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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
12/913,475	10/27/2010	Rob A. Gearhart	CAM920100028US1 (260)	3954
46321	7590	03/22/2018	EXAMINER	
CRGO LAW STEVEN M. GREENBERG 7900 Glades Road SUITE 520 BOCA RATON, FL 33434			BLOOMQUIST, KEITH D	
			ART UNIT	PAPER NUMBER
			2178	
			NOTIFICATION DATE	DELIVERY MODE
			03/22/2018	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ROB A. GEARHART, LIAM HARPUR,
MARK KELLY, and JOHN RICE

Appeal 2017-010751
Application 12/913,475
Technology Center 2100

Before JOHNNY A. KUMAR, HUNG H. BUI, and KEVIN C. TROCK,
Administrative Patent Judges.

KUMAR, *Administrative Patent Judge.*

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the final rejection of claims 1, 4–7, 10–14, and 17–20. Claims 2, 3, 8, 9, 15, and 16 have been cancelled. Claims App’x. 11, 13, 15. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.¹

¹ Rather than reiterate the arguments of Appellants and the Examiner, we refer to the Final Office Action (“Final Act.”) mailed Feb. 26, 2016, the Appeal Brief (“App. Br.”) filed Mar. 22, 2017, the Answer (“Ans.”) mailed June 16, 2017, and the Reply Brief (“Reply Br.”) filed Aug. 16, 2017, for the respective details. We have considered in this Decision only those arguments Appellants actually raised in the Briefs. Any other arguments Appellants could have made but chose not to make in the Briefs are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(vii).

STATEMENT OF THE CASE

Claim 1 is representative of the invention and reads as follows:

1. A method for message composition management for fatigued composers of electronic messages, the method comprising:

logging errors in different messages that are composed by a message composer in a messaging client executing in memory of a computer and subsequently transmitted by the messaging client;

computing a number of the logged errors;

detecting a request by the message composer to transmit a new message to a designated recipient in the messaging client;

computing a fatigue quotient for the message composer based upon the computed number of the logged errors for the different messages but not the new message; and,

diverting the message to a drafts folder instead of transmitting the message if the fatigue quotient exceeds a threshold value.

App. Br. 11 (Claim App'x.).

Examiner's Rejections & References

(1) Claims 1, 4, 7, 10, 14, and 17 are rejected under 35 U.S.C. § 103(a) as being unpatentable over *Gmail new features - Mail Goggles*, published by The WWW Blog on 10/7/2008 (“Mail Goggles”), Coughlan, et al., US 8,041,344 B1; issued Oct. 18, 2011 (“Coughlan”), and Stut, et al., US 2010/0021873 A1; published Jan. 28, 2010 (“Stut”).

(2) Claims 6, 12, and 19 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Mail Goggles, Coughlan, Stut, and Fein, et al., US 2009/0089390 A1; published Apr. 2, 2009 (“Fein”).

Issue on Appeal

Did the Examiner err in finding that the combination of Mail Goggles, Coughlan, and Stut teaches or suggests: “computing a fatigue quotient for the message composer based upon the computed number of the logged errors for the different messages but not the new message” (hereinafter “fatigue quotient” feature), as set forth in independent claim 1, and similarly recited in independent claims 7 and 14?

ANALYSIS

We have reviewed the Examiner’s rejections in light of Appellants’ contentions that the Examiner has erred. Further, we have reviewed the Examiner’s response to claims 1, 4, 7, 10, 14, and 17 that has been argued by Appellants. App. Br. 5–8; Reply Br. 2–10. We are unpersuaded by Appellants’ contentions. We adopt as our own (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken and (2) the reasons set forth by the Examiner in the Examiner’s Answer in response to Appellants’ Appeal Brief. Ans. 8–10. However, we highlight and address specific findings and arguments for emphasis as follows.

In support of the obviousness rejection, the Examiner finds:

Mail Goggles teaches a method for message composition management for fatigued composers of electronic messages, comprising:

- detecting a request by the message composer to transmit a new message to a designated recipient in a messaging client (p. 2, methods are implemented in a Gmail email client, which executes on one or more computers when accessed by a user; p. 3 describes that user fatigue is determined after a user selects to send a message); and

- *computing a fatigue quotient* for the message composer; and diverting the message to a drafts folder instead of transmitting the message if the fatigue quotient exceeds a threshold value (*p. 2, Mail Goggles* determines fatigue through puzzle solving; a user is required to solve puzzles in a set time to send a message; if an error threshold is exceeded and puzzles aren't solved, the message is saved in a drafts folder).

Coughlan, in view of *Stut* teaches logging errors in different messages that are composed by a message composer in a messaging client executing in memory of a computer and subsequently transmitted by the messaging client; computing a number of the logged errors; and *computing a fatigue quotient based upon the computed number of the logged errors for different messages but not the new message*.

Final Act. 2–3 (emphasis ours).

Appellants acknowledge:

1. Mail Google at page 2 determines fatigue through puzzle solving which an end user must complete within a threshold time in order to send a message. If an error threshold is exceeded and the puzzles are not solved, the message is saved in a drafts folder.
2. *Coughlan* refers to the diversion of message when the message is determined to have a threshold number of errors beyond a baseline number for the user previously determined.
3. *Stut* provides for determining user fatigue by counting errors over time in order to specify a baseline error rate for the user.
4. "The log excludes the current message as described in *Coughlan*, which compares a current message to a baseline error rate in a messaging system."

App. Br. 5–6. Appellants argue, however, the combination of *Mail Goggles*, *Coughlan*, and *Stut* fails to teach the claimed fatigue quotient feature, i.e., “the fatigue quotient for the message composer is computed based on the computed number of the logged errors for the different messages but not the new message” (App. Br. 6–8; Reply Br. 2–10).

We are not persuaded by Appellants' argument. At the outset, we note the reference to the negative limitation "for the different messages but not the new message" was added to independent claims 1, 7, and 14 by Appellants in an effort to distinguish over the cited prior art in an Amendment filed on December 28, 2015. In that Amendment, Appellants cited paragraph 19 of the Specification as support for such a limitation. *See* Amendment 10. However, as correctly recognized by the Examiner, the negative claim limitation is not supported by Appellants' disclosure. Ans. 7–8. The cited paragraph 19 of Appellants' Specification only (1) describes the fatigue quotient as being computed based on the previously computed number of errors and (2) does not "describe a reason to exclude the relevant limitation." *Santarus, Inc. v. Par Pharmaceutical, Inc.*, 694 F.3d 1344, 1351 (Fed. Cir. 2012). As such, we find there is no basis in the cited paragraph of Appellants' Specification for adding the negative limitation and accord no patentable weight to the negative limitation.

When the reference to "the different messages but not the new message" is not accorded any patentable weight, we agree with the Examiner's finding that the combination of Mail Goggles, Coughlan, and Stut teaches or suggests every recited element of representative claim 1, including the fatigue quotient feature as discussed above.² For example, the Examiner explains:

The Board is respectfully directed to Col. 2 line 45 to Col. 3, line 42 of Coughlan. An embodiment of the invention is broadly described (and . . . whereby a user is determined to be impaired based on monitoring user messages to detect an impaired

² Separate patentability is not argued for claims 4–7, 10–14, and 17–20. App. Br. 5–9.

state. The user device can be switched to a mode which, among other things, will send all future messages in a text messaging client to a draft folder for a specified period of time. A user who tries to send a new message while this mode is active – and the mode can remain active for several hours – will have that new message and any other new messages that the user attempts to send during that time period sent to a draft folder instead of being transmitted.

The entering of this mode is based solely on fatigue determined by calculations carried out based on errors made in messages previously written, excluding any errors which may exist in the new message. Therefore, the prior art clearly teaches that a request to transmit a message is made, a fatigue quotient is computed based only on logged errors for previous messages, and the message is diverted to drafts if the determination has been made that the error rate, and hence the fatigue quotient, is too high.

Ans. 10 (emphasis ours).

We agree with the Examiner's explanations that the combination of Mail Goggles, Coughlan, and Stut teaches or suggests the fatigue quotient feature as discussed above .

Therefore, Appellants have not shown reversible error in the Examiner's rejection of claims 1, 4–7, 10–14, and 17–20.

DECISION³

We affirm the Examiner's rejection of claims 1, 4–7, 10–14, and 17–20 under 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)(v).

AFFIRMED

³ We note claim 14 recites a computer-readable storage medium having computer readable program code. Appellants' Specification is devoid of any definition of "computer readable storage medium" and fails to expressly limit the term "computer readable storage medium" to exclude signals, carrier waves, etc. Thus, interpreting "computer readable storage medium" broadly, but reasonably, in light of Appellants' Specification, the term "computer readable storage medium" encompasses transitory propagating signals. *See Ex parte Mewherter*, 107 USPQ2d 1857 (PTAB 2013) (precedential) (expanded panel) (holding recited computer-readable storage medium ineligible under § 101 since it encompasses transitory media). A signal is not within one of the four categories of patentable subject matter as defined under 35 U.S.C. § 101. *In re Nuijten*, 500 F.3d 1346, 1357 (Fed. Cir. 2007). *See also Ex parte Mewherter*, 107 USPQ2d 1857 (PTAB 2013) (precedential); *Manual of Patent Examining Procedure* ("MPEP") § 2106(I), 8th ed., Rev. 9 (Aug. 2012). In the event of further prosecution, the Examiner should ascertain whether claims 14 and 17–20 should be rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter.