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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JENNIFER M. FARVER, JOSHUA GOLDSHLAG,  
DAVID PARMENTER, and TIM WAKELING

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Appeal 2019-005270  
Application 12/959,985  
Technology Center 2100

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Before ALLEN R. MacDONALD, JEREMY J. CURCURI, and  
PHILLIP A. BENNETT, *Administrative Patent Judges*.

MacDONALD, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from a Final Rejection<sup>2</sup> of claims 49–100. Appeal Br. 12. Appellant has cancelled claims 1–48. Appeal Br. 29. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE. We also newly reject claims 49–100 under 35 U.S.C. § 112(b) as being indefinite.

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<sup>1</sup> Appellant identifies the real party in interest as Ab Initio Technology LLC. Appeal Br. 1.

<sup>2</sup> Unless otherwise specified, “Final Act.” is the action mailed Dec. 1, 2017.

CLAIMED SUBJECT MATTER

Claim 49 is illustrative of the claimed subject matter (emphasis, formatting, and bracketed material added):

49. A method of processing data, the method including
- [A.] presenting, in a first user interface of a first program, a development environment configured to receive information about one or more data processing programs;
  - [B.] receiving input in the first user interface, and, based on the received information and input, generating one or more structured documents;
  - [C.] storing the one or more structured documents in tangible computer-readable data storage media;
    - [i.] the one or more structured documents representing a specification defining a second user interface that enables a user of the second user interface to configure one or more data processing programs;
    - [ii.] the one or more structured documents including
      - (1) identification of user interface elements to be presented in the second user interface,
      - (2) variables defining characteristics of the user interface elements,
      - (3) identification of a data processing program *capable of being parameterized*, wherein the data processing program includes processing steps to be executed by a computer system,
      - (4) identification of one or more parameters to be used in parameterizing the data processing program to generate a parameterized instance of at least part of the data processing program, wherein the parameterized instance may be used to process input data received from at least one data source, and wherein the parameters affect execution of processing of the input data;

- [D.] executing *the second program*;
- [E.] providing the specification to the second program;
- [F.] instantiating the second user interface by the second program, including, based on the specification,
  - [i.] displaying at least one user interface element that enables a user to affect a value of at least one parameter, and
  - [ii.] displaying an interactive visualization of one or more parameters or variables related to the data processing program;
- [G.] based on the value of that one parameter, generating a parameterized instance of at least part of the data processing program;
- [H.] executing the parameterized instance on input data to produce processed data, wherein the processed data may be intermediate data or output data; and
- [I.] displaying display data, based on at least some of the processed data, in the second user interface.

### REFERENCES<sup>3</sup>

The Examiner relies on the following references:

Name	Reference	Date
Wholey, III et al.	US 7,164,422 B1	Jan. 16, 2007
Fowler	US 2008/0082959 A1	Apr. 3, 2008

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<sup>3</sup> All citations herein to patent and pre-grant publication references are by reference to the first named inventor only.

## REJECTIONS

### A.

The Examiner rejects claims 49–100 under 35 U.S.C. § 103 as being unpatentable over the combination of Fowler and Wholey. Final Act. 6–13.

We select claim 49 as the representative claim for this rejection. The contentions discussed herein as to claim 49 are determinative as to this rejection. Therefore, we do not address the details of the merits of the 35 U.S.C. § 103 rejection of claims 50–100 further herein.

### B.

The following grounds of rejection . . . have been withdrawn by the [E]xaminer.

The [Examiner's] rejection of claims 55–56, 58, 68–69, 73, 86, and 98 under 35 U.S.C. § 112(b) is withdrawn.

The [Examiner's] rejection of claims 49–100 under 35 U.S.C. § 101 is withdrawn.

Ans. 3.

## PROSECUTION HISTORY

We limit this history to the rejections based on 35 U.S.C. §§ 102 and 103. Even this limited prosecution history is complex as there were eight (8) Office Actions each responded to by Appellant with a significant amendment to the pending claims. Claims 49–100 are on appeal and are rejected under 35 U.S.C. § 103 using a reference combination unique to the last Office Action. Claim 49 was present only in the last two (2) Office Actions, and claims 50–100 were present only in that last Office Action.

1. On December 3, 2010, U.S. Patent Application 12/959,985 was filed containing claims 1–29, and claiming benefit to U.S. Provisional Application 61/286,293 filed December 14, 2009.

2. On September 19, 2012, the Examiner mailed a non-final rejection rejecting claims 1–15, 17, 28, and 29, under 35 U.S.C. § 102 based on Hudson (US 2008/0270920 A1), and rejecting claims 16 and 18–27 under 35 U.S.C. § 103 based on Hudson in view of Engels (US 2007/0233655 A1).
3. On December 17, 2012, Appellant filed an amendment (amending all independent claims) and request for reconsideration.
4. On February 5, 2013, the Examiner mailed a final rejection again rejecting claims 1–15, 17, 28, and 29, under 35 U.S.C. § 102 based on Hudson, and rejecting claims 16 and 18–27 under 35 U.S.C. § 103 based on Hudson in view of Engels.
5. On August 5, 2013, Appellant filed a request for continued examination (RCE) significantly amending claims 1–29 and adding new claims 30–39.
6. On December 19, 2013, the Examiner mailed a second non-final rejection rejecting claims 1–15, 17–19, and 28–39, under 35 U.S.C. § 102 based on Hudson, rejecting claims 16 and 23–27 under 35 U.S.C. § 103 based on Hudson in view of Engels, and rejecting claims 20–22 under 35 U.S.C. § 103 based on Hudson in view of Kudukoli (US 2001/0020291 A1).
7. On May 12, 2014, Appellant filed an amendment (cancelling claims 28 and 29, significantly amending claims 1–27 and 30–39, and adding new claims 40–43) and request for reconsideration.
8. On August 15, 2014, the Examiner mailed a second final rejection rejecting claims 1–14, 16–27, and 30–43, under 35 U.S.C. § 102 based on Geller (US 5,844,554), and rejecting claim 16 under 35 U.S.C. § 103 based on Geller in view of Olsen (US 2003/0172193 A1).
9. On February 13, 2015, Appellant filed a second request for continued examination (RCE) significantly amending claims 1–27 and 30–43, and adding new claims 44–46.

10. On October 14, 2015, the Examiner mailed a third non-final rejection rejecting claims 1–14, 16–27, and 30–46, under 35 U.S.C. § 103 based on Geller in view of Wholey (US 2007/0011668 A1), and rejecting claim 16 under 35 U.S.C. § 103 based on Geller in view of Wholey '688 in view of Olsen.
11. On March 14, 2016, Appellant filed an amendment (significantly amending claims 1–27 and 30–46, and adding new claim 47) and request for reconsideration.
12. On July 7, 2016, the Examiner mailed a third final rejection rejecting claims 1–27 and 30–47, under 35 U.S.C. § 103 based on Stienhans (US 2005/0257198 A1) in view of Burns (US 2010/0262902 A1).
13. On January 6, 2017, Appellant filed a third request for continued examination (RCE) cancelling claim 34, significantly amending claims 1–27, 30–33, and 35–47, and adding new claims 48–49.
14. On April 10, 2017, the Examiner mailed a fourth non-final rejection rejecting claims 1–27, 30–33, and 35–49, under 35 U.S.C. § 103 based on Fowler (US 2008/0082959 A1).
15. On August 8, 2017, Appellant filed an amendment (cancelling all claims except claim 49, significantly amending claim 49, and adding new claims 50–100) and request for reconsideration.
16. On December 1, 2017, the Examiner mailed a fourth final rejection rejecting claims 49–100 under 35 U.S.C. § 103 based on Fowler in view of Wholey (US 7,164,422 B1).
17. On May 29, 2018, Appellant filed a Notice of Appeal.
18. On December 31, 2018, Appellant filed an Appeal Brief.
19. On May 3, 2019, the Examiner mailed an Examiner's Answer to the Appeal Brief.
20. On June 28, 2019, Appellant filed a Reply Brief.
21. On June 10, 2020, an oral hearing was held before the Patent Trial and Appeal Board.

### NEW GROUND OF REJECTION

Pursuant to our authority under 37 C.F.R. § 41.50(b), we reject claims 49–100 under 35 U.S.C. § 112(b), as being indefinite.

Part D of independent claim 49 recites “the second program” which lacks antecedent basis in claim 49. At the hearing held on June 10, 2020, Appellant’s representative indicated the step of “executing the second program” should read –executing a second program–. For purposes of Appellant’s appeal of the § 103 rejections, we read part D of claim 49 as –executing a second program–. We determine the “dataflow graph execution environment” (Spec. 4:6–5:8) is exemplary of a second program.

Independent claims 77 and 89 contain the same indefiniteness as claim 49. Dependent claims 50–76, 78–88, and 90–100, respectively incorporate by dependency the indefiniteness of claims 49, 77, and 89.

### OPINION

We have reviewed the Examiner’s rejections in light of Appellant’s arguments that the Examiner has erred. Appellant’s contentions we discuss are determinative as to the rejections on appeal. Therefore, Appellant’s other contentions are not discussed in detail herein.

#### A.

The Examiner finds as to above part C.ii.(3) of claim 49:

Fowler discloses a method of processing data, the method including

...

(3) identification of a data processing program *capable of being parameterized [para 0032-0034, parameterisable specification data]*, wherein the data processing program



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includes processing steps to be executed by a computer system  
[para 0018, 0026, specify pattern including instructions],

Final Act. 4–5.

B.

Appellant contends that the Examiner erred in rejecting claim 49 under 35 U.S.C. § 103 because:

Fowler did not suggest structured documents representing a specification defining a second user interface that includes identification of a data processing program **capable of being parameterized**, as recited in Appellant’s Claim 49.

Appeal Br. 16.

C.

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.* We conclude the Examiner’s analysis fails to meet this standard because the rejections do not adequately explain the Examiner’s findings of fact.

We agree with the Examiner that Fowler discloses “one or more structured documents representing a specification defining a second user interface [para 0010, 0015-0020, generate further specification data based on original specification and input].” Final Act. 6. However, we agree with Appellant that the language of claim 49 requires “identification of a data

processing program capable of being parameterized,” and we disagree with the Examiner’s reasoning (Final Act. 7 (repeating the page 22 reasoning of the April 10, 2017 Non-Final Action)) that Fowler (paragraphs 18, 32–43, 26) without more is sufficient to show the argued claim limitation.

We conclude, consistent with Appellant’s arguments that there is insufficient articulated reasoning to support the Examiner’s finding that Fowler discloses the argued “identification of a data processing program capable of being parameterized” claim limitation. However, we find that Wholey does disclose “identification of a data processing program capable of being parameterized,” at figures 14–16 and column 15, line 16 through column 16, line 12. Wholey also discloses that these parameters are provided to the program in a parameter grid and presented in a user interface (column 9, lines 49–50).

We leave it to the Examiner to determine the determine the appropriateness of any subsequent rejection under 35 U.S.C. § 103 based on (1) substituting a structured document representing a specification as in Fowler for the “parameter grid” of Wholey and (2) using such a structured document to additionally define Wholey’s user interface for presenting direct entry runtime parameters to a user (the user interface elements and variables disclosed by Wholey at column 9, line 49 through column 10, line 52).

We conclude, consistent with Appellant’s arguments that there is insufficient articulated reasoning to support the Examiner’s findings that Fowler discloses, “identification of a data processing program capable of being parameterized,” as required by claim 49. Therefore, we conclude that there is insufficient articulated reasoning to support the Examiner’s final

conclusion that claim 49 would have been obvious to one of ordinary skill in the art at the time of Appellant's invention.

D.

Although we do not address the individual merits of dependent claims 50–76, 78–88, and 90–100 further herein, we note that we agree with many of Appellant's numerous arguments that Fowler is lacking. However, as above we find the Wholey reference (assigned to the present real party in interest) potentially discloses or renders obvious many of these claim limitations. Again, we leave it to the Examiner to determine the appropriateness of any rejection under 35 U.S.C. § 103 of claims 50–76, 78–88, and 90–100 over the combination of Wholey in view of Fowler. We agree with the Examiner that the Wholey and Fowler references are each highly relevant, just not in the Fowler in view of Wholey format used by the Examiner.

CONCLUSION

The Appellant has demonstrated the Examiner erred in rejecting claims 49–100 as being unpatentable under 35 U.S.C. § 103.

The Examiner's rejection of claims 49–100 as being unpatentable under 35 U.S.C. § 103 is **reversed**.

We newly reject claims 49–100 under 35 U.S.C. § 112(b) as being indefinite.

DECISION SUMMARY

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>	<b>New Ground</b>
49-100	103	Fowler, Wholey		49-100	
49-100	112(b)	Indefiniteness			49-100
<b>Overall Outcome</b>				49-100	49-100

TIME PERIOD FOR RESPONSE

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b). 37 C.F.R. § 41.50(b) provides “[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review.”

37 C.F.R. § 41.50(b) also provides that the Appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new Evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner. . . .

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same Record. . . .

Further guidance on responding to a new ground of rejection can be found in the Manual of Patent Examining Procedure § 1214.01.

REVERSED; 37 C.F.R. 41.50(b)