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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte GRANT VERSTANDIG and ALEXANDER SIEDLECKI

Appeal 2017-001956¹
Application 13/404,801²
Technology Center 3600

Before BRUCE T. WIEDER, TARA L. HUTCHINGS, and
ROBERT J. SILVERMAN, *Administrative Patent Judges*.

HUTCHINGS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner’s final rejection of claims 1, 2, 7–10, 14–17, 23, 24, 27, and 28. An oral hearing was held on October 16, 2018. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ Our decision references Appellants’ Specification (“Spec.,” filed Feb. 24, 2012), and Appeal Brief (“Br.,” filed June 20, 2016), the Examiner’s Final Office Action (“Final Act.,” mailed Oct. 20, 2015) and Answer (“Ans.,” mailed Sept. 23, 2016), and the transcript of the oral hearing held on October 16, 2018 (“Tr.”).

² Appellants identify Audax Health Solutions, LLC as the real party in interest. Br. 3.

CLAIMED INVENTION

Appellants' claimed invention "relate[s] generally to a health-related survey such as a health risk assessment, and more particularly [to] apparatus and methods for a health-related survey using pictogram answers." Spec. ¶ 1003.

Claims 1, 8, and 14 are the independent claims on appeal. Claims 1 and 8, reproduced below with bracketed notations added, are illustrative of the claimed subject matter:

1. A method comprising:

[(a)] sending a signal representing a first question and a plurality of pictogram answers for the first question including a first pictogram answer and a second pictogram answer, the first pictogram answer having a first portion and a second portion, the second pictogram answer having a first portion and a second portion, the first portion of the first pictogram answer substantially corresponding in shape to the first portion of the second pictogram answer and being unrelated to human anatomy, the second portion of the first pictogram answer differing in shape to the second portion of the second pictogram answer;

[(b)] receiving a signal representing a selection by a first user of a pictogram answer from the plurality of pictogram answers for the first question at a first time;

[(c)] dynamically selecting a second question and a plurality of pictogram answers for the second question based on the selection of the pictogram answer at the first time;

[(d)] automatically sending a signal representing the second question and the plurality of pictogram answers for the second question, the first question and the second question collectively defining at least portion of a health-related survey;

[(e)] receiving a signal representing a selection by the first user of a pictogram answer from the plurality of pictogram answers for the second question at a second time after the first time;

[(f)] defining, at a processor, a health-related social user profile having health-related information based on the selection for the first question and the selection for the second question, the health-related social user profile accessible by a plurality of users including the first user;

[(g)] receiving, a signal representing a permission granted by the first user for access to the health-related social user profile; and [sic]

[(h)] receiving, from a user device associated with a second user from the plurality of users, a request to access the health-related social user profile, the second user not being a healthcare professional; and

[(i)] granting the user device permission to access the health-related social user profile based on the request and the permission.

8. A method, comprising:

[(a)] sending a signal representing a dashboard within a session at a first time that includes a first question and a plurality of pictogram answers for the first question, the plurality of pictogram answers including a first pictogram answer and a second pictogram answer, the first pictogram answer having a first portion representing a first portion of a statement answering the first question and a second portion representing a second portion of the statement answering the first question, the second pictogram answer having a first portion and a second portion, the first portion of the first pictogram answer substantially corresponding in shape to the first portion of the second pictogram answer and being unrelated to human anatomy, the second portion of the first pictogram answer differing in shape to the second portion of the second pictogram answer;

[(b)] receiving a selection of a user through the dashboard within the session of a pictogram answer from the plurality of pictogram answers for the first question;

[(c)] dynamically selecting a second question and a plurality of pictogram answers for the second question based on receiving the selection of the pictogram answer at the first time;

[(d)] automatically sending a signal representing the dashboard within the session at a second time after the first time

that includes the second question and the plurality of pictogram answers for the second question, the second question being different from the first question, the first question and the second question collectively defining at least portion of a health-related survey; and [sic]

[(e)] receiving a selection from the user through the dashboard within the session of a pictogram answer from the plurality of pictogram answers for the second question;

[(f)] defining, at a processor, a health-related social user profile having health-related information based on the selection for the first question and the selection for the second question, the health-related information being different from the selection of the first question and the selection of the second question; and

[(g)] sending, to a second user, a signal representing at least a portion of the health-related social user profile in response to a request from the second user and a permission setting of the first user.

REJECTIONS

Claims 1, 2, 7–10, 14–17, 23, 24, 27, and 28 are rejected under 35 U.S.C. § 101 as directed to a judicial exception without significantly more.

Claims 1, 2, 7–10, and 28 are rejected under 35 U.S.C. § 103(a) as unpatentable over Pristine (US 2004/0138924 A1, pub. July 15, 2004), Cacioppo (US 2012/0270201 A1, pub. Oct. 25, 2012), Iliff (US 2003/0135095 A1, pub. July 17, 2003), and Fotsch (US 2005/0165627 A1, pub. July 28, 2005).

Claims 14–17 and 23 are rejected under 35 U.S.C. § 103(a) as unpatentable over Pristine, Iliff, Cacioppo, and Ackerson (US 2012/0295676 A1, pub. Nov. 22, 2012).

Claim 24 is rejected under 35 U.S.C. § 103(a) as unpatentable over Pristine, Iliff, Cacioppo, Ackerson, and Nanos (US 2001/0052122 A1, pub. Dec. 13, 2001).

Claim 27 is rejected under 35 U.S.C. § 103(a) as unpatentable over Pristine, Iliff, Cacioppo, Fotsch, and Ackerson.³

ANALYSIS

Patent-Ineligible 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. *Alice Corp. 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 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 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.* If the

³ The Examiner indicates that claim 27, which depends from claim 8, is rejected under 35 U.S.C. § 103(a) as unpatentable over “Pristine, Iliff, Cacioppo, and Brown as applied to claim 8 above, and in further view of Ackerson.” Final Act. 22. Yet, claim 8 was rejected as obvious over Pristine, Iliff, Cacioppo, and Fotsch. *Id.* at 4. Therefore, we treat the identification of Brown, instead of Fotsch, as inadvertent error.

claims are not directed to a patent-ineligible concept, e.g., 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.” *Id.* (quoting *Mayo*, 566 U.S. at 79, 78).

The Court acknowledged in *Mayo*, that “all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas.” *Mayo*, 566 U.S. at 71. Therefore, the Federal Circuit has instructed that claims are to be considered in their entirety to determine “whether their character as a whole is directed to excluded subject matter.” *McRO, Inc. v. Bandai Namco Games Am., Inc.*, 837 F.3d 1299, 1312 (Fed. Cir. 2016) (quoting *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1346 (Fed. Cir. 2015)).

In rejecting the claims under 35 U.S.C. § 101, the Examiner determined that the claims are directed to the abstract idea of displaying a patient questionnaire and defining a patient profile based on answers to the questionnaire. Final Act. 2–3; *see also* Ans. 6. The Examiner concluded that this is an abstract idea analogous to the process found patent-ineligible in *SmartGene, Inc. v. Advanced Biological Labs, S.A.*, 555 F. App’x 950 (Fed. Cir. 2014), in which new and stored information is analyzed using rules to identify options. Final Act. 3; *see also* Ans. 6–7 (“[t]he focus of the asserted claims, as illustrated by claim 14, is on collecting information via a questionnaire, analyzing the answers provided, and displaying certain results of the collection and analysis, such as a patient profile and reminders”), 7 (“[t]he advance the Appellant makes is a process of gathering and analyzing

information of a specified content, then displaying the results, and not any particular assertedly inventive technology for performing those functions,” i.e., an abstract idea). The Examiner also determined that the claims do not include additional elements that are sufficient to amount to significantly more than the judicial exception. Final Act. 3.

Independent Claim 14 and Dependent Claims 15–17, 23, and 24

Focusing first on apparatus claim 14, Appellants contend that the Examiner “failed to treat the step-one *Alice/Mayo* test as the meaningful inquiry it is.” Br. 13. Appellants assert that the Examiner’s analysis “entirely ignored significant portions of claim 14,” such as the claimed “reminder module” that is “configured to cause at least a portion of the health-related user profile to be displayed by a user device associated with a second user based, at least in part on a health-related goal shared by the first and second user.” But the Examiner’s formulation of the abstract idea need not copy the language recited in the claim. Instead, the Federal Circuit has explained that “the ‘directed to’ inquiry applies a stage-one filter to claims, considered in light of the [S]pecification, based on whether ‘their character as a whole is directed to excluded subject matter.’” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016) (quoting *Internet Patents Corp.*, 790 F.3d at 1346). It asks whether the focus of the claims is on a specific improvement in relevant technology or on a process that itself qualifies as an “abstract idea” for which computers are invoked merely as a tool. *See id.* at 1335–36.

Here, claim 14 recites an apparatus comprising three components: a survey module, a database, and a reminder module. The survey module is configured to send questions defining at least a portion of a health-related

survey and a plurality of pictogram answers for each question. The database is configured to store a health-related user profile having health-related information associated with the selections of pictogram answers from the questions of the survey. And the reminder module is configured to cause at least a portion of the health-related user profile to be displayed by a user device associated with a second user based, at least in part, on a health-related goal shared by the first and second users. In other words, claim 14 recites collecting information via a survey, processing the information, such as to create a health-related user profile, and displaying at least a portion of the health-related user profile.

Appellants' Specification also provides insight into the problem the claimed invention seeks to address. Appellants' Specification is entitled "Systems and Methods for a Health-Related Survey Using Pictogram Answers." Spec., Title. The Specification describes that the invention "relates generally to a health-related survey[,] such as a health risk assessment, and more particular [to an] apparatus and methods for a health-related survey using pictogram answers." *Id.* ¶ 1003. In the Background section, the Specification describes that the advent of online social networks in which users share and connect with other users has led companies to collect and leverage information associated with the users of the social networking sites. *Id.* ¶ 1004. Health care providers likewise desire information about a customer's lifestyle in order to provide better health care services for the customer. *Id.* It is known for health care providers to use surveys to gather information about a person's lifestyle, as it pertains to health, and then deliver individualized information, such as ideas for developing a healthy lifestyle, based on the information. *Id.* ¶ 1005.

“Unfortunately, some people may find known surveys boring and may lack the motivation to complete known surveys.” *Id.* “Thus, a need exists for systems and methods for a health-related survey using pictogram answers to define a health-related user profile.” *Id.* ¶ 1006.

In one example, a set of three pictogram answers is presented to a patient seeking information regarding the patient’s last doctor visit. *Id.* ¶ 1063. A first pictogram answer depicts a calendar that displays the number “3” and text stating, “[w]ithin the last 3 months.” A second pictogram answer depicts a calendar with the number “6” and text stating “[w]ithin the last 6 months.” And a third pictogram answer depicts a calendar with the number “12” and text stating “[w]ithin the last 12 months.” *Id.* ¶ 1063. In this example, the calendar represents the claimed first portion, and the numbers (e.g., 3, 6, and 12) represent the second portion, as recited in claim 14. By providing the answers as a pictogram, the “pictogram answers [are] more game-like and/or more fun to answer than text alone.” *Id.* “Therefore, the user may be more likely to answer the set of pictogram answers compared to text only answers.” *Id.*

Paragraph 1039 of the Specification describes a reminder module for generating a reminder based on activity or a period of inactivity with the social health system. The reminder could be associated with the user’s progress to a specific goal, profile completion, and/or other metrics stored by the social health system. *Id.* ¶ 1039. The reminder module also can receive information from the user to update or send a reminder to a different user. *Id.* For example, a first user and a second device who are associated on a social health system and share a common goal. *Id.* The first user can

accomplish the goal and the reminder module can send a reminder to the second user to continue to strive towards the goal. *Id.*

Considering the claim language in light of the Specification, we agree with the Examiner (Ans. 6–7) that the focus of claim 14 is on collecting information via a questionnaire, analyzing the answers provided, and displaying certain results of the collection and analysis, such as a patient profile and reminders — i.e., an abstract idea. *See Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1354 (Fed. Cir. 2016) (claims held to be directed to an abstract idea where “[t]he advance they purport to make is a process of gathering and analyzing information of a specified content, then displaying the results, and not any particular assertedly inventive technology for performing those functions”).

Seeking to draw an analogy to the claims in *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014), Appellants contend that the claimed reminder module, when viewed as an ordered combination, “address[es] the Internet-centric challenge of alerting a second user to the first user’s health related user profile based on a shared health-related goal.” Br. 13. Appellants maintain that “in the pre-Internet world, permission to access health-related data was not granted ‘from the user device’ that is used to provide the health-related data.” *Id.* The claimed location “is only possible in the post-Internet world where users can complete health-related profiles on their own time, at a location of their choice, and set permissions for the health-related profile using their own devices (e.g., as distinct from medical historic surveys conducted by a medical professional).” *Id.* at 13–14.

Although Appellants ostensibly suggest otherwise, the claims at issue in *DDR Holdings* were not held patent-eligible because they required user devices or because the claims themselves involved the use of technology, such as the Internet. Instead, the Federal Circuit held that the claims were directed to patent-eligible subject matter because the claimed invention was “necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks” (i.e., 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), and did not simply use computers to serve a conventional business purpose. *DDR Holdings*, 773 F.3d at 1257. Appellants have not demonstrated that claim 14 addresses any comparable Internet-centric challenge.

To the contrary, Appellants’ Specification describes a need to make surveys “more game-like and/or more fun to answer than text alone” to motivate an individual to complete a survey. Spec. ¶ 1063; *see also id.* ¶ 1005. But using pictograms to make surveys more game-like and more fun seeks to address a business problem, not a problem rooted in technology or specifically arising in the realm of computer networks. Unlike the situation in *DDR Holdings*, there is no indication that claim 14 requires more than generic technology operating in its ordinary capacity to effect an improvement to a business process.

Appellants assert that claim 14’s reminder module, viewed as an ordered combination, addresses the Internet-centric challenge of alerting a second user to the first user’s health-related user profile. Br. 13. Yet, as the

court cautioned in *DDR Holdings*, “not all claims purporting to address Internet-centric challenges are eligible for patent.” *DDR Holdings*, 773 F.3d at 1258. Thus, in *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709 (Fed. Cir. 2014), although the patentee argued that its claims were “directed to a specific method of advertising and content distribution that was previously unknown and never employed on the Internet before” (*id.* at 714), the court determined that this alone could not render the claims patent-eligible where the claims merely recited the abstract idea of “offering media content in exchange for viewing an advertisement,” along with “routine additional steps such as updating an activity log, requiring a request from the consumer to view the ad, restrictions on public access, and use of the Internet.” *Id.* at 715–16. Much like the situation in *Ultramercial*, there is no indication here that a computer network, or the Internet, in particular, is used other than in its normal, expected, and routine manner for receiving and processing data. In addition, narrowing the abstract idea to cause a portion of the health-related user profile to be displayed by a user device that is associated with a second user based on a shared health-related goal merely limits the use of the abstract idea to a particular technological environment, which the Court made clear in *Alice* is insufficient to transform an otherwise patent-ineligible abstract idea into patent-eligible subject matter. *See Alice Corp.*, 134 S. Ct. at 2358.

Turning to step two, Appellants argue that claim 14 contains significantly more under step two of the *Alice/Mayo* framework. Br. 14. In particular, Appellants contend that the claimed reminder module, when viewed as an ordered combination, “represents a departure from what is well-understood, routine, and conventional in the field,” because at the time

of the invention it was “well-understood and conventional in the field of healthcare data collection . . . to maintain strict confidentiality [of] health-related data.” *Id.* at 15. But there is nothing in claim 14 about maintaining confidentiality of the health-related data, and the argument is not commensurate in scope with what’s claimed. We find no indication in the record, nor do Appellants point us to anything in the record, to indicate that causing a portion of the health-related user profile to be displayed by a user device associated with a second user based at least in part on a shared health-related goal requires any specialized computer hardware or other inventive computer component, invokes any assertedly inventive programming, or is implemented using anything other than generic computer components. As such, we are not persuaded that the reminder module, considered individually and as an ordered combination, recites an inventive concept sufficient to transform the abstract idea into a practical application.

We also disagree with Appellants’ assertion that claim 14 is an improved user interface for a computer, analogous to the claims in *Core Wireless Licensing S.A.R.L. v. LG Electronics, Inc.*, 880 F.3d 1356 (Fed. Cir. 2018). Tr. 14. There, the invention concerned “improved display interfaces, particularly for electronic devices with small screens like mobile telephones.” *Core Wireless Licensing*, 880 F.3d at 1359. “The improved interfaces allow a user to more quickly access desired data stored in, and functions of applications included in, the electronic devices.” *Id.* An application summary window displays “a limited list of common functions and commonly accessed stored data which itself can be reached directly from the main menu listing some or all applications.” *Id.* (citation omitted). The patents at issue in *Core Wireless Licensing* “explain that the disclosed

application summary window ‘is far faster and easier than conventional navigation approaches,’ particularly for devices with small screens.” *Id.* (citation omitted). The Federal Circuit found that the claims are directed to an improved user interface for computing devices, and directed to a particular manner of summarizing and presenting content in electronic devices. Here, claim 14 recites a survey module configured to send a first question and a plurality of pictogram answers for the first question, and a second question and a plurality of answers for the second question. In so doing, claim 14 seeks to “improve[] engagement of the survey intake[, thereby] obtaining more data.” Tr. 14. But the improvement identified by Appellants is an improvement to the abstract idea of gathering data, analyzing data, and displaying the results, which is insufficient to transform the abstract idea into a patent-eligible applicaiton. We find no improvement to claim 14’s survey module analogous to the improved user interface of *Core Wireless Licensing* that results in faster navigation.

We are not persuaded that the Examiner erred in rejecting claim 14 and its dependent claims under 35 U.S.C. § 101. Therefore, we sustain the Examiner’s rejection.

Independent Claim 1 and Dependent Claims 2, 7, and 28

Appellants assert that claim 1 is patent eligible for reasons similar to those described above with reference to claim 14. Br. 16. These arguments are not persuasive, at least for the same reasons presented above with respect to claim 14.

Appellants assert that claim 1 recites limitations related to receiving a request to access a health-related social user profile of a first user from a user device associated with a second user who is not a healthcare

professional, and granting the user device associated with the second user permission to access the health-related social user profile based on the request and a permission granted by the first user. Appellants contend that these limitations “when viewed within the claim as an ordered combination distinguishes claim 1 from claims previously found by the courts to be directed to abstract ideas.” Br. 16. Specifically, Appellants charge that claim 1 “addresses the Internet-centric challenge of sharing health-related social user profiles with non-healthcare professionals and is contrasted against pre-Internet business methods of maintaining health records in confidence among health-care professionals [sic].” *Id.* And Appellants contend that granting permission to access a health-related social user profile, when viewed as an ordered combination, represents a departure from what is well understood, routine, and conventional in the field. *Id.* According to Appellants’ attorney argument, it was “well-understood and conventional in the field of healthcare data collection . . . to maintain strict confidentiality [of] health-related data.” *Id.* at 16–17.

However, claim 1, like claim 14, is directed to collecting information via a questionnaire, and analyzing the answers provided — i.e., an abstract idea. Claim 1 additionally recites receiving a signal representing a permission granted by the first user for access to the health-related social user profile; receiving a request from the second user, who is not a healthcare professional, to access the health-related social user profile; and granting the user device permission to access the health-related social user profile based on the request and the permission (i.e., steps (g)–(i)). In other words, claim 1 recites an abstract idea along with routine additional steps that lack any particular inventive technology. *See Ultramercial*, 772 F.3d at

715–16 (recitation of abstract idea along with routine additional steps, such as restrictions on public access and use of the Internet, is patent-ineligible). Such steps, specified at a high level of generality, are insufficient to supply an inventive concept. Steps (g) and (h), for example, represent insignificant data gathering steps that add nothing of practical significance to the underlying abstract idea. *See CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1370 (Fed. Cir. 2011).

We are not persuaded, on the present record, that the Examiner erred in rejecting claim 1 and its dependent claims under 35 U.S.C. § 101. Therefore, we sustain the Examiner’s rejection.

Independent Claim 8 and Dependent Claims 9, 10, and 27

Appellants assert that claim 8 is patent eligible for reasons similar to those described above with reference to claims 1 and 14. Br. 17. These arguments are not persuasive, at least for the same reasons presented above with respect to claims 1 and 14.

We are not persuaded, on the present record, that the Examiner erred in rejecting claim 8 and its dependent claims under 35 U.S.C. § 101. Therefore, we sustain the Examiner’s rejection of claims 8–10 and 27.

Obviousness

Independent Claim 1, and Dependent Claims 2, 7, and 28

We are not persuaded by Appellants’ argument that the Examiner erred in rejecting claim 1 under 35 U.S.C. § 103(a), because Fotsch fails to disclose or suggest limitations (h) and (i), as recited in claim 1. Br. 6–7. In rejecting claim 1, the Examiner finds that Fotsch at Figure 1 and paragraphs 77 and 81 teaches the argued limitations. *See Final Act.* 7–8. Appellants

argue that paragraph 77 of Fotsch teaches a patient granting access to a healthcare provider, not an individual who is not a healthcare professional, as required by limitations (h) and (i). Br. 7.

Fotsch provides at paragraph 77 that a patient “may grant or deny access by selecting a particular permission type for one or more individuals.” Fotsch further provides that “[i]n this example, each of the individuals is a healthcare provider (e.g., physician).” Fotsch ¶ 77; *see also id.* at Fig. 7. Pointing to this passage, Appellants argue that Fotsch fails to disclose that the second user is *not* a healthcare provider, as required by limitations (h) and (i). However, the passage does not limit the individuals who are granted access to include *only* healthcare providers. Instead, it refers to a particular embodiment depicted in Figure 7 and suggests that individuals who are not healthcare providers may be granted access in other embodiments. Supporting this interpretation, Fotsch expressly provides in the preceding paragraph that the patient grants access to a “healthcare provider *or another individual*,” i.e., someone who is not a healthcare provider. *Id.* ¶ 76 (emphasis added).

We also are not persuaded by Appellants’ argument that the Examiner erred in rejecting claim 1 under 35 U.S.C. § 103(a) because Pristine teaches away from the claimed invention. Br. 7–8. Appellants assert that Pristine discloses assembling compiled information into a report that is provided to a doctor or medical professional. *Id.* at 7 (citing Pristine ¶¶ 22–23). Appellants’ argument is not persuasive at least because Appellants do not point to any passage in Pristine that criticizes, discredits, or otherwise discourages a patient from granting an individual who is not a healthcare provider access to the patient’s health record — which is required to

establish a “teaching away.” *See In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994) (explaining that 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 claimed path).

Therefore, we sustain the Examiner’s rejection under 35 U.S.C. § 103(a) of independent claim 1 and its dependent claims, which are not argued separately.

