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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* EVAN R. KIRSHENBAUM, HENRI J. SUERMONDT,  
GEORGE H. FORMAN, and STEPHANE CHIOCCHETTI

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Appeal 2010-009942  
Application 11/118,178<sup>1</sup>  
Technology Center 2100

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*Before* THU A. DANG, JAMES R. HUGHES, and  
GREGORY J. GONSALVES, *Administrative Patent Judges.*

HUGHES, *Administrative Patent Judge.*

DECISION ON APPEAL

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<sup>1</sup> Application filed April 29, 2005. The real party in interest is Hewlett-Packard Development Company, LP. (App. Br. 1.)

## STATEMENT OF THE CASE

This is an appeal under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 1-25, 27-33, 35, and 37-51. Claims 26, 34, and 36 are canceled. (App. Br. 2.) We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

### *Invention*

Appellants' invention relates generally to the field of a search and confirm mechanism for developing training information to be used for training a categorizer. (Spec. 3-4: ¶ 8.)<sup>2</sup>

### *Representative Claim*

Independent claim 1, reproduced below with the key disputed limitations emphasized, further illustrates the invention:

1. A system, comprising:
  - a data set comprising a plurality of cases;
  - a search engine to receive a query relating to at least one category and to identify at least one case within the data set that matches the query;
  - a confirmation module to receive one of a first indication that the identified at least one case belongs to the category, and a second indication that the identified at least one case does not belong to the category; and
  - a storage to store training information for training a categorizer, *the training information modified in response to the confirmation module receiving one of the first indication and second indication.*

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<sup>2</sup> We refer to Appellants' Specification ("Spec."); Reply Brief ("Reply Br.") filed Apr. 22, 2010; and Appeal Brief ("App. Br.") filed Sept. 18, 2009. We also refer to the Examiner's Answer ("Ans.") mailed Feb. 22, 2010.

*Rejections on Appeal*

1. The Examiner rejects claims 1-6, 9-22, 24, 25, 28-30, 32, 33, 37-39, 41, 42. and 44-51 under 35 U.S.C. § 102 (b) as anticipated by Johnson (U.S. Patent No. 6,418,434 B1, issued July 9, 2002).

2. The Examiner rejects claims 7, 8, and 27<sup>3</sup> under 35 U.S.C. § 103(a) as unpatentable over Johnson and Lyon (U.S. Patent No. 5,903,884, issued May 11, 1999).

3. The Examiner rejects claims 23 and 43 under 35 U.S.C. § 103(a) as unpatentable over Johnson and further in view of Prager (U.S. Patent No. 6,003,027, issued Dec. 14, 1999).

4. The Examiner rejects claims 31 and 35 under 35 U.S.C. § 103(a) as unpatentable over Johnson and Suchter (U.S. Patent No. 6,675,161 B1, issued Jan. 6, 2004).

5. The Examiner rejects claim 40 under 35 U.S.C. § 103 (a) as unpatentable over Johnson and Cohen (U.S. Patent No. 7,184,602 B2, issued Feb. 27, 2007 (filed May 2, 2003)).

*Grouping of Claims*

Based on Appellants' arguments in the Briefs, we will decide the appeal on the basis of representative claims 1, 3, 21, and 51. *See* 37 C.F.R. § 41.37(c)(1)(iv).

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<sup>3</sup> The Examiner rejected claims 7, 8, and 27 together in the Final Office Action mailed December 12, 2008, but omits claim 27 in the second Grounds of Rejection in the Answer (Ans. 30-32) and instead includes claim 27 with the first Ground of Rejection (Ans. 18). We deem this to be harmless error in view of Appellants' response (Reply. Br. 10) and amend the Grounds of Rejection for consistency.

## ISSUE

Based upon our review of the administrative record, Appellants' contentions, and the Examiner's findings and conclusions, we have determined that the following issue is dispositive in this appeal:

Under § 102, did the Examiner err in finding that Johnson describes "a storage to store training information for training a categorizer, *the training information modified in response to the confirmation module receiving one of the first indication and second indication.*"

(emphasis added) within the meaning of independent claim 1?

## FINDINGS OF FACT

We adopt the Examiner's findings in the Answer and the Final Office Action as our own, except as to those findings that we expressly overturn or set aside in the Analysis that follows.

## ANALYSIS

### *Anticipation Rejection*

#### *Claims 1, 2, 4-6, 9-20 and 41-50*

Appellants contend, Johnson fails to disclose "modifying training information for training a categorizer in response to the confirmation module receiving one of the first and second indications recited in claim 1." (Reply Br. 1-5; App. Br. 11.) We disagree for the reasons that follow.

Regarding independent claim 1, we observe that independent claim 1 is an apparatus (system) claim consisting of a data set, search engine, confirmation module, and storage. We construe the "storage" limitation of claim 1 to recite storing modified training information, i.e., data, but this modified data is not positively recited in claim 1. Rather, the "training

information” is modified in response to receipt by the confirmation module of either a first or second indication.

We find that the limitation at issue consists of a statement of intended use and data (non-functional descriptive material) and is not to be given patentable weight. “An[ ]intended use or purpose usually will not limit the scope of the claim because such statements usually do no more than define a context in which the invention operates.” *Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corp.*, 320 F.3d 1339, 1345 (Fed. Cir. 2003).

Although “[s]uch statements often . . . appear in the claim’s preamble,” *In re Stencel*, 828 F.2d 751, 754 (Fed.Cir. 1987), a statement of intended use or purpose can appear elsewhere in a claim. *Id.* The data stored (training information), as well as the data on which modification of the training data may be based (first indication or second indication), constitutes non-functional descriptive material, which merely recites what the information or data represents (the name or label for the data). The acts of modifying and storing training information based on data (first indication, second indication), as well as the structure and functionality of the storage, are the same regardless of what the data constitutes, how the data may be named, or the relationship among the data and do not further limit the claimed invention either functionally or structurally. The informational content of the data thus represents non-functional descriptive material, which “does not lend patentability to an otherwise unpatentable computer-implemented product or process.” *Ex parte Nehls*, 88 USPQ2d 1883, 1889 (BPAI 2008) (precedential). *See Ex parte Curry*, 84 USPQ2d 1272, 1274 (BPAI 2005) (informative) (Fed. Cir. Appeal No. 2006-1003), *aff’d*, (Rule 36) (June 12, 2006) (“wellness-related” data in databases and communicated on

distributed network did not functionally change either the data storage system or the communication system used in the claimed method). *See also In re Ngai*, 367 F.3d 1336, 1339 (Fed. Cir. 2004); *Nehls*, 88 USPQ2d at 1887-90 (discussing non-functional descriptive material). This reasoning is applicable in the present case.

Assuming *arguendo*, that patentable weight is given to the above-mentioned data, we find Appellants' arguments unavailing for the following reasons. We agree with and adopt the Examiner's findings with respect to claim 1. (Ans. 38-39.) In particular, we agree with the Examiner's finding that Johnson discloses a storage that stores training information (training vectors) for training a categorizer. (Ans. 38.) We find that Johnson discloses that the training vectors ("training information") are modified (query/object synthesis modification) as a *proximate result* of corrective action being taken. Fig. 5 shows that the responses are determined (S350), and then the findings are eliminated and ranked. Thus, the response are modified (eliminated and ranked), based on the classification. (Ans. 39; Johnson, col. 5, ll. 15-20.) We observe that the claim language does not indicate *how* the training information is modified. We also observe that Appellants presented similar arguments regarding independent claims 41 and 47 which recite commensurate limitations. (App. Br. 14.) Accordingly, we find Appellants' arguments unavailing for the same reasons discussed above.

Based on this record, we conclude that the Examiner did not err in concluding that Johnson would have disclosed or described the limitation at issue. Accordingly, we affirm the Examiner's rejection of representative

claim 1, independent claims 41 and 47 and dependent claims 2, 4-6, 9-20, 42-46, and 48-50 not separately argued with particularity. (App. Br. 10.)

Claim 3

Appellants argue that Johnson fails to disclose the limitations recited in dependent claim 3. (App. Br. 11-12.) We agree with and adopt the Examiner's finding that Johnson discloses a display monitor to display information. (Ans. 7.) Moreover, similar to the above discussion, Appellants' arguments are directed to displayed *data* ("information associated with the identified cases"). (App. Br. 12.) The data displayed on the monitor does not alter the structure or function of the display monitor. Therefore, the information associated with the identified cases is non-functional descriptive material.

Based on this record, we conclude that the Examiner did not err in rejecting dependent claim 3. Accordingly, we affirm the Examiner's rejection of claim 3.

Claims 21, 22, 24, 25, 28-30, 32, 33, and 37-39

Appellants contend that Johnson does not teach modifying training information for training a categorizer in response to receiving the indications of which cases in a first group belong to the first category, where the first group of cases is identified based on matching to a received query relating to at least a first category, as recited in independent claim 21. (Reply Br. 8; App. Br. 12.) We agree with and adopt the Examiner's findings with respect to claim 21. (Ans. 15-16, 41-42.)

The Examiner determined that Johnson discloses that the training vectors ("training information") are modified as a *proximate result* (Ans. 16) of the corrective action being taken on the received responses. (*Id.*, 41-42.)

Appellants contend that the corrective action in step S375 of Johnson is a request for other documents and, according to Appellants, the Examiner has not shown how the corrective action modifies the training vectors. (Reply Br. 8.) We observe that Appellants do not respond to the Examiner's specific findings that the training vectors are modified as a *proximate result* of the aforementioned corrective action of the received responses.

Based on this record, we conclude that Appellants have not shown the Examiner erred in rejecting representative claim 21. Accordingly, we affirm the Examiner's rejection of claim 21 and claims 22, 24, 25, 28-30, 32, 33, and 37-39 not argued with particularity.

Claim 51

Appellants contend that Johnson fails to disclose a "confirmation module" as claimed. (Reply Br. 9-10; App. Br. 14-15.) We observe that independent claim 51 is an apparatus (system) claim that comprises a display monitor and storage. Therefore, similar to the arguments regarding claim 1 *supra*, we conclude that Appellants' arguments regarding the confirmation module are directed to non-functional descriptive material and statements of intended use because the argued limitations do not alter the function or structure of either the display monitor or storage. We agree with and adopt the Examiner's findings with respect to claim 51. (Ans. 27-28, 44-45.) In addition, we do not find that the Examiner conceded that Johnson failed to disclose a positive training set of cases, as alleged by Appellants. (App. Br. 15.) The Examiner determined that Johnson disclosed this limitation. (Ans. 45.)

Further, the acts of modifying the positive training set of cases in response to receiving the first indications and modifying the negative

training sets in response to receiving the second indications, as well as the structure and functionality of the storage, are the same regardless of what the data constitutes, how the data may be named, or the relationship among the data and do not further limit the claimed invention either functionally or structurally. (*See supra* discussion of claim 1.)

*Obviousness Rejections*

*Claims 7, 8, and 27*

Appellants contend *inter alia*:

Moreover, with respect to claim 7, the Examiner conceded that Johnson does not disclose "negative training." 12/12/2008 Office Action at 17. Instead, the Examiner cited Lyon, and in particular, column 10, line 9, a line, which refers to negative training of the classifier. However, there is absolutely no hint given in Lyon of adding the identified at least one case to the negative training set of cases in response to receiving the second indication (that the identified at least one case does not belong to the category). Therefore, claim 7 is further allowable for the foregoing reason.

(App. Br. 16.) Claim 8 is similarly argued. (*Id.*) We find Appellants' arguments unavailing.

Initially, we observe that the Examiner does not concede that Johnson foreclosed the teaching of positive/negative training. (Ans. 31.) Further, in addition to the above, Appellants' argument consists of reciting the claim language and a conclusory statement that the cited references do not disclose the cited limitation and is therefore allowable. (App. Br. 16.) This form of argument does not amount to a separate patentability argument and is unpersuasive of error in the Examiner's rejection. *See Ex parte Belinne*, No. 2009-004693, 2009 WL 2477843 at \*3-4 (BPAI Aug. 10, 2009) (informative); *see also* 37 C.F.R. § 41.37(c)(iv) ("A statement which merely

points out what a claim recites will not be considered an argument for separate patentability of the claim.”). Appellants’ argument “do[es] not . . . explain why the Examiner’s explicit fact finding is in error.” *Belinne*, 2009 WL 2477843 at \*4. Mere attorney arguments and conclusory statements that are unsupported by factual evidence are entitled to little probative value. *In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997); *see also In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984). This is applicable in the present case. Claim 27 is not argued with particularity. Accordingly, dependent claim 27 falls with independent claim 21.<sup>4</sup>

*Claims 23, 31, 35, 40, and 43*

As noted above, claims 23, 31, 35, 40, and 43 are rejected under different combinations of references. Appellants did not separately argue for the patentability of these dependent claims with particularity. Accordingly, we affirm the Examiner’s rejections of claims 23, 31, 35, 40, and 43 for the reasons discussed above.

Reply Brief

The Reply Brief is properly used to respond to points of argument raised by the Examiner in the Answer and not as a means for presenting new arguments. *See Ex parte Borden*, 93 USPQ2d 1473, 1474 (BPAI 2010) (“informative”) (absent a showing of good cause, the Board is not required to address arguments in the Reply Brief that could have been presented in

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<sup>4</sup> According to the record, dependent claim 27 is still pending. However, claim 27 is not included in the Claim Appendix. We view this omission as harmless error, particularly given the fact that Appellants did not particularly urge patentability for claim 27.

the principal Brief). While we have fully considered Appellants' responses in the Reply Brief, we decline to address any new arguments not originally presented in the principal Brief. With respect to all claims before us on appeal, arguments which Appellants could have made but chose not to make have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).

#### CONCLUSIONS OF LAW

Appellants have not shown that the Examiner erred in rejecting claims 1-6, 9-22, 24, 25, 28-30, 32, 33, 37-39, 41, 42, and 44-51 under 35 U.S.C. § 102(b).

Appellants have not shown that the Examiner erred in rejecting claims 7, 8, 23, 27, 31, 35, 40, and 43 under 35 U.S.C. § 103(a).

#### DECISION

We affirm the Examiner's rejection of claims 1-6, 9-22, 24, 25, 28-30, 32, 33, 37-39, 41, 42, and 44-51 under 35 U.S.C. § 102(b)

We affirm the Examiner's rejections of claims 7, 8, 23, 27, 31, 35, 40, and 43 under 35 U.S.C. § 103(a).

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).

AFFIRMED

Vsh