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BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JEFF JONES, TOM MILLER,
TOM QUINN, and KARTIK SHAH

Appeal 2017-005720
Application 13/492,727[1]
Technology Center 3600

Before DEBRA K. STEPHENS, DANIEL J. GALLIGAN, and
DAVID J. CUTITTA II, *Administrative Patent Judges*.

CUTITTA, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's Final rejection of claims 46, 48–51, 53–56, 58, and 60, which are all of the claims pending in the application.[2] We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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[1] Appellants identify Aptus Health, Inc., as the real party in interest. *See* Br. 3.

[2] Claims 1–45, 47, 52, 57, and 59 have been cancelled. *See* Br. 9.

STATEMENT OF THE CASE

According to Appellants, the claims are directed to a drug sample request fulfillment service. Spec. 3:12–21, Abstract.[3] Claim 46, reproduced below, is representative of the claimed subject matter:

> 46. A computer system for promoting pharmaceutical drugs, comprising:
>
> a mobile communication device configured for a prescriber to access mobile drug sampling services;
>
> a drug sample promotional ecosystem configured to execute on one or more pieces of computer hardware to provide said mobile drug sampling services to the mobile communication device, the drug sample promotional ecosystem comprising a promotional orchestration engine which comprises a services engine, an analysis engine, and a learning engine;
>
> a computer communication network provided between said mobile communication device and said drug sample promotional ecosystem;
>
> wherein the services engine is configured to process transaction requests received from the mobile communication device via the computer communication network, so as to access said mobile drug sampling services;
>
> wherein the analysis engine is configured to execute a set of rules associated with a service requested by the prescriber, the set of rules defining whether the prescriber is to receive a particular drug sample, its dosage, and its form, the analysis engine comprising an electronic authorization and authentication component for analyzing and validating one of electronic, digital, and digitized signatures when the prescriber uses said mobile communication device to access said promotional ecosystem;

[3] This Decision refers to: (1) Appellants' Specification, filed June 8, 2012 ("Spec."); (2) the Final Office Action, mailed August 19, 2015 ("Final Act."); (3) the Appeal Brief, filed April 7, 2016 ("Br."); and (4) the Examiner's Answer, mailed August 12, 2016 ("Ans.").

wherein the learning engine is configured to customize the mobile drug sampling services for the prescriber in accordance with the set of rules in the analysis engine, the learning engine determining whether the prescriber receives services corresponding to the requested service comprising certain types of drugs at certain stages of development including after development, based on one or more behaviors selected from a group consisting essentially of one or more samples requested by the prescriber in a given period of time, whether the prescriber has had mandatory education, and whether the prescriber accepts a visit from a pharmaceutical representative;

said mobile drug sampling services being accessible via multiple entry points using said mobile communication device including through at least one of direct access channels, channel partners, and pharmaceutical sample centers;

wherein said mobile communication device is configured to:

display, on a touch screen of the mobile communication device, information associated with the customized mobile drug sampling services indicating available drug samples received from said drug sample promotional ecosystem via the computer communication network for said prescriber to request the available drug samples;

receive, from the touch screen, a drug sample request through a hyperlink depicted on the touch screen as a sample request button for one or more of the available drug samples from said prescriber;

capture, from the touch screen, a digital signature of the prescriber upon receipt of the drug sample request; and

transmit, via the computer communication network, the captured digital signature to the electronic authorization and authentication component, such that the drug sample request is authorized by said promotional ecosystem.

REJECTION

Claims 46, 48–51, 53–56, 58, and 60 stand rejected under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter. Final Act. 2–3.

Our review in this Appeal is limited only to the above rejection and the issues raised by Appellants. Arguments not made are waived. *See* MPEP § 1205.02; 37 C.F.R. §§ 41.37(c)(1)(iv) and 41.39(a)(1).

ANALYSIS

The Examiner concluded claims 46, 48–51, 53–56, 58, and 60 are directed to patent-ineligible subject matter. Final Act. 2–3. We agree with the Examiner.

In *Alice*, the Supreme Court 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. v. CLS Bank Int'l*, 134 S.Ct. 2347, 2355 (2014) (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 75–79 (2012)). The first step in the analysis is to "determine whether the claims at issue are directed to one of those patent-ineligible concepts." *Id.* If so, the second step is to consider the elements of the claims "individually and 'as an ordered combination' to determine whether the additional elements 'transform the nature of the claim' into a patent-eligible application." *Id.* (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.* (quoting *Mayo*, 566 U.S. at 73).

Step One

As an initial matter, we observe that independent claims 46, 51, and 56 respectively recite a system, a method and a non-transitory computer readable medium. As such, the claims are directed to statutory classes of invention within 35 U.S.C. § 101.

Turning to the first step of the *Alice* analysis, we agree with the Examiner that the present claims are directed to an abstract idea, namely, "determining drug samples available to a prescriber and authorizing the prescriber to access the drug samples based on rules" including the processes of a "prescriber accessing available drug samples, customizing the drug samples displayed, the prescriber requesting samples and signing for the requested drug samples, the system using a set of rules to analyze whether the prescriber is to receive a particular drug sample based on behaviors and authorizing the drug sample request." Ans. 3; Final Act. 2.

Appellants' argument that the claims are not directed to an abstract idea "because each of the claims, as a whole, is tied to one or more particular machines or apparatuses" (Br. 10–11) is not persuasive. In *In re Bilski*, the Federal Circuit adopted a machine-or-transformation ("MoT") test to determine whether a process claim is eligible under 35 U.S.C. § 101. *See In re Bilski*, 545 F.3d 943, 954 (Fed. Cir. 2008) (en banc). Under *Bilski*'s MoT test, a claimed process can be considered 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." *Bilski*, 545 F.3d at 954 (citing *Gottschalk v. Benson*, 409 U.S. 63, 70, 93 (1972). The Supreme Court held, however, in *Bilski v. Kappos*, 561 U.S. 593, 604 (2010), that the MoT test, while a "useful and important clue," is no longer the sole test for

determining the patent eligibility of process claims under§ 101. Now, the Supreme Court has created the two-step framework in *Alice* to determine subject matter eligibility. *Alice*, 134 S. Ct. at 2354.

Using the MoT then as a useful clue, we are not persuaded that the claimed "mobile communication device including a touch screen,[] computer communication network, and one or more pieces of computer hardware" recite "particular machines." *Id.* Instead, we agree with the Examiner's finding that those components are broadly claimed "generic" computing devices. Ans. 4–5. Indeed, the Specification describes mobile devices as "input/output devices" which include generic, general-purpose computers such as "laptop computers, notebook computers . . . personal digital assistants; personal digital assistant proxies." Spec. 9:24–32. Further, the Specification makes clear that known, generic touch screen mobile devices are used to provide the invention. *Id.* at 39:14–16 ("Any suitable mobile platforms may be used . . . such as IPhone™, IPod Touch™, IPad™, Android™, Blackberry™, and Windows Mobile™."). Even further, the Specification describes an "exemplary implementation of a WAN," i.e., a computer communication network, "is the Internet." *Id.* at 10:1–9. The Internet "is a ubiquitous information-transmitting medium, not a novel machine." *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 716–17 (Fed. Cir. 2014). As such, the computing components recited in the claims are generic computing components, rather than any particular machine. The claims, therefore, amount merely to instructions to apply the abstract idea using broadly claimed "generic" computing components. And claims that simply use a generic computing device to perform an abstract idea, like the claims in *Alice*, are still abstract. *See Alice*, 134 S. Ct. at 2358.

Moreover, even assuming that the computing components recited in the claims are "particular" computing components, the "claims are not saved from abstraction merely because they recite components [allegedly] more specific than a generic computer." *BSG Tech LLC v. Buyseasons, Inc.*, 899 F.3d 1281, 1286 (Fed. Cir. 2018) (citing *In re TLI Commc'ns LLC Patent Litig.*, 823 F.3d 607, 612–613 (Fed. Cir. 2016) and *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat'l Ass'n*, 776 F.3d 1343, 1347 (Fed. Cir. 2014)). Here, the recited "touch screen of the mobile device" and "computer communication network" only serve to confine the abstract idea to a particular technological environment, specifically, a mobile device and its associated communications network. *Affinity Labs of Texas, LLC v. DIRECTV, LLC*, 838 F.3d 1253, 1258–59 (Fed. Cir. 2016) (Determining that limiting an abstract idea to "cellular telephones . . . does not render the claims any less abstract."). As such, the recitation of a "touch screen of the mobile device" operating on a "computer communication network" does not save the asserted claims at step one.

Step Two

Turning to the second step of the *Alice* analysis, we further agree with the Examiner that the claims fail to transform the abstract idea into a patent-eligible invention. Final Act. 3. In particular, we agree with the Examiner's determination that the claims recite "generic computer component[s] that perform[] functions (i.e. accessing services, displaying options, receiving request, capturing signature, transmitting signature)" that are "conventional activities previously known to the industry." Ans. 4; Final Act. 4.

Appellants' arguments that the claims amount to significantly more than the abstract idea itself because the claims "solve an Internet-centric

problem with a claimed solution that is necessarily rooted in computer technology" (Br. 11–13) are not persuasive. The claims here do not attempt to solve "a challenge particular to the Internet." *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1256–57 (Fed. Cir. 2014). Instead, the claims *use* a generically recited "computer communication network" — that is not even claimed to be the Internet — to provide the allegedly inventive features reflected in the abstract idea, discussed *supra*. In particular, the claims recite the use of some computer network to provide "information . . . indicating available drug samples," provide "a hyperlink," and "transmit . . . [a] captured digital signature . . . such that the drug sample request is authorized." Indeed, the Specification's discussion of the Internet describes the *use* of the Internet to implement a drug sample fulfillment system. *See* Spec. 7:19–27, 39:11–23, and Fig. 2A.

Even further, Appellants' Specification refutes Appellants' argument that the invention is directed to an Internet-centric problem. The Specification describes a "drug sample fulfillment platform has helped to control the rising costs of personal selling, [but] much of its functionality requires manual work done by hand . . . Thus, there is a need for an architecture to orchestrate drug sample distribution while avoiding or reducing the foregoing and other problems." *Id.* at 2:7–16. That is, Appellants' Specification describes the invention eliminates the need for representatives to personally sell drugs to drug prescribers (*id.* at 1:19–21 ("Promotion and distribution of drug samples can be accomplished without the use of sales representatives.")) and reduces manual work. *Id.* at 8:11–13 ("This automatic replenishment of drug samples frees the prescriber 102 from having to manually keep track of drug samples that are available to him

at any point in time."), and 16:22–24 ("An electronic authorization and authentications, such as digital signatures, provides a means of eliminating the manual steps for obtaining drug samples."). These are business problems, not Internet problems.

We are also not persuaded that the "use of a mobile communication device having a touch screen to provide customized drug sampling services" "provide[s] unconventional features that confine the alleged abstract idea to a particular useful application." Br. 14. As discussed *supra*, Appellants' Specification describes that touch screen mobile devices are commonly known. Spec. 39:14–16. Appellants' Specification also describes that using a network to promote and provide pharmaceutical drugs is commonly known. Spec. 1:19–21 ("With the proliferation of networking technology, many prescribers are members of online communities where promotion and distribution of drug samples can be accomplished without the use of sales representatives."). Appellants' use of existing technology to implement the abstract idea is insufficient to transform the claims into patent-eligible subject matter. *Content Extraction*, 776 F.3d at 1348.

Additionally, Appellants' argument that the "claims are directed to such *new* and *useful* patent-eligible applications" because "none of the prior art anticipates or renders obvious" the claimed invention (Br. 11) does not persuade us that the claims are patent-eligible. Our reviewing court has held that it is not "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." *SAP Am., Inc. v. InvestPic, LLC*, 898 F.3d 1161, 1163 (Fed. Cir. 2018). As discussed *supra*, we determine that the claims do not recite significantly more than the abstract idea itself, and, in this case, the

absence of prior art that anticipates or renders obvious the claimed invention does not persuade us that the claims are patent-eligible.

Appellants have not proffered sufficient evidence or argument to persuade us that any of the limitations in the remaining dependent claims provide a meaningful limitation that transforms the claims into a patent-eligible application. *See* Br. 9–14. Accordingly, Appellants have not persuaded us claims 46, 48–51, 53–56, 58, and 60 are directed to patent-eligible subject matter. Therefore, we sustain the rejection of claims 46, 48–51, 53–56, 58, and 60 under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter.

DECISION

For the reasons above, we affirm the Examiner's decision rejecting claims 46, 48–51, 53–56, 58, and 60.

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