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EXAMINER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CHRISTOPHER LEE GRAHAM and JEFF WESTON JENKINS

Appeal 2019-000628
Application 13/555,330
Technology Center 2100

Before MAHSHID D. SAADAT, ERIC S. FRAHM, and CATHERINE SHIANG, *Administrative Patent Judges*.

FRAHM, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant¹ appeals under 35 U.S.C. § 134(a) from the Examiner’s Final Rejection of claims 3–9 and 22. Claims 1, 2, and 10–21 have been canceled (*see* Appeal Br. 10–11, Appendix of Claims). We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. “The word ‘applicant’ when used in this title refers to the inventor or all of the joint inventors, or to the person applying for a patent as provided in §§ 1.43, 1.45, or 1.46.” 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Christopher Graham (Appeal Br. 2).

STATEMENT OF THE CASE

Introduction

Appellant's application relates to a method and system for debating by chatting in a virtual forum such as an on-line chatroom (Title; Abstract; *see* Spec. ¶ 1). The disclosed invention is applicable to the fields of sports, politics, and/or entertainment (Spec. ¶¶ 3, 4).

Claim 3 is illustrative of the appealed subject matter and reads, with bracketed numbers/letters and emphases added, as follows:

3. A method of debating, comprising:

[A] selecting a competitor to support from a selection provided by a virtual forum, wherein selecting a competitor to support from a selection provided by a virtual forum comprises a user selecting *a primary competitor* within an association of competitors to support and *a secondary competitor* in a specific competitive event to support, and

[B1] communicating in the virtual forum, *wherein a visual representation of the primary competitor and the secondary competitor are displayed in the virtual forum* adjacent to the user's name and proximate to the user's communications to the virtual forum [B2] so that others using the virtual forum can see the visual representations of the user's primary competitor and secondary competitor.

The Examiner's Rejections

(1) Claims 3–6, 8, 9, and 22 are rejected under pre-AIA U.S.C. § 103(a) as being unpatentable over Meredith (US 2011/0022450 A1; Jan. 27, 2011) and Dawson et al. (US 2010/0205545 A1; Aug. 12, 2010) (hereinafter, "Dawson")² (Final Act. 2–4; Ans. 3–5).

² Appellant primarily presents arguments as to independent claims 3 and 22, which recite commensurate limitations. *See* Appeal Br. 4–9. Appellant does not argue separately the patentability of dependent claims 4–6, 8, or 9. *See*

(2) Claim 7 is rejected under pre-AIA U.S.C. § 103(a) as being unpatentable over Meredith, Dawson, and Bou-Ghannam et al. (US 2007/0288560 A1; Dec. 13, 2007) (hereinafter, “Bou-Ghannam”) (Final Act. 4; Ans. 5).

ISSUE

Based on Appellant’s arguments presented in the Appeal Brief (*see* Appeal Br. 4–9),³ the issue presented before us on Appeal is whether Appellant has shown the Examiner erred in rejecting representative claim 3, and thus claims 3–9 and 22 all rejected under § 103(a) over the same base combination of Meredith and Dawson, as being unpatentable for obviousness.

ANALYSIS

We have reviewed the Examiner’s rejections (Final Act. 2–4; Ans. 3–5) in light of Appellant’s contentions in the Appeal Brief (Appeal Br. 4–9)

Appeal Br. 6–9. Accordingly, we select claim 3 as representative of the group of claims consisting of claims 3–6, 8, 9, and 22. *See* 37 C.F.R. § 41.37(c)(1)(iv). Because Appellant argues claim 7 on a similar basis as claim 3 from which claim 7 depends, and the rejection of claim 7 relies on the same base combination of Meredith and Dawson, we will decide the outcome of claim 7 on the same basis as claim 3.

³ Notably, the Examiner makes additional explanation for the combination (Ans. 7–8), including newly relying on paragraph 68 of Meredith as teaching the “secondary competitor” recited in claim 3 (*see* Ans. 3, 6). Appellant has not filed a Reply Brief or otherwise contested these findings and reasoning.

that the Examiner has erred, as well as the Examiner's response to Appellant's arguments in the Appeal Brief (Ans. 6–8). We disagree with Appellant's contentions. With regard to representative claim 3, we adopt as our own: (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken (Final Act. 2–4; *see also* Ans. 3–5) and (2) the reasons set forth by the Examiner in the Examiner's Answer in response to Appellant's Appeal Brief (Ans. 6–8). We concur with the conclusions reached by the Examiner, as well as the Examiner's findings as to the applied references. We provide the following for emphasis.

With respect to claim 3, Appellant argues (*see* Appeal Br. 7) the Examiner has erred in relying on Meredith as disclosing or suggesting limitation A, including “a user selecting . . . a secondary competitor.” However, we agree with the Examiner's findings (*see* Final Act. 2–3; Ans. 3, 6) that Meredith teaches or suggests selecting a secondary competitor with the description of selecting a rivalry team 612 as shown and visually represented in Figure 7 (Meredith ¶¶ 68, 72). Appellant has not presented sufficient argument or evidence to rebut these findings regarding Meredith's teaching of a secondary competitor selection, or otherwise shown this aspect of the rejection to be in error.

We also agree with the Examiner's findings (Ans. 3, 6) that affiliation section 610 shown in Figure 7 and described in paragraphs 60 and 71 (*see also* Meredith ¶ 67) teaches or suggests the selection of a primary competitor as recited in claim 3. In this light, we are not persuaded by Appellant (*see* Appeal Br. 7) that the Examiner erred in relying on Meredith as teaching or suggesting the disputed claim limitations recited in limitation A of claim 3.

In general, Appellant's arguments (Appeal Br. 6–8) are drawn to Meredith and Dawson individually, and not to the combination articulated by the Examiner. The Examiner (*see* Final Act. 2–3; Ans. 3–4) relies upon Meredith for all of the subject matter of claim 3 except for the explicit teaching of displaying visual representations as set forth in limitation B1. And, as discussed above, the Examiner relies upon Dawson for teaching these missing limitations (*see generally* Final Act. 3; Ans. 4). Thus, Appellant's contentions (Appeal Br. 7–9) that Meredith and Dawson individually fail to disclose limitation B1 are not persuasive in light of the Examiner's application of a *combination* of the teachings and suggestions of Meredith and Dawson. We note that each reference cited by the Examiner must be read, not in isolation, but for what it fairly teaches in combination with the prior art as a whole. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986) (finding one cannot show non-obviousness by attacking references individually where the rejections are based on combinations of references). In this light, Appellant's arguments (*see* Appeal Br. 7–8) concerning the individual shortcomings in the teachings of Meredith and Dawson are not persuasive, and are not convincing of the non-obviousness of the claimed invention set forth in independent claim 3.

Appellant's contentions that the Examiner (i) fails to support a rational underpinning to support the conclusion of obviousness; (ii) has not provided a compelling reason why someone would have combined the icons of Dawson with the chat room of Meredith; and (iii) used hindsight reconstruction to fill in the blanks, are not persuasive. The Examiner has provided a factual basis and articulated reasoning with a rational underpinning to support the conclusion of obviousness with regard to claim

3 (*see* Final Act. 2–3; Ans. 3–4). *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). We agree with the Examiner that:

. . . Meredith does not teach the display of a visual representation of a *secondary competitor* adjacent to the user’s name. Dawson teaches a social networking environment wherein multiple visual representations of the user’s associations are displayed adjacent to the user’s name in the user’s communications (Dawson, Fig.2, *John Smith associated with icons 230c, 230d*; para.42-47). It would have been obvious to one of ordinary skill in the art to include Dawson's teaching with Meredith's method in order to quickly ascertain the various associations of the other participants (Dawson, para.42, *helpful to understand as much about participant as quickly as possible*).

Ans. 4. Notably, Appellant does not dispute the Examiner’s reasoning that the combination would be obvious “in order to quickly ascertain the various associations of the other participants” (Ans. 4). We also agree with the Examiner’s further rationale for the combination provided at pages 7 through 8 of the Answer:

In particular, Dawson clearly teaches the visual representation of a plurality of icons adjacent to a user’s name within a virtual forum (Dawson, Fig.2, *John Smith associated with icons 230c, 230d*; para.42-47) and furthermore teaches that the icons are not limited to the examples given but may be any suitable types of icons (Dawson, para.47) wherein the icon definitions are stored (Dawson, para.46). Therefore *it would have been obvious to modify Dawson’s icons to be related to teams, competitions, or allegiances to teams or competitors and include with Meredith's method in order to quickly ascertain the various associations of the other participants* (Dawson, para.42, *helpful to understand as much about participant as quickly as possible*).

Ans. 7–8 (emphasis added). Again, Appellant has not presented sufficiently persuasive argument or evidence to rebut these findings and reasoning

regarding the motivation to combine, or otherwise shown this aspect of the rejection to be in error. Accordingly, we disagree with Appellant's assertions (Appeal Br. 8–9) that there is no proper motivation to combine Meredith and Dawson.

Appellant's contention that the Examiner's obviousness determination is hinged upon impermissible hindsight is only supported by a conclusory statement that the Examiner "used hindsight reconstruction to fill in the blanks" (Appeal Br. 9). Appellant's statement is unsupported by fact or evidence, and arguments of counsel cannot take the place of factually supported objective evidence. *See, e.g., In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974). Also, while not required to, Appellant has not submitted evidence of secondary considerations. Evidence of secondary considerations "may also serve a guard against slipping into use of hindsight." *Kahn*, 441 F.3d at 986 (Fed. Cir. 2006) (quoting *Graham v John Deere Co.*, 383 U.S. 1, 36 (1966)). Therefore, we accord very little probative value to Appellant's statements that combining the teachings of Meredith and Dawson required more than ordinary skill in the art.

In view of the foregoing, Appellant's contention (Appeal Br. 8–9) that it would not have been obvious to combine Meredith and Dawson because the Examiner's reasoning involves hindsight is unconvincing.

Summary

Appellant has not shown the Examiner erred in rejecting representative claim 3 as being unpatentable under 35 U.S.C. § 103(a). In view of the foregoing, we sustain the obviousness rejection of representative claim 3, as well as claims 4–6, 8, 9, and 22 grouped therewith as being obvious over the base combination of Meredith and Dawson. For similar

reasons, and because (i) Appellant relies on the arguments presented as to claim 3 in arguing dependent claim 7; and (ii) claim 7 depends from claim 3, we also sustain the remaining obviousness rejection of claim 7 over the base combination taken with Bou-Ghannam.

CONCLUSION

For all of the reasons above, we hold as follows:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
3–6, 8, 9, 22	103(a)	Meredith, Dawson	3–6, 8, 9, 22	
7	103(a)	Meredith, Dawson, Bou-Ghannam	7	
Overall Outcome			3–9, 22	

TIME PERIOD FOR RESPONSE

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). *See* 37 C.F.R. §§ 41.50(f), 41.52(b) (2013).

AFFIRMED