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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JOHN COLGRAVE

Appeal 2016-005119
Application 14/563,896¹
Technology Center 3600

Before HUBERT C. LORIN, ANTON W. FETTING and
NINA L. MEDLOCK, Administrative Patent Judges.

LORIN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

John Colgrave (Appellant) seeks our review under 35 U.S.C. § 134(a) of the Final Rejection of claims 1–8. We have jurisdiction under 35 U.S.C. § 6(b).

SUMMARY OF DECISION

We AFFIRM.

¹ The Appellant identifies International Business Machines Corporation as the real party in interest. App. Br. 2.

THE INVENTION

Claim 1, reproduced below, is illustrative of the subject matter on appeal.

1. A system for implementing a registry of business entity definitions, the system comprising:
 - at least one processor; and
 - a computer readable memory communicatively coupled to said processor having said business entity definitions stored thereon;
 - wherein said system is programmed to:
 - receive a request from a user to access a business entity definition in said registry, said business entity definition comprising a plurality of information elements, each of said information elements having permission details associated therewith;
 - obtain the identity of the user from data associated with the request;
 - determine, for each of said information elements, whether the user has permission to access that said information element based on the permission details associated with that said information element and said identity of the user; and
 - deny the user access to those information elements for which it is determined that the user does not have permission.

THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Nykanen	US 2002/0174117 A1	Nov. 21, 2002
Keene	WO 01/22299 A1	Mar. 29, 2001

The following rejections are before us for review:

1. Claims 1–8 are rejected under 35 U.S.C. § 101 as being directed to judicially-expected subject matter.
2. Claims 1–8 are rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.
3. Claims 1–8 are rejected under 35 U.S.C. § 112, second paragraph, as failing to particularly point out and distinctly claim the subject matter which Appellant regards as the invention.
4. Claims 1–8 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Nykanen and Keene.
5. Claims 7 and 8 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Keene and Nykanen.
6. Claims 1–8 are provisionally rejected on the ground of nonstatutory double patenting as being unpatentable over the claims of co-pending Application 10/561,260.

ISSUES

Did the Examiner err in rejecting claims 1–8 under 35 U.S.C. §101 as being directed to non-statutory subject matter?

Did the Examiner err in rejecting claims 1–8 are rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement?

Did the Examiner err in rejecting claims 1–8 are rejected under 35 U.S.C. § 112, second paragraph, as failing to particularly point out and distinctly claim the subject matter which Appellant regards as the invention?

Did the Examiner err in rejecting claims 1–8 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Nykanen and Keene?

Did the Examiner err in rejecting claims 7 and 8 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Keene and Nykanen?

Did the Examiner err in rejecting claims 1–8 are provisionally rejected on the ground of nonstatutory double patenting as being unpatentable over the claims of co-pending Application 10/561,260?

ANALYSIS

The rejection of claims 1–8 under 35 U.S.C. §101 as being directed to judicially-excepted subject matter.

The Appellant argues these claims as a group. *See* App. Br. 10–15. We select claim 1 as the representative claim for this group, and the remaining claims 2–7 stand or fall with claim 1. 37 C.F.R. § 41.37(c)(1)(iv).

Alice Corp. Pty. Ltd. v. CLS Bank International, 134 S. Ct. 2347 (2014) identifies a two-step framework for determining whether claimed subject matter is judicially-excepted from patent-eligibility under 35 U.S.C. § 101.

According to *Alice* step one, “[w]e must first determine whether the claims at issue are directed to a patent-ineligible concept,” such as an abstract idea. *Alice*, 134 S. Ct. at 2355.

In that regard, the Examiner determined “[t]he claims are directed to the abstract idea of controlling access to business entity definitions.” Final Rej. 2.

The Appellant agrees that claim 1 is directed to, more generally, the concept of controlling access to data. “[I]t would seem that the ‘abstract idea’ at issue is controlling access to data.” App. Br. 10.

The Appellant then argues that “the claimed subject matter is significantly more than the abstract idea of ‘controlling access to data’” (App. Br. 10) because:

“controlling access to *business entity definitions*” is a specific application of the larger idea of controlling access to data[] [and] Appellant’s claims are to specific machines that control access to business entity definitions including all of the following: requiring that a business entity definition be divided into a plurality of information elements, each of which has separate permission details associated therewith, and requiring that it is the identity of the user, and not some other characteristic or classification, that determines, on an element-by-element basis, whether access will be granted.

Id. at 10–11 (emphasis added).

This is an unpersuasive argument.

Focusing on “business entity definitions” as the type of data to which access is controlled does not render the abstract idea “controlling access to data” any less abstract. Limiting “data” to which access is controlled to “business entity definitions” simply limits the “controlling access to data” abstract idea to a particular environment; that is, to business entity definitions. *Cf. Return Mail, Inc. v. United States Postal Service*, 868 F.3d 1350, 1368 (Fed. Cir. 2017) (“[L]imit[ing] the abstract idea to a particular environment,” here a mail processing system with generic computing technology, “does not make the claims any less abstract for the step 1 analysis.”) (quoting *In re TLI Commc’ns LLC Patent Litig.*, 823 F.3d 607, 613 (Fed. Cir. 2016)). See also *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016) (“collecting information, including when limited to particular content (which does not change its character as information), [is] within the realm of abstract ideas.”) It still is an abstract

idea but one described at a lower level of abstraction. *Cf. Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1240–41 (Fed. Cir. 2016) (“An abstract idea can generally be described at different levels of abstraction. As the Board has done, the claimed abstract idea could be described as generating menus on a computer, or generating a second menu from a first menu and sending the second menu to another location. It could be described in other ways, including, as indicated in the Specification, taking orders from restaurant customers on a computer.”)

Step two 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.’” *Alice*, 134 S. Ct. at 2355 (*quoting Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 US 66, 73 (2012)).

In that regard, the Examiner determined that

[t]he additional elements or combination of elements in the claims other than the abstract idea per se amount to no more than: (i) mere instructions to implement the idea on a computer, and/or (ii) recitation of generic computer structure that serves to perform generic computer functions that are well-understood, routine, and conventional activities previously known to the pertinent industry. Viewed as a whole, these additional claim elements do not provide meaningful limitations to transform the abstract idea into a patent eligible application of the abstract idea such that the claims amount to significantly more than the abstract idea itself. For example, claim 1 generically recites a “system” programmed to perform well understood, routine, and conventional activities such as denying a user access to data if they do not have permission to the data. Also, for example, claim 7 recites a “server computer . . . wherein the server is programmed for,” which is merely a generically recited computer structure with software for performing routing operations, such as “receiving a request”

Final Rej. 2–3.

The Appellant argues that claim 1 presents something novel. “[I]t cannot be reasonably argued at this point that Appellant’s claims are to an abstract idea because they present nothing novel, nothing that is not well-known and conventional.” App. Br. 11.

“[N]ovelty in implementation of the idea is a factor to be considered only in the second step of the *Alice* analysis.” *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014). Novelty is a factor to be considered when determining “whether the claims contain an ‘inventive concept’ to ‘transform’ the claimed abstract idea into patent-eligible subject matter.” *Id.* However, a finding of novelty or nonobviousness does not necessarily lead to the conclusion that subject matter is patentable eligible. “Groundbreaking, innovative, or even brilliant discovery does not by itself satisfy the § 101 inquiry.” *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2117 (2013). The question in step two of the *Alice* framework is not whether an additional feature is novel but whether the implementation of the abstract idea involves “more than the performance of ‘well-understood, routine, [and] conventional activities previously known to the industry.’” *Content Extraction and Transmission LLC v. Wells Fargo Bank, Nat. Ass’n*, 776 F.3d 1343, 1347–48 (quoting *Alice*, 134 S. Ct. at 2359).

In that regard, the Appellant has not shown the novel features transform the abstract idea into patent-eligible subject matter. The system claimed involves the use of a “processor,” “computer readable memory” and programming which the Specification suggests covers generic devices and software (*see* Spec. 5:14–19 (“any such client/server . . . has a processor”))

and 13:4–5 (“could be implemented in a variety of programming languages”). As claimed, the processor performs certain information processing steps such as “receiving,” “obtaining,” “determining,” and “denying” that generic processors are known to perform.

The Appellant further argues pre-emption. “It should be clear that Appellant’s claims do not monopolize the idea of controlling access to data.” App. Br. 12.

Appellant’s claims apply only if the use of business entity definitions that comprising multiple elements each of which has separate permission details associated therewith for controlling access. Appellant’s claims apply only if the identity of the requestor, and not some other characteristic or classification, is considered against the permission details on an element-by-element basis for granting or denying access to a specific element of the business entity definition.

App. Br. 12.

A difficulty with this argument appears to be that it confuses the pre-emption concern with the level of abstraction describing the abstract idea. With respect to the pre-emption concern, “[w]hat matters is whether a claim threatens to subsume the full scope of a fundamental concept, and when those concerns arise, we must look for meaningful limitations that prevent the claim as a whole from covering the concept’s every practical application.” *CLS Bank Intern. v. Alice Corp. Pty. Ltd.*, 717 F.3d 1269, 1281 (Fed. Cir. 2013) (Lourie, J., concurring). Here, said relied-on claim limitation simply narrows the abstract idea so that it is described at a lower level of abstraction. It does not render the abstract idea to which the claim is directed to any less an abstract idea. Pre-emption is not a separate test.

To be clear, the proper focus is not preemption per se, for some measure of preemption is intrinsic in the statutory right granted

with every patent to exclude competitors, for a limited time, from practicing the claimed invention. *See* 35 U.S.C. § 154. Rather, the animating concern is that claims should not be coextensive with a natural law, natural phenomenon, or abstract idea; a patent-eligible claim must include one or more substantive limitations that, in the words of the Supreme Court, add “significantly more” to the basic principle, with the result that the claim covers significantly less. *See Mayo* 132 S. Ct. at 1294. Thus, broad claims do not necessarily raise § 101 preemption concerns, and seemingly narrower claims are not necessarily exempt.

Id. *See also Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015) (“[w]hile preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility.”). Because we find the claimed subject matter covers patent-ineligible subject matter, the pre-emption concern is necessarily addressed. “Where a patent’s claims are deemed only to disclose patent ineligible subject matter under the *Mayo* framework, [] preemption concerns are fully addressed and made moot.” *Ariosa Diagnostics*, 788 F.3d at 1379.

Finally, Appellant relies on *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014) to argue that “the present claims are necessarily rooted in computer technology and describe subject matter to address issues specifically arising in the realm of computer networks.” App. Br. 13.

However, there is no mention of computer networks in claim 1 and the computer technology that claim 1 does mention the Specification suggests covers generic devices and software. *Cf. Dealertrack, Inc. v. Huber*, 674 F.3d 1315, 1333 (Fed. Cir. 2012) (“[s]imply adding a ‘computer aided’ limitation to a claim covering an abstract concept, without more, is insufficient to render the claim patent eligible.”). “[T]he claims at issue [in

DDR] specif[ied] how interactions with the Internet are manipulated to yield a desired result—a result that overrides the routine and conventional sequence of events ordinarily triggered by the click of a hyperlink.” *DDR*, 674 F.3d at 1257. In contrast, here claim 1 covers generic elements and programming to perform information processing steps such as “receiving,” “obtaining,” determining,” and “denying” that they are known to perform, albeit involving specific types of information which as such do not add significantly more to the controlling access to data abstract idea claim 1 is directed to. *See Bancorp Services, L.L.C. v. Sun Life Assur. Co. of Canada (U.S.)*, 687 F.3d 1266, 1278 (Fed. Cir. 2012) (“[T]he use of a computer in an otherwise patent-ineligible process for no more than its most basic function—making calculations or computations—fails to circumvent the prohibition against patenting abstract ideas and mental processes.”).

The Appellant further argues that “claims 1 and 7 each recite[s] a machine, which is an expressly permitted category of patentable subject matter under 35 U.S.C. § 101.” App. Br. 14. But the question is not whether claims 1 and 7 are statutory. They are. The question is whether they are judicially-excepted from patent-eligibility for being directed to an abstract idea without adding significantly more to transform it into an inventive concept. In that regard, for the foregoing reasons, the Appellant’s arguments are unpersuasive as to error in the Examiner’s determination that claims 1 and 7 are patent-ineligible.

We have considered all of the Appellants’ remaining arguments and have found them unpersuasive. Accordingly, because representative claim 1, and claims 2–7 which stand or fall with claim 1, are directed to an abstract idea and do not present an “inventive concept,” we sustain the

Examiner's determination that they are directed to ineligible subject matter under 35 U.S.C. § 101. *Cf. LendingTree, LLC v. Zillow, Inc.*, 656 F. App'x 991, 997 (Fed. Cir. 2016) ("We have considered all of LendingTree's remaining arguments and have found them unpersuasive. Accordingly, because the asserted claims of the patents in suit are directed to an abstract idea and do not present an "inventive concept," we hold that they are directed to ineligible subject matter under 35 U.S.C. § 101.").

The rejection of claims 1–8 are under 35 U.S.C. § 112, first paragraph, for failing to comply with the written description requirement.

The Examiner's position is that "claim [1] is directed to a genus without sufficient written description. '[G]eneric language in the application as filed does not automatically satisfy the written description requirement.' *Ariad Pharmaceuticals Inc. v. Eli Lilly & Co.*, 94 USPQ2d 1161, 1172 (Fed. Cir. 2010)." Final Rej. 4.

However, "[a] claim will not be invalidated on section 112 grounds simply because the embodiments of the specification do not contain examples explicitly covering the full scope of the claim language." *LizardTech, Inc. v. Earth Resource Mapping, Inc.*, 424 F.3d 1336, 1345 (Fed. Cir. 2005).

On the specific matter of whether there is adequate written descriptive support in the original Specification for what is now claimed, the question is whether "the specification [] describe[s] the invention in sufficient detail so 'that one skilled in the art can clearly conclude that the inventor invented the claimed invention as of the filing date sought.' *Lockwood v. Am. Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997) []." *In re Alonso*, 545 F.3d 1015 (Fed. Cir. 2008). In that regard, claim 1 appears to be similar in scope to the

claims as originally filed. “Original claims are part of the specification and in many cases will satisfy the written description requirement.” *LizardTech*, 424 F.3d at 1346 (noting “that an originally filed claim can provide the requisite written description to satisfy section 112,” but holding that “nothing in claim 21 or the specification constitutes an adequate and enabling description” despite the fact that “claim 21 is part of the original disclosure”).

The rejection is not sustained.

The rejection of claims 1–8 under 35 U.S.C. § 112, second paragraph, for failing to particularly point out and distinctly claim the subject matter which Appellant regards as the invention.

The Examiner takes the position that “the limitations ‘system [] programmed to [functions]’ and ‘server[] programmed for [functions]’” in claims 1 and 7, respectively, are “simply [] substitute[s] for the phrase ‘means for.’” Final Rej. 6. Accordingly, the Examiner attaches a rebuttable presumption that “35 U.S.C. §112, ¶ 6” (Final Rej. 7) applies to these claims. Consistent therewith, the Examiner found that “the written description fails to clearly link or associate the disclosed structure to the claimed function such that one of ordinary skill in the art would recognize what structure performs the claimed function.” Final Rej. 7. Consequently, the Examiner determined the claims to be indefinite.

The Appellant argues that “[o]ne of skill in the art would understand that the “processor” recited in claim 1 could be satisfied by the “processor” described in the specification. (Appellant’s specification, p. 5, lines 21–36). And, that the server recited in claim 7 could be satisfied by the server

described in the specification. (Appellant’s specification, element 10, Fig. 1).” App. Br. 20.

The difficulty with the Examiner’s position is that it has not been shown that claims 1 and 7 require the “system”/”server” to perform functions that generic systems/servers are not expected to perform. It is generally known that generic computers process information so as to “receive,” “obtain,” “determine,” and “deny” information. Albeit the claims process specific *types* of information, that does affect a generic computer’s common processing functions. Appellant’s citing of disclosure in the Specification (e.g., element 10 (e.g., “Processor”) in Fig. 1) of generic devices to perform said functions shows that Appellant agrees with that view.

Given no further reasoning as to why generic systems/servers are not expected to perform said functions as claimed, the requirement for disclosure of additional structure in order to render the claims definite has not been made out in the first instance. *Cf. Ergo Licensing, LLC v. CareFusion 303, Inc.*, 673 F.3d 1361, 1364–65 (Fed. Cir. 2012):

In re Katz Interactive Call Processing Patent Litigation identified a narrow exception to the requirement that an algorithm must be disclosed for a general-purpose computer to satisfy the disclosure requirement: when the function “can be achieved by any general purpose computer without special programming.” 639 F.3d 1303, 1316 (Fed.Cir.2011). In *In re Katz*, we held that “[a]bsent a possible narrower construction” of the terms “processing,” “receiving,” and “storing,” the disclosure of a general-purpose computer was sufficient. *Id.* We explained that “[i]n substance, claiming ‘means for processing,’ ‘receiving,’ and ‘storing’ may simply claim a general-purpose computer, although in means-plus-function terms.” *Id.* at 1316 n. 11. In other words, a general-purpose

computer is sufficient structure if the function of a term such as “means for processing” requires no more than merely “processing,” which any general-purpose computer may do without any special programming. *Id.* at 1316–17. If special programming is required for a general-purpose computer to perform the corresponding claimed function, then the default rule requiring disclosure of an algorithm applies. It is only in the rare circumstances where any general-purpose computer without any special programming can perform the function that an algorithm need not be disclosed.

The Examiner also found that “[c]laim 2 recites (in-part) ‘the data processing host device is further configured to ’ Claim 2 is indefinite because the phrase “the data processing host device” lacks antecedent basis and therefore it is unclear to which claim element the phrase “the data processing host device” refers to. Claims 3-5 recite similar limitations.” Final Rej. 8.

The Appellant argues that “[t]his is simply correct. If the decision in this appeal is otherwise favorable, Appellant asks leave to correct the claims in this regard.” Reply Br. 15.

Accordingly, the rejection of claims 2–5 on this ground is affirmed.

The rejection of claims 1–8 under 35 U.S.C. § 103(a) as being unpatentable over Nykanen and Keene.

The Examiner’s position is that Nykanen discloses all that is claimed but

does not directly disclose: each of said information elements having permission details associated therewith; the processor configured to: determine for each of said information elements, whether the user has permission to access that said information

element based on the permission details associated with that said information element and said identity of the user; and deny the user access to those information elements for which it is determined that the user does not have permission.

Final Rej. 9.

Keene is relied on as disclosing said missing disclosure. Final Rej. 10. The Examiner argues, *inter alia*, that “it would have been obvious to one of ordinary skill in the art, at the time the invention was made, to modify the system of Nykanen to include having permission details associated with each element, as taught by Keene, and to modify the process of Nykanen to include determining whether the user has permission to access each element, also taught by Keene.” Final Rej. 10.

The difficulty with the Examiner’s position is that it does explain how the combination of Nykanen and Keene would lead one of ordinary skill in the art, first, to include “a plurality of information elements, each of said information elements having permission details associated therewith” in a business entity definition, and then, second, to determine for each of said information elements, whether the user has permission to access that said information element based on the permission details associated with that said information element and said identity of the user; and deny the user access to those information elements for which it is determined that the user does not have permission, as claimed. We agree with the Appellant that

Keene is merely describing that groups of data or objects may have access codes associated therewith and that an authorized user is granted access to that group or object. Keene does not teach or suggest different access privileges *for different information elements within a business entity definition* as claimed. None of the cited references teach or suggest this idea.

App. Br. 22.

We agree that “[n]either reference, nor any combination of the two, teaches or suggests that a particular user may have access [to] some elements within the business entity definition and not to others: ‘determin[ing] *for each of said information elements*, whether the user has permission to access that said information element based on the permission details associated with that said information element and said identity of the user.’ (Claim 1[7]) (emphasis added).” App. Br. 22.

The rejection is not sustained.

The rejection of claims 7 and 8 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Keene and Nykanen.

The Examiner’s position is that Keene discloses all that is claimed but for “that the record is a business entity definition,” for which Nykanen is relied on. Final Rej. 15. “[I]t would have been obvious to one of ordinary skill in the art, at the time the invention was made, to modify the records of Keene to include business entity definitions, as taught by Nykanen.” *Id.*

But this has a similar difficulty. The claims do not simply call for information elements having permission details as Keene is said to disclose and a business entity definition as Nykanen is said to disclose. Rather, the claims call for “a business entity definition comprising a plurality of information elements, each of said information elements having permission details associated therewith.” How one of ordinary skill in the art given Keene’s information elements having permission details and Nykanen’s business entity definition would be led first, to include “a plurality of information elements, each of said information elements having permission details associated therewith” in a business entity definition, and then, second, to determine for each of said information elements, whether the user

has permission to access that said information element based on the permission details associated with that said information element and said identity of the user; and deny the user access to those information elements for which it is determined that the user does not have permission, as claimed, is not adequately explained.

The rejection is not sustained.

The provisional rejection of claims 1–8 on the ground of nonstatutory double patenting as being unpatentable over the claims of co-pending Application 10/561,260.

The Appellant argues

[w]ithout addressing the merits of this rejection, Appellant requests that this rejection be held in abeyance until the claims are otherwise in condition for allowance. If a double patenting rejection is still deemed appropriate by the Examiner at that point, Appellant will formally respond.

App. Br. 28.

Given no substantive argument as to error in the rejection, it is summarily affirmed.

CONCLUSIONS

The rejection of claims 1–8 under 35 U.S.C. §101 as being directed to non-statutory subject matter is affirmed.

The rejection of claims 1–8 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement is reversed.

The rejection of claims 1 and 6–8 under 35 U.S.C. § 112, second paragraph, as failing to particularly point out and distinctly claim the subject matter which Appellant regards as the invention is reversed.

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The rejection of claims 2–5 under 35 U.S.C. § 112, second paragraph, as failing to particularly point out and distinctly claim the subject matter which Appellant regards as the invention is affirmed.

The rejection of claims 1–8 under 35 U.S.C. § 103(a) as being unpatentable over Nykanen and Keene is reversed.

The rejection of claims 7 and 8 under 35 U.S.C. § 103(a) as being unpatentable over Keene and Nykanen is reversed.

The provisional rejection of claims 1–8 on the ground of nonstatutory double patenting as being unpatentable over the claims of co-pending Application 10/561,260 is affirmed.

DECISION

The decision of the Examiner to reject claims 1–8 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)(1)(iv).

AFFIRMED