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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* RODERICK A. HYDE, EDWARD K. Y. JUNG,  
JORDIN T. KARE, ERIC C. LEUTHARDT, ROYCE A. LEVIEN,  
RICHARD T. LORD, ROBERT W. LORD, MARK A. MALAMUD, JOHN  
D. RINALDO, JR., DENNIS J. RIVET, CLARENCE T. TEGREENE, and  
LOWELL L. WOOD, JR.

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Appeal 2017-000825  
Application 13/374,747<sup>1</sup>  
Technology Center 3600

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Before MAHSHID D. SAADAT, MARC S. HOFF, and  
SCOTT B. HOWARD, *Administrative Patent Judges*.

HOWARD, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Final Rejection of claims 1–3, 7, 8, 10, 12–16, 19–21, 23–26, 30, 31, 34, 35, 37–39, 41, 42, 63, 84, 105, and 126–130, which constitute all of the claims pending in this application. Claims 4–6, 9, 11, 17, 18, 22, 27–29, 32, 33, 36, 40, 43–62, 64–83, 85–104, and 106–125 have been cancelled. Br. 37–46 (Claims App’x). We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

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<sup>1</sup> Appellants identify Elwha, LLC as the real party in interest. Br. 4.

## THE INVENTION

The disclosed and claimed invention is directed “to managing information in an evidence-based medical practice, particularly data relating to patients or to diagnostic or therapeutic treatments.” Spec. ¶ 1.

Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A healthcare information management system comprising:
  - circuitry for obtaining an indication that a particular condition was treated in a first patient with a first protocol;
  - circuitry for causing a record of a second patient to include the indication that the particular condition was treated in the first patient with the first protocol; and
  - circuitry for retrieving the record of the second patient selectively in response to an association between the second patient and an indication of an institutional readmission after the record of the second patient includes the indication that the particular condition was treated in the first patient with the first protocol.

## REFERENCES

The prior art relied upon by the Examiner as evidence in rejecting the claims on appeal is:

Joao	US 2002/0032583 A1	Mar. 14, 2002
Farooq	US 2011/0295622 A1	Dec. 1, 2011

## REJECTIONS

Claims 1–3, 7, 8, 10, 12–16, 19–21, 23–26, 30, 31, 34, 35, 37–39, 41, 42, 63, 84, 105, and 126–130 stand rejected under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter. Final Act. 2.

Claims 1–3, 7, 8, 10, 12–16, 19–21, 23–26, 30, 31, 34, 35, 37–39, 41, 42, 63, 105, and 126–130 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Farooq and Joao. Final Act. 3–23.

### ANALYSIS

We have reviewed the Examiner’s rejection in light of Appellants’ arguments that the Examiner erred. In reaching this decision, we have considered all evidence presented and all arguments made by Appellants. We are not persuaded by Appellants’ arguments regarding claims 1–3, 7, 8, 10, 12–16, 19–21, 23–26, 30, 31, 34, 35, 37–39, 41, 42, 63, 105, and 126–130. Instead, we incorporate herein and adopt as our own: (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken (Final Act. 2–23), and (2) the reasons and rebuttals set forth in the Examiner’s Answer in response to Appellants’ arguments (Ans. 25–31). We incorporate such findings, reasons, and rebuttals herein by reference unless otherwise noted. For the avoidance of doubt, as set forth in footnote 2, *infra*, we do not incorporate the sections of the Final Rejection and Answer relating to the Examiner’s alternative conclusion that the claims “are directed to the abstract idea of ‘comparing new and stored information and using rules to identify options,’” as set forth at page 25 of the Answer. However, we highlight and address specific findings and arguments for emphasis as follows.

Section 101 Rejection

General Principles

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.*, 566 U.S. 66, 70–71 (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*, 566 U.S. 79, 78). 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*, 566 U.S. 72–73).

The Supreme Court set 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.*

“The ‘abstract idea’ step of the inquiry calls upon us to look at the ‘focus of the claimed advance over the prior art’ to determine if the claim’s ‘character as a whole’ is directed to excluded subject matter.” *Affinity Labs of Tex. v. DirectTV, LLC*, 838 F.3d 1253, 1257 (Fed. Cir. 2016) (quoting *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016)); *see also Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016). There is no definitive rule to determine what constitutes an “abstract idea.” Rather, the Federal Circuit has explained that “both [it] and the Supreme Court have found it sufficient to compare claims at issue to those claims already found to be directed to an abstract idea in previous cases.” *Enfish*, 822 F.3d at 1334; *see also Amdocs (Israel) Ltd. v. Openet Telecom, Inc.*, 841 F.3d 1288, 1294 (Fed. Cir. 2016) (explaining that, in determining whether claims are patent ineligible under § 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”).

Under the second step of the *Alice/Mayo* framework, we examine the claim limitations “more microscopically,” *Elec. Power*, 830 F.3d at 1354, to determine whether they contain “additional features” sufficient to “transform the nature of the claim’ into a patent-eligible application.” *Alice*, 134 S. Ct. at 2355, 2357 (quoting *Mayo*, 566 U.S. at 78). “[M]ere recitation of concrete, tangible components is insufficient to confer patent eligibility to an otherwise abstract idea. Rather, the components must involve more than performance of ‘well-understood, routine, conventional activit[ies]’ previously known to the industry.” *In re TLI Commc’ns LLC Patent Litig.*, 823 F.3d 607, 613 (Fed. Cir. 2016) (citing *Alice*, 134 S. Ct. at 2359).

Step 1 – Abstract Idea

The Examiner concludes that claim is directed to a basic concept of providing healthcare, which is an abstract idea. Final Act. 2. The Examiner further determines “that the claims as currently submitted by the [Appellants] are directed to the abstract idea of ‘comparing new and stored information and using rules to identify options’. Several cases have found concepts relating to processes of comparing data that can be performed mentally abstract, such as comparing new and stored information and using rules to identify options (*SmartGene*).” Ans. 25.

Appellants argue the Examiner “has provided no evidence demonstrating that ‘providing healthcare’ is an ‘abstract idea’ under MPEP and legal standards.” Br. 7–8. More specifically, Appellants argue that providing healthcare does not fit within the four examples provided in a recent PTO memo: “(1) Fundamental economic practices – *Alice*, (2)

Certain methods of organizing human activities *Bilski*, (3) “[A]n idea of itself – Benson and [LeRoy]; and (4) Mathematical relationships/formulas – *Benson and Flook*.” *Id.* at 8 (footnotes omitted). Without giving a reason, Appellants state “that ‘providing healthcare’ is clearly distinguishable from such concepts.” *Id.*

We are not persuaded by Appellants’ arguments that the Examiner erred. To the contrary, our reviewing court has recognized that practicing medicine—in other words, providing healthcare—is an abstract idea and merely implementing it on a computer does not make it any less abstract. *See SmartGene, Inc. v. Adv. Bio. Labs., SA*, 555 F. App’x 950 (Fed. Cir. 2014). In *SmartGene*, the claims defined a “method for guiding the selection of a therapeutic treatment regimen for a patient with a known disease or medical condition” and provided three steps for performing the method. 555 F. App’x at 954–55 (citation omitted). The Federal Circuit concluded that the claim “does not purport to identify new computer hardware . . . . Nor does it purport to identify any steps beyond those which doctors routinely and consciously perform.” *Id.* at 955. Accordingly, our reviewing court determined that the claims are directed to an abstract idea. *Id.* at 955.

Similar to the claims in *SmartGene*, the claims at issue in this appeal are directed to circuitry that performs the steps a doctor practicing evidence-based medicine would perform mentally or with pen and pencil. That is, the claims are directed to no more than circuitry to link records based on similar medical conditions and treatments. Accordingly, the claims are directed to practicing medicine, just like the claims in *SmartGene*. *See also CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1373 (Fed. Cir.

2011) (methods that can be performed in the human mind are abstract) (citing *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972)).<sup>2</sup>

Appellants also argue that the claims are not directed to an abstract idea because there is no preemption. Br. 9–11. We are not persuaded by [Appellants’] argument. Although the extent of preemption is a consideration, the absence of complete preemption is not dispositive. *See, e.g., Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015) (“While preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility.”); *Ultramercial, Inc. v. Hulu, LLC*, 722 F.3d 1335, 1346 (Fed. Cir. 2013) (“[T]he Supreme Court has stated that, even if a claim does not wholly pre-empt an abstract idea, it still will not be limited meaningfully if it contains only insignificant or token pre- or post-solution activity—such as identifying a relevant audience, a category of use, field of use, or technological environment.”) (citations omitted), *vacated and remanded*, *WildTangent, Inc. v. Ultramercial, LLC*, 134 S. Ct. 2870 (2014) (remanding for consideration in light of *Alice*, 134 S. Ct. 2347).

Step 2 – Something More

The Examiner determines that “[t]he claims do not amount to significantly more than the abstract idea itself such as not being an

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<sup>2</sup> Because we agree with the Examiner that the claims are directed to the abstract idea of providing healthcare, we need not reach the Examiner’s alternative conclusion that the claims “are directed to the abstract idea of ‘comparing new and stored information and using rules to identify options.’” Ans. 25. Accordingly, Appellants’ arguments directed to that conclusion are moot.

improvement to the functioning of a computer itself.” Final Act. 2. The Examiner further determines “the computer related claims require no more than a generic computer to perform generic computer functions that are well-understood, routine and conventional activities previously known to the industry.” *Id.* Specifically, the Examiner finds the Specification states that circuitry includes a general purpose computer that performs generic computer functions. Ans. 26–27.

Appellants argue that the claims are directed to something more because they effect a transformation. Br. 12–13. Specifically, Appellants contend that the claims require the modification of a record of the second patient. *Id.*

We are not persuaded by Appellants’ argument that the Examiner erred. Appellants have not identified any cases holding that the modification of a data record can be something more. To the contrary, the Federal Circuit has recognized that “[m]erely requiring the selection and manipulation of information . . . by itself does not transform the otherwise-abstract processes of information collection and analysis.” *Elec. Power*, 830 F.3d at 1355.

Appellants also argue the Examiner erred by not providing evidence that the claims are “well-understood, routine and conventional.” Br. 13–14.

We disagree. The Examiner cited sections of the Specification indicating that the claim can be accomplished using generic computer components such as a general purpose computing device. *See* Ans. 26–27 (citing Spec. ¶¶ 59, 60, 169). Additionally, using a “computer server and code implemented in software”—a generic computer component—to perform a method does not impart patentability. Our reviewing court “found similar claims to be ineligible despite the recitation of a general purpose

computer or the Internet.” *Versata Dev. Grp., Inc. v. SAP Am., Inc.*, 793 F.3d 1306, 1334 (Fed. Cir. 2015) (collecting cases). As in *Versata*, the claims here “do not improve some existing technological process or solve some technological problem in conventional industry practice.” *Id.*

Similarly,

[T]he claims at issue are not rooted in computer technology to solve a problem specifically arising in some aspect of computer technology. Instead, the claims at issue are more like the claims we summarized in *DDR Holdings* as insufficient to reach eligibility—claims reciting a commonplace business method aimed at processing business information despite being applied on a general purpose computer.

*Id.*; see also *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1373–77 (Fed. Cir. 2011) (merely using a computer readable medium is not sufficient to transform an abstract idea to patentable subject matter); see also *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709 (Fed. Cir. 2014) (finding a method for distribution of products over the Internet directed to unpatentable under the *Alice/Mayo* framework).

Finally, Appellants assert the claim does not just generally link the use of providing healthcare to a particular technological environment. Br. 15. Instead, Appellants assert the claims specifically link to the steps performed by the circuitry. *Id.*

We are not persuaded by Appellants’ argument the Examiner erred. First, Appellants’ argument consists of no more than reciting the limitations of the claims with a naked assertion the limitations make the claims patent-eligible:

Applicant submits that the above-noted recitations of Claims 1, 42, 63, 84 and 105 do not merely “**generally**” link the use of “providing healthcare” or “comparing new and stored

information and using rules to identify options” to a “particular technological environment.” Rather, the claims *specifically* link to “obtaining an indication that a particular condition was treated in a first patient with a first protocol”; “causing a record of a second patient to include the indication that the particular condition was treated in the first patient with the first protocol” and “retrieving the record of the second patient selectively in response to an association between the second patient and an indication of an institutional readmission after the record of the second patient includes the indication that the particular condition was treated in the first patient with the first protocol.” Such a link clearly distinguishes from the “*general*” link to a particular environment contemplated by *Alice* (e.g. mere “implementation via computers”). For at least this reason, Applicant requests withdrawal of the rejections und 35 U.S.C. 101.

*Id.* (footnote omitted). Merely reciting the claim limitations and stating it is specifically linked to the claim without providing a reason is not persuasive. *Cf. In re Lovin*, 652 F.3d 1349, 1357 (Fed. Cir. 2011) (Rule 41.37 requires “more substantive arguments in an appeal brief than a mere recitation of the claim elements and a naked assertion that the corresponding elements were not found in the prior art.”); 37 C.F.R. § 41.37(c)(1)(iv) (“A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim.”).

Second, claim 1 simply recites circuitry for performing the steps identified by Appellants. Because, as discussed above, the Specification states that circuitry can be a general purpose computer, contrary to Appellants’ argument, the claim does no more than implement a method on a general purpose computer.

Accordingly, we sustain the Examiner’s rejection of claims 1–3, 7, 8, 10, 12–16, 19–21, 23–26, 30, 31, 34, 35, 37–39, 41, 42, 63, 84, 105, and 126–130 as directed to patent-ineligible subject matter.<sup>3</sup>

Section 103 Rejection

Although stated several different ways, Appellants’ primary argument is that the Examiner erred in finding Farooq teaches “circuitry for causing a record of a second patient to include the indication that the particular condition was treated in the first patient with the first protocol,” as recited in claim 1. *See* Br. 15–16, 20–30. More specifically, Appellants argue because the Examiner finds at one specific point in the Examiner’s Answer Farooq *does not* teach “circuitry for *obtaining an indication that a particular condition was treated in a first patient with a first protocol,*” as recited in claim 1, the Examiner erred in finding at another specific point in the Examiner’s Answer Farooq teaches “circuitry for obtaining *an indication that a particular condition was treated in a first patient with a first protocol,*” as recited in claim 1. *Id.* (emphasis added).

The Examiner finds Joao teaches “circuitry for obtaining an indication that a particular condition was treated in a first patient with a first protocol,” as recited in claim 1, and that a person of ordinary skill in the art would have “expand[ed] the system of Farooq to further include, circuitry for obtaining an indication that a particular condition was treated in a first patient with a first protocol, as taught by Joao.” Final Act. 5; *see also* Ans. 28–30 (discussing the combination of Joao and Farooq). Accordingly, the

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<sup>3</sup> Appellants argue the claims as a group. We decide the appeal of these claims on the basis for claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Examiner finds “that Farooq in view of Joao more than seemingly suggest, ‘circuitry for causing a record of a second patient to include the indication that the particular condition was treated in the first patient with the first protocol,” as recited in claim 1. Ans. 29.

Nonobviousness cannot be established by attacking the references individually when the rejection is predicated upon a combination of prior art disclosures. *In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). The test for obviousness is not whether the claimed invention is expressly suggested in any one or all of the references, but whether the claimed subject matter would have been obvious to those of ordinary skill in the art in light of the *combined teachings* of those references. *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). Because Appellants’ arguments are directed to Farooq individually and not the combination of Farooq and Joao, Appellants do persuade us that the Examiner erred.

Appellants also argue the Examiner has not sufficiently explained the rejection because “the Patent Office has merely cited extensive portions of Farooq (e.g., [ ] references to the entirety of numerous paragraphs), presented unsupported paraphrased interpretations of those portions, and made the conclusory statements that those portions ‘disclose’ the specific recitations of” the claims. Br. 17–18. According to Appellants, the rejection does not comply with 37 C.F.R. § 1.104(c)(2). *Id.* at 16–20.

We are not persuaded by Appellants’ arguments that the Examiner erred. First, as our reviewing Court has held, “all that is required of the office to meet its prima facie burden of production is to set forth the statutory basis of the rejection and the reference or references relied upon in a sufficiently articulate and informative manner as to meet the notice

requirement of [35 U.S.C.] § 132.” *In re Jung*, 637 F.3d 1356, 1363 (Fed. Cir. 2011). We have reviewed the Examiner’s rejection (Final Act. 3–23) and conclude that the notice requirement is satisfied in this case by “the examiner’s discussion of the theory of invalidity . . . , the prior art basis for the rejection . . . , and the identification of where each limitation of the rejected claims is shown in the prior art reference by [paragraph] number.” *Jung*, 637 F.3d at 1363. No more is required to make a prima facie rejection.

Second, contrary to Appellants’ arguments, the Examiner has provided more than just the recitation of relevant paragraphs. For example, the Examiner identifies why the paragraphs are being cited and how they teach the claim limitations. *See* Final Act. 3–23, 26–30; Ans. 28–30. For example, the Examiner makes detailed findings in the Answer tying together the cited sections of the prior art references. Ans. 28–30. Appellants did not file a Reply Brief addressing this finding.

Finally, Appellants argue the Examiner erred in finding sufficient reason to combine the prior art. Br. 30–34. Relying on *pre-KSR* case law, Appellants assert the Examiner’s “rational is analogous to stating ‘it would be obvious to combine Reference A (which teaches element X) with Reference B (which teaches element Y) simply because reference B says that its invention is ‘beneficial.’” *Id.* at 33.

The Examiner finds:

One of ordinary skill in the art at the time of the invention would have been motivated to expand the system of Farooq in this way since it facilitates improved healthcare quality, efficient information collection, processing and dissemination, efficient diagnosis and treatment, cost

efficiency, cost containment, as well as many other benefits and advantages.

Final Act. 5 (citing Joao ¶ 14). The Examiner also quotes from the Manual of Patent Examining Procedure, which states:

[a]n implicit motivation to combine exists not only when a suggestion may be gleaned from the prior art as a whole, but when the ‘improvement’ is technology-independent and the combinations of references results in a product or process that is more desirable, for example because it is stronger, cheaper, cleaner, faster, lighter, smaller, more durable, or more efficient . . . we have held that there exists . . . a motivation to combine prior art references even absent any hint of suggestion in the references themselves.

Ans. 31 (emphasis omitted) (quoting MPEP § 2143)

In *KSR*, the Supreme Court rejected the rigid application of the teaching, suggestion, or motivation (TSM) test in favor of a more expansive and flexible approach to the determination of obviousness. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 415 (2007). The Court stated, “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.” *Id.* at 418. Instead, “if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.” *Id.* at 417. Additionally, the conclusion of obviousness can be based on the interrelated teachings of multiple patents, the effects of demands known to the design community or present in the marketplace, and the background knowledge possessed by a

person having ordinary skill in the art. *Id.* at 418. The skilled artisan is “[a] person of ordinary creativity, not an automaton.” *Id.* at 421.

Applying *KSR*, we are not persuaded by Appellants’ argument that the Examiner erred. To the contrary, as the Examiner determined, it would have been obvious to apply a stated advantage in one prior art reference and apply it to a second. Indeed, that is exactly what the Supreme Court held in *KSR* when determining it would have been obvious to add a pedal position sensor to the design of support member of the pedal assembly.

Accordingly, we sustain the Examiner’s rejection of claims 1–3, 7, 8, 10, 12–16, 19–21, 23–26, 30, 31, 34, 35, 37–39, 41, 42, 63, 84, 105, and 126–130 under 35 U.S.C. § 103(a) as being unpatentable over Farooq and Joao.

#### DECISION

For the above reasons, we affirm the Examiner’s decisions rejecting claims 1–3, 7, 8, 10, 12–16, 19–21, 23–26, 30, 31, 34, 35, 37–39, 41, 42, 63, 84, 105, and 126–130.

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). *See* 37 C.F.R. § 41.50(f).

AFFIRMED