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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JASON CANNEY, JOEL HASSELL, SID  
GREGORY, CHRIS PIZZURRO, TOM HUBER, and  
STEVE MARKEL

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Appeal 2017-007925<sup>1</sup>  
Application 14/316,027<sup>2</sup>  
Technology Center 2400

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Before JOHNNY A. KUMAR, LARRY J. HUME, and  
JOHN D. HAMANN, *Administrative Patent Judges*.

HUME, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134(a) of the Final Rejection of claims 1–12, which are all claims pending in the application. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> According to Appellants, the real party in interest is Canoe Ventures, LLC. App. Br. 3.

<sup>2</sup> This application is related to Application Ser. No. 14/315,963, Appeal No. 2017-003637, Decision mailed December 4, 2017 (Examiner affirmed).

## STATEMENT OF THE CASE<sup>3</sup>

### *The Invention*

Appellants' disclosed embodiments and claimed invention "relate[] to the field of Content On Demand (COD) systems and more specifically to the modifying asset campaigns of asset managers to improve asset insertion into COD content selections." Spec. ¶ 2.

### *Related Case*

Although Appellants do not identify it as such (see App. Br. 3) as required by 37 C.F.R. § 41.37(c)(1)(ii), this Appeal is related to now-abandoned application Serial No. 14/315,963, Appeal No. 2017-003637, for which the Decision on Appeal affirming the Examiner was mailed on December 4, 2017.

### *Exemplary Claim*

Claim 1, reproduced below, is representative of the subject matter on appeal (*emphasis* added to contested limitations):

1. A system, comprising:

[L1] *a Content On Demand (COD) asset insertion decision system operable to process a plurality of asset campaigns from a plurality of asset managers, to process information from a remote COD content distributor about COD content selections by a plurality of Customer Premises Equipment (CPEs), to identify and qualify assets of the asset campaigns for insertion in the COD content selections, and to*

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<sup>3</sup> Our decision relies upon Appellants' Appeal Brief ("App. Br.," filed Nov. 8, 2016); Reply Brief ("Reply Br.," filed May 3, 2017); Examiner's Answer ("Ans.," mailed Mar. 3, 2017); Final Office Action ("Final Act.," mailed Apr. 26, 2016); and the original Specification ("Spec.," filed June 26, 2014).

direct the remote COD content distributor to insert the qualified assets into the COD content selections; and

[L2] *an analytics processor communicatively coupled to the COD asset insertion decision system and operable to collect information about the assets inserted in the COD content selections, to modify the asset campaigns based on the collected information, and to present the modified asset campaigns to the COD asset insertion decision system, wherein*

[L3] *the COD asset insertion decision system is further operable to re-qualify the assets based on the modified asset campaigns.*

#### *Prior Art*

The Examiner relies upon the following prior art as evidence in rejecting the claims on appeal:

Hood	US 2008/0046924 A1	Feb. 21, 2008
Kitts et al. ("Kitts")	US 2014/0101685 A1	Apr. 10, 2014

#### *Rejections on Appeal<sup>4</sup>*

R1. Claims 1–12 stand rejected under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter. Final Act. 7.

R2. Claims 1–12 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Hood and Kitts. Final Act. 10.

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<sup>4</sup> The Examiner also provisionally rejected claims 1–12 under the judicially-created doctrine of nonstatutory obviousness-type double patenting as not being patentably distinct over claims 1–12 of Application No. 14/315,963. Final Act. 6. We conclude this provisional rejection is now moot, because Application No. 14/315,963 has been abandoned. *See* n.2, *supra*.

## CLAIM GROUPING

Based on Appellants' arguments (App. Br. 5–16), we decide the appeal of patent-ineligible subject matter Rejection R1 of claims 1–12 on the basis of representative claim 1; and we decide the appeal of obviousness Rejection R2 of claims 1–12 on the basis of representative claim 1.<sup>5</sup>

## ISSUES AND ANALYSIS

In reaching this decision, we consider all evidence presented and all arguments actually made by Appellants. We do not consider arguments Appellants could have made but chose not to make in the Briefs, and we deem any such arguments waived. 37 C.F.R. § 41.37(c)(1)(iv).

We disagree with Appellants' arguments with respect to claims 1–12 and, unless otherwise noted,<sup>6</sup> we incorporate by reference herein and adopt as our own: (1) the findings and reasons set forth by the Examiner in the

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<sup>5</sup> "Notwithstanding any other provision of this paragraph, the failure of appellant to separately argue claims which appellant has grouped together shall constitute a waiver of any argument that the Board must consider the patentability of any grouped claim separately." 37 C.F.R. § 41.37(c)(1)(iv). In addition, when Appellants do not separately argue the patentability of dependent claims, the claims stand or fall with the claims from which they depend. *In re King*, 801 F.2d 1324, 1325 (Fed. Cir. 1986).

<sup>6</sup> For Example, with respect to Rejection R1 under § 101, the Examiner incorrectly states, "[t]he claim(s) does not fall within at least one of the four categories of patent eligible subject matter because at least any part of the claimed invention is directed to a judicial exception of an abstract idea." Final Act. 7. We disagree with the Examiner's legal conclusion because claim 1 is directed to a "system," claim 5 is directed to a "method," and claim 9 is directed to a "non-transitory computer readable medium," each of which falls into one of the four categories of statutory subject matter. We clarify that Rejection R1 deals with a patent-ineligible *judicial exception* to an otherwise statutory class of subject matter.

action from which this appeal is taken, and (2) the reasons and rebuttals set forth in the Examiner's Answer in response to Appellants' arguments. We highlight and address specific findings and arguments regarding claim 1 for emphasis as follows.

1. § 101 Rejection R1 of Claims 1–12

Issue 1

Appellants argue (App. Br. 5–10; Reply Br. 2) the Examiner's rejection of claim 1 under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter is in error. These arguments present us with the following issue:

Did the Examiner err in concluding representative claim 1 is directed to an abstract idea without adding significantly more, and thus is patent-ineligible under § 101?

Analysis

*Alice Framework*

Section 101 provides that anyone who "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. 35 U.S.C. § 101. The Supreme Court has repeatedly emphasized that patent protection should not extend to claims that monopolize "the basic tools of scientific and technological work." *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 71 (2012); *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2354 (2014). Accordingly, laws of nature, natural phenomena, and abstract ideas are not patent-eligible subject matter. *Id.*

The Supreme Court's two-part *Mayo/Alice* framework guides us in distinguishing between patent claims that impermissibly claim the "building blocks of human ingenuity" and those that "integrate the building blocks into something more." *Id.* (internal quotation marks, citation, and bracketing omitted). First, we "determine whether the claims at issue are directed to [a] patent-ineligible concept[]." *Id.* at 2355. If so, we "examine the elements of the claim to determine whether it contains an 'inventive concept' sufficient to 'transform' the claimed abstract idea into a patent-eligible application." *Id.* at 2357 (quoting *Mayo*, 566 U.S. at 72, 79). While the two steps of the *Alice* framework are related, the "Supreme Court's formulation makes clear that the first-stage filter is a meaningful one, sometimes ending the § 101 inquiry." *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016). We note the Supreme Court "has not established a definitive rule to determine what constitutes an 'abstract idea'" for the purposes of step one. *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1334 (Fed. Cir. 2016) (citing *Alice*, 134 S. Ct at 2357).

However, our reviewing court has held claims ineligible as directed to an abstract idea when they merely collect electronic information, display information, or embody mental processes that could be performed by humans. *Elec. Power Grp.*, 830 F.3d at 1353–54 (collecting cases). At the same time, "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. Abstract ideas may include, but are not limited to, fundamental economic practices, methods of organizing human activities, an idea of itself, and mathematical formulas or relationships. *Alice*, 134 S. Ct. at 2355–57. Under this guidance, we must therefore ensure at step one that we

articulate what the claims are directed to with enough specificity to ensure the step one inquiry is meaningful. *Id.* at 2354 ("[W]e tread carefully in construing this exclusionary principle lest it swallow all of patent law.").

