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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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Ex parte TERUHIKO GODA, NAOKI TAKEDA,
EIJI TOKUNAGA, and KOICHI NAKAO

_____

Appeal 2019-002948
Application 14/498,723
Technology Center 2400

_____

Before CARL W. WHITEHEAD JR., DAVID M. KOHUT, and
IRVIN E. BRANCH, *Administrative Patent Judges*.

PER CURIAM

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant[1] appeals from the Examiner's decision to reject claims 1–19. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM IN PART.

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[1] We use "Appellant" to reference the applicant as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as "Nintendo Co., Ltd." Appeal Br. 3.

STATEMENT OF THE CASE

Appellant's Invention

Appellant's invention relates to "reducing a processing load on a side of server." Spec. 0,[2] ll. 17–19. Independent claims 1 and 17, reproduced below, are illustrative of argued subject matter.

> 1.　　An information processing system comprising a first server and a first user terminal, wherein:
>
> the first server comprises:
>
>> storage configured to store content and to store download information for respective content downloads for each of a plurality of user terminals, including the first user terminal, or for each of a plurality of users of the user terminals, the download information for each respective content download including one or more download tasks comprising information for download operations for a user terminal for downloading the respective content download;
>>
>> first communication circuitry; and
>>
>> first processing circuitry configured to control the first server to at least:
>>
>>> receive, via the first communication circuitry, from the first user terminal, a first request for download;
>>>
>>> transmit, via the first communication circuitry, to the first user terminal, in response to the first request, download information for the first user terminal or for a user of the first user terminal;

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[2] The original Specification does not label the first page with a page number, labels the second page as page "1," and so forth. We accordingly reference the first page as page "0."

receive, via the first communication circuitry, from the first user terminal, a second request for content from the first user terminal; and

transmit, via the first communication circuitry, to the first user terminal, in response to the second request, the requested content from the storage,

wherein the first user terminal comprises:

second communication circuitry; and

second processing circuitry configured to control the first user terminal to at least:

receive, via the second communication circuitry, the download information that is transmitted from the first server;

transmit, via the second communication circuitry, to the first server, the second request in accordance with the received download information; and

acquire, via the second communication circuitry, from the first server, in accordance with the download tasks included in the received download information, the requested content.

17.   A terminal apparatus comprising:

communication circuitry; and

processing circuitry configured to control the terminal apparatus to perform operations comprising:

determining, by accessing a revision server, a renewal of a download task list comprising one or more download tasks for downloading content, the download tasks comprising information for download operations for a user terminal for downloading content; and

when renewal of the download task list is determined:

> acquiring, by accessing a list server, the download task list;
>
> generating a task status list for the download tasks in the download task list;
>
> accessing, based on the task status list, a content server to acquire content; and
>
> updating the task status list based on whether content acquisition for a particular download task is successful or unsuccessful.

Appeal Br., Claims Appendix.

Rejections

Claims 1–5 and 14–19[3] stand rejected under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter. Final Act. 2–9.

Claims 1, 5–7, and 14–16 stand rejected under 35 U.S.C. § 103 as unpatentable over Doi (JP 2006/114967 A; Apr. 27, 2006) and Gordon (US 2010/0011090 A1; Jan. 14, 2010). Final Act. 10–17.

Claims 2–4 stand rejected under 35 U.S.C. § 103 as unpatentable over Doi, Gordon, and Ruppert (US 2009/0029776 A1; Jan. 29, 2009). Final Act. 17–22.

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[3] The record does not clearly identify the claims rejected under § 101. The Final Action omits a statement of rejection (Final Act. 2–3), states "[c]laims 1–19 are directed to an abstract idea" (*id.* at 3), and states "claims 6–13 appear to be only tangentially related to the abstract idea[] and [thus] have not been rejected as abstract ideas" (*id.* at 6–7). The Answer omits a statement of rejection and references "the rejection of claims 1–19 under 35 U.S.C. § 101." Ans. 4. In light of the above, we view claims 6–13 as not being rejected under § 101.

Claims 8–12 stand rejected under 35 U.S.C. § 103 as unpatentable over Doi, Gordon, and Consalus (US 2014/0298041 A1; Oct. 2, 2014). Final Act. 22–29.

Claims 13 and 17–19 stand rejected under 35 U.S.C. § 103 as unpatentable over Doi, Gordon, and Iwaya (US 2013/0104121 A1; Apr. 25, 2013). Final Act. 29–36.

35 U.S.C. § 101

Principles of Law

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. *E.g.*, *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*. *Alice*, 573 U.S. 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 (1853))); 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 187; *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.* (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.*

PTO Guidance

The PTO provides guidance for 35 U.S.C. § 101. USPTO's 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019) ("Guidance"). Under the 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, and 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)).

84 Fed. Reg. at 52–55. Only if a claim (1) recites a judicial exception and (2) does not integrate that exception into a practical application, do we then conclude the claim is directed to a judicial exception (*id.* at 54) and look to whether the claim:

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

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

Id. at 56.

Further, the Examiner must explain the required determinations.
October 2019 Patent Eligibility Guidance Update ("Guidance Update")
at 16.[4] The Examiner must also explicitly identify the required evidence.
Id.

Analysis

We are persuaded the Examiner erred in rejecting claims 1–5 and 14–
19 under § 101. The same errors occur for each of claims 1–5 and 14–19,
which are addressed as a group by the Examiner (Final Act. 8–
9). We explain Appellant's contentions and the Examiner's errors with
reference to claim 1.

Appellant contends the Examiner does not adequately address the
claimed use of download information and included download tasks.
Appeal Br. 10–14. First, and as addressed below for the Guidance's
Step 2A(prong 1), there is the following ***claimed corresponding of the
download information*** to content downloads and terminals/users:
"download information for respective content downloads for each of a
plurality of user terminals or for each of a plurality of users of the user
terminals, the download information . . . including one or more download
tasks . . . for downloading the respective content download." Second, and as

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[4] Available at https://www.uspto.gov/sites/default/files/documents/
peg_oct_2019_update.pdf.

addressed below for the Guidance's Step 2B, there is the following *claimed implementing of the download information* via a first user terminal: transmitting a download request to a server; receiving the download information from the server in response to the request; transmitting a content request to the server in accordance with the received download information; and acquiring the requested content from the server in accordance with the download tasks included in the received download information.

Turning to the Guidance's Step 2A (prong 1), the Examiner states the claimed corresponding of download information constitutes JE subject matter. Final Act. 6–7. Specifically, the Examiner states the claimed corresponding of download information: corresponds the download information to respective content and terminals/users (*id.* at 5–6); thereby constitutes a "classification of download information based on terminals" (*id.* at 6) that is analogous to the patent-ineligible "classifying and storing digital images in an organized manner" addressed in *TLI Communications LLC v. AV Automotive LLC*, 823 F.3d 607 (Fed. Cir. 2016) (Final Act. 5); and also thereby constitutes a "predetermined classification" that is analogous to the patent-ineligible "collecting, . . . recognizing . . . , and storing" of data addressed in *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat. Ass'n*, 776 F.3d 1343 (Fed. Cir. 2014) (Final Act. 7).

Appellant contends that, even assuming the claimed corresponding of download information is analogous to the patent-ineligible claim features of *TLI* and *Content Extraction*, the Examiner still fails to explain why the claimed corresponding of download information falls within the Guidance's categories of JE subject matter. Reply Br. 2.

The claimed subject matter does not fall within one of the Guidance's categories of judicial exceptions. *See* Guidance at 52. Further, even assuming (arguendo) the Examiner shows the claimed corresponding of download information is equivalent to the patent-ineligible claim features of *TLI* and *Content Extraction*, the Examiner does not show the Guidance's categories of JE subject matter encompass those patent-ineligible claim features. *See e.g.*, Guidance at 52–53 nn.12–15 (listing Federal Circuit determinations of patent-ineligibility and omitting *TLI* and *Content Extraction*); *see also id.* at 52 n.11 (stating *TLI* is part of a "growing body of precedent" that problematically describes "similar subject matter . . . both as abstract and not abstract"). Therefore, we conclude the claims do not recite judicial exceptions pursuant to Step 2A, Prong One, of the Guidance. We reverse the Examiner's 35 U.S.C. § 101 rejection of claims 1–5 and 14–19.

