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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BEN SIMON SAMSON, JEFFREY PAUL LA FOREST, and ROBERT PRESTON HORNSBY JR.

Appeal 2018-003123
Application 11/786,135
Technology Center 3600

Before MAHSHID D. SAADAT, ALLEN R. MacDONALD, and JOHN P. PINKERTON, *Administrative Patent Judges*.

MacDONALD, *Administrative Patent Judge*.

DECISION ON APPEAL[1]

STATEMENT OF CASE

Appellants appeal under 35 U.S.C. § 134(a) from a final rejection of claims 24, 26–28, 30–36, 38–45, 47–53, and 55–64. Claims 1–23, 25, 29, 37, 46, and 54 have been cancelled. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

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[1] Appellants indicate the real party in interest is PPS Decision Systems, LLC. App. Br. 2.

Representative Claim

Representative claim 24 under appeal reads as follows (emphasis added):

> 24. A computer system for offering items for sale to consumers comprising a computer having a non-transitory memory for storing machine instructions that are to be executed by the computer, the machine instructions when executed by the computer implement the following functions:
>
> ***collecting consumer information relating to a consumer's interactions with a website offering items for auction and including bidding history of the consumer over two or more auctions;***
>
> storing the consumer information in a consumer database;
>
> ***generating an incentive amount for an unsold item based on the consumer information relating to the consumer's interactions with the website offering the items for auction and including the bidding history of the consumer over two or more auctions;*** and
>
> delivering via a computer network an incentive including the generated incentive amount to the consumer to induce purchasing of the unsold item.

App. Br. 12[2] (Claims Appendix 1).

Rejections on Appeal

1. The Examiner rejected claims 24, 26–28, 30, 35, 36, 40, 41, 43–45, 48–50, 52, 53, and 56–64 under 35 U.S.C. § 103(a) as being unpatentable over Rackson et al. (US 2002/0165817 A1; published Nov. 7, 2002)

[2] The Claims Appendix of Appellants' Appeal Brief is separately numbered.

("Rackson") and Bezos et al. (US 6,606,608 B1; issued Aug. 12, 2003) ("Bezos").[3] *See* Ans. 5.

2. The Examiner rejected claims 31–34, 38, 39, 47, and 55 under 35 U.S.C. § 103(a) as being unpatentable over Rackson, Bezos, and Goldhaber et al. (US 5,794,210 A; issued Aug. 11, 1998) ("Goldhaber").[4] *See* Ans. 18.

3. The Examiner rejected claim 42 under 35 U.S.C. § 103(a) as being unpatentable over Rackson, Bezos, and Deaton et al. (US 5,687,322 A; issued Nov. 11, 1997) ("Deaton"). *See* Ans. 20.

4. The Examiner rejected claim 51 under 35 U.S.C. § 103(a) as being unpatentable over Rackson, Bezos, and Gerace (US 5,848,396 A; issued Dec. 8, 1998) ("Gerace"). *See* Ans. 21.

5. The Examiner rejected claims 24, 26–28, 30–36, 38–45, 47–53, and 55–64 under 35 U.S.C. § 101 for being directed to patent-ineligible subject matter. *See* Ans. 3, 5.

Issues on Appeal

Did the Examiner err in rejecting claims 24, 31, 43, 50, and 60 as being obvious?

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[3] The patentability of claims 26–28, 30, 35, 36, 38–42, 44, 45, 47–49, 51–53, 55–59, and 61–64 is not separately argued from that of claim 24, 43, 50, and 60. *See* App. Br. 9–10. Accordingly, except for our ultimate decision, the rejection of claims 26–28, 30, 35, 36, 38–42, 44, 45, 47–49, 51–53, 55–59, and 61–64 under 35 U.S.C. § 103(a) is not discussed further herein.

[4] The patentability of claims 32–34 is not separately argued from that of claim 31. *See* App. Br. 9–10. Accordingly, except for our ultimate decision, the rejection of claims 32–34 under 35 U.S.C. § 103(a) is not discussed further herein.

Did the Examiner err in rejecting claims 24, 26–28, 30–36, 38–45, 47–53, and 55–64 as being directed to patent-ineligible subject matter?

ANALYSIS

A. *Section 103 Case Law*

The mere existence of differences between the prior art and the claim does not establish non-obviousness. *See Dann v. Johnston*, 425 U.S. 219, 230 (1976). Instead, the relevant question is "whether the difference between the prior art and the subject matter in question is a [difference] sufficient to render the claimed subject matter unobvious to one skilled in the applicable art." *Dann*, 425 U.S. at 228 (internal quotations and citations omitted). Indeed, the Supreme Court made clear that when considering obviousness, "the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

B. *Appellants' § 103 Arguments*

B.1. *Claims 24, 43, 50, and 60*

Claim 24 recites "collecting consumer information relating to a consumer's interactions with a website offering items for auction and including bidding history of the consumer over two or more auctions," and "generating an incentive amount for an unsold item based on the consumer information relating to a consumer's interactions with a website offering items for auction and including the bidding history of the consumer over two or more auctions." Claims 43, 50, and 60 are similar to claim 24, but recite different types of collected information: claim 43 recites "bid frequency information relating to a consumer's bidding history with a website offering

items for auction over two or more auctions;" claim 50 recites "consumer click stream information relating to a consumer's interactions with a website offering items for auction over two or more auctions;" and claim 60 recites "consumer sensitivity information relating to a consumer's interactions with a website offering items for auction over two or more auctions."

Regarding claim 24, the Examiner found:

> ***Rackson . . . discloses generating an incentive advertisement for an unsold item based on the consumer information relating to the consumer's interactions with the website offering the items for auction and including the bidding history of the consumer*** (see Rackson "[0109] The system may collect "market data" on losing as well as winning bidders so that targeted e-mail advertising may be directed to the "losers" or the winners of bids.[").]
>
> ***[Rackson] further discloses collecting consumer information relating to a consumer's interactions with a website offering items for auction*** (Figs. 3, 11, 12, 14; and "[50]. . . The remote auction service for the purposes of this disclosure, may represent an auction service portal such as provided by eBay (remote auction service 12), while auction service 14 may be used to represent the auction services provided by Yahoo . . . " and "[67]. . . In this manner, a plurality of virtual connections may be established between the remote auction service (web site for Internet-based auctions) for each item's web page and the multi-auction service ..."; [).]
>
> ***Rackson further discloses and including bidding history of the consumer*** ([109]) over two or more auctions ("[14]. . . For example, if the highest bidder has a questionable credit rating or closing history .... A database of bidder performance statistics (closing rates, timeliness, seller feedback, etc ... "), "[78]. . . the highest bidder may have a questionable credit rating or closing history, or the highest bidder may ... A database of bidder performance statistics (closing rates, Timeliness, seller feedback, etc.) can be factored into the "optimal bid" selection process in order to determine an adjusted bid ... "; "[113]. . . The system

may review the bidding history of the bidders involved in a particular auction at a remote auction service to determine from past bidding, how likely these bidders are to win . . .The multi-auction service can perform additional analysis on the bid history for that item and review prior bid history by current bidders at step 644 on other objects to determine whether the competing bidders are operating under control of a programmed bidding strategy where the maximum bid for the bidder may be determined from their prior bid activity ... ").

Hence, Rackson clearly discloses collecting consumer information relating to a consumer's interactions with a website offering items for auction and including bidding history of the consumer over two or more auctions.

