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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* EUGENE A. FUSZ

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Appeal 2017-000234<sup>1</sup>  
Application 14/473,268<sup>2</sup>  
Technology Center 3600

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Before BRADLEY B. BAYAT, AMEE A. SHAH, and  
MATTHEW S. MEYERS, *Administrative Patent Judges*.

BAYAT, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Eugene A. Fusz (“Appellant”) appeals under 35 U.S.C. § 134(a) from the final rejection of claims 39–58. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> Our Decision references Appellant’s Appeal Brief (“Appeal Br.,” filed Dec. 23, 2015) and Reply Brief (“Reply Br.,” filed Sept. 29, 2016), the Examiner’s Answer (“Ans.,” mailed Aug. 1, 2016) and Final Office Action (“Final Act.,” mailed July 31, 2015).

<sup>2</sup> Appellant identifies “Fusz Digital Ltd.” as the real party in interest. Appeal Br. 1.

## CLAIMED INVENTION

Appellant's invention relates to a method and system "which allows consumers to generate anonymous, self-generated profiles which further allows the consumers to provide self-defined marketing data to marketers." Spec. ¶ 2. Method claim 39 and system claim 49 are the independent claims on appeal and recite substantially similar subject matter. *See* Appeal Br.15, 17, Claims App. Independent claim 39, with added bracketed notations, is illustrative of the claims on appeal and recites:

39. A method for generating a database of personalized anonymous consumer profiles, said method comprising:

[(1)] transmitting, by a server computer to a consumer computer, a questionnaire including only questions configured such that answers to the questions include only non-identifying information concerning a consumer;

[(2)] receiving answers to the questionnaire by the server computer from the consumer computer, the answers entered via a user interface displayed by the consumer computer, the user interface configured such that only answers containing non-identifying information may be entered into the user interface;

[(3)] transmitting, by the server computer, instructions to the consumer computer to not store the answers;

[(4)] configuring the received answers as a consumer profile within a consumer profile database coupled to the server computer, the consumer profile database including only non-identifying information concerning the consumer;

[(5)] transmitting at least one advertisement to the consumer computer based on data within the consumer profile database;

[(6)] receiving, by the server computer, anonymous feedback on the at least one advertisement;

[(7)] transmitting, by the server computer, the anonymous feedback to at least one marketer computer such that the consumer is not identified to the at least one marketer computer; and

[(8)] updating the consumer profile database based on the received feedback.

Appeal Br. 15, Claims App.

### REJECTIONS

Claims 39–58 are rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter.

Claims 39–41, 43–51, and 53–58 are rejected under 35 U.S.C. § 103(a) as unpatentable over Goldhaber and Kepecs.

Claims 42 and 52 are rejected under 35 U.S.C. § 103(a) as unpatentable over Goldhaber, Kepecs, and Gabber.

### ANALYSIS

#### *Non-Statutory Subject Matter*

Under 35 U.S.C. § 101, an invention is patent-eligible if it claims a “new and useful process, machine, manufacture, or composition of matter.” 35 U.S.C. § 101. The Supreme Court, however, has long interpreted § 101 to include an implicit exception: “[l]aws of nature, natural phenomena, and abstract ideas” are not patentable. *See, e.g., Alice Corp. Pty Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2354 (2014).

The Supreme Court, in *Alice*, reiterated the two-step framework previously set forth in *Mayo Collaborative Services v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1300 (2012), “for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim

patent-eligible applications of these concepts.” *Alice Corp.*, 134 S. Ct. at 2355. The first step in that analysis is to “determine whether the claims at issue are directed to one of those patent-ineligible concepts,” *id.*, e.g., to an abstract idea. If the claims are not directed to an abstract idea, the inquiry ends. Otherwise, the inquiry proceeds to the second step where the elements of the claims are considered “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.” *Alice Corp.*, 134 S. Ct. at 2355 (quoting *Mayo*, 132 S. Ct. at 1297).

*Alice Step One*

According to *Alice* step one, we determine whether the claims at issue are directed to a patent-ineligible concept, such as an abstract idea. *Alice*, 134 S. Ct. at 2355. The “directed to” inquiry in the claims applies a stage-one filter to the claims, considered in light of the Specification, based on whether “their character as a whole is directed to excluded subject matter.” *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1346 (Fed. Cir. 2015); *see also Genetic Techs. Ltd. v. Merial L.L.C.*, 818 F.3d 1369, 1376 (Fed. Cir. 2016); *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016) (Inquiring into “the focus of the claimed advance over the prior art.”).

