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Table with 5 columns: APPLICATION NO., FILING DATE, FIRST NAMED INVENTOR, ATTORNEY DOCKET NO., CONFIRMATION NO.
13/921,840 06/19/2013 Anuj Gupta 20030.595 8950

119741 7590 02/21/2019
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EXAMINER

SITTNER, MATTHEW T

ART UNIT PAPER NUMBER

3682

NOTIFICATION DATE DELIVERY MODE

02/21/2019

ELECTRONIC

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* ANUJ GUPTA, ANUP, MANISH KASAT, and NEERAJ BAGGA

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Appeal 2017-008940  
Application 13/921,840<sup>1</sup>  
Technology Center 3600

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Before BIBHU R. MOHANTY, MICHAEL C. ASTORINO, and  
BRUCE T. WIEDER, *Administrative Patent Judges*.

WIEDER, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the Examiner's final rejection of claims 1–20. 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 Adobe Systems Incorporated. (Appeal Br. 1.)

### CLAIMED SUBJECT MATTER

Appellants’ “invention generally relate[s] to marketing and, more particularly, to a method and apparatus for targeting messages in desktop and mobile applications.” (Spec. ¶ 1.)<sup>2</sup>

Claims 1, 8, and 14 are the independent claims on appeal. Claim 1 is illustrative. It recites:

1. A computer implemented method comprising:
  - retrieving, over a computer network by a user device from at least one remote server, an advertising policy generated by the at least one remote server for a first software application installed on the user device, wherein the advertising policy is generated by the at least one server to comprise a plurality of events with regard to operation of the first software application installed on the user device and one or more advertisements, wherein the one or more advertisements comprise an advertisement related to a second software application, and wherein the plurality of events comprise: crashing the first software application, opening a type of document in the first software application, adding a comment within the first software application, and copying content within the first software application;
  - storing, at the user device, the advertising policy and the one or more advertisements;
  - recording, by the user device, user behavior and application usage data during operation of the first software application installed on the user device;
  - determining, by the user device, that the advertising policy has been satisfied by comparing the recorded user behavior and application usage data during operation of the first software application on the user device to the plurality of events with regard to operation of the first software application;
  - retrieving, by the user device, the advertisement related to the second software application stored at the user device and providing the advertisement for display on the user device based

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<sup>2</sup> “Spec.” refers to the Specification filed June 19, 2013.

on the determination that the at least one advertising policy has been satisfied.

### REJECTIONS

Claims 1–20 are rejected under 35 U.S.C. § 112(a) as failing to comply with the written description requirement.

Claims 1–20 are rejected under 35 U.S.C. § 101 as directed to a judicial exception without significantly more.

### ANALYSIS

#### The § 112(a) rejection

The Examiner finds that the Specification “fails to disclose the amended claimed features [of claim 1] as follows: *wherein the plurality of events comprise crashing the first software application, opening a type of document in the first software application, adding a comment within the first software application, and copying content within the first software application.*” (Final Action 3.) Specifically, the Examiner determines:

Based upon the current amendments, Examiner interpreted the claim to read a ‘singular ad policy’ which is [sic] must include each of the four listed events (i.e., crashing, opening, adding, and copying) and no others. Further, Examiner interpreted that the ad policy is only triggered when “all four” recited elements are triggered. Finding no references which taught such a narrow claim scope, Examiner dropped the prior-art rejection. However, Examiner made a 112 rejection as he could not find support in Appellants’ specification for an ad policy which required all four elements to make the ad policy. Further, Examiner found no support in the specification requiring that all four events be triggered in order to satisfy the ad policy.

(Answer 7.)

Appellants disagree and argue that

the Specification explicitly describes creating a single policy that comprises a plurality of initial policies and corresponding events. One of ordinary skill in the art reading the *Specification* would thus understand that Applicant, at the time of filing, was in possession of all of the individually disclosed triggering events, and one or more embodiments that combine the disclosed triggering events into a single policy. That is the beginning and the end of the issue on appeal.

(Reply Br. 3.)

The test for sufficiency of a written description is “whether the disclosure clearly ‘allow[s] persons of ordinary skill in the art to recognize that [the inventor] invented what is claimed.’” *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed.Cir.2010) (en banc) (quoting *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1562–63 (Fed.Cir.1991)). The disclosure must “reasonably convey[] to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.” *Id.* at 1351. Possession means “possession as shown in the disclosure” and “requires an objective inquiry into the four corners of the specification from the perspective of a person of ordinary skill in the art.” *Id.*

*Crown Packaging Tech., Inc. v. Ball Metal Beverage Container Corp.*, 635 F.3d 1373, 1380 (Fed. Cir. 2011).

As an initial matter, we note that immediately prior to being amended to its current form, claim 1 recited, in relevant part, “wherein the triggering event comprises at least one of: crashing the first software application, opening a type of document in the first software application, adding a comment within the first software application, or copying content within the first software application.” (See Amendment and Response to Final Office Action, filed January 14, 2016, at 2.) In its current form, claim 1 recites “wherein the plurality of events comprise: crashing the first software

application, opening a type of document in the first software application, adding a comment within the first software application, and copying content within the first software application.”

In view of the prosecution history, we agree, in part, with the Examiner’s claim interpretation. Specifically, applying a broadest reasonable interpretation, we determine that the claimed advertising policy comprises a plurality of events, and that the plurality of events comprises at least the four recited events of “[ (1) ] crashing the first software application, [ (2) ] opening a type of document in the first software application, [ (3) ] adding a comment within the first software application, and [ (4) ] copying content within the first software application.” *See* Claim 1.

Appellants argue that the Specification discloses “crashing a first software application” (Appeal Br. 10, citing Spec. ¶ 10<sup>3</sup>), “opening a type of document in the first software application” (*id.*, citing Spec. ¶ 10), “adding a comment within the first software application” (*id.* at 11, citing Spec. ¶ 10), and “copying content within the first software application” (*id.*, citing Spec. ¶ 9). But the Specification discloses more than just these four events, and Appellants do not persuasively argue that the Specification discloses that these particular four events are necessary to the invention.

The Specification discloses:

**[0009]** . . . The policies may also define specific actions that are to be performed when the recorded data satisfies the policy. For example, a policy for ADOBE<sup>®</sup> READER<sup>®</sup> may dictate that if a user performs a “text copy” operation a predefined number of times in the same document, then display a message advertising the virtues of ADOBE<sup>®</sup> ExportPDF . . . .

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<sup>3</sup> Appellants erroneously cited paragraph numbers of the published application. (*See, e.g.*, Appeal Br. 10.) Here, we cite to the Specification.

**[0010]** The embodiments record data regarding product usage and user behavior within operation of the application. The recorded data is stored in a database as it is generated. The recorded data includes various events in the application including [(a)] mouse selection or [(b)] using a tool/feature, such as adding a comment, copying content, and the like. Applications events are also recorded, such as application [(c)] crashes or [(d)] updates, in addition to a number of times each event occurs within a day, week, month, or other predetermined time period. The recorded data also includes [(e)] each type of document that is opened in the application and application specific information such as [(f)] language, [(g)] geography, and the like. After each event or piece of data is recorded, the embodiments determine from the currently accumulated recorded data, whether a policy has been satisfied that requires the display of a message or other action. The policy that is satisfied may be due to product usage, user behavior, or it may be that [(h)] a predefined amount of time has passed since a last message was displayed.

(Spec. ¶¶ 9–10.) In other words, in addition to the four events recited in claim 1, the Specification discloses events including, e.g., (a) mouse selection, (d) updates, (f) application language, (g) application geography, and (h) time passed since last message display. Appellants do not point to any disclosure in the Specification regarding why the four events recited in the claim are necessary or why the above noted five additional events are not necessary. In short, it is not clear from the Specification that one of ordinary skill in the art reading the Specification would recognize that the inventors invented what is now claimed, i.e., a method that requires the four recited events but not the five additional events. *See Purdue Pharma L.P. v. Faulding Inc.*, 230 F.3d 1320, 1326 (Fed. Cir. 2000) (“[O]ne cannot disclose a forest in the original application, and then later pick a tree out of the forest and say here is my invention.”); *see also Ariad Pharms., Inc.*, 598 F.3d at 1351.

Therefore, we will affirm the Examiner’s rejection of claim 1 under § 112(a). Independent claims 8 and 14 contain similar language and are similarly rejected. Claims 8 and 14, and dependent claims 2–7, 9–13, and 15–20, are not separately argued and fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

*The § 101 rejection*

“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.” 35 U.S.C. § 101. Section 101, however, “contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable.” *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014) (quoting *Assoc. for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (2013)).

*Alice* applies a two-step framework, earlier set out in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012), “for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts.” *Alice*, 573 U.S. at 217.

