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ETorch, Inc. 225 West Washington, Suite 1150 Chicago, IL 60606			HUSSAIN, TAUQIR	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte PAUL EVERTON

Appeal 2019-005699
Application 15/872,078
Technology Center 2400

Before JAMES R. HUGHES, JOYCE CRAIG, and
MATTHEW J. McNEILL, *Administrative Patent Judges*.

CRAIG, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1–14. *See* Final Act. 1. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm-in-part.

¹ We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Etorch, Inc. Appeal Br. 1.

CLAIMED SUBJECT MATTER

The invention relates to a system for email fraud prevention. Spec. ¶ 3. Specifically, the system includes a brand recognizer that may analyze email content with “machine vision” techniques. *Id.* ¶ 14. If the brand recognizer detects that an image in an email is associated with a particular brand, but determines that the email sender is not authorized to send emails on behalf of that brand, the email may be routed to a quarantine. *Id.* ¶ 17. A network administrator may then inspect the email to either confirm it was a phishing email or mark it as a false positive. *Id.* ¶ 18. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A system comprising:

processing circuitry, storage circuitry, and networking circuitry of a mail transfer agent, wherein:

the storage circuitry holds a database;

the networking circuitry is operable to receive, via a network connection, an email message;

the processing circuitry is operable to analyze the email message to detect an image present in the email message; and

the processing circuitry is operable to:

determine, based on one or more records of the database, that the detected image is associated with a particular brand; and

process the email message based on whether one or more characteristics of the email message are associated with the particular brand in the database.

REJECTIONS²

Claims 1–4 stand rejected under 35 U.S.C. § 102(a)(2) as anticipated by Gammage et al. (US 2008/0091765 A1; published Apr. 17, 2008) (“Gammage”). Final Act. 15–16.

Claims 5, 6, 8, and 10–14 stand rejected under 35 U.S.C. § 103 as unpatentable over Gammage and Dinkin (US 2005/0050150 A1; published Mar. 3, 2005). Final Act. 17–19.

Claim 7 stands rejected under 35 U.S.C. § 103 as unpatentable over Gammage and Maylor et al. (US 2017/0078321 A1; published Mar. 16, 2017) (“Maylor”). Final Act. 19–20.

Claim 9 stands rejected under 35 U.S.C. § 103 as unpatentable over Gammage and Buss et al. (US 2016/0180468 A1; published Jun. 23, 2016) (“Buss”). Final Act. 20–21.

ANALYSIS

Rejection of Claims 1–4 Under 35 U.S.C. § 102(a)(2)

Appellant contends that Gammage does not disclose the claim 1 limitation

determine, based on one or more records of the database, that the detected image is associated with a particular brand; and process the email message based on whether one or more characteristics of the email message are associated with the particular brand in the database.

² The Examiner withdrew the rejection of claims 1–14 under 35 U.S.C. § 101 as directed to patent-ineligible subject matter. Ans. 3. In the event of further prosecution, the Examiner may wish to reconsider, under the USPTO’s 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019) (“2019 Revised Guidance”), whether the claims are directed to an abstract idea, without significantly more.

Appeal Br. 6.

The Examiner found that Gammage discloses the disputed limitation. *See* Final Act. 15–16 (citing Gammage, Fig. 1, ¶ 30). The Examiner clarified, in an Advisory Action dated January 7, 2019, that the claim term “brand” can be defined as a “kind, grade, or make, as indicated by a stamp, trademark, or the like.” Advisory Act. 3. In the Answer, the Examiner asserted that a “particular brand can be interpreted as a parameter/indicator.” Ans. 5.

We agree with Appellant that the Examiner erred. We begin by concluding that the Examiner’s interpretation of “brand” as “a kind, grade, or make, as indicated by a stamp, trademark, or the like” (Advisory Act. 3) is reasonably broad, as compared to “parameter/indicator,” the interpretation in the Answer, which we conclude is unreasonably broad. *See* Ans. 5. Appellant’s Specification supports the former interpretation by describing a brand content database that “comprise[s] known-good . . . and/or known-bad . . . content associated with various brands (e.g., banks, shippers, retailers, and/or any other brand which may be used as part of a phishing scam)” and “stores logos and/or other images or design marks associated with particular brands.” Spec. ¶ 14. In other words, a “particular brand,” as recited in the claims, is the identity of a business or other entity identifiable by an image, logo, or other mark.

Gammage discloses “an ‘undesired email’ detection, or anti-spam, process 44” that “comprises a statistical token analysis (STA) system, which is a form of a Bayesian filtering system.” Gammage ¶ 29. Gammage further discloses that “STA systems arrange emails into tokens, which are the smallest units for which a statistic is collected” and that “[t]okens can be

words, letters, punctuation marks or any other email component.” *Id.* ¶ 31. But, “in addition to the known tokenization techniques for the text of emails, anti-spam process 44 performs a tokenization and analysis of images in emails in an attempt to recognize undesired emails with image-based messages.” *Id.* ¶ 33. Gammage’s image tokens include “characteristics, features and parameters of the image,” such as “Image dimension tokens” and “Image file size tokens.” *Id.* ¶¶ 36, 43, 44.

Gammage’s STA system thus considers features of images for their statistical relevance as indications of spam email. *See id.* ¶¶ 34–61. But the Examiner has not shown, and we have not found, any disclosure in Gammage that describes determining an association between image features and a particular brand. In other words, Gammage identifies spam email based in part on image features known, with some likelihood, to be associated with spam email in general, not because of any association with an entity that could be identified by the image features—i.e., a particular brand.

For these reasons, we are persuaded that the Examiner erred in finding that Gammage discloses the disputed limitation of claim 1.

Accordingly, we reverse the Examiner’s § 102 rejection of independent claim 1 and dependent claims 2–4, which stand with claim 1.

Because it is dispositive that the Examiner has not shown by a preponderance of evidence that Gammage discloses the disputed limitations, we do not address other issues raised by Appellant’s arguments related to claims 1–4. *See Beloit Corp. v. Valmet Oy*, 742 F.2d 1421, 1423 (Fed. Cir. 1984) (finding an administrative agency is at liberty to reach a decision based on “a single dispositive issue”).

Rejection of Claims 5–14 Under 35 U.S.C. § 103

We review appealed rejections for error based upon the issues identified by Appellant and in light of Appellant’s arguments and evidence. *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential). Appellant does not reference the § 103 rejections in either the Appeal Brief or the Reply Brief. *See* Appeal Br. 1–11; Reply Br. 1–5. Arguments not made are waived. *See* 37 C.F.R. § 41.37(c)(1)(iv) (2017).

In the absence of any specific arguments directed to the § 103 rejections, we *pro forma* sustain the § 103 rejections of claims 5–14.

DECISION

We reverse the decision of the Examiner rejecting claims 1–4, but affirm the decision of the Examiner rejecting claims 5–14.

DECISION SUMMARY

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–4	102	Gammage		1–4
5, 6, 8, 10–14	103	Gammage, Dinkin	5, 6, 8, 10–14	
7	103	Gammage, Maylor	7	
9	103	Gammage, Buss	9	
Overall Outcome:			5–14	1–4

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). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART