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Table with 5 columns: APPLICATION NO., FILING DATE, FIRST NAMED INVENTOR, ATTORNEY DOCKET NO., CONFIRMATION NO.
13/615,307 09/13/2012 Lee Linden 19487.352.2 6040

107193 7590 11/01/2018
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EXAMINER

SEIBERT, CHRISTOPHER B

ART UNIT PAPER NUMBER

3625

NOTIFICATION DATE DELIVERY MODE

11/01/2018

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte LEE LINDEN and BENJAMIN LEWIS

Appeal 2017-007229
Application 13/615,307¹
Technology Center 3600

Before MARC S. HOFF, JASON J. CHUNG, and JOYCE CRAIG,
Administrative Patent Judges.

CRAIG, *Administrative Patent Judge.*

DECISION ON APPEAL

Appellants² appeal under 35 U.S.C. § 134(a) from the Examiner's non-final rejection of claims 1–20, which are all of the claims pending in this application. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

¹ According to Appellants, this application is related to copending Application No. 13/615,289 and copending Application No. 13/615,328. App. Br. 1. This application is also related to copending Application No. 13/615,321.

² According to Appellants, the real party in interest is Facebook, Inc. App. Br. 1.

INVENTION

Appellants' invention relates to a method for enabling a gift transaction. Spec 1. Claim 1 is illustrative and reads as follows:

1. A method comprising:

identifying, by at least one processor, at least a first pending gift item previously selected but not yet purchased as a gift for a recipient by a first sender and not yet rejected by the recipient;

receiving a gift request from a second sender, the gift request specifying the recipient and a second gift item;

identifying, by the at least one processor, a complementary relationship between the first pending gift item from the first sender and the second gift item from the second sender by comparing attributes of the first pending gift item from the first sender and attributes of the second gift item from the second sender;

sending, by the at least one processor, based on the identification of the complementary relationship between the first pending gift item and the second gift item, an approval electronic message requesting approval, from the recipient, of an aggregated gift item that is a combination of the first pending gift item from the first sender and the second gift item from the second sender; and

in response to approval of the aggregated gift item by the recipient and prior to the first sender or the second sender purchasing the first pending gift item or the second gift item:

posting a notification of the aggregated gift item for publication by an online social network, the notification identifying the first sender, the second sender, the recipient, and the aggregated gift item, and the notification available for viewing and comment among the first sender, the second sender, friends of the first sender, and friends of the second sender; and

initiating payment of the second gift item on behalf of the second sender.

REJECTIONS

Claims 1–20 stand rejected under 35 U.S.C. § 101 because the claimed invention is directed to a judicial exception without significantly more. Non-Final Act. 3–5.

Claims 1, 4, 6–9, 11, 14, and 16–19 stand rejected under pre-AIA 35 U.S.C. § 103(a) as unpatentable over the combination of O’Sullivan et al. (US 2010/0280879 A1; published Nov. 4, 2010) (“O’Sullivan”), Morgenstern (US 2008/0189188 A1; published Aug. 7, 2008), and Hsu et al. (US 2006/0122926 A1; published June 8, 2006) (“Hsu”). Non-Final Act. 5–9.

Claims 2, 5, 10, 12, 15, and 20 stand rejected under pre-AIA 35 U.S.C. § 103(a) as unpatentable over the combination of O’Sullivan, Morgenstern, Hsu, and Jacobi et al. (US 2011/0166956 A1; published July 7, 2011) (“Jacobi”). Non-Final Act. 9–11.

Claims 3 and 13 stand rejected under pre-AIA 35 U.S.C. § 103(a) as unpatentable over the combination of O’Sullivan, Morgenstern, Hsu, and Agarwal (US 2006/0178946 A1; published Aug. 10, 2006). Non-Final Act. 11–12.

Claim 1 stands provisionally rejected on the ground of nonstatutory double patenting as unpatentable over claim 1 of copending Application No. 13/615,289, claim 1 of copending Application No. 13/615,321, and claim 1 of copending Application No. 13/615,328. Non-Final Act. 12–13.

ANALYSIS

We have reviewed the rejections of claims 1–20 in light of Appellants’ arguments that the Examiner erred. We have considered in this decision only those arguments Appellants actually raised in the Briefs. Any

other arguments Appellants could have made, but chose not to make, in the Briefs are waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Appellants' arguments are not persuasive of error. We agree with and adopt as our own the Examiner's findings of facts and conclusions as set forth in the Answer (Ans. 4–13) and in the Action from which this appeal was taken (Non-Final Act. 2–14). We provide the following explanation for emphasis.

Rejection of Claims 1–20 under 35 U.S.C. § 101

Under 35 U.S.C. § 101, an invention is patent-eligible if it claims a “new and useful process, machine, manufacture, or composition of matter.” 35 U.S.C. § 101. The Supreme Court, however, has long interpreted § 101 to include an implicit exception: “[l]aws of nature, natural phenomena, and abstract ideas” are not patentable. *See, e.g., Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2354 (2014). In determining whether a claim falls within the excluded category of abstract ideas, we are guided in our analysis by the Supreme Court's two-step framework, described in *Mayo* and *Alice*. *Alice*, 134 S. Ct. at 2355 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 76–77 (2012)).

In accordance with that framework, we first determine whether the claim is “directed to” a patent-ineligible abstract idea. *See id.* at 2356.

If the claim is “directed to” a patent-ineligible abstract idea, we then consider the elements of the claim—both individually and as an ordered combination—to assess whether the additional elements transform the nature of the claim into a patent-eligible application of the abstract idea. *Id.* at 2355. This is a search for an “inventive concept”—an element or combination of elements sufficient to ensure that the claim amounts to

“significantly more” than the abstract idea itself. *Id.* (internal quotations and citation omitted). The Court acknowledged in *Mayo* that “all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas.” *Mayo*, 566 U.S. at 71. We, therefore, look to whether the claims focus on a specific means or method that improves the relevant technology or are instead directed to a result or effect that itself is the abstract idea and merely invoke generic processes and machinery. *See Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1336 (Fed. Cir. 2016).

In rejecting independent claims 1 and 11, and dependent claims 2–10 and 12–20, under 35 U.S.C. § 101, the Examiner determined the claims are directed to an abstract idea of “gift shopping,” i.e., a “fundamental economic practice.” Non-Final Act. 4. The Examiner also determined the claims as a whole do not amount to significantly more than the abstract idea itself. *Id.* at 4–5.

Alice Step 1: Abstract Idea

As to the first step of the *Alice* inquiry, Appellants contend the Examiner erred by inventing an abstract idea and not citing case authority for the conclusion that “gift shopping” is an abstract idea akin to a fundamental economic practice and a method of organizing human activity. App. Br. 13.

We are not persuaded of error. To determine whether the claims at issue are directed to an abstract idea, we need only look to other decisions where similar concepts were previously found abstract by the courts. *See Amdocs (Israel) Limited v. Openet Telecom, Inc.*, 841 F.3d 1288, 1294 (Fed. Cir. 2016) (“Instead of a definition [for what an ‘abstract idea’ encompasses], then, 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.”)

We agree with the Examiner that the claimed invention resembles the claims at issue in *Alice*. See Non-Final Act. 4; see also Ans. 5. Claim 1 is directed to gift shopping, whereby a complementary relationship between two gifts sent by two senders is identified, the recipient is notified on an online social network of the resulting aggregate gift, and, after the recipient approves the gift, payment for the second gift is initiated. Gift shopping is a fundamental economic practice, long prevalent in our system of commerce, like the risk hedging in *Bilski* (see *Bilski v. Kappos*, 561 U.S. 593 (2010)) and the intermediated settlement in *Alice* (see *Alice*, 134 S. Ct. at 2356–57). Thus, gift shopping, like the fundamental economic practices above, is an “abstract idea” beyond the scope of § 101. See *Alice*, 134 S. Ct. at 2356. Accordingly, we see no error in the Examiner’s conclusion that the claims are directed to a fundamental economic practice. See Non-Final Act. 4; see also Ans. 4–7.

Appellants next argue that the Examiner’s analysis overly generalizes the claims because “the actual claims contain numerous steps that are not involved in the concept of ‘gift shopping.’” App. Br. 16. Appellants assert that the Examiner merely copied and pasted the claim language and concluded, without further analysis, that all of the elements are “directed to the abstract idea.” *Id.*

We are not persuaded of error. Appellants’ argument does not address the Examiner’s determinations as to which claim elements are part of the abstract idea and which are additional elements. See Ans. 4–5. For example, the Examiner determined that “identifying at least a first pending

gift item previously selected but not yet purchased as a gift for a recipient by a first sender and not yet rejected by the recipient,” is directed to the abstract idea itself, while “by the at least one processor,” is an additional limitation. *Id.* at 5–6. Additional elements are addressed in step 2 of the *Alice* analysis, which endeavors to identify additional elements “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 (quoting *Mayo*, 566 U.S. at 73).

