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BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte EDWARD ROBERT CAMPBELL and ERIAN S. TOULEGENOV

Appeal 2016-006951
Application 13/645,120
Technology Center 3600

Before ALLEN R. MacDONALD, ROBERT E. NAPPI, and JOHN P. PINKERTON *Administrative Patent Judges*.

NAPPI, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134(a) from the Examiner's Final Rejection of claims 1 through 20. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

INVENTION

Appellants' disclosed invention is directed to a system for presenting webpages that convey a medical provider's knowledge base. The website is searchable for specific medical procedures and the specific diseases treated. *See* Abstract and page 6 of Appellants' Specification. Claim 1 is representative of the invention and reproduced below.

> 1. An apparatus for a medical website, comprising:
>
> a website consisting of one or more web pages hosted on a server configured to convey a medical provider's knowledge base and interaction website;
>
> where the website is configured to maintain and display information regarding a plurality of medical providers in one or more databases and a user of the website may search the knowledge base regarding the plurality of medical providers through a user interface and a search routine that takes the user's query to search the databases;
>
> a counter configured to keep track of one or more of
>
> 1) a total number of specific medical procedures done by a first medical provider in the plurality of medical providers,
>
> 2) a number of specific medical procedures done by the first medical provider per set period of time,
>
> 3) a total number of specific diseases treated by the first medical provider,
>
> 4) a number of specific diseases the first medical provider has treated per set period of time, and then the counter is configured to communicate with the databases to store the tracked information in the one or more databases; and
>
> where the specific medical procedures and the specific diseases treated are searchable criteria in the search routine implemented on the website as well as displayed information on one or more web pages regarding each medical provider in the plurality of medical providers, where the website and its functionality are implemented with one or more selected from the group consisting of i) coded software, ii) hardware circuits, and iii) a combination of coded software and hardware circuits,

> and where any portions of the website and its functionality implemented in coded software are stored in a non-transitory computer readable medium in a format executable by one or more processing components.

REJECTIONS AT ISSUE[1]

The Examiner has rejected claims 3, 7, and 16 under 35 U.S.C. § 112 second paragraph as being indefinite. Final Action 2.

The Examiner has rejected claims 1 through 20 under 35 U.S.C. § 101 for being directed to non-statutory subject matter. Final Action 3.

The Examiner has rejected claims 1 and 10 through 15 under 35 U.S.C. § 103 for being unpatentable over Soon-Shiong (US 2008/0183497 A1, published July 31, 2008) and Zides (US 2010/0235295 A1, published Sept. 16, 2010). Final Action 4–12.

The Examiner has rejected claim 2 under 35 U.S.C. § 103 for being unpatentable over Soon-Shiong, Zides, and Cook (US 2006/0080146 A1, published Apr. 13, 2006). Final Action 12–14.

The Examiner has rejected claims 4, 5, and 17 under 35 U.S.C. § 103 for being unpatentable over Soon-Shiong, Zides, and Hampton (US 2013/0218717 A1, published Aug. 22, 2013). Final Action 14–17.

The Examiner has rejected claim 6 under 35 U.S.C. § 103 for being unpatentable over Soon-Shiong, Zides, and Royall (US 7,451,094 B2, issued Nov. 11, 2008). Final Action 17–19.

The Examiner has rejected claims 3 and 7 under 35 U.S.C. § 103 for being unpatentable over Soon-Shiong, Zides, Gremett (US 8,170,958 B1,

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[1] Throughout this Decision we refer to the Appeal Brief filed October 16, 2015, Reply Brief filed July 1, 2016, Final Office Action mailed March 3, 2015, and the Examiner's Answer mailed May 5, 2016.

issued May 1, 2012), Ryder (US 2010/0088182 A1, published Apr. 8, 2010), and Rugh (US 2006/0287997 A1, published Dec. 21, 2006). Final Action 19–21.

The Examiner has rejected claim 8 under 35 U.S.C. § 103 for being unpatentable over Soon-Shiong, Zides, and Dodson (US 8,046,241 B1, issued Oct. 25, 2011). Final Action 21–23.

The Examiner has rejected claims 9 and 20 under 35 U.S.C. § 103 for being unpatentable over Soon-Shiong, Zides, and Psota (US 2009/0144070 A1, published June 4, 2009). Final Action 23–26.

The Examiner has rejected claim 16 under 35 U.S.C. § 103 for being unpatentable over Soon-Shiong, Zides, Gremett, Ryder, Rugh, and Cook. Final Action 27–29.

The Examiner has rejected claim 18 under 35 U.S.C. § 103 for being unpatentable over Soon-Shiong, Zides, Hampton, and Royall. Final Action 30–32.

The Examiner has rejected claim 19 under 35 U.S.C. § 103 for being unpatentable over Soon-Shiong, Zides, Hampton, Kosman (US 2005/018086), and Vining (US 2006/0172708). Final Action 32– 33.

REJECTION UNDER 35 U.S.C. § 112

Appellants argue the Examiner's rejection under 35 U.S.C. § 112 second paragraph is in error. Appellants argue that the term "negative comment" is sufficiently definite as when it is interpreted in light of the Specification the term is understood as an unfavorable review associated with low scores. App. Br. 12–16, and Reply Br. 6–15. Specifically, Appellants point to paragraphs 28, 39, 41, 59 and Figures 4, 5a, and 12, which discuss an entry field for comments, grades assigned to medical

providers and a questionnaire provided. App. Br. 14-15, Reply Br 10–15. Further, Appellants provide several definitions of negative and assert the claim term is definite. Reply Br. 6-10.

We are persuaded of error by Appellants' arguments. Initially, we note representative claim 3 recites the analyzing routine as detecting 1) negative comments and 2) low scores, thus identifying that a "negative comment" is separate from a low score. The grades shown in Figure 5a are low scores and not negative comments. However, paragraph 98 of Appellants' Specification identifies a series of questions directed to a patient's visit, and question 16 recites "how would you describe your experience during this visit. A) positive; B) neutral; C) negative[.]" Thus, while the term is subjective, as found by the Examiner, Appellants' Specification provides objective mechanism to determine if a comment is negative. Accordingly, we do not sustain the Examiner's rejection of claims 3, 7, and 16.

REJECTION UNDER 35 U.S.C. § 101

PRINCIPLES OF LAW

Patent-eligible subject matter is defined in § 101 of the Patent Act, which recites:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

There are, however, three judicially created exceptions to the broad categories of patent-eligible subject matter in § 101: laws of nature, natural phenomena, and abstract ideas. *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2354 (2014); *Mayo Collaborative Servs. v. Prometheus Labs.,*

Inc., 132 S. Ct. 1289, 1293 (2012). Although an abstract idea, itself, is patent-ineligible, an application of the abstract idea may be patent-eligible. *Alice*, 134 S. Ct. at 2355. Thus, we must 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). The claim must contain elements or a combination of elements that are "'sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [abstract idea] itself.'" *Id.* (citing *Mayo*, 132 S. Ct. at 1294).

The Supreme Court sets forth a two-part "framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts." *Id.* at 2355.

> First, we determine whether the claims at issue are directed to one of those patent-ineligible concepts. [*Mayo*,] 132 S.Ct., at 1296–1297. If so, we then ask, "[w]hat else is there in the claims before us?" *Id.*, at ——, 132 S.Ct., at 1297. To answer that question, 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.*, at ——, 132 S.Ct., at 1298, 1297. We have 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." *Id.*, at ——, 132 S.Ct., at 1294.

Id.

ANALYSIS

We have reviewed Appellants' arguments in the Briefs, the Examiner's rejections, and the Examiner's response to Appellants' arguments. Appellants' arguments have not persuaded us of error in the Examiner's determination that the claims are unpatentable.

Appellants argue on pages 16 through 53 of the Brief, that the claims are not directed to an abstract idea. Further, on pages 53 through 55 of the Brief, Appellants argue the claims recites significantly more than the abstract idea. Specifically, Appellants argue:

> Appellants respectfully submit that the Office Action merely asserts "Claim(s) 1-20 is/are directed to the abstract idea of organizing human activity by maintaining and presenting tracked information regarding a plurality of medical providers," but does not provide a comparison between the Applicant's concept as defined by its actual claim limitations on posting web pages and then specific hardware such as a counter and software routines to search the knowledge base on specific criteria important to the potential patient and to the limitations in any case that have been found by the courts to be abstract ideas to show the similarity required by the US PTO guidelines.

App. Br. 21 (emphasis omitted). Further, Appellants argue:

> First, Appellants' concept is not any of the abstract examples: creating a contractual relationship (buySAFE), hedging (Bilski), mitigating settlement risk (Alice Corp.), processing loan information (Dealertrack), managing an insurance policy (Bancorp), managing a game of Bingo (Planet Bingo), allowing players to purchase additional objects during a game (Gametek), or generating rule-based tasks for processing an insurance claim (Accenture). Second, Appellants' concept is not any of the abstract examples: tax-free investing (Fort Properties) or arbitration (In re Comiskey). Third, Appellants' concept is not any of the abstract examples: advertising as an exchange or currency (Ultramercial), structuring a sales force or marketing company (In re Ferguson), using an algorithm for determining

> the optimal number of visits by a business representative to a client (In re Maucorps), allowing players to purchase additional objects during a game (Gametek), and computing a price for the sale of a fixed income asset and generating a financial analysis output (Freddie Mac). Fourth, Appellants' concept is not any of the abstract examples: a mental process that a neurologist should follow when testing a patient for nervous system malfunctions (In re Meyer), and meal planning (DietGoal).

App. Br. 23–24 (emphasis omitted).

These arguments have not persuaded us the Examiner erred in determining representative claim 1 recites an abstract idea. The Examiner states "the abstract idea of searching a database comprising information regarding a plurality of medical providers using specific medical procedures and specific diseases treated as search criteria, which is interpreted as the abstract idea of comparing new and stored information using rules to identify options" and that the claims do not recite additional elements that amount to significantly more than the abstract idea. Answer 37. We concur.

The Federal Circuit has explained that, in determining whether claims are patent-eligible under Section 101, "the decisional mechanism courts now apply is to examine earlier cases in which a similar or parallel descriptive nature can be seen—what prior cases were about, and which way they were decided." *Amdocs (Israel) Ltd. v. Openet Telecom, Inc.*, 841 F.3d 1288, 1294 (Fed. Cir. 2016). The Federal Circuit also noted in that decision that "examiners are to continue to determine if the claim recites (i.e., sets forth or describes) a concept that is similar to concepts previously found abstract by the courts." *Amdocs*, 841 F.3d at 1294 n.2 (citation omitted).

In the instant case, representative claim 1 recites a) a website to convey a medical provider's knowledge base, b) the website displaying information concerning providers in a database which allows the searches of

the knowledge base; c) a counter to keep track of one or more pieces of data concerning a medical provider d) a database structure to store the counted data and e) wherein the website allows search of the database. Thus, the claim is directed to the abstract concept of having a knowledge base, distributing collected data, and allowing it to be searched, which is similar to the claims at issue in *SmartGene Inc. v Advanced Biological Laboratories* 555 Fed. Appx 950, 954 (Fed. Cir. 2014 (non precedential, holding that a method for guiding selection of a therapeutic treatment using knowledge bases, generating ranked lists of treatment routines and generating advisory information for treatment "does no more than call on a 'computing device' with basic functionality for comparing stored and input data and rules, to do what doctors do routinely")). The claims are also similar to those considered by the court in *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1354 (Fed. Cir. 2016) (holding that claims directed to a process of gathering and analyzing information of a specific content are directed to an abstract idea). They are also similar to those at issue in *Content Extraction and Transmission LLC. v. Wells Fargo Bank Nat'l Ass'n*, 776 F.3d 1343, 1347 (Fed. Cir. 2014) (holding that the claims were "drawn to the abstract idea of 1) collecting data, 2) recognizing certain data within the collected data set, and 3) storing that recognized data in memory."). Thus, we concur with the Examiner that the claims are directed to the use of an abstract idea.

With respect to the second part of the *Alice* analysis, Appellants argue the "claims recite multiple structures that are not generic to every computer and perform novel functions" Answer 25.

Further, Appellants assert that the claim is drawn to significantly more than the abstract idea as it is rooted in computer technology and provides "objective verified information using computer technology to be displayed

to a potential patient/user of the medical server so that they can make an informed decision." App. Br. 54–55, *see also* Reply Br. 16–18.

We are not persuaded of error in the Examiner's rejection by these arguments. As the Examiner states, the additional limitations are directed to generic computer functions. Answer 37–38 (citing para. 117 of Appellants' Specification to show generic computer functions. We concur and are not persuaded of error by Appellants' arguments.

Further, we note that contrary to Appellants' arguments discussed above, the recitation of a counter is not hardware, but as discussed in Appellants' Specification paragraph 63 is a (software) routine. Additionally, Appellants' Specification, in paragraphs 117 and 120, discusses implementing the invention using generic and well known computing devices.

"[T]he use of generic computer elements like a microprocessor or user interface do not alone transform an otherwise abstract idea into patent-eligible subject matter." *FairWarning IP v. Iatric Sys. Inc.*, 839 F.3d 1089, 1096 (citing *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1256 (Fed. Cir. 2014)). *See also Alice Corp*. We disagree with Appellants that the claim is rooted in computer technology as the disclosed invention merely uses the webpage and server to provide access to information. We are not persuaded that the claims are drawn to an inventive concept because the invention provides "objective verified information using computer technology to be displayed to a potential patient/user of the medical server so that they can make an informed decision." App. Br. 54–55. This is merely using the computer technology as a means of disseminating information. Thus, Appellants' arguments have not persuaded us that representative claim 1 recites significantly more than the abstract idea and,

therefore, we sustain the Examiner's 35 U.S.C. § 101 rejection of claim 1 and claims 2 through 20 grouped with claim 1.

REJECTIONS UNDER 35 U.S.C. § 103

Rejection of claims 1 and 10 through 15 based upon Soon-Shiong and Zides

Appellants argue on pages 55 through 66 of the Appeal Brief, and 24–25 of the Reply Brief, that the rejection of these claims is in error. Appellants assert that "[t]he prior art does not present[] obtaining objectively verifiable data. Instead, the claims of the instant Application expressly include claim language that require an objective piece of technology, a counter, to track the amount of procedures performed." App. Br. 55.

We are not persuaded of error by these arguments. Representative claim 1 does not recite a limitation to verifiable data, merely that a counter is used. We are not persuaded by Appellants' arguments that the combination of Soon-Shiong and Zides does not teach the claimed counter. While Soon-Shiong does not teach a counter, the Examiner relies upon Zides to analyze success rates for the health care provider using different metrics. Answer 40. We concur. Zides does not use the term counter; however, we find the skilled artisan would recognize that a count is used in Zides' system. Specifically, as Appellants identify in their arguments on page 60 of the Brief, the success rate is a number of successful treatments out of a number of people being treated. Thus, to calculate a success rate a count of the number of people is required. That Zides displays a success rate and not a count is irrelevant as the claim does not recite what data is displayed. Further, we note that Zides states, in paragraph 84, "[i]n one implementation, the system will identify all of the healthcare providers who were used by more than a threshold number of users," which provides

further evidence that a count of people being treated is used. Thus, Appellants' arguments have not persuaded us of error in the Examiner's rejection of representative claim 1, and claims 10 through 14 grouped with claim 1.

Appellants argue the rejection of claim 15 is in error for the same reasons as claim 1. App. Br. 66 and 67. Thus, we sustain the Examiner's rejection of claim 15.

Rejection of claim 2 based upon Soon-Shiong, Zides, and Cook

Appellants argue that the rejection of claim 2 is in error for the same reasons as claim 1. App. Br. 70. We note that in the Reply Brief, Appellants present arguments directed to claim 2. Reply Brief 28–29. Appellants have not shown good cause as to why these arguments could not be presented earlier. As such, these arguments have not been considered, and are waived. *See Ex parte Borden*, 93 USPQ2d 1473, 1476 (BPAI 2010) (informative) (absent a showing of good cause, the Board is not required to address arguments in Reply Brief that could have been presented in the principal Appeal Brief); 37 C.F.R. § 41.41(b)(2). Thus, we sustain the Examiner's rejection of claim 2 for the reasons discussed above with respect to claim 1.

Rejection of claims 4, 5, and 17 based upon Soon-Shiong, Zides and Hampton

Appellants argue the Examiner's rejection of claim 4 is in error as the combination of Soon-Shiong, Zides, and Hampton does not teach providing accumulated patient reviews from patients through a verification mechanism as recited in claim 4. App. Br. 67–69. Specifically, Appellants assert that

Hampton, which the Examiner relies upon to teach this limitation, merely teaches a verification that a person, and not a robot, is generating the review. Thus, the reference does not teach verification that the person making the review is actually the person who used the product (or as claimed received the service). App. Br. 68.

The Examiner finds Hampton teaches preventing non-customers from providing a rating. Answer 17, 41 (citing Hampton para. 138).

We concur with Appellants and disagree with the Examiner. We do not find sufficient evidence to show that Hampton teaches the review from patients who through a verification mechanism have been seen and serviced by the medical provider, as recited in claim 4. As discussed by Appellants, the verification of Hampton is just to confirm there is a human and not a robot completing the survey and there is no verification that the human received the service. Thus, we do not sustain the Examiner's rejection of claim 4, claim 5, which depends thereupon, and claim 17 with recites a similar limitation and is similarly rejected.

However, we note that Zides in para. 87, discusses a verification system to prevent entry of falsified information by a rogue user. The record does not show the Examiner considered this teaching of Zides. Therefore, should there be further prosecution of the application, we leave it to the Examiner to determine the appropriateness of a new ground of rejection.

Rejection of claim 6 based upon Soon-Shiong, Zides, and Royall

Appellants argue the Examiner's rejection of claim 6 is in error as the combination of Soon-Shiong, Zides, and Royall does not teach patients enter their randomly assigned code, which is used to verify the patient entering the review is actually a patient of the medical provider. App. Br. 71–72.

The Examiner finds that Royall teaches emailing each candidate (patient) a unique user name and password for electronically accessing a survey form, which meets the claim. Answer 20, 42 citing Royall Col. 9, ll. 40–48, and Col. 9, ll. 16–20.

We disagree with the Examiner. Initially, we note that claim 6 depends upon claim 4 and thus includes the limitations of claim 4 discussed above. We also note that Hampton, which is used in the rejection of claim 4, is not applied in the rejection of claim 6. Finally, we note that the Examiner has not shown that Royall teaches the limitations of claim 4. Thus, on its face, the Examiner has not shown that the combination of Soon-Shiong, Zides, and Royall teaches all of the limitations of claim 6. Accordingly, we do not sustain the Examiner's rejection of claim 6.

However, as noted above, Zides in para. 87, discusses a verification system to prevent entry of falsified information by a rogue user which may be relevant to claim 4. The record does not show the Examiner considered this teaching of Zides. Therefore, should there be further prosecution of the application, we leave it to the Examiner to determine the appropriateness of a new ground of rejection for claim 6.

Rejection of claims 3 and 7 based upon Soon-Shiong, Zides, Gremett, Ryder, and Rugh.

Appellants argue the Examiner's rejection of claim 3 is in error as the combination of the references does not teach the claim 3 recitation of the content analyzing routine detecting negative comments. App. Br. 73–75. Specifically, Appellants argue that Ryder teaches that the moderator, a person, not a content analyzing routine as claimed, must review the comments to find a negative review. App. Br. 74. Further, Appellants argue

that Rugh teaches that feedback (reviews) can be left for both positive and negative comments and does not teach the claimed content analyzing routine. *Id.* Finally, Appellants argue Gremett does not disclose distinguishing between negative and positive ratings.

We are not persuaded of error by these arguments. The Examiner finds that Ryder teaches a moderator may review for objectionable content (negative reviews) and censor reviews and also that this may be automated by a filter. Answer 42 (citing Ryder para. 29). We concur with the Examiner and find that Ryder teaches the filter (a routine) that reviews comments to determine objectionable content (which encompasses negative reviews). Thus, Appellants' arguments have not persuaded us of error in the Examiner's rejection of claims 3 and 7.

Rejections of Claims 8, 9, 16, 18, 19, and 20

Appellants argue that the Examiner's rejection of these claims is in error for the reasons discussed with respect to the obviousness rejection of claims 1 and 15. App. Br. 75–76. As discussed above, Appellants have not persuaded us of error in the obviousness rejection of claims 1 and 15. Accordingly, we sustain the Examiner's obviousness rejections of claims 8, 9, 16, 18, 19, and 20.

DECISION

We affirm the Examiner's rejection of claims 1 through 20 under 35 U.S.C. § 101.

We affirm the Examiner's rejections of claims 1, 2, 3, 7 through 16, and 18– 20 under 35 U.S.C. § 103.

We reverse the Examiner's rejections of claims 4, 5, 6, and 17 under 35 U.S.C. § 103.

We reverse the Examiner's rejection of claims 3, 7, and 16 under 35 U.S.C. § 112, second paragraph.

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