Claim 39 recites “[a] method for generating a database of personalized anonymous consumer profile, said method comprising” eight steps, in which steps 1–4, 6, and 7 are performed “by a server computer,” including (1) “transmitting . . . to a consumer computer, a questionnaire,” (2) “receiving

answers to the questionnaire,”<sup>3</sup> (3) “transmitting . . . instructions to the consumer computer,” (4) “configuring the received answers as a consumer profile within a consumer profile database,” (5) “transmitting at least one advertisement to the consumer computer,” (6) “receiving . . . anonymous feedback on the at least one advertisement,” (7) “transmitting the anonymous feedback to at least one marketer computer,” (8) “and updating the consumer profile database based on the received feedback.” Claim 49 recites “[a]n anonymous consumer profiling system comprising a server computer that includes one or more processors and is coupled to a memory, said server computer is configured to:” perform the same eight steps recited in claim 39.

In *Enfish*, the Federal Circuit noted that “[s]oftware can make non-abstract improvements to computer technology just as hardware improvements can[.]” *Enfish*, 822 F.3d at 1335. The court in *Enfish* presented the question as “whether the focus of the claims is on [a] specific asserted improvement in computer capabilities . . . or, instead, on a process that qualifies as an ‘abstract idea’ for which computers are invoked merely as a tool.” *Enfish*, 822 F.3d at 1335–1336. There, the court found the “plain focus of the claims” was on “an improvement to computer functionality itself, not on economic or other tasks for which a computer is used in its ordinary capacity.” *Id.* at 1336.

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<sup>3</sup> We note that claims 39 and 49 optionally recite “the user interface configured such that only answers containing non-identifying information *may* be entered into the user interface.” *See* claims 39 and 49 (emphasis added).

“In determining the eligibility of [Appellant’s] claimed process for patent protection under § 101, the[] claims must be considered as a whole.” *Diamond v. Diehr*, 450 U.S. 175, 188 (1981). The question is whether the claims as a whole “focus on a specific means or method that improves the relevant technology” or are “directed to a result or effect that itself is the abstract idea and merely invoke generic processes and machinery.” *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1314 (Fed. Cir. 2016). In this case, claims 39 and 49 as a whole are focused on serving an advertisement to a consumer computer based on data within a consumer profile database and receiving feedback about the advertisement from the consumer anonymously. Contrary to Appellant’s contention that “[t]he pending claims are analogous to those in *Enfish*” (Reply Br. 3), we fail to see how claim 39 is focused on an improvement to the claimed “server computer.” *Cf. In re TLI Communications LLC Patent Litigation*, 823 F.3d 607, 613 (Fed. Cir. 2016) (The claims’ focus “was not on an improved telephone unit or an improved server.”). Nor do we see that claim 49 is focused on an improvement to the claimed “server computer,” “one or more processors,” or “memory.” We note that the claimed “non-identifying information” is merely information represented by data stored in a database (claim 39) or memory (claim 49).

“The ‘abstract idea’ step of the inquiry calls upon us to 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. DirectTV, LLC*, 838 F.3d 1253, 1257 (Fed. Cir. 2016) (citing *Electric Power Group, LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed.

Cir. 2016)); *see also Enfish*, 822 F.3d at 1335, quoted in *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1241 (Fed. Cir. 2016).

In that regard, the Background section of the Specification recognizes that “[o]ne well accepted marketing method is to gather information about a target audience and directs a product, or service, to that audience for review,” and discusses the problems, which are that “it is difficult to obtain information about the target audience because many individuals do not freely provide information about themselves to strangers” (Spec. ¶ 3), and that to market a product or service, the vendor currently has to retain a marketing and advertising company to purchase targeting marketing and the media through which the targeted marketing will be applied, which “is inefficient because the timing for the marketing is likely inappropriate for a large segment of the targeted consumers.” Spec. ¶ 4. The inventor solved the problem via “self-generating an anonymous consumer profile, personalized to the user, providing access to the anonymous consumer profile to one or more entities, receiving marketing data from the entities based on the anonymous consumer profile, providing feedback on the received marketing data, the feedback becoming a part of the anonymous consumer profile, and repeating the receiving marketing data and providing feedback steps.” *Id.* ¶ 5. According to the Specification:

At least one result is a consumer centric marketing system which provides largely personalized marketing to consumers at a time and place of their choosing, with the relevancy of the marketing being determined by the consumers themselves. The marketing is based on demographics and professed desires with regard to products and services that might be offered as the consumers provide the information in their profiles that serve as the definitions that allow marketers to provide appropriate marketing data directly to them by filtering the profiles. In addition, the

consumers are able to filter marketers, as in one embodiment, a marketer has to be "approved" by a consumer before that marketer has access to the anonymous profile. In addition, such methods and apparatus provide vendors with an ability to provide targeted marketing when desired by consumers while not requiring personal contact information for the consumer. It is believed to be desirable to provide consumers with timely marketing that they are interested in experiencing.

Id. ¶ 13. In light of the Specification's description of the problems and solution, the advance over the prior art by the claimed invention is in improving the collection of consumer information to conduct more effective and efficient targeted marketing.

Given the focus of claims 39 and 49 as a whole is on data gathering activities to create personalized anonymous consumer profiles for effectively targeting the serving of online advertisements, and in light of the Specification, the focus of the invention is analyzing and updating the online consumer profiles to conduct more effective and efficient targeting. The claims are properly characterized as being "directed to" customizing online advertising to an audience.<sup>4</sup> *See* Ans. 3–4. Targeting online advertising to an audience is a fundamental economic practice. In view of the above, claims 39 and 49 are directed to an abstract idea.<sup>5</sup> We underscore the

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<sup>4</sup> *Cf. Elec. Power Grp.*, 830 F.3d at 1353 (When "the focus of the asserted claims" is "on collecting information, analyzing it, and displaying certain results of the collection and analysis," the claims are directed to an abstract idea.)

<sup>5</sup> *See Morsa v. Facebook, Inc.*, 77 F. Supp. 3d 1007, 1014 (C.D. Cal. 2014), *aff'd*, 622 F. App'x 915 (Fed. Cir. 2015) (claims directed to "targeting advertisements to certain consumers, and using a bidding system to determine when and how advertisements will be displayed" held to be an abstract idea). Matching consumers with a given product or service "has

similarity of this case to *Intellectual Ventures I*, in which the Federal Circuit held that “customizing information based on ... information known about the user” is an abstract idea. *Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1369 (Fed. Cir. 2015). The court in *Intellectual Ventures I* explained that tailoring of content based on information about the user—such as where the user lives (identifying information) or what time of day the user views the content (non-identifying information)—is an abstract idea and fundamental practice long prevalent. *Id.* at 1370. And the type of information processed (e.g., non-identifying information) is not patentably distinguishing because “[i]nformation as such is an intangible.” *Elec. Power Grp.*, 830 F.3d at 1353 (“collecting information, including when limited to particular content (which does not change its character as information), [is] within the realm of abstract ideas.”).

#### *Alice Step Two*

Step two is “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. This inventive concept must do more than simply recite “well-understood, routine, conventional activity.” *Mayo*, 132 S. Ct. at 1298.

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been practiced as long as markets have been in operation.” *Id.* (citation omitted); *see also OpenTV, Inc. v. Netflix Inc.*, 76 F.Supp.3d 886, 893 (N.D. Cal. 2014) (“The concept of gathering information about one’s intended market and attempting to customize the information then provided is as old as the saying, ‘know your audience.’”).

Under the second step of the *Alice* framework, we agree with the Examiner (Final Act. 2–3; Ans. 7–8) and conclude that claims 39 and 49 do not contain an inventive concept sufficient to “transform the nature of the claim’ into a patent-eligible application.” *Alice*, 134 S. Ct. at 2355 (citation omitted). The introduction of a server computer or a generic processor into the claims does not alter the analysis here.<sup>6</sup> *See, e.g.*, Spec. ¶ 17. The claims do no more than simply instruct the practitioner to implement the abstract idea on a generic computer. *See Elec. Power Grp.*, 830 F.3d at 1355 (“Nothing in the claims, understood in light of the specification, requires anything other than off-the-shelf, conventional computer, network, and display technology for gathering, sending, and presenting the desired information”); *see also Dealertrack, Inc. v. Huber*, 674 F.3d 1315, 1333 (Fed. Cir. 2012) (“Simply adding a ‘computer aided’ limitation to a claim