Independent Claim 8, and Dependent Claims 9 and 10

We are persuaded by Appellants’ argument that the Examiner erred in rejecting claim 8 under 35 U.S.C. § 103(a), because Cacioppo fails to disclose or suggest limitation (a), as recited in claim 8. Br. 8–10. The Examiner finds that Cacioppo at Figure 6A and paragraph 43 teaches this limitation. Final Act. 11.

Cacioppo provides an audience response system (“ARS”) with dynamic user interfaces. Cacioppo ¶ 27. The ARS includes multiple remote handsets that may be used by students to answer questions posed by a teacher, vote on a topic, confirm attendance at a lecture, and so on. *Id.* ¶ 28. The dynamic user interfaces include multiple configurable user input interface elements for answering various questions presented in an audience interaction environment, such as a classroom. *Id.* ¶ 31. A teacher configures the configurable user input interface elements to correspond to possible answers to a question, and a student answers the question by selecting the appropriate user input interface element. *Id.* For example, a teacher may configure user input interface elements 602a–602e to correspond to different spatial regions on a displayed world map. *Id.* User

input interface element 602b shows a box around South America. *See id.* at Fig. 6A.

In rejecting claim 8, the Examiner finds that each answer associated with Cacioppo's configurable user input interface elements 602a–602e has two portions: a box and a spatial region contained within the box. *See* Final Act. 10 (“the box represents the container for the spatial region and the spatial region represents the second portion of a statement”). The Examiner takes the position that the claimed “first portion of the pictogram answer is represented in Cacioppo as the box,” and the claimed “second portion of the pictogram is represented in Cacioppo as the portion of the country [sic].” Ans. 5.

However, we agree with Appellants that one of ordinary skill in the art would not reasonably understand Cacioppo's box to be a portion of the pictogram answer. *See* Br. 10; *see also* Tr. 8 (describing that Cacioppo's “box” is a line around the answer, not a portion of the answer). For example, Cacioppo describes that user input elements 602a–602d (or “boxes”) may be configured as shown in Figure 6A to enclose the different answers (i.e., spatial regions), or as shown in Figure 6B to point to the different spatial regions). Cacioppo ¶ 38. Stated differently, the user input elements 602a–602d (“boxes”) would be understood by one of skill in the art to enclose the answer, not constitute a portion of the answer.

The Examiner further determines that the content of the first and second pictogram answers, as recited in claim 8's limitation (a), is an obvious matter of design choice. Final Act. 10–11; *see also* Ans. 5–6. Yet, “[r]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning

with some rational underpinning to support the legal conclusion of obviousness.” *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 418 (2007) (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)). Here, the Examiner has failed to provide any articulated reasoning with rational underpinnings for modifying Pristine with Cacioppo to arrive at Appellants’ claimed invention, including limitation (a).

Therefore, we do not sustain the Examiner’s rejection under 35 U.S.C. § 103(a) of independent claim 8 and claims 9 and 10, which depend therefrom.

Independent Claim 14 and Dependent Claims 15–17, 23, and 24

Independent claim 14 includes language substantially similar to the language of claim 8, and stands rejected based on the same findings applied with respect to claim 8. *See* Final Act. 16. Therefore, we do not sustain the Examiner’s rejection under 35 U.S.C. § 103(a) of independent claim 14 and the Examiner’s rejections of dependent claims 15–17, 23, and 24.

Dependent Claim 27

The Examiner’s rejection of dependent claim 27 does not cure the deficiency in the Examiner’s rejection of independent claim 8. Therefore, we do not sustain the rejection of claim 27 for the same reason set forth above with respect to the independent claim 8.

DECISION

The Examiner’s rejection of claims 1, 2, 7–10, 14–17, 23, 24, 27, and 28 under 35 U.S.C. § 101 is affirmed.

The Examiner’s rejection of claims 1, 2, 7, and 28 under 35 U.S.C. § 103(a) is affirmed.

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The Examiner's rejections of claims 8–10, 14–17, 23, 24, and 27 under 35 U.S.C. § 103(a) are reversed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED