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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte KAVEL PATEL and SAJJIT THAMPY

Appeal 2017-005293
Application 14/053,889
Technology Center 3600

Before ST. JOHN COURTENAY III, DENISE POTHIER, and
JASON CHUNG, *Administrative Patent Judges*.

COURTENAY, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants¹ appeal under 35 U.S.C. § 134(a) from the Examiner's Final Rejection of claims 1–35, which constitute all the claims pending in this application. We have jurisdiction over the pending claims under 35 U.S.C. § 6(b).

We affirm.

¹ According to Appellants, the real party in interest is Quotient Technology Inc., a Delaware corporation having headquarters in Mountain View, California (NYSE: QUOT). App. Br. 1.

STATEMENT OF THE CASE

Introduction

Appellants' invention generates, "by a coupon distributor, a score that represents a quality of a coupon campaign that a coupon provider offers to the coupon distributor." (Abstract).

Exemplary Claim

1. A method comprising:

detecting, by a computing system of a coupon distributor, a first plurality of attribute values, within a first hypertext transfer protocol (HTTP) request from a first browser of a first coupon provider, that are associated with a first coupon campaign that has been offered to the coupon distributor by the first coupon provider that is different than the coupon distributor and that provides a first product or service to which a first coupon of the first coupon campaign pertains, wherein the computing system of the coupon distributor comprises one or more microprocessors and a memory that stores coupon campaign data, wherein the first HTTP request is addressed by a first particular uniform resource locator (URL);

determining, by the one or more microprocessors and based on the first plurality of attribute values, a first score that represents a quality of the first coupon campaign;

based on the first score, determining, by the one or more microprocessors, at least one of:

a presentation emphasis that is inversely correlated with the first score,

a plurality of coupons to simultaneously present that includes the first coupon based on a distinctness of the first score relative to scores of coupon campaigns of other coupons of the plurality of coupons, or

whether to distribute the first coupon campaign to a second coupon distributor that is different than the coupon distributor;

detecting, by a computing system of a coupon distributor, a second plurality of attribute values, within a second HTTP request from a second browser of a second coupon provider, that are associated with a second coupon campaign that has been offered to the coupon distributor by the second coupon provider that is different than the coupon distributor and that provides a second product or service to which a second coupon of the second coupon campaign pertains, wherein the computing system of the coupon distributor comprises one or more microprocessors and a memory that stores coupon campaign data, wherein the second HTTP request is addressed by a second URL;

determining, by the one or more microprocessors and based on the second plurality of attribute values, a second score that represents a quality of the second coupon campaign;

based on the second score, determining, by the one or more microprocessors, at least one of:

whether to distribute a presentation emphasis that is inversely correlated with the second score,

a plurality of coupons to simultaneously present that includes the second coupon based on a distinctness of the second score relative to scores of coupon campaigns of other coupons of the plurality of coupons, or

whether to distribute the second coupon campaign to a third coupon distributor that is different than the coupon distributor.

Rejection

Claims 1–35 are rejected under 35 U.S.C. § 101 as being directed to a judicial exception without significantly more.² Final Act. 2–4.

Issue on Appeal

Did the Examiner err in rejecting claims 1–35 under 35 U.S.C. § 101 as being directed to a judicial exception without significantly more?

ANALYSIS

We have considered all of Appellants’ arguments and any evidence presented. To the extent Appellants have not advanced separate, substantive arguments for particular claims, or other issues, such arguments are waived. *See* 37 C.F.R. § 41.37(c)(1)(iv). We highlight and address specific findings and arguments for emphasis in our analysis below.

Mayo/Alice Analysis under 35 U.S.C. § 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, 82–84 (2012), “for distinguishing patents that claim laws of

² See MPEP § 706.03(a), form paragraph 7.05.015.

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*. Abstract ideas may include, but are not limited to, fundamental economic practices, methods of organizing human activities, an idea of itself, and mathematical formulas or relationships. *Id.* at 2355–57.

If the claims are *not directed* to a patent-ineligible concept, *the inquiry ends*. See *Visual Memory LLC v. NVIDIA Corp.*, 867 F.3d 1253, 1262 (Fed. Cir. 2017).

Otherwise, the inquiry proceeds to the second step in which 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). We consider the question of whether the claims are directed to a *specific improvement* in the capabilities of the computing devices, or, instead, “a process that qualifies as an ‘abstract idea’ for which computers are invoked merely as a tool.” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1336 (Fed. Cir. 2016).

We, therefore, decide under step two whether the claims: (a) set forth an *inventive concept* that provides a specific means or method that *improves* the relevant technology, or (b) 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.

The Examiner's Rejection under 35 U.S.C. § 101

Regarding the first step of the *Alice/Mayo* analysis, the Examiner concludes that claims 1–35 are directed to a judicial exception, i.e., an abstract idea, because:

Claim(s) 1-35 is/are directed to comparing and organizing information (the steps of detecting, determining, determining, detecting, determining, determining, and determining) for possible transmission to a remote computer, which is *similar to concepts that have been identified as abstract by the courts* such as using categories to organize, store and transmit information in *Cyberfone* [³] or comparing new and stored information and using rules to identify options in *SmartGene*. [⁴]

³ The Examiner is referring to *Cyberfone Systems, LLC v. CNN Interactive Group, Inc.*, 558 Fed. App'x 988 (Fed. Cir. 2014) (nonprecedential). In *Cyberfone*, the court held: (1) the patent claim involved a patent-ineligible abstract idea; (2) the method (process) that requiring the use of a telephone was insufficient to meet the transformation prong of the test for patent eligibility; and, (3) the recited step of “exploding” data transactions was insufficient to meet the transformation prong of test for patent eligibility. *See Cyberfone's* method claim 1, i.e., the last step of: “sending said different exploded data transactions over a channel to said different destinations, all based on said data transaction information entered in said single transmission.” *Id.* at 990.

⁴ The Examiner is referring to *SmartGene, Inc. v. Advanced Biological Laboratories, SA*, 555 F. App'x 950, 955 (Fed. Cir. 2014) (“Whatever the boundaries of the ‘abstract ideas’ category, the claim at issue here involves a mental process excluded from section 101: the mental steps of comparing new and stored information and using rules to identify medical options.”) In *SmartGene*, step (c) of *Advanced Biological Laboratories' claim 1* recites: “generating in said computing device advisory information for one or more therapeutic treatment regimens in said ranked listing based on said patient information and said expert rules.” *Id.* at 952. (nonprecedential).

Final Act. 2 (emphasis added).⁵

Regarding the second step of the *Mayo/Alice* analysis, the Examiner finds the claims do not include additional elements that are sufficient to amount to significantly more than the judicial exception, because:

the additional elements considered individually and as an ordered combination, do not amount to significantly more than the abstract idea.

The claims include additional elements of at least one microprocessor, memory and storage media. These elements are recited at a high level of generality and *only perform generic computer functions of manipulating information and sharing information between computers. Generic computers performing generic computer functions, without an inventive concept, do not amount to significantly more than the abstract idea.* The reference in the claims to HTTP and URLs are simply *a field of use* that attempts to confine the invention to *a particular technological environment.*

The type of information being manipulated does not impose meaningful limitations or render the idea less abstract. The claim elements considered as an ordered combination do nothing more than when analyzed individually. *The dependent claims further do not add significantly more:* claim 2 consists entirely of nonfunctional printed matter, disclosing at most a human interpretation of data which does not impart any technical structure or feature to the invention, claim 3 is further simply descriptive of data, claim 4 provides an additional step of organizing information, and so on. *The claims do not improve the performance of any computer on which implemented or of any other device or technology but merely recite the use of common, routine data processing steps implemented on generic computers*

⁵ “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).

in order to carry out the abstract idea. This is insufficient to meet the requirement of the title.