Under the "abstract idea" step we must evaluate "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) (citation omitted). If the claims are not directed to a patent-ineligible concept, the inquiry ends. *See Visual Memory LLC v. NVIDIA Corp.*, 867 F.3d 1253, 1262 (Fed. Cir. 2017). If the concept is directed to a patent-ineligible concept, we proceed to the "inventive concept" step. For that second step we must "look with more specificity at what the claim elements add, in order to determine 'whether they identify an "inventive concept" in the application of the ineligible subject matter' to which the claim is directed." *Affinity Labs*, 838 F.3d at 1258 (quoting *Elec. Power Grp.*, 830 F.3d at 1353).

#### *Alice Step 1 — Abstract Idea*

Our reviewing court has held claims ineligible for being directed to an abstract idea when they merely collect electronic information, display information, or embody mental processes that could be performed by humans. *Elec. Power Grp.*, 830 F.3d at 1353–54 (collecting cases). At the same time, "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. Under this guidance, we must therefore ensure at step one that we articulate what the claims are directed to with enough specificity to ensure the step one inquiry is meaningful. *Alice*, 134 S. Ct. at 2354 ("[W]e tread

carefully in construing this exclusionary principle lest it swallow all of patent law.").

The Examiner concludes the appealed claims are patent-ineligible because "the claimed invention is directed to a judicial exception of an abstract idea of inserting assets into content based on a plurality of asset campaigns, modifying the asset campaigns, presenting the modified asset campaigns for reviewing." Final Act. 7.

Appellants contend, "[t]he mere fact that a person may describe a claim in abstract terms does not render that claim unpatentable under § 101. Absolutely any claim, including a patentable one, can be rephrased broadly to include an abstract concept." App. Br. 5. Appellants further argue:

It therefore remains an important duty for the Examiner not to disregard specifically claimed features when applying the *Alice* test. The Examiner must consider the entirety of the claim, including each specific limitation, when evaluating a claim under the first part of the *Alice* test. In regards to inventions involving computer technology, the Federal Circuit has clarified that claims directed to software are not inherently abstract, and has stated that "[w]e thus see no reason to conclude that all claims directed to improvements in computer-related technology, including those directed to software, are abstract and necessarily analyzed at the second step of *Alice*, nor do we believe that *Alice* so directs." *Enfish*, slip opinion at 11.

App. Br. 6.

In addition, Appellants argue claim 1 describes a system to insert assets from asset campaigns into Content On Demand (COD) content. *Id.* "Appellant submits that this intensive task of identifying assets for insertion into COD content, and modifying asset campaigns based on which assets

have been inserted, is not a lofty abstract concept, but rather involves a specific technique to improve the operations of the numerous servers, computers, and CPEs that handle COD content on a daily basis." <sup>7</sup>

Under the "abstract idea" step we must evaluate "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*, 838 F.3d at 1257 (citation omitted).

Turning to the claimed invention, device claim 1 recites, *inter alia*, a system that includes "a Content On Demand (COD) asset insertion decision system operable . . . to identify and qualify assets of the asset campaigns for insertion in the COD content selections;" "an analytics processor communicatively coupled to the COD asset insertion decision system and operable . . . to modify the asset campaigns based on the collected information, and to present the modified asset campaigns to the COD asset insertion decision system;" "wherein the COD asset insertion decision

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<sup>7</sup> By emphasis on the alleged improved operations of servers, computers, and customer premises equipment (CPE) that handle COD content, Appellants appear to conflate the *Alice* Step 1 analysis regarding abstractness with *Alice* Step 2 analysis for "significantly more," to which *DDR Holdings* is directed. See *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014); and see "*Alice* Step 2—*Inventive Concept*" section, *infra*. Appellants additionally cite *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016) in their Appeal Brief (7). However, we find Appellants' claim 1 is distinguishable over the claim considered by the court in *Enfish*, which was found to be "directed to an improvement in the functioning of a computer." *Enfish*, 822 F.3d at 1338. The court in *Enfish* further noted: "In contrast, the claims at issue in *Alice* and *Versata* can readily be understood as simply adding conventional computer components to well-known business practices." *Id.*

system is further operable to re-qualify the assets based on the modified asset campaigns."

The Examiner summarizes the *Alice Step 1* analysis by stating:

[The claim limitations] correspond to concept identified as abstract idea by the courts, such as *comparing new and stored information and using rules to identify options (SmartGene), organiz[ing] information through mathematical correlation (Digitech), displaying an advertisement in exchange for access to copyrighted media (Ultramerical) etc.* The concept described in claims 1, 5 and 9 is not meaningfully different that those "An Idea 'Of Itself'" found by the courts to be abstract idea. As such, the description in claim 1, 5 and 9 of inserting assets into content based on a plurality of asset campaigns, modifying the asset campaigns, presenting the modified asset campaigns to the COD insertion system can be performed by human using a pen and paper, or human mind. *For example, a campaign manager can modify the campaigns manually, and provide a modified asset campaigns to the asset managers verbally or written with paper and pen, and perform the steps of listing orderly where the media assets (i.e. commercial) insert into media content based on a plurality of asset campaigns feedback without a computer.*

Ans. 3–4.

Under step one, we agree with the Examiner that the inventions claimed in each of independent claims 1, 5, and 9 are directed to one or more abstract ideas (i.e., comparing new and stored information and using rules to identify options, organizing information through mathematical correlation, and/or displaying an advertisement in exchange for access to copyrighted media), which we consider, in this case, to be systems and methods of organizing human activities pertaining to advertising by modifying, presenting, and inserting assets into asset campaigns. *See Ans. 2 et seq.*

As the Specification itself observes, "[t]he invention relates to the field of Content On Demand (COD) systems and more specifically to the modifying asset campaigns of asset managers to improve asset insertion into COD content selections." Spec. ¶ 2.<sup>8</sup>

We find this type of activity, i.e., collecting information for managing advertising or asset campaigns includes longstanding conduct that existed well before the advent of computers and the Internet, and could be carried out by a human with pen and paper. *See CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1375 (Fed. Cir. 2011) ("That purely mental processes can be unpatentable, even when performed by a computer, was precisely the holding of the Supreme Court in *Gottschalk v. Benson*.").<sup>9</sup>

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<sup>8</sup> *See also* Spec. 41 ("Abstract"):

One embodiment herein includes a Content On Demand (COD) asset insertion system that is operable to process a plurality of asset campaigns from a plurality of asset managers, to process information from a remote COD content distributor about COD content selections by a plurality of Customer Premises Equipment (CPEs), to identify and qualify assets of the asset campaigns for insertion in the COD content selections, and to direct the remote COD content distributor to insert the qualified assets into the COD content selections. The embodiment also includes an analytics processor that is operable to collect information about the assets inserted in the COD content selections, to modify the asset campaigns based on the collected information, and to present the modified asset campaigns to the COD asset insertion decision system. The COD asset insertion decision system is further operable to re-qualify the assets based on the modified asset campaigns.

<sup>9</sup> *CyberSource* further guides that "a method that can be performed by human thought alone is merely an abstract idea and is not patent-eligible under § 101." *CyberSource*, 654 F.3d at 1373.

Our reviewing court has previously held other patent claims ineligible for reciting similar abstract concepts. For example, although the Supreme Court has enhanced the § 101 analysis since *CyberSource* in cases like *Mayo* and *Alice*, they continue to "treat[ ] analyzing information by steps people go through in their minds, or by mathematical algorithms, without more, as essentially mental processes within the abstract-idea category." *Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1146–47 (Fed. Cir. 2016) (alteration in original) (quoting *Elec. Power Grp.*, 830 F.3d at 1354).

In this regard, the claims are similar to claims our reviewing court has found patent-ineligible in *Elec. Power Grp.*, 830 F.3d at 1353–54 (collecting information and "analyzing information by steps people go through in their minds, or by mathematical algorithms, without more, [are] essentially mental processes within the abstract-idea category").

Therefore, in agreement with the Examiner, we conclude claim 1 involves nothing more than collecting and processing information "to identify and qualify assets of the asset campaigns for insertion in the COD content selections," and "to modify the asset campaigns based on the collected information" without any particular inventive technology—an abstract idea. *See Elec. Power Grp.*, 830 F.3d at 1354. We further refer to *Content Extraction*, where the Federal Circuit has provided additional guidance on the issue of eligible subject matter by holding claims to collecting data, recognizing certain data within the collected data set, and storing that recognized data in memory were directed to an abstract idea and therefore unpatentable under § 101. *Content Extraction & Transmission LLC v. Wells Fargo Bank, N.A.*, 776 F.3d 1343 (Fed. Cir. 2014).

Accordingly, on this record, and under step one of *Alice*, we agree with the Examiner's conclusion the claims are directed to an abstract idea.

*Alice Step 2 —Inventive Concept*

If the claims are directed to a patent-ineligible concept, as we conclude above, we proceed to the "inventive concept" step. For that step we must "look with more specificity at what the claim elements add, in order to determine 'whether they identify an "inventive concept" in the application of the ineligible subject matter' to which the claim is directed." *Affinity Labs*, 838 F.3d at 1258 (quoting *Elec. Power Grp.*, 830 F.3d at 1353).

In applying step two of the *Alice* analysis, our reviewing court guides we must "determine whether the claims do significantly more than simply describe [the] abstract method" and thus transform the abstract idea into patentable subject matter. *Ultramerical, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014) (citation omitted). We look to see whether there are any "additional features" in the claims that constitute an "inventive concept," thereby rendering the claims eligible for patenting even if they are directed to an abstract idea. *Alice*, 134 S. Ct. at 2357. Those "additional features" must be more than "well-understood, routine, conventional activity." *Mayo*, 566 U.S. at 79.

Evaluating representative claim 1 under step 2 of the *Alice* analysis, we agree with the Examiner that it lacks an inventive concept that transforms the abstract idea of "comparing new and stored information and

using rules to identify options" (Ans. 4–5) into a patent-eligible application of that abstract idea. *See also* Final Act. 7–8.<sup>10</sup>

Appellants allege:

[I]nserting assets into COD content for delivery to CPEs (user devices that are electronic) cannot be done using a pen and paper, as the Examiner contends on page 3 of the Examiner's answer, because the COD content (and the inserted assets) are electronic signals. Second, the CPEs receiving COD content can number in the millions. The Appellant contends that no human could conceivably direct asset insertion into millions of COD content being delivered to millions of devices. And, even if only one CPE was involved, it would not be feasible for a human to direct the asset insertion into COD content across a networked system involved in COD content delivery as would be understood by one skilled in the art.

Reply Br. 2. We disagree with Appellants' contentions.

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<sup>10</sup> The Examiner concludes claim 1 is directed to generic computer elements because:

[T]he claim limitations do not add a meaningful limitation to the abstract idea because they would be routine in any computer implementation . . . [and] do not add more to the abstract idea as these limitations when given their broadest reasonable interpretation are merely deemed to be performed on a generic computer as described in the [S]pecification according to **Fig.1, Fig. 2, and paragraphs [0028-0042]**, which is shown to perform in the conventional manner and has not shown any unconventional use and/or improvement of the computer structure/system. . . . There is no indication that the combination of elements improve the functioning of a computer or improve any other technology. Their collective function merely provide conventional computer implementation. Therefore, at least the above reasons, the claims 1-12 are rejected under 35 U.S.C. 101 as being directed to non-statutory subject matter.

Ans. 4–5.

We disagree because, as our reviewing court held in *FairWarning*:

While the claimed system and method certainly purport to accelerate the process of analyzing audit log data, **the speed increase comes from the capabilities of a general-purpose computer, rather than the patented method itself.** See *Bancorp Servs., L.L.C. v. Sun Life Assurance Co. of Can.* (U.S.), 687 F.3d 1266, 1278 (Fed. Cir. 2012) (“[T]he fact that the required calculations could be performed **more efficiently** via a computer does not materially alter the patent eligibility of the claimed subject matter.”).

*FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1095 (Fed. Cir. 2016) (emphases added).

We agree with the Examiner because, as in *Alice*, we find the recitation of a "Content On Demand (COD) asset insertion decision system" and "an analytics processor communicatively coupled to the COD asset insertion decision system" that process information (claim 1); and "processing a plurality of asset campaigns . . . [and] information" (claims 5 and 9) is simply not enough to transform the patent-ineligible abstract idea here into a patent-eligible invention. See *Alice*, 134 S. Ct. at 2357 (“[C]laims, which merely require generic computer implementation, fail to transform [an] abstract idea into a patent-eligible invention.”).<sup>11</sup>

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<sup>11</sup> Appellants allege:

inserting assets into COD content for delivery to CPEs (user devices that are electronic) cannot be done using a pen and paper, as the Examiner contends on page 3 of the Examiner's answer, because the COD content (and the inserted assets) are electronic signals. Second, the CPEs receiving COD content can number in the millions. The Appellant contends that no human could conceivably direct asset insertion into millions of COD content being delivered to millions of devices. And, even

Accordingly, based upon the findings above, on this record, we are not persuaded of error in the Examiner's conclusion that the appealed claims are directed to patent-ineligible subject matter. Therefore, we sustain the Examiner's § 101 rejection of independent claim 1, and grouped claims 2–9, 17–21, 25–28, 30, and 34–37, not argued separately, and which fall therewith. *See Claim Grouping, supra.*

2. § 103 Rejection R2 of Claims 1–12

Issue 2

Appellants argue (App. Br. 10–16; Reply Br. 2–3) the Examiner's rejection of claim 1 under 35 U.S.C. § 103(a) as being obvious over the combination of Hood and Kitts is in error. These contentions present us with the following issue:

Did the Examiner err in finding the cited prior art combination teaches or suggests a system that includes, *inter alia*, limitation L1, "a Content On Demand (COD) asset insertion decision system operable . . . to identify and qualify assets of the asset campaigns for insertion in the COD content selections;" limitation L2, "an analytics processor communicatively coupled to the COD asset insertion decision system and operable . . . to modify the asset campaigns based on the collected information, and to present the modified asset campaigns to the COD asset insertion decision system," and limitation L3 "wherein the COD asset insertion decision system is further

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if only one CPE was involved, it would not be feasible for a human to direct the asset insertion into COD content across a networked system involved in COD content delivery as would be understood by one skilled in the art.

Reply Br. 2.

operable to re-qualify the assets based on the modified asset campaigns," as recited in claim 1?

Analysis

Appellants first contend "[o]ne issue is whether the Examiner has identified where each and every element of the Appellant's claims is taught by the cited references. . . . The burden of proving *anticipation* of a claim therefore rests with the Examiner." App. Br. 10 (emphasis added). We note the rejection is for *obviousness* under § 103, and not for anticipation under § 102.

*The Cited Prior Art Teaches or Suggests all Limitations*

*Limitation L1: COD asset insertion decision system*

Appellants argue Hood makes no mention of "asset campaigns" but instead, refers to "auction campaigns" that determine auction operation for "avails" or open timeslots. App. Br. 11.

During prosecution, claims must be given their broadest reasonable interpretation when reading claim language in light of the specification as it would be interpreted by one of ordinary skill in the art. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). Under this standard, we interpret claim terms using "the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant's specification." *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

We note Appellants have not cited to a definition of "asset campaigns" in the Specification that would preclude the Examiner's broader reading of the recited "Content On Demand (COD) asset insertion decision system" onto Hood's "auction campaign manager" that manages video on demand auction campaigns.<sup>12</sup> Final Act. 10 (citing, *inter alia*, Hood ¶¶ 40–45); Ans. 5–10.

*Limitation L2: Analytics Processor to Modify Asset Campaigns*

The Examiner finds Hood teaches "an analytics processor communicatively coupled to the COD asset insertion decision system." Final Act. 10 (citing Hood Fig. 2, "Ad Decision Service" 204 coupled to "Auction Campaign Manager" 210; ¶¶ 43, 45).

With respect to the Examiner's reliance on Kitts for teaching or suggesting optimizing or modifying asset campaigns via Hood's analytics processor, Appellants contend:

Kitts cannot disclose the modification of asset campaigns based on information collected from COD content selections because Kitts is not related to on-demand content (e.g., COD). Kitts is directed to tracking advertisements in real time television broadcasts (a.k.a. linear advertising). In fact, Kitts does not even use the terms "COD", or "VOD" (Video On Demand). And, Kitts' only use of the term "demand" regards a market

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<sup>12</sup> Any special meaning assigned to a term "must be sufficiently clear in the specification that any departure from common usage would be so understood by a person of experience in the field of the invention." *Multiform Desiccants Inc. v. Medzam Ltd.*, 133 F.3d 1473, 1477 (Fed. Cir. 1998); *see also Helmsderfer v. Bobrick Washroom Equip., Inc.*, 527 F.3d 1379, 1381 (Fed. Cir. 2008) ("A patentee may act as its own lexicographer and assign to a term a unique definition that is different from its ordinary and customary meaning; however, a patentee must clearly express that intent in the written description.").

demand (see e.g., paragraph [0171] of Kitts). The Appellant's claim explicitly states that the asset campaigns are modified based on the collected information and that collected information regards assets that are inserted into COD content selections.

App. Br. 11.

The Examiner summarizes the pertinent findings of obviousness under § 103 by stating:

***In general, Hood discloses an advertising insertion within the VOD system . . . and Kitts discloses tracking of advertisement campaign for a product or service, and adjust and/or modify advertisement campaign based on tracking information collected.*** Therefore, Hood in view of Kitts clearly teach content on demand and modifying asset campaigns based on information collected for COD asset insertion.

Ans. 10.

Appellants' contention regarding Kitts not being directed to content on demand does not persuade us of error on the part of the Examiner because Appellants are responding to the rejection by attacking the references separately, even though the rejection is based on the combined teachings of the references. Nonobviousness cannot be established by attacking the references individually when the rejection is predicated upon a combination of prior art disclosures. *See In re Merck & Co. Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

*Limitation L3: Requalification of Assets*

The Examiner finds Kirk teaches or suggests the asset insertion decision system re-qualifies the assets based upon the modified asset campaigns. Final Act. 10–11 (citing Kirk ¶¶ 13, 53–54, 231–236; Fig. 17);

*see also* Ans. 7. "[Kirk] compares the one or more sales metrics to one or more sales goals for the product or service . . . , and identifies an adjustment to the first advertisement campaign that will cause the one or more sales metrics to more closely meet the one or more sales goals." Ans. 8 (emphasis omitted). We find this disclosure of Kirk teaches or at least suggests re-qualification of assets, i.e., re-qualifying advertising campaigns.

Therefore, based upon the findings above, on this record, we are not persuaded of error in the Examiner's reliance on the cited prior art combination to teach or suggest the disputed limitations of claim 1, nor do we find error in the Examiner's resulting legal conclusion of obviousness. Therefore, we sustain the Examiner's obviousness rejection of independent claim 1, and grouped claims 2–12 which fall therewith. *See* Claim Grouping, *supra*.

#### REPLY BRIEF

To the extent Appellants *may* advance new arguments in the Reply Brief (Reply Br. 2–3) not in response to a shift in the Examiner's position in the Answer, we note arguments raised in a Reply Brief that were not raised in the Appeal Brief or are not responsive to arguments raised in the Examiner's Answer will not be considered except for good cause (*see* 37 C.F.R. § 41.41(b)(2)), which Appellants have not shown.

## CONCLUSIONS

(1) The Examiner did not err with respect to patent-ineligible subject matter Rejection R1 of claims 1–12 under 35 U.S.C. § 101), and we sustain the rejection.

(2) The Examiner did not err with respect to obviousness Rejection R2 of claims 1–12 under 35 U.S.C. § 103(a) over the cited prior art combination of record, and we sustain the rejection.

## DECISION

We affirm the Examiner's decision rejecting claims 1–12.

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