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| 13/291,122  | 11/08/2011  | Adri Verlaan         | 334095-US-NP        | 6211             |
| 69316   | 7590        | 09/13/2019           | EXAMINER            |                  |
| MICROSOFT CORPORATION<br>ONE MICROSOFT WAY<br>REDMOND, WA 98052 |             |                      | JUNG, SEUNG WOON    |                  |
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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* ADRI VERLAAN, JOHN RONALD BERKELEY,  
ETHAN GUR-ESH, OGUZ MUT, KAARE KOEHLER HOEVIK, and  
ALEXANDER LEE SMITH

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Appeal 2018-005791  
Application 13/291,122  
Technology Center 2100

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Before ALLEN R. MacDONALD, JOSEPH P. LENTIVECH, and  
DAVID J. CUTITTA II, *Administrative Patent Judges*.

MacDONALD, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>1</sup>

STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134(a) from a final rejection of claims 1–9 and 20. Appellant has cancelled claims 10–19. Appeal Br. 2. We have jurisdiction under 35 U.S.C. § 6(b). We REVERSE.

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<sup>1</sup> Appellant indicates the real party in interest is Microsoft Technology Licensing, LLC. Appeal Br. 2.

*Representative Claim*

Representative claim 1 under appeal reads as follows (emphasis, formatting, and bracketed material added):

1. A method comprising:

[A.] receiving a static markup language web template,  
the static markup language web template including

[i.] one or more static markup language  
instructions defining a preview of a  
configurable control displayable within a static  
markup language authoring system and

[ii.] one or more content management system  
instructions defining the configurable control,

***the one or more content management system  
instructions being disabled within the static markup  
language web template;***

[B.] disabling the one or more static markup language  
instructions defining the preview of the configurable  
control;

[C.] enabling the one or more content management  
system instructions defining the configurable control;  
and

[D.] rendering at the web server the static markup  
language web template using the one or more enabled  
content management system instructions for the  
configurable control.

*References*<sup>2</sup>

|           |                    |               |
|-----------|--------------------|---------------|
| Dulepet   | US 7,316,003 B1    | Jan. 1, 2008  |
| Roy       | US 8,015,487 B2    | Sept. 6, 2011 |
| Sweetland | US 2009/0019386 A1 | Jan. 15, 2009 |

*Rejection on Appeal*<sup>3</sup>

The Examiner rejected claims 1–9 and 20 under 35 U.S.C. § 103 as being unpatentable over the combination of Dulepet, Roy, and Sweetland. All other rejections have been withdrawn. Ans. 3.

*Issue on Appeal*

Did the Examiner err in rejecting claim 1 as being obvious?

ANALYSIS<sup>4</sup>

We have reviewed the Examiner’s rejections in light of Appellant’s arguments that the Examiner has erred.

A.

The Examiner notes the initial step of the claim includes “[content management system] instructions disabled within the web template.” Final Act. 8. The Examiner finds that “Dulepet . . . discloses the editor add[s] a

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<sup>2</sup> All citations herein to this reference are by reference to the first named inventor only.

<sup>3</sup> For simplicity, we label the rejection under 35 U.S.C. § 103(a), as a rejection under § 103.

<sup>4</sup> The contentions discussed herein as to claim 1 are determinative as to this rejection. Therefore, except for our ultimate decision, we do not discuss claims 2–9 and 20 further herein.

comment code before and after each dynamic code line in the web page source code at column 8, lines 62-66.” Final Act. 9. Although the Examiner also speaks to the later claimed function of “disabling the one or more static markup language instructions defining the preview of the configurable control” (Final Act. 10 (emphasis omitted)) being shown by Roy, that disabling is separate from disabling the CMS instructions.

B.

Appellant raises the following argument in contending that the Examiner erred in rejecting claim 1 under 35 U.S.C. § 103.

The Office does not appear to specifically address the disabled content management system instructions in the web template. The Office mentions that Dulepet teaches adding a comment code before and after each dynamic code line, but it is not clear if the Office is asserting that such disclosure teaches the claim feature “the one or more content management system instructions being disabled within the web template.” If the Office is making such an assertion, then the Appellant respectfully disagrees and submits that Dulepet’s discussion of comment tags is not for **disabling** content management system instructions but rather for **flagging** JSP elements for a controller. See Dulepet at Col. 9, lines 57-61 (“Controller 330 may determine an association between a dynamic source code element and its corresponding dynamically generated page content **by identifying a pair of instrumentation comment lines previously inserted into the web page source code by pre-processor 340,**” *emphasis added*). As such, the JSP code is not “disabled” but rather flagged for further processing.

Appeal Br. 10.

C.

The Examiner responds:

[The r]ecited limitation of claim 1 requires received one or more content management system instructions **being disabled** (emphasis added). However, claim language does not contain

how to disable the one or more content management system instructions. As stated in the rejection, turning to the corresponding specification at ¶ [0025], “the one or more CMS instructions are disabled using a commenting feature of the static markup language”, which is substantially [the] same to the disclosure of Dulepet, recites “Preprocessor 340 marks or instruments dynamic source code statements in the Web page source code. This may be done by inserting a comment code line before each dynamic code line, and a comment code line after each dynamic code line.” (Dulepet, at column 8, lines 62-66).

Ans. 26.

D.

As articulated by the Federal Circuit, the Examiner’s burden of proving non-patentability is by a preponderance of the evidence. *See In re Caveney*, 761 F.2d 671, 674 (Fed. Cir. 1985) (“preponderance of the evidence is the standard that must be met by the PTO in making rejections”). “A rejection based on section 103 clearly must rest on a factual basis[.]” *In re Warner*, 379 F.2d 1011, 1017 (CCPA 1967). “The Patent Office has the initial duty of supplying the factual basis for its rejection. It may not . . . resort to speculation, unfounded assumptions or hindsight reconstruction to supply deficiencies in its factual basis.” *Id.*

Appellant’s Specification states that

In one implementation, the one or more CMS instructions are ***disabled using a commenting feature of the static markup language***, although other disabling options may be employed (e.g., a disabling property, tag, or flag that indicates to a template authoring tool that the one or more CMS instructions are disabled). When disabled, the one or more CMS instructions are operatively hidden from the static markup language-based template authoring tool or otherwise suppressed within the static markup language-based template authoring tool in some way.

Spec. 25 (emphasis added). We conclude that an artisan would understand this to describe *changing* each line of the CMS instructions to be a comment line using a commenting feature which thus *deactivates* the instruction.

The Examiner determines that disabling is shown by Dulepet, at column 8, which states “[marking] may be done by inserting a comment code line before each dynamic code line, and a comment code line after each dynamic code line.”

We disagree with the Examiner. Dulepet inserts a comment code line (i.e., a new code line) before each dynamic code line (i.e., not part of the dynamic code line). We conclude that an artisan would understand that such an insertion would mark (i.e., flag) the dynamic code line, but would not deactivate the instruction. We conclude the Examiner’s analysis fails to meet the required standard because the rejection does not adequately explain the Examiner’s findings of fact. Particularly, we agree with Appellant that Dulepet does not teach the claim 1 limitation of “content management system instructions being disabled.” We conclude, consistent with Appellant’s arguments, there is insufficient articulated reasoning to support the Examiner’s finding that Dulepet teaches this limitation. Therefore, we further conclude that there is insufficient articulated reasoning to support the Examiner’s final conclusion that claim 1 would have been obvious to one of ordinary skill in the art at the time of Appellant’s invention.

## CONCLUSION

(1) Appellant has established that the Examiner erred in rejecting claims 1–9 and 20 as being unpatentable under 35 U.S.C. § 103.

(2) On this record, the Examiner has not shown claims 1–9 and 20 to be unpatentable.

(3) We reverse the Examiner’s rejection of claims 1–9 and 20.

In summary:

| <b>Claims Rejected</b> | <b>Basis</b>                  | <b>Affirmed</b> | <b>Reversed</b> |
|------------------------|-------------------------------|-----------------|-----------------|
| 1–9, 20                | § 103 Dulepet, Roy, Sweetland |                 | 1–9, 20         |

REVERSED