UNITED STATES PATENT AND TRADEMARK OFFICE

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UNITED STATES PATENT AND TRADEMARK OFFICE
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BEFORE THE PATENT TRIAL AND APPEAL BOARD
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Ex parte ROBIN MONTAGUE MATHEWS, MICHAEL P. RUFFINI, and
TUSHAR SAXENA
_____

Appeal 2018-005006
Application 13/156,597
Technology Center 3600
_____

BEFORE ST. JOHN COURTENAY III, JENNIFER L. McKEOWN, and
CATHERINE SHIANG, *Administrative Patent Judges*.

McKEOWN, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant[1] appeals under 35 U.S.C. § 134(a) from the Examiner's
decision to reject claims 1–18, 20, and 21. We have jurisdiction under
35 U.S.C. § 6(b).

We AFFIRM.

STATEMENT OF THE CASE

Appellant's disclosed and claimed invention relates to

A network device in a customer premises network collects profile data for a client device of multiple client devices in the customer premises network and sends the client profile data to a remote provider network. The network device receives, from the remote provider network, a group of advertisement files for targeted advertising to the client device and stores, in a memory, the group of advertisement files. The network device detects an advertisement insertion cue in linear program content being streamed to the client device, selects an advertisement file from the stored group of advertisement files, and inserts the selected advertisement file into the linear program content being streamed to the client device.

Abstract.

Claim 1 is illustrative of the claimed invention and reads as follows:

1. A method performed by a local media server device in a customer premises, comprising:

collecting, by the local media server device in the customer premises, profile data from users of multiple client devices in the customer premises;

sending, by the local media server device and to a remote provider network, multiple user profiles based on the profile data associated with the multiple client devices in the customer premises;

receiving, by the local media server device and from the remote provider network, mapped listings, each of the mapped listings including uniform resource locators (URLs) to access, from an advertising server in the remote provider network, advertisement files that match one of the multiple user profiles;

retrieving, by the local media server device and via the URLs, the advertisement files to create a locally-stored group of advertisement files for each of the multiple user profiles;

receiving, by the local media server device and from one of the multiple client devices, a selection of linear program content; retrieving, by the local media server device and from the remote provider network, a stream of the linear program content;

associating, by the local media server device and using information about the stream, the linear program content with a particular user profile of the multiple user profiles;

detecting, by the local media server device, an advertisement insertion cue in the stream of the linear program content;

selecting for insertion an advertisement file from one of the locally-stored group of advertisement files for the particular user profile;

inserting, by the local media server device, the selected advertisement file into the stream of the linear program content at a time-slot corresponding to the advertisement insertion cue;

sending, by the local media server device, the stream of the linear program content with the selected advertisement file to the one of the multiple client devices;

receiving, by the local media server device and from the remote provider network, an updated mapped listing with different URLs to access advertisement files designated for presentation for the particular user profile;

updating, by the local media server device, the locally-stored group of advertisement files to form an updated locally-stored group of advertisement files, wherein the updating comprises:

changing a status of one of the advertisement files in the locally-stored group of advertisement files from current to not current when the one of the advertisement files is not designated for presentation in the updated mapped listing, and

changing a status of a previous locally-stored advertisement file from not current to current when the previous locally-stored advertisement file is designated for presentation in the updated mapped listing; and

> selecting for insertion, by the local media server device, an advertisement file from one of the updated locally-stored group of advertisement files for the particular user profile.

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Wen	US 2001/0047297 A1	Nov. 29, 2001
Krewin	US 2002/0078444 A1	June 20, 2002
Laney	US 2006/0143649 A1	June 29, 2006
Altberg	US 2007/0127650 A1	June 7, 2007
Dharmaji	US 2009/0204901 A1	Aug. 13, 2009
Diab	US 2011/0299549 A1	Dec. 8, 2011

REJECTIONS

The Examiner rejected claims 1–18, 20, and 21 under 35 U.S.C. § 101 as directed to patent ineligible subject matter. Final Act. 2–9.

The Examiner rejected claims 1, 2, 4, 6–12, 14–18, and 20 under 35 U.S.C. § 103 as unpatentable over Krewin, Diab, Wen, and Altberg. Final Act. 9–31.

The Examiner rejected claims 3, 5, and 13 under 35 U.S.C. § 103 as unpatentable over Krewin, Diab, Wen, Altberg, and Laney. Final Act. 31–33.

The Examiner rejected claim 21 under 35 U.S.C. § 103 as unpatentable over Krewin, Diab, Wen, Altberg, and Dharmaji. Final Act. 34–35.

ANALYSIS

THE 35 U.S.C. § 101 REJECTION

Claims 1–18, 20, and 21

Based on the record before us, we are not persuaded that the Examiner erred in concluding that claims 1–18, 20, and 21 are directed to patent ineligible subject matter.

An invention is patent-eligible if it claims a "new and useful process, machine, manufacture, or composition of matter." 35 U.S.C. § 101. However, the Supreme Court has long interpreted 35 U.S.C. § 101 to include implicit exceptions: "[l]aws of nature, natural phenomena, and abstract ideas" are not patentable. *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014) (citation omitted).

In determining whether a claim falls within an excluded category, we are guided by the Supreme Court's two-step framework, described in *Mayo* and *Alice. Id.* at 217–18 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 75–77 (2012)). In accordance with that framework, we first determine what concept the claim is "directed to." *See Alice*, 573 U.S. at 219 ("On their face, the claims before us are drawn to the concept of intermediated settlement, *i.e.,* the use of a third party to mitigate settlement risk."); *see also Bilski v. Kappos*, 561 U.S. 593, 611 (2010) ("Claims 1 and 4 in petitioners' application explain the basic concept of hedging, or protecting against risk.").

Concepts determined to be abstract ideas, and thus patent ineligible, include certain methods of organizing human activity, such as fundamental economic practices (*Alice*, 573 U.S. at 219–20; *Bilski*, 561 U.S. at 611); mathematical formulas (*Parker v. Flook*, 437 U.S. 584, 594–95 (1978)); and

mental processes (*Gottschalk v. Benson*, 409 U.S. 63, 67 (1972)). Concepts determined to be patent eligible include physical and chemical processes, such as "molding rubber products" (*Diamond v. Diehr*, 450 U.S. 175, 191 (1981)); "tanning, dyeing, making water-proof cloth, vulcanizing India rubber, smelting ores" (*id.* at 182 n.7 (quoting *Corning v. Burden*, 56 U.S. 252, 267–68 (1854))); and manufacturing flour (*Benson*, 409 U.S. at 69 (citing *Cochrane v. Deener*, 94 U.S. 780, 785 (1876))).

In *Diehr*, the claim at issue recited a mathematical formula, but the Supreme Court held that "[a] claim drawn to subject matter otherwise statutory does not become nonstatutory simply because it uses a mathematical formula." *Diehr*, 450 U.S. at 176; *see also id.* at 191 ("We view respondents' claims as nothing more than a process for molding rubber products and not as an attempt to patent a mathematical formula."). Having said that, the Supreme Court also indicated that a claim "seeking patent protection for that formula in the abstract . . . is not accorded the protection of our patent laws, . . . and this principle cannot be circumvented by attempting to limit the use of the formula to a particular technological environment." *Id.* (citing *Benson* and *Flook*); *see, e.g.*, *id.* at 187 ("It is now commonplace that an *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection.").

If the claim is "directed to" an abstract idea, we turn to the second step of the *Alice* and *Mayo* framework, where "we must 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." *Alice*, 573 U.S. at 221 (citation omitted). "A claim

that recites an abstract idea must include 'additional features' to ensure 'that the [claim] is more than a drafting effort designed to monopolize the [abstract idea].'" *Id.* (alterations in original) (quoting *Mayo*, 566 U.S. at 77). "[M]erely requir[ing] generic computer implementation[] fail[s] to transform that abstract idea into a patent-eligible invention." *Id.*

The PTO has published revised guidance on the application of section 101. USPTO's 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019) ("Memorandum").[2] Under that guidance, we first look to whether the claim recites:

> (1) any judicial exceptions, including certain groupings of abstract ideas (i.e., mathematical concepts, certain methods of organizing human activity such as a fundamental economic practice, or mental processes); and

> (2) additional elements that integrate the judicial exception into a practical application (*see* MANUAL OF PATENT EXAMINING PROCEDURE ("MPEP") § 2106.05(a)–(c), (e)–(h) (9th ed. 2018)).

See Memorandum 52, 55–56. Only if a claim (1) recites a judicial exception and (2) does not integrate that exception into a practical application, do we then look to whether the claim:

> (3) adds a specific limitation beyond the judicial exception that are not "well-understood, routine, conventional" in the field (*see* MPEP § 2106.05(d)); or

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[2] The Memorandum was updated in October 2019.

(4) simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception.

See Memorandum 56.

Analysis – Revised Step 2A

Under the Memorandum, in prong one of step 2A we look to whether the claims recite a judicial exception. The claimed invention includes "collecting. . . profile data from users of multiple client devices in the customer premises;" "receiving. . . mapped listings" where the mapped listings matches advertisement files with user profiles; "retrieving. . .the advertisement files to create a locally-stored group of advertisement files for each of the multiple user profiles;" "retrieving. . . a stream of the linear program content;" "associating . . . linear program content with a particular user profile of the multiple user profiles;" "detecting . . . an advertisement insertion cue in the stream of the linear program content;" "selecting for insertion an advertisement file from one of the locally-stored group of advertisement files for the particular user profile;" "inserting. . . the selected adve1iisement file into the stream of the linear program content at a time-slot corresponding to the advertisement insertion cue;" "sending. . . the stream of the linear program content with the selected advertisement file to the one of the multiple client devices;" "receiving. . . an updated mapped listing with different URLs to access advertisement files designated for presentation for the particular user profile;" and "selecting for insertion, by the local media server device, an advertisement file from one of the updated locally-stored group of advertisement files for the particular user profile."

In other words, the claimed invention collects user profile data, matches advertisements to the user profiles, creates a locally-stored group of advertisement files for each of the multiple user profiles, associates the linear program content with a user profile, selects an advertisement for the particular user profile from a locally-stored group of files, inserts the advertisement into the linear program content, updates the locally-stored group of advertisements, and selects an advertisement for a particular user profile from an updated locally-stored group of advertisement files. As the Examiner identifies, this claimed method is targeted advertising. Final Act. 4; *see also* Spec. ¶ 11 ("The systems and/or methods described herein may provide a highly granular level of targeted advertising, down to individual client devices within a customer premises."). Targeted advertising is a certain method of organizing human activity, which is an abstract idea. *See, e.g.*, *Intellectual Ventures I LLC v. Capital One Bank*, 792 F.3d 1363, 1369-70 (noting that tailoring advertisements based on location or time of day is a fundamental practice long prevalent in our system and finding abstract claims related to customizing information based on user information and navigation data); *see also* Final Act. 3–4.

Additionally, the claimed associating, detecting and selecting steps could alternatively be performed in a human mind. Namely, a person could associate a program with a user profile, identify where an advertisement is to be inserted, and select the advertisement to insert for the particular user profile. The claimed invention, thus, recites mental processes, which is an abstract idea. *See Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1354 (Fed. Cir. 2016) (noting that the Federal Circuit has "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."); *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1372–73 (Fed. Cir. 2011) (holding that a claim whose "steps can be performed in the human mind, or by a human using a pen and paper" is directed to an "unpatentable mental process[]"). As such, the claimed invention recites a judicial exception.

Under prong two of revised step 2A, we determine whether the recited judicial exception is integrated into a practical application of that exception by (a) identifying whether there are any additional elements recited in the claim beyond the judicial exception(s); and (b) evaluating those additional elements individually and in combination to determine whether they integrate the exception into a practical application.

The additional elements recited here are a local media server and a remote provider network, as well as "sending. . . multiple user profiles based on the profile data associated with the multiple client devices in the customer premises;" "receiving. . . a selection of linear program content;" and "updating. . . the locally-stored group of advertisement files to form an updated locally-stored group of advertisement files," wherein the status may be changed from not current to current or from current to not current. Here, the additional limitations recited beyond the judicial exception itself, alone or in combination, fail to integrate the exception into a practical application. More particularly, and contrary to Appellant's unsupported assertions, the claimed invention is not (i) an improvement to the functionality of a computer or other technology or technical field (*see* MPEP § 2106.05(a)); (ii) a "particular machine" to apply or use the judicial exception (*see* MPEP § 2106.05(b)); (iii) a particular transformation of an

article to a different thing or state (*see* MPEP § 2106.05(c)); or (iv) any other meaningful limitation (*see* MPEP § 2106.05(e)). *See also* 84 Fed. Reg. at 55.

Appellant argues that the claimed invention provides a technical improvement. Appeal Br.15–16; Reply Br. 4–5. Namely, Appellant maintains that the claimed invention is "directed to a specific improvement to computer technology functionality namely, inserting advertisements into linear content at highly granular level down to individual client devices within a customer premises and maintaining a feedback control loop that allows for rapid and/or dynamic advertisement targeting (see, e.g., Specification, para. 0011)." Appeal Br. 15–16.

As discussed above, targeted advertisements is a fundamental practice long prevalent in our system. *See Intellectual Ventures I LLC*, 792 F.3d at 1369-70. The claimed additional limitations, particularly the local media server and remote provider network, are merely tools to implement the claimed judicial exception. The Federal Circuit has found that "merely adding computer functionality to increase the speed or efficiency of the process does not confer patent eligibility on an otherwise abstract idea." *Id.* at 1370. *See also Intellectual Ventures I LLC v. Erie Indemnity Co.*, 711 F. App'x 1012, 1017 (Fed. Cir. 2017) (unpublished) ("Though the claims purport to accelerate the process of finding errant files and to reduce error, we have held that speed and accuracy increases stemming from the ordinary capabilities of a general-purpose computer 'do[ ] not materially alter the patent eligibility of the claimed subject matter.'"); *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1375 (Fed. Cir. 2011) ("[T]he incidental use of a computer to perform the [claimed process] does not

impose a sufficiently meaningful limit on the claim's scope."). Moreover, Appellant's argument is not commensurate with the scope of the claim. In particular, the claimed invention does not recite a feedback control loop.

We further note that the additional steps of receiving, storing, and updating data are insignificant extra-solution activity. *See* MPEP § 2106.05(g); *see also*, *e.g.*, *OIP Techs., Inc.*, 788 F.3d 1359, 1363 (Fed. Cir. 2015) (noting that storing data is well-understood, routine, and conventional and does not render claims eligible); *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1355 (Fed. Cir. 2014) ("That a computer receives and sends the information over a network—with no further specification—is not even arguably inventive."); *Elec. Power Grp., LLC*, 830 F.3d at 1354 (finding abstract steps for "gathering and analyzing information of a specified content, then displaying the results). As such, based on the record before us, we determine that the claimed invention is not integrated into a practical application.

Analysis – Revised Step 2B

Under step 2B, we determine that the claimed additional limitations, alone or in combination, does not add significantly more to the abstract idea. Appellant argues that the claimed invention includes an inventive concept that adds significantly more the claimed invention. Appeal Br. 18–19. Specifically, Appellant alleges that the inventive concept is the "implementation of a local media server device to insert advertisements into linear content at highly granular level down to individual client devices within a customer premises and maintaining a feedback control loop that allows for rapid and/or dynamic advertisement targeting." Appeal Br. 19. Appellant further explains that the "'inventive concept harnesses this

technical feature of network technology' in a local media server device by storing and serving targeted advertisements with little delay between the content being displayed to the user and the advertisement being displayed to the user." *Id.*

We find this argument unpersuasive. As discussed above, the claimed invention merely uses the computer as a tool to implement the judicial exception. For example, storing data is well known, routine and conventional. *See Content Extraction & Transmission LLC v. Wells Fargo Bank*, *Nat'l Ass'n*, 776 F.3d 1343, 1347 (Fed. Cir. 2014) (discussing that data collection, recognition, and storage is well known). Moreover, as also noted above, the claimed invention does not recite a feedback control loop. Moreover, as the Examiner points out, the claimed invention does

> not include additional elements that are sufficient to amount to significantly more than the judicial exception because the only other element in the claims besides the abstract ideas identified above is a generic computer structure, 'server' that is merely performing or applying the abstract ideas. Paragraphs 0018, 0019, 0031, 0062 and 0063 of the specification (US Patent Application Publication No. 2012/0316968 A 1) detail any combination of a generic/existing computer systems in hardware and/or software that are programmed to perform the method.

Final Act. 7. *See also Elec. Power Grp.*, *LLC*, 830 F.3d at 1355 (finding that use of "conventional computer, network, and display technology for gathering, sending, and presenting the desired information" does not add significantly more to the claimed abstract idea); *CyberSource Corp.*, 654 F.3d at 1375 ("[T]he incidental use of a computer to perform the [claimed process] does not impose a sufficiently meaningful limit on the claim's scope.").

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Accordingly, based on the record before us, we affirm the rejection of claims 1–18, 20, and 21 as directed to patent ineligible subject matter.

THE 35 U.S.C. § 103 REJECTION BASED ON KREWIN, DIAB, WEN, AND ALTBERG

Claims 1, 2, 4, 6–12, 14–18, and 20

Based on the record before us, we are not persuaded that the Examiner erred in concluding that claims 1, 2, 4, 6–12, 14–18, and 20 are unpatentable over Krewin, Diab, Wen, and Altberg.

Appellant argues that Krewin fails to mark advertisements as current or not current and Altberg fails to teach or suggest an active or inactive status in local storage. Appeal Br. 23–24; Reply Br. 6. For example, Appellant contends that Altberg "fails to disclose or suggest that the locally-stored advertisements can be marked as current or not current in local storage." Appeal Br. 24.

Appellant's argument, however, fails to consider Krewin and Altberg *combined* as set forth by the Examiner. For example, the Examiner combines Krewin's storing and updating advertisements in local storage with Altberg's active and inactive indicators for advertisements. *See* Final Act. 15. One cannot show non-obviousness by attacking references individually where the rejections are based on combinations of references. *See In re Keller*, 642 F.2d 413, 426 (CCPA 1981); *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). As such, we find Appellant's arguments unpersuasive.

We are similarly not persuaded by Appellant's argument that Diab is non-analogous art. *See* Appeal Br. 25–26. Our reviewing court has set forth

a two-prong test for determining whether a prior art reference is analogous:
(1) whether the reference is from the same field of endeavor as the claimed
invention, and (2) if the reference is not within the same field of endeavor,
whether the reference is reasonably pertinent to the particular problem with
which the inventor is involved. *In re Klein*, 647 F.3d 1343 (Fed. Cir. 2011).

Appellant argues that Diab "relates to energy efficient management of
services delivered to a home network (DIAB, Abstract)." Appeal Br. 25.
According to Appellant, Diab's system for energy-efficient based services
would not be reasonably pertinent to the problem addressed by the claimed
invention, "inserting target advertising into linear program content." *Id.*

We disagree, because we find a preponderance of the evidence
supports the Examiner's findings. Notably, as the Examiner explains, both
the claimed invention and Diab are concerned with collecting and providing
services to a distributed network within a premises, namely within a home.
Compare Diab ¶¶ 61, 62, 109 (describing managing services for a plurality
of devices in a home network, including creating profiles for multiple
devices) with Spec. 11 (noting the desire to "provide a highly granular level
of targeted advertising, down to individual client devices within a customer
premises."); *see also* Ans. 7. While Diab is not directed to advertising,
Diab's method of collecting information from and distributing service to
multiple devices within a premises is at least reasonably pertinent to the
particular problem with which the claimed invention is involved.

Accordingly, based on the record before us, we affirm the rejection of
claims 1, 2, 4, 6–12, 14–18, and 20.

THE 35 U.S.C. § 103 REJECTION BASED ON KREWIN, DIAB, WEN, ALTBERG,
AND LANEY

Claims 3, 5, and 13

Claims 3 and 5 depend from claim 1 and claim 13 depends from claim 9. Appellant does not present separate arguments, but instead relies on the arguments for claims 1 and 9. *See* Appeal Br. 29. For the reasons discussed above, we find Appellants argument unpersuasive. Accordingly, based on the record before us, we affirm the rejection of claims 3, 5, and 13 as unpatentable over Krewin, Diab, Wen, Altberg, and Laney.

THE 35 U.S.C. § 103 REJECTION BASED ON KREWIN, DIAB, WEN, ALTBERG, AND DHARMAJI

Claim 21

Nevertheless, we are persuaded that the Examiner erred in rejecting claim 21. Claim 21 recites

> 21. The network of claim 17, the local server being further configured to:
> provide internal feedback to indicate whether the selected advertisement file was successfully inserted into the stream of the linear program content or whether an advertisement file from the advertisement files was available that matched the determined profile, and
> generate an updated profile for the one of the multiple client devices based on the internal feedback.

As such, claim 21 requires internal feedback that indicates (1) whether a file was successfully inserted or (2) whether an advertisement file matching the determined profile was available. As shown in Fig. 4B, reproduced below, the Specification separately identifies internal feedback 470 and user feedback 465.

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160 →
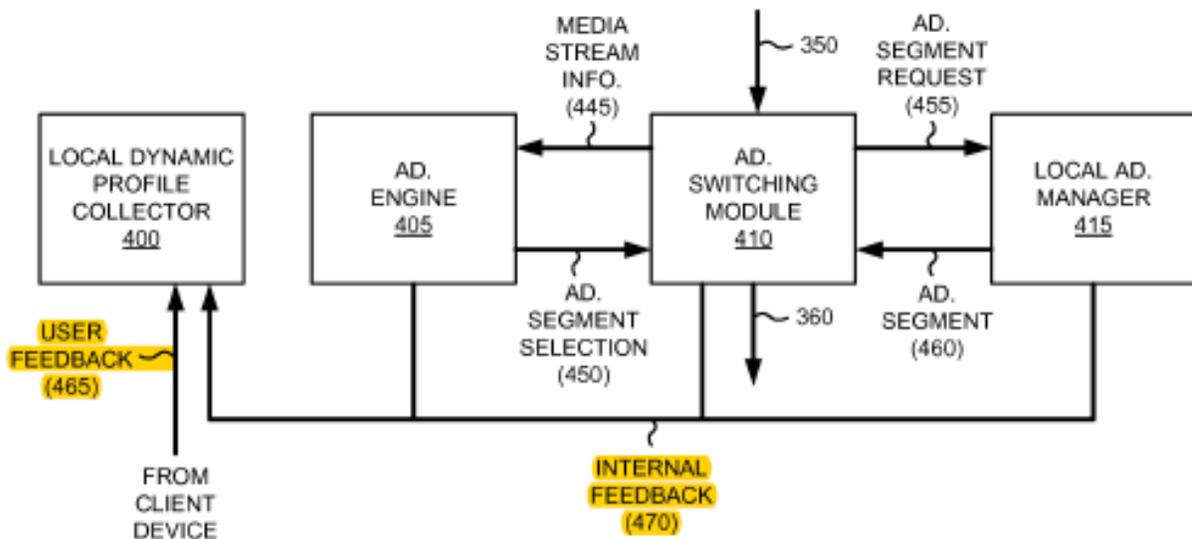
FIG. 4B

**Annotated Fig. 4B Including Internal Feedback 470
and User Feedback 465**

Notably, the Specification describes local media server receiving internal feedback from internal components, such as an advertisement engine 405, an advertisement switching module 410, and/or local advertisement manager 415, in contrast to user feedback from a client device. Spec. ¶¶ 49–50.

Appellant contends the Examiner erred in relying on Dharmaji's user responses to satisfy the claimed internal feedback. Appeal Br. 28; Reply Br. 8. We agree. Dharmaji describes that a "mobile viewing device records a user's response to advertisements and reports it back to an ad serving platform." Dharmaji, Abstract. While Dharmaji's user responses provide feedback, the claimed invention requires *internal* feedback. *See* Spec. 49–50 (describing internal feedback as distinct from user feedback). In view of the

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Specification, Dharmaji's user responses from client devices would not satisfy the claimed internal feedback. We are, therefore, persuaded of error in the Examiner's rejection of claim 21.

Accordingly, based on the record before us, we reverse the rejection of claim 21.

CONCLUSION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–18, 20, 21	101	Eligibility	1–18, 20, 21	
1, 2, 4. 6–12, 14–18, 20	103	Krewin, Diab, Wen, Altberg	1, 2, 4. 6–12, 14–18, 20	
3, 5, 13	103	Krewin, Diab, Wen, Altberg, Laney	3, 5, 13	
21	103	Krewin, Diab, Wen, Altberg, Dharmaji		21
Overall Outcome			1–18, 20, 21	

TIME PERIOD FOR RESPONSE

Because we have affirmed at least one ground of rejection with respect to each claim on appeal, the Examiner's decision is affirmed. *See* 37 C.F.R. § 41.50(a)(1).

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).

<u>AFFIRMED</u>