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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ZHIDONG LU and JOHN STAUFFER

Appeal 2016-000753
Application 13/192,576
Technology Center 3600

Before ANTON W. FETTING, JOSEPH A. FISCHETTI, and CYNTHIA L. MURPHY, *Administrative Patent Judges*.

MURPHY, *Administrative Patent Judge*.

DECISION ON APPEAL

The Appellants[1] appeal under 35 U.S.C. § 134 from the Examiner's Final Rejection of claims 1, 2, and 5–20. We have jurisdiction over this appeal under 35 U.S.C. § 6(b).

We AFFIRM.

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[1] "The real party in interest in this appeal is True Fit Corporation." (Appeal Br. 4.)

STATEMENT OF THE CASE

According to the Appellants, "[t]his invention relates to determining a likelihood that an item, such as an item of apparel or shoes, will suit a consumer based at least in part on the consumer's previous experiences with one or more other items." (Spec. 1.)

Illustrative Claim

> 1. A method, for use in a computer system comprising at least one computer processor, of determining a likelihood that a subject item will suit a subject consumer, the method comprising:
>
> (A) receiving data describing a plurality of previous experiences by the subject consumer with a plurality of items, each of the plurality of items and the subject item being susceptible to characterization along a plurality of dimensions, the plurality of dimensions comprising a first dimension and a second dimension, the first dimension comprising a size, the second dimension comprising one of a target age range and an ease of fit, each of the plurality of dimensions having a plurality of possible values;
>
> (B) receiving data indicating a value for the first dimension and the second dimension for each of the plurality of items;
>
> (C) based at least in part on the data received in (A) and (B), determining, using the at least one computer processor, whether an item is likely to suit the subject consumer along each of the plurality of dimensions, the determining comprising ascribing greater importance to one of the plurality of previous experiences by the subject consumer with one of the plurality of items than to another of the plurality of previous experiences by the subject consumer with another of the plurality of items; and
>
> (D) based at least in part on the determination in (C), determining, using the at least one computer processor, whether the subject item is likely to suit the subject consumer.

Rejection

The Examiner rejects claims 1, 2, and 5–20 under 35 U.S.C. § 101 as failing to recite patent-eligible subject matter. (Final Action 2.)

ANALYSIS

Independent claim 1 recites "[a] method, for use in a computer system comprising at least one computer processor." (Appeal Br., Claims App.) The claimed method requires four steps: a data-receiving step (A), another data-receiving step (B), a determining step (C), and another determining step (D) that resolves "whether [a] subject item is likely to suit [a] subject consumer." (*Id.*) According to the Appellants, the "meaningful limitations" in independent claim 1 "relate to receiving particular types of information, and analyzing that information in particular ways to determine whether an item is likely to suit a consumer." (*Id.* at 16–17.)

The Examiner determines that independent claim 1 is directed to "assisted shopping" which is a "fundamental economic practice" and, thus, an "abstract idea." (Final Action 2.) The Examiner also determines that the additional elements recited in independent claim 1 amount to "generic computer components" that "perform their basic functions of receiving, storing, processing, and displaying data." (*Id.* at 3.) More succinctly, the Examiner determines that independent claim 1 does not pass muster under the *Alice* test.

With the *Alice* test, there are two steps for distinguishing between an "abstract idea[]" and a "patent-eligible application[]" of an abstract idea. *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2355 (2014). The first step of the *Alice* test is to consider whether the claims at issue are "directed to" an abstract idea. *Id.* If so, the inquiry proceeds to the second

step of the *Alice* test where the elements of the claims are considered "individually and 'as an ordered combination'" to evaluate whether there are additional elements that "'transform the nature of the claim' into a patent-eligible application." *Id.*

With respect to first step of the *Alice* test, the Appellants argue that fundamental economic practices are confined to "financial markets, producing or distributing income or wealth, or the organization or administration of economic system," and something as simple as "assisted shopping" does not qualify as a fundamental economic practice. (Reply Br. 3; *see also* Appeal Br. 11–15.)

We are not persuaded by this argument because it is contrary to Federal Circuit precedent reflecting that less sophisticated financial concepts can also constitute fundamental economic practices. In *In re Smith* 815 F.3d. 816 (Fed. Cir. 2016), for example, the claims on appeal recited a method of conducting a wagering game utilizing a deck of playing cards. *Id.* at 817–18. The Federal Circuit held that the claimed wagering game "compare[d] to other 'fundamental economic practice[s]'" and was "drawn to an abstract idea much like *Alice's* method of exchanging financial obligations and *Bilski's* method of hedging risk." *Id.* at 818–19.

Moreover, as indicated above, the ostensibly meaningful limitations in independent claim 1 are information centric as they relate only to the content of the data received and the analysis thereof. (*See* Appeal Br. 17.) Even absent an economic aspect, a claim that focuses on gathering information of a particular content and analyzing this information in particular ways still falls squarely under the abstract-idea umbrella. In *Electric Power Group, LLC v. Alstom S.A.*, 830 F.3d 1350 (Fed. Cir. 2016), for example, "a large

portion of the lengthy claims [was] devoted to enumerating types of information and information sources available within the power-grid environment," but the Federal Circuit still held that the claims were "directed to an abstract idea." *Id.* at 1354–55. Hence, the limitations listed in independent claim 1 regarding particulars of the received data, and/or details about the analysis/output thereof, do not elevate the claimed method above an abstract idea.

As for the second step of the *Alice* test, the Appellants argue that independent claim 1 contains meaningful limitations that "go far beyond mere instruction to implement" an abstract idea "on a generic computer system." (Appeal Br. 17.)

We are not persuaded by this argument because, as discussed above, these allegedly meaningful limitations relate only to the content of the information received and the analysis thereof. Federal Circuit precedent establishes that merely selecting information (by content or source) for collection, analysis, and/or display does nothing significant to differentiate a process from the information-based category of abstract ideas. In *Electric Power Group,* for example, the Federal Circuit held that "limiting the claims to the particular technical environment of power-grid monitoring" was "insufficient to transform them into patent-eligible applications of the abstract idea at their core." *Id.* at 1354.

The Appellants also advance arguments premised upon the claimed method providing a rooted-in-computer-technology solution to a problem that arises in the realm of computer networks and only in the digital age. (*See* Appeal Br. 17–19; *see also* Reply Br. 6–7.) According to the Appellants, the claimed method "overrides the routine and conventional

sequence . . . triggered by an online purchase transaction" when "a consumer clicks a hyperlink to purchase an item from an online merchant." (Appeal Br. 18.) Also, according to the Appellants, "[t]he sheer number of consumers seeking to make online purchases" necessitates "the use of comput[er] technology." (*Id.* at 19.)

Without even looking at § 101 implications, we are unpersuaded by these arguments because they are not commensurate with the scope of independent claim 1. Independent claim 1 is not restricted to online purchase transactions, does not mention hyperlinking, and does not specify computer components capable of serving a high volume of consumers. (*See* Appeal Br., Claims App.) Claim 1 simply requires certain steps to be performed using "at least one computer processor." (*Id.*)[2]

As for the Appellants' arguments premised upon the principle of preemption (*see* Appeal Br. 15–16; *see also* Reply Br. 4–6), preemption concerns are fully addressed and made moot when, as here, a claim is shown to recite only patent ineligible subject matter under the *Alice* test. "While preemption may signal patent ineligible matter, the absence of complete preemption does not demonstrate patent eligibility." *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015).

Thus, we sustain the Examiner's rejection of independent claim 1 under 35 U.S.C. § 101.

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[2] For this reason alone, independent claim 1 is immediately distinguishable from those at issue in *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014) which recited a "web browser," a "source page," a "first web page," an "active link," an "associated link," and an automatic generation/transmission of a "second web page" to the web browser. *Id.* at 1249–50.

Independent claims 10 and 16 recite data-receiving and determining limitations akin to those recited in independent claim 1. (*See* Appeal Br., Claims App.) The Appellants argue only that "[f]or reasons similar to those discussed above with reference to claim 1," the Examiner's rejection of independent claims 10 and 16 is also improper. (*Id.* at 23–24, 27–28.) As we agree with the Examiner that independent claim 1 does not pass muster under the *Alice* test, we are unpersuaded by these arguments.

Thus, we sustain the Examiner's rejection of independent claims 10 and 16 under 35 U.S.C. § 101.

The rest of the claims on appeal (i.e., claims 2, 5–9, 11–15, and 17–20) depend directly or indirectly from one of the above-discussed independent claims. (*See* Appeal Br., Claims App.) The Examiner determines that the dependent claims are "directed to an abstract idea without adding significantly more to the idea itself." (Answer 6.) Although the Appellants discuss the dependent claims under separate subheadings, they do not advance any substantive arguments beyond those addressed above in our analysis of independent claim 1. (*See* Appeal Br. 20–30.)[3]

Thus, we sustain the Examiner's rejection of dependent claims 2, 5–9, 11–15, and 17–20 under 35 U.S.C. § 101.

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[3] The Appellants allude to possibility that the dependent claims recite additional elements that would alter the outcome of the *Alice* test, but they do not direct our attention to these supposedly significant limitations. (*See* Appeal Br. 20–30.) Moreover, our review of the dependent claims reveals that the recited additional limitations pertain only to particulars of the received data (e.g., claims 5, 6, 8, 11, 12, 15, 18, 19) and/or details about the analysis/ output thereof (e.g., claims 2, 7, 9, 13, 14, 17, 20). (*See id.*, Claims App.) As discussed above, such limitations do little to elevate the status of an abstract idea and/or transform it into a patent-eligible application.

DECISION

We AFFIRM the Examiner's rejection of claims 1, 2, and 5–20.

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