Final Act. 2–3 (emphasis added).⁶

For the aforementioned reasons, the Examiner concludes that all claims 1–35 on appeal are not patent-eligible under 35 U.S.C. § 101.

Mayo/Alice Analysis — Step 1

Regarding *Alice* Step 1, Appellants contend the claims are not directed to an abstract idea under the *Alice/Mayo* framework. App. Br. 4. Appellants contend, inter alia:

There is no claim that recites or describes “comparing and organizing information,” or “possible transmission to a remote computer.” While these concepts are *involved* in the claims, *Enfish* and the Bahr Memorandum [7] establish that rejecting claims based on such a high level of abstraction is impermissible. Describing the claims at such a high level of abstraction and untethered from the language of the claims all but ensures that the exceptions to § 101 swallow the rule.

...

Here, the claims are not simply directed to *any* form of comparing, organizing, or remotely transmitting information, but instead are specifically directed to scoring digital coupon campaign attributes that are wholly contained within an HTTP

⁶ The patent eligibility inquiry may contain underlying issues of fact. *Mortg. Grader, Inc. v. First Choice Loan Servs. Inc.*, 811 F.3d 1314, 1325 (Fed. Cir. 2016). In particular, “[t]he question of whether a claim element or combination of elements is well-understood, routine and conventional to a skilled artisan in the relevant field is a question of fact.” *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1368 (Fed. Cir. 2018).

⁷ See *R. Bahr*, May 2016 Update: Memorandum - Formulating a Subject Matter Eligibility Rejection and Evaluating the Applicant's Response to a Subject Matter Eligibility Rejection (May 4, 2016). See App. Br. 5.

request, and applying preconfigured special processing according to the scoring.

App. Br. 6–7. (emphasis added.).

Appellants recite the claim language in support (App. Br. 8), and attempt to distinguish the claims on appeal from the claims considered by the Federal Circuit in *SmartGene* and *Cyberfone*. See App. Br. 9–10. Appellants urge: “In short, as it often does, the Office has ‘stretched’ the holdings of *Cyberfone* and *SmartGene* far beyond what they actually held. Furthermore, the Office Action legally erred by applying the mental steps doctrine to the alleged abstract idea, rather than the claim as a whole. The law requires that the claim as a whole be examined for mental equivalence.” App. Br. 10.

In response, the Examiner further explains the basis for the rejection:

Contrary to the appellant's assertion, every claim element recites the *comparison and organization of information*, excepting the recitation of *generic computers* and the barely-specified *mathematics*. That the phrases themselves are not used is immaterial; that is what is being done, and it is all that is being done. The “scoring [of] digital campaign attributes” is just *unspecified mathematics*, and that the input is “wholly contained within an HTTP request” recites nothing but that the input is formatted *according to certain rules*. The “pre-configured special processing” simply refers to rules as to how a decision is made according to the results of the scoring; this is, again, *a step that does not require computers at all*. That the approach “incorporates online transaction processing and quantitative analysis” does not change in any way that all of this simply recites *comparing and organizing of data*; in fact, the appellant has not made any attempt to explain how either thing is any different from comparing and organizing data.

Ans. 4 (emphasis added).

The Examiner further explains:

The [A]ppellant notes, bottom of [App. Br.] pg. 7, the nature of the problem [being] solved: “current techniques do not adequately take into account the varying degree in quality of each coupon campaign” when making decisions as to how to proceed with a coupon campaign.” *This is clearly nothing more than a business problem, and one that could of course be solved without resort to computers at all . . .* The [A]ppellant complains that the Examiner has not taken into account what the claim as a whole recites. *This is incorrect.* The entire claim recites comparing and organizing data, with unspecified mathematical computations, all of which is entirely abstract.

Ans. 5 (emphasis added).

Appellants respond in the Reply Brief (1–10), asserting: (a) the claims achieve an improved technological result, (b) all claims recite unconventional solutions, (c) what is claimed is not a business method, (d) all claims recite significantly more than generic limitations, (e) the claims as a whole do not recite only mental steps, and (f) all recited limitations have patentable weight. In support, Appellants rely on, inter alia, *Bascom Global Internet Services v. AT&T Mobility*, 827 F. 3d 1341 (Fed. Cir. 2016), and *McRO, Inc. v. Bandai Namco Games America Inc.*, 837 F. 3d 1299 (Fed. Cir. 2016) (decided between the filing of Applicant’s opening brief and the Examiner’s Answer, yet not cited or acknowledged in the Examiner’s Answer).

Based upon our review of the record, we need not rely on the non-precedential *SmartGene* and *Cyberfone* Federal Circuit opinions to sustain the Examiner’s conclusion that under *Alice*, step one, claims 1–35 (directed to coupon distribution and presentation) are directed to an abstract idea, i.e.,

a fundamental economic practice. *See* Ans. 5 (“*This is clearly nothing more than a business problem, and one that could of course be solved without resort to computers at all.*”) (emphasis added).

We note independent claims 1, 14, and 27 are directed to, inter alia, gathering *data* by “detecting a first plurality of attribute values,” processing *data*, to determine “a first score that represents a quality of the first coupon campaign,” and further processing data, to determine at least one of:

a presentation emphasis that is inversely correlated with the first score,

a plurality of coupons to simultaneously present that includes the first coupon based on a distinctness of the first score relative to scores of coupon campaigns of other coupons of the plurality of coupons, or

whether to distribute the first coupon campaign to a second coupon distributor that is different than the coupon distributor;

Claim 1.

Claim 1 essentially repeats the aforementioned steps with respect to detecting “a second plurality of attribute values” to determine based on a second score at least one of:

whether to distribute a presentation emphasis that is inversely correlated with the second score,

a plurality of coupons to simultaneously present that includes the second coupon based on a distinctness of the second score relative to scores of coupon campaigns of other coupons of the plurality of coupons, or

whether to distribute the second coupon campaign to a third coupon distributor that is different than the coupon distributor.

Claim 1.

Data gathering is a classic example of insignificant extra-solution activity. See, e.g., *In re Bilski*, 545 F.3d 943, 963 (Fed. Cir. 2008) (en banc), *aff'd* on other grounds, 561 U.S. 593 (2010). Our reviewing court has concluded that abstract ideas include the concepts of collecting data, recognizing certain data within the collected data set, and storing the data in memory. *Content Extraction & Transmission LLC v. Wells Fargo Bank, N.A.*, 776 F.3d 1343, 1347 (Fed. Cir. 2014); see also *Smart Sys. Innovations, LLC v. Chicago Transit Authority*, 873 F.3d 1364, 1372 (Fed. Cir. 2017) (concluding “claims directed to the collection, storage, and recognition of data are directed to an abstract idea.”); *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016) (The collection of information and analysis of information are abstract ideas).

Moreover, but for the recitation of a generic “computing system” and “one or more microprocessors and a memory” (independent claims 1 and 27), “[o]ne or more storage media,” “one or more processors” (independent claim 14), and a generic “database” (dependent claims 3 and 16), we find the recited steps or acts, could be performed as mental steps, or with the aid of pen and paper. See *Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138 (Fed. Cir. 2016) (“While the Supreme Court altered the § 101 analysis since *CyberSource* in cases like *Mayo* and *Alice*, we continue to ‘treat[] analyzing information by steps people go through in their minds, or by mathematical algorithms, without more, as essentially mental processes within the abstract-idea category.’”) (quoting *Elec. Power*, 830 F.3d at 1354); see also *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1375 (Fed. Cir. 2011) (“That purely mental processes can be unpatentable, even when performed by a computer, was precisely the holding of the Supreme Court in

Gottschalk v. Benson”). “[M]erely selecting information, by content or source, for collection [and] analysis . . . does nothing significant to differentiate a process from ordinary mental processes.” *Elec. Power*, 830 F.3d at 1355. Receiving and analyzing (or identifying data), by itself, does not transform an otherwise-abstract process or system of information collection and analysis. *See id.*

Appellants cite *Enfish* and aver “the courts have already settled that ineligibility cannot be concluded unless a claim is analyzed as a whole.” App. Br. 9.

However, we note the claimed self-referential table considered by the court in *Enfish* was a specific type of data structure designed to improve the way a computer stores and retrieves data in memory. *Enfish*, 822 F.3d at 1339. Only Appellants’ dependent claims 3 and 16 include “a database within a database that maps products to product categories.” On this record, Appellants have not shown that the recited “database that maps products to product categories” (*id.*) improves the way a computer stores and retrieves data in memory, as was the case in *Enfish*.

Thus, we are not persuaded that Appellants’ claimed invention improves the recited database’s functionality or efficiency, or otherwise changes the way the database functions, at least in the sense contemplated by the Federal Circuit in *Enfish*, 822 F.3d 1327 (Fed. Cir. 2016). *See* claims 3 and 16 (Appeal Br. 22–23, 26 (Claims Appendix)).

Appellants advance no further substantive arguments regarding *Alice* Step 1. Therefore, on this record, we conclude Appellants’ claims 1–35 are directed to an abstract idea which is similar to the abstract ideas identified by

our reviewing courts, as discussed above, which could additionally be performed as mental steps, albeit with the aid of pen and paper.

Mayo/Alice Analysis – Step 2

Because we conclude the claims are directed to an abstract idea for essentially the same reasons articulated by the Examiner (Final Act. 2–3; Ans. 3–6), we turn to the second part of the *Alice/Mayo* analysis. We analyze the claims to determine if there are additional limitations that individually, or as an ordered combination, ensure the claims amount to “significantly more” than the abstract idea. *Alice*, 134 S. Ct. at 2357.

Regarding *Alice* Step 2, Appellants address the purported *inventive concept* of the claims: Appellants argue, inter alia: “the Office Action fails to establish that the Examiner actually considered the claims as ordered combinations in any meaningful way, as required by *Bascom*, *DDR*, or the Bahr Memorandum.” App. Br. 12.

In the Appeal Brief (11), and in the Reply Brief (1, 3, 4, 6), Appellants cite to *Bascom Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016). *See e.g.*, Reply Br. 4 (“improved computer operations [were found by the court] to be eligible even when they were limited to a single application (web filtering) and even when based on a prior art filter solution.”).

However, *Bascom* also guides that “[a]n abstract idea on ‘an Internet computer network’ or on a generic computer is still an abstract idea.” *Bascom*, 827 F.3d at 1341.

In the Reply Brief, Appellants additionally rely on (as an intervening authority) *McRO, Inc. v. Bandai Namco Games America Inc.*, 837 F.3d 1299, 1312 (Fed. Cir. 2016) for the guidance that a process specifically

designed to achieve an improved technological result in conventional industry practice may be patent-eligible. Reply Br. 2.

However, *McRO* also guides: “[t]he abstract idea exception prevents patenting a *result* where ‘it matters not by what process or machinery the result is accomplished.’” *McRO*, 837 F.3d at 1312 (quoting *O’Reilly v. Morse*, 56 U.S. 62, 113 (1854)) (emphasis added).

Moreover, we do not find that Appellants’ claims are similar to the claimed solution the court held to be patent-eligible in *DDR*. In *DDR*, the Federal Circuit applied the Supreme Court’s *Alice* two-step framework, and upheld the validity of *DDR*’s patent on its web-page display technology. *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1255 (Fed. Cir. 2014).

The problem addressed by Appellants’ claims is not similar or otherwise analogous to the specific technical problem addressed by the subject claims in *DDR*, which were directed to *retaining a website visitor when the visitor clicked on a third-party merchant’s advertisement on the host website*. Instead of taking the visitor to the third-party merchant’s website (and thus losing the visitor to the third-party merchant), *DDR*’s claimed system generated a *hybrid web page* that: (1) displayed product information from the third-party merchant, but also, (2) retained the host website’s “look and feel.”

Here, Appellants’ claims 1–35 are not directed to a website that retains the host website’s “look and feel” while displaying product information from the third-party merchant, as was the case in *DDR*. *DDR*, 773 F.3d at 1257. Although Appellants’ invention is directed to the possible *result* of “a presentation emphasis that is inversely correlated with the first

score” (independent claims 1, 14, and 27), we find such *presentation* is at best merely an *improvement* in the *informational content* (i.e., data) that is intended to be viewed and evaluated by a person as a mental step.

We find the claims on appeal are *silent* regarding specific limitations directed to an *improved* computer system, processor, memory, network, database, or Internet. Therefore, we find Appellants’ claimed invention does not provide a solution “necessarily rooted in *computer technology* in order to overcome a problem specifically arising in the realm of computer networks,” as considered by the court in *DDR*, 773 F.3d at 1257. (Emphasis added.).

Appellants further infer the Examiner does not “understand what is meant by the term ‘generic computer function.’” App. Br. 15.

We disagree. Although the recited steps or functions in Appellants’ claims 1–35 may be performed faster or more efficiently with the recited “one or more microprocessors and memory” (claim 1), or “one or more processors” (claim 14) or “computing system comprising: computer hardware” and “a memory” (claim 27), we find the speed increase comes from a “general purpose computer, rather than the patented method itself,” and does “not materially alter the patent eligibility of the claimed invention.” *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1095 (Fed. Cir. 2016).

Our reviewing court provides guidance regarding the use of such *generic* computer components. *See Elec. Power Grp. LLC*, 830 F.3d at 1355 (“We have repeatedly held that such invocations of computers and networks that are not even arguably inventive are ‘insufficient to pass the test of an inventive concept in the application’ of an abstract idea.”) (quoting *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1353, 1355 (Fed. Cir. 2014));

Intellectual Ventures I v. Capital One Financial Corp., 850 F.3d 1332, 1341 (Fed. Cir. 2017) (“Rather, the claims recite both a generic computer element—a processor—and a series of generic computer ‘components’ that merely restate their individual functions. . . . That is to say, they merely describe the functions of the abstract idea itself, without particularity. This is simply not enough under step two.”).

Further, the Supreme Court guides that the “prohibition against patenting abstract ideas ‘cannot be circumvented by attempting to limit the use of the formula to a particular technological environment’ or [by] adding ‘insignificant post solution activity.’” *Bilski v. Kappos*, 561 U.S. 593, 610–11 (2010) (quoting *Diamond v. Diehr*, 450 U.S. 175, 191–92 (1981)).

Appellants further urge: “Claim 1 does not cover all applications of coupon distribution.” App. Br. 17.

Regarding Appellants’ argument regarding preemption (App. Br. 16–17), our reviewing court provides applicable guidance: “[w]hile 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); *Ultramercial Inc. v. Hulu LLC*, 722 F.3d 1335, 1346 (Fed. Cir. 2013) (“[T]he Supreme Court has stated that, even if a claim does not wholly pre-empt an abstract idea, it still will not be limited meaningfully if it contains only insignificant or token pre- or post-solution activity—such as identifying a relevant audience, a category of use, field of use, or technological environment.”) (Citations omitted), *vacated and remanded*, *WildTangent, Inv. v. Ultramercial LLC*, 134 S. Ct. 2870 (2014) (remanding for consideration in light of *Alice*, 134 S. Ct. 2347).

Therefore, we are not persuaded by Appellants' argument regarding the absence of complete preemption. App. Br. 16–17

Because we find Appellants have not established the claims are directed to an *improvement* in the recited generic computer components, we conclude that none of the claim limitations, viewed both individually and as an ordered combination, amount to significantly more than the judicial exception in order to sufficiently transform the nature of the claims into patent-eligible subject matter.

Procedural Due Process

Lastly, Appellants allege a constitution violation of procedural due process by the Examiner:

The Office Action commits the clear due process error of denying Applicants a hearing by *failing to fully address the dependent claims*. Rather than examining and writing about each dependent claim individually, the Office Action shockingly tosses aside Claims 5-13 using only the clause "and so on," and alleging on page 5 that the Office found "an analysis of representative claims [is] sufficient." There can be no clearer evidence that the government has denied the applicants due process of law than a written admission that essential parts of the application simply were not considered, and thus not the subject of the government "hearing" represented by examination of the application resulting in the Office Action. *Due process requires examining all claims and, for any claim that is rejected, articulating reasons for rejection that fully comply with applicable law and written Office practice guidance*. At best, the Office Action's treatment of Claims 5-13 rests on a conclusory statement that *cannot state a prima facie case of ineligibility based upon the Office's own Guidance and the Bahr Memorandum, which require Examiners to exhaustively address every claim, and every element and limitation of every claim*.

App. Br. 18–19 (emphasis added).

In response, the Examiner further explains the basis for the rejection:

In regard to the appellant's complaint that the Examiner did not point out in detail how it is that the dependent claims fail to provide significantly more than the abstract idea, courts have repeatedly determined that it is unnecessary to do so. For example, in *Thales Visionix*, the court never mentioned the dependent claims at all except to point out the fact of their existence; so if the Examiner tossed aside claims 5-13, as the appellant complains, so did the Federal Circuit. The same was true in the case the appellant later refers to, *Planet Bingo*. The Examiner certainly considered every claim, and pointed out in the final rejection, by way of example, how the first few dependent claims did not contain anything that amounted to significantly more than the abstract idea. The implication of "and so on" is that the same fact pattern is to be found throughout the remaining dependent claims, and it would have been redundant and unnecessary to labor over the specific details of each, as each simply provides further abstraction. None of the dependent claims introduce any new or novel device, or improve upon the generic computer, or do any similar thing; each and every one of them simply recites further comparing and organizing, and/or further unspecified mathematical computations, and/or further recitations of the type of information being manipulated; all of this is entirely abstract and so none of it can possibly rise to the level of "significantly more" than generic computer implementation of the abstract idea. This is not a violation of due process, and if the applicant believed that any dependent claim amounted to significantly more than the abstract idea, he certainly could have suggested it to the Examiner in replying to the earlier non-final rejection.

Ans. 11.

We agree with the Examiner for the reasons discussed *infra*.

Regarding procedural due process, the Supreme Court guides:

The right to an impartial decision maker is unquestionably an aspect of procedural due process. See *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process.”). This applies to administrative proceedings as well as judicial trials. See *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973).

NEC Corp. v. U.S., 151 F.3d 1361 (1998).

It is our view that the Examiner has accorded the Appellants procedural due process by satisfying the notice requirement set forth under 35 U.S.C. § 132(a). The Federal Circuit has held, “the prima facie case is merely a procedural device that enables an appropriate shift of the burden of production.” *Hyatt v. Dudas*, 492 F.3d 1365, 1369 (Fed. Cir. 2007).

[A]ll that is required of the office to meet its prima facie burden of production is to set forth the statutory basis of the rejection and the reference or references relied upon in a sufficiently articulate and informative manner as to meet the notice requirement of [35 U.S.C.] § 132. As the statute itself instructs, the examiner must “notify the applicant,” “stating the reasons for such rejection,” “together with such information and references as may be useful in judging the propriety of continuing prosecution of his application.”

In re Jung, 637 F.3d 1356, 1363 (Fed. Cir. 2011).

This burden is met by “adequately explain[ing] the shortcomings it perceives so that the applicant is properly notified and able to respond.” *Hyatt*, 492 F.3d at 1370. It is only “when a rejection is so uninformative that it prevents the applicant from recognizing and seeking to counter the grounds for rejection” that the prima facie burden has not been met and the

rejection violates the minimal requirements of 35 U.S.C. § 132. *Chester v. Miller*, 906 F.2d 1574, 1578 (Fed. Cir. 1990).

With respect to the Examiner’s prima facie case, as explained in our *Frye* decision, the Examiner has the initial burden—“to set forth the basis for any rejection so as to put the patent applicant on notice of the reasons why the applicant is not entitled to a patent on the claim scope that he seeks—the so-called ‘prima facie case.’” *Ex Parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (Precedential). The Office carries its procedural burden when its rejection satisfies the requirements of 35 U.S.C. § 132 by notifying the applicant of the reasons for rejection, “together with such information and references as may be useful in judging the propriety of continuing [the] prosecution of [the] application.” *See Jung*, 637 F.3d at 1363 (alteration in original). It is well-established that the Board may affirm an Examiner’s rejection so long as Appellants have had “a fair opportunity to react to the thrust of the rejection.” *Jung*, 637 F.3d at 1365 (quoting *In re Kronig*, 539 F.2d 1300, 1302–03 (CCPA 1976)) (internal quotation marks omitted).

Here, it is our view that Appellants have had “a fair opportunity to react to the thrust of the rejection.” *Id*

Moreover, our procedural rule, 37 C.F.R. § 41.37(c)(1)(iv), permits the Board to group claims whereby “the failure of appellant to separately argue claims which appellant has grouped together shall constitute a waiver of any argument that the Board must consider the patentability of any grouped claim separately.”

Appellants advance nominal separate arguments for some dependent claims, asserting that “[c]laims 5–13 contain far more, with features such as:

- Early detection of bad campaigns (claim 5);
- Establishment of a feedback loop (claims 6-7);
- Technology-driven custom charging (claims 8-9);
- Technology-driven performance forecasting (claim 10);
- Technology-driven competitive analysis (claim 13).”

App. Br. 19.

We note Appellants summary characterization of dependent claims 5–13 is not commensurate with the exact claim language recited. *Id.*; see *In re Self*, 671 F.2d 1344, 1348 (CCPA 1982) (“[A]ppellant’s arguments fail from the outset because . . . they are not based on limitations appearing in the claims.”). In the alternative, “[a] statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim.” 37 C.F.R. § 41.37(c)(1)(iv). Therefore, on this record, we find Appellants have failed to advance separate, substantive arguments for the dependent claims on appeal.

We have carefully considered Appellants’ allegation of a procedural due process violation by the Office, but we do not believe such due process violation has occurred. We have considered all of Appellants’ arguments in rendering our decision, and it is our view that the Examiner provided adequate notice under 35 U.S.C. § 132(a), such that Appellants have had a full and fair opportunity to respond to the thrust of the Examiner’s rejection.

In light of the foregoing, we conclude, under the *Mayo/Alice* analyses, that each of Appellants’ claims 1–35 considered as a whole, is directed to a *patent-ineligible abstract idea* (under *step one*), and under *step two*, does not

recite something “*significantly more*” to transform the nature of the claim into a patent-eligible application.

Accordingly, for the reasons discussed above, we sustain the Examiner’s rejection under 35 U.S.C. § 101 of claims 1–35, as being directed to a judicial exception without significantly more.⁸

CONCLUSION

The Examiner did not err in rejecting claims 1–35 under 35 U.S.C. § 101, as being directed to a judicial exception without significantly more

DECISION

We affirm the Examiner’s decision rejecting claims 1–35 under 35 U.S.C. § 101.

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). *See* 37 C.F.R. § 41.50(f).

AFFIRMED

⁸ To the extent Appellants have not advanced separate, substantive arguments for particular claims, or other issues, such arguments are waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).