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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MANS OLOF-ORS and DAVID LEHR

Appeal 2017-002108
Application 11/408,804
Technology Center 3600

Before JEAN R. HOMERE, SHARON FENICK,
and ADAM J. PYONIN, *Administrative Patent Judges*.

HOMERE, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's Final Rejection of claims 1, 6, 8–11, 13, 16, 20–23, and 43–50, which constitute all claims pending in this application.¹ Final Act. 2. Claims 2–5, 7, 12, 14, 15, 17–19, and 24–42 have been canceled. *Id.* We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

¹ Appellants identify the real party in interest as Thompson Reuters. App. Br. 2.

Introduction

According to Appellants, the claimed subject matter relates to a method and system (100) for delivering on a regular basis (e.g. hourly) to a user's Java enabled mobile phone (104) information, such as, e.g., for a user who is a farmer, current market prices, weather forecasts, and any news that may affect crops previously designated by the user. Spec. ¶¶ 4, 18, 23, and Fig. 1. This may be useful if the user's mobile phone (104) does not have a data subscription to facilitate a web based solution or a wireless application protocol ("WAP") solution for obtaining such data. *Id.* ¶ 23. In particular, a content server (101) communicates with the user phone (104) via a cellular wireless network (e.g., telecom tower, satellite) by text messages (up to 160 characters) condensing a large amount of information encoded and selected based on priority information associated with the user. *Id.* ¶¶ 18–22, and 25. More particularly, and in the example where the user is a farmer, upon receiving data feeds corresponding to current market data, a processor at the content server (101) executes instructions a from a storage medium (108) at the content server (101) to determine the farmer's geographic location by analyzing the farmer's subscription data including weather forecasts, selected produce, and current market prices. *Id.* ¶¶ 24, 28, 30, 31, 49, and 59. The content server processor then accesses from a profile database (107) preference information (e.g. commodity, exchange, location, market price) previously set by the farmer so as to select corresponding portions of the data feeds (201, 201A), which it encodes in textual characters of a short message service (SMS) using encoding tables (202, 202A) containing short form information values consisting of a single textual character (203, 203A). *Id.* ¶¶ 32, 38, 39, 43, 59, Figs. 2, and 2A. Subsequently, the content server

processor sends the short SMS messages to the mobile device (104) via the cellular wireless network. *Id.* Upon receiving the SMS text including a first data item concatenated with a second data item without delimiters, a second processor at the farmer's mobile device (104) executes instructions retrieved from a second medium at the storage server to decode the received SMS text. *Id.* ¶¶ 26, 41, 46, 52, 53–56, and Figs. 5A–B. Then, the mobile device (104) displays the decoded text on its graphical user interface (106) as user readable information. *Id.*

Representative Claim

Independent claim 1 below is representative, and reads as follows:

Claim 1. A system comprising:

a processor at a content server, wherein the content server receives a plurality of data feeds containing data;
and

a medium at the content server storing instructions adapted to be executed by the processor to:

determine a current geographic location of a user based in part on an analysis of a subscription pattern of the user for at least one of weather and market content;

access preference information associated with the user, wherein the preference information of the user is stored in a profile database at the content server that is remote from a mobile device associated with the user, and further wherein the preference information of the user includes commodity trading preferences of the user including an indication of a commodity, an indication of an exchange, a location of the user, and a market price for the commodity, wherein the market price is determined by the exchange;

select, by the processor, a portion of the data from the received plurality of data feeds for the user based on (1) the preference information associated with the user and (2) the location of the user, wherein the selected data comprises a first data item including a first plurality of

textual characters and a second data item including a second plurality of textual characters;

encode the selected data in textual characters of a short message service (SMS) text message using one or more encoding tables containing unique short form information values associated with at least one data item of the selected data, wherein each of the unique short form information values consists of a single textual character; and

send the encoded SMS text message solely via a cellular wireless network to the mobile device of the user, wherein the encoded SMS text message comprises the unique short form information values associated with the selected data and wherein the encoded SMS text message comprises the first data item concatenated with the second data item without any delimiter between the first data item and the second data item, wherein the SMS text message can be received by the mobile device via the cellular network, and the textual characters of the received SMS text message can be parsed and decoded by the mobile device to display the selected data as user-readable information, the user-readable information being in at least one of a graphical and textual form.

App. Br. 23, Claims App.

Prior Art Relied Upon

Russo	US 2004/0068458 A1	Apr. 8, 2004
Boone	US 2005/0132016 A1	June 16, 2005
Bal	US 2005/0169240 A1	Aug. 4, 2005
Anderson et al. ("Anderson")	US 2005/0180370 A1	Aug. 18, 2005
Bonar et al. ("Bonar")	US 2006/0126620 A1	June 15, 2006
Alperin et al. ("Alperin")	US 2007/0130155 A1	June 7, 2007
Talozi et al.	US 2007/0207798 A1	Sept. 6, 2007

(“Talozi”)
Donald et al. US 7,620,407 B1 Nov. 17, 2009
(“Donald”)

Hest, *Farming The Web*, Farm Industry News, Vol. 29, Iss. 4, 1–6, (2006),
[http://proquest.umi.com/pqdweb?index=5&did=1014601531&SrchMode=2
&sid=3&Fmt=4](http://proquest.umi.com/pqdweb?index=5&did=1014601531&SrchMode=2&sid=3&Fmt=4), last visited Sept. 2018.

Horvitz, et al. EP 1 326 189 A3 August 17, 2005

Rejections on Appeal

Claims 1, 6, 8–11, 13, 16, 20–23, 43, 44, 46–48, and 50 stand rejected under 35 U.S.C. § 112(a) or 35 U.S.C. § 112 (pre-AIA), first paragraph, as failing to comply with the written description requirement. Final Act. 8–10.²

Claim 43 stands rejected under 35 U.S.C. 112(b) or 35 U.S.C. § 112 (pre-AIA), second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which the inventor or a joint inventor, or for pre-AIA the applicant regards as the invention. *Id.* at 11.

Claims 1, 6, 8–11, 13, 16, 20–23, and 43–50 stand rejected under 35 U.S.C. § 101 as being directed to patent ineligible material. *Id.* at 12–14.

Claims 1, 6, and 9–11 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Alperin, Russo, Boone, Bonar, Horvitz and Donald. *Id.* at 14–32.³

² The Examiner withdrew the written description rejection of claims 45 and 49. Ans. 1–2.

³ Donald is omitted from the Examiner’s statement of the rejection, but it is discussed in the body of the rejection. Consequently, we treat the rejection as being made in further view of Donald.

Claim 8 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Alperin, Donald, Russo, Bonar, Horvitz, Boone, and Hest. *Id.* at 32–34.

Claims 43–46 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Alperin, Russo, Boone, Bonar, Horvitz and Anderson. *Id.* at 34–43.

Claims 13, 21–23, and 47–50 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Alperin, Donald, Russo, Boone, and Horvitz. *Id.* at 43–65.

Claim 16 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Alperin, Donald, Russo, Boone, Horvitz, and Talози. *Id.* at 65–66.

Claim 20 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Alperin, Russo, Donald, Boone, Horvitz, and Bal. *Id.* at 67–68.

ANALYSIS⁴

Written Description Rejections

Appellants argue that the Examiner erred in concluding the originally-filed written description does not support the recitation “send[ing] the encoded SMS text message solely via a cellular wireless network” to the mobile device of the user, as recited currently in independent claim 1. App.

⁴ Rather than reiterate all the arguments of Appellants and all the Examiner’s findings and conclusions, we refer to the Appeal Brief (filed June 1, 2016) (“App. Br.”); the Reply Brief (filed November 22, 2016) (“Reply Br.”); and the Answer (mailed September 22, 2016) (“Ans.”); and the Final Office Action (mailed October 2, 2015) (“Final Act.”) for the respective details.

Br. 8. In particular, Appellants argue although the Specification does not recite the disputed limitations, *verbatim*, an ordinarily skilled artisan would recognize that paragraph 23 of the Specification shows that Appellants had possession of the disputed subject matter at the time of the invention. *Id.* In particular, Appellants argue that the ordinarily-skilled artisan would appreciate that the disclosure of “a farmer, using a mobile phone, wishes to receive information, but ‘does not have a data subscription’” implies that the farmer must therefore communicate solely via cellular wireless network. *Id.* at 11 (emphasis omitted) (citing Spec. ¶ 23).

This argument is persuasive. As correctly noted by Appellants, to satisfy the written description requirement, a patent Specification must describe the claimed invention in sufficient detail that *one skilled in the art* can reasonably conclude that the inventor had possession of the claimed invention. Reply Br. 5 (citing *Moba, B.V. v. Diamond Automation, Inc.*, 325 F.3d 1306, 1319 (Fed. Cir. 2003)). An applicant may show possession of the claimed invention by describing the claimed invention with all of its limitations using such descriptive means as words, structures, figures, diagrams, and formulas that fully set forth the claimed invention. *Lockwood v. American Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997). However, our reviewing court guides that “[a] description which renders obvious the invention for which an earlier filing date is sought is not sufficient.” *Lockwood* 107 F.3d at 1572 (quoting *Jepson v. Coleman*, 314 F.2d 533, 536 (CCPA 1963)). “[I]t is ‘not a question of whether *one skilled in the art* might be able to construct the patentee's device from the teachings of the disclosure. . . . Rather, it is a question whether the application *necessarily* discloses that particular device.’” *Id.* (emphasis added).

At the outset, we note Appellants' originally-filed Specification discloses the following:

Many people do not use the Internet or computers and, instead, rely on mobile devices as their primary form of communication.

The farmer has a JAVA enabled mobile phone and wants to receive this information on his mobile phone. However, this farmer does not have a data subscription so a web based solution or wireless application protocol ("WAP") solution may not possible.

The server 101 may communicate with one or more mobile devices 104 through a variety of means such as, but not limited to, a wireless network, a telecom tower, and a satellite.

Id. Spec. ¶¶ 20, 23 and 25.

Although the written description requirement does not impose an “*in haec verba*” recitation of the disputed claim language in the original Specification, it nonetheless requires a sufficient description of the claim subject matter so as to enable one of ordinary skills in the art to make and use the invention. *In re Wright*, 866 F.2d 422 (Fed. Cir 1989); *see also Agilent Techs., Inc. v. Affymetrix, Inc.*, 567 F.3d 1366 (Fed. Cir. 2009). As noted in the cited portions above, the Specification indicates that the farmer's mobile device can generally communicate with a wireless network, telecom tower, and satellite. Spec. ¶ 25. Further, the Specification indicates that the farmer's mobile device does not have a data subscription, and thus cannot communicate via a data wireless network. *Id.* ¶ 23.

Therefore, we agree with Appellants that the ordinarily-skilled artisan, having read the Specification, would readily understand that Appellants had possession of the recitation that the farmer's device communicates with the

server solely via the cellular wireless network (e.g. telecom tower, satellite). Accordingly, we do not sustain the written description rejection of claim 1.

With respect to claim 43, Appellants argue the Examiner erred in concluding that the originally-filed Specification does not support the recitation “a second processor at the mobile device that is unconnected for data transmission.” App. Br. 9. In particular, Appellants argue that the ordinarily-skilled artisan would appreciate that paragraph 23 of the Specification supports the cited recitation for the same reasons set forth in the discussion of claim 1. *Id.*

We agree with Appellants that the ordinarily-skilled artisan would readily appreciate that a farmer’s mobile device without *data subscription*, as disclosed in paragraph 23 of the Specification, supports the recitation that the mobile device is unconnected for *data transmission*. Reply Br. 6–7.

Further, Appellants argue the Examiner similarly erred in concluding that the Specification does not support the recitation “a second medium at the mobile device server storing instruction adapted to be executed by the second processor to display the user-readable information,” as recited in claim 43. *Id.* Specifically, Appellants argue the ordinarily-skilled artisan would readily appreciate that paragraphs 25 and 26 of the Specification disclosing a mobile phone containing a graphical user interface for displaying “textual descriptions as well as graphical icons” supports a processor to display user-readable information in a first display system. App. Br. 9; Reply Br. 7. Furthermore, Appellants argue that the term “second medium” was used in claim 43 to distinguish the storage medium at the mobile device from the storage medium at the content server. *Id.*

This argument is persuasive. Paragraph 52 of the Specification discloses “a client application stored on the mobile device.” Hence, the ordinarily skilled artisan would appreciate that the cited disclosure supports a second storage medium at the mobile device distinguishable from the first storage medium at the content server.

Accordingly, we do not sustain the written description rejection of claim 43.

As per claim 46, Appellants argue the Examiner erred in concluding that the originally-filed Specification does not support the recitation “adapted to be executed by second processor of the mobile device to send to the content server an SMS text message that includes at least a portion of the preference information.” App. Br. 10. In particular, Appellants argue that the disclosure of a mobile device sending an update to the content server via SMS text message in paragraph 36 of the Specification supports the disputed limitation. *Id.*

We agree with Appellants the ordinarily-skilled artisan would appreciate that the disclosure of the mobile device sending a text to the server and decoding the encoded text message supports the claim limitation that the mobile device includes a [second] processor distinguishable from the [first] processor at the content server. *Id.*; Reply Br. 8; Spec. ¶¶ 36, and 52.

Because we are persuaded the Examiner erred in concluding that the disputed claim limitations discussed above are supported by Appellants’ originally-filed Specification, we do not sustain the Examiner’s written description rejection of claims 1, 6, 8–11, 13, 16, 20–23, 43, 44, 46–48, and 50.

Indefiniteness Rejection

Appellants argue that the Examiner erred in concluding that claim 43 is indefinite. App. Br. 10–11. In particular, Appellants argue the ordinarily-skilled artisan would not construe “a second processor at the mobile device that is unconnected for data transmission” as conflicting with the recitation “and is connected for exchange of SMS text messages.” *Id.*, Reply Br. 8–9. Instead, Appellants submit the ordinarily skilled artisan would be apprised that because the mobile device does not have a data subscription to facilitate the exchange of data with the content server, the mobile device can only communicate with the content server via SMS text messages. *Id.* (citing Spec. ¶ 23).

This argument is persuasive. “The legal standard for definiteness is whether a claim reasonably apprises those of skill in the art of its scope.” *In re Warmerdam*, 33 F.3d 1354, 1361 (Fed. Cir. 1994) (citing *Amgen Inc. v. Chugai Pharmaceutical Co. Ltd.*, 927 F.2d 1200, 1217, (Fed. Cir.1991)). The “inquiry therefore is merely to determine whether the claims do, in fact, set out and circumscribe a particular area with a reasonable degree of precision and particularity.” *In re Moore*, 439 F.2d 1232, 1235 (CCPA 1971). In particular, a claim is indefinite “where the language ‘said lever’ appears in a dependent claim where no such ‘lever’ has been previously recited.” *Ex parte Moelands*, 3 USPQ2d 1474, 1476 (BPAI 1987).

As discussed above, we do not agree with the Examiner that the recitation “a second processor at the mobile device that is unconnected for data transmission” conflicts with the recitation “and is connected for exchange of SMS text messages,” as recited in claim 43. Instead, we agree with Appellants, in light of paragraph 23 of the Specification, the ordinarily

skilled artisan would be apprised that the scope of the disputed limitations requires the mobile device communicating with the content sever via SMS text message when the mobile device does not subscribe for a data plan. That is, in light of the Specification, the recited “SMS” message is distinguishable from “data.”

Because the Examiner has failed to show that the ordinarily-skilled artisan, having read Appellants’ Specification, would not be apprised of the scope of claim 43, we do not sustain this rejection.

Patent Ineligibility Rejection

Appellants argue the Examiner erred in concluding that claims 1, 6, 8–11, 13, 16, 20–23, and 43–50 are directed to the mere abstract idea of “selecting economic data based on user preference rules which determine the selection based on location, subscriber data, analyzing economic data associated with the user.” App. Br. 12. According to Appellants, the claims are directed to implementing a specific solution to a problem arising in computer technology, as opposed to a tool for implementing a fundamental concept of selecting economic based on user preference rules. *Id.* at 13–14 (citing *Enfish LLC v. Microsoft Corp.*, 118 USPQ.2d 1684, No. 2015-1244, (Fed. Cir. 2016)).

Appellants emphasize the following claim limitations:

- (1) select a portion of data feeds for the user based preference information and location of the user, the selected data comprises a first and a second plurality of textual characters
- (2) encode the textual characters using an encoding table containing unique short form information values associated with at least one data item of the selected data,

- (3) send SMS text message solely via a cellular wireless network to the mobile device, the SMS text message comprises the first data item concatenated with the second data item without any delimiter between them,
- (4) parse and decode at the mobile device the received and encoded SMS text message to display the selected data as user readable information.

Reply Br. 13.

Appellants then submit that the claims solve the problem of exchanging large amount of data between a content server and a mobile device, even when no data subscription is present, by using encoded SMS texts, which allows the devices to exchange significantly more information within a 160 character limit. App. Br. 14; Reply Br. 12. In other words, Appellants allege that the elements of claim 1 amount to significantly more than the abstract idea because those elements disclose specific limitations other than what is well-understood, routine and conventional in the field. *Id.*

The USPTO Memorandum titled “Changes to Examination Procedures Pertaining to Subject Matter Eligibility,” April 19, 2018 (“Memorandum”),⁵ pursuant to *Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. 2018) (“*Berkheimer*”), instructs that the question of whether certain claim limitations represent *a well-understood, routine, and conventional activity* is an issue of fact that the Examiner must find, and expressly support in writing with evidence to satisfy the substantial evidence standard under

⁵ *Changes in Examination Procedure Pertaining to Subject Matter Eligibility, Recent Subject Matter Eligibility Decision (Berkheimer v. HP, Inc.)* 1–5 (2018), <https://www.uspto.gov/sites/default/files/documents/memo-berkheimer-20180419.PDF>.

the Administrative Procedure Act (APA). Memorandum 2–3. That is, upon Appellants challenging an Examiner’s finding in a step 2B *Mayo* analysis alleging that a claimed feature is *well-understood, routine, and conventional* in the relevant industry, the Examiner must establish such fact by more than mere knowledge or mere disclosure of the disputed fact in the prior art. *Id.* at 3. In other words, upon receiving Appellants’ challenge, the Examiner must establish such element(s) is/are *well-understood, routine and conventional* activity by producing evidence that the element(s) is/are widely prevalent or in common use in the relevant industry. *Id.* (citing MPEP 2106.05(d)(I)). The Examiner must therefore support the rejection in writing with one or more of the following:

- (1) A citation to an express statement in the Specification or to a statement made by an applicant during prosecution that demonstrates the well-understood, routine, conventional nature of the element(s).
- (2) A citation to one or more of court decisions discussed in MPEP 2106.05(d)(II) as noting the well-understood, routine, conventional nature of the element(s).
- (3) A citation to a publication that demonstrates the well-understood, routine, conventional nature of the element(s) (e.g., a book, manual, review article or other source that describes the state of the art and discusses what is well-known and in common use in the relevant industry).
- (4) A statement that the Examiner is taking official notice of the well-understood, routine, conventional nature of the element(s).

Id. at 3–4.

In the present case, the Examiner states: “[T]he claimed limitations are directed toward the use of conventional or generic technology in an established well understood/known environment without any claim that the invention reflects an inventive solution to any problem presented by combining the two.” Ans. 14.

We do not agree with the Examiner’s characterization of the claimed elements. Although the claims encompass a generic computer performing the functions of selecting a portion of data feeds, encoding the selected data into short form SMS text message, and sending the encoded SMS text message to mobile device, the claims are not limited to just those functions. As persuasively argued by Appellants, the claims recite additional functions, particularly the specific encoding that uses encoding tables containing short form values to produce an encoded text message concatenating a first data item with a second data item without delimiter so as to transfer a large amount of data to a wireless device, which does not have data subscription. Such functionality necessarily provides a technical improvement to the operation of the communications. On the record before us, we do not find the Examiner has provided sufficient evidence to establish such functions performed by the computer are *well-understood, routine or conventional* activities. *Cf. BASCOM Glob. Internet Servs. v. AT&T Mobility LLC*, 827 F.3d 1341, 1351 (Fed. Cir. 2016) (Finding filtering steps in claims satisfy *Alice* step 2 because they were “claiming a technology-based solution (not an abstract-idea-based solution implemented with generic technical components in a conventional way) to filter content on the Internet that overcomes existing problems with other Internet filtering systems.”).

Thus, after reviewing the 35 U.S.C. § 101 arguments articulated by Appellants in the Briefs, we find Appellants' arguments persuasive. Accordingly, we do not sustain the Examiner's rejection that claims 1, 6, 8–11, 13, 16, 20–23, and 43–50 are directed to patent ineligible subject matter.

Obviousness Rejections

Appellants argue that the Examiner erred in concluding that the combination of Alperin, Russo, Boone, Bonar, Horvitz and Donald renders claims 1, 6, and 9–11 unpatentable. App. Br. 15–17. In particular, Appellants argue the cited references are not properly combined to teach or suggest encoding selected data in textual characters of a short message using encoding tables containing short form information values, as recited in independent claim 1. *Id.* at 15. According to Appellants, Alperin's disclosure of merely retrieving from a database user preference information, in response to the user's request, so as to update settings in user end devices does not teach the disputed limitations. *Id.*; Reply Br. 15 (citing Alperin ¶¶ 41, 42, 58, and 59). Further, Appellants argue the Examiner has not sufficiently explained how Russo's disclosure of selecting data feeds from market exchanges to be displayed on a user device could be combined with Alperin's system for retrieving profile information for updating settings in an end device to teach the disputed limitations. *Id.*

Appellants' arguments are persuasive. Alperin discloses a system for retrieving user preference information from a profile database in response to a user's request, and for propagating the retrieved profile information to update the settings of a plurality user devices. Alperin ¶¶ 53, 54, and 58. Russo discloses electronically transmitting to a user device selected portions of market data feeds. Russo ¶¶ 177, 178, 180, 181, 184, 185, and 208.

Although we agree with the Examiner that Russo teaches transmitting to the user device selected market data feeds, Russo's teaching does not cure the noted deficiencies of Alperin. The user preference information retrieved by Alperin relates to information for updating the device settings, as opposed to selecting which portions of the data feed for subsequent display on the user device. In other words, because Alperin's retrieved preference information does not play any role in the data feed selection, we agree with Appellants that the combination of Alperin and Russo would fall short of teaching the disputed limitations. At best, the proposed combination would result in updating the settings of user devices such that the devices are an operating (e.g., on mode) when receiving data feeds, and not operating (e.g., sleep mode) when it is not in service or receiving data feeds.

Because Appellants have shown at least one reversible error in the Examiner's rejection, we need not reach Appellants' remaining arguments.

Accordingly, we are persuaded or error in the Examiner's anticipation rejection of claim 1.

Because claims 6, 8–11, 13, 16, 20–23, and 43–50 recite the disputed limitations of claim 1 discussed above, and the secondary references relied upon by the Examiner do not cure the noted deficiencies in Alperin and Russo, we do not sustain the Examiner's anticipation of the cited claims for the same reason set forth above.

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DECISION

For the above reasons, we reverse the Examiner's written description rejections, the indefiniteness rejection, the patent ineligibility rejection, and the obviousness rejections of claims 1, 6, 8–11, 13, 16, 20–23, and 43–50 as set forth above.

REVERSED