Under the two-step framework, it must first be determined if “the claims at issue are directed to a patent-ineligible concept.” *Id.* If the claims are determined to be directed to a patent-ineligible concept, then the second step of the framework is applied to determine if “the elements of the claim . . . contain[] an ‘inventive concept’ sufficient to ‘transform’ the

claimed abstract idea into a patent-eligible application.” *Id.* at 221 (citing *Mayo*, 566 U.S. at 72–73, 79).

With regard to step one of the *Alice* framework, we apply a “directed to” two prong test to: 1) evaluate whether the claim recites a judicial exception, and 2) if the claim recites a judicial exception, evaluate whether the claim “appl[ies], rel[ies] on, or use[s] the judicial exception in a manner that imposes a meaningful limit on the judicial exception, such that the claim is more than a drafting effort designed to monopolize the judicial exception.” *See 2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50, 54 (Jan. 7, 2019) (hereinafter “2019 Guidance”).

Here, the Examiner determines that “Claim 1 is directed to the abstract idea of: targeting messages by: collecting and comparing known information, and by comparing new and stored information and using rules to identify options, and by displaying an advertisement.” (Final Action 4, emphasis omitted.)

Appellants disagree and argue that “the Examiner is unable to point to any case that identifies the foregoing language as an abstract idea.” (Appeal Br. 13.)

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

The ‘directed to’ inquiry . . . cannot simply ask whether the claims *involve* a patent-ineligible concept, because essentially every routinely patent-eligible claim involving physical products and actions *involves* a law of nature and/or natural phenomenon

. . . . Rather, the ‘directed to’ inquiry applies a stage-one filter to claims, considered in light of the specification, based on whether ‘their character as a whole is directed to excluded subject matter.’ *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1346 (Fed. Cir. 2015).

*Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016). In other words, the first step of the *Alice* framework “asks whether the focus of the claims is on the specific asserted improvement in [the relevant technology] or, instead, on a process that qualifies as an ‘abstract idea’ for which computers are invoked merely as a tool.” *Id.* at 1335–36; *see also* 2019 Guidance at 54–55.

The Specification provides evidence as to what the claimed invention is directed. In this case, the Specification discloses that the “invention generally relate[s] to marketing and, more particularly, to a method and apparatus for targeting messages in desktop and mobile applications.” (Spec. ¶ 1.) Claim 1 provides further evidence. Claim 1 recites “retrieving . . . by a user device . . . an advertising policy . . . for a first software application installed on the user device, wherein the advertising policy . . . comprise[s] a plurality of events,” “storing, at the user device, the advertising policy and the one or more advertisements,” “recording, by the user device, user behavior and application usage data,” “determining, by the user device, the advertising policy has been satisfied,” “retrieving, by the user device, the advertisement related to the second software application.” In short, claim 1 is directed the abstract idea of commercial interactions, i.e., advertising and marketing activities and, more particularly, targeting messages in desktop and mobile applications. (*See* 2019 Guidance at 52; *see*

*also* Spec. ¶ 1.) This is accomplished by retrieving information, storing information, analyzing information, and retrieving information.

Although we and the Examiner describe, at different levels of abstraction, to what the claims are directed, it is recognized that “[a]n abstract idea can generally be described at different levels of abstraction.” *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1240 (Fed. Cir. 2016). That need not and, in this case does not, “impact the patentability analysis.” *Id.* at 1241.

We note that claims, like claim 1 here, directed to targeting an advertising message to a user based on user activity, have been determined to be directed to an abstract idea. *See Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1369 (Fed. Cir. 2015) (determining claims related “to customizing information based on (1) information known about the user and (2) navigation data” to be directed to an abstract idea); *see also Affinity Labs of Texas, LLC v. DIRECTV, LLC*, 838 F.3d 1253, 1271 (Fed. Cir. 2016). “[W]e have 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 Grp.*, 830 F.3d at 1353. “In a similar vein, we have treated 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.” *Id.* at 1354; *see also Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014) (“The process of receiving copyrighted media, selecting an ad [after consulting an activity log], offering the media in exchange for watching the selected ad, displaying the ad, allowing the consumer access to the media, [recording the event to the activity log,] and

receiving payment from the sponsor of the ad all describe an abstract idea.”). Claim 1 merely implements the abstract idea in the field of desktop and mobile applications.

Nonetheless, Appellants seek to analogize the present claims to the claims in *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014). (Appeal Br. 17.) We are not persuaded of error. The claims in *DDR Holdings* “specify how interactions with the Internet are manipulated to yield a desired result — a result that overrides the routine and conventional sequence of events ordinarily triggered by the click of a hyperlink.” *DDR Holdings*, 773 F.3d at 1258. Appellants do not persuasively argue that claim 1 overrides or varies some routine and conventional sequence of events.

Appellants also seek to analogize the present claims to those in *Bascom Global Internet Services, Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016). (See Appeal Br. 17, Reply Br. 9–10.)<sup>4</sup> In *Bascom*, the court determined that “an inventive concept can be found in the non-conventional and non-generic arrangement of known, conventional pieces.” *Bascom*, 827 F.3d at 1350. Specifically, Bascom’s content filter could be “installed remotely in a single location” and “this particular arrangement of elements is a technical improvement over the prior art ways of filtering.” *Id.* Appellants, although reciting limitations of claim 1, do not direct us to what

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<sup>4</sup> We acknowledge that some of these considerations may be more properly evaluated under step two of the *Alice* framework. However, for purposes of maintaining consistent treatment within the USPTO, we evaluate it under step one. See 2019 Guidance.

is alleged to be the “non-conventional and non-generic arrangement of known, conventional pieces.” (*See* Reply Br. 10.)

Nonetheless, Appellants argue that

the present case involves an inventive concept that provides a technical solution to a technical problem. Specifically, the claims are directed the [sic] inventive concept of providing targeted messages while protecting consumer privacy by utilizing a remote server to generate and provide advertising policies that comprise a plurality of complex triggering events

.....

(*Id.*)

Claim 1, however, does not recite “protecting consumer privacy” or similar language.

Appellants’ argument appears to be based on the disclosure in the Specification that “[b]ecause the application retrieves the policy from the marketer, and no recorded data is sent to the marketer, there is no invasion of user privacy.” (Spec. ¶ 13.) And although claim 1 recites “retrieving, over a computer network by a user device from at least one remote server, an advertising policy,” we do not see, and Appellants do not indicate, where claim 1 restricts sending recorded data, such as “user behavior and application usage data,” to the remote server or marketer. In other words, Appellants’ argument does not rely on where behavior and usage data is stored, but instead relies on claim 1 not including a step of reporting the recorded user behavior and usage data to the marketer. But claim 1 does not exclude reporting the recorded user behavior and usage data to the marketer. *Ultramercial* illustrates why we do not find Appellants’ argument persuasive.

The claim at issue in *Ultramercial* related to “receiving copyrighted media, selecting an ad [after consulting an activity log], offering the media in exchange for watching the selected ad, displaying the ad, allowing the consumer access to the media, [recording the event to the activity log,] and receiving payment from the sponsor of the ad . . . .” *Ultramercial, Inc.*, 772 F.3d at 715. The claim was determined to recite patent-ineligible subject matter. *Id.* at 717. If we consider the step of recording the event to the activity log to be analogous to sending user data to a marketer, we do not see how removing that step from the claim would render the claim patent-eligible.

Therefore, we do not find Appellants’ argument persuasive. Appellants also do not persuasively argue what technical problem is solved by “providing targeted messages . . . by utilizing a remote server to generate and provide advertising policies.” (*See* Reply Br. 10.)

Appellants also seek to analogize the present claims to the claims in *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1313 (Fed. Cir. 2016). (Appeal Br. 17–18, Reply Br. 9–11.) We disagree. In *McRO*, the court determined that

the claimed improvement here is allowing computers to produce “accurate and realistic lip synchronization and facial expressions in animated characters” that previously could only be produced by human animators. As the district court correctly recognized, this computer automation is realized by improving the prior art through “the use of rules, rather than artists, to set the morph weights and transitions between phonemes.” The rules are limiting in that they define morph weight sets as a function of the timing of phoneme sub-sequences.

*McRO*, 837 F.3d at 1313 (citations omitted). Here, the asserted improvement is to a business practice regarding “targeting messages in

desktop and mobile applications.” (Spec. ¶ 1.) In short, “[t]hese claims in substance [are] directed to nothing more than the performance of an abstract business practice . . . using a conventional computer. Such claims are not patent-eligible.” *DDR Holdings*, 773 F.3d at 1256.

Moreover, Appellants do not argue that they invented a computer network, a user device, or a remote server. Nor do we see how the recitation of a computer network, a user device, and a remote server, even in conjunction with the recited functions, “ensure[s] ‘that the [claim] is more than a drafting effort designed to monopolize the [abstract idea].’” *Alice*, 573 U.S. at 221 (brackets in original) (quoting *Mayo*, 566 U.S. at 77.) Claim 1 uses generic computer components as tools to perform the abstract idea. (See Spec. ¶¶ 16, 18, 19; see also *Credit Acceptance Corp. v. Westlake Servs.*, 859 F.3d 1044, 1055 (Fed. Cir. 2017) (and cases cited therein).)

In view of the above, we agree with the Examiner that claim 1 is directed to an abstract idea.

Step two of the *Alice* framework has been described “as a search for an ‘“inventive concept” ’—*i.e.*, an element or combination of elements that is ‘sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.’” *Alice*, 573 U.S. at 217–18 (brackets in original) (quoting *Mayo*, 566 U.S. at 72–73).

Appellants argue that “the present case utilizes rules of a particular type to address a computer-centric problem and produce a novel, desired result through specific means or methods that improve the relevant technology.” (Appeal Br. 18.) We are not persuaded of error.

As discussed above, claim 1 is directed to the abstract idea of commercial interactions, *i.e.*, advertising and marketing activities and, more

particularly, targeting messages in desktop and mobile applications. The additional elements of a generic computer network, user device, and remote server, do not recite significantly more than the ineligible concept itself. Nor, as discussed above, do Appellants argue that they invented a computer network, a user device, or a remote server.

[T]he mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention. Stating an abstract idea “while adding the words ‘apply it’ ” is not enough for patent eligibility. Nor is limiting the use of an abstract idea “ ‘to a particular technological environment.’ ” Stating an abstract idea while adding the words “apply it with a computer” simply combines those two steps, with the same deficient result. Thus, if a patent’s recitation of a computer amounts to a mere instruction to “implemen[t]” an abstract idea “on . . . a computer,” that addition cannot impart patent eligibility.

*Alice*, 573 U.S. at 223 (citations omitted).

“[T]he relevant question is whether the claims here do more than simply instruct the practitioner to implement the abstract idea . . . on a generic computer.” *Id.* at 225. They do not. Claim 1 relates to retrieving information, storing information, analyzing information, and retrieving information, to target messages in desktop and mobile applications.

Taking the claim elements separately, the function performed by the generic computer components at each step is purely conventional. Retrieving/receiving, storing, analyzing, and retrieving/receiving additional information are basic computer functions, i.e., they are well-understood, routine, and conventional functions previously known to the industry. *See Elec. Power Grp.*, 830 F.3d at 1356 (The claims “do not include any requirement for performing the claimed functions of gathering, analyzing,

and displaying in real time by use of anything but entirely conventional, generic technology. The claims therefore do not state an arguably inventive concept . . . .”); *see also In re Katz Interactive Call Processing Patent Litig.*, 639 F.3d 1303, 1316 (Fed. Cir. 2011) (“Absent a possible narrower construction of the terms ‘processing,’ ‘receiving,’ and ‘storing,’ . . . those functions can be achieved by any general purpose computer without special programming.”).

Considered as an ordered combination, the generic computer components of Appellants’ method add nothing that is not already present when the steps are considered separately. For example, claim 1 does not, as discussed above, purport to improve the functioning of the components themselves. Nor does it effect an improvement in any other technology or technical field. Instead, claim 1 amounts to nothing significantly more than an instruction to apply the abstract idea using generic computer components. That is not enough to transform an abstract idea into a patent-eligible invention. *See Alice*, 573 U.S. at 225–26.

Appellants also argue that the claims produce a novel result. (Appeal Br. 18.) But “under the *Mayo/Alice* framework, a claim directed to a newly discovered law of nature (or natural phenomenon or abstract idea) cannot rely on the novelty of that discovery for the inventive concept necessary for patent eligibility.” *Genetic Techs. Ltd. v. Merial L.L.C.*, 818 F.3d 1369, 1376 (Fed. Cir. 2016).

In view of the above, we are not persuaded that the Examiner erred in rejecting claim 1 under § 101. Claims 2–20 are not separately argued and fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Appeal 2017-008940  
Application 13/921,840

DECISION

The Examiner's rejection of claims 1–20 under 35 U.S.C. § 112(a) is affirmed.

The Examiner's rejection of claims 1–20 under 35 U.S.C. § 101 is affirmed.

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

AFFIRMED