35 U.S.C. § 103
Claims 1, 5–7, and 14–16 (Doi and Gordon)

Claims 1, 5–7, and 14–16 are rejected as obvious over Doi and Gordon. Appellant addresses these claims as a group, contesting only the Examiner's reliance on Gordon. Appeal 14–17. We select claim 1 as representative of the group. 37 C.F.R. § 41.37(c)(1)(iv). We are not persuaded the Examiner erred in rejecting claim 1 under § 103.

Claim 1 recites, in disputed part, "download tasks" of a user terminal. *See infra*. The download tasks are part of the claimed download information ("download information . . . including one or more download tasks"), thus received by the first user terminal from the server ("receive . . . the download information . . . from the first server"), and used by the first

user terminal to download content from the server ("download tasks . . . for downloading the respective content download" and "acquire . . . from the first server[] in accordance with the download tasks").

Appellant contends the Examiner "applies Gordon as allegedly suggesting the providing of download tasks to the mobile terminal in Doi." Appeal Br. 15. Appellant further contends Gordon does not suggest the claimed download tasks because:

> Gordon discloses a download management system in which download managers on a network negotiate bandwidth allocations[.] . . . [V]arious download managers each gather information about download tasks (e.g., user requested content, scheduled content, streamed download, etc.) that are planned or in operation . . . [and] communicate[] to the other download managers these planned or operational download tasks . . . . The download managers can then work together to share the download resources[.]

> Gordon is quite different from the claimed subject matter in which download information from a server to a device requesting content includes download tasks[,] which are then used by the device to acquire the content. Gordon contains no disclosure of, for example, the shared resource providing download tasks to the devices requesting content.

Id. at 16.

We not persuaded of error because Appellant addresses only Gordon, whereas the claimed download tasks are read on Doi's invention as modified in view of Gordon. *See In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986) ("Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references."). Specifically, the Examiner finds Doi's invention transmits download information from a server to devices requesting content. *See* Final Act. 12. The Examiner finds Gordon

communicates scheduled download tasks to networked user devices, thereby improves downloads of the devices, and thereby suggests to communicate scheduled download tasks within Doi's download information that is provided to networked user devices requesting content. Final Act. 13–15 (citing Gordon ¶ 18); *see* Gordon ¶ 18 (the user devices adjust their downloads based on the scheduled download tasks of other devices). Thus, contrary to Appellant's above argument, Examiner finds Doi's invention as modified—not Gordon—achieves a system whereby a shared resource of devices provides download tasks to devices requesting content. *See* Appeal Br. 16.

We also note Appellant's contention that Gordon does not teach a "shared resource" providing download tasks to user computing devices not to be persuasive of Examiner error. *See* Appeal Br. 16. Gordon's "global politeness coordination function" (e.g., a server accessed via the Internet) dictates how the user devices download content, e.g., how a device prioritizes a download and/or adjusts its download bandwidth. Gordon ¶¶ 4, 8–10, 19–20, 29, 31.

For the foregoing reasons, we sustain the rejection of claims 1, 5–7, and 14–16 under § 103.

Claims 2–4 (Doi, Gordon, and Ruppert)

Claims 2–4 are rejected as obvious over Doi, Gordon, and Ruppert. Each claim argued separately. Appeal 17–19. We are not persuaded the Examiner erred in rejecting claims 2–4 under § 103.

<u>Claim 2</u>

Claim 2 depends from claim 1 and adds that the claimed first user terminal (and particularly its second processing circuitry) is "configured to

access the first server according to existence/non-existence of renewal of the download information."

Appellant contends the Examiner cites Ruppert as teaching claim 2's limitations. Appeal Br. 17–18. Appellant further contends:

> [Ruppert's cited paragraphs 144–45] describe that a system server 201 . . . builds packages for downloading to the EGMs based on information about the EGMs. However, nothing in the referenced portions . . . discloses or suggests any conditions for the processing circuitry of the EGMs to access the server 201, much less that the processing circuitry of the EGM is configured to access a server based on existence/non-existence of renewal of download information . . . [comprising] download operations for . . . a respective content download.

Id. (original emphasis); *see also* Reply Br. 6.

We are not persuaded of Examiner error for each of two reasons.

First, Appellant's argument is not commensurate with the claim scope. Appellant contends the claimed "access . . . according to existence[] of renewal of the download information" requires a renewal of download operations. Appeal Br. 18. That is incorrect. Though base claim 1 recites that the download information includes download tasks/operations, claim 2's "existence[] of renewal of the download information" does not specify a renewal of the included download tasks/operations. Thus, claim 2's "renewal of the download information" can concern a renewal of other included information.

Second, we agree with the Examiner's determinations. The Examiner finds Ruppert's EGM and download server system (201) suggest adding claim 2's "according to" condition to Doi's server system and terminal. *Id.* at 12–13 (citing Ruppert ¶¶ 144–45). We agree because Ruppert's server system and EGM exchange the following communications: the system

13

broadly notifies EGMs, e.g., via broadcasts, that a list of available downloads has changed; in response, and EGM requests new software and the system verifies the EGM and request; and, if the EGM is verified, the system instructs the EGM to add a software package, e.g., provides the location of a distribution server for the respective download. Ruppert ¶ 145; *see also id.*, abst. ("multicast protocol . . . to implement a one-way download progress notification"), ¶¶ 789–95 (describing the general purpose and use of multicast protocol). By incorporating these teachings, Doi's terminal would request new software from the system (i.e., access the system) in response to a change in the list of software available for download and would thus "access the . . . server according to existence[] of renewal of . . . download information" (claim 2).

Claim 3

Claim 3 depends from claim 2 and adds that the claimed first user terminal (and particularly its second processing circuitry) "is further configured to transmit a request to the first server, . . . when a renewal of the download information is determined to exist, for transmission of the download information."

Appellant contends the Examiner cites Ruppert as teaching claim 3's limitations. Appeal Br. 18. Appellant further contends:

> [A]s discussed [for claim 2], the new data for [Ruppert's] EGMs referenced in ¶ [0145] relates to the system server building packages for download. Ruppert et al. does not disclose that the processing circuitry of the EGM is configured to transmit a request based on the existence of new data, much less transmit a request for the claimed download information based on the existence of new data.

Id.; *see also* Reply Br. 7.

We are not persuaded of Examiner error. We agree with the Examiner's determinations. The Examiner finds Ruppert's download server system (201) and EGM suggest adding claim 3's "when" condition to Doi's server system and terminal. Final Act. 19–20 (citing Ruppert ¶ 145). By incorporating Ruppert's noted teachings (*see supra* 17–18), Doi's terminal would request new software from the system in response to a renewed (changed) list of available software and thus "transmit a request to the first server, . . . when a renewal of the download information is determined to exist, for transmission of the download information" (claim 3).

Claim 4

Claim 4 depends from claim 2 and adds: "the [first user terminal] is further configured to inquire of the second server the existence/non-existence of the renewal of the download information."

Appellant contends the Examiner cites Ruppert as teaching claim 4's limitations. Appeal Br. 18. Appellant further contends Ruppert's EGM is not described as "inquiring of a server" about the existence of a renewal of download information. Appeal Br. 19; Reply Br. 7 ("[T]he Appeal Brief [contentions] are directed to Ruppert et al.'s failure to disclose that the EGM inquires of a server about the existence/non-existence of the renewal of the claimed download information.").

We are not persuaded of Examiner error. We agree with the Examiner's determinations. The Examiner finds Doi's terminal receives, from the server system, a Uniform Resource Identifier (URI) location to download content and then "inquire[s] of the second server" (claim 4) to download content. Final Act. 21. The Examiner finds Ruppert's download server system (201) and EGM suggest to "inquire . . . the existence[] of the

renewal of the download information." *Id.* at 22 (citing Ruppert ¶ 145). Thus, the Examiner proposes to add Ruppert's noted teachings (*see supra* 17–18) to the communications between Doi's terminal and the URI location (second server). In Doi's resulting invention, the terminal would inquire the URI's server about the availability of the content (i.e., would request the content) before downloading and would thus "inquire of the second server the existence[] of the renewal of the download information" (claim 4).

