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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DAVID ANDREW GRAVES

Appeal 2014-006264[1]
Application 13/484,895[2]
Technology Center 3600

Before ANTON W. FETTING, TARA L. HUTCHINGS, and AMEE A. SHAH, *Administrative Patent Judges*.

HUTCHINGS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 1–20. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE and enter a NEW GROUND OF REJECTION pursuant to our authority under 37 C.F.R. § 41.50(b)..

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[1] Our decision references Appellant's Appeal Brief ("App. Br.," filed Dec. 2, 2013) and Reply Brief ("Reply Br.," filed Apr. 21, 2014), and the Examiner's Answer ("Ans.," mailed Feb. 19, 2014) and Final Office Action ("Final Act.," mailed Aug. 2, 2013).

[2] Appellant identifies Hewlett-Packard Development Company, LP as the real party in interest. Br. 2.

CLAIMED INVENTION

Appellant's invention relates to calculating a misconduct prediction value for a user account of a remote computing service provider. *See* Spec. ¶ 9.

Claims 1, 8, and 13 are the independent claims on appeal. Claim 1, reproduced below, is illustrative of the subject matter on appeal:

> 1. A non-transitory machine-readable storage medium encoded with instructions executable by a processor of [a] computing device, the storage medium comprising instructions to:
>
> acquire payment data corresponding to a method of payment for consumption of a plurality of resources of a remote computing service provider in connection with a user account of the remote computing service provider;
>
> determine a degree to which resource consumption values of a misconduct utilization profile correspond to respective levels of consumption of the plurality of resources of the remote computing service provider by an application provided to the remote computing service provider in connection with the user account; and
>
> calculate a misconduct prediction value for the user account based on the acquired payment data and the determined degree to which the resource consumption values of the misconduct utilization profile correspond to the respective levels of consumption.

REJECTIONS

Claims 1–3 are rejected under 35 U.S.C. § 103(a) as unpatentable over Mityagin (US 2009/0054123 A1, pub. Feb. 26, 2009) and Hillmer (US 2003/0097330 A1, pub. May 22, 2003).

Claim 4 is rejected under 35 U.S.C. § 103(a) as unpatentable over Mityagin, Hillmer, and Lee (US 2002/0099649 A1, pub. July 25, 2002).

Claims 5 and 6 are rejected under 35 U.S.C. § 103(a) as unpatentable over Mityagin, Hillmer, and Maruyama (US 2005/0204140 A1, pub. Sept. 15, 2005).

Claim 7 is rejected under 35 U.S.C. § 103(a) as unpatentable over Mityagin, Hillmer, Maruyama, and Lee.

Claims 18 and 19 are rejected under 35 U.S.C. § 103(a) as unpatentable over Mityagin, Hillmer, and Broder (US 2008/0147456 A1, pub. June 19 2008).[3]

Claims 8, 9, and 20 are rejected under 35 U.S.C. § 103(a) as unpatentable over Mityagin, Hillmer, and Maruyama.

Claims 10–12 are rejected under 35 U.S.C. § 103(a) as unpatentable over Mityagin, Hillmer, Maruyama, and Broder.

Claims 13 is rejected under 35 U.S.C. § 103(a) as unpatentable over Mityagin and Maruyama.

Claims 14 is rejected under 35 U.S.C. § 103(a) as unpatentable over Mityagin, Maruyama, Hillmer, and Lee.[4]

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[3] Claims 18 and 19 ultimately depend from claim 2. The rejection heading for claims 18 and 19 incorrectly identifies these claims as unpatentable over Mityagin and Maruyama "as applied to Claim 2" in view of Broder. Final Act. 17. But claim 2 is rejected over Mityagin and Hillmer, and the Examiner's findings in rejecting claims 18 and 19 relate to the Mityagin, Hillmer, and Broder references. *Id.* at 17–20. Thus, we treat claims 18 and 19 as rejected over Mityagin, Hillmer, and Broder.

[4] Claim 14 depends from claim 13. The rejection heading identifies claims 13 and 14 as unpatentable over Mityagin and Maruyama. Final Act. 30. But in the statement of rejection for claim 14, the Examiner acknowledges that Mityagin and Maruyama fail to disclose certain limitations recited in claim 14, and the Examiner relies on Hillmer and Lee to cure the deficiency. *See id.* at 33–34. Thus, we treat claim 14 as rejected over Mityagin, Maruyama, Hillmer, and Lee.

Claim 15 is rejected under 35 U.S.C. § 103(a) as unpatentable over Mityagin, Maruyama, Hillmer, Lee, and Luk (US 7,813,944 B1, iss. Oct. 12, 2010).[5]

Claims 16 and 17 are rejected under 35 U.S.C. § 103(a) as unpatentable over Mityagin, Maruyama, and Broder.

ANALYSIS

We are persuaded by Appellant's argument that the Examiner erred in rejecting independent claim 1 under 35 U.S.C. § 103(a) because Mityagin and Hillmer do not disclose or suggest

> determin[ing] a degree to which resource consumption values of a misconduct utilization profile correspond to respective levels of consumption of the plurality of resources of the remote computing service provider by an application provided to the remote computing service provider in connection with the user account,

as recited in independent claim 1. App. Br. 9–13; *see also* Reply Br. 6–10. The Examiner relies on paragraphs 6, 36, 42–47, 50, 53, 62–64, and 70–73 of Mityagin as suggesting the argued limitation. *See* Final Act. 3–4. And the Examiner relies on paragraphs 47–50 of Hillmer as disclosing the argued limitation. *Id.* at 4. However, we agree with Appellant that there is nothing in any of the cited paragraphs that discloses or suggests the argued limitation.

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[5] Claim 15 depends from claim 14. The rejection heading identifies claim 15 as being rejected over Mityagin, Lee, and Luk. Final Act. 34. But claim 14 was rejected over Mityagin, Maruyama, Hillmer, and Lee. Thus, we treat claim 15 as rejected over Mityagin, Maruyama, Hillmer, Lee, and Luk.

Mityagin is related to systems and methods to collect information through collaborative computer games that exploit human contextual inference and reward game participants. Mityagin ¶ 1. Mityagin discloses that to compel players to participate in the game, and thus, generate information relevant to a task, players receive rewards of monetary value. *Id.* ¶ 6. Fraud mitigation, thus, is necessary to prevent fraudulent accumulation of points and illegitimate claim rewards. *Id.* The game platform includes a task component, a game facilitation component, a scoring component, and a fraud component, and the game platform is coupled to a rewards component. *Id.* ¶ 36. The fraud component can select a player and employ probes to detect whether the player is a robot instead of a legitimate player. *Id.* ¶ 43.

The Examiner takes the position that rewards/points earned by players for participating in a game, as described by Mityagin, constitutes the claimed "plurality of resources of [the] remote computing service provider." Final Act. 3 ("a plurality of resources [rewards/points]"). However, claim 1 recites that the plurality of resources are consumed "by an application provided to the remote computing service provider in connection with the user account."

In this regard, Appellant's Specification describes that a user uploads an application to the service provider, and the user-provided application, when executing, consumes a variety of remote computing service resources of the remote service provider, such as processing resources, networking resources, and storage resources. *Id.* ¶ 14. The Specification expressly defines "remote computing service provider" as "an entity that sells, rents or otherwise provides remote computing services[.]" *Id.* ¶ 12. And the

Specification expressly defines a processing resource, networking resource, and storage resource as processing, networking, and storage resources required in connection with an application provided to the service provider by the user. *Id.* ¶¶ 22, 32, 33.

Here, Mityagin's monetary rewards are earned by user participation to allow the game platform to collect useful information from the user. But the rewards are not consumed by any application "provided in connection with the user account," as called for in claim 1.

Hillmer does not cure the deficiency of Mityagin. Hillmer relates to a system for detecting fraudulent transactions based on a plurality of transaction parameters received from a vendor representing at least one transaction for one or more commodities between a customer and a vendor. Hillmer Abstract, ¶ 9. Hillmer describes computing a score depending on the propensity of the transacted commodity to be involved in fraud. *Id.* Such parameters may include a frequency of use over a certain period of time. *Id.* ¶ 42. But Hillmer fails to disclose or suggest a plurality of resources of the remote computing service provider are consumed by an application provided to the remote computing service provider in connection with the user account, as required by claim 1.

On this record, the Examiner fails to adequately explain how, and we fail to see how, Hillmer, alone or in combination with Mityagin, discloses or suggests determining levels of consumption of a plurality of resources by an application provided to the remote computing service provider in connection with the user account, let alone

> determin[ing] a degree to which resource consumption values of a misconduct utilization profile correspond to respective levels of consumption of the plurality of resources of

> the remote computing service provider by an application provided to the remote computing service provider in connection with the user account,

as recited in independent claim 1.

In view of the foregoing, we do not sustain the Examiner's rejection of independent claim 1 and the rejections of its dependent claims under 35 U.S.C. § 103(a).

Independent claims 8 and 13 include language substantially similar to the language of claim 1 and stand rejected based on the same erroneous findings. *See* Final Act. 20–23, 30–34. Therefore, we do not sustain the rejections of independent claim 8 and 13 and their dependent claims under 35 U.S.C. § 103(a) for the same reasons set forth with respect to claim 1. We also do not sustain the rejections under 35 U.S.C. § 103(a) of claim 10 and claims 12–21, which depend from claims 1 and 11, respectively.

NEW GROUND OF REJECTION

Claims 1–20 are rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter. We select independent claim 1 as representative of the claims being rejected.

The Supreme Court set forth a framework "for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of [these] concepts." *Alice Corp., Pty. Ltd. v. CLS Bank Intl.*, 134 S. Ct. at 2347, 2355 (2014) (citing *Mayo Collaborative Servs. v. Prometheus Labs.*, Inc., 132 S. Ct. 1289 (2012)). The first step in this analysis is to "determine whether the claims at issue are directed to one of those patent-ineligible concepts." *Id.* (citing *Mayo*, 132 S. Ct. at 1296–97). If so, in the second step, the elements of the claims "individually and 'as an ordered combination"' are considered to determine

whether there are additional elements that "'transform the nature of the claim' into a patent-eligible application." *Id.* (citing *Mayo*, 132 S. Ct. at 1298, 1297). Stated differently, the second step is a "search for an 'inventive concept' — *i.e.*, an element or combination of elements that is 'sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.'" *Id.* (quoting *Mayo*, 132 S. Ct. at 1294).

Appellant's Specification describes the invention as being "relate[d] to calculating a misconduct prediction value." Spec., Abstract. Claim 1 is a Beauregard claim — named after *In re Beauregard*, 53 F.3d 1583 (Fed. Cir. 1995) — that recites a storage medium encoded with instructions to perform the following process: (1) acquiring payment data, (2) determining a degree to which resource consumption values of a misconduct utilization profile correspond to respective levels of consumption of the plurality of resources, and (3) calculating a misconduct prediction value for the user a count.

Here, the subject matter of the claims, as reasonably broadly construed, falls into a familiar class of claims "directed to" a patent ineligible concept. Our reviewing court has held collecting data from multiple data sources, analyzing the data, and displaying the results to be in the realm of abstract ideas. *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016); *Cf. CyberSource Corp. v. Retail Decisions*, Inc., 654 F.3d 1366, 1371 (Fed. Cir. 2011) ("The Court [*Parker v. Flook*, 437 U.S. 584 (1978)] rejected the notion that the recitation of a practical application for the calculation could alone make the invention patentable."). The court also has "treated analyzing information by steps people go through in their minds, or by mathematical algorithms, without more, as

essentially mental processes within the abstract-idea category." *Id.* (collecting cases).

Given that claim 1 is directed to an abstract idea, we next consider whether there is an inventive concept, defined by an element or combination of elements in claim 1, which is significantly more than the abstract idea of updating electronic records. *See Alice*, 134 S. Ct. at 2355 (citation omitted). We see nothing in the subject matter that transforms the abstract idea of calculating a value.

The claim's invocation of a "computing device" with a "storage medium," "processor," as well as "resources" and "remote computing service provider," adds no inventive concept. The computer functionality is generic: storing instructions executable by a processor of a computing device for acquiring payment data for consumption of resources of a remote computing service provider, determining a degree to which resource consumption values of a misconduct utilization profile correspond to consumption of the reources of the remote computing service provider, and calculating a value. There is no algorithm specified. The computers in *Alice* were receiving and sending information over networks, connecting the intermediary to the other institutions involved, and the Court found the claimed role of computers insufficient. *Alice*, 134 S. Ct. at 2358 ("the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention").

Therefore, claim 1 is rejected under 35 U.S.C. § 101. The other independent claims — system claim 8 and method claim 13 — similarly cover claimed subject matter that is judicially-excepted from patent eligibility under § 101. The dependent claims perform calculations based on

data obtained from particular sources, such as IP address of the remote computing service provider, destination IP addresses used in connection with the user account, or a number of network ports open in connection with the user account. But the type of information used does not transform the invention. *See CyberSource Corp.*, 654 F.3d at 1370 ("mere '[data-gathering] step[s] cannot make an otherwise nonstatotory claim statutory").

Therefore, we enter a new ground of rejection of claims 1–20 under 35 U.S.C. § 101.

DECISION

The Examiner's rejections of claims 1–20 under 35 U.S.C. § 103(a) are reversed.

A NEW GROUND OF REJECTION has been entered for claims 1–20 under 35 U.S.C. § 101.

37 C.F.R. § 41.50(b) provides that "[a] new ground of rejection . . . 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 . . . .

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).

REVERSED; 37 C.F.R. § 41.50(b)