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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/270,848	10/11/2011	Mark B. Barron	PTS008CIP	8204
27137	7590	12/12/2018	EXAMINER	
DIEDERIKS & WHITELAW, PLC 13885 HEDGEWOOD DR., SUITE 317 WOODBIDGE, VA 22193			SHUI, MING	
			ART UNIT	PAPER NUMBER
			3684	
			NOTIFICATION DATE	DELIVERY MODE
			12/12/2018	ELECTRONIC

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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* MARK B. BARRON and MICHAEL HAYS

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Appeal 2017-003549  
Application 13/270,848<sup>1</sup>  
Technology Center 3600

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Before MURRIEL E. CRAWFORD, BART A. GERSTENBLITH, and  
BRUCE T. WIEDER, *Administrative Patent Judges*.

CRAWFORD, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants seek our review under 35 U.S.C. § 134 of the Examiner's final decision rejecting claims 11–27 and 29–41. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

BACKGROUND

Appellants' invention is directed to a system and method for remote acquisition and delivery of goods. Spec. ¶ 2.

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<sup>1</sup> Appellants identify Consumeron, LLC as the real party in interest. Brief 6.

Claim 11 is illustrative:

11. A method for remote acquisition and delivery of goods comprising:

locating a plurality of agents of a service provider at various geographic locations, each agent having a mobile agent system in communication with at least one remote server, wherein each mobile agent system includes: a digital image capture device and a communication device;

receiving a first acquisition request from a first customer for a first set of one or more goods, including receiving product data from the first customer regarding at least one of the one or more goods, with the product data is in the form of one or more of images, video, bar codes, QR codes, image recognition and near field communication data;

contacting one of the plurality of agents for a location having the first set of one or more goods;

electronically transmitting, in real-time, information on the first set of one or more goods to the first customer using the digital image capture device of the agent;

acquiring the first set of one or more goods via the agent;  
and

providing for delivery of the first set of one or more goods to a delivery site selected by the first customer.

The Examiner relies on the following prior art references as evidence of unpatentability:

Miller	US 7,574,365 B2	Aug. 11, 2009
Winter	US 2006/0111955 A1	May 25, 2006
Hayes	US 2006/0173772 A1	Aug. 3, 2006
Kohl	US 2007/0203791 A1	Aug. 30, 2007
Bell	US 2008/0086386 A1	Apr. 10, 2008
Stefanik	US 2008/0281684 A1	Nov. 13, 2008
Morse	US 2009/0089211 A1	Apr. 2, 2009

Appellants appeal the following rejections:

Claims 11–40 are rejected under 35 U.S.C. § 101.

Claims 15 and 19 are rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

Claims 11, 12, 15, 18, and 41 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which the inventor regards as the invention.<sup>2</sup>

Claims 11–15, 18–20, 22–24, 27, 29–39, and 41 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Winter in view of Stefanik and in further view of Bell.

Claims 16 and 17 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Winter, in view of Stefanik and in further view of Bell and Hayes.

Claim 21 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Winter in view of Stefanik and in further view of Bell and Miller.

Claims 25 and 26 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Winter in view of Stefanik and in further view of Bell and Kohl.

Claim 40 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Winter in view of Stefanik in further view of Bell and Morse.

## PRINCIPLES OF LAW

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<sup>2</sup> The Examiner has withdrawn the 112, second paragraph, rejection as it applied to other claims. Ans. 3–4, 9–11.

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

In determining whether a claim falls within the excluded category of abstract ideas, we are guided in our analysis by the Supreme Court’s two-step framework, described in *Mayo* and *Alice*. *Id.* at 2355 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1296–97 (2012)). In accordance with that framework, we first determine whether the claim is “directed to” a patent-ineligible abstract idea. *See id.* at 2356 (“On their face, the claims before us are drawn to the concept of intermediated settlement, *i.e.*, the use of a third party to mitigate settlement risk.”); *Bilski v. Kappos*, 561 U.S. 593, 611 (2010) (“Claims 1 and 4 in petitioners’ application explain the basic concept of hedging, or protecting against risk.”); *Diamond v. Diehr*, 450 U.S. 175, 184 (1981) (“Analyzing respondents’ claims according to the above statements from our cases, we think that a physical and chemical process for molding precision synthetic rubber products falls within the § 101 categories of possibly patentable subject matter.”); *Parker v. Flook*, 437 U.S. 584, 594–595 (1978) (“Respondent’s application simply provides a new and presumably better method for calculating alarm limit values.”); *Gottschalk v. Benson*, 409 U.S. 63, 64 (1972) (“They claimed a method for converting binary-coded decimal (BCD) numerals into pure binary numerals.”).

The patent-ineligible end of the spectrum includes fundamental economic practices, *Alice*, 134 S. Ct. at 2357; *Bilski*, 561 U.S. at 611; mathematical formulas, *Parker*, 437 U.S. at 594–95; and basic tools of scientific and technological work, *Gottschalk*, 409 U.S. at 69. On the patent-eligible side of the spectrum are physical and chemical processes, such as curing rubber, *Diamond*, 450 U.S. at 184 n.7, “tanning, dyeing, making waterproof cloth, vulcanizing India rubber, smelting ores,” and a process for manufacturing flour, *Gottschalk*, 409 U.S. at 69.

If the claim is “directed to” a patent-ineligible abstract idea, we then consider the elements of the claim—both individually and as an ordered combination—to assess whether the additional elements transform the nature of the claim into a patent-eligible application of the abstract idea. *Alice*, 134 S. Ct. at 2355. This is a search for an “inventive concept”—an element or combination of elements sufficient to ensure that the claim amounts to “significantly more” than the abstract idea itself. *Id.*

In addition, 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, 1373 (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.”).

Claims involving data collection, analysis, and display are directed to an abstract idea. *Elec. Power Grp. v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016) (holding that “collecting information, analyzing it, and displaying certain results of the collection and analysis” are “a familiar class of claims ‘directed to’ a patent ineligible concept”); *see also In re TLI*

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*Commc'ns LLC Patent Litig.*, 823 F.3d 607, 611 (Fed. Cir. 2016);  
*FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1093–94 (Fed. Cir.  
2016).

Claims that recite an improvement to a particular computer technology have been found patent eligible. *See, e.g., McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1314–15 (Fed. Cir. 2016) (determining claims not abstract because they “focused on a specific asserted improvement in computer animation”).

## ANALYSIS

### *Rejection under 35 U.S.C. §101*

The Examiner determines that the claims are directed to the remote acquisition and delivery of one or more goods and are considered to be a means for organizing human behavior. Final Act. 2. The Examiner also determines that the current claim set is directed towards data gathering in order to organize specific tasks to ensure the acquisition and delivery of goods. We agree. In addition, the claims are directed to the collection, analysis, and storage of data, which is also an abstract idea.

The Examiner finds that the recited components of the claims are performing their most basic functions and are merely streaming data back and forth between servers and computer interfaces. As such, the Examiner finds that the additional elements do not amount to an improvement to the functioning of a computer and do not move beyond a general link of the use of the abstract idea to a particular technological environment. In addition, the Examiner finds that the claims amount to nothing more than requiring a generic computer to perform generic computer functions that are well-

understood, routine and conventional activities previously known to the industry. *Id.* at 4.

Appellants argue that the claims recite an improvement upon a typical purchasing method, use particular machinery and include numerous specific limitations beyond what would be routine or conventional for a purchasing method. Appellants do not explain, however, what the improvement is or which of the limitations of the claim are beyond what would be routine and conventional. In regard to the recitation of particular machinery such as digital image capture device and a communication device, we agree with the Examiner's finding that these elements perform their most basic functions and the functions performed are well-understood, routine and conventional. This finding is supported by the disclosure in the Specification at paragraph 7 that the digital image capture device is a digital camera in a cell phone which is a well-understood, routine and conventional device for capturing images.

We are not persuaded of error on the part of the Examiner by Appellants' argument that there is no evidence in the record that the claims cover only an abstract idea. Brief 12. The Examiner recognizes that the claims cover more than an abstract idea. The Examiner considers the other elements that are in addition to the abstract idea in determination of whether the claims include significantly more than the abstract idea.

Appellants' argument concerning the absence of evidence supporting the determination that the claims are directed to an abstract idea also does not persuade us of Examiner error. Patent eligibility under § 101 presents an issue of law. *Accenture Glob. Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1340 (Fed. Cir. 2013). There is no requirement that an

examiner cite evidentiary support to conclude that a claim is directed to a patent-ineligible concept, such as an abstract idea. The courts consider the determination of whether a claim is eligible (which involves identifying whether an exception such as an abstract idea is being claimed) to be a question of law. *See Rapid Litig. Mgmt. v. CellzDirect*, 827 F.3d 1042, 1047 (Fed. Cir. 2016). Thus, courts do not require “evidence” that a claimed concept is a judicial exception, and generally decide the legal conclusion of eligibility without resolving any factual issues. *FairWarning IP, LLC v. Iatric Sys.*, 839 F.3d 1089, 1097 (Fed. Cir. 2016) (citing *Genetic Techs. Ltd. v. Merial LLC*, 818 F.3d 1369, 1373 (Fed. Cir. 2016)).

We are also not persuaded of error on the part of the Examiner by Appellants’ argument that the specified uses of devices claimed do not tie up people sending images over the internet or shopping for goods for that matter. Brief 13. While preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility.” *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015); *see also OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1362–63 (Fed. Cir. 2015) (“[T]hat the claims do not preempt all price optimization or may be limited to price optimization in the e-commerce setting do not make them any less abstract.”). And, “[w]here a patent’s claims are deemed only to disclose patent ineligible subject matter under the *Mayo* framework, as they are in this case, preemption concerns are fully addressed and made moot.” *Ariosa*, 788 F.3d at 1379.

We are not persuaded of error on the part of the Examiner by Appellants’ argument that the invention is not directed to a fundamental economic practice, an idea or even a mathematical relationship/formula.

Even if Appellants are correct, the claims are clearly directed to the collection, analysis, and storage of data and, therefore, are directed to an abstract idea on that basis.

We are likewise not persuaded of error on the part of the Examiner by Appellants' argument that claim 11 is not directed to an abstract idea because it requires structural elements such as the digital capture device. These structural elements are considered by the Examiner in the second step of the analysis and we agree with the Examiner that these elements amount to generic devices performing generic functions and as such do not amount to significantly more than the abstract idea.

In view of the foregoing, we will sustain the Examiner's rejection of claim 11. We will sustain the rejection as it is directed to the remaining claims because Appellants do not address the eligibility of these claims or make similar arguments to those made in support of the eligibility of claim 11.

*Rejection of claims 15 and 19 under 35 U.S.C. § 112, first paragraph*

The Examiner determines that the disclosure does not adequately describe "calculating which of the plurality of agents could most efficiently carry out the first acquisition request," as recited in claim 15. Final Act. 11. Specifically, the Examiner determines that the disclosure does not reveal the manner in which the calculation—of which of the plurality of agents could most efficiently carry out the first acquisition—is completed because there is no meaningful structure/algorithm as to how this value is generated. *Id.* at 12.

In regard to claim 19, the Examiner determines that there is no disclosure of how calculating a price estimate based on the first acquisition request is done because there is no disclosure of any meaningful structure/algorithm. *Id.*

The issue of determining whether the disclosure satisfies 35 U.S.C. § 112, first paragraph is whether the Specification describes the claimed invention in sufficient detail that a person skilled in the art could reasonably conclude that Appellants had possession of the claimed subject matter as of the filing date, *see Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1562–63 (Fed. Cir. 1991), i.e., that Appellants possessed the invention, including how to perform the calculations recited in claims 15 and 19.

Claim 15 recites “calculating which of the plurality of agents could most efficiently carry out the first acquisition request using the at least one remote server.” Claim 19 recites “calculating a price estimate based on the first acquisition request.”

The Federal Circuit has held that the written description requirement may be satisfied when the particular steps, i.e., an algorithm, necessary to perform the claimed function, are described in the Specification. *See, e.g., Vasudevan Software, Inc. v. MicroStrategy, Inc.*, 782 F.3d 671, 681–83 (Fed. Cir. 2015). Appellants have not directed our attention to a disclosure in the Specification of an algorithm (whether in the form of a mathematical formula, in prose, as a flow chart, or in any other manner) for performing the claimed calculations. Appellants have not directed our attention to a disclosure in the Specification that describes the claimed invention in sufficient detail that a person skilled in the art could reasonably conclude that Appellants possessed the invention.

Therefore, we sustain the Examiner's rejection of claims 15 and 19 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

*Rejections of claims 11, 12, 15, 18, 19, 21, and 41 under 35 U.S.C. § 112, second paragraph*

The Examiner concludes that claims 11, 12, 21, and 41 are hybrid claims. Ans. 8–9. The preamble of claim 1 recites a method and steps to perform the method, however, the body of the claim recites a mobile agent system, which includes a digital image capture device and a communication device.

Claim 11 is similar to a claim found definite in *Microprocessor Enhancement Corp. v. Texas Instruments, Inc.*, 520 F.3d 1367 (Fed. Cir. 2008). The claim structure was as follows:

A method of executing instructions in a pipelined processor comprising:  
[structural limitations of the pipelined processor];  
the method further comprising:  
[method steps implemented in the pipelined processor].

*Id.* at 1374 (quoting U.S. Patent No. 5,471,593 col. 129, l. 27–col. 130, l. 32 (filed Jan. 21, 1994)). As explained in *HTC Corporation v. IPCom GmbH & Co.*, 667 F.3d 1270, 1277–78, the *Microprocessor* claim made clear that direct infringement was limited to practicing the claimed method in the pipelined processor possessing the required structure. *Id.* We agree with Appellants that infringement would only occur when the method steps of claim 11 are performed with the claimed structure.

In view of the foregoing, we will not sustain this rejection of indefiniteness based on claim 11 as being a hybrid claims. We also will not sustain the rejection using this rationale of claims 12, 21, and 41 for the same reason.

The Examiner also rejects claim 15 as indefinite because an ordinary artisan cannot determine how to avoid infringement of the calculating step, i.e., there is no disclosure of any meaningful structure/algorithm explaining how one would generate the efficiency value. Final Act. 15

A claim is invalid for indefiniteness if, when read in light of the specification, it fails to inform, with reasonable certainty, those skilled in the art about the scope of the invention. *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2124 (2014). When the USPTO has initially issued a well-grounded rejection that identifies ways in which language in a claim is ambiguous, vague, incoherent, opaque, or otherwise unclear in describing and defining the claimed invention, and thereafter the applicant fails to provide a satisfactory response, the USPTO can properly reject the claim as failing to meet the statutory requirements of § 112, second paragraph. *See In re Packard*, 751 F.3d 1307, 1311 (Fed. Cir. 2014).

We agree with the Examiner that claim 15 fails to particularly point out and distinctly claim the subject matter of the invention because it is not clear how the calculating step is performed thus rendering the claim indefinite.

We are not persuaded of error on the part of the Examiner by Appellants' argument that the steps are clear, especially when read in light of the Specification. Brief 10–12 (citing Spec. ¶¶ 38–41). Appellants do not

explain with any particularity how the identified portions of the Specification disclose how the individual steps are implemented by a computer, particularly the determining step. Appellants do not, therefore, persuade us that the Examiner erred.

In view of the foregoing, we will sustain this rejection as it is directed to claim 15. We will also sustain this rejection as it is directed to claim 19 for the same reason.

The Examiner rejects claim 18 because the recitation “receiving instructions from the first customer using the communication device to remotely inspect the first set of one or more goods utilizing the digital capture device” is unclear as to how the customer uses a device he does not have. Ans. 9–10.

We will not sustain this rejection because we agree with Appellants that when claim 18 is read along with claim 11, from which it depends, it is clear that the recitation of “using the communication device” refers to the step of receiving. As such, claim 18 is clear that the mobile agent has the communication device and uses this device to receive the instructions from the customer.

*Rejection under 35 U.S.C. § 103(a)*

We will not sustain this rejection. The Examiner finds that Winter discloses the invention as claimed except for receiving product data from the first customer in the form of images, vides, bar codes, QR codes, etc. and also does not disclose electronically transmitting real-time information to the customer using digital image capture device of the agent. Final. Act. 9–10.

We find that Winter discloses a customer appointment coordination system and method and more particularly coordination of customer appointment confirmation and management of mobile resources to the customer appointment. Winter ¶ 2. In the Winter system a work order is determined by the system by identifying a piece of equipment or material or supply that is required to provide the product or service to the customer. *Id.* ¶ 33. The system then generates a requisition to an inventory entity or supplier to provide the equipment or material or supply to the agent prior to their traveling to the customer location. *Id.* ¶ 35. The system also selects the agent to deliver the service or product to the customer from a plurality of agents based on the agent status, customer location and agent location and notifies the customer of the pending arrival of the agent to the customer's location. *Id.* ¶ 36.

We agree with Appellants that there would have been no reason to modify the system disclosed in Winter with the teachings of Bell so that real-time information on the set of goods is electronically transmitted to the customer using a digital image capture device of an agent as taught by Bell. The Winters system itself identifies any equipment or material or supply that is required to provide the product or service requested by the customer. The Examiner has not established that there would have been a reason to include the step of contacting the customer with digital information about the goods as the goods have already been identified by the system.

In view of the foregoing, we will not sustain this rejection as it is directed to claim 11 and claims 12–15, 18–20, 22–24, 30–38, dependent therefrom. We will not sustain this rejection as it is directed to claims 29,

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39, and 41 because each rejection of these claims relies on the combined teachings of Winter and Bell as well.

We will not sustain the remaining rejections under 35 U.S.C. § 103(a) for the same reason.

#### DECISION

We affirm the Examiner's § 101 rejection.

We affirm the Examiner's § 112, first paragraph, rejection.

We affirm the Examiner's § 112, second paragraph, rejection of claims 15 and 19.

We do not affirm the Examiner's § 112, second paragraph, rejection of claims 11, 12, 18, 21, and 41.

We do not affirm the Examiner's § 103(a) rejection.

#### TIME PERIOD

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1) (2009).

ORDER

AFFIRMED