Rackson does not explicitly disclose generating an incentive amount for an unsold item based on the consumer information ... and including the bidding history of the consumer over two or more auctions. That is, Rackson discloses a targeted ad or incentive ad based on consumer interaction with the website auction and also the bidding history. And, Rackson discloses tracking bidding history over two or more auctions. Rackson does not explicitly disclose that the targeted/incentive ad includes an incentive amount or that the bidding history is Rackson's bid history over two or more auctions. However, ***Bezos discloses generating an incentive amount for an unsold item based on the consumer information relating to the consumer's interactions with the website offering the items for auction and including the bidding history of the consumer over two or more auctions*** (Figs. 4, 5; 5:15-45, "For example, the auction system may offer to a bidder who has won 5 auctions a 10% discount (limited to some maximum discount) on the next auction in which that bidder places the first bid. Such a discount would reward active bidders and would encourage continued participation in auctions. Other participants in such an auction may not even know that the first bidder is eligible to receive a discount. As other examples, the auction system may offer a discount to first time bidders, to bidders who match a certain demographic (e g., senior citizens), or to bidders based on their

> bidding or selling history (e.g., seller or bidder in a certain number of auctions or in auctions of a certain dollar amount).").

Ans. 25–28 (emphasis modified).

Further, regarding claims 43, 50, and 60, the Examiner found:

> [T]he variations in the certain consumer information is addressed in each of the responses following.
>
> . . .
>
> [In] further regards to claim 43, ***Rackson discloses "at least bid frequency information relating to a consumer's bidding history"*** ([108], "reporting and auction status functionality where the seller or buyer ... The statistics on the bid history may be reviewed .. .frequency of bids"; [69], " ... and frequency of bidding activity ... ". And, note in the explanation in the rejection above how ***other market data can be used for the targeting***. And, as explained above, ***this frequency information is market data as data related to the bidders and auction activity***. Hence, the targeting can occur on the market data as bid frequency information).
>
> . . .
>
> And, in further regards to claim 50, ***Rackson discloses "click stream information relating to a consumer's interactions with a website offering items for auction".*** Examiner notes that Appellant's Specification discloses click stream at only one found location and as follows: "[22] ... Preferably, the browsing behavior 11 has click stream information, which includes other components of the auction site that were visited by the consumer, number of pages visited, time spent on each page during each visit per each auction, number of auctions visited/participated, and frequency of revisiting auctions." And, note that click stream information includes auctions history information including number of auctions and frequency of auctions information. And, ***Rackson discloses click stream information as auctions history and activity information for a particular bidder*** (see bidder history and frequency citations preceding; also, see Fig. 14 at item 550 for win % for a particular bidder which requires number of auctions information and notes on

bidder information at item 546; also, see [115] for win% for a particular bidder which requires number of auctions information, "[115] ... For example, the win percentage 550 may be calculated based on how often that bidder wins when bidding on similar or other types of items."). Hence, the targeting can occur on the market data as click stream information.

. . .

And, in regards to claim 60, ***Rackson discloses the actual claim language of, "collecting consumer sensitivity information relating to a consumer's interactions with a website offering items for auction;".*** See Applicant's Spec at [24] for a description of consumer sensitivity information which can include price sensitive or brand sensitive or feature sensitive or time sensitive.

And, ***Rackson discloses "consumer sensitivity information" as a further description of "consumer information" (This reads on price sensitive or brand sensitive or feature sensitive***: Fig. 12, shows at item 422 whether the bidder is particular manufacturer sensitive or not and at item 418 condition of the item sensitive or not and at item 416 the level of price sensitivity and at item 420 the quantity sensitivity; this reads on feature sensitive: Fig. 14, shows at item 502 whether the bidder is push or powered sensitive or not; this reads on brand sensitive: also see [112] for manufacturer or brand sensitivity "[112] ... For example, if the user prefers product manufactured by one manufacturer, the user may specify that preference 422, whether the bidder will accept near substitutes 424, and whether a premium 430 will be paid for one brand or another."; this reads on time sensitivity: "[112] ... An ending date and time for the bidding on this item type may be specified by the bidder using a calendar-like interface 412, or a default timeframe may be specified by the multi-auction server, or open ended bidding maybe defined to end on successful acquisition of the item ... "). Also, note the citations and explanation above for the variety of marketing data that can be used for targeting. And, consumer sensitivity information is another form of market data on a bidder. Hence, the targeting can occur on the market data as consumer sensitivity information.

Ans. 29–31 (emphasis modified).

Appellants raise the following arguments in contending that the Examiner erred in rejecting claims 24, 43, 50, and 60 under 35 U.S.C. § 103(a):

> ***The "market data" disclosed in Rackson is not the information collected by the claimed computer systems. For example, Rackson is silent on the collection of bid frequency information relating to a consumer's bidding history, as recited in claim 43.*** The disclosed "market data" only tracks losers or winners of bids. This does not teach or suggest bidding frequency. Whether a consumer wins or loses an auction does not reveal the frequency of their bids. ***As another example, Rackson is silent on click stream information relating to a consumer's interactions with a website, as recited in claim 50***. Rather, Rackson collects data on losers or winners of bids. Rackson does not disclose or suggest the collection of any data using a click stream. The Examiner's argument otherwise is complete speculation. ***Claim 60 recites collecting consumer sensitivity information, including product or price sensitivity. Rackson does not track or use consumer sensitivity information***. It simply uses win/lose data to send out an e-mail to market products. ***Bezos does not cure the defective teachings of Rackson with respect to independent claims 43, 50 and 60 and the associated dependent claims***. Bezos simply discloses an auction system that "may offer to a bidder who has won 5 auctions a 10% discount." 5: 15-45. This discount applies to how many auctions a bidder has won. It does not relate to bid frequency (claim 43), click stream information (claim 50), or consumer sensitivity information (claim 60). For at least these reasons, the rejection of these claims should be overturned.
>
> Claim 24 recites the collection of consumer information relating to a consumer's interactions with a website offering items for auction and including bidding history of the consumer over two or more auctions. . . . The Examiner attempts to apply Bezos for a teaching of generating an incentive amount for an unsold item based on the consumer information relating to the consumer's interactions with the website offering the items for auction and

> including the bidding history of the consumer over two or more auctions. Bezos discloses that a "seller or bidder in a certain number of auctions or in auctions of a certain dollar amount" may get a discount. Bezos also discloses that "the auction system may offer to a bidder who has won 5 auctions a 10% discount . . . on the next auction." ***However, Bezos does not disclose or suggest the claimed collected consumer information.*** The claimed consumer information includes bidding history of a consumer over two or more auctions. According the claimed consumer information must also include addition consumer information relating to a consumer's interactions with a website. ***The Examiner has not shown and cannot show that Bezos discloses the required consumer information, which includes more than bidding information over two or more auctions.*** For at least this reason, this rejection should be overturned with respect to claim 24 and associated dependent claims.

App. Br. 8–9 (emphasis modified).

Appellants' arguments do not persuasively establish that the Examiner erred. As the Examiner correctly found, Rackson discloses a multi-auction system that collects bidder information, including frequencies of bids by bidders. *See* Ans. 29 (citing Rackson ¶¶ 69, 108). Thus, Rackson does teach "collecting . . . bid frequency information relating to a consumer's bidding history with a website offering items for auction," as recited in claim 43.

Further, as also correctly found by the Examiner, Appellants' Specification defines "click stream information" as including "number of auctions visited/participated, and frequency of revisiting auctions," and Rackson discloses collecting information regarding a number of auctions that a user participates in and a number of auctions that a user wins and calculating a win percentage for that user based on the collected information. *See* Ans. 29–30 (citing Spec. 6:7–10; Rackson ¶ 115). Thus, consistent with

that description, Rackson teaches "collecting consumer click stream information relating to a consumer's interactions with a website offering items for auction," as recited in claim 50.

As the Examiner also correctly found, Appellants' Specification defines "consumer sensitivity information" as including classification categories of a consumer's sensitivity to items for auction, such as price sensitivity, brand sensitivity, time sensitivity, and feature sensitivity, and Rackson discloses collecting preferences of a bidder, such as time preferences, price preferences, manufacturer preferences, substitute preferences, and premium preferences. *See* Ans. 30–31 (citing Spec. 6:23–7:24; Rackson ¶ 112). Thus, Rackson also teaches "collecting consumer sensitivity information relating to a consumer's interactions with a website offering items for auction," as recited in claim 60.