Appellants also argue the claims are directed to concrete, patent-eligible concepts, not mere “gift shopping.” App. Br. 17. In Appellants’ view, the claims are directed to

systems and methods for sending aggregated gift items by identifying complementary relationships between pending gift items to the same recipient from multiple senders and utilizing an online social network to provide digital notifications and messages to the senders of the aggregated gift item (and friends of the multiple senders) prior to the senders purchasing the aggregated gift item to initiate payment on behalf of the senders.

Id. (citing *Enfish*).

We are not persuaded. In *Enfish*, “the plain focus of the claims is on an improvement to [the] computer functionality itself.” *Enfish*, 822 F.3d at 1336. In contrast, we do not find a claimed focus on an improvement to the computer functionality here. Appellants point to the Specification, but none of the cited paragraphs explains how using a social networking system to provide digital notifications and messages prior to a sender purchasing a gift improves any computer functionality. See App. Br. 18 (citing Spec. ¶¶ 18, 50, 55, 56). We agree with the Examiner that the claims are directed to

solving a business or commercial problem, not a technical problem. *See* Ans. 7.

For these reasons, we are not persuaded of error in the Examiner’s determination that the claims are directed to “gift shopping,” which is a fundamental economic practice and an “abstract idea.”

Alice Step 2: Inventive Concept

As to the second step of the *Alice* inquiry, Appellants argue “the actual elements of the claims go far beyond the general idea of ‘gift shopping.’” App. Br. 19. As in step 1 of the *Alice* analysis, Appellants again identify claim elements that Appellants do not consider part of the abstract idea of “gift shopping.” *Id.* at 19–20. Appellants argue the Examiner failed to analyze any additional elements in step 2 because the Examiner determined that all of the claim elements are directed to the abstract idea of “gift shopping” in step 1. *See id.* at 19.

Appellants’ arguments are not persuasive. The question in step 2 of the *Alice* analysis is not whether there are additional elements in the claims, but whether the additional elements add anything “significantly more” to transform the abstract concept into patentable eligible subject matter. *Alice*, 134 S. Ct. at 2355. The Examiner identified the recited “by the at least one processor,” and the recited social network being “online” as additional elements. Ans. 8. The Examiner determined that the additional elements are merely instructions to perform the abstract idea on a generic computer. *Id.* Appellants have not challenged the Examiner’s determinations with regard to the additional elements identified by the Examiner. Nor have Appellants argued that any additional element adds something “significantly more” such that the claims are patent-eligible. *See* App. Br. 19–23.

For example, Appellants do not argue that any of the elements of claims 1 and 11 are individually inventive. *See* App. Br. 19–20. Instead, in the Reply Brief (Reply Br. 6–8), Appellants for the first time rely on *DDR Holdings, LLC v. Hotels.com L.P.*, 773 F.3d 1245 (Fed. Cir. 2014), in which the Federal Circuit found claims were “necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks” because they addressed a technical issue unique to Internet website problems. 773 F.3d at 1257.

Here, unlike in *DDR Holdings*, the claims merely use technology to address issues of communication between gift senders, gift recipients, and others, without solving any underlying technological issues. As recognized by the Supreme Court, “the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.” *See Alice*, 134 S. Ct. at 2358–59 (concluding claims “simply instruct[ing] the practitioner to implement the abstract idea of intermediated settlement on a generic computer” not patent eligible); *see also Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715–16 (Fed. Cir. 2014) (Claims merely reciting abstract idea of using advertising as currency as applied to particular technological environment of the Internet not patent eligible.); *Accenture Global Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1344–45 (Fed. Cir. 2013) (Claims reciting “generalized software components arranged to implement an abstract concept [of generating insurance-policy-related tasks based on rules to be completed upon the occurrence of an event] on a computer” not patent eligible.); *Dealertrack, Inc. v. Huber*, 674 F.3d 1315, 1333–34 (Fed. Cir. 2012) (“Simply adding a ‘computer aided’

limitation to a claim covering an abstract concept, without more, is insufficient to render [a] claim patent eligible.”).

We are also not persuaded by Appellants’ argument that the claimed limitations as an ordered combination include an inventive concept because “they provide an inventive concept that provides a technical solution to a technical problem.” App. Br. 20 (citing *Bascom Global Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016)). Appellants argue “the ordered combination of limitations in the claims provide an inventive concept that goes beyond mere recitation of ‘gift shopping.’” *Id.* at 21. In particular, Appellants argue the claims

include the inventive concept of sending aggregated gift items by identifying complementary relationships between pending gift items to the same recipient from multiple senders and utilizing an online social network to provide digital notifications and messages to the senders of the aggregated gift item (and friends of the multiple senders) prior to the senders purchasing the aggregated gift item to initiate payment on behalf of the senders.

Id. Appellants further argue the claimed invention “serves to provide a digital solution that can remove concerns regarding the absence of a brick-and-mortar store” and “serves to remove the hurdle of entering payment or delivery information prior to selecting a gift. App. Br. 21–22.

The claims here are distinguishable from those in *Bascom*. In *Bascom*, the system claims were directed to a “content filtering system for filtering content retrieved from an Internet computer network,” which the court held were directed to an abstract idea. *Bascom*, 827 F.3d at 1348–49. The court further held the claims included an inventive concept in the ordered combination of system components, including a local client computer and a remote ISP server connected to the client computer and

Internet computer network providing for “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 claims at issue here do not involve a similar or analogous arrangement or “ordered combination” of components. We agree with the Examiner that the additional limitations are not improvements to the functioning of a computer or some other technology (*see* Ans. 9–10), and that any problems being solved are commercial, not technological. Indeed, we find nothing in Appellants’ claims that adds anything “significantly more” to transform the abstract concept of gift shopping.

Because Appellants’ claims 1–20 are directed to a patent-ineligible abstract concept and do not recite something “significantly more” under the second prong of the *Alice* analysis, we sustain the Examiner’s rejection of these claims under 35 U.S.C. § 101.

Rejection of Claims 1–20 under 35 U.S.C. § 103

In rejecting independent claims 1 and 11 for obviousness, the Examiner found the combination of O’Sullivan, Morgenstern, and Hsu teaches all of the recited limitations. Non-Final Act. 6–11.

Appellants contend that the Examiner erred because the cited references fail to teach or suggest the limitation

sending, by the at least one processor, based on the identification of the complementary relationship between the first pending gift item and the second gift item, an approval electronic message requesting approval, from the recipient, of an aggregated gift item that is a combination of the first pending gift item from the first sender and the second gift item from the second sender,

as recited by independent claim 1 and as similarly recited by independent claim 11. App. Br. 26. Appellants argue that O’Sullivan’s teaching of determining aggregated pairs of unwanted gifts and requested exchange gifts to determine valuation or equivalency recommendations “is fundamentally distinct from” the disputed limitation. *Id.* at 27.

We are not persuaded that the Examiner erred. The Examiner found O’Sullivan identifies a “complementary relationship” between the pending gifts by matching “specific user-designated valuation, specific user-designated gift or item, relative current resale value of gifts, relative value of gifts, relative relatedness between the gift recipient and another user associated with another gift, or relative relatedness of gifts (e.g., manufacturer, brand, category, use or purpose, etc.),” any one of which is a complementary relationship. Ans. 10–11 (citing O’Sullivan ¶ 61). The Examiner further found that O’Sullivan teaches that gifts can be aggregated during this process (O’Sullivan ¶ 66), and that an approval electronic message is sent to the recipient (O’Sullivan ¶ 64). *Id.* at 11.

Appellants have not rebutted the Examiner’s findings persuasively. *See* Reply Br. 9–10. The test for obviousness is not whether the claimed invention is expressly suggested in any one or all of the references, but whether the claimed subject matter would have been obvious to those of ordinary skill in the art in light of the combined teachings of those references. *See In re Keller*, 642 F.2d 413, 425 (CCPA 1981). Appellants have not persuaded us that the disputed limitation would not have been obvious to an artisan of ordinary skill in light of the combined teachings of the cited prior art references.

Appellants next contend the Examiner erred because the cited references also fail to teach or suggest the limitation

in response to approval of the aggregated gift item by the recipient and prior to the first sender or the second sender purchasing the first pending gift item or the second gift item:

