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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ELAINE M. SPOONER, JOHN D. KOSCHEKA,
MICHAEL S. BESSOLO, MARK L. SIMPSON, JEAN L. YUAN,
J. CRAIG D. RUSSELL, CHRISTOPHER M. BETTES, and
GREG McCARTHY

Appeal 2017-000514
Application 13/090,997¹
Technology Center 3600

Before MICHAEL C. ASTORINO, CYNTHIA L. MURPHY, and
BRUCE T. WIEDER, *Administrative Patent Judges*.

WIEDER, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the Examiner's rejection of claims 1–33. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ According to Appellants, the real party in interest is FOX ENTERTAINMENT GROUP, INC. (Appeal Br. 1.)

CLAIMED SUBJECT MATTER

Appellants' invention "relates generally to the delivery of media content, and in particular, to a method, apparatus, system, and article of manufacture for customized billboard advertisements" (Spec. ¶ 6.)

Claims 1, 9, and 17 are the independent claims on appeal. Claim 1 is illustrative. It recites:

1. A computer implemented method for delivering a website advertisement, comprising:

(a) displaying, by a server computer, a graphical user interface, wherein the graphical user interface comprises customization attributes;

(b) accepting, from an administrator of an owner of media content, administrator input into the graphical user interface, wherein the administrator input defines settings for the customization attributes for displaying one or more billboard advertisements via a website, wherein:

(i) the one or more billboard advertisements each comprise an advertisement for media content;

(ii) the customization attributes define access rights based on a user and/or a categorical group of users for display of the one or more billboard advertisements;

(iii) the media content advertised in the advertisement and the advertisement are owned and provided by the owner via the website; and

(iv) the user is a customer of the owner;

(c) receiving, by the server computer, a request from the user on a client computer to access the website; and

(d) in response to the request and based on the access rights, transmitting, by the server computer to the client computer, processing instructions that cause the client computer to display, on a display device, a first billboard advertisement of the one or more billboard advertisements, wherein:

- (i) the first billboard advertisement is primarily displayed without occlusion;
- (ii) remaining billboard advertisements of the one or more billboard advertisements are displayed partially occluded by the first billboard advertisement; and
- (iii) the one or more billboard advertisements are displayed based on the customization attributes.

REJECTIONS

Claims 1–33 are rejected under 35 U.S.C. § 101 as directed to a judicial exception without significantly more.

Claims 1–27 are rejected under 35 U.S.C. § 103(a) as unpatentable in view of Harrang (US 2010/0131385 A1, pub. May 27, 2010) and Robert (US 2008/0307343 A1, pub. Dec. 11, 2008).

Claims 28–33 are rejected under 35 U.S.C. § 103(a) as unpatentable in view of Harrang, Robert, and Michel (US 2010/0205261 A1, pub. Aug. 12, 2010).

ANALYSIS

The § 101 rejection of claims 1–33

Appellants argue all claims together for this rejection. Therefore, the claims will stand or fall together. We select claim 1 as representative.

“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.” 35 U.S.C. § 101. Section 101, however, “contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable.” *Alice Corp. Pty. Ltd. v.*

CLS Bank Int'l, 134 S. Ct. 2347, 2354 (2014) (quoting *Assoc. for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (2013)).

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

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

With regard to step one of the *Alice* framework, the Examiner determines that the claims

are directed to the abstract idea of providing an interface for an administrator to define settings for the display of advertisements to client computer users of a website wherein the advertisements are related to media content and are displayed in accordance with display settings and in a manner partially occluding underlying advertisements by a first advertisement.

(Final Action 2.)

Appellants argue that “the present claims are directed towards delivering customizable billboard advertisements” (Appeal Br. 9.) In particular, Appellants argue, the claims are “directed towards defining particular settings for advertisements and for a particular manner in which such advertisements are displayed . . . , along with the ability to accept

customization attributes for defining how such ads are displayed.” (*Id.* at 12.)

Under step one of the *Alice* framework, we “look at the ‘focus of the claimed advance over the prior art’ to determine if the claim’s ‘character as a whole’ is directed to excluded subject matter.” *Affinity Labs of Texas, LLC v. DIRECTV, LLC*, 838 F.3d 1253, 1257 (Fed. Cir. 2016) (quoting *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016)).

The Specification provides evidence as to what the claimed invention is directed. In this case, the Specification discloses that the invention “relates generally to the delivery of media content, and in particular, to a method, apparatus, system, and article of manufacture for customized billboard advertisements” (Spec. ¶ 6.) Claim 1 recites a method for delivering an advertisement comprising: “displaying . . . a graphical user interface,” “accepting . . . input into the graphical user interface, wherein the . . . input defines settings for the customization attributes for displaying one or more . . . advertisements,” “receiving . . . a request from the user . . . to access the website,” “in response to the request . . . , transmitting . . . instructions that cause the client computer to display . . . a first . . . advertisement . . . , wherein: (i) the first . . . advertisement is primarily displayed without occlusion,” “(ii) remaining . . . advertisements . . . are displayed partially occluded by the first . . . advertisement; and (iii) the . . . advertisements are displayed based on the customization attributes.”

Although we and the Examiner describe, at different levels of abstraction, to what the claims are directed, it is recognized that “[a]n abstract idea can generally be described at different levels of abstraction.” *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1240 (Fed. Cir. 2016). That

need not and, in this case does not, “impact the patentability analysis.” *See id.* at 1241.

In this case, as in *Alice*, we need not labor to delimit the precise contours of the “abstract ideas” category. It is enough to recognize that there is no meaningful distinction in the level of abstraction between the concept of customizing web page content as a function of information known about a user, *Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1369 (Fed. Cir. 2015), and “the delivery of media content, and in particular, . . . customized billboard advertisements” to a user (Spec. ¶ 6). Both are squarely within the realm of “abstract ideas” as the Court has used that term. *See Alice*, 134 S. Ct. at 2357.

Nonetheless, Appellants seek to analogize the present claims to those in *DDR Holdings*. (Appeal Br. 12–13, citing *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014). Appellants argue that “the claims are not merely directed towards advertising or enhancing revenue but are explicitly directed towards defining particular settings for advertisements and for a particular manner in which such advertisements are displayed (i.e., partially occluding some advertisements and not others)” (*Id.* at 12.) Specifically, Appellants argue, the claims address “a business challenge that is particular to the Internet.” (*Id.* at 12–13.)

We disagree. Unlike the claims here, the claims in *DDR Holdings* “specify how interactions with the Internet are manipulated to yield a desired result—a result that overrides the routine and conventional sequence of events ordinarily triggered by the click of a hyperlink.” *DDR Holdings*, 773 F.3d at 1258 (emphasis added). In other words, the invention claimed in *DDR Holdings* does more than “simply instruct the practitioner to

implement the abstract idea with routine, conventional activity.” See *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014); see also *DDR Holdings*, 773 F.3d at 1259. Moreover, in view of the need to position advertisements in, e.g., newspaper inserts, Appellants do not persuasively argue why positioning advertisements on a web page display is a business challenge particular to the Internet. See *Intellectual Ventures I*, 792 F.3d at 1369 (analogizing customizing a web page display for a user to tailoring a newspaper insert for a subscriber).

In view of the above, we agree with the Examiner that the claims are directed to an abstract idea.

Step two of the *Alice* framework has been described “as a search for an ‘“inventive concept” ’—*i.e.*, an element or combination of elements that is ‘sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.’” *Alice*, 134 S. Ct. at 2355 (quoting *Mayo*, 566 U.S. at 72–73).

Appellants argue “that based on the arguments set forth below with respect to the 103 rejections, by definition, the present claims are not ‘well-understood, routine and conventional’ in the art, and thus support subject matter eligibility.” (Appeal Br. 14.) But “under the *Mayo/Alice* framework, a claim directed to a newly discovered law of nature (or natural phenomenon or abstract idea) cannot rely on the novelty of that discovery for the inventive concept necessary for patent eligibility.” *Genetic Techs. Ltd. v. Merial L.L.C.*, 818 F.3d 1369, 1376 (Fed. Cir. 2016)

In view of the above, we are not persuaded that the Examiner erred in rejecting claim 1 under § 101. Claims 2–33 are not separately argued and fall with claim 1. See 37 C.F.R. § 41.37(c)(1)(iv).

The § 103 rejection of claims 1, 5–7, 9, 13–15, 17, 21–23, and 25–27

Appellants argue that Harrang does not “describe billboard advertisements that consist[] of advertisements for media content.” (Appeal Br. 15.) Appellants also argue that “Robert is not directed towards billboard advertisements for media content whatsoever.” (*Id.* at 17.)

As an initial matter, we note that the content of the advertisement, i.e., that the advertisement is for media content, is claimed solely for what it communicates. We also note that the content of the advertisement has no functional or structural relation to the substrate. Therefore, that the advertisement is for media content is entitled to no patentable weight. *See In re Distefano*, 808 F.3d 845, 850 (Fed. Cir. 2015); *see also Praxair Distribution, Inc. v. Mallinckrodt Hosp. Prods. IP Ltd.*, 890 F.3d 1024, 1031–32 (Fed. Cir. 2018). Therefore, we do not find these arguments persuasive of error.

Appellants further argue that “Harrang does not depict or describe an owner (of both the advertisements and media content) that has the ability to configure the advertisements that are displayed to the user via a website.” (Appeal Br. 15.) But, claim 1 does not recite “an owner (of both the advertisements and media content) that has the ability to configure.” Rather, claim 1 recites “accepting, from an *administrator* of an owner of media content, *administrator* input.” (Emphasis added.) In other words, the input is from the administrator, not the owner. Therefore, we do not find this argument persuasive of error.

Appellants further argue that “Harrang’s teaching is limited to advertising within a social network environment,” and that “the claims explicitly provide for delivering both content and ads for the content via a

website that is owned by the same entity.” (Reply Br. 5) Claim 1 recites “an owner of media content,” “a website” and that “the media content advertised in the advertisement and the advertisement are owned and provided by the owner via the website.” Claim 1 is silent as to the owner of the website. Therefore, we do not find this argument persuasive of error.

Appellants also argue that

[i]n rejecting the display of a billboard advertisement without occlusion and the display of remaining billboard advertisements partially occluded, the Action relies on Robert’s perspective view of documents that are displayed in a “cover flow view” (i.e., a file management system). . . . Robert does not have the ability to customize how the perspective view is presented or for specifying attributes for customizing the perspective view

(Appeal Br. 17–18.)

As an initial matter, we agree with the Examiner that, under a broadest reasonable interpretation, the term “billboard advertisement” includes “an advertisement generally rectangular in shape, displayed to a viewer of a website in a prominent position.” (Answer 6.) This is in accord with the description of a billboard advertisement in the Specification, i.e., “[t]he shape and structure of the billboard advertisement may vary but is traditionally a rectangular advertisement.” (*See* Spec. ¶ 53.) Additionally, the Examiner finds that “a person of ordinary skill in the art would recognize that . . . advertisements can vary in size and prominence on display on a website.” (Answer 6.) The Examiner also finds that

Robert, while not specifically reciting an advertisement, discloses at least at figure 24B the announcement or advertisement of product information related to computer products, and at least at figure 24F and 27F the presentation of rectangular (i.e., billboard) announcements or advertisements, and as described at least at paragraphs [102] and [103], “a

preview,” including partially occluded, by a first advertisement, second advertisements of media content titles, which the Examiner interprets to be the equivalent of a billboard advertisement, respectively.

(Answer 6–7.)

Figure 24F of Robert is reproduced below:

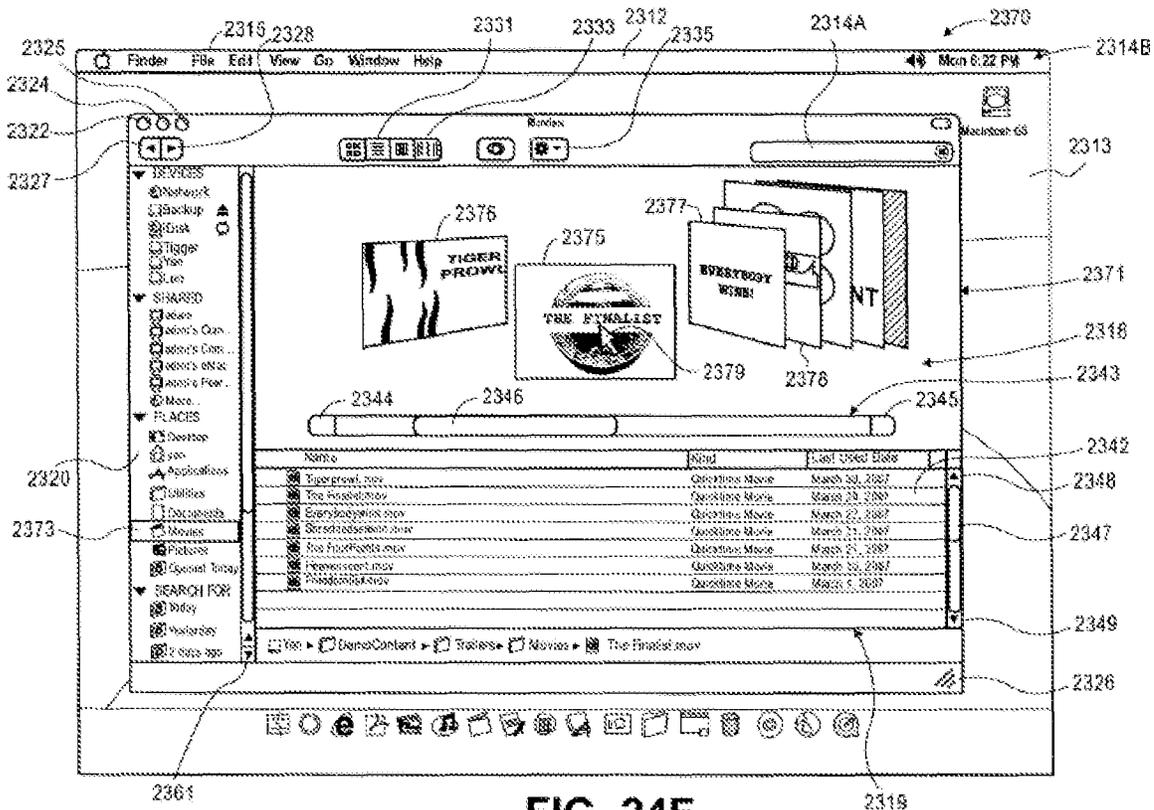


FIG. 24F

Figure 24F of Robert, above, shows a user interface on a display device. (See Robert ¶¶ 107–109.) Elements 2375–78 are rectangular-shaped elements that enclose information regarding the listed movies. (*Id.* ¶ 115.) Appellants do not point to a particular definition of “advertisement” in the Specification or persuasively argue why the Examiner, applying a broadest reasonable interpretation, erred in construing “billboard advertisement” to

include such announcements of product information or movie information in the rectangular-shaped elements 2375–78 of Robert. In view of the above, we are not persuaded that the Examiner erred in finding that Robert discloses billboard advertisements. Moreover, Figure 24F of Robert shows element 2378 partially occluded by element 2377.

Nonetheless, Appellants also argue that “Robert does not have the ability to customize how the perspective view is presented or for specifying attributes for customizing the perspective view.” (Appeal Br. 18.) However, the Examiner relies on Harrang, not Robert, for disclosing “a media content provider (MCP) administrator is enabled to interact with a graphical user interface to define settings for customization attributes for displaying billboard advertisements as claimed in claims 1, 9, and 17 limitations (i) to (iv).” (Answer 9.) In view of the above, we do not find Appellants’ argument persuasive of error.

Appellants further argue that “[n]either Harrang nor Robert teach, disclose or suggest a website that has both the ability to customize the display of the advertisements as well as the ability to actually provide the advertised media content to the user.” (Appeal Br. 15.)

The Examiner answers that “Harrang further discloses the administrative management of a media content advertising and distribution system at least at paragraphs [61], [62], and Figure 4, wherein administrators define the media content to be distributed, media content channel distribution, and rules such as payment rules, access rights and related rules, and others.” (Answer 9.) Moreover, Appellants do not indicate where claim 1 recites “actually provid[ing] the advertised media content to the

user,” rather than merely instructing the client computer to display advertisements. Therefore, we do not find this argument persuasive of error.

Nonetheless, Appellants argue that “[a]s claimed, not only is advertisement for media content, but the billboard advertisement that can be displayed by any one particular user is controlled by customization attributes that the owner of the advertisement (that also owns the website) defines.”

