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EXAMINER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte SWATI TEWARI, MICHAEL ROBERT BOURKE,
JASON FAMA, and SHMUEL KORENBLIT

Appeal 2016-005577
Application 11/541,056
Technology Center 3600

Before ANTON W. FETTING, JOSEPH A. FISCHETTI, and
NINA L. MEDLOCK, *Administrative Patent Judges*.

FETTING, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE¹

Swati Tewari, Michael Robert Bourke, Jason Fama, and Shmuel Korenblit (Appellants) seek review under 35 U.S.C. § 134 of a final rejection of claims 1–7, 9–18, and 20, the only claims pending in the

¹ Our decision will make reference to the Appellants’ Appeal Brief (“Br.,” filed September 8, 2015) and the Examiner’s Answer (“Ans.,” mailed February 29, 2016), and Final Action (“Final Act.,” mailed March 5, 2015). The Real Party in Interest is Verint Americas Inc.

application on appeal. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b).

The Appellants invented a way of scheduling of a workforce. Specification para. 1.

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 of operating a computer system to perform partial shift swapping, the method comprising the steps of:

[1] implementing a workforce optimization platform that executes on the computer system,

wherein the workforce optimization platform generates a schedule comprising a plurality of shifts;

in the computer system:

[2] receiving a partial shift swap request to swap a portion of a shift from an offering agent to an accepting agent,

the shift having a date and at least one time range indicating the portion of the shift time range to be re-assigned to the accepting agent;

[3] determining a disposition of the partial shift swap request

by applying a set of criteria associated with a hard validation rule to the partial shift swap request

when the accepting agent accepts the partial shift swap request;

[4] if the partial shift swap request is denied based on the hard validation rule,

denying the partial shift swap request;

[5] if the partial shift swap request is not denied based on the hard validation rule,

applying a set of criteria associated with a soft validation rule to the partial shift swap request;

[6] if the partial shift swap request is not approved based on the soft validation rule,

providing the partial shift swap request for review;

and

[7] if the disposition indicates the partial shift swap request is approved based on the soft validation rule or after review,

updating the schedule to reflect the partial shift swap request.

Claims 1–7, 9–18, and 20 stand rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter.

ISSUES

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

ANALYSIS

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 Intl, 134 S. Ct. 2347, 2355 (2014) (citing *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 132 S. Ct. 1289 (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 performing partial shift swapping. Final Act. 3.

Although 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 recites that it is a method of operating a computer system to perform partial shift swapping. The steps in claim 1 result in approving and updating a schedule to reflect a partial shift swap request. The Specification at paragraph 1 recites that the invention relates to scheduling of a workforce. Thus, all this evidence shows that claim 1 is

directed to scheduling a partial shift swap in a workforce, i.e. scheduling work. This is consistent with the Examiner's finding.

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. Like the risk hedging in *Bilski*, the concept of scheduling work is a fundamental business practice long prevalent in our system of commerce. The use of scheduling work is also a building block of organizing human activity. Thus, scheduling work, like hedging, is an “abstract idea” beyond the scope of §101. *See Alice Corp. Pty. Ltd.*, 134 S. Ct. at 2356.

As in *Alice Corp. Pty. Ltd.*, we need not labor to delimit the precise contours of the “abstract ideas” category in this case. It is enough to recognize that there is no meaningful distinction in the level of abstraction between the concept of risk hedging in *Bilski* and the concept of scheduling work at issue here. Both are squarely within the realm of “abstract ideas” as the Court has used that term. *See Alice Corp. Pty. Ltd.*, 134 S. Ct. at 2357.

Further, claims involving data collection, analysis, and display are directed to an abstract idea. *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). Claim 1, unlike the claims found non-abstract in prior cases, uses

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generic computer technology to perform data reception, analysis, and presentation 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 receiving, analyzing, and presenting data.

The remaining claims merely describe parameters for such scheduling. 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 receive and analyze data amounts to electronic data query and retrieval—one of the most basic functions of a computer. 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. The sequence is a generic form of decision blocks. Viewed as a whole, Appellants’ method claims simply recite the concept of scheduling work as performed by a generic computer. To be sure, the claims recite doing so by advising one to respond to a swap request by checking rules and approval and let one know when it is approved. But this is no more than abstract conceptual advice on the parameters for such scheduling work and the generic computer processes necessary to process those parameters, and does 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 23 pages of specification spell out different generic equipment and parameters that might be applied using

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this concept and the particular steps such conventional processing would entail based on the concept of scheduling work 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 scheduling work 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.*, 134 S. Ct. 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., 134 S. Ct. at 2360.

We are not persuaded by Appellants’ argument that

Similar to the rejection found insufficient in *Google Inc. v. SimpleAir Inc.*, here the Office Action ignores the claim language by failing to explicitly address the actual claim limitations. For example, the Office Action does not sufficiently explain how the challenged claims allegedly relate to the abstract idea of “comparing new and stored information and using rules to identify options.”

App. Br. 8. The Examiner finds the claims directed to performing partial shift swapping. Final Act. 3. The preamble states this directly. Thus, the Examiner has substantial evidence to support this finding. The Examiner

then finds this is an abstract concept because shift swapping is a method of organizing human activities. Contrary to Appellants' argument, the Examiner explicitly addresses and relies on the actual claim limitations.

We are not persuaded by Appellants' argument that the Examiner makes no reference whatsoever as to any of the actual limitations recited in the claim, much less identifies which combination of steps, if any, were considered. App. Br. 9. The claim stands on its own as a recitation of what it contains. As we find *supra*, each limitation is a primitive data operation such as receiving and presenting data and using data in decision blocks. The meaning of the data is discernable only to the human mind and so undeserving of weight. *In re Bernhart*, 417 F.2d 1395, 1399 (CCPA 1969).

We are not persuaded by Appellants' argument that no *prima facie* case has been made as to the dependent claims. App. Br. 10. Appellants conflate consideration with explication. The Examiner considered each claim and provided a summary analysis of that consideration by stating that

the claims do not include additional elements that are sufficient to amount to significantly more than the judicial exception because the additional elements or combination of elements in the claims other than the abstract idea *per se* amount to no more than: a method of organizing human activities and an abstract idea limited solely by mere instructions to implement the idea on a computer, or by recitation of generic computer structure that serves to perform generic computer functions that are well-understood, routine, and conventional activities previously known to the industry.

Final Act. 3–4. As the Examiner makes findings as to what the claims do not have as contrasted with what they have, there is little to be gained in reciting each claim limitation and repeating the finding as to what is not

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there. What is not there is manifest on each claim's face. Claims 2–7 only recite further data in the form of decision criteria, whose meanings again are perceptible only to the human mind. Claim 9 only adds further decision blocks, which again are primitive fundamental data processing operations. The remaining claims are the equivalent of claims 1–7 and 9 but drafted to cover software performing the steps.

CONCLUSIONS OF LAW

The rejection of claims 1–7, 9–18, and 20 under 35 U.S.C. § 101 as directed to non-statutory subject matter is proper.

DECISION

The rejection of claims 1–7, 9–18, and 20 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