Regarding claim 24, as the Examiner correctly found, Rackson discloses the multi-auction system directing targeted e-mail advertisements to auction losers based on collected market data and further discloses collecting bidding history of bidders. *See* Ans. 25–26 (citing Rackson ¶¶ 14, 78, 109, 113). As the Examiner also correctly found, Bezos discloses offering a discount to a bidder based on the bidding history of the bidder. *See* Ans. 27 (citing Bezos 5:15–15, Figs. 4, 5). Thus, the combination of Rackson and Bezos teaches or suggests "collecting consumer information relating to a consumer's interactions with a website offering items for auction and including bidding history of the consumer over two or more auctions," and "generating an incentive amount for an unsold item based on the consumer information relating to a consumer's interactions with a website offering items for auction and including the bidding history of the

consumer over two or more auctions," as recited in claim 24. We agree with the Examiner that claim 24 does not require additional consumer information beyond the claimed "bidding history" (*see* Ans. 34), and thus, Appellants' argument that Bezos fails to teach or suggest consumer information which includes more information that bidding information is not persuasive.

Accordingly, Appellants have not shown the Examiner erred in rejecting claims 24, 43, 50, and 60 under 35 U.S.C. § 103(a).

B.2. *Claim 31*

Claim 31 recites "collecting consumer information relating to a consumer's interactions with a website offering items for auction and including browsing data of the consumer over two or more auctions," and "generating an incentive amount for an unsold item based on the consumer information relating to the consumer's interactions with the website offering the items for auction and including the browsing data of the consumer over two or more auctions." Regarding claim 31, the Examiner found:

> ***In regards to claim 31, Rackson discloses the above.*** And, as noted above, Rackson discloses using websites (Fig. 3; [50, 55]) tracking user history ([12, 14, 113]) and targeting the user ([109]). Rackson does not explicitly disclose wherein the consumer information includes browsing data. However, ***Goldhaber discloses*** users participating in auctions and bidding (Figs. 14, 15; 19:19-35; 20:35-55) users using the Internet/World Wide Web for viewing content (7:30-40, " ... plus automatic tracking of her previous Internet usage ... "; 8:50-55, "The World Wide Web allows anyone to maintain public "home pages" that are visible to all. . . ") and ***tracking user viewing/browsing history*** (7:30-40, " ... plus automatic tracking of her previous Internet usage .... "; 8:40-50, "The present invention can provide "points of interest" that establish a mechanism for tracking all consumption and viewing ... "; 16:25-35, " ... The software agent

> 110 and/or the attention brokerage server 106 may remove from the list of matches all ads that the consumer has already viewed (or has viewed within a particular time frame) (FIG. 11A, block 186)."; 6:45-61, "The demographic profiles can be constructed through interest questionnaires that the consumer completes when subscribing to the service, and also through electronic tracking of his/her usage of the service (and other habits). Thus, the profiles can be dynamic, evolving with the customer's transaction history. A customer can choose to exclude any transaction (e.g .. viewing of certain material or purchasing of certain products) from his profile ... ") and targeting a user based on viewing history (6:24-31). ***Hence, Goldhaber clearly discloses wherein the consumer information includes browsing data.***

Ans. 40–41 (emphasis modified).

Appellants raise the following arguments in contending that the Examiner erred in rejecting claim 31 under 35 U.S.C. § 103(a).

> The Examiner admits that Rackson does not explicitly disclose consumer information that includes browsing information. The Examiner attempts to apply Goldhaber for a teaching of this limitation. . . .
>
> However, [column 6, lines 24–31 of Goldhaber cited by the Examiner] only discloses the storage of demographic profiles of potential viewers. ***It does not disclose or suggest "viewing history," as urged by the Examiner. For at least this reason, it also does not disclose the "browsing information" recited in the claims.***
>
> . . .
>
> At best, [column 6, lines 45–61 of Goldhaber cited by the Examiner] discloses electronic tracking of service usage. ***The Examiner has not shown and cannot show that "service usage" discloses the recited browser information. Goldhaber does not disclose "how" the "service usage" is collected, and it is mere speculation to argue that it is collected using "browsing information."*** For at least these reasons, the rejection of these claims should be overturned.

App. Br. 9–10 (emphasis added).

We are not persuaded the Examiner erred. As previously described, the Examiner correctly found that Rackson discloses the multi-auction system directing targeted e-mail advertisements to auction losers based on collected market data, and that Bezos discloses offering a discount to a bidder based the bidding history of the bidder. *See* Ans. 25–27, 40 (citing Rackson ¶¶ 14, 78, 109, 113; Bezos 5:15–15, Figs. 4, 5). As further correctly found by the Examiner, Goldhaber discloses a system that electronically tracks a consumer's usage of an electronic service in order to construct a demographic profile for the consumer. *See* Ans. 40–41 (citing Goldhaber 6:46–51). Thus, the combination of Rackson, Bezos, and Goldhaber teaches or suggests "collecting consumer information relating to a consumer's interactions with a website offering items for auction and including browsing data of the consumer over two or more auctions," and "generating an incentive amount for an unsold item based on the consumer information relating to the consumer's interactions with the website offering the items for auction and including the browsing data of the consumer over two or more auctions," as recited in claim 31. Accordingly, Appellants have not shown the Examiner erred in rejecting claim 31 under 35 U.S.C. § 103(a).

C. *Section 101 Rejection*

Subsequent to the Examiner's decision to reject claims 24, 26–28, 30–36, 38–45, 47–53, and 55–64 under 35 U.S.C. § 101, the United States Patent and Trademark Office (USPTO) published revised guidance on the application of 35 U.S.C. § 101. USPTO's January 7, 2019 Memorandum,

2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50, 50–57 (Jan. 7, 2019) ("Revised Guidance").

The Examiner's rejection merely lists numerous "examples of abstract ideas with[in] the July 2015 101 update" (Final Act. 6), states selected claim language is directed to an abstract idea (Final Act. 7, lines 13–15), and without further meaningful analysis concludes "[t]his is similar to the non-limiting abstract idea examples above" (Final Act. 7, line 14).

Thus, upon review of the Examiner's analysis in support of the rejection of the aforementioned claims under 35 U.S.C. § 101 (*see* Final Act. 6–8; *see also* Ans. 22–24), we do not sustain the rejection because the Examiner's articulated reasoning is not sufficient to establish that the claims recite an abstract idea that falls within one of the three enumerated categories of abstract ideas (*i.e.*, mathematical concepts, certain methods of organizing human activity, or mental processes).

Because the aforementioned claims are not patentable in light of the sustained rejection under 35 U.S.C. § 103(a), we exercise our discretion to not reach eligibility of the claims under the Revised Guidance.[5] Instead, we leave the review of the aforementioned claims under the Revised Guidance to the Examiner in the event of further prosecution of the claims.

[5] Given that in this instance, a determination that these claims are not patent eligible under 35 U.S.C. § 101 based on the Revised Guidance would necessitate a new ground of rejection under 35 U.S.C. § 101.

CONCLUSIONS

(1) The Examiner has not erred in rejecting claims 24, 26–28, 30–36, 38–45, 47–53, and 55–64 under 35 U.S.C. § 103(a).

(2) Appellants have established that the Examiner erred in rejecting claims 24, 26–28, 30–36, 38–45, 47–53, and 55–64 under 35 U.S.C. § 101.

(3) Claims 24, 26–28, 30–36, 38–45, 47–53, and 55–64 are not patentable.

DECISION

We affirm the Examiner's rejections of claims 24, 26–28, 30–36, 38–45, 47–53, and 55–64 under 35 U.S.C. § 103(a).

We reverse the Examiner's rejections of claims 24, 26–28, 30–36, 38–45, 47–53, and 55–64 under 35 U.S.C. § 101.

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

AFFIRMED