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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* MICHAEL P. WHITMAN

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Appeal 2016-003856  
Application 13/910,262<sup>1</sup>  
Technology Center 3600

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Before CARL W. WHITEHEAD JR., ADAM PYONIN and  
JEFFREY S. SMITH, *Administrative Patent Judges*.

WHITEHEAD JR., *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant is appealing the Examiner's Final rejection of claims 1–20 under 35 U.S.C. § 134(a). Appeal Brief 2. We have jurisdiction under 35 U.S.C. § 6(b) (2012).

We AFFIRM.

*Introduction*

The invention is directed to “tracking of information provided by medical devices including electro-mechanical surgical devices.”

Specification, ¶ 3.

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<sup>1</sup> Appellant identifies Covidien LP as the real party in interest. Appeal Brief 1.

*Illustrative Claim*

Claim 1 is illustrative below:

1. A wireless medical communication system for tracking medical information, comprising:

at least one server;

a plurality of wireless handheld surgical staplers for automatically and wirelessly transmitting/receiving the medical information to/from the at least one server upon actuation of at least one of the plurality of wireless handheld surgical staplers to perform a surgical procedure on a patient; and

a hospital or medical care environment information network configured to wirelessly communicate (i) directly with the at least one server or (ii) directly with the plurality of wireless handheld surgical staplers;

wherein the medical information collected by the plurality of wireless handheld surgical staplers is generated in real-time in response to interaction between at least one of the plurality of wireless handheld surgical staplers and tissue; and

wherein the medical information collected is automatically and wirelessly integrated with patient data located in the hospital or medical care environment information network in order to create an updated patient profile.

*Rejections on Appeal*

Claims 1–20 stand rejected under 35 U.S.C. §101 because the claimed invention is directed to nonstatutory subject matter. Final Action 2–3.

Claims 1–7, 9–12 and 14–19 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Malackowski (US Patent Application

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Publication 2001/0034530 A1; published October 25, 2001), Hooven (US Patent 5,383,880; issued January 24, 1995) and Reeves (US Patent 7,778,848 B1; issued August 17, 2010). Final Action 3–9.

Claims 8, 13 and 20 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Malackowski, Hooven, Reeves and Tierney (US Patent 6,331,181 B1; issued December 18, 2001). Final Action 9–10.

### ANALYSIS

Rather than reiterate the arguments of Appellant and the Examiner, we refer to the Appeal Brief (filed March 24, 2016), the Final Rejection (mailed November 5, 2015) and the Answer (mailed September 8, 2016) for the respective details.

#### 35 U.S.C. §101 rejection

The U. S. Supreme Court provides a two-step test for determining whether a claim is directed to patent-eligible subject matter under 35 U.S.C. § 101.<sup>2</sup> In the first step, we determine whether the claims are directed to one or more judicial exceptions (i.e., law of nature, natural phenomenon, and abstract ideas) to the four statutory categories of invention (i.e., process, machine, manufacture, and composition of matter). *Alice*, 124 S.Ct. at 2354 (citations omitted) (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S.Ct. 1289, 1296–97 (2012), “*Mayo*”). Prior cases are replete with decisions finding software that organizes and manipulates data, similar to that recited by the present claims, to be directed to ineligible abstract ideas. *See, e.g., Intellectual Ventures I LLC v. Erie Indem. Co.*, 850 F.3d 1315,

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<sup>2</sup> *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 124 S.Ct. 2347, 2354 (2014) (hereinafter “*Alice*”).

1327 (Fed. Cir. 2017) (“[C]reating an index and using that index to search for and retrieve data.”); *Elec. Power Group v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016) (Collection, manipulation, and display of data.); *Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1370 (Fed. Cir. 2015) (Customizing information and presenting it to users based on particular characteristics.); *Content Extraction and Transmission LLC v. Wells Fargo Bank, National Ass'n*, 776 F.3d 1343, 1347 (Fed. Cir. 2014) (“[C]ollecting data, [] recognizing certain data within the collected data set, and [] storing that recognized data in a memory”).

In the second step, we “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.” *Id.* (citing *Mayo*, 132 S.Ct. at 1297–98). In other words, the second step is to “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.* (citing *Mayo*, 132 S.Ct. at 1294).

Appellant argues the 35 U.S.C. § 101 rejection is erroneous because:

[T]he claims recite **processing** of medical information **based on interactions** between tissue and attachments of a plurality of wireless handheld surgical staplers to allow a surgeon to **perform** a surgical stapling procedure on a **patient**. Also, the medical information is integrated with patient data to create an **updated patient profile** automatically and in real-time. Clearly these functions/operations/processes amount to more than an abstract idea.

Appeal Brief 5.

Appellant further argues “the claims do **not** merely organize an **existing** human activity. Instead, the claims recite the **creation** of new medical information (i.e., updated patient profiles) that occurs during a surgical procedure on a patient, in real-time, and to continuously create updated patient profiles as a surgical procedure takes place.” Appeal Brief 6.

We agree with the Examiner’s findings,<sup>3</sup> that the claims are directed to a judicially recognized exception as the claims recite an abstract idea,<sup>4</sup> because the claims are directed to data gathering, storing and processing and that claims involving data collection, analysis, and display have been found to be directed to an abstract idea. *See Elec. Power Grp. v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016) (Holding that “collecting information, analyzing it, and displaying certain results of the collection and analysis” are “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).

Further, the claims in the instant application, unlike the claims found non-abstract in prior cases, use generic computer technology to perform data collection, analysis, and display and do 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

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<sup>3</sup> See Answer 4.

<sup>4</sup> See *Alice Corp. v. CLS Bank International*, 134 S.Ct. 2347, 2355–56 (2014).

computer animation.”); *compare* Specification ¶¶ 4–5, 17. As such, we agree that the other recitations in the claims do not amount to significantly more than the abstract idea.

In any case, as we stated above, our reviewing court has repeatedly held that claims directed to data storage and analysis such as the instant claims are directed to abstract ideas. *See, e.g., Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1349 (Fed. Cir. 2015); *OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1363 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 701 (2015); *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat’l Ass’n*, 776 F.3d 1343, 1347 (Fed. Cir. 2014); *Digitech Image Techs., LLC v. Elecs. for Imaging, Inc.*, 758 F.3d 1344, 1351 (Fed. Cir. 2014); *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1370 (Fed. Cir. 2011).

Subsequently, we sustain the Examiner’s 35 U.S.C. §101 rejection of claims 1–20.

### 35 U.S.C. §103 rejection

Appellant argues that the obviousness rejection is improper because, “Malackowski, Hooven, and Reeves do not disclose ‘wirelessly integrating patient data’ with medical information stored in ‘hospital or medical care environment information network’ in order to ‘create an updated patient profile,’ as recited in amended independent claim 1.” Appeal Brief 8. Appellant contends the Examiner’s findings that Reeves (column 3, lines 38–47; claim 11) teaches updating the patient’s profile is erroneous. Appeal Brief 8; see Final Action 4.

Appellant argues:

Nowhere does this portion of Reeves teach or suggest “updating of patient data.” However, claim 11 does teach “updating . . . digital medical records.” Nevertheless, such data is updated to “facilitate emergency medical treatment of the user” of the bodily worn device. In contrast, claim 1 recites integrating medical information collected from surgical devices during a surgical procedure with patient data of a hospital or medical environment network to create updated patient profiles which are fed back into the wireless handheld surgical devices as the surgical procedure takes place in order to influence the surgical procedure in real-time.

Appeal Brief 8.

We do not find Appellant’s arguments persuasive because they are not commensurate with the scope of the claims. Claim 1 requires, “a plurality of wireless handheld surgical staplers for automatically and wirelessly transmitting/receiving the medical information to/from the at least one server upon actuation of at least one of the plurality of wireless handheld surgical staplers to perform a surgical procedure on a patient.” The claim requires transmitting/receiving medical information upon actuation of the surgical stapler and does not limit integrating or updating the patient’s profile upon initiation of the surgical procedure.

Further, we find there is not a patentable distinction between the claimed “updating a patient data” and “updating [] digital medical records” as taught by Reeves. “As our precedents make clear, however, the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR*



*Int'l v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). Accordingly, we sustain the obviousness rejection of independent claims 1 and 14, as well as, dependent claims 2–7, 9–12 and 15–19 not separately argued. See Appeal Brief 8–9.

Appellant argues the obviousness rejection of dependent claims 8, 13 and 20 is erroneous because Tierney fails to “cure any deficiencies of Malackowski, Hooven, and Reeves.” Appeal Brief 9–10. We do not find Appellant’s argument persuasive because we did not find the combination of Malackowski, Hooven and Reeves deficient. Accordingly, we sustain the Examiner’s obviousness rejection of dependent claims 8, 13 and 20.

#### DECISION

The Examiner’s nonstatutory subject matter rejection of claims 1–20 is sustained.

The Examiner’s obviousness rejections of claims 1–20 is sustained.

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). See 37 C.F.R. § 1.136(a)(1)(v).

AFFIRMED