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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* JOHN TORRES FREMLIN, VLADIMIR FRIDMAN,  
LEX ARQUETTE, and ERBIL KARAMAN

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Appeal 2019-000202  
Application 13/799,581  
Technology Center 2400

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Before JENNIFER S. BISK, LARRY J. HUME, and  
JULIET MITCHELL DIRBA, *Administrative Patent Judges*.

DIRBA, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>1</sup>

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>2</sup> seeks review of the Examiner’s rejection of claims 1–3, 5–11, and 13–20. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

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<sup>1</sup> This Decision uses the following abbreviations: “Spec.” for the original Specification, filed March 13, 2013; “Final Act.” for the Final Office Action, mailed December 6, 2017; “Appeal Br.” for Appellant’s Appeal Brief, filed June 25, 2018; “Ans.” for Examiner’s Answer, mailed September 14, 2018; and “Reply Br.” for Appellant’s Reply Brief, filed October 8, 2018.

<sup>2</sup> We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. According to Appellant, the real party in interest is Facebook, Inc. Appeal Br. 3.

## BACKGROUND

Appellant's disclosed embodiments and claimed invention relate to a social-networking system. Spec. ¶¶ 5–7. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A method comprising, by one or more server computing devices:

providing for presentation in a graphical user interface (GUI) of a client computing device, an identification of a first user;

receiving real-time video of the first user from the client computing device;

identifying a plurality of second users having a relationship to the first user based at least in part on a social graph, wherein:

the social graph comprises a plurality of nodes and edges connecting the nodes;

at least one node in the graph corresponds to the first user; and

at least one node in the graph corresponds to one of the second users;

selecting, for presentation in the GUI on the client computing device, one or more of the identified second users having an associated video based at least in part on a social-graph proximity score of the at least one node corresponding to the first user to the least one node corresponding to identified second users, wherein the social-graph proximity score is based on determining a plurality of the nodes are connected to each other by an edge; and

providing for presentation in the GUI on the client computing device presence information comprising the video of the first user and the video of one or more of the selected second users, wherein:

*the providing of the video of one or more of the selected users is based on the social-graph proximity score between the node corresponding to the first user and the node corresponding to a respective one of the second users and a frequency of interaction between the first user and the respective one of the second users;*

the presence information indicates a temporal, spatial, modal, or social accessibility or availability of the first user; and

the GUI provides the presence information of the first user and one or more of the selected second users as it is captured in real-time.

Appeal Br. 18 (Claims App.) (emphasis added).

#### THE REJECTIONS

R1. Claims 1–3, 6–11, and 14–19 stand rejected under pre-AIA 35 U.S.C. § 103(a) as obvious over Liu (US 2014/0036027 A1, published Feb. 6, 2014), Garcia (US 2012/0278395 A1, published Nov. 1, 2012), and Chew (US 2014/0019882 A1, published Jan. 16, 2014). Final Act. 3–26.

R2. Claims 5, 13, and 20 stand rejected under pre-AIA 35 U.S.C. § 103(a) as obvious over Liu, Garcia, Chew, and Reddy (US 2013/0061296 A1, published Mar. 7, 2013). Final Act. 26–27.

#### ANALYSIS

We review the appealed rejections for error based upon the issues identified by Appellant and in light of the arguments and evidence produced thereon. *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential). To the extent Appellant has not advanced separate, substantive arguments for particular claims, or other issues, such arguments are waived. 37 C.F.R. § 41.37(c)(1)(iv).

We have considered all of Appellant’s arguments and any evidence presented. We highlight and address specific findings and arguments for emphasis in our analysis below.

*Obviousness Rejection R1 of Claims 1–3, 6–11, and 14–19*

Appellant argues claims 1–3, 6–11, and 14–19 together as a group. *See* Appeal Br. 11–16. Therefore, consistent with the provisions of 37 C.F.R. § 41.37(c)(1)(iv), we limit our discussion to claim 1. Independent claims 9 and 17 and dependent claims 2, 3, 6–8, 10, 11, 14–16, 18, and 19 stand or fall with claim 1.

*Motivation to Combine*

Appellant contends that the rejection fails to establish a prima facie case of obviousness. Appeal Br. 13–16; Reply Br. 3–4. We disagree.

In rejecting claims under 35 U.S.C. § 103, the Examiner bears the initial burden of establishing a prima facie case of obviousness. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992); *see also In re Piasecki*, 745 F.2d 1468, 1472 (Fed. Cir. 1984). An Examiner’s rejection establishes a prima facie case when it provides notice of the reasons for the rejection, and the rejection is deficient when it “is so uninformative that it prevents the applicant from recognizing and seeking to counter the grounds for rejection.” *In re Jung*, 637 F.3d 1356, 1362 (Fed. Cir. 2011). If this initial burden is met, the burden of coming forward with evidence or argument shifts to Appellant. *See Oetiker*, 977 F.2d at 1445; *see also Piasecki*, 745 F.2d at 1472. Obviousness is then determined on the basis of the evidence as a whole and the relative persuasiveness of the arguments. *Id.*

Appellant argues that the Examiner failed to make a prima facie case “because the Examiner has failed to provide a clear articulation of the reasons why the proposed Liu-Garcia-Chew combination would have been obvious to one of skill in the art.” Appeal Br. 13 (emphasis omitted). Appellant contends that the Examiner’s statements are “conclusory” and fail to articulate two findings that, according to Appellant, are required for a prima facie case—“a finding that there was [a] reasonable expectation of success” and “a finding that there was some teaching, suggestion, or motivation . . . to modify the reference or to combine reference teachings.” *Id.* at 13–15 (citing MPEP § 2143(G) (Rev. 6, Sept. 2007)). Appellant alleges that the Examiner “does not advance an obviousness rationale,” but rather simply asserts that one of ordinary skill would have been motivated to make the proposed combination. Reply Br. 3–4.

Appellant’s arguments do not persuade us of error. First, we disagree that an examiner, to make a prima facie case, is always required to articulate an express finding that “there was [a] reasonable expectation of success.” Appeal Br. 14 (citing MPEP § 2143(G)). Instead, “[t]he key to supporting any rejection under 35 U.S.C. 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious.” MPEP § 2143 (requiring “a reasoned explanation as to why the invention as claimed would have been obvious”); *accord In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (requiring rational underpinning to support obviousness conclusion), *cited with approval in KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

Second, we reject Appellant’s arguments that the Examiner failed to articulate a rationale and failed to provide a sufficient motivation to combine the references. The Examiner made findings regarding the disclosure of

each reference, found that a person of ordinary skill in the art would have been motivated to combine those teachings, and provided an explanation for why an ordinary artisan would have done so in a manner that renders claim 1 obvious. Final Act. 3–10; Ans. 14–17. The Examiner’s findings and rationale are sufficient to make a prima facie case, and we are not persuaded by Appellant’s argument to the contrary.

Moreover, Appellant does not present argument or evidence to persuade us that the proposed combination would not have been obvious. Consequently, Appellant has not shown error in the Examiner’s findings or ultimate conclusion as to obviousness. *See In re Oetiker*, 977 F.2d at 1445 (If an examiner presents a prima facie case, “the burden of coming forward with evidence or argument shifts to the applicant.”).

#### *The Frequency Limitation*

Claim 1 recites: “the providing of the video of one or more of the selected users is based on the social-graph proximity score between the node corresponding to the first user and the node corresponding to a respective one of the second users and *a frequency of interaction between the first user and the respective one of the second users.*” Appeal Br. 18 (Claims App.) (emphasis added) (italicized text referred to herein as the “frequency limitation”). Appellant alleges that the Examiner failed to establish that the proposed combination teaches or suggests the frequency limitation. Appeal Br. 12–13; Reply Br. 2.

The Examiner pointed to Garcia for this limitation. Final Act. 7. Specifically, the Examiner found that Garcia’s user profile identifies a user’s first degree contacts, and Garcia retrieves a list of other users who are within

a pre-determined social proximity (e.g., first degree contacts, or first and second degree contacts). *Id.* (citing Garcia ¶¶ 11, 22). The Examiner explained that the frequency limitation is taught or suggested by Garcia:

Although Garcia does not explicitly discuss “frequency of interaction”, it would be apparent to one of ordinary skill in the art, based on the disclosure of Garcia, that first degree friends refers to those [the] user is likely to interact with the most and/or has the strongest connections to (see “connections” in ¶0011). Accordingly, the limitation is taught.

*Id.* (emphasis omitted).

Appellant argues the Examiner fails to establish that the frequency limitation is taught or suggested by the references. Appeal Br. 12–13. In particular, Appellant contends that the rejection “equate[s]” the first degree friends with the frequency limitation, which “conflat[es] the concept of degree of separation with ‘frequency of interaction.’” *Id.* at 12 (emphasis omitted). Appellant further submits that “degree of separation . . . by itself does not necessarily provide information of the frequency of interaction” because the latter is also based on several different factors. *Id.* at 12–13.

In response, the Examiner clarifies that Garcia’s disclosure of degree of separation, combined with other aspects of Garcia, *suggests* the frequency limitation. Ans. 12–14. Specifically, the Examiner finds, “Garcia addresses the problem of determining [the] likelihood that a user will interact with another user based on the strength of their connections . . . and/or the degree of separation” between the user and another user. *Id.* at 13 (citing Garcia ¶¶ 11, 13). The Examiner further concludes that the broadest reasonable interpretation of “frequency of interaction”<sup>3</sup> includes a likelihood of

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<sup>3</sup> The Examiner also expresses concern regarding the clarity of this phrase and its support in the Specification. Ans. 12–13. However, the Final Office

interaction. *Id.* The Examiner finds that it would have been obvious for Garcia to select contacts to present to the first user based on the frequency of interaction between the users. *Id.* at 13–14; *see id.* at 15–16 (explaining that it would have been obvious to display individuals with “a stronger affinity or connection . . . before . . . those users with whom the first user has a lower frequency of interaction”). In reply, Appellant reiterates the argument from the Appeal Brief and argues that the Examiner “fails to provide any analysis or rationale linking” the findings regarding Garcia to the frequency limitation, without otherwise addressing the Answer’s findings and conclusions. Reply Br. 2.

First, we determine the Examiner, in the Final Office Action and the Answer, sufficiently establishes that the references teach or suggest the frequency limitation. Specifically, the Examiner finds: (1) Garcia discloses social proximity, (2) there is a correlation between social proximity and frequency of interaction, (3) Garcia “model[s] the relationships among groups of individuals . . . ranging from casual acquaintances and close familial bonds,” (4) Garcia “addresses the problem of determining likelihood that a user will interact with another user based on the strength of their connection[,],” and (5) Garcia ranks individuals based on their spatial and temporal proximity to the user. Final Act. 7 (citing Garcia ¶¶ 11, 13, 22, 29); Ans. 12–13 (quoting Garcia ¶ 13). The Examiner also concludes that

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Action does not include a rejection under 35 U.S.C. § 112. Accordingly, we have not considered, and do not decide, whether Appellant has satisfied the definiteness, written description, and/or enablement requirements of § 112. *Cf.* Manual of Patent Examining Procedure § 1213.02 (9th Ed., Rev. 08.2017, Jan. 2018) (no inference should be drawn when the Board elects not to issue a new ground of rejection under 37 C.F.R. § 41.50(b)).

“frequency of interaction,” under the broadest reasonable interpretation, encompasses a likelihood of interaction between particular users. Ans. 13. Moreover, the Examiner explains that modifying Garcia to rank individuals by the frequency of their interaction with the user would be obvious to improve the relevance of results. *Id.* at 15–16. As a result, the Examiner concludes that the frequency limitation is obvious in light of Garcia. *Id.* at 13–14.

Appellant fails to present sufficient argument or evidence to demonstrate that the disputed limitation would not have been obvious to a person of ordinary skill in the art. *See Hyatt v. Dudas*, 492 F.3d 1365, 1370 (Fed. Cir. 2007) (If the Examiner “adequately explain[s]” the rejection, “the burden shifts to the applicant to rebut the prima facie case with evidence and/or argument.”). Appellant’s primary argument is that the Examiner fails to sufficiently establish that the frequency limitation would have been obvious in light of the references; however, as explained above, we disagree.

Appellant also contends the Examiner “conflat[es] the concept of degree of separation with ‘frequency of interaction,’” and Appellant argues that the former “does not necessarily” dictate the latter. Appeal Br. 12–13 (emphasis omitted); Reply Br. 2. Although we agree with Appellant that social proximity and frequency of interaction are different concepts, we are not persuaded that the Examiner equated or conflated these concepts. Rather, the Examiner found that there is a *correlation* between social proximity and frequency of interaction, and we are not persuaded of error in this finding. Then, the Examiner properly used this finding, among others, to articulate a rationale explaining why the frequency limitation would have been obvious.

Appellant does not otherwise allege error in the Examiner's factual findings, claim construction, or obviousness rationale. *See* Reply Br. 2 (no response to additional factual findings and claim construction provided in the Answer). For example, Appellant identifies no errors or inaccuracies in the Examiner's factual findings or rationale, does not contend the Examiner's proposals are beyond the level of skill of one of ordinary skill in the art, and does not submit that the combination of references would yield undesirable, unpredictable, or unexpected results. Consequently, Appellant has not shown error in the Examiner's findings or ultimate conclusion as to obviousness. *See In re Oetiker*, 977 F.2d at 1445 (If an examiner presents a prima facie case, "the burden of coming forward with evidence or argument shifts to the applicant.").

Therefore, based upon the findings above, on this record, we are not persuaded of error in the Examiner's reliance on the cited prior art combination to teach or suggest the disputed limitation of claim 1, nor do we find error in the Examiner's resulting legal conclusion of obviousness. Accordingly, we sustain the Examiner's obviousness rejection of independent claim 1 and grouped claims 2, 3, 6–11, and 14–19, which fall therewith.

*Obviousness Rejection R2 of Claims 5, 13, and 20*

The Examiner rejects claims 5, 13, and 20 over a combination of Liu, Garcia, Chew, and Reddy. Final Act. 26–27.

Claims 5, 13, and 20 depend from independent claims 1, 9, and 17, respectively. For these dependent claims, Appellant relies on the same arguments made with respect to claim 1. *See* Appeal Br. 11, 16. These

arguments, however, are not persuasive for the reasons discussed above. Consequently, Appellant's arguments do not show error in the Examiner's factual findings and the conclusion of obviousness of claims 5, 13, and 20.

### CONCLUSION

We sustain the Examiner's rejection of claims 1-3, 6-11, and 14-19 under pre-AIA 35 U.S.C. § 103(a) as obvious over Liu, Garcia, and Chew. We also sustain the Examiner's rejection of claims 5, 13, and 20 under pre-AIA 35 U.S.C. § 103(a) as obvious over Liu, Garcia, Chew, and Reddy.

In summary:

| <b>Claims Rejected</b> | <b>35 U.S.C. §</b> | <b>Basis</b>             | <b>Affirmed</b>  | <b>Reversed</b> |
|------------------------|--------------------|--------------------------|------------------|-----------------|
| 1-3, 6-11, 14-19       | 103(a)             | Liu, Garcia, Chew        | 1-3, 6-11, 14-19 |                 |
| 5, 13, 20              | 103(a)             | Liu, Garcia, Chew, Reddy | 5, 13, 20        |                 |
| <b>Overall Outcome</b> |                    |                          | 1-3, 5-11, 13-20 |                 |

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). *See* 37 C.F.R. § 41.50(f).

**AFFIRMED**