Claims 8–12 (Doi, Gordon, and Consalus)

Claims 8–12 are rejected as obvious over Doi, Gordon, and Consalus. Claims 8–12 are not argued separately. *See* Appeal Br. 19. Appellant argues only that they depend from claim 6 (*id.*), which is also not separately argued (*id.* at 17). Appellant argues only that claim 6 depends from claim 1. *Id.* As the arguments for claim 1 are not persuasive, we are not persuaded the Examiner erred in rejecting claims 8–12 under § 103.

Claims 13 and 17–19 (Doi, Gordon, and Iwaya)

Claims 13 is not argued separately. Appellant argues only that claim 6 depends from claim 1. Appeal Br. 19, 21. As the arguments for claim 1 are not persuasive, we are not persuaded the Examiner erred in rejecting claim 13 under § 103.

Claim 17 is separately argued. For the reasons below, we are not persuaded the Examiner erred in rejecting claim 17 under § 103. As claims 18 and 19 depend from claim 17, we are also not persuaded the Examiner erred in rejecting claims 18 and 19 under § 103.

Claim 17

Claim 17 recites in disputed part: "control the terminal apparatus to perform operations comprising: . . . determining, by accessing a revision server, a renewal of a download task list comprising one or more download tasks . . . for a user terminal for downloading content; . . . acquiring, by accessing a list server, the download task list." Appeal Br. 20–21.

Appellant contends the Examiner cites Iwaya as suggesting the above claim limitations. Appeal Br. 20. Appellant further contends:

> [T]he [terminal] device [10] of Iwaya et al. receives version information from a [software] server [12a] and uses the version information [to] determine whether to download a newer version of system software. This does not involve accessing a [revision] server and a list server as recited in claim 17. Moreover, Iwaya et al.'s "file list" is generated by the [terminal] device [10] itself—there is no disclosure of downloading this list[.]

Id. at 20–21.

We are persuaded of Examiner error. The Examiner cites Iwaya's patch file provider server (12b) and system software provider server (12a) as respectively suggesting the claimed revision server and list server. Final Act. 32–33; Ans. 16–18. As Appellant argues, the Examiner does not show, as required by the mapping of Iwaya's servers to the claimed servers, that the patch file server ("revision server") is accessed to determine a renewal of a download task list and the software server ("list server") is accessed to acquire the same download task list. The Examiner maps Iwaya's servers to the claimed servers without even addressing whether Iwaya's servers are related by a download task list as above. *See e.g.*, Ans. 13.

We add that the only apparent commonality between Iwaya's servers is that a terminal acquires version information and a list of downloads for each server. Iwaya ¶¶ 81, 93–94. Specifically, the terminal acquires version information from the patch file server, software server, and a content server (12c) to determine a "list of patch files" (Iwaya ¶ 93), a "latest version" of software (*id.* ¶ 81), i.e., a list of one, and a "list of content files" (*id.* ¶ 94) for for download from those servers. The Examiner does not find the patch file server ("revision server") is accessed to determine a renewal of version information or a download list and the software server ("list server") is accessed to acquire the same version information or a download list.

Conclusion

For the foregoing reasons, we sustain the § 103 rejection of claims 1– 5 and 14–16. We do not sustain the § 103 rejection of claims 17–19.

OVERALL CONCLUSION

We affirm the Examiner's decision to reject claims 1–16.[5] We

reverse the Examiner's decision to reject claims 17–19.

DECISION SUMMARY

Claims Rejected	35 U.S.C.	Basis	Affirmed	Reversed
1–5, 14–19	§ 101	Subject Matter Eligibility		1–5, 14–19
1, 5–7, 14–16	§ 103	Doi, Gordon	1, 5–7, 14–16	
2–4	§ 103	Doi, Gordon, Ruppert	2–4	
8–12	§ 103	Doi, Gordon, Consalus	8–12	
13, 17–19	§ 103	Doi, Gordon, Iwaya	13	17–19
Overall Outcome			1–16	17–19

AFFIRMED IN PART

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[5] "The affirmance of the rejection of a claim on any of the grounds specified constitutes a general affirmance of the decision of the examiner on that claim." 37 C.F.R. § 41.50.