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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* WILLIAM JOHN DELINSKY, TIMOTHY JAMES FISH,  
MICHAEL D. MORENCY, and DAVID GARY WALKER

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Appeal 2017-006557  
Application 14/275,094<sup>1</sup>  
Technology Center 3600

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Before MURRIEL E. CRAWFORD, JOSEPH A. FISCHETTI, and  
BRUCE T. WIEDER, *Administrative Patent Judges*.

WIEDER, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the Examiner's final rejection of claims 36–63. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART and enter a NEW GROUND OF REJECTION pursuant to our authority under 37 C.F.R. § 41.50(b).

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<sup>1</sup> According to Appellants, the real party in interest is Peter K. Trzyna. (Appeal Br. 2.)

CLAIMED SUBJECT MATTER

Appellants’ “invention pertains to call referral, as in the case of a calling debtor who is referred by the lender to a credit counseling agency, along with automated generation of related documentation, inter-computer communication, and networking.” (Spec. ¶ 3.<sup>2</sup>) In other words, “the invention involves, a computerized system for the management, tracking, and reporting of referrals made from one company, individual, or entity to another company, individual, or entity.” (*Id.* ¶ 16.)

Claims 36 and 62 are the independent claims on appeal. Claim 36 is illustrative. It recites:

36. A method of using an apparatus processing phone call routing, the method including:

automatically capturing, by an apparatus comprising a programmed computer system, call data for each of a plurality of phone calls utilizing a toll free number and routed as referrals to a service, which engages an association of the captured phone call data for each of the referrals with call referral information generated by the apparatus so as to distinguish the service from phone call referral data for a plurality of other services receiving other referrals,

wherein, the association is used by the apparatus in generating a digital reporting, that is communicated to the service, which comprises the captured call data and the generated call referral information for the referrals to the service.

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<sup>2</sup> “Spec.” refers to the “Substitute Specification-Clean Version” filed May 12, 2014.

### REJECTION<sup>3</sup>

Claims 36–63 are rejected under 35 U.S.C. § 101 as directed to a judicial exception without significantly more.

### ANALYSIS

Appellants argue claims 36–51 and 58–61 together. We select claim 36 as representative. Claims 37–51 and 58–61 will stand or fall with claim 36. *See* 37 C.F.R. § 41.37(c)(1)(iv).

“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. Section 101, however, “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)).

*Alice* applies a two-step framework, earlier set out in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012), “for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts.” *Alice*, 134 S. Ct. at 2355.

Under the two-step framework, it must first be determined if “the claims at issue are directed to a patent-ineligible concept.” *Id.* If the claims are determined to be directed to a patent-ineligible concept, e.g., an abstract

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<sup>3</sup> The rejection of claims 62 and 63 under 35 U.S.C. § 112, second paragraph, was withdrawn. (Advisory Action mailed Mar. 30, 2016.)

idea, then the second step of the framework is applied to determine if “the elements of the claim . . . contain[] an ‘inventive concept’ sufficient to ‘transform’ the claimed abstract idea into a patent-eligible application.” *Id.* at 2357 (citing *Mayo*, 566 U.S. at 72–73, 79).

With regard to step one of the *Alice* framework, the Examiner determines that the claims

are directed to the abstract idea of “electrical digital computer machine and a data processing system, methods of making and for using the machine, products produced thereby, as well as data structures and articles of manufacture pertaining thereto, and all necessary intermediates of that which is discussed herein, all in the field of computerized aspects of card crediting to mortgages and the like.”

(Final Action 4, quoting Spec. ¶ 3; *see also* Answer 4.) The Examiner also determines that the claims “are directed to a method of using an apparatus [for] processing phone call routing.” (Final Action 7.)

Appellants argue that the former is not “correct because this excerpt from the Field of Invention [in the Specification] specifies items not found in the claims, such as ‘data structures and articles of manufacture’ etc.”

(Reply Br. 4.) As to the latter, Appellants argue that “‘using an apparatus [for] processing phone call routing’ is not an abstract idea.” (Appeal Br. 23.) Moreover, in view of the two determinations by the Examiner, Appellants argue that “Applicant [is left] to guess . . . what is the contended abstract idea.” (Appeal Br. 24.)

Under step one of the *Alice* framework, we “look at the ‘focus of the claimed advance over the prior art’ to determine if the claim’s ‘character as a whole’ is directed to excluded subject matter.” *Affinity Labs of Texas, LLC*

*v. DIRECTV, LLC*, 838 F.3d 1253, 1257 (Fed. Cir. 2016) (quoting *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016)).

The Specification provides evidence as to what the claimed invention is directed. In this case, the Specification discloses that the “invention pertains to call referral.” (Spec. ¶ 3.) Claim 36 provides further evidence. Claim 36 recites “[a] method of . . . processing phone call routing . . . including,” “capturing, by . . . a programmed computer system, call data,” the computer system “engages an association of the captured phone call data . . . with call referral information generated by the” computer system, “wherein the association is used by the [computer system] in generating a digital reporting, that is communicated to the service” to which the calls are routed as referrals.

Although “[a]n abstract idea can generally be described at different levels of abstraction,” *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1240 (Fed. Cir. 2016), here we agree with Appellants that the Examiner’s determination that the claims “are directed to the abstract idea of ‘electrical digital computer machine and a data processing system, methods of making and for using the machine, products produced thereby, as well as data structures and articles of manufacture pertaining thereto . . . .’” (Final Action 4), specifies items not found in the claims and does not correctly reflect to what claim 36 is directed.

However, we agree with the Examiner that the claims are directed to the abstract idea of “using an apparatus [for] processing phone call routing.” (*See id.* at 7.) Specifically, and in view of the above, it is clear that claim 36 is directed to collecting call data, analyzing data (to associate the collected data with the generated call referral data), and presenting the results. “[W]e

have treated collecting information, including when limited to particular content (which does not change its character as information), as within the realm of abstract ideas.” *Elec. Power Grp.*, 830 F.3d at 1353. “In a similar vein, we have treated 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.” *Id.* at 1354. “And we have recognized that merely presenting the results of abstract processes of collecting and analyzing information, without more (such as identifying a particular tool for presentation), is abstract as an ancillary part of such collection and analysis.” *Id.*

Moreover, here, the limitations do not recite implementation details. Instead, they recite functional results to be achieved. In other words, claim 36 does not recite “a particular way of programming or designing the software . . . , but instead merely claim[s] the resulting [method].” *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d at 1241. In short, claim 36 is directed to the abstract idea of capturing/collecting call data, associating/analyzing the call data with other data (“call referral information”), and generating a report.

Nonetheless, Appellants seek to analogize the present claims to the claims in *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1313 (Fed. Cir. 2016). (Reply Br. 15.) Appellants argue that the present claims “do not simply use a computer as a tool to automate a conventional activity.” (*Id.*) We disagree. In *McRO*, the court determined that

the claimed improvement here is allowing computers to produce “accurate and realistic lip synchronization and facial expressions in animated characters” that previously could only be produced by human animators. As the district court correctly recognized, this computer automation is realized by improving the prior art through “the use of rules, rather than artists, to set the morph

weights and transitions between phonemes.” The rules are limiting in that they define morph weight sets as a function of the timing of phoneme sub-sequences.

*McRO*, 837 F.3d at 1313 (citations omitted). Here, rather than a technological improvement, the asserted improvement is to a business practice regarding capturing/collecting call data, associating/analyzing the call data with other data (“call referral information”), and generating a report. (*See* Claim 36.)

In view of the above, we agree with the Examiner that independent claim 36 is directed to an abstract idea.<sup>4</sup>

Step two of the *Alice* framework has been described “as a 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.’” *Alice*, 134 S. Ct. at 2355 (citing *Mayo*, 566 U.S. at 72–73).

Appellants argue that “[t]he Examiner has not explained, nor is an explanation apparent, as to how no more than a generic computer to perform generic functions can handle telephone calls as claimed without significantly more.” (Appeal Br. 20, internal quotes and emphasis omitted.) Appellants further argue that the Examiner has provided no evidence that the specific limitations are well-understood, routine and conventional. (*Id.* at 30.)

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<sup>4</sup> We will analyze claims 52–57 and 62–63 under step two. *See Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1339 (Fed. Cir. 2016) (In some “cases involving computer-related claims, there may be close calls about how to characterize what the claims are directed to. In such cases, an analysis of whether there are arguably concrete improvements in the recited computer technology could take place under step two.”).

“Thus, the Office rejects claims based on a contention of fact . . . without providing any ‘substantial evidence’ . . . .” (*Id.* at 37.)

The Examiner determines that “[t]he claim(s) does/do not include additional elements that are sufficient to amount to significantly more than the judicial exception, because the additional elements are simply a generic recitation of a computer and a computer network performing their generic computer functions.” (Final Action 5.) Citing paragraph 47 of Appellants’ Specification, the Examiner determines that

these are general purpose computers that perform routine and conventional activities. All of the claimed steps directed to the abstract idea (capturing and generating) are well understood, routine and conventional functions (see page 7 of July 2015 update: Subject Matter Eligibility). These steps are similar to examples of well understood, routine and conventional functions that are listed on this page (receiving, processing and storing data, electronic recordkeeping, etc.). . . . It is the routine and conventional functions of the claims used to carry out the abstract idea and general purpose computers as admitted by Appellant [sic] on page 8-9 of the specification that fail Part 2B of the Subject Matter Eligibility test [i.e., step two of the *Alice* framework]. Therefore, claim limitations do not amount to significantly more.

(Answer 8.)

The Examiner appears to rely on paragraph 47 of the Specification as disclosing that use of a programmed computer system to perform all of the steps of, e.g., claim 36, was well-known, routine, or conventional. (*See* Answer 7–8). But, paragraph 47 relates to a step of “referring a telephone communication.” To the extent the Examiner determines that paragraph 47 relates to other claim steps, e.g., capturing call data or associating call data with call referral information, the Examiner does not clearly articulate why

the paragraph should be so broadly read. Moreover, paragraph 47, like paragraphs 22 and 23 (relating to detecting and associating phone numbers), appears in the Specification under the heading of “Summary of the Invention,” rather than, e.g., “Background of the Invention,” or the like. (*See Spec.* at 6, 4.) Thus, it is unclear why the Examiner has determined that these paragraphs provide evidence of what was well-known, routine, or conventional to a person having ordinary skill in the art.

Notwithstanding, claim 36 recites capturing/collecting call data, associating/analyzing the call data with other data (“call referral information”), and generating a report. Collecting, analyzing, and reporting data are routine computer functions. *See Elec. Power Grp.*, 830 F.3d at 1355. And “limiting the claims to [a] particular technological environment . . . is, without more, insufficient to transform them into patent-eligible applications of the abstract idea at their core.” *Id.* at 1354. There can be no reasonable argument here that collecting, analyzing, and reporting data are not routine activities of general purpose computers. Therefore, we agree with the Examiner that the generic computer components in claim 36, i.e., the “programmed computer system,” performs routine computer functions. (*See Final Action 6.*) “Whether something is well-understood, routine, and conventional to a skilled artisan . . . is a factual determination.” *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1369 (Fed. Cir. 2018). “The improvements in the specification, to the extent they are captured in the claims, create a factual dispute regarding whether the invention describes well-understood, routine and conventional activities.” *Id.* We see no factual dispute here.

Additionally, we note that claim 36 does not recite a step for receiving or routing phone calls. Claim 36 recites data collection, analysis, and

reporting. Therefore, we do not find persuasive Appellants' argument that "a generic computer' cannot handle telephone calls without significantly more" or that there is "no factual basis whatsoever that 'no more than a generic computer' can handle telephone calls as claimed." (Appeal Br. 33.)

Appellants seek to analogize the present claims to the claims in *DDR Holdings*. (See Appeal Br. 50–51.) We disagree. Unlike claim 36 here, the claims in *DDR Holdings* "specify how interactions with the Internet are manipulated to yield a desired result—a result that overrides the routine and conventional sequence of events ordinarily triggered by the click of a hyperlink." *DDR Holdings*, 773 F.3d 1245, 1258 (Fed. Cir. 2014) (emphasis added). In other words, the invention claimed in *DDR Holdings* does more than "simply instruct the practitioner to implement the abstract idea with routine, conventional activity." See *Ultracommercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014); see also *DDR Holdings*, 773 F.3d at 1259.

Appellants also seek to analogize the present claims to those in *Bascom Global Internet Services, Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016). (See Appeal Br. 51–52.) In *Bascom*, the court determined that "an inventive concept can be found in the non-conventional and non-generic arrangement of known, conventional pieces." *Bascom*, 827 F.3d at 1350. Specifically, "[t]he inventive concept described and claimed in the '606 patent is the installation of a filtering tool at a specific location, remote from the end-users, with customizable filtering features specific to each end user." *Id.* at 1350. The Federal Circuit determined that this "particular arrangement of elements is a technical improvement over the prior art ways of filtering." *Id.* Appellants argue that "no consideration was given [by the Examiner] as to whether the inventive concept was found in

the non-conventional and non-generic arrangement of known, conventional pieces.” (Appeal Br. 52.) But Appellants do not clearly indicate what element(s) in method claim 36 might correspond to, e.g., the “filtering tool at a specific location, remote from the end-users.” Therefore, we do not find this argument persuasive.

In view of the above, we agree with the Examiner, albeit under a different rationale, that claim 36 is directed to a judicial exception without significantly more. Claims 37–51 and 58–61 fall with claim 36. *See* 37 C.F.R. § 41.37(c)(1)(iv). Further in view of the above, we designate our decision as a new ground of rejection.

Appellants separately argue, claims 52–57. In particular, Appellants argue that

the Examiner has not provided information sufficient to understand how “not more than a generic computer” can carry out ... connecting the inbound communication to an outbound line to connect the caller with the phone number (claims 52-53) or ... routing the inbound communication to an outbound communication line, regardless of whether the location is identified, to connect the caller with a phone number (claims 54-55).

(Appeal Br. 53, emphasis and paragraphing omitted.) Appellants also argue, with regard to claims 56 and 57, that the Examiner has not explained how the step of “from a trunk interface, receiving an inbound communication” can be met by use of “not more than a generic computer.” (*Id.*) We are persuaded of error.

Claim 52, which depends from claim 36 recites, in relevant part, “connecting the inbound communication [from a trunk interface] to an outbound communication line to connect the caller with the phone number

for the service associated with the location of the caller.” Claim 53 depends from claim 52.

Claim 54, which depends from claim 36 recites, in relevant part, “routing the inbound communication [from a trunk interface] to an outbound communication line, regardless of whether the location is identified, to connect the caller with a phone number of one the [sic] services.” Claim 55 depends from claim 54.

Claim 56, which depends from claim 36 recites, in relevant part, “from a trunk interface, receiving an inbound communication from a caller.” Claim 57 depends from claim 56.

Appellants’ Figure 1 shows an arrangement of a generic computer system (“database management system” and “custom software”) connected with an “IVR” (interactive voice response system) and “trunk interface boards” (connected to inbound and outbound audio lines). This may reflect a well-understood, routine, and conventional configuration that performs the well-understood, routine, and conventional steps of connecting and routing inbound communications. But, as made clear in *Berkheimer*, this is a question of fact. *See Berkheimer*, 881 F.3d at 1369. And here, the Examiner has not provided sufficient evidence to support a finding that these steps were well-understood, routine, or conventional to a skilled artisan. Therefore, we will reverse the rejection of claims 52–57.

Appellants also separately argue independent claim 62 and claim 63, which depends from claim 62. Claim 62 recites:

62. In an apparatus which, for each of a plurality of phone calls, detects and stores a number received from a trunk line interface, captures call data from a phone call from which the number has been detected, performs a routing of the phone call

to an outbound phone line by using a stored telephone number of a service to connect to one of multiple long distance carriers, generates call referral information, engages an association of the captured call data and the generated call referral information, the association used to generate a digital reporting that is communicated to the service to which the telephone call was routed, a method comprising:

automatically capturing, by an apparatus comprising a programmed computer system, call data for each of a plurality of phone calls connecting to the one of the multiple long distance carriers in routed referrals to a service, which engages an association of the captured phone call data for each of the referrals with call referral information generated by the apparatus so as to distinguish the service from phone call referral data for a plurality of other services receiving other referrals,

wherein, the association is used by the apparatus in generating a digital reporting, that is communicated to the service, which comprises the captured call data and the generated call referral information for the referrals to the service.

Appellants argue that claims 62 and 63

positively recite: a trunk line interface, routing a phone call, an outbound phone line, captured call data and generated call referral information, connect to one of multiple long distance carriers, and digital reporting, that is communicated to the service, which comprises the captured call data and the generated call referral information. While clearly the Examiner's contention that these can be carried out with "no more than a generic computer" cannot possibly be correct.

(Appeal Br. 57, emphasis omitted.)

We note that the claim terms cited by Appellants as being "positively recited," appear in the preamble to claim 62. Indeed, even though "call data" is recited in the preamble, the reference to "call data" in the body of the claim does not indicate an antecedent basis. Similarly, even though "digital reporting" and "call referral information" are recited in the

preamble, the reference to “digital reporting” and the initial reference to “call referral information” in the body of the claim do not indicate an antecedent basis. Likewise, “an apparatus” is recited in the preamble, yet the initial reference to “an apparatus” in the body of the claim does not indicate an antecedent basis. Nonetheless, we also note that in the body of the claim, the term “connecting to the one of the multiple long distance carriers” has antecedent basis from the term “one of multiple long distance carriers” in the preamble. Hence, it is unclear if the “apparatus” term of the preamble takes with it into the body of the claim the features recited in the preamble, such as “a trunk line interface.” See *Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1305–06 (Fed. Cir. 1999).

In determining the preamble’s effect on claim scope, we consider, among other factors, whether there is “dependence on a particular . . . preamble phrase for antecedent basis” and whether there is “clear reliance on the preamble during prosecution . . . because such reliance indicates use of the preamble to define, in part, the claimed invention.” *Catalina Mktng. Int’l, Inc. v. Coolsavings.com, Inc.*, 289 F.3d 801, 808 (Fed. Cir. 2002).

In view of the above, the question of dependence on the preamble language for antecedent basis leads to, at best, mixed results. However, Appellants clearly rely on the preamble in arguing for patent eligibility. (*See* Appeal Br. 57.) This supports construing the claim preamble as if it was in the balance of the claim, i.e., that the claim preamble limits the scope of the claim. *See id.*

It is not clear from either the Final Action or the Examiner’s Answer that the Examiner has considered whether the apparatus recited in the preamble of claim 62 amounts to more than a generic computer performing

routine computer functions, e.g., “detects and stores a number received from a trunk line interface,” and “performs a routing of the phone call to an outbound phone line.” (*See, e.g.*, Final Action 5.) In other words, in view of the above, it is not clear that the Examiner has determined whether the additional elements recited in the preamble of claim 62 are sufficient to amount to significantly more than the judicial exception. (*See id.*) It follows that the Examiner has not provided sufficient evidence to support a finding that the claimed configuration of these elements was well-understood, routine, or conventional to a skilled artisan. *See Berkheimer*, 881 F.3d at 1369.

Therefore, we will reverse the rejection of claims 62 and 63.

#### DECISION

The Examiner’s rejection of claims 36–51 and 58–61 under 35 U.S.C. § 101 is affirmed under a different rationale and, therefore, we designate this as a new ground of rejection of claims 36–51 and 58–61 under 35 U.S.C. § 101.

The Examiner’s rejection of claims 52–57 and 62–63 under 35 U.S.C. § 101 is reversed.

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b). Section 41.50(b) provides that, “[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review.” Section 41.50(b) further provides that Appellants, WITHIN TWO MONTHS FROM THE DATE OF THIS DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

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(1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the Examiner, in which event the proceeding will be remanded to the Examiner.

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same record.

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. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART; 37 C.F.R. § 41.50(b)