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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JANET E. CASE

Appeal 2017-004451
Application 12/166,157
Technology Center 3600

Before ALLEN R. MacDONALD, HUNG H. BUI, and
DAVID J. CUTITTA II, *Administrative Patent Judges*.

MacDONALD, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ Appellant indicates the Real Party in Interest is Proxio. App. Br. 1.

STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134(a) from a final rejection of claims 1–32. We have jurisdiction under 35 U.S.C. § 6(b). We AFFIRM.

Representative Claim

Representative claim 1 under appeal reads as follows (emphases, formatting, and bracketed material added).

1. A private market system, comprising:
 - [A.] one or more buying parties, wherein each buying party interacts with the system using a processing unit based device;
 - [B.] one or more selling parties, wherein each selling party interacts with the system using a processing unit based device;
 - [C.] a computer that executes a private market unit;
 - [D.] a network capable of connecting the one or more buying parties and the one or more selling parties to the private market unit; and
 - [E.] the private market unit further comprising
 - [i.] an offer repository storing one or more offers of products or services with privacy levels attached to each offer from the one or more selling parties, the privacy levels including
 - [a.] *a public privacy level*,
 - [b.] *a network privacy level* and
 - [c.] *a private privacy level*,
 - [ii.] a request repository storing one or more requests for products or services from the one or more buying parties, an anonymity repository storing a set of anonymity parameters for each of the one or more buying parties, the one or more selling parties and one of the product and the service that is part of a transaction,

- [iii.] a matching engine that matches a particular offer for one of the product and service in the offer repository with one or more requests for one of the product and service in the request repository based on the set of anonymity parameters for each of the one or more buying parties, the one or more selling parties and one of the product and the service that is part of the transaction which maintains the anonymity of the buying parties to generate a matching request and the selling party and
- [iv.] a notification engine that notifies a buying party associated with the matching request of the match based on the privacy levels of the offers and the parameters stored in the anonymity repository for the selling party associated with the particular offer and the relationship between the buying party and the selling party and initiates the transaction based on the anonymity parameters.

Examiner's Rejections

A. Section 101

The Examiner rejected claims 1–32 “under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter” (Final Act. 4) i.e., for being directed to patent-ineligible subject matter.

We select claim 1 as representative. Appellant does not argue separate patentability for claims 2–32. Except for our ultimate decision, we do not address this rejection of claims 2–32 further herein.

B. Section 103

1.

The Examiner rejected claims 1–14, 18–28, and 32 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Kuehr-McLaren et

al. (US 2005/0102195 A1; pub. May 12, 2005) and Millard et al. (US 2002/0007335 A1; pub. Jan. 17, 2002).

Appellant argues separate patentability for claim 1. Appellant does not argue separate patentability for claims 2–14, 18–28, and 32. To the extent that Appellant discusses claim 18, Appellant merely repeats the arguments directed to claim 1. Such a repeated argument is not an argument for “separate patentability.” Except for our ultimate decision, we do not address this rejection of claims 2–14, 18–28, and 32 further herein.

2.

The Examiner rejected claims 15–17 and 29–31 under 35 U.S.C. § 103(a) as being unpatentable over Kuehr-McLaren and Millard in various combinations with other references.²

Separate patentability is not argued for claims 15–17 and 29–31. Rather, Appellant argues against these claims solely by reference to the arguments presented for their parent independent claims. Thus, the rejections of these claims turn on our decision as to claim 1. Except for our ultimate decision, we do not address these rejections further herein.

Issues on Appeal

Did the Examiner err in rejecting claim 1 for being directed to patent-ineligible subject matter?

Did the Examiner err in rejecting claim 1 for being obvious?

² We treat headings D. and E. at page 16 of the Appeal Brief and page 3 of the Reply Brief as though they correctly reference the rejections under 35 U.S.C. § 103.

ANALYSIS

We have reviewed the Examiner’s rejections in light of Appellant’s arguments (Appeal Brief and Reply Brief) that the Examiner has erred. We disagree with Appellant’s conclusions.

A. Section 101

Under 35 U.S.C. § 101, a patent may be obtained for “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” The Supreme Court has “long held that this provision contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable.” *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2354 (2014) (quoting *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (2013)). 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, 82–83 (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*, 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,” such as an abstract idea. For example, a fundamental economic practice is an abstract idea:

[In *Bilski v. Kappos*], the Court grounded its conclusion that all of the claims at issue were abstract ideas in the understanding that risk hedging was a “fundamental economic practice.” 561 U.S., at 611.

Alice, 134 S. Ct. at 2357.

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. We, therefore, look to whether the claims focus on a specific means or method that improves the relevant technology or are instead directed to a result or effect that itself is the abstract idea and merely invoke generic processes and machinery. *See Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1336 (Fed. Cir. 2016). If the claims are not directed to 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 the additional elements ‘transform the nature of the claim’ into a patent-eligible application.” *Alice*, 134 S. Ct. at 2355 (quoting *Mayo*, 566 U.S. at 79, 78).

In other words, the second step is to “search for an ‘inventive concept’—*i.e.*, an element or combination of elements that is ‘sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.’” *Id.* (alteration in original) (quoting *Mayo*, 566 U.S. at 72–73). The prohibition against patenting an abstract idea “cannot be circumvented by attempting to limit the use of the formula to a particular technological environment’ or adding ‘insignificant postsolution activity.’” *Bilski v. Kappos*, 561 U.S. 593, 610–11 (2010) (citation omitted).

B. *Examiner’s §101 Rejection - Alice/Mayo - Steps 1 and 2*

Applying step 1 of the *Alice/Mayo* analysis, the Examiner determines:

The claims are directed to business interactions which is considered to be an abstract idea inasmuch as such activity is considered to be a fundamental economic practice by organizing, storing, and transmitting information (offers and privacy levels for business interactions). Organizing, storing, and transmitting

information has been deemed by the Federal Circuit to be an abstract idea (see *Cyberfone [v]. CNN et al* (Fed[.] Cir[.] 2014)[.]

Final Act. 2.

Applying step 2 of the *Alice/Mayo* analysis, the Examiner determines:

[W]hen considering the elements and combinations of elements, the claims as a whole do not amount to significantly more than the abstract idea itself. This is because the claim does not amount to an improvement to another technology or technical field; and do not amount to an improvement to the functioning of a computer itself.

Furthermore, the claim merely amounts to the application or instructions to apply the abstract idea (i.e. business interactions) on a computer, with the claims requiring nothing more than a generic computer to perform generic computer functions that are well-understood, routine and conventional activities previously known to the industry.

10/28/2014 Non-Final Act. 4.

C. Appellant's § 101 Arguments

1. Abstract Idea – “tie up”

Appellant raises the following arguments in contending that the Examiner erred in rejecting claim 1 as directed to patent ineligible subject matter.

Pursuant to Step 2A [of the 2014 Interim Eligibility Guidelines, 79 Fed. Reg. 74618 (Dec. 16, 2014)], the examiner asserts that the claims are directed to the abstract idea of business interactions. OA at 4. ***Pursuant to Step 2A, the examiner must then determine if the abstract idea is set forth in the claims and would “tie up” the abstract idea.*** In the present case, the abstract idea is not set forth in the claims and the claims would not tie up the abstract idea since these claims do not embody the alleged abstract idea (the fundamental economic practice of business interactions) since the claims recite other elements and thus the abstract idea is not set forth in the claims. Specifically, the claims

recite other features of the claimed apparatus and method that do not claim the abstract idea and thus the claims are not directed to the abstract idea. Furthermore, the claims clearly do not “tie up” the idea of business interactions. Thus, pursuant to Step 2A of the Interim Guidelines, claims 1-32 are not directed to an abstract idea and the rejection should be withdrawn.

App. Br. 10–11 (emphasis added).

Essentially Appellant asserts that procedurally the Examiner is required to perform a “tie up” analysis as part of Step 1 of the *Alice/Mayo* framework (Step 2A of the 2014 Interim Eligibility Guidelines); and the Examiner fails to do so. We are unpersuaded by Appellant’s assertion. To the extent that any “tie up” analysis requirement exists, it is as part of the “significantly more” analysis of Step 2 of the *Alice/Mayo* framework (Step 2B of the 2014 Interim Eligibility Guidelines). *See Mayo*, 566 U.S. at 86–87 (the Court uses the phrase “tie up” three times in its discussion of the controlling precedents which reinforce its conclusion that to be patent eligible a claim directed to an abstract idea must add something of significance to that abstract idea).

To the extent that Appellant asserts the Examiner has erred in showing claim 1 does not recite significantly more, we address such assertions below based on the particularized arguments Appellant presents to support the assertions.

2. *Abstract Idea – Cyberfone*

Appellant also raises the following arguments in contending that the Examiner erred in rejecting claim 1 as directed to patent ineligible subject matter.

[T]he examiner has relied on the Cyberfone CAFC case to support his cursory[] conclusion that the claims are directed to

an abstract idea. However, *the Cyberfone case is inapplicable since it was decided before the Alice case, the USPTO Guidelines*, subsequent CAFC cases and the USPTO memos cited above and thus the Court *could not have used the proper test to assess whether the claims are in fact directed to an abstract idea*. For example, the Cyberfone test does not follow the test set forth in the Alice case nor the further refinements to the patent eligibility test set forth in the Enfish and TLC cases. Thus, the Cyberfone case cannot be used as a basis for a case in which the court found a claim to be an abstract idea. As a result, the examiner has not identified a court case in which the court found claims, using the proper test, like the pending claims directed to an abstract idea. Thus, the alleged abstract idea is not similar to the court examples (that have applied the proper test) and thus is not an abstract idea under Step 2A of the USPTO Guidelines.

App. Br. 11 (emphasis added).

We are not persuaded by Appellant's argument. Contrary to Appellant's assertion that the USPTO's 2014 Interim Eligibility Guidelines could not have used *Cyberfone* to assess whether a claim is directed to an abstract idea, the USPTO's Guidelines explicitly reference *Cyberfone* as an example of a claim to an abstract idea. 79 Fed. Reg. at 74622, 74630–31.

3. *Abstract Idea – Not directed thereto*

Appellant also raises the following arguments in contending that the Examiner erred in rejecting claim 1 as directed to patent ineligible subject matter.

[U]nder Step 2A and the *Enfish* and *TLC cases*, the examiner has overly broadly[] define[d] the abstract idea without taking into account all of the claim language as is required under the current case law. For example, the examiner's allegation that the claims are directed to a fundamental economic practice by organizing, storing and transmitting information *ignores the various claim elements of the claims that, when properly analyzed under the*

case law, show that the claims are not directed to any abstract idea. Specifically, the claims recite [Appellant fully quotes claim 1 above portions E. i–iv] which were not properly considered by the cursory analysis performed by the examiner in the office action. Thus, pursuant to Step 2A, the claims are not in fact directed to an abstract idea and the rejection should be withdrawn for at least this additional reason.

App. Br. 11–12.

We are not persuaded by Appellant’s argument. We agree with the Examiner’s determination that claim 1 is directed to an abstract idea in the form of sales process functions in a private market (see all of the functions recited in above portions E. i–iv of claim 1). Contrary to Appellant’s argument, these claimed functions are business functions, not technological functions. Also contrary to Appellant’s argument, claim 1 is directed to a “fundamental economic practice.” Such activities are squarely within the realm of abstract ideas. Sales process functions in a private market are a fundamental business practice long prevalent in our system of commerce, like the risk hedging in *Bilski*, the intermediated settlement in *Alice*, verifying credit card transactions in *CyberSource* (see *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1370 (Fed. Cir. 2011)), collecting and analyzing information to detect and notify of misuses in *FairWarning* (see *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1093–94 (Fed. Cir. 2016)), and guaranteeing transactions (see *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1354 (Fed. Cir. 2014)). Sales process functions in a private market are also a building block of a market economy. Thus, sales process functions in a private market, like risk hedging and intermediated settlement, are an “abstract idea” beyond the scope of § 101. See *Alice* 134 S. Ct. at 2356.

4. *Significantly More*

Appellant also raises the following arguments in contending that the Examiner erred in rejecting claim 1 as directed to patent ineligible subject matter.

The claims also are directed to substantially more than the abstract idea since the claims are directed to ***improvement in a technical field*** (pursuant to the *Enfish* case) and directed to a solution that did not exist prior to the Internet and thus was not well known prior to the Internet pursuant to the *DDR Holdings* case.

....

Pursuant to the *Enfish* case, the claims are directed to ***improvement in a technical field*** (a sales marketplace) in which the claims recite the various elements set forth in the independent claims that provide an improvement in technology (the privacy levels and the matching engine) that did not exist in the prior art as explained below in response to the prior art rejections. Thus, the claims are directed to substantially more than the abstract idea for at least this reason.

....

The claims are ***directed to a technical problem*** (an real estate sales . . . system) and a solution (the privacy levels and the matching engine) that did not exist before the Internet. Therefore, the claim elements are not well known pursuant to *DDR Holdings* and are not directed to simply a computer implementation of a notoriously well known idea like hedging. . . .

....

. . . Similar to the *Bascom* case, the present claims are directed broadly to a marketplace that may be an abstract idea like the content filtering in *Bascom*. However, like *Bascom*, the present claims are a particular arrangement of elements (see summary of claims above) that are a ***technical improvement*** (including the privacy level and how the matching engine

operates with respect to those privacy levels) over the prior art ways of a private market as described in the background of the present patent application.

App. Br. 13–14 (emphasis added).

[P]ursuant to the *McRO* [*Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299 (Fed. Cir. 2016)] case, the instant claims are directed to patent eligible subject matter. Like the *McRO* claims, the present claims are directed to improving an existing technological process (a computer based private market system) like the lip synchronization and facial expression control of animated characters in *McRo* [sic]. Furthermore, the claims specifically recite [Appellant fully quotes claim 1 above portions E. iii–iv] which are like the set of rules in the *McRO* [sic] claims so that the present claims do not preempt any idea (for the same reasons as the *McRO* case) and are limited to the specific processes for the computer private market set forth in the claims (like the specific processes for automatically animating characters using particular information and techniques and does not preempt all techniques of *McRO* [sic]) and thus are patent eligible for the same reasons set forth in *McRo* [sic]. Furthermore, like *McRO* [sic], ***it is the processes above and not the use of a computer that improved the existing technological process of a computer private market.***

App. Br. 12–13.

We see no reason on the record to question the Appellant’s assertion that the claimed invention improves “buying” and “selling” (claim 1) by improving the business transaction (i.e., transaction steps) of sales process functions in a private market. However, the fact that a claimed concept is “[g]roundbreaking, innovative, or even brilliant” is not enough to “satisfy the § 101 inquiry.” *Myriad*, 569 U.S. at 591. Nor is it enough for subject-matter eligibility that claimed techniques be novel and nonobvious in light of prior art, passing muster under 35 U.S.C. §§ 102 and 103. *See Mayo*, 566 U.S. at 89–90; *Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138,

1151 (Fed. Cir. 2016) (“[A] claim for a new abstract idea is still an abstract idea. A claim directed to a unique and advantageous marketing and sales arrangement is nonetheless directed to a marketing and sales arrangement and constitutes an abstract idea.”³ “[U]nder the *Mayo/Alice* framework, a claim directed to a newly discovered law of nature (or natural phenomenon or abstract idea) cannot rely on the novelty of that discovery for the inventive concept necessary for patent eligibility.” *Genetic Techs. Ltd. v. Merial L.L.C.*, 818 F.3d 1369, 1376 (Fed. Cir. 2016); *Diamond v. Diehr*, 450 U.S. 175, 188–89 (1981). The search for a § 101 inventive concept is distinct from demonstrating § 102 novelty.”); *Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1315 (Fed. Cir. 2016) (same for obviousness) (Symantec). We conclude that the improvement of claim 1 is an improved sequence of sales process functions in a private market (fundamental economic practice), that is, an improved abstract idea. The claims here are ineligible because their innovation is an innovation in ineligible subject matter.

Further, in contrast to cases such as *BASCOM*, we conclude claim 1 contains no technical solution. *Bascom Global Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016). Unlike the claims at issue in

³ See *Ultramercial, Inc. v. Hulu LLC*, 772 F.3d 709 (Fed. Cir. 2014). In this case, the patentee argued that its financial arrangement (a method of using advertising as an exchange or currency) was distinguishable from the “routine,” “long prevalent,” or “conventional” abstract idea in *Alice* because it was “directed to a specific method of advertising and content distribution that was previously unknown.” *Id.* at 714. The court rejected the patentee’s position that “abstract ideas remain patent-eligible under § 101 as long as they are new ideas, not previously well known, and not routine activity.” *Id.*

BASCOM, claim 1 does not introduce a technical advance or improvement. It contains nothing that amounts to significantly more than a patent upon the abstract idea itself. *Id.* See *Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1152 (Fed. Cir. 2016). To the extent claim 1 adds anything to the abstract idea, it is a statement to use a computer to perform the business functions of “storing” the business data, “matching” transactions, and providing “notifications” to the transaction’s parties. “[I]f a patent’s recitation of a computer amounts to a mere instruction to ‘implemen[t]’ an abstract idea ‘on . . . a computer,’ that addition cannot impart patent eligibility.” *Alice*, 134 S. Ct. at 2358 (alteration in original) (quoting *Mayo*, 566 U.S. at 84). Appellant’s argument that claim 1 is directed to an improvement in a technical field is simply an attempt to reach into the ineligible concept (sales process functions in a private market) to show an improvement to the well-understood, routine, and conventional activity of storing, matching, and providing notification. The timing, execution, and confidentiality (privacy) of sales process functions in a private market is a buying and sales problem, not a technological problem.

Claim 1 does not “focus on a specific means or method that improves the relevant technology,” but is “directed to a result or effect that itself is the abstract idea and merely invoke[s] generic processes and machinery.” *McRO*, 837 F.3d at 1314. This is not enough to transform an abstract idea into patent-eligible subject matter. See, e.g., *Alice*, 134 S. Ct. at 2360 (explaining that claims that “amount to ‘nothing significantly more’ than an instruction to apply the abstract idea . . . using some unspecified, generic computer” “is not ‘enough’ to transform an abstract idea into a patent-eligible invention” (quoting *Mayo*, 566 U.S. at 77, 79)); *Intellectual*

Ventures I LLC v. Capital One Fin. Corp., 850 F.3d 1332, 1342 (Fed. Cir. 2017) (“[T]he claim language here provides only a result-oriented solution, with insufficient detail for how a computer accomplishes it.”).

5. *Additional 101 Procedural Argument*

Appellant further raises the following argument in contending that the Examiner erred in rejecting claim 1 as directed to patent ineligible subject matter.

[T]he examiner ***did not address*** the *McRo* [sic] case which was cited in the appeal brief and relied on in the arguments made by Applicant. Thus, it appears that the examiner ***has no rebuttal*** argument for the *McRo* [sic] case.

Reply Br. 1 (emphasis added).

Appellant’s argument overlooks the Examiner’s conclusion, that “the claims do not speak to a particular technical improvement such as those in *Bascom* or ***other decisions rendered by the courts***” (Ans. 6 (emphasis added)), is inclusive of Appellant’s *McRO* argument. We agree with the Examiner’s discussion and conclusion.

D. *Appellant’s § 103 Arguments*

Appellant raises the following arguments in contending that the Examiner erred in rejecting claim 1 under 35 U.S.C. § 103.

Kuehr fails to disclose the claimed different privacy levels (public privacy level, a network privacy level and a private privacy level) that are used by a claimed notification engine to notify a buyer) and that are used to initiate the transaction based on the claimed anonymity parameters.

Furthermore, while Millard generally discloses privacy levels, Millard still fails to disclose the two claim elements set forth above.

App. Br. 15 (emphasis omitted).

In particular, Appellant argues the Kuehr-McLaren reference fails to disclose or suggest the limitation of different privacy levels. However, Examiner did not cite Kuehr-McLaren for this limitation. Rather, the Examiner cited Millard. Final Act. 7–8. Then, Appellant argues⁴ the Millard reference fails to disclose or suggest the limitations of an “offer repository” and a “notification engine.” However, Examiner did not cite Millard for these limitations. Rather, the Examiner cited Kuehr-McLaren. Final Act. 6–7.

We conclude that Appellant’s argument does not address the actual reasoning of the Examiner’s rejection. Instead, Appellant attacks each of the Kuehr-McLaren and Millard references singly for lacking teachings that the Examiner relied on the combination of references to show. It is well established that one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. *See In re Keller*, 642 F.2d 413 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091 (Fed. Cir. 1986). This form of argument is inherently unpersuasive to show Examiner error. Our reviewing court requires that references must be read, not in isolation, but for what they fairly teach in combination with the prior art as a whole. *Merck*, 800 F.2d at 1097.

CONCLUSION

(1) The Examiner has not erred in rejecting claims 1–32 under 35 U.S.C. § 101 for being directed to patent-ineligible subject matter.

⁴ We are reading the argued “two claim elements” (App. Br. 15) as the “offer repository” and “notification engine” of the portion of claim 1 which Appellant quotes at page 14 of the Appeal Brief.

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(2) The Examiner has not erred in rejecting claims 1–32 as being unpatentable under 35 U.S.C. § 103(a).

DECISION

The Examiner’s rejections of claims 1–32 are affirmed.

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