UNITED STATES PATENT AND TRADEMARK OFFICE

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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 YING CHEN, JEFFREY THOMAS KREULEN, LARRY LEE
PROCTOR, JAMES J. RHODES, and WILLIAM SCOTT SPANGLER,

_____

Appeal 2017-004336
Application 11/674,590[1]
Technology Center 3600

_____

Before JOHN A. JEFFERY, CATHERINE SHIANG, and
BETH Z. SHAW, *Administrative Patent Judges*.

SHIANG, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's
rejection of claims 1 and 22, which are all the claims pending in the
application.[2] We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

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[1] Appellants identify International Business Machines Corporation as the
real party in interest. App. Br. 3.
[2] Claims 2–21 have been cancelled. App. Br. 20.

STATEMENT OF THE CASE

Introduction

According to the Specification, the present invention relates to analytics tools and methodologies for assisting in the identification of potential partnering relationships in a given industry. Spec. ¶ 1.

> One embodiment of the present invention is a method for use with a set of intellectual property documents related to an industry of interest; the method comprising: classifying the intellectual property documents by assignee, creating categories for the documents, the categories identified by terms associated with the industry of interest, 5 each of the intellectual property documents assigned to one of the categories, and constructing a contingency table that includes a listing of assignees for each of the categories, the listing for identifying assignees having interests in complementary ones of the categories.

Spec. ¶ 5. Claim 1 is exemplary:

> 1. A method comprising:
>
> identifying an area of interest,
> a first computer processor in a first data processing system performing at least one of a search operation and a query operation among a plurality of databases that include information about documents relevant to said identified area of interest utilizing a combination of a structured field and a non-structured field to identify the set of documents related to said identified area of interest;
> retrieving said identified documents matching a keyword;
> analyzing relationships between said identified documents using an analytical tool that is based on knowledge about said area of interest from multiple domain experts;
> classifying said identified documents in the set of documents by assignee;

creating categories for said identified documents, said categories identified by a combination of the structured field and the non-structured field;

creating an additional category that includes all of said identified documents that were not included in one of the created categories;

deleting a number of said created categories and merging a number of said created categories that are determined to be similar to one another;

providing an indication of those features within a category having greater occurrence in said identified documents of said identified area of interest,

assigning each of said identified documents to at least one of said merged categories;

constructing a first contingency table that includes a listing of assignees including a first assignee and a second assignee with respect to each of said merged categories, wherein a value, associated with the first assignee and one of the merged categories corresponding to the first assignee, represents a number of said identified documents matching said first assignee and the corresponding merged category;

comparing the merged categories with at least a threshold number of items that match both the first assignee and another assignee among the listing of assignees;

determining, by one of the multiple domain experts based on the rendering on the computer display, whether the cell in the first contingency table exceeds a threshold value;

visually rendering on a computer display within a second data processing system with a second computer processor, the first contingency table, wherein a cell in the first contingency table is rendered one of a plurality of colors based on a document count in a row of the first contingency table, based on the cell in the contingency table exceeding the threshold value, based on a number of documents assigned to the first assignee, and based on a total number of documents in the first contingency table;

outputting the first contingency table through a physical input-output port using an intervening physical input-output

controller from the first computer processor to a computer network;

coupling the first data processing system to the second data processing system with the second computer processor through the computer network;

the second data processing system creating a second contingency table based on the coupled first data processing system and the second data processing system;

outputting the second contingency table through the physical input-output port using the intervening physical input-output controller from the second computer processor to the computer network; and

making said indication available to a user.

References and Rejections

Claims 1 and 22 stand rejected under 35 U.S.C. § 101 because they are directed to patent-ineligible subject matter. Final Act. 2–6.

Claim 1 stands rejected under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over the collective teachings of Stobbs et al. (US 8,095,581 B2, issued Jan. 10, 2012) ("Stobbs"), Nutter et al. (US 2002/0178029 Al, published Nov. 28, 2002) ("Nutter"), Rujan et al. (US 2006/0212413 Al, published Sept. 21, 2006) ("Rujan"), VanTrieste (US 2006/0086782 Al, published Apr. 27, 2006), and Zilka et al. (US 7,117,443 B1, issued Oct 3, 2006) ("Zilka"). [3] Final Act. 6–22.

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[3] Throughout this opinion, we refer to (1) the Final Rejection dated June 15, 2016 ("Final Act."); (2) the Appeal Brief dated October 11, 2016 ("App. Br."); (3) the Examiner's Answer dated November 17, 2016 ("Ans."); and (4) the Reply Brief dated January 17, 2017 ("Reply Br.").

ANALYSIS[4]

35 U.S.C. § 101

The Examiner rejects the claims under 35 U.S.C. § 101 because they are directed to patent-ineligible subject matter. *See* Final Act. 2–6; Ans. 2–8. In particular, the Examiner concludes the claims are directed to the abstract idea of information manipulation and display. *See* Final Act. 3–4; Ans. 3–4. The Examiner determines:

> Claim 1 recites several method steps that obtain, query, analyze, classify, and categorize data, the construction of a table indicating assignees and values, identifying assignee overlap, and visually rendering, outputting, and making that comparison available to the user. Ultimately, Appellant's method steps use categories to organize, store, and transmit information about patents and patent assignees. This is an abstract idea of itself . . . . Alternatively, Appellant's claims can be seen as obtaining and comparing intangible data (i.e., comparing obtained intangible patent data based on assignee and industry/category), which also is an abstract idea of itself . . . Appellant's specification further corroborates that the invention is directed toward an abstract idea because it notes that the invention is used to assist "in the identification of potential partnering relationships in a given industry," such as "cross-licensing relationships" for a set of patents and other IP that a business entity might own (see specification paragraphs 1–2). Thus, when viewed in light of the specification, the abstract idea could alternatively be considered to be a fundamental economic activity or a certain method of organizing human activity because it relates to managing potential business relations between people or businesses such as deciding whether to form partnering or cross-licensing relationships.

Ans. 3–4.

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[4] To the extent Appellants advance new arguments in the Reply Brief without showing good cause, Appellants have waived such arguments. *See* 37 C.F.R. § 41.41(b)(2).

The Examiner determines the claims do not identify an inventive concept to transform the nature of the claims into a patent-eligible application. *See* Final Act. 4–6; Ans. 4–8. Appellants argue the Examiner erred. *See* App. Br. 11–13; Reply Br. 2–4.

Appellants have not persuaded us of error. Section 101 of the Patent Act provides "[w]hoever 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. That provision "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 *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2116 (2013)). According to the Supreme Court:

> [W]e set forth a framework for distinguishing patents that claim
> laws of nature, natural phenomena, and abstract ideas from
> those that claim patent-eligible applications of those concepts.
> First, we determine whether the claims at issue are directed to
> one of those patent-ineligible concepts. . . . If so, we then ask,
> "[w]hat else is there in the claims before us?" . . . To answer
> that question, we consider the elements of each claim both
> individually and "as an ordered combination" to determine
> whether the additional elements "transform the nature of the
> claim" into a patent-eligible application. . . . We have
> described step two of this analysis 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 Corp., 134 S. Ct. at 2355 (quoting *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 132 S.Ct. 1289, 1294, 1296–98

(2012)).

The Federal Circuit has described the *Alice* step-one inquiry as looking at the "focus" of the claims, their "character as a whole," and the *Alice* step-two inquiry as looking more precisely at what the claim elements add—whether they identify an "inventive concept" in the application of the ineligible matter to which the claim is directed. *See Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016); *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335–36 (Fed. Cir. 2016); *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1346 (Fed. Cir. 2015).

Regarding *Alice* step one, the Federal Circuit has "treated *collecting information*, including when limited to particular content (which does not change its character as information), as within the realm of abstract ideas." *Elec. Power*, 830 F.3d at 1353 (emphasis added); *see also Internet Patents*, 790 F.3d at 1348–49; *OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1363 (Fed. Cir. 2015); *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat'l Ass'n*, 776 F.3d 1343, 1347 (Fed. Cir. 2014). "In a similar vein, we have treated *analyzing information* [including manipulating information] by steps people go through in their minds, or by mathematical algorithms, without more, as essentially mental processes within the abstract-idea category." *Elec. Power*, 830 F.3d at 1354 (emphasis added); *see also In re TLI Commc'ns LLC Patent Litig.*, 823 F.3d 607, 613 (Fed. Cir. 2016). "And we have recognized that *merely presenting the results of abstract processes of collecting and analyzing information, without more* (such as identifying a particular tool for presentation), is abstract as an ancillary part of such collection and analysis." *Elec. Power*, 830 F.3d at

1354 (emphasis added); *see also Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d
709, 714–15 (Fed. Cir. 2014).

The rejected claims "fall into a familiar class of claims 'directed to' a
patent-ineligible concept." *Elec. Power*, 830 F.3d at 1353. Contrary to
Appellants' arguments (App. Br. 11–13; Reply Br. 2–4), we agree with the
Examiner that the claims are similar to the claims of *Electric Power,* and are
focused on the combination of abstract-idea processes. *See* Ans. 7; *Elec.
Power*, 830 F.3d at 1354. For example, claim 1 is directed to collecting,
analyzing, and displaying information ("identifying . . . performing . . . a
search operation and a query operation . . . ; retrieving . . . ; analyzing . . .;
classifying . . .; creating . . .; deleting . . .; providing . . . , assigning . . .;
constructing . . .; comparing . . .; determining . . .; visually rendering . . . ;
outputting . . .; coupling . . .; making said indication available . . . ."). *See
Elec. Power*, 830 F.3d at 1353. Dependent claim 22 is directed to similar
processes, and Appellants have not shown claim 22 is directed to other non-
abstract processes. *See* claim 22.

We also agree with the Examiner that when viewed in light of the
Specification, the claims are directed to a fundamental economic activity or
a method of organizing human activity. *See* Ans. 3–4. As pointed out by
the Examiner (Ans. 3–4), the Specification states the invention is used to
assist in "the identification of potential partnering relationships in a given
industry," such as "cross-licensing relationships (e.g., partnerships)" for a set
of patents and other intellectual property that a business entity might own.
Spec. ¶¶ 1–2.

For the reasons discussed below, Appellants' following assertion is
unpersuasive:

the "deleting a number of said created categories and merging a number of said created categories that are determined to be similar to one another" feature from claim 1 provides greater efficiency by removing unnecessary items. The "utilizing interactive clustering of the features for use in classifying groups of the items" feature from claim 22 increases efficiency by clustering features. This increases efficiency in creating databases that are useful to the user.

App. Br. 12.

As discussed above, those claim steps are directed to the abstract processes of manipulating information, and Appellants have not explained why such information manipulation renders the claims patent eligible. *See Elec. Power*, 830 F.3d at 1353. Further, those claim steps merely result in *different known information content* for databases, and Appellants have not explained why populating *different information* content in databases constitutes "an improvement to database technology" (App. Br. 13) or renders the claims patent eligible under *Alice*.

Contrary to Appellants' assertion (App. Br. 11–13), the rejected claims are unlike the claims in *Enfish*. In *Enfish*, the court determines:

> The . . . patents are directed to *an innovative logical model for a computer database.* . . . A logical model generally results in the creation of particular tables of data, but it does not describe how the bits and bytes of those tables are arranged in physical memory devices. *Contrary to conventional logical models, the patented logical model includes all data entities in a single table, with column definitions provided by rows in that same table.* The patents describe this as the "self-referential" property of the database.

Enfish, 822 F.3d at 1330 (emphases added).

[T]he plain focus of the claims is on an improvement to

> computer functionality itself, not on economic or other tasks for
> which a computer is used in its ordinary capacity.

> [T]he claims . . . are directed to a specific improvement to the
> way computers operate, embodied in the self-referential table.

Id. at 1336.

The rejected claims are unlike the claims of *Enfish* because they are

not "directed to an innovative logical model for a computer database [that]

includes all data entities in a single table, with column definitions provided

by rows in that same table." *Id.* at 1330.[5] Instead, the pending claims are

directed to using databases to manipulate data, and "the focus of the claims

is not on such an improvement in computers as tools, but on certain

independently abstract ideas that use computers as tools." *Elec. Power*, 830

F.3d at 1354.

Appellants cite page 1346 of the *Enfish* opinion and asserts "the field

of data mining . . . has been recently upheld as a valid area for patents."

App. Br. 11. But that page does not include such a broad statement. In fact,

"data mining" does not even appear in the *Enfish* opinion.

Appellants also cited *Ex Parle Carvalho et al.*, 2016 WL3646737

(Patent Tr. & App. Bd. 2016) (App. Br. 13), but that decision is not

precedential. In any event, Appellants' assertion that the pending claims are

patent eligible because they "describe structured data" (App. Br. 13) is

unpersuasive under that PTAB decision. *See Carvalho*, 2016 WL3646737 at

*4. In *Carvalho*, the PTAB panel determined the claims are patent eligible

because they "are directed to an improvement in the functioning of a

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[5] As a result, Appellants' assertion that both "*Enfish* and the present
invention describe software that constructs tables" (App. Br. 12) does not
show the pending claims are patent eligible.

computer (i.e., eliminating word aligner latency delay uncertainty)"—not because they describe structured data. *Id.*

Regarding *Alice* step two, contrary to Appellants' assertion (App. Br. 11–13; Reply Br. 2–4), Appellants have not shown the claims in this case require an arguably inventive set of components or methods, or invoke any assertedly inventive programming. *See Elec. Power*, 830 F.3d at 1355.

Further, contrary to Appellants' arguments (App. Br. 11–13; Reply Br. 2–4) and as pointed out by the Examiner (Ans. 7), the claims are similar to the claims of *Electric Power*, because they do not require any nonconventional computer, network, or display components, or even a "non-conventional and non-generic arrangement of known, conventional pieces," but merely call for performance of the claimed information collection, analysis, and display functions on generic computer components and display devices. *See Elec. Power*, 830 F.3d at 1355; *see also* Claim 1 (reciting "a first computer processor in a first data processing system," "databases," "a second data processing system with a second computer processor," and "a computer network). Dependent claim 22 calls for the same generic components and devices, and Appellants have not shown claim 22 requires any non-conventional components or devices. *See* claim 22.

Similar to the claims of *Electric Power,* the rejected claims specify what information is desirable to gather, analyze, and display, but they "do not include any requirement for performing the claimed functions of gathering, analyzing, and displaying . . . by use of anything but entirely conventional, generic technology." *Elec. Power*, 830 F.3d at 1356. Therefore, similar to the claims of *Electric Power*, the rejected claims "do not state an arguably inventive concept in the realm of application of the

information-based abstract ideas." *Elec. Power*, 830 F.3d at 1356.

Appellants' argument regarding the absence of prior art rejection of claim 22 (Reply Br. 4) is unpersuasive, because prior art rejection is determined under 35 U.S.C. § 102 and §103, which are different statutory requirements. As the Supreme Court emphasizes: "[t]he 'novelty' of any element or steps in a process, or even of the process itself, is of *no relevance* in determining whether the subject matter of a claim falls within the § 101 categories of possibly patentable subject matter." *Diamond v. Diehr*, 450 U.S. 175, 188–89 (1981) (emphasis added). Our reviewing court further guides that "[e]ligibility and novelty are separate inquiries." *Two-Way Media Ltd. v. Comcast Cable Commc'ns, LLC*, 874 F.3d 1329, 1340 (Fed. Cir. 2017).

Appellants cite *BASCOM Global Internet Services, Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (2016) (Reply Br. 4), but do not persuasively explain why that case is similar to the present case. In *BASCOM*, the court determined that at the pleading stage and construed in favor of the nonmovant,

> The inventive concept described and claimed . . . *is the installation of a filtering tool at a specific location, remote from the end-users, with customizable filtering features specific to each end user. This design gives the filtering tool both the benefits of a filter on a local computer and the benefits of a filter on the ISP server.* BASCOM explains that the inventive concept rests on taking advantage of the ability of at least some ISPs to identify individual accounts that communicate with the ISP server, and to associate a request for Internet content with a specific individual account.

Id. at 1350 (emphasis added).

The rejected claims are unlike the claims of *BASCOM* because they

are not directed to an "installation of a filtering tool at a specific location, remote from the end-users, with customizable filtering features specific to each end user." *Id.* at 1350. Nor do they "give[] the filtering tool both the benefits of a filter on a local computer and the benefits of a filter on the ISP server." *Id.* In fact, the pending claims do not even recite any "ISP server."

In short, Appellants have not shown the claims, read in light of the Specification, require anything other than conventional computer, network, and display technology for collecting, analyzing, and presenting the desired information. *See Elec. Power*, 830 F.3d at 1354. Such invocations of computers and networks are "insufficient to pass the test of an inventive concept in the application" of an abstract idea and, therefore, do not add significantly more to that idea. *Elec. Power*, 830 F.3d at 1355.

Because Appellants have not persuaded us the Examiner erred, we sustain the Examiner's rejection of claims 1 and 22 under 35 U.S.C. § 101.

35 U.S.C. § 103

On this record, the Examiner did not err in rejecting claim 1.

I

Appellants contend VanTrieste does not teach:

visually rendering on a computer display within a second data processing system with a second computer processor, the first contingency table, wherein a cell in the first contingency table is rendered one of a plurality of colors based on a document count in a row of the first contingency table, based on the cell in the contingency table exceeding the threshold value, based on a number of documents assigned to the first assignee, and based on a total number of documents in the first contingency

table;

as recited in claim 1. *See* App. Br. 14–16. In particular, Appellants contend claim 1 requires all of the limitations above, and VanTrieste alone does not teach them. *See* App. Br. 14–16.

Appellants have not persuaded us of error. Because the Examiner relies on the combination of Stobbs, Nutter, and VanTrieste to teach the disputed claim limitations, Appellants cannot establish nonobviousness by attacking VanTrieste individually. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

> The Examiner determines Stobbs and Nutter collectively teach

> visually rendering on a computer display within a second data processing system with a second computer processor, the first contingency table, wherein a cell in the first contingency table is . . . based on a document count . . . of the first contingency table, based on the cell in the contingency table exceeding the threshold value, based on a number of documents assigned to the first assignee, and based on a total number of documents in the first contingency table;

as recited in claim 1. *See* Final Act. 11, 14–16, 18. Appellants do not dispute that determination in the Appeal Brief.

The Examiner finds VanTrieste teaches the claimed "is rendered one of a plurality of colors." *See* Final Act. 18. Appellants do not dispute that finding. In fact, Appellants acknowledge VanTrieste teaches "coloring cells based on values" (App. Br. 15; *see also* App. Br. 16). Further, the Examiner finds—and Appellants do not persuasively dispute—VanTrieste teaches "in a row." *See* Final Act. 18; VanTrieste ¶ 67 ("Screen 300 includes multiple cells 310 arranged in rows 330 and columns 320. . . . Rows 330 include rows

14

330a, 330b, 330c, 330d, among others depicted and ellipsis 332 represents additional rows of cells that are not depicted") (emphases omitted).

Appellants do not contend the Examiner erred in the rationale for combining the teachings of Stobbs, Nutter, and VanTrieste. Therefore, we agree with the Examiner that Stobbs, Nutter, and VanTrieste collectively teach

> visually rendering on a computer display within a second data processing system with a second computer processor, the first contingency table, wherein a cell in the first contingency table is rendered one of a plurality of colors based on a document count in a row of the first contingency table, based on the cell in the contingency table exceeding the threshold value, based on a number of documents assigned to the first assignee, and based on a total number of documents in the first contingency table;

as required by claim 1. *See* Final Act. 11, 14–16, 18–20.

In addition, Appellants' assertion that VanTrieste does not teach cells are colored based on "'document count', 'a number of documents assigned to the first assignee', and 'a total number of documents in the first contingency table'" (App. Br. 16) is unpersuasive. The Examiner cites Stobbs—not VanTrieste—for teaching those limitations. *See* Final Act. 18.

II

Appellants contend:

> . . . claim 1 includes: coupling the first data processing system to the second data processing system with the second computer processor through the computer network . . .; and "the second data processing system creating a second contingency table based on the coupled first data processing

> The Office action . . . relies on Stobbs to overcome the above features. The Office action argues that Stobbs teaches use of "additional tables".

> However, Stobbs does not specify that the "additional tables" are contingency tables that are based on the first data processing system coupled to the second data processing system, as in claim 1. Stobbs does not teach or suggest coupling two data processing systems and then creating a second contingency table for the coupled systems, as in claim 1.

App. Br. 17.

Appellants' general assertion is unpersuasive of error. *See* 37 C.F.R. § 41.37(c)(1)(iv) ("A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim."); *see also In re Lovin*, 652 F.3d 1349, 1357 (Fed. Cir. 2011) (holding that "the Board reasonably interpreted Rule 41.37 to require more substantive arguments in an appeal brief than a mere recitation of the claim elements and a naked assertion that the corresponding elements were not found in the prior art").

III

First, Appellants argue:

> Claim 1 also requires "the second data processing system creating a second contingency table", which is contrary to Stobbs which does not include multiple data processing systems in the creation of a second contingency table. Claim 1 requires that one of the two data processing systems connected by a network create a contingency table for both of the two systems connected by a network.

> Under the broadest reasonable interpretation, Stobbs describes a system that can include a separate client and server, but it is one system (see Stobbs col. 5 lines 5–10). It is not

16

> reasonable to suggest that Stobbs teaches the multiple, separate data processing system requirements of claim 1, or one of two networked data processing systems creating a contingency table for both data processing systems connected by a computer network. This is because Stobbs does not teach or suggest creating values of a contingency table for coupled systems, and also because Stobbs does not teach or suggest creation of a contingency table by just one of the two coupled systems connected by a network.

App. Br. 17.

We disagree. Appellants do not argue the inventors specifically define the term "a second data processing system" in the Specification. As pointed out by the Examiner (Ans. 12), Appellants cite paragraphs 24 and 43 of the Specification for supporting that claim term (App. Br. 8–9), and those paragraphs do not define that term. *See* Spec. ¶¶ 24, 43. As a result, we agree with the Examiner that Stobbs teaches "a second data processing system" according to how one skilled in the art would understand that term. *See* Ans. 12. Specifically, the Examiner maps the claimed "first data processing system" and "second data processing system" to Stobbs' client computer 20 and server computer 24, respectively. *See* Ans. 12; Stobbs 4:4–11 ("The client computer 20 is connected to a multi-user network 22, for communication with the server computer 24 . . . The server computer 24 can be a single computer (e.g., single processor) or a multiple computer system") (emphases omitted). Appellants do not dispute such findings and fail to show Examiner error.

Second, Appellants' assertion that "[c]laim 1 requires that one of the two data processing systems connected by a network create a contingency table *for both of the two systems connected by a network*" (emphasis added) (App. Br. 17) is not commensurate with the scope of the claim, as the

limitation "the second data processing system creating a second contingency table" does not require the italicized portion. In any event, Appellants do not explain how the italicized portion shows an Examiner error.

To the extent Appellants' remaining assertions are directed to additional limitations, such general assertions are unsupported by evidence and are unpersuasive. *See* 37 C.F.R. § 41.37(c)(1)(iv); *Lovin,* 652 F.3d at 1357; *see also In re Geisler,* 116 F.3d 1465, 1470 (Fed.Cir.1997) ("attorney argument [is] not the kind of factual evidence that is required to rebut a prima facie case of obviousness"); *Meitzner v. Mindick,* 549 F.2d 775, 782 (CCPA 1977) ("Argument of counsel cannot take the place of evidence lacking in the record.").

IV

In the Reply Brief and for the first time, Appellants belatedly argue:

> The Examiner's Answer failed to show the present claim feature of "a cell in the first contingency table is rendered one of a plurality of colors based on . . . a total number of documents in the first contingency table". . . .

> The Examiner's Answer argues that "[t]he contingency table of Stobbs is based on a document count and a number of documents assigned to each assignee and a total number of documents in the table because the table includes a 'sum of factors' value". However, a review of column 18, lines 47–67 of Stobbs does not reveal basing the contingency table on "a total number of documents in the first contingency table" . . . .

> Rather, the "sum of factors" value in Stobbs is a sum of the "factor" value for a particular group of the table. (Stobbs, col. 19, lines 47–67). For example, Stobbs lists multiple sum of factor values for the table referred to in column 18, lines 30–41.

> Stobbs defines a "factor value" as indicating "how well [a] patent fits within a linguistic cluster". (Stobbs, col. 12, lines 20–25). Therefore Stobbs views a "sum of factors" value as a relational value, not a summation of "a total number of documents in the first contingency table" as in claim 1.
>
> . . . .
>
> The Examiner's Answer does not point out in any reference that "a cell in the first contingency table is rendered one of a plurality of colors based on a document count in a row of the first contingency table". For example, no mention was made in the Examiner's Answer that a reference discussed coloring based on document count in a row.

Reply Br. 5–6.

With respect to the above claim limitations, the Examiner has provided the same findings in the Final Action and the Examiner's Answer. *See* Final Act. 18; Ans. 9. In particular, the Examiner has already provided the finding ("[t]he contingency table of Stobbs is based on a document count and a number of documents assigned to each assignee and a total number of documents in the table because the table includes a 'sum of factors' value") in the Final Action (Final Act. 18), and the Examiner's Answer merely repeats that finding (Ans. 9).

Therefore, Appellants have waived the above arguments because they are untimely, and Appellants have not demonstrated any "good cause" for the belated presentation. *See* 37 C.F.R. § 41.41(b)(2).

Because Appellants have not persuaded us the Examiner erred, we sustain the Examiner's rejection of independent claim 1.

DECISION

We affirm the Examiner's decision rejecting claims 1 and 22 under 35 U.S.C. § 101.

We affirm the Examiner's decision rejecting claim 1 under pre-AIA 35 U.S.C. § 103(a).

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). *See* 37 C.F.R. § 41.50(f).

AFFIRMED