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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CRISTIAN RADU, FIKRET ATEŞ,
JAN LANDEQUIST, AINSLEY CHARLES WARD,
STEVEN VAN SWEEVELT, DAVID GROSSMAN and
AZIZ KOUFKOUF¹

Appeal 2017-004971
Application 12/259,466
Technology Center 3600

Before CAROLYN D. THOMAS, CARL W. WHITEHEAD JR and
NABEEL U. KHAN, *Administrative Patent Judges*.

WHITEHEAD JR., *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants are appealing the final rejection of claims 1, 2, 4, 5, 8, 9,
and 12–17 under 35 U.S.C. § 134(a). Appeal Brief 2. We have jurisdiction
under 35 U.S.C. § 6(b) (2012).

We affirm.

¹ According to Appellants, the real party in interest MASTERCARD
INTERNATIONAL INCORPORATED. *See* Appeal Brief 2.

Introduction

“The purpose of the claimed process and apparatus is to allow a consumer to perform the merchant loyalty program enrollment process multiple times so that the consumer’s payment device can store multiple unique loyalty program identifiers of a variety of merchant loyalty programs.” Appeal Brief 15 (*citing* Specification page 16, lines 5–9).

Illustrative Claim

1. A method for enrolling a cardholder in a merchant loyalty program, comprising:

- verifying and authenticating, by a registration device, a cardholder and the cardholder’s payment device;
- determining, by the registration device, that the cardholder is not a current participant in a merchant’s loyalty program and that the payment device is eligible to participate in the merchant’s loyalty program;
- assigning, by the registration device, a unique loyalty program identifier to the cardholder;
- prompting, by the registration device, the cardholder to enter loyalty program enrollment information;
- receiving, by the registration device from the cardholder’s payment device, the loyalty program enrollment information and a payment device identifier;
- generating, by the registration device, an enrollment file comprising the enrollment information, payment account information, and the loyalty program identifier;
- providing, by the registration device, the enrollment file and said payment device identifier to at least one of an issuer of said payment device and an agent of said issuer;
- receiving, by the registration device, a command script signed with a cryptogram from one of the issuer or the agent of the issuer; and
- transmitting, by the registration device, the command script to the payment device, wherein the payment device deciphers the cryptogram and the command script executes to cause the unique loyalty program identifier to be stored in a memory of said payment device.

Rejections on Appeal

Claims 1, 2, 4, 5, 8, 9, and 12–17 stand rejected under 35 U.S.C. § 101 because the claimed invention is directed to non-statutory subject matter. Final Action 2–6.

Claims 1, 2, 4, 8, 9, 13, and 15–17 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hawkins (US Patent Application Publication 2007/0162337 A1; published July 12, 2007) and Khan (US Patent Application Publication 2004/0159700 A1, published August 19, 2004). Final Action 7–40.

Claims 4, 12, and 14 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hawkins, Khan and Craft (US Patent Application Publication 2008/0255942 A1; published October 16, 2008). Final Action 40–41.

Claim 5 stands rejected under 35 U.S.C. §103(a) as being unpatentable over Hawkins, Khan and Bishop (US Patent Application Publication 2004/0172340 A1; published September 2, 2004). Final Action 42.

ANALYSIS

Rather than reiterate the arguments of Appellants and the Examiner, we refer to the Appeal Brief (filed June 13, 2016), the Reply Brief (filed January 30, 2017), the Answer (mailed December 1, 2016) and the Final Action (mailed January 15, 2016) for the respective details.

35 U.S.C. § 101 Rejection

The Supreme Court has set forth an analytical “framework 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. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2355 (2014) (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 71–73 (2012)). In the first step of the analysis, we determine whether the claims at issue are “directed to” a judicial exception, such as an abstract idea. *Alice*, 134 S. Ct. at 2355. If not, the inquiry ends. *Thales Visionix Inc. v. U.S.*, 850 F.3d 1343, 1346 (Fed. Cir. 2017); *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1339 (Fed. Cir. 2016). If the claims are determined to be directed to an abstract idea, then we consider under step two whether the claims contain an “inventive concept” sufficient to “transform the nature of the claim” into a patent-eligible application. *Alice*, 134 S. Ct. at 2355 (quotations and citation omitted).

Noting that the two stages involve “overlapping scrutiny of the content of the claims,” the Federal Circuit has described “the first-stage inquiry” as “looking at the ‘focus’ of the claims, their ‘character as a whole,’” and “the second-stage inquiry (where reached)” as “looking more precisely at what the claim elements add — specifically, whether, in the Supreme Court’s terms, they identify an ‘inventive concept’ in the application of the ineligible matter to which (by assumption at stage two) the claim is directed.” *Electric Power Grp, LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016). In considering whether a claim is directed to an abstract idea, we acknowledge, as did the Court 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: (1) whether the claims focus on a specific means or method that improves the relevant technology, or (2) are directed to a result or effect that itself is

the abstract idea, in which the claims merely invoke generic processes and machinery. *See Enfish*, 822 F.3d at 1336.

Step One: Whether the Claims Are Directed to a Patent-Ineligible Concept (Abstract Idea)

The Examiner finds:

Method Claim(s) 1, 8 are rejected under 35 U.S.C.[§]101 because the claimed invention (enrolling cardholders in a loyalty program at a POS and using “a command script signed with a cryptogram from and issuer or an agent” to prevent fraud and which causes a unique program identified to be stored in the payment device) is directed to a judicial exception (i.e., a law of nature, a natural phenomenon, or an abstract idea) without significantly more. Based upon consideration of all of the relevant factors with respect to the claim as a whole, Claim(s) X is/are directed to an abstract idea. The abstract idea(s) is/are identified as: “An Idea ‘Of Itself’” and/or “Fundamental Economic Practice” and/or “Certain Methods of Organizing Human Activity.”

Final Action 2–3.

Appellants contend that the rejection mischaracterizes pending independent claims 1 and 8 because “the claims do not concern or recite a ‘fraud prevention card’ as alleged.” Appeal Brief 15. Appellants further contend:

[T]he pending claims are instead directed towards enrolling a cardholder in a merchant loyalty program by utilizing a registration device (or a merchant point of sale terminal) which ultimately transmits a command script to the consumer's payment device that executes to cause a unique loyalty program identifier to be written into a memory of that payment device. Accordingly, Appellants respectfully maintain that the Office has mischaracterized the pending claims and has failed to any specific authority that compels the conclusion that the claimed invention, which is by definition limited to the field of consumer payment devices and which requires the use of multiple

electronic devices—unlike the claims in *Bilski* and *Alice* which, at least in theory, could be performed without a computer—is “abstract” within the meaning of Section 101.
Appeal Brief 16.

Claim 1 recites, “verifying and authenticating, by a registration device, a cardholder and the cardholder’s payment device” and claim 8 recites “determining, by the merchant point of sale terminal from said payment device information, that the cardholder is not a current participant in a merchant’s loyalty program” therefore it is evident that both claims 1 and 8 attempt to address the unauthorized utilization of a merchant’s loyalty program, hence fraud protection. Our reviewing court has explained that claims directed to “the mere formation and manipulation of economic relations” and “the performance of certain financial transactions” are properly held to be directed to abstract ideas. *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat. Ass’n*, 776 F.3d 1343, 1347 (Fed. Cir. 2014); *see also, e.g., Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 716 (Fed. Cir. 2014) (finding computer-implemented system for “using advertising as a currency [on] the Internet” to be ineligible); *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1352, 1355 (Fed. Cir. 2014) (finding computer-implemented system for guaranteeing performance of an online transaction to be ineligible.); *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1370 (Fed. Cir. 2011) (finding computer-implemented system for “verifying the validity of a credit card transaction[] over the Internet” to be ineligible).

Also, our reviewing court has repeatedly held that information collection and analysis, including when limited to particular content, is within the realm of abstract ideas. *See, e.g., Elec. Power Grp.*, 830 F.3d at

1353 (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”); *Fair Warning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1093–94 (Fed. Cir. 2016) (claims directed to collecting information and analyzing it according to certain rules were directed to an abstract idea); *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1370 (Fed. Cir. 2011) (computer-implemented system for “verifying the validity of a credit card transaction[] over the Internet” was patent-ineligible).

In short, we have considered all of Appellants’ arguments challenging the characterization of the pending claims as being directed to abstract ideas, but we do not find them to be persuasive of error. Rather, we agree with the Examiner, at step one of the *Alice* analysis, that the claims are directed to one or more abstract ideas. Accordingly, we turn to the second step of the *Alice* analysis, in which we determine whether the additional elements of the claims transform them into patent-eligible subject matter.

Step Two: Whether Additional Elements Transform the Idea into Patent-Eligible Subject Matter

Appellants argue:

[E]ven if the pending claims could be considered to be ‘directed to a judicial exception’ as alleged, Appellants respectfully maintain that the claims recite significantly more than an abstract idea and are thus patent-eligible. In particular, the elements recited by the present independent claims include meaningful limitations that add more than generally linking use of an abstract idea to generic computing devices.

Appeal Brief 16.

Appellants respectfully submit that these required claim elements are similar to the additional elements in the *DDR Holdings* case, and maintain that the claim limitations, when taken as an ordered combination, provide unconventional steps that confine the alleged abstract idea to a particular useful combination and thus are patent-eligible.

Appeal Brief 17 (footnote omitted).

Respectfully, regardless of Appellants' contentions that "the claimed process specifies interactions between a registration device, a cardholder payment device, and an issuer or an agent of the issuer that are manipulated to yield a result that is different from conventional processes,"² Appellants do not present sufficient persuasive evidence or argument that the claims are directed to an improvement specific to a computer network or the Internet *itself* (e.g., improving the network's operation or configuration, or retaining website visitors). *Compare, e.g., Elec. Power*, 830 F.3d at 1354, *with DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257 (Fed. Cir. 2014). We find the claims in the instant application differs from the claims addressed in *DDR*. Accordingly, we do not find that the claims recite *significantly more* to transform the abstract idea into a patent-eligible application.

Appellants further contend:

[T]he claimed methods and apparatus for enrolling a consumer in a merchant loyalty program clearly do *not* tie up all applications for providing consumers with a consumer payment device that has multiple unique loyalty program identifiers of a variety of merchant loyalty programs stored therein such that others cannot practice them. Instead, Appellants maintain that the pending claims tie down a specific cardholder enrollment process

² Appeal Brief 17.

that functions in a specific manner to solve a specific problem. Thus, the claims do not preempt the field of enrolling consumers in merchant loyalty programs and therefore, in concert with the arguments presented immediately above, Appellants respectfully maintain that the claims are indeed patent-eligible.

Appeal Brief 19.

We agree the Supreme Court has described “the concern that drives this exclusionary principle [i.e., the exclusion of abstract ideas from patent eligible subject matter] as one of pre-emption.” *Alice*, 134 S. Ct. at 2354. But characterizing pre-emption as a driving concern for patent eligibility is not the same as characterizing preemption as the sole test for patent eligibility. As our reviewing court has explained, “[t]he 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*, 134 S. Ct. at 2354). And although “preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility.” *Id.* Moreover, “[w]here a patent's claims are deemed only to disclose patent ineligible subject matter under the [*Alice/Mayo*] framework . . . , preemption concerns are fully addressed and made moot.” *Id.*; *see also OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1362–63 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 701 (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.”). Accordingly, we sustain the Examiner’s 35 U.S.C. § 101 rejection of claims 1, 2, 4, 5, 8, 9 and 12–17.

35 U.S.C. § 103 Rejections

Appellants contend in regard to independent claims 1, 13 and 17 that “Hawkins fails to teach or suggest the ‘[prompting,] receiving, generating, and providing’ [claim] elements.” Appeal Brief 24. Appellants argue that Hawkins’ paragraph 31 fails to disclose the “prompting” element because the “paragraph resides in the ‘Target Offer Redemption’ section of Hawkins, and does not concern prompting a cardholder for enrollment information.” Appeal Brief 24. Appellants contend:

It instead relates to transmitting targeted offers to an incentive redemption server during an activation process, wherein a customer can slide or scan a merchant loyalty card through a payment terminal or electronic cash register (ECR) or otherwise enter his or her loyalty number (into the payment terminal) so that the customer's merchant loyalty identification number will be transmitted to a communication staging server 255 of the Incentive Management System (IMS) 165.

Appeal Brief 24 (footnote omitted).

“Second, Appellants maintain that Hawkins fails to teach or suggest providing the enrollment file and cardholder device identifier *to at least one of an issuer of the payment device or an agent of that issuer*, as required by claims 1, 13 and 17. In fact, Hawkins does not even mention payment

device issuers.³ Appeal Brief 25. Claim 1⁴ recites “prompting, by the registration device, the cardholder to enter loyalty program enrollment information” and it is evident that Hawkins discloses this by providing devices where the customer may slide/scan her merchant loyalty card or enter the loyalty number or other identification number. *See* Hawkins, paragraph 31. Hawkins further discloses in paragraph 30:

[I]n one embodiment wherein CPG⁵ activated offers are redeemed by the customer at the merchant POS [point of sale] **105** as described in the foregoing process, a report of such CPG redemptions may be generated by the IMS [incentive management system] **165** and transmitted to the merchant for use during settlement of funds between the merchant [issuer] and the CPG.

³“The term ‘payment device’ refers to a device used to permit or control access to a payment account. A payment device may be configured to interact with contact or contactless readers and may have an integrated circuit chip (ICC) mounted in or on a body of the payment device. The payment device may be formed in a traditional plastic credit card shaped body, or it may be mounted in or on a body of another device (e.g., such as a mobile telephone, a hand-held computer, a key fob, or the like).”
Specification 4.

“Each issuer, or issuer agent, processes the records from the enrollment file that relate to customers holding payment cards issued by the issuer.”
Specification 14.

⁴ Claim 1 is the representative claim. *See* Appeal Brief 21.

⁵ “[A] personal incentive may be a[n] advertisement, coupon or offer presented to a customer by a retail merchant or a manufacturer (such manufacturer also Known as a ‘CPG’ or a ‘Consumer Packaged Goods’ in certain industries) for a discount off the regular price of the product.”
Hawkins, paragraph 17.

Appellants have not convinced us of Examiner error merely because Hawkins' paragraph 31 is located under the "Target Offer Redemption" heading of the publication. It is also evident that Hawkins discloses customers' enrollment information to at least one of an issuer/agent of issuer of the payment device as noted above. See Answer 12 (*citing* Hawkins ¶ 26).

Appellants argue:

Furthermore, Appellants respectfully maintain that Hawkins fails to teach or suggest the "receiving, generating, and providing" elements highlighted above. First, Hawkins fails to teach or suggest a registration device receiving loyalty program enrollment information and a payment device identifier from the cardholder's payment device. The Examiner alleges that paragraphs 0023 and 0020 of Hawkins describe such operation. But paragraph 0023 instead describes a device registration database 260 that contains identifiers "obtained during an enrollment process" without any further explanation as to how that occurred.

Appeal Brief 24 (footnote omitted).

Claim 1 recites, "receiving, by the registration device from the cardholder's payment device, the loyalty program enrollment information and a payment device identifier." It has already been established by the Examiner that Hawkins discloses a cardholder's payment device in paragraph 31 wherein the cardholder enters her information. *See* Final Action 9. Hawkins further discloses in paragraphs 20 and 23 wherein the customer's information is received and used to create personal incentives and offers. Accordingly, we do not find Appellants' arguments persuasive of Examiner error.

Appellants contend, “Khan does not teach or suggest *determining, by the registration device, that the cardholder is not a current participant in a merchant’s loyalty program and that the payment device is eligible to participate in the merchant’s loyalty program before assigning ... a unique loyalty program identifier to the cardholder*, as required by independent claims 1, 13 and 17.” Appeal Brief 25. Claim 1 recites, “determining, by the registration device, that the cardholder is not a current participant in a merchant’s loyalty program and that the payment device is eligible to participate in the merchant’s loyalty program.” Claim 1 does not require any particular method to determine that the cardholder is not a participant in a merchant’s loyalty program. Khan discloses “[t]he ViVOserver may provide accounting functions including transaction events, summaries and consolidation, credit card data management, balance transfers, periodic settlement of accounts, and new account additions” and “The ViVOserver may allow user definable notification of special card-related discounts, and provides easy sign-up process for loyalty and member cards.” See Final Action 13 (*citing* Khan 167). We do not find Appellants’ arguments persuasive of Examiner error because the combination of Hawkins and Khan readily discloses adding new accounts in a merchant’s loyalty program.

Appellants conclude:

[O]ne skilled in the art could not reasonably discern, from the portion of Kahn highlighted above (and/or FIG. 10 of Kahn), disclosure of a registration device that first receives *a command script signed with a cryptogram from one of the issuer or the agent of the issuer* and then transmits *the command script to the payment device, wherein the payment device deciphers the cryptogram and the command script executes to cause the unique*

loyalty program identifier to be stored in a memory of said payment device, as required by claims 1, 13 and 17.

Appeal Brief 27–28.

Khan discloses “[t]he ViVOadapter will perform mutual device authentication and challenge protocols, exchange security cryptography routines and keys, exchange data typical to credit/debit/ATM/pre-pay/loyalty/member/ID cards magnetic domain track data upon presentation by an RF proximity chip card or via other communication mediums described herein.” Final Action 14 (*citing* Khan paragraph 153).

Appellants, however, have not presented arguments that the Examiner erred in determining obviousness pursuant to our current case law. As the

Supreme Court instructs us, “[t]he obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation,” and “[u]nder the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 419, 420 (2007).

Here, we agree with the Examiner that one of ordinary skill would combine the teachings of the references “in order to prevent fraud during customer payments and using loyalty programs.” Final Action 15. We find the Examiner provides a rational underpinning to support the legal conclusion of obviousness. *See KSR*, 550 at 418. Accordingly, we sustain the Examiner obviousness rejection of claims 1, 2, 4, 5, 13–15 and 17 argued together.

See Appeal Brief 28.

Appellants argue in regard to independent claims 8 and 16, “that there is no substantial evidence in the record to support any reason to modify Hawkins with Kahn in the manner suggested by the Examiner” and

incorporated the same arguments made for independent claims 1, 13 and 17. Appeal Brief 29. We do not find Appellants' arguments persuasive for claims 8 and 16 for the same reasons that we do not find the arguments persuasive for claims 1, 13 and 17 as indicated *supra*. Appellants further contend that:

[T]he Examiner attempted to admit that Hawkins fails to teach or suggest several elements of claims 8 and 16. However, incorrect claim elements were cut and pasted on page 19, line 20 to page 20, line 8 with regard to claim 8 (and on page 31, line 21 to page 32, line 3 with regard to claim 16) of the Final Action. In particular, the claim elements labeled “[2], [3], [8] and [9]” appearing on pages 19-20 of the Final Action are those of claim 1, which features a registration device, and not those of independent claim 8 which features a merchant point of sale terminal. (Similar errors appear on pages 31-31.)

Appeal Brief 29.

We agree with Appellants that the Examiner included more limitations than claims 8 and 16 recite. *See* Final Action 20 (limitations marked 8 and 9). The Examiner initially addresses claims 8's merchant point of sale limitation in the rejection. *See* Final Action 16 (*citing* Hawkins, paragraph 24). We do not find the claims' merchant point of sale device to be patentably distinguishable over the registration device required in claim 1. Further, outside of pointing out the error in the rejection, Appellants do not address why a merchant point of sale device would be patentably distinguishable over a generic registration device. *See* Appeal Brief 29.

Appellants contend:

[T]he Examiner failed to address the third element of claim 8 (and the similar element of claim 16) anywhere in the Final Action, which element recites: *prompting, by the merchant point*

of sale terminal, a consumer associated with the payment device to provide an assent response indicating a desire to join the merchant loyalty program.

Appeal Brief 29–30.

The Examiner addressed the *prompting* limitation in rejecting claims 1, 13, and 17. *See* Final Rejection 9 (*citing* Hawkins, paragraph 31). Accordingly, we did not find Appellants’ arguments persuasive in regard to claims 8 and 16 for the same reasons we do not find Appellants’ arguments in regard to claims 1, 13, and 17 persuasive of Examiner error. We sustain the Examiner’s obviousness rejection of claims 8, 9, 12, and 16, which essentially are not argued separately. *See* Appeal Brief 30.

Appellants contend that claims 4, 12, and 14 are patentable over the combination of Hawkins, Khan, and Craft and that claim 5 is patentable over the combination Hawkins, Khan, and Bishop because neither Craft nor Bishop cured the alleged deficiencies of the Hawkins and Khan combination. Appeal Brief 30–31. We do not find Appellants’ arguments persuasive because we did not find the Hawkins/Khan combination deficient. Accordingly, we sustain the Examiner’s obviousness rejection of dependent claims 4, 5, 12, and 14.

DECISION

The Examiner’s 35 U.S.C. § 101 rejection of claims 1, 2, 4, 5, 8, 9, and 12–17 is affirmed.

The Examiner’s 35 U.S.C. § 103 rejections of claims 1, 2, 4, 5, 8, 9, and 12–17 are 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). *See* 37 C.F.R. § 1.136(a)(1)(v).

AFFIRMED