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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DANIEL ALEXANDER BELTRAMO JR.,
NICHOLAS NAVEEN RAU,
and LEON MACK TILLING

Appeal 2016–003327
Application 13/604,195
Technology Center 3600

Before ANTON W. FETTING, AMEE A. SHAH, and
ROBERT J. SILVERMAN, *Administrative Patent Judges*.
FETTING, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE¹

Daniel Alexander Beltramo Jr., Nicholas Naveen Rau, and Leon Mack Tilling (Appellants) seek review under 35 U.S.C. § 134(a) of a final rejection of claims 1–22, the only claims pending in the application on appeal. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b).

¹ Our decision will make reference to the Appellants’ Appeal Brief (“App. Br.,” filed July 30, 2015) and Reply Brief (“Reply Br.,” filed February 9, 2016), and the Examiner’s Answer (“Ans.,” mailed December 9, 2015), and Final Action (“Final Act.,” mailed March 3, 2015).

The Appellants invented a way of online polling of users. Specification para. 2.

An understanding of the invention can be derived from a reading of exemplary claim 1, which is reproduced below (bracketed matter and some paragraphing added).

1. A method comprising:

[1] counting, using a processor, a number of times a first poll is provided for display to a user

with two or more different webpages

in two or more different Internet domains;

and

[2] if the number of times the first poll has been provided for display to the user exceeds a first threshold number of times,

wherein the first threshold number of times is at least one,

selecting, using the processor,

a second poll for display to the user with the two or more different webpages

or

a third webpage different from the two or more different webpages.

The Examiner relies upon the following prior art:

Van Luchene	US 2007/0192179 A1	Aug. 16, 2007
Aviv et al.	US 2009/0018893 A1	Jan. 15, 2009
Peroff et al.	WO 01/33831 A2	May 10, 2001

Claims 1–22 stand rejected under 35 U.S.C. § 101 as directed to non–statutory subject matter.

Claims 21 and 22 stand rejected under 35 U.S.C. § 112(a) as lacking a supporting written description within the original disclosure.

Claims 1–3, 5–11, and 13–22 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Peroff and Van Luchene.

Claims 4 and 12 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Peroff, Van Luchene, and Aviv.

ISSUES

The issues of eligible subject matter turn primarily on whether the claims recite more than abstract conceptual advice as to what a computer is to do without implementation details as to how to do so.

The issues of written description matter turn primarily on whether the Specification supports claims 21 and 22.

The issues of obviousness turn primarily on whether the art applied describes allowing the user who has been at a page before to participate in a different survey.

FACTS PERTINENT TO THE ISSUES

The following enumerated Findings of Fact (FF) are believed to be supported by a preponderance of the evidence.

Facts Related to the Prior Art

Peroff

01. Peroff is directed to conducting an interactive survey over a data communication network. Peroff 1:12–14.
02. Peroff describes allowing a user to participate in a poll if the user has not participated previously and bypassing any poll if the user has participated previously. Peroff 18:22–19:21 and Figure 4.

Van Luchene

03. Van Luchene is directed to conducting survey based qualification of keyword searches. Van Luchene para. 8.

ANALYSIS

Claims 1–22 rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter

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 those concepts. First, [] determine whether the claims at issue are directed to one of those patent-ineligible concepts. [] If so, we then ask, “[w]hat else is there in the claims before us? [] To answer that question, [] consider the elements of each claim both individually and “as an ordered combination” to determine whether the additional elements “transform the nature of the claim” into a patent-eligible application. [The Court] described step two of this analysis as 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.”

Alice Corp., Pty. Ltd. v CLS Bank Int’l, 134 S. Ct. 2347, 2355 (2014) (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012)).

To perform this test, we must first determine whether the claims at issue are directed to a patent-ineligible concept. The Examiner finds the claims directed to displaying a poll to a user which is a form of administering and organizing human activities. Final Act. 6; Ans. 3–4.

While the Court in *Alice* made a direct finding as to what the claims were directed to, we find that this case’s claims themselves and the Specification provide enough information to inform one as to what they are directed to.

The preamble to claim 1 does not recite what it is directed to, but the steps in claim 1 result in selecting which poll to present. The Specification at paragraph 2 recites that the invention relates to online polling of users. Thus, all this evidence shows that claim 1 is directed to presenting a poll.

It follows from prior Supreme Court cases, and *Bilski* (*Bilski v Kappos*, 561 U.S. 593 (2010)) in particular, that the claims at issue here are directed to an abstract idea. The concept of presenting a poll is a fundamental human organizational practice long prevalent in our system of politics. The use of presenting a poll is also a building block of government. Thus, presenting a poll is an “abstract idea” beyond the scope of §101. See *Alice Corp. Pty. Ltd.* at 2356.

Further, claims focusing on data collection, analysis, and display, without any particular inventive technology for performing those functions, are

directed to an abstract idea. *Elec. Power Grp. v. Alstom S.A.*, 830 F.3d 1350, 1353–54 (Fed. Cir. 2016) (holding that claims focused on “collecting information, analyzing it, and displaying certain results of the collection and analysis” are in “a familiar class of claims ‘directed to’ a patent ineligible concept”); *see also In re TLI Commc’ns LLC Patent Litig.*, 823 F.3d 607, 611 (Fed. Cir. 2016); *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1093–94 (Fed. Cir. 2016). Claim 1, unlike the claims found non-abstract in prior cases, uses generic computer technology to perform data analysis and selection and does not recite an improvement to a particular computer technology. *See, e.g., McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1314–15 (Fed. Cir. 2016) (finding claims not abstract because they “focused on a specific asserted improvement in computer animation”). As such, claim 1 is directed to the abstract idea of counting and selecting data.

The remaining claims merely describe selection parameters. We conclude that the claims at issue are directed to a patent-ineligible concept.

The introduction of a computer into the claims does not alter the analysis at *Mayo* step two:

the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention. Stating an abstract idea “while adding the words ‘apply it’” is not enough for patent eligibility. Nor is limiting the use of an abstract idea “to a particular technological environment.” Stating an abstract idea while adding the words “apply it with a computer” simply combines those two steps, with the same deficient result. Thus, if a patent’s recitation of a computer amounts to a mere instruction to “implement[t]” an abstract idea “on . . . a computer,” that addition cannot impart patent

eligibility. This conclusion accords with the preemption concern that undergirds our §101 jurisprudence. Given the ubiquity of computers, wholly generic computer implementation is not generally the sort of “additional feature[e]” that provides any “practical assurance that the process is more than a drafting effort designed to monopolize the [abstract idea] itself.”

Alice Corp. Pty. Ltd., 134 S. Ct. at 2358 (citations omitted).

“[T]he relevant question is whether the claims here do more than simply instruct the practitioner to implement the abstract idea [] on a generic computer.” *Alice Corp. Pty. Ltd.*, 134 S. Ct. at 2359. They do not.

Taking the claim elements separately, the function performed by the computer at each step of the process is purely conventional. Using a computer to count data and select a next step amounts to electronic data processing—one of the most basic functions of a computer. The limitation of “for display” is not a step, but a recitation of intended use, *viz.* an aspiration, which is outside the scope of the claim. All of these computer functions are well-understood, routine, conventional activities previously known to the industry. In short, each step does no more than require a generic computer to perform generic computer functions.

Considered as an ordered combination, the computer components of Appellants’ method add nothing that is not already present when the steps are considered separately. Viewed as a whole, Appellants’ method claims simply recite the concept of presenting a poll as performed by a generic computer. To be sure, the claims recite doing so by advising one to decide whether to display one poll or another depending on whether the viewer has

viewed a poll. But this is no more than abstract conceptual advice on the parameters for such presenting a poll and the generic computer processes necessary to process those parameters, and do not recite any particular implementation.

The method claims do not, for example, purport to improve the functioning of the computer itself. Nor do they effect an improvement in any other technology or technical field. The 19 pages of specification spell out different generic equipment and parameters that might be applied using this concept and the particular steps such conventional processing would entail based on the concept of presenting a poll under different scenarios. They do not describe any particular improvement in the manner a computer functions. Instead, the claims at issue amount to nothing significantly more than an instruction to apply the abstract idea of presenting a poll using some unspecified, generic computer. Under our precedents, that is not enough to transform an abstract idea into a patent-eligible invention. *See Alice Corp. Pty. Ltd.* at 2360.

As to the structural claims, they

are no different from the method claims in substance. The method claims recite the abstract idea implemented on a generic computer; the system claims recite a handful of generic computer components configured to implement the same idea. This Court has long “warn[ed] ... against” interpreting § 101 “in ways that make patent eligibility ‘depend simply on the draftsman’s art.’”

Alice Corp. Pty. Ltd. at 2360.

We are not persuaded by Appellants' argument that the Examiner errs in "overgeneralizing the claims and arguing that overgeneralization is non-statutory instead of addressing the actual language of the claims at issue." App. Br. 10. Appellants conflate the two steps of *Alice*. The first step finds what the claim is directed to. As we find *supra*, the claims are directed to presenting a poll. Appellants' arguments relate to the second step of *Alice*, which looks at the remainder of the claims and the claims as a whole, which we analyze *supra*.

We are not persuaded by Appellants' argument that "the Examiner must start by identifying an abstract idea that is the focus of the claim and gives rise to concerns that a fundamental building block of science or technology is being monopolized." App. Br. 12. The Examiner did so with regard to what is identified and whether the idea is monopolized, and our analysis *supra* does so. The abstract idea need not be a fundamental building block of science or technology, and indeed *Alice* found a fundamental building block of business. The abstract idea need not be a fundamental idea in the sense that a rectangle need not be a square. Rather, as a square is an instance of a rectangle, a fundamental building block is an instance of an abstract idea, and so a showing of a fundamental building block is a tool for showing an abstract idea.

We are not persuaded by Appellants' argument that

While claim 1 recites selecting, using a processor, a second poll for display to the user with two or more different webpages or a third webpage different from the two or more webpages, it is clear that claim 1 does not recite "display[ing] a poll to a user" as inaccurately alleged by the Examiner.

App. Br. 13. This is a non-sequitur. Selecting which poll to present is a form of displaying a poll to a user. While we would agree the claim does not actually include a display step, this makes the claim even more abstract as it results in a decision that is not acted upon within the claim. A decision per se is among the most primitive abstractions.

We are not persuaded by Appellants' argument that "displaying a poll is not an abstract idea. It is an everyday action taken by many websites." App. Br. 14. An everyday action per se is an abstraction absent implementation details, because it is an abstract conceptual idea in common practice.

We are not persuaded by Appellants' argument that claim 1 does not preempt all ways of presenting a poll. That the claims do not preempt all forms of the abstraction or may be limited to the abstract idea in a particular setting do not make them any less abstract. *See OIP Technologies, Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1360–1361 (2015).

We are not persuaded by Appellants' argument that the claims recite specific structure. Reply Br. 7–8. Appellants refer to programming implied by the steps. But this programming is directed to an abstract idea as we find *supra*. *See Elec. Power Grp. v. Alstom S.A.*, 830 F.3d at 1353–54, *id*.

Appellants further argue (Reply Brief 11) that the asserted claims are akin to the claims found patent-eligible in *DDR Holdings, LLC v. Hotels.com, L.P.* 773 F.3d 1245 (Fed. Cir. 2014). In *DDR Holdings*, the Court evaluated the eligibility of claims "address[ing] the problem of retaining website visitors that, if adhering to the routine, conventional functioning of Internet hyperlink protocol, would be instantly transported away from a host's website after 'clicking' on an

advertisement and activating a hyperlink.” *Id.* at 1257. There, the Court found that the claims were patent eligible because they transformed the manner in which a hyperlink typically functions to resolve a problem that had no “pre-Internet analog.” *Id.* at 1258. The Court cautioned, however, “that not all claims purporting to address Internet-centric challenges are eligible for patent.” *Id.* For example, in *DDR Holdings* the Court distinguished the patent-eligible claims at issue from claims found patent-ineligible in *Ultramercial*. *See id.* at 1258–59 (citing *Ultramercial*, 772 F.3d at 715–16). As noted there, the *Ultramercial* claims were “directed to a specific method of advertising and content distribution that was previously unknown and never employed on the Internet before.” *Id.* at 1258 (quoting *Ultramercial*, 772 F.3d at 715–16). Nevertheless, those claims were patent ineligible because they “merely recite[d] the abstract idea of ‘offering media content in exchange for viewing an advertisement,’ along with ‘routine additional steps such as updating an activity log, requiring a request from the consumer to view the ad, restrictions on public access, and use of the Internet.’” *Id.*

Appellants’ asserted claims are analogous to claims found ineligible in *Ultramercial* and distinct from claims found eligible in *DDR Holdings*. The ineligible claims in *Ultramercial* recited “providing [a] media product for sale at an Internet website;” “restricting general public access to said media product;” “receiving from the consumer a request to view [a] sponsor message;” and “if the sponsor message is an interactive message, presenting at least one query to the consumer and allowing said consumer access to said media product after receiving a response to said at least one query.” *Ultramercial*, 772 F.3d at 712. Similarly, Appellants’ asserted

claims recite counting data and deciding a logical branch. This is precisely the type of activity found ineligible in *Ultramercial*.

Because the rejection under 35 U.S.C. § 101 based on an abstract idea is dispositive, we do not reach the cumulative rejection based on transitory signals.

Claims 21 and 22 rejected under 35 U.S.C. § 112(a) as lacking a supporting written description within the original disclosure

The Examiner finds “The applicant has newly added in the limitation of ‘counting the number of times the first poll is provided for display to the user based on the number of the requests’ into claim 21. There is no support in the original disclosure for this limitation.” Final Act. 7. Both claims ultimately depend from claim 1 and were entered in an amendment filed December 22, 2014. Appellants cite Specification 35–38 and 42 as supporting this limitation. App. Br. 8. These portions describe counting the number of times the first poll is provided for display to the user. As this is a referral back to claim 1, which is not included in the rejection, the current rejection is not predicated on this preface.

The Examiner goes on to find

At the very least the applicant has support for counting the number of times a poll is provided for display. However, the applicant does not have support for that specifically being based on a number of requests and the number of times a first poll is provided for display.

Ans. 12. This finding suggests the Examiner interprets the “based on” phrase as modifying “counting.” Looking back to claim 1, it is apparent that “based on” modifies “is provided” as supported by claim 1.

Claims 1–3, 5–11, and 13–22 rejected under 35 U.S.C. § 103(a) as unpatentable over Peroff and Van Luchene

We are persuaded by Appellant’s argument that the references fail to describe limitation [2], particularly selecting a second poll if the number of times the first poll has been provided exceeds at least one. App. Br. 20–22. Examiner cites Peroff 18:22–19:5 as describing allowing the user who has been there before to participate in a different survey. Ans. 19–20. This is incorrect. Peroff describes such a user as being skipped. FF 02.

Claims 4 and 12 rejected under 35 U.S.C. § 103(a) as unpatentable over Peroff, Van Luchene, and Aviv

These claims depend from those in the above rejection.

CONCLUSIONS OF LAW

The rejection of claims 1–22 under 35 U.S.C. § 101 as directed to non-statutory subject matter is proper.

The rejection of claims 21 and 22 under 35 U.S.C. § 112(a) as lacking a supporting written description within the original disclosure is improper.

The rejection of claims 1–3, 5–11, and 13–22 under 35 U.S.C. § 103(a) as unpatentable over Peroff and Van Luchene is improper.

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The rejection of claims 4 and 12 under 35 U.S.C. § 103(a) as unpatentable over Peroff, Van Luchene, and Aviv is improper.

DECISION

The rejection of claims 1–22 is affirmed.

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) (2011).

AFFIRMED