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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte STEPHEN F. CULVER, LESLIE M. FISCHER,
JAMES L. McBRIDE, LISAA A. SUTHERLAND, and
JOHN A. VITAGLIANO

Appeal 2017-005468
Application 13/452,395
Technology Center 3600

Before JOHN A. JEFFERY, BRUCE R. WINSOR, and
JUSTIN BUSCH, *Administrative Patent Judges*.

BUSCH, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellants¹ appeal from the Examiner's decision to reject claims 30–38, which constitute all the claims pending in this application. We have jurisdiction under 35 U.S.C. § 6(b). Claims 1–29 and 39–53 were cancelled.

We affirm.

CLAIMED SUBJECT MATTER

Appellants' invention "relates to retail food sales. In particular, the present invention relates to characterizing the nutritional value of foods in a

¹ Appellants identify the real party in interest as Guiding Stars Licensing Company. Br. 3.

standardized way, establishing food nutritional value designations, and presenting that information in a readily observable manner.” Spec. ¶ 2.

Claim 30² is representative and reproduced below:

30. A non-transitory computer-readable medium including a computer program for assigning nutritional value ratings to a plurality of food products of the same and different type, wherein the computer program includes instructions that, when executed by a computer system, uses the computer system to perform a method comprising, for each food product, assigning a nutritional quality rating for use by food consumers by:

d. executing a data gathering function and a data filtering function of the computer system that

i. stores in one or more databases nutritional data for a plurality of nutritional quality attributes of the food product, wherein caloric value is not an evaluated nutritional quality attribute of the food product; and

ii. establishes ranges of nutritional quality attribute values for each nutritional quality attribute, wherein nutritional quality attribute values are not established for caloric content of the food product;

e. assigning a point value to each of the ranges of nutritional quality attributes to establish a relative importance of each of the ranges, and storing the point values for each of the ranges in the one or more databases; and

f. executing a scoring function of the computer system, wherein the scoring function is in communication with the one or more databases that

i. calculates a total nutritional quality score for the food product based on the point values of the nutritional

² We note that Appellants’ listing of the claims in the Appeal Brief inadvertently used the letters “d,” “e,” and “f,” instead of “a,” “b,” and “c” when labeling the steps for assigning a nutritional quality rating. Prior versions used the letters a–c but we reproduce the claim here consistent with the claims presented in the Appeal Brief.

quality attributes for the food product and a scoring algorithm, and

ii. assigns a nutritional value rating based upon the total nutritional quality score, wherein each nutritional value rating corresponds to a nutritional quality score or a range of nutritional quality scores, and wherein the same scoring algorithm and rating correlations are used to output nutritional quality information to consumers for different types of food products.

REJECTION³

Claims 30–38 stand rejected under 35 U.S.C. § 101 as directed to ineligible subject matter. Final Act. 2–4.

ANALYSIS

Appellants provide one subheading “CLAIMS 30–38 ARE PATENTABLE SUBJECT MATTER UNDER 35 USC § 101” in the Argument section of the Brief. Br. 6. Appellants, therefore, argue claims 30–38 “as a group (all claims subject to the ground of rejection stand or fall together).” 37 C.F.R. § 41.37(c)(1)(iv) (2016). And we, therefore, select claim 30 as representative of the group and decide the appeal with respect to the group on the basis of representative claim 30 alone. *See id.*

³ In the Withdrawn Rejections section of the Answer, the Examiner indicates “[t]he 101 rejection regarding the claims 30–38 as directed to a signal per se is withdrawn in light of the approved Terminal Disclaimer on 02/11/15.” Ans. 2. These rejections, however, were withdrawn in a previous Office action that Appellants do not appeal from. *See* present Appl’n 13/452,395, Office action mailed August 5, 2015. Thus, these rejections are not before us.

Accordingly, claims 31–38 stand or fall together with representative claim 30.

The Alice/Mayo Framework

The Patent Act defines patent-eligible subject matter broadly: “Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.” 35 U.S.C. § 101.

Appellants contend: “Claim 30 [is] directed to a ‘manufacture’ in accordance with the [*Interim Eligibility Guidance on Subject Matter Eligibility* (IEG)] provided by the US Patent Office. Specifically, the manufacture is the non-transitory computer-readable medium containing instructions thereon that are actionable by a computer system in combination with a database.” Br. 6 (citing *July 2015 Update on Subject Matter Eligibility*, 80 Fed. Reg. 45,429 (July 30, 2015) (“the 2015 Guidelines”)⁴). We agree with Appellants that claim 30 is directed to a manufacture—one of the four statutory categories of subject matter that Congress deems to be appropriate subject matter for a patent.

We, however, find unavailing Appellants argument that “[c]laim 30 renders the invention patentable subject matter as being directed to a ‘manufacture.’” Br. 6. “A person may have ‘invented’ . . . a manufacture, which may include anything under the sun that is made by man, but it is not

⁴ The 2015 Guidelines are available at <https://www.uspto.gov/sites/default/files/documents/ieg-july-2015-update.pdf>.

necessarily patentable under section 101 unless the conditions of the title are fulfilled.” *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 89 (2012) (quoting H.R. REP. No. 1923, 82d Cong., 2d Sess., at 6 (1952)).

That is, in *Mayo*, 566 U.S. at 70, and *Alice Corp. Proprietary Ltd. v. CLS Bank International*, 134 S. Ct. 2347, 2354 (2014), the Supreme Court explained that § 101 “contains an important implicit exception” for laws of nature, natural phenomena, and abstract ideas. *See Diamond v. Diehr*, 450 U.S. 175, 185 (1981). In *Mayo* and *Alice*, the Court set forth a two-step analytical framework for evaluating patent-eligible subject matter: (1) “determine whether the claims at issue are directed to” a patent-ineligible concept, such as an abstract idea; and, if so, (2) “consider the elements of each claim both individually and ‘as an ordered combination’ to determine whether the additional elements” add enough to transform the “nature of the claim” into “significantly more” than a patent-ineligible concept. *Alice*, 134 S. Ct. at 2355 (quoting *Mayo*, 566 U.S. at 79); *see Affinity Labs of Tex., LLC v. DIRECTV, LLC*, 838 F.3d 1253, 1257 (Fed. Cir. 2016).

Step one in the *Mayo/Alice* framework involves looking at the “focus” of the claims at issue and their “character as a whole.” *Elec. Power Group, LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016). Instead of using a definition of an abstract idea, “the decisional mechanism courts now apply is to examine earlier cases in which a similar or parallel descriptive nature can be seen—what prior cases were about, and which way they were decided.” *Amdocs (Isr.) Ltd. v. Openet Telecom, Inc.*, 841 F.3d 1288, 1294 (Fed. Cir. 2016) (citing *Elec. Power*, 830 F.3d at 1353–54); *accord* page 3,

section III of the 2015 Guidelines (instructing Examiners that “a claimed concept is not identified as an abstract idea unless it is similar to at least one concept that the courts have identified as an abstract idea.”).

Step two involves the search for an “inventive concept.” *Alice*, 134 S. Ct. at 2355; *Elec. Power*, 830 F.3d at 1353. For an inventive concept, “more is required than ‘well-understood, routine, conventional activity already engaged in’” by the relevant community. *Rapid Litig. Mgmt. Ltd. v. CellzDirect, Inc.*, 827 F.3d 1042, 1047 (Fed. Cir. 2016) (quoting *Mayo*, 566 U.S. at 79–80).

Step One of the Alice Framework

Appellants do not contest the Examiner’s conclusion that claim 30 is directed to (1) a mathematical relationship/formula, Final Act. 2–4; Ans. 7–8 (citing numerous court decisions from page 5, section III, sub-section D of the 2015 Guidelines), and (2) a method of organizing human activity, Ans. 6–7 (citing *Dietgoal Innovations LLC v. Bravo Media LLC*, 599 F. App’x. 956 (Fed. Cir. 2015)). Rather than distinguishing the claimed invention from these abstract ideas, Appellants contend claim 30 is more than an abstract idea, Br. 7—an argument related to step two of the *Alice* analysis.

Moreover, we see little difference between claim 30 here directed to collecting and analyzing data and those in, for example, *Electric Power*. Similar to the claims in *Electric Power*,

the claims do not go beyond requiring the collection, analysis, and display of available information in a particular field, stating those functions in general terms, without limiting them to technical means for performing the functions that are arguably an advance over conventional computer and network technology. The claims, defining a desirable information-based result and not

limited to inventive means of achieving the result, fail under §101.

Elec. Power, 830 F.3d at 1351. And just as in *Electric Power*, we find “collecting information, including when limited to particular content (which does not change its character as information), as within the realm of abstract ideas.” *Id.* at 1353.

Moreover, a method is merely an abstract idea and is not patent-eligible under § 101 if the method can be performed by human thought alone, or by a human using pen and paper. *See CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1372–73 (Fed. Cir. 2011); *see also Gottschalk v. Benson*, 409 U.S. 63, 67 (1972). The *functions* of claim 30 can be performed mentally or by using pen and paper. That is, a human can mentally (or use pen and paper to do so): (1) store nutritional data for nutritional quality attributes of a food product, and establish ranges of nutritional quality attribute values for each nutritional quality attribute; (2) assign a point value to each of the ranges to establish a relative importance of each of the ranges, and store the point values in memory; and (3) calculate a total nutritional quality score for the food product based on the point values of the nutritional quality attributes and a scoring algorithm, and assign a nutritional value rating based upon the total nutritional quality score. That claim 30 adds a “non-transitory computer-readable medium including a computer program . . . wherein the computer program includes instructions, that, when executed by a computer system, uses the computer” to perform the method of claim 30 does not change our conclusion. *See Alice*, 134 S. Ct. at 2357–58.

For the above reasons, Appellants provide no persuasive argument or evidence showing the claims are not directed to an abstract idea.

Accordingly, we are unpersuaded the Examiner erred in concluding the claims are directed to an abstract idea.

Step Two of the Alice Framework

Because we find that the claims are “directed to an abstract idea,” we turn to step two of the *Alice* framework to determine whether the limitations, when considered both “individually and ‘as an ordered combination’” contain an “inventive concept” sufficient to transform the claimed “abstract idea” into a patent-eligible application. *Alice*, 134 S. Ct. at 2355–58.

We find unavailing Appellants’ contention that the fact that specific elements of claim 30 “and their combination solve the problem of providing consumers with reliable nutritional quality analysis across an array of food types so that a fair comparison may be made among disparate food types” is sufficient to transform the abstract idea into an eligible application of that idea. Br. 8. Even assuming claim 30 is directed to an improvement to a nutritional quality analysis, the improvement does not parallel any improvement to computer functionality itself, such as with *Enfish*’s “self-referential table for a computer database.” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1336 (Fed. Cir. 2016). Nor do Appellants identify any recitation in the claims that is directed to an improvement to a problem specifically arising in the realm of computer networks, such as *DDR*’s overriding of routine and conventional sequence of events ordinarily triggered by the click of a hyperlink. *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014). Thus, contrary to Appellants’

contention that claim 30 is significantly more than storing and organizing data (Br. 8), claim 30 is directed to “an economic or other [process] for which the computer is used in its ordinary capacity” as a tool. *Enfish*, 822 F.3d at 1336.

Our reviewing court recognized in *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 714 (2014) (quoting *Bilski v. Kappos*, 561 U.S. 593, 594 (2010)) that the “machine-or-transformation” test, although not the only test, can nevertheless provide a “‘useful clue’ in the second step of the *Alice* framework.” Under the “machine-or-transformation” test, a claimed process is patent eligible under § 101 if: (1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing. *In re Bilski*, 545 F.3d 943, 954 (Fed. Cir. 2008), *aff’d sub nom. Bilski*, 561 U.S. at 593. According to the Federal Circuit in *In re Bilski*, the transformation prong of the machine-or-transformation test (1) must involve transforming an underlying article from one state to a different state or thing, and (2) must be central to the purpose of Appellants’ claimed process. *Id.* While an underlying article can be intangible, such as electrical signals, and transformation can include data transformation, the data must represent a physical object or an article. *In re Bilski*, 545 F.3d at 962–63.

“Regardless of what statutory category (‘process, machine, manufacture, or composition of matter,’ 35 U.S.C. § 101) a claim’s language is crafted to literally invoke, we look to the underlying invention for patent-eligibility purposes.” *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1374 (Fed. Cir. 2011). In that case, the Federal Circuit stated that, notwithstanding the fact that a particular claim was drawn to a computer

readable medium (CRM), it was “clear that the invention underlying both” the CRM claim and the method claim “is a method for detecting credit card fraud, not a manufacture for storing computer-readable information.” *Id.* The court then treated the CRM claim and the method similarly with respect to the §101-eligibility of the two claims. *Id.* at 1374–76. Similarly, the underlying invention of Appellants’ CRM claims relates to providing nutritional ratings of food, not a manufacture for storing a computer program. Accordingly, the machine-or-transformation test is as relevant to Appellants’ CRM claims as it would be to claims drafted to the underlying process executed by the claimed computer program.

Nevertheless, we find unavailing Appellants’ contention that the “resultant output to consumers is transformative of the information input as a result of the nutritional quality analysis performed.” Br. 8. Claim 30 does not apply the algorithm to or obtain data from physical and tangible objects, such as bones, organs, and body tissues. *See, e.g., In re Abele*, 684 F.2d 902 (CCPA 1982) (holding a process for graphically displaying X-ray data as patent-eligible because X-ray data was obtained from physical and tangible objects such as bones, organs and body tissues); *see also Arrhythmia Research Tech., Inc. v. Corazonix Corp.*, 958 F.2d 1053 (Fed. Cir. 1992) (concluding that claims directed to an apparatus and process of analyzing electrocardiographic signals were patent-eligible because these electrical signals were obtained from physical heart activity that was being monitored in a patient). Claim 30 recites assigning a nutritional quality attribute for a food product, storing nutritional data for nutritional attributes of the food product, and calculating a total nutritional quality score for the food

product—mere data that indirectly relates to the food product. We see no causal connection between the data and a physical and tangible representation of the food product.

Nor do we find availing Appellants’ preemption argument that the pending claims would not prevent one from providing nutritional information because it does not alter our § 101 analysis. *See* Br. 9. Preemption concerns are fully addressed and made moot where a claim is deemed to disclose patent ineligible subject matter under the two-part framework described in *Alice. AriosaDiagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015). “While preemption may signal patent ineligible matter, the absence of complete preemption does not demonstrate patent eligibility.” *Id.*

Lastly, Appellants separately argue claim 37 under the same subheading that groups claims 30–38. Br. 9. At the outset, we note Appellants fail to provide proper subheadings as required by 37 C.F.R. § 41.37(c)(1)(iv) (providing that “any claim(s) argued separately or as a subgroup shall be argued under a separate subheading that identifies the claim(s) by number.”). Therefore, to the extent that Appellants intend to argue claim 37 separately, such a separate argument does not comply with regulatory requirements and, therefore, is waived.

Nevertheless, even if we were to consider Appellants’ additional contention regarding claim 37, we find this argument unavailing. According to Appellants, claim 37 is directed to patent-eligible subject matter because the claim “provides very specific limitations about the use of two different correlations for two different food types.” Br. 9. Appellants do not

persuasively explain how using two different correlations for two different food types alters the character of claim 37 as being directed to an abstract idea under step one of the *Alice* framework, or provides significantly more than the abstract idea under step two of the *Alice* framework. Moreover, nothing precludes performing the functions of claim 37 mentally or with pen and paper. *See CyberSource*, 654 F.3d at 1372–73; *see also Gottschalk*, 409 U.S. at 67. That is, a human can mentally (or use pen and paper to do so) use a first correlation between each nutritional value rating and a nutritional quality score for a first type of food products, and use a second correlation between each nutritional value rating and a nutritional quality score for a second type of food products.

Thus, “the claims at issue amount to ‘nothing significantly more’ than an instruction to apply the abstract idea . . . using some unspecified, generic computer.” *Alice*, 134 S. Ct. at 2360 (citing *Mayo*, 566 U.S. at 71).

Summary

For the above reasons, Appellants have not persuaded us of error in the Examiner’s rejection of claims 30–38 under 35 U.S.C. § 101. Accordingly, we sustain the Examiner’s rejection.

DECISION

We affirm the Examiner’s decision to reject claims 30–38 as directed to ineligible subject matter under 35 U.S.C. § 101.

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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). *See* 37 C.F.R. § 41.50(f).

AFFIRMED