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<sup>6</sup> [T]he mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention. Stating an abstract idea “while adding the words ‘apply it’” is not enough for patent eligibility. Nor is limiting the use of an abstract idea “to a particular technological environment.” Stating an abstract idea while adding the words “apply it with a computer” simply combines those two steps, with the same deficient result. Thus, if a patent’s recitation of a computer amounts to a mere instruction to “implemen[t]” an abstract idea “on . . . a computer,” that addition cannot impart patent eligibility. This conclusion accords with the pre-emption concern that undergirds our § 101 jurisprudence. Given the ubiquity of computers, wholly generic computer implementation is not generally the sort of “additional featur[e]” that provides any “practical assurance that the process is more than a drafting effort designed to monopolize the [abstract idea] itself.”

*Alice*, 134 S. Ct. at 2358 (citations omitted).

covering an abstract concept, without more, is insufficient to render [a] claim patent eligible”) (citation omitted).

The functions performed by the process in claim 39 and components recited in the system of claim 58 represent well-understood, routine, and conventional activities and structures. *Cf. Alice* at 2360 (“Nearly every computer will include a ‘communications controller’ and ‘data storage unit’ capable of performing the basic calculation, storage, and transmission functions required by the method claims.”). The recited functions of transmitting information (e.g., questionnaire, instructions) and receiving information (e.g., answers, feedback) are routine and conventional. *See, e.g., Symantec*, 838 F.3d at 1321 (receiving or transmitting data over a network—using the Internet to gather data), *OIP Techs., Inc., v. Amazon.com, Inc.*, 788 F.3d 1359, 1363, (Fed. Cir. 2015) (sending messages over a network); *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1355 (Fed. Cir. 2014) (computer receives and sends information over a network). The claimed activities of configuring information as a profile within a database and updating the profile database are routine functions. *See, e.g., Versata Dev. Group, Inc. v. SAP Am., Inc.*, 793 F.3d 1306, 1334 (Fed. Cir. 2015) (storing and retrieving information in memory); *Alice*, 134 S. Ct. at 2359 (creating and maintaining “shadow accounts”); *Ultramercial*, 772 F.3d at 716 (updating an activity log). And transmitting an advertisement based on data within a consumer profile database<sup>7</sup> by comparing data is one of the most basic functions of a computer. The claims require nothing more than a

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<sup>7</sup> “[T]he consumer generated anonymous data system includes a processor programmed to compare the set of data with each consumer generated profile.” Spec. ¶ 37.

generic computer performing generic computer functions. *See* Spec. ¶¶ 17–21 (describing a system with generic components). Looking at the claimed elements separately, the function performed by the computer at each step of the process is purely conventional. Considered as an ordered combination, the computer components of claims 39 and 49 add nothing that is not already present when the steps are considered separately. Viewed as a whole, Appellant’s claims simply recite the concept of personalized targeted online advertising to an audience as performed by a generic computer—albeit using non-identifying information, which is not recited with any particular implementation and fails to transform the abstract idea into a patent-eligible application. “We have repeatedly held that such invocations of computers and networks that are not even arguably inventive are ‘insufficient to pass the test of an inventive concept in the application’ of an abstract idea.” *Elec. Power Grp.*, 830 F.3d at 1355 (quoting *buySAFE*, 765 F.3d at 1353).

We now address Appellant’s arguments in the briefs, which we find unpersuasive to overcome the conclusion reached in the rejection thereof.<sup>8</sup>

Appellant argues that the claims recite patent eligible subject matter because they are comparable to the claims the Supreme Court found patent eligible in *Diamond v. Diehr*, 450 U.S. 175 (1981). Appeal Br. 6. Appellant focuses specifically on an implementation of the claims on the Internet and the non-identifying nature of the information, which would “enable a person to remain anonymous while providing marketing sources with their consumer profile and providing feedback based on advertisements received

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<sup>8</sup> In view of the Examiner’s additional reasoning in the Answer and our explanation in the Decision, Appellant’s contentions as to any deficiencies have been addressed. *See* Appeal Br. 4–5; *see also* Reply Br. 1–3.

from marketing sources” (*id.*) as similar to *Diehr*’s control of the rubber-mold press. We find no parallel. Indeed, neither claim 39 nor claim 49 recite a computer network or the term Internet. And as we have explained, the evidence supports construing the claimed “server computers” and “processors” as covering generic computers that do nothing more than limit the type of received information. We do not see and Appellant does not persuasively explain, how these limitations render claims 39 and 49 comparable to the *Diehr* claims — which “involv[ed] the transformation of an article, in this case raw, uncured synthetic rubber, into a different state or thing.” *Diehr*, 450 U.S. at 184.

We disagree with Appellant’s argument that the claims here are “analogous to those in *DDR Holdings*”. Appeal Br. 7–8 (citing *DDR Holding, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014)).

In *DDR Holdings*, the Federal Circuit determined that, although the patent claims at issue involved conventional computers and the Internet, the claims addressed the problem of retaining website visitors who, if adhering to the routine, conventional functioning of Internet hyperlink protocol, would be transported instantly away from a host’s website after “clicking” on an advertisement and activating a hyperlink. *DDR Holdings*, 773 F.3d at 1257. The court, thus, held that the claims were directed to statutory subject matter because they claim a solution “necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks.” *Id.* No such technological advance is evident in the claimed invention. Unlike the situation in *DDR Holdings*, Appellants do not identify any problem particular to computer networks and/or the Internet that claim 39 and 49 allegedly overcome. As discussed above, the invention

addresses problems associated with the reluctance of customers to provide information and the inefficiency of retaining outside marketing, advertising, and media – business problems. *See* Spec. ¶¶ 3, 4. And as we indicated above, the claims do not even recite a computer network, so *DDR Holdings* is not analogous. *See Intellectual Ventures I*, 792 F.3d at 1371 (“The patent claims here do not address problems unique to the Internet, so *DDR* has no applicability.”).

Finally, we find Appellant’s contention that “the pending claims recite an inventive concept as defined by the *BASCOM* case” unavailing. *See* Reply Br. 3–4 (citing *BASCOM Global Internet Services v AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016)). A plain reading of the claim in *BASCOM* shows that it is directed to a “content filtering system” comprising a filtering scheme, logical filtering elements, an ISP server associating a network account to a filtering scheme and a filtering element; the ISP further executing an associated filtering scheme utilizing an associated set of logical filtering elements. The court found that “[t]he claims carve out a specific location for the filtering system (a remote ISP server) and require the filtering system to give users the ability to customize filtering for their individual network accounts.” *BASCOM*, 827 F.3d at 1352. We do not see, and Appellant does not explain, in what way claims 39 and 49 are like claim 1 of *BASCOM* in claiming a technology-based solution.

In view of the foregoing, we sustain the rejection of independent claims 39 and 49 under 35 U.S.C. § 101. We also sustain the rejection of dependent claims 40–48 and 50–58, which are not argued separately, for the same reasons. Because our reasoning in sustaining the rejection under

35 U.S.C. § 101 deviates from that of the Examiner, we denominate it as a new ground of rejection.

*Obviousness over Goldhaber and Kepecs*

In rejecting independent claim 39 as obvious over Goldhaber and Kepecs, the Examiner finds that Goldhaber discloses all the claim limitations except for “the consumer profile database including only non-identifying information concerning the consumer.” Final Act. 5. To cure this deficiency, the Examiner finds “Kepecs discloses a discount administration process (OAP) computer 11 that maintains a Key database of consumer accounts (column 5, lines 54-57), wherein the lowest level of identification is simply the KEY with no other identification data, thus maintaining complete consumer anonymity (column 6, lines 52-54).” *Id.* The Examiner explains:

Both Goldhaber et al and Kepecs are concerned with an effective method of marketing products to potential consumers. It would have been obvious to one having ordinary skill in the art at the time the invention was made to include all of the stored files and the one or more consumer profile databases including only nonidentifying information concerning the consumer in Goldhaber et al, as seen in Kepecs, since the claimed invention is merely a combination of old elements, and in the combination each element merely would have performed the same function as it did separately, and one of ordinary skill in the art would have recognized that the results of the combination were predictable.

*Id.* at 5–6.

Appellant argues that “Goldhaber does not disclose or suggest, ‘transmitting, by a server computer to a consumer computer, a questionnaire including *only questions configured such that answers to the questions include only non-identifying information concerning a consumer.*’” Appeal

Br. 9; *see also* Reply Br. 4 Appellant contends that “the profile information of Goldhaber is asserted as being the equivalent of only questions configured such that answers to questions include only nonidentifying information concerning a consumer.” *Id.* According to Appellant, “[w]hile the profile information of Goldhaber may not include personal data of a consumer, the profile information is not the *only* information entered by a consumer. Therefore, the Examiner’s use of the profile information, on page 4 of the Office Action, by itself, as the *only* questions in a questionnaire is misleading as to the scope of Goldhaber.” *Id.*

We are not persuaded of Examiner error because Appellant’s argument is not commensurate with the scope of claim 39. Claim 39 does not require that *all* questionnaires transmitted to the consumer include only questions configured such that the answers include only non-identifying information. As the Examiner finds, Goldhaber discloses that a “consumer computer **104** may display the following ‘profile questionnaire’ and associated information requesting certain demographic related information from the consumer,” such as: gender, birth date, ethnicity, religion, and interests. *See* Goldhaber 13:32–14:5; *see also* Ans. 9 (citing Goldhaber 13:32–40). Goldhaber’s aforementioned profile questionnaire includes only questions that would elicit only non-identifying information concerning the user; Goldhaber underscores this fact by declaring: “Your profile does NOT include your contact [or identifying] information.” Goldhaber 14:9–10. Appellant does not adequately explain why this finding by the Examiner, under the broadest

reasonable interpretation, does not account for the recited language of the claim.

Appellant further argues that

the proposed combination of Kepecs with the system of Goldhaber teaches away from Goldhaber because Goldhaber is directed towards an attention brokerage system which compensates a consumer who views advertisements based on the personal information they provide to an advertiser. In this case, in order for a consumer to be compensated, personal information about the consumer is provided to an advertiser. Thus, any anonymity provided by using a key, as described in Kepecs, would frustrate the purpose of Goldhaber in allowing consumers to sell their personal information. Accordingly, Claim 39 is submitted to be patentable over Goldhaber and Kepecs.

Appeal Br. 12.

Appellant however provides no objective supporting evidence to show that Goldhaber is rendered inoperable for using only non-identifying information. Rather, Goldhaber teaches that a consumer can opt to make a profile available to advertisers as a “blind profile,” without any identifying information, leave the default to remain “anonymous,” or “hide” the profile from advertisers. *See* Goldhaber 13:55–14:15. And the fact that a consumer may choose not to release contact (identifying) information for compensation certainly does not render Goldhaber inoperable.

There also is no basis for a finding of a “teaching away” based on our review of the record. Appellants do not point to any passage in Goldhaber that criticizes, discredits, or otherwise discourages providing only non-identifying information, which is required to establish a “teaching away.” *See In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994) (A teaching away occurs when a reference discourages one skilled in the art from following the claimed path, or when the reference would lead one skilled in the art in a

direction divergent from the path that was taken by the applicant); *see also In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004) (The prior art’s mere disclosure of more than one alternative does not constitute a teaching away from any of the alternatives when the disclosure does not criticize, discredit, or otherwise discourage the solution claimed). In other words, substituting the identifying and non-identifying information in Goldhaber with *only* non-identifying information results in the proposed alternative, such that a consumer’s anonymity is preserved while not exercising the option of being compensated by allowing identifying information to be released to an advertiser.

Accordingly, we are not apprised of error by the Examiner in rejecting claim 39 as obvious over Goldhaber and Kepecs. We, therefore, sustain the rejection of independent claim 39, including independent claim 49, which is not argued separately. *See* Appeal Br. 12. We also sustain the rejection of claims 40, 41, 43–48, 50, 51, and 53–58, which are argued based on their dependence from those independent claims. *See id.*

*Obviousness over Goldhaber, Kepecs, and Gabber*

We are not persuaded by Appellant’s argument that “Gabber does not describe or suggest ‘transmitting, by a server computer to a consumer computer, a questionnaire including *only questions configured such that answers to the questions include only non-identifying information concerning a consumer,*’ as recited in Claim 39.” As discussed above, Goldhaber teaches this disputed limitation. Accordingly, we are not apprised of error by the Examiner in rejecting claims 42 and 52 as obvious

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over Goldhaber, Kepecs, and Gabber. We, therefore, sustain the rejection of claims 42 and 52.

DECISION

The rejection of claims 39–58 under 35 U.S.C. §101 is affirmed.

The rejections of claims 39–58 under 35 U.S.C. §103(a) are 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).

AFFIRMED