(Reply Br. 6.) We do not find this argument persuasive of error. As discussed above, settings for customization attributes are input by an administrator, not the owner. Additionally, claim 1 is silent as to the owner of the website. Moreover, claim 1 recites that “the customization attributes define access rights based on a user and/or a categorical group of users for display of the one or more billboard advertisements.” And Harrang discloses a media content provider that includes an interface

that allows a user/administrator to interact with the MCP’s [media content provider’s] software and hardware resources; a system database **408** that includes a media content transfer manager application (MCTM) **410**, a User Profile, User Access Rights (UAR), and Digital Rights Management (DRM) information repository **412**, a set of media content channels and affiliated media content access rules **414** (e.g., payment rules, referral rules, DRM rules, and/or access restriction rules).

(Harrang ¶ 61.) In other words, Harrang discloses that an administrator can establish/customize access rights for a user. In view of the above, we do not find Appellants’ argument persuasive of error.

Appellants also argue that “Harrang is limited to social network services and cannot be extended beyond such a context/environment” and that “in the social network service, multiple advertisers are used to display a

variety of items to a variety of users.” (Reply Br. 7–8.) We are not persuaded of error.

Claim 1 recites “accepting . . . administrator input into the graphical user interface, wherein the administrator input defines settings for the customization attributes for displaying *one or more* billboard advertisements via a website.” (Emphasis added.) Applying a broadest reasonable interpretation, claim 1 includes the case of a single advertisement.

Appellants do not persuasively argue why Harrang does not disclose at least one advertiser displaying at least one advertisement to a user via a website.

In view of the above, we are not persuaded that the Examiner erred in rejecting claim 1 under § 103(a). Independent claims 9 and 17, and dependent claims 5–7, 13–15, 21–23, and 25–27 are not separately argued and fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The § 103(a) rejection of claims 2, 10, and 18

Claim 2 recites:

2. The computer implemented method of claim 1, further comprising:

transmitting, from the server computer to the client computer, instructions causing the client computer to display a second billboard advertisement of the remaining billboard advertisements primarily without occlusion, wherein the displaying of the second billboard advertisement causes the first billboard advertisement to be displayed partially occluded by the second billboard advertisement.

Appellants argue that Robert discloses “moving a document across a screen and how to display different thumbnails. . . . Further, nowhere in Robert is there a first document that partially occludes a second document

followed by the display of the second document in such a manner that it partially occludes the first document.” (Appeal Br. 20.)

The Examiner answers that Robert

discloses a scroll bar control (element 2346) and the selection and scrolling of a media content advertisement wherein first and second advertisement graphics are selected and moved in a manner which causes the graphical effect of occluding second advertisements by first advertisements and replacing first and second advertisements relative amount of occlusion as the scrolling operation proceeds.

(Answer 12.)

Robert discloses two procedures for scrolling content. One is through scrolling a list using scroll bar control object 2347. (*See* Robert Fig. 24F and ¶ 109.) The other is through scrolling the elements 2375–78 by using the scroll bar control object 2346, as shown in Figure 24F. (*See id.* Fig. 24F, and ¶¶ 109 and 115.) Robert refers to the latter as the cover flow view. (*Id.*) In the cover flow view, as shown in Figure 24F, the selected document “is spaced apart from the collection of documents on either side of it.” (*Id.* ¶ 109.) By using the scroll bar control object 2346, a user can move a document from one side, to the center (spaced apart) position, to the other side. (*Id.* ¶¶ 109 and 115.) As shown in Figure 24F, “when several documents are on one side of the selected document, at least some of the documents are covered by other documents on that side; in other words, on that side, the documents are arranged in an [at least partially] overlapping manner.” (*Id.* ¶ 109.)

In view of the above, we are not persuaded of error. Claims 10 and 18 are not separately argued and fall with claim 2. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The § 103(a) rejection of claims 3, 11, and 19

Claim 3 recites: “The computer implemented method of claim 2, wherein the second billboard advertisement scrolls or slides across a display area to cause the partial occlusion of the first billboard advertisement.”

Appellants argue that “Robert’s document movement does not serve to actually partially occlude other ads. Instead, a thumbnail is displayed in the middle and a new thumbnail is displayed thereafter (without occluding any other documents).” (Appeal Br. 20.)

We are not persuaded of error. As discussed above, elements 2375–78 of Robert are billboard advertisements within the broadest reasonable interpretation of that term. As also discussed above, in particular with regard to claim 2, “when several documents [i.e., billboard advertisements] are on one side of the selected document, at least some of the documents are covered by other documents.” (Robert ¶ 109.)

In view of the above, we are not persuaded of error. Claims 11 and 19 are not separately argued and fall with claim 3. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The § 103(a) rejection of claims 4, 12, and 20

Claim 4 recites: “The computer implemented method of claim 1, wherein the customization attributes provide that one or more billboard advertisements that are displayed correspond to media content that the user has licensed from a media content owner.”

The Examiner finds that Harrang discloses “the ability for administrators to control and restrict access to media content displayed to community users.” (Answer 13, citing Robert ¶¶ 50 and 61.)

Appellants argue that even accepting the Examiner's finding, claim 4 requires "that the customization attributes provide that the billboard advertisements correspond to media content that the user has already licensed from a media content owner." (Reply Br. 9.)

We are persuaded of error. The Examiner does not point to a disclosure in Robert that relates the ability for administrators to restrict access to content as disclosed in Robert, with the displaying of advertisements to the user on the client computer that correspond to content already licensed to the user.

Therefore, we will reverse the rejection of claim 4 under § 103(a). Claims 12 and 20 contain similar language and for similar reasons we will also reverse the rejection of claims 12 and 20 under § 103(a).

The § 103(a) rejection of claims 8, 16, and 24

Claim 8 recites:

8. The computer implemented method of claim 1, further comprising:

receiving a communication, from the client computer to the server computer, indicating an activation of the first billboard advertisement; and

in response to such communication, transmitting, from the server computer to the client computer, processing instructions that cause the client computer to display additional information relating to the first billboard advertisement.

The Examiner finds that

Robert discloses a number of methods to display additional information relating to the first billboard advertisement As a second example, Robert at least at paragraph [122] and Figures 27A to 27N discloses the display of additional information with

respect to a media content advertisement in the form of an animated preview.

(Answer 14.)

Appellants disagree and argue that “FIGs. 27A-27N, and paragraph [0122] merely provide for playing back the content represented by a thumbnail. Such a playback of a movie is not ‘additional information relating to the first billboard advertisement’ as claimed.” (Reply Br. 11.)

Appellants do not persuasively argue why, e.g., providing a preview or playback of an advertised movie is not providing additional information relating to the advertisement for that movie. Therefore, we are not persuaded of error. Claims 16 and 24 are not separately argued and fall with claim 8. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The § 103(a) rejection of claims 28, 30, and 32

Claim 28 recites: “The computer implemented method of claim 1 further comprising: specifying a priority for which of the settings to use when a conflict between settings arises.”

The Examiner finds that Michel discloses this limitation because Michel discloses that “only end-user locations meeting both criteria A and B will be sent the content, user **404** will not receive the content regarding the minivan or the sports car. As seen in FIG. **4**, users **406**, **408** and **410** meet the criteria and will receive the content” (Michel ¶ 52; *see also* Final Action 18.)

Appellants argue that the cited portion of Michel discloses “a series of different criteria and determines which users meet both criteria A and B.” (Reply Br. 12.)

We are persuaded of error. The disclosure in Michel relied on by the Examiner discloses that multiple criteria may be required to, e.g., determine to whom an advertisement should be directed. But the Examiner does not indicate where Michel discloses a conflict between settings. It follows that the Examiner also does not indicate where Michel discloses specifying a priority in the event of a conflict.

Therefore, we will reverse the rejection of claim 28 under § 103(a). Claims 30 and 32 contain similar language and for similar reasons we will also reverse the rejection of claims 30 and 32 under § 103(a).

The § 103(a) rejection of claims 29, 31, and 33

Claims 29, 31, and 33 depend, respectively, from claims 28, 30, and 32. The additional portion of Michel relied on by the Examiner does not cure the deficiency noted above with regard to claims 28, 30, and 32. (*See Answer 15.*)

Therefore, we will reverse the rejection of claims 29, 31, and 33 under § 103(a).

DECISION

The Examiner's rejection of claims 1–33 under 35 U.S.C. § 101 is affirmed.

The Examiner's rejection of claims 1–3, 5–11, 13–19, and 21–27 under 35 U.S.C. § 103(a) is affirmed.

The Examiner's rejections of claims 4, 12, 20, and 28–33 under 35 U.S.C. § 103(a) are reversed.

Appeal 2017-000514
Application 13/090,997

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