’ rational under *KSR*.” App. Br. 23 (emphasis added). Appellants additionally argue that “the motivation fails to consider the differences between the references, which per *Altberg* require a real-time communication linked to a reference.” *Id.*

Appellants’ arguments are unpersuasive. Regardless of the merits of the Examiner’s obvious-to-try rationale, the Examiner additionally provides the following reasoning: “*Altberg* already teaches that viewable distance from the user’s avatar and advertisement display location is a deciding factor on delivering the ad impression.” Final Act. 37. We understand the Examiner to be additionally relying on *Datta* for the straightforward proposition that it would have been obvious to charge for the advertising in *Altberg*’s system when the avatar is close enough for an advertisement to be displayed, and to not charge when the avatar is too distant for an advertisement to be displayed.

Accordingly, we sustain the obviousness rejection of claim 4, as well as the anticipation rejection of claim 19, which Appellants do not argue separately from claims 3 and 4. *See* App. Br. 29.

*Claim 6*

Claim 6 reads as follows:

6. The method as claimed in claim 1, wherein the advertising display point is a fixed relative region of space in the virtual world within which the different advertising content items are displayed.

The Examiner finds that Altberg discloses that “virtual bulletin boards can be part of virtual landscape and avatars can continuously move in and around and past bulletin boards.” Final Act. 11. Appellants acknowledge that Altberg “does teach virtual bulletin boards being presented in the virtual world.” Appellants argue, though, that Altberg contains “[n]o mention . . . of these virtual bulletin boards being the [claimed] reference. No reference of computing a distance between the advertising display point and the virtual user exists.” App. Br. 11.

Appellants’ arguments are unpersuasive because, as found by the Examiner, Altberg does teach fixed advertising display points. *See, e.g.*, Altberg ¶¶ 515–37 (discussing virtual objects 1007 that are configured to collect information from an avatar 101 and provide communication with a controller 1005). “[T]he virtual object (1007) may present a public visual prompt, such as a text message [or] a dialog box . . . to avatars with[in] a predetermined distance of the virtual object.” *Id.* ¶ 520. The virtual object 1007 may have “a visible representation in the virtual world and occup[y] a finite 3D space in the virtual world. *Id.* ¶ 534.

Accordingly, we sustain the anticipation rejection of claim 6.

*Claim 7*

Claim 7 reads as follows:

7. The method as claimed in claim 1, wherein the advertisement plan includes a plurality of different advertising sponsors, each associated with a different one of the different advertising content items, wherein each of the different advertising sponsors pays a fee for having the corresponding advertising content item selectively presented upon the advertising display point of the virtual world.

Appellants argue “[t]he fact that advertiser[]s pay a fee in Altberg is standard for advertisement. There is no ‘advertisement plan’ inherent in Altberg that includes a plurality of different advertising sponsors per the claimed limitation.”

This argument is not persuasive. Altberg discloses, for example, that advertisements can be used for different categories of products (e.g., hotels and car rentals), which reasonably indicates different advertisers:

In one embodiment, the system uses one or more pre-determined rules to select the advertisements based on one or more parameters derived specific[ally] from the context. The parameters may be explicitly specified by the customer (e.g., via an [Interactive Voice Response] tree), or implicitly derived from the communications received from the customer. For example, when the customer asks for a specific hotel, the system can implicitly derive the economic level based on the mentioned hotel (e.g., using a look up table that pre-categorize the economic level of known hotels); and the economic level determined based on the hotel can be applied to the selection of rental car advertisements in cross selling, or the selection of hotel advertisements in pitch switching.

Altberg ¶ 363.

Accordingly, we sustain the anticipation rejection of claim 7.

*Claim 9*

Claim 9 reads as follows:

9. The method as claimed in claim 1, wherein the advertising plan includes display types for the user's distance for the advertising content, and the display types include at least one of slides, banners, and videos.

Appellants argue that Altberg does not expressly or inherently mention an advertising plan that includes display types for the user's distance in the portions of Altberg referenced by the Examiner. App. Br. 25.

Appellants' argument is unpersuasive. Altberg discloses that the system can present a reference to the user for contacting an advertiser. Altberg ¶¶ 108–09. Altberg expressly states that the reference can be presented via various forms, such as virtual bulletin boards and banners. Altberg ¶ 110. Furthermore, if the banner is created so that the user can read the content, then that display, by definition, constitutes a display type for the user's distance.

Accordingly, we sustain the anticipation rejection of claim 9.

*Claim 10*

Claim 10 reads as follows:

10. The method as claimed in claim 1, wherein the advertising plan includes display types for the at least one virtual user's distance from the advertising display point, and the advertising plan includes a set of rules for the at least one virtual user for distance from the different advertising content items, and the advertising plan includes rotation time rules for the different advertising content items based on the viewable distance of the at least one virtual user.

Appellants argue that Altberg does not teach a set of rules for rotation times for different content based on viewable distance of virtual users to an advertising point are present in an advertising plan of Altberg. App. Br. 26.

We understand the Examiner's position to be that Altberg discloses advertisements are dynamically overlaid onto a bulletin board when an avatar is within a specified distance, and that Altberg further discloses that within this period of the Avatar being nearby, the advertisements additionally can be rotated as the Avatar walks by the bulletin board. Final Act. 14–15. Appellants do not set forth persuasive arguments for why such functionality fails to disclose or suggest the disputed claim language.

Accordingly, we sustain the anticipation rejection of claim 10.

*Claims 12 and 13*

Claims 12 and 13 read as follows:

12. The method as claimed in claim 1, per the advertising plan displaying a first of the plurality of different advertising content items when a distance between the virtual user and the advertising display point is at a first distance and displaying a second of the plurality of different advertising content items when a distance between the virtual user and the advertising display point is at a second distance.

13. The method as claimed in claim 12, per the advertising plan displaying a third of the plurality of different advertising content items when a distance between the virtual user and the advertising display point is at a third distance.

Appellants' arguments regarding claim 12 are similar to those addressed in relation to claim 1. App. Br. 27–28. As already noted above, we find these arguments unpersuasive for the reasons set forth in relation to claim 1.

Appellants then argue in relation to claim 13 that “[n]o third distance consistent with the claims defined in an advertising plan is explicitly or inherently present in the relied upon portions of Altberg.” App. Br. 28.

The Examiner premises the rejection of claim 13 on the following theory:

[Altberg’s] avatars can continuously move in and around and past bulletin boards, avatar considered “nearby” based on distance (i.e.,] “viewable distance” as claimed), bulletin board can display dynamic ads on its overlay based and update the content periodically as an avatar moves past a bulletin board (i.e.,] “distance dependent advertising plan”, “different advertising content items” and “based on changes in distance of the user . . . from the display point” as claimed) as per [0075] et al., advertisers pay a fee for displaying advertisements in virtual world according to various fee structures and conditions).

Final Act. 13.

As explained in relation to claim 1, converting from the bulletin board’s initial image to the dynamic overlay image when the avatar approaches the bulletin board constitutes changing the images based on transitioning between a first and second distance. However, we disagree with the Examiner that Altberg’s functionality of dynamically changing the content as the avatar moves past the bulletin board reasonably corresponds to claim 13’s requirement of displaying a third advertising content item when a distance between the virtual user and the advertising display point is at a third distance. The fact that the image may change as the avatar walks by does not necessarily mean that the rotation is based on distance. It appears just as possible that the image rotation can be based upon time.

Accordingly, we do not sustain the anticipation rejection of claim 13. Because the issue is not before us, we do not address the separate question of

whether it would have been obvious to base the disclosed image rotation specifically on distance.

*Claim 15*

Claim 15 reads as follows:

15. The method as claimed in claim 10, wherein viewable distance rules and the rotation time rules are aggregated, averaged or combined statistically.

Appellants argue that the cited passages of Altberg do not disclose this claim language. App. Br. 28.

This argument is unpersuasive. The Examiner explains, and we agree, that Altberg's advertisements are dynamically selected for display to nearby avatars relevant to activities taking place in the vicinity of the display, and the advertisements are based on circumstances near the bulletin board. Final Act. 15 (citing Altberg ¶¶ 75, 80, 95). The Examiner notes that the dynamic changes to the advertisements can be based on plural avatars moving around, entering/exiting the specified area. Final Act. 15. Such functionality for plural avatars reasonably corresponds to aggregating viewable-distance and time-rotation rules.

Accordingly, we sustain the anticipation rejection of claim 15, as well as claim 20, which is not argued separately. *See* App. Br. 29.

*Claim 16*

Claim 16 reads as follows:

16. The method as claimed in claim 10, wherein viewable distance rules and the rotation time rules are separately evaluated.

The Examiner reasons that Altberg discloses the claimed rules being separately evaluated because Altberg's system includes an option of presenting different content for each avatar. Final Act. 21–22. Appellants argue that the cited passages of Altberg do not disclose this claim language. App. Br. 28–29.

The portion of Appellants' Specification that discusses separate evaluations of the rules (Spec. ¶ 33), as well as the surrounding disclosure (e.g., Spec. ¶¶ 29–37), appears to indicate that the claim drafters intend claim 16 to mean that the viewable-distance rules for one or more avatars are evaluated separately from the rotation-time rules for the same avatar(s). The Examiner appears, though, to be interpreting claim 16 to mean that the viewable-distance rules and rotation-time rules for one avatar can be evaluated separately from the viewable-distance rules and rotation-time rules for a second avatar. Final Act. 21–22.

Even if we assume the Examiner's alternative interpretation of claim 16 is reasonable, the Examiner has not established that Altberg teaches such a limitation. The fact that the *advertisement content* differs from one avatar to another does not necessarily mean that *viewable-distance rules and rotation-time rules* differ from one avatar to another.

Accordingly, we do not sustain the anticipation rejection of claim 16, or of claim 21, which contains similar language.

*Claims 22–26*

Claim 22 is reproduced below, in pertinent part, with emphasis added:

22. A system for distance dependent advertising for [a] virtual world, the system comprising at least one processor and at least one memory, wherein the processor is configured for

...

creating an advertising plan, wherein the advertisement plan contains one or more advertising content [items] for the advertisement display point, the advertisement plan includes the advertising sponsor for the one or more advertising content, the advertising plan includes a display distance rule for the one or more advertising content, and the advertising plan includes rates for the one of more advertising content for the advertising sponsor, the advertising plan includes display types the advertising content dependent upon a distance of each of the virtual users from the advertisement display point, and the display types includes at least one of slides or banners or videos or a form of digital advertising media subject to change dependent on a computed distance of a least a subset of the virtual users from the advertisement display point, and *the advertising plan includes rotation time rules for the one or more advertising content based on the viewable distance of at least a subset of the virtual users from the advertisement display point;*

Appellants argue that the rejection is in error because the Final Action groups claim 17 and 22 together, even though the claimed limitations are different. App. Br. 30. Appellants urge that “claim 17 lacks the above highlighted limitations, which are not properly addressed.” *Id.*

This argument is unpersuasive. Regardless of the Examiner’s claim grouping and regardless whether this language is addressed in the rejection of claim 17, the disputed claim language is substantively identical to that of claim 10. Appellants provide no persuasive arguments for why the disputed language of claim 22 should be interpreted any differently than that of claim 10, which we addressed above.

Accordingly, we sustain the anticipation rejection of claim 22, as well as that of claims 23–26, which Appellants do not argue separately. App. Br. 30.

*Claim 27*

27. A method for distance dependent advertising in a virtual world, the method comprising:

identifying users in a virtual world, wherein the users are in a viewable distance from an advertisement display point, in a virtual environment;

displaying a plurality of sets of information on the advertisement display point in accordance with an advertisement plan, wherein the plurality of sets information includes advertising content, the advertisement plan including an advertisement sponsor, and the advertising plan containing a charge rate for the advertising content for the advertising sponsor;

computing a distance of each of the users from the advertisement display point in the virtual environment; and

on determining that each of the users reaches a predetermined distance from the advertisement display point, enabling each of the users at respective predetermined distances from the advertisement display point to view a distinct advertising content from among the plurality of sets of information, wherein the advertising content to be displayed on the advertisement display point changes based on changes in a user's distance from the advertisement display point.

Appellants argue that the cited portions of *Altberg* are silent as to an advertising plan that includes “a plurality of sets of displayed information that includes ‘advertising content, a charge rate for advertising content, and the like.’” App. Br. 30–31. This argument is unpersuasive. *Altberg* discusses charging advertisers advertisement fees. *See, e.g., Altberg* ¶¶ 16, 17, 145.

Appellants argue that the relied upon portions of *Altberg* fail to compute a distance from each of the viewers and the advertisement display point. App. Br. 31. Appellants also argue that *Altberg* “discuss[es] content

that is changed based on semantics (of what is being discussed at a meeting), but fails to explicitly or inherently teach that advertising content is changed based on a user's distance from the advertisement display point." *Id.*

These arguments are unpersuasive. As mentioned above, Altberg provides dynamic overlays of advertising when an avatar is within a specified distance. This disclosure also implies that Altberg's system must, in some manner, measure the avatar's distance from the advertising point in order to know when the avatar is within the specified range.

Appellants argue that the cited portions fail to enable users at predetermined distances to view distinct content from among the different sets of information. *Id.* This argument is unpersuasive. As mentioned in relation to claim 16 (*see* Final Act. 21–22), Altberg's discloses the functionality of displaying different advertisements for different avatars. Altberg ¶ 105.

Accordingly we sustain the anticipation rejection of claim 27.

## CONCLUSIONS

We sustain the rejection of claims 1–27 under 35 U.S.C. § 101 as being directed to patent ineligible subject matter.

We sustain the rejection of claims 1–3, 5–12, 14, 15, 17–20, and 22–27 under 35 U.S.C. § 102(b) as being unpatentable over Altberg.

We sustain the rejection of claims 4 under 35 U.S.C. § 103 as being unpatentable over Altberg and Datta.

We do not sustain the rejection of claims 13, 16, and 21 under 35 U.S.C. § 102(b) as being unpatentable over Altberg.

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DECISION

The Examiner's decision rejecting claims 1–27 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)(1). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED