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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/310,373	12/02/2011	Grant Verstandig	AUDA-001/01US 316256-2002	8402
58249	7590	01/02/2019	EXAMINER	
COOLEY LLP ATTN: IP Docketing Department 1299 Pennsylvania Avenue, NW Suite 700 Washington, DC 20004			NG, JONATHAN K	
			ART UNIT	PAPER NUMBER
			3686	
			NOTIFICATION DATE	DELIVERY MODE
			01/02/2019	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte GRANT VERSTANDIG and ALEXANDER SIEDLECKI

Appeal 2017-001953¹
Application 13/310,373²
Technology Center 3600

Before BRUCE T. WIEDER, TARA L. HUTCHINGS, and
ROBERT J. SILVERMAN, *Administrative Patent Judges*.

HUTCHINGS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner’s final rejection of claims 1–22. An oral hearing was held on October 16, 2018.

We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ Our decision references Appellants’ Specification (“Spec.,” filed Dec. 2, 2011), and Appeal Brief (“Br.,” filed Dec. 10, 2015), and the Examiner’s Final Office Action (“Amend.,” mailed Mar. 11, 2015) and Answer (“Ans.,” mailed Sept. 23, 2016), and the transcript of the oral hearing held on October 16, 2018.

² Appellants identify Audax Health Solutions, LLC as the real party in interest. Br. 3.

CLAIMED INVENTION

Appellants' claimed invention "relate[s] generally to a health-related survey such as a health risk assessment, and more particularly [to] apparatus and methods for a health-related survey using pictogram answers." Spec. ¶ 1002.

Claims 1, 8, and 14 are the independent claims on appeal. Claim 1, reproduced below with bracketed notations added, is illustrative of the claimed subject matter:

1. A method comprising:

[(a)] sending a signal representing a first question and a plurality of pictogram answers for the first question including a first pictogram answer and a second pictogram answer, the signal sent to a user device such that a user of the user device can select a first pictogram answer independent from any other individual;

[(b)] receiving a signal representing the user selection of the first pictogram answer from the plurality of pictogram answers for the first question;

[(c)] selecting a second question based on the selection of the first pictogram answer by the user, and not a third question (1) that is different from the second question and (2) designated for selection when the user selects the second pictogram answer;

[(d)] sending a signal representing the second question and a plurality of pictogram answers for the second question, the second question being different from the first question, the plurality of pictogram answers for the second question being different from the plurality of pictogram answers for the first question, the first question and the second question collectively defining at least portion of a health-related survey, the plurality of pictogram answers for the first question and the plurality of pictogram answers for the second answer configured to engage the user more than text-only answers;

[(e)] receiving a signal representing a user selection of a pictogram answer from the plurality of pictogram answers for the second question; and

[(f)] defining a health-related user profile based on the user selection for the second question.

REJECTIONS

Claims 1 and 8 are provisionally rejected under 35 U.S.C. § 101 as claiming the same invention as that of claims 1, 3, 4, and 8 of copending Application No. 13/310,373.³

Claims 1–20 are rejected under 35 U.S.C. § 101 as directed to a judicial exception without significantly more.

Claims 1 and 2 are rejected under 35 U.S.C. § 102(b) as anticipated by Pristine (US 2004/0138924 A1, pub. July 15, 2004).

Claim 3 is rejected under 35 U.S.C. § 103(a) as unpatentable over Huyn (US 2002/0035486 A1, pub. Mar. 21, 2002) and Kellman (US 2003/0151630, pub. Aug. 14, 2003).

Claims 4 and 5 are rejected under 35 U.S.C. § 103(a) as unpatentable over Pristine and Afeyan (US 2007/0282666 A1, pub. Dec. 6, 2007).

Claims 6 and 7 are rejected under 35 U.S.C. § 103(a) as unpatentable over Pristine and Iliff (US 2003/0135095 A1, pub. July 17, 2003).

Claims 8–10, 21, and 22 are rejected under 35 U.S.C. § 103(a) over Pristine and Young (US 2005/0273359 A1, pub. Dec. 8, 2005).

Claim 11 is rejected under 35 U.S.C. § 103(a) as unpatentable over Pristine, Young, Huyn, and Kellman.

Claims 12 and 13 are rejected under 35 U.S.C. § 103(a) as unpatentable over Pristine, Young, and Afeyan.

³ 13/310,373 is the Application Number for the current appeal.

Claims 14 and 15 are rejected under 35 U.S.C. § 103(a) as unpatentable over Pristine and Sukurai (US 2002/0062248 A1, pub. May 23, 2002).

Claims 16 and 17 are rejected under 35 U.S.C. § 103(a) as unpatentable over Pristine, Sakurai, and Iliff.

Claim 18 is rejected under 35 U.S.C. § 103(a) as unpatentable over Pristine, Sukurai, Huyn, and Kellman.

Claims 19 and 20 are rejected under 35 U.S.C. § 103(a) as unpatentable over Pristine, Sukurai, and Afeyan.

ANALYSIS

Nonstatutory Double Patenting

Claims 1 and 8 are provisionally rejected under 35 U.S.C. § 101 as claiming the same invention as claims 1, 3, 4, and 8 “of copending Application No. 13/310,373.” Final Act. 3. Even though Appellants do not contest this rejection (*see* Br. 14), Application No. 13/310,373 refers to the subject application on appeal. Because the Examiner has not established a *prima facie* provisional rejection under 35 U.S.C. § 101, we do not sustain this provisional rejection.

Anticipation

Claims 1 and 2 are rejected under 35 U.S.C. § 102(b) as anticipated by Pristine. Appellants do not contest this rejection. Therefore, we summarily sustain the rejection of claims 1 and 2 under 35 U.S.C. § 102(b).

Obviousness

Independent Claim 8 and Dependent Claims 9–13, 21, and 22

In rejecting claim 8 under 35 U.S.C. § 103(a), the Examiner relies on Pristine as disclosing substantially all of the claim limitations. *See* Final Act. 12–14 (citing Pristine ¶¶ 24, 48, 49, 52, 58, Figs. 7–8). The Examiner acknowledges that Pristine does not teach “access[ing] a third-party repository containing lifestyle information for the user;” “compar[ing] the pictogram answer for the first question against the lifestyle information during the first time period;” and “identify[ing] . . . the pictogram answer for the first question as a suspect answer based on the lifestyle information being inconsistent with the pictogram answer for the first question,” as recited in claim 8. *Id.* at 13–14. The Examiner finds that Young teaches these limitations. *Id.* at 14 (citing Young ¶ 50). Specifically, the Examiner finds that Young discloses “an automated system for eliciting information from a patient where [the] system receives and stores data from a patient for use in comparing consistency of answers,” and “flagging the answer as being inconsistent when comparing to previous data” *Id.*

Young describes a patient using a computing system to complete a health care questionnaire at a pre-op screening website prior to surgery. Young ¶¶ 10, 40. Specifically, a health care provider determines that a patient needs a particular surgical procedure, logs into a pre-op screening website, and sets up a questionnaire for the patient. *Id.* ¶ 41. The patient logs into the pre-op screening website and answers the questions. *Id.* ¶ 44. The patient’s answers are stored, and software processes the answers to check for certain errors and determine a confidence level. *Id.* ¶ 50. For example, if a patient answers “no” to hypertension but the physician

measures high blood pressure during a physical exam, then the on-line questionnaire makes further inquiry or the patient's answer is reviewed or re-confirmed to get a set of consistent and reliable answers. *Id.*

Appellants argue that because Young's system collects its own information, it cannot be reasonably interpreted as accessing a third party repository for lifestyle information, as required by claim 8. Br. 5–6. The Examiner interprets Young's centralized database 34 on computer 30 as the claimed third party repository. *See* Final Act. 14 (citing Young ¶ 50); *see also* Ans. 3–4 (citing Young ¶¶ 10, 50, Fig. 2). The Examiner takes the position that Young's paragraph 50 “clearly teaches to access[] a third party repository [centralized database 34] for information.” Ans. 3. The Examiner points out that claim 8 does not clearly delineate the first and second parties and the Examiner determines one of ordinary skill in the art would interpret Young's hospital as a third party, and the patient and healthcare provider as the first and second parties, respectively. *Id.* at 4.

However, claim 8 recites code comprising seven steps to be executed by a processor, and the steps include receiving a user selection. Therefore, one of ordinary skill in the art would understand the entity or entities whose code causes the processor to execute the recited steps and a user as the first and second party. Young discloses that computer 30 hosts websites for viewing information and for receiving information from a patient and health care provider. Young ¶ 40. The information displayed on the hosted website is stored on central database 34. *Id.* Central database 34 also stores and maintains the questionnaires and the corresponding answers which pass through the website. *Id.*; *see also id.* ¶ 50. Because the Examiner finds that centralized database 34 on computer 30 is the claimed third party repository,

and centralized database 34 stores and maintains the questionnaires and corresponding answers, making it one of the first and second parties, the Examiner has not adequately shown on the present record “access[ing] a third party repository,” as recited in claim 8.

The Examiner additionally finds in the Answer that Pristine at paragraph 58 teaches “obtaining data from a third-party repository of data.” *Id.* at 3. Pristine at paragraph 58 teaches that the kiosk can send an intake report to a server, and the server selects an appropriate treatment room and prints the report. But sending a report to a central server and the server printing and/or selecting a treatment room does not teach or suggest accessing a third-party repository containing lifestyle information for the user, and comparing a pictogram answer for the first question against the lifestyle information, as required by claim 8.

The Examiner also finds that Pristine teaches at paragraph 61 that the server can be located in a third party location. Paragraph 61 teaches a variation in which a server is located at a dispatch center and executes the intake software. In this variation, the server determines availability of certain hospitals to handle a condition reported by a patient and directs the patient to a hospital having capacity and/or expertise to handle the patient and the patient’s condition. Pristine ¶ 61. But because the central dispatch center executes the intake software, the central dispatch center and patient correspond to first and second parties and, thus, fail to teach accessing a third-party repository, as required by claim 8. *See, e.g.*, Pristine ¶¶ 43–57. (describing the intake process in which a computer system presents questions and recites responses). The Examiner has not shown that Pristine, alone or in combination with Young, teaches accessing a third party

repository containing lifestyle information for the user, and comparing the pictogram answer for the first question against the lifestyle information, as required by claim 8.

Therefore, we do not sustain the rejection of claim 8 under 35 U.S.C. § 103(a). We also do not sustain the rejections of claims 9–13, 21, and 22, which depend from claim 8 and do not cure the deficiencies in the rejection of claim 8.

Independent Claim 14 and Dependent Claims 4, 6, 7, 15–17, and 19

Appellants do not contest the rejections of claims 4, 6, 14–17 and 19 under 35 U.S.C. § 103(a). Therefore, we summarily sustain the rejections of claims 14–17 and 19 under 35 U.S.C. § 103(a).

Dependent Claims 3 and 18

We are persuaded by Appellants’ arguments that the Examiner erred in the rejections of dependent claims 3 and 18 under 35 U.S.C. § 103(a) because Huyn and Kellman do not teach or suggest that “the first pictogram answer has a size and the second pictogram answer has a size larger than the size of the first pictogram answer, the size of the first pictogram answer being associated with a numerical value, the size of the second pictogram answer being associated with a numerical value larger than the numerical value associated with the first pictogram answer,” as recited in claim 3, and similarly recited in claim 18. Br. 6–7. The Examiner maintains that the argued limitation is obvious over Huyn and Kellman because Huyn teaches that a questionnaire presents different images, each image being associated with a specific value or answer (Final Act. 7 (citing Huyn ¶ 80), 25), and Kellman teaches displaying various images to the user that are

“proportionally sized based on [the] value assigned to each image” (*id.* at 8 (citing Kellman, Fig. 4, Abstract); *see also id.* at 25).

Appellants argue that paragraph 80 of Huyn illustrates a picture of human hands so that a patient can select a specific hand joint, but does not disclose or suggest presenting several different images or images associated with a specific value or answer, asserting Huyn is not relevant to a plurality of pictogram answers. Br. 6–7. Appellants further argue that Kellman teaches data visualization, but does not contain a description of surveys or pictogram answers. *Id.* at 7.

In the Answer, the Examiner elaborates that Huyn at paragraph 80 teaches displaying images of different medications to the patient, and that each image is associated with a specific value, or answer. Ans. 4–6. The Examiner reasons that “medications have different shapes and sizes and therefore displaying images of different medications is analogous to displaying images with different sizes.” *Id.* at 5. The Examiner acknowledges that Huyn fails to teach a first image having a size larger than a second image. *Id.* And the Examiner finds that Kellman describes displaying images of objects having different sizes, the objects’ sizes being based on the objects’ associated value. *Id.* The Examiner determines that it would have been obvious to combine the references to “allow[] a user to discriminate size among many objects in a visual scene.” *Id.*

Huyn teaches a questionnaire system in communication with a commercial medication software package that provides images of different medications to help patients identify medications whose names and dosage they do not remember. Huyn ¶ 80. The images can be “organized by symptom and displayed to the patient.” *Id.*

Kellman shows in Figure 4 aircraft position and heading in two dimensional space. Kellman ¶ 27, Fig. 4. The axes represent latitude and longitude, and a number displays the altitude of the aircraft. *Id.* The size of the aircraft icon is selected from a limited number of discriminable different sizes to represent the aircraft altitude, with each size representing a distinct altitude range. *Id.* at Abstract.

It is unclear how or why, and the Examiner does not adequately explain how or why, one of ordinary skill in the art having knowledge of Kellman's disclosure of conveying altitude information through icon size, would be motivated to modify the size of images in Huyn's medications such that "the first pictogram answer has a size and a second pictogram answer has a size larger than the size of the first pictogram answer, the size of the first pictogram answer being associated with a numerical value, the size of the second pictogram answer being associated with a numerical value larger than the numerical value associated with the first pictogram answer," as recited in claim 3, and similarly recited in claim 18. For example, it is unclear what value would be associated with Huyn's image sizes of medications, particularly where the images help patients remember the names and dosage of their medications.

Therefore, we do not sustain the rejections of claims 3 and 18 under 35 U.S.C. § 103(a).

Dependent Claims 5 and 20

We are persuaded by Appellants' arguments that the Examiner erred in rejecting dependent claims 5 and 20 under 35 U.S.C. § 103(a) because Afeyan does not teach or suggest

the first pictogram answer has a first portion and a second portion, the second pictogram answer has a first portion and a second portion, the first portion of the first pictogram answer substantially corresponding in shape to the first portion of the second pictogram answer and being unrelated to human anatomy, the second portion of the first pictogram answer differing in shape to the second portion of the second pictogram answer[,] as recited in claim 5, and similarly recited in claim 20. *See* App. Br. 7–8. The Examiner determines that “Afeyan further teaches [that] each answer has two portions[:] the box and the thumbs up.” Final Act. 10 (citing Afeyan, Fig. 7A, ¶ 185), 27 (citing Afeyan, Fig. 7A).

However, we agree with Appellants that one of ordinary skill in the art would not reasonably understand Afeyan's box to be a portion of the pictogram answer. In particular, we agree that one of ordinary skill would interpret Afeyan's box as a border to a “thumbs up” answer that itself does not convey meaning. *See* Br. 8 (“the ‘box’ of Afeyan is a mere border or background . . . it does not convey meaning, and it therefore cannot be reasonably interpreted as reading on a portion of a pictogram answer”). Therefore, we do not sustain the Examiner's rejections under 35 U.S.C. § 103(a) of dependent claims 5 and 20.

Patent-Ineligible Subject Matter

Under 35 U.S.C. § 101, an invention is patent-eligible if it claims a “new and useful process, machine, manufacture, or composition of matter.” 35 U.S.C. § 101. The Supreme Court, however, has long interpreted § 101

to include an implicit exception: “[l]aws of nature, natural phenomena, and abstract ideas” are not patentable. *Alice Corp. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2354 (2014).

The Supreme Court, in *Alice*, reiterated the two-step framework previously set forth in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012), “for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts.” *Alice Corp.*, 134 S. Ct. at 2355. The first step in that analysis is to “determine whether the claims at issue are directed to [one of those] patent-ineligible concepts.” *Id.* If the claims are not directed to a patent-ineligible concept, e.g., an abstract idea, the inquiry ends. Otherwise, the inquiry proceeds to the second step where the elements of the claims are considered “individually and ‘as an ordered combination’” to determine whether there are additional elements that “transform the nature of the claim’ into a patent-eligible application.” *Id.* (quoting *Mayo*, 566 U.S. at 79, 78).

The Court acknowledged in *Mayo*, that “all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas.” *Mayo*, 566 U.S. at 71. Therefore, the Federal Circuit has instructed that claims are to be considered in their entirety to determine “whether their character as a whole is directed to excluded subject matter.” *McRO, Inc. v. Bandai Namco Games Am., Inc.*, 837 F.3d 1299, 1312 (Fed. Cir. 2016) (quoting *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1346 (Fed. Cir. 2015)).

In rejecting the claims under 35 U.S.C. § 101, the Examiner determined that the claims are directed to the abstract idea of providing a

healthcare survey to a patient. Final Act. 4; *see also* Ans. 8. The Examiner concluded that the focus of the claims, as illustrated by claim 14, is on “collecting information via a survey, analyzing the answers providing, and displaying certain results of the collection and analysis, such as issuing rewards,” which the Examiner determines is a combination of abstract idea processes and, therefore, an abstract idea. Ans. 8 (citing *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat’l Ass’n*, 776 F.3d 1343, 1347 (Fed. Cir. 2014) (collecting information, including when limited to particular content, is within the realm of abstract ideas); *In re TLI Commc’ns LLC Patent Litigation*, 823 F.3d 607, 613 (Fed. Cir. 2017) (analyzing information by steps people go through in their minds or by mathematical algorithms is essentially a mental process within the abstract-idea category.). Specifically, the Examiner determines that “[t]he advance the Appellant[s] make[] is a process of gathering and analyzing information of a specified content, then displaying the results, and not any particular assertedly inventive technology for performing those functions,” i.e., an abstract idea. Ans. 8. The Examiner also determined that the claims do not include additional elements that are sufficient to amount to significantly more than the judicial exception. Final Act. 4; *see also* Ans. 9–10.

Independent Claim 14 and Dependent Claims 15–20

Seeking to draw an analogy to the claims in *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014), Appellants provide attorney argument that claim 14 is not directed to an abstract idea because it is rooted in computer technology and does not recite a business practice known from the pre-Internet world along with the requirement to perform it on the Internet. Br. 9. In particular, Appellants assert that in the pre-Internet

world health related user profiles, if developed at all, presumably were developed in isolated systems, such as those maintained by hospitals or doctors. *Id.* If rewards for developing the user profiles were issued, presumably they were not issued on the basis of the number of questions answered. *Id.* According to Appellants, the claimed solution is “only possible in the post-Internet world” where users can complete health-related profiles on their own time and preferred location. *Id.* at 9–10. Appellants further contend that only in the post-Internet environment is providing incentives a useful mechanism for encouraging users to complete additional survey questions. *Id.* at 10. However, Appellants do not cite any factual evidence to support these assertions, which amount to mere attorney argument. *See In re Pearson*, 949 F.2d 1399, 1405 (CCPA 1974) (“Attorney’s argument in a brief cannot take the place of evidence.”). Moreover, even if Appellants provided evidentiary support to support the assertions, the challenge that Appellants’ identify the invention as addressing — i.e., incentivizing a user to complete additional survey questions to develop more robust profiles (Br. 10; *see also* Spec. ¶ 1004 (“people may find known surveys boring and may lack the motivation to complete known surveys”)) — is not a problem rooted in computer technology or an Internet-centric challenge.

Although Appellants ostensibly suggest otherwise, the claims at issue in *DDR Holdings* were not held patent-eligible because they involved the use of the Internet. Instead, the Federal Circuit held that the claims were directed to patent-eligible subject matter because the claimed invention was “necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks” (i.e., retaining

website visitors who, if adhering to the routine, conventional functioning of Internet hyperlink protocol, would be transported instantly away from a host's website after "clicking" on an advertisement and activating a hyperlink), and did not simply use computers to serve a conventional business purpose. *DDR Holdings*, 773 F.3d at 1257. Here, Appellants have not demonstrated that claim 14 addresses any comparable Internet-centric challenge or uses a computer network other than in its normal, expected, and routine manner.

Appellants assert that claim 14 "is not directed to an abstract idea as contemplated by the courts." Br. 10. Claim 14 recites an apparatus having a survey module, a database, and a reward module. The survey module is configured to: (1) send a signal representing a first question and a plurality of pictogram answers; (2) receive a signal representing a selection of an answer; (3) send a signal representing a second question and a plurality of pictogram answers; (4) receive a signal representing a selection of an answer; (5) send a signal representing a third question; (6) receive a signal representing a selection of an answer; and (7) send a signal representing a fourth question and a plurality of pictogram answers. The database stores a health related user profile for the first user and second user based on their answers to the questions. The reward module causes a first reward to be issued to the first user and a second reward to be issued to the second user based on the number of questions answered.

Claim 14, thus, broadly recites communicating information between users and an apparatus. Claim 14 recites an "apparatus" that comprises a survey module implemented in at least one of processor or memory, a database, and a reward module operably coupled to the database module.

Yet, the underlying processes recited in claim 14 are all acts that could be performed by a human, e.g., via oral or written communication, without the use of a computer. For example, a person (or questioner), using pen and paper, could communicate a question and a plurality of pictogram answers to a user, and the user, in turn, could communicate a selection of a pictogram answer from the plurality orally or via a written communication. In response to receiving the selected answer, the questioner then could store a health-related user profile based on answers to questions, mentally or using pen and paper. A person additionally could cause a reward to be issued to the user based on the number of answers received.

The Federal Circuit has held that if a method can be performed by human thought alone, or by a human using pen and paper, it is merely an abstract idea and is not patent-eligible under § 101. *See CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1372–73 (Fed. Cir. 2011) (“[A] method that can be performed by human thought alone is merely an abstract idea and is not patent-eligible under § 101.”); *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972) (“Phenomena of nature . . . , mental processes, and abstract intellectual concepts are not patentable, as they are the basic tools of scientific and technological work.”). And, mental processes remain unpatentable even when automated to reduce the burden on the user of what once could have been done with pen and paper. *CyberSource*, 654 F.3d at 1375 (“That purely mental processes can be unpatentable, even when performed by a computer, was precisely the holding of the Supreme Court in *Gottschalk v. Benson*.”).

Claim 14 recites that the reward module is coupled to the database module and configured to cause a first reward to be issued to a first user and

a second reward to be issued to the second user. But, like the risk hedging in *Bilski*⁴ and the intermediated settlement in *Alice*, the use of rewards to incentivize desired behavior is “a fundamental economic practice long prevalent in our system of commerce,” *Alice Corp.*, 134 S. Ct. at 2356 (citing *Bilski*, 561 U.S. at 611), and “an ‘abstract idea’ beyond the scope of § 101.” *Id.*

Claim 14 combines the abstract idea of collecting and analyzing information with the abstract idea of issuing rewards. However, merely combining two abstract ideas does not make the combination any less abstract. *RecogniCorp, LLC v. Nintendo Co.*, 855 F.3d 1322, 1327 (Fed. Cir. 2017) (“Adding one abstract idea . . . to another abstract idea . . . does not render the claim non-abstract.”); *see also FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1094 (Fed. Cir. 2016) (determining the pending claims were directed to a combination of abstract ideas).

Turning to step two, Appellants assert that claim 14 contains recitations that are significantly more than what is well-understood, routine, and conventional in the field. Br. 10. Specifically, Appellants assert that issuing rewards to a user for a profile based on a number of answers is not conventional in the field of healthcare data collection. *Id.* Appellants assert that healthcare-related data is collected by healthcare professionals and kept highly confidential for privacy purposes. *Id.* at 10–11. “But the relevant inquiry is not whether the claimed invention as a whole is unconventional or non-routine.” *BSG Tech. LLC v. BuySeasons, Inc.*, 899 F.3d 1281, 1290 (Fed. Cir. 2018). Instead, the question is whether the claim includes

⁴ *Bilski v. Kappos*, 561 U.S. 593 (2010).

additional elements, i.e., elements *other* than the abstract idea itself, that “transform the nature of the claim’ into a patent-eligible application.” *Alice Corp.*, 134 S. Ct. at 2355 (quoting *Mayo*, 566 U.S. at 79, 78). These transformative elements must supply an “inventive concept” that ensures the patent amounts to “significantly more than a patent upon the [ineligible concept] itself.” *Id.* (alteration in original) (quoting *Mayo*, 566 U.S. at 72–73).

The Examiner determined here, and we agree, that the only elements beyond the abstract idea are generic computer components used to perform generic computer functions, e.g., sending, receiving, storing, processing, and storing data (*see* Final Act. 4; Ans. 4)— a determination amply supported by Appellants’ Specification (*see, e.g.*, Spec. ¶¶ 1021–1027). The Federal Circuit, in accordance with *Alice*, has “repeatedly recognized the absence of a genuine dispute as to eligibility” where claims have been defended as involving an inventive concept based “merely on the idea of using existing computers or the Internet to carry out conventional processes, with no alteration of computer functionality.” *Berkheimer v. HP, Inc.*, 890 F.3d 1369, 1373 (Fed. Cir. 2018) (Moore, J., concurring) (citations omitted).

We are not persuaded of Examiner error by Appellants’ argument that that claim 14 is patent-eligible because it does not pre-empt the use of the abstract idea in all fields. Br. 11. There is no dispute that the Supreme Court has described “the concern that drives [the exclusion of abstract ideas from patent eligible subject matter] as one of pre-emption.” *Alice Corp.*, 134 S. Ct. at 2354. But, characterizing pre-emption as a driving concern for patent eligibility is not the same as characterizing pre-emption as the sole test for patent eligibility. “The Supreme Court has made clear that the

principle of preemption is the basis for the judicial exceptions to patentability” and “[f]or this reason, questions on preemption are inherent in and resolved by the § 101 analysis.” *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015) (citing *Alice Corp.*, 134 S. Ct. at 2354). “[P]reemption may signal patent ineligible subject matter, [but] the absence of complete preemption does not demonstrate patent eligibility.” *Id.*

To the extent that Appellants argue that claim 14 is analogous to the claims in *Core Wireless Licensing S.A.R.L. v. LG Electronics, Inc.*, 880 F.3d 1356 (Fed. Cir. 2018) because it improves a display interface by “driv[ing] better interaction and improv[ing] user interaction with the machine interface,” we are not persuaded. Tr. 14 (“the claims do not “provid[e] a static list of questions that everyone goes through, but subsequent questions can be based on answers previously provided”). The invention in *Core Wireless* concerned “improved display interfaces, particularly for electronic devices with small screens like mobile telephones.” *Core Wireless Licensing*, 880 F.3d at 1359. “The improved interfaces allow a user to more quickly access desired data stored in, and functions of applications included in, the electronic devices.” *Id.* An application summary window displays “a limited list of common functions and commonly accessed stored data which itself can be reached directly from the main menu listing some or all applications.” *Id.* (citation omitted). The patents at issue in *Core Wireless Licensing* “explain that the disclosed application summary window ‘is far faster and easier than conventional navigation approaches,’ particularly for devices with small screens.” *Id.* (citation omitted). The Federal Circuit found that the claims are directed to an improved user interface for

computing devices, and directed to a particular manner of summarizing and presenting content in electronic devices. Here, claim 14 recites an apparatus comprising a survey module configured to send signals representing first through fourth questions and a plurality of pictogram answers for each question, and to receive signals representing a selection of an answer to each of the four questions. In so doing, claim 14 seeks to “improve[] engagement of the survey intake[, thereby] obtaining more data.” Tr. 14. But the improvement identified by Appellants is an improvement to the abstract idea of gathering data, analyzing data, and displaying the results, which is insufficient to transform the abstract idea into a patent-eligible application. We find no improvement to claim 14’s survey module analogous to the improved user interface of *Core Wireless Licensing* that results in faster navigation.

We are not persuaded that the Examiner erred in rejecting claim 14 and its dependent claims under 35 U.S.C. § 101. Therefore, we sustain the Examiner’s rejection.

Independent Claim 8 and Dependent Claims 9–13, 20, and 21

Appellants argue that claim 8 does not recite an abstract idea “[f]or reasons similar to those discussed with reference to claim 14.” Br. 12. Appellants contend that claim 8 is necessarily rooted in computer technology. *Id.* at 12. In particular, Appellants assert that “the ability to access a third party repository containing lifestyle information for the user and the ability to compare pictogram answers against the lifestyle information is an integral part of the claim such that absent computer technology in which it is rooted, no solution remains,” and it is “simply not feasible [to access a third party repository] without the assistance of a

computer.” *Id.* Here, Appellants’ argument is based on the same false premise described above with respect to claim 14: using computers to implement the abstract idea makes the claim patent eligible. We find no indication in the Specification, nor do Appellants direct us to any indication, that the operations recited in claim 8, whether considered alone or in combination, focus on a specific improvement in computer technology. Instead, claim 8 focuses on a process that qualifies as an abstract idea for which computers are invoked as a tool.

Appellants also argue that claim 8 contains “significantly more” than the abstract idea because it includes improvements to another technology or technical field. *Id.* Specifically, Appellants provide attorney argument that “claim 8 applies health-related survey results, which are traditionally highly confidential for patient privacy purposes, to a different use in a different field, the open sharing paradigm of third-party lifestyle data, to provide ‘a health-related user profile based on the user selection of the first question, the user selection of the second question, and the suspect answer.”

Appellants charge that this limitation is an improvement to another technology field, and represents a limitation other than what is well-known, understood, routine, and conventional in the field. *Id.* at 12–13. However, we fail to see how or why, and Appellants do not explain how or why, this limitation constitutes a technological improvement as opposed to an improvement in a business practice. We find no indication in the Specification, nor do Appellants provide any indication, that the operations recited in claim 8 require any specialized computer hardware, invoke any assertedly inventive programming, or otherwise are implemented using other than generic computer technology.

Here, the advance Appellants purport to make is a process of gathering and analyzing information of a specified content, and not any particular assertedly inventive technology for performing those functions. “As many cases make clear, even if a process of collecting and analyzing information is ‘limited to particular content’ or a particular ‘source,’ that limitation does not make the collection and analysis other than abstract.” *SAP Am., Inc. v. Investpic, LLC*, 898 F.3d 1161, 1168 (Fed. Cir. 2018) (quoting *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1355 (Fed. Cir. 2016) (citing cases)). “It is clear from *Mayo* that the ‘inventive concept’ [under step two of the *Mayo/Alice* test] cannot be the abstract idea itself.” *Berkheimer v. HP Inc.*, 890 F.3d at 1374 (Moore, J., concurring); *see also BSG Tech. LLC v. BuySeasons, Inc.*, 899 F.3d at 1290 (“[i]t has been clear since *Alice* that a claimed invention’s use of the ineligible concept to which it is directed cannot supply the inventive concept that renders the invention ‘significantly more’ than that ineligible concept”).

We are not persuaded, on the present record, that the Examiner erred in rejecting independent claim 8 and its dependent claims under 35 U.S.C. § 101. Therefore, we sustain the Examiner’s rejection.

Independent Claim 1 and Dependent Claims 2, 7, and 28

Appellants assert that claim 1 has been amended to recite sending a signal representing a first question and selecting a second question based on selection of the first pictogram answer by the user and, therefore, “contains significantly more than providing a healthcare survey to a patient.” Br. 13. Yet, the limitations identified by Appellants amount to steps for gathering and processing information, which are abstract ideas and fail to provide an inventive concept. Additionally, the identified limitations are steps for

providing a healthcare survey to a patient, the abstract idea identified by the Examiner. As such, they fail to transform the claimed subject matter into a patent-eligible application such that the claims amount to significantly more than the abstract idea itself.

Appellants additionally argue that claim 1 is patent eligible because it does not tie up the judicial exception identified by the Examiner. But preemption is not a separate test for patent eligibility.

We are not persuaded, on the present record, that the Examiner erred in rejecting claim 1 and its dependent claims under 35 U.S.C. § 101. Therefore, we sustain the Examiner's rejection.

DECISION

The Examiner's provisional rejection of claims 1 and 8 under 35 U.S.C. § 101 is reversed.

The Examiner's rejection of claims 1 and 2 under 35 U.S.C. § 102(b) is affirmed.

The Examiner's rejections of claims 3, 5, 8–13, 18, and 20–22 under 35 U.S.C. § 103(a) are reversed.

The Examiner's rejections of claims 4, 6, 7, 14–17, and 19 under 35 U.S.C. § 103(a) are affirmed.

The Examiner's rejection of claims 1–22 under 35 U.S.C. § 101 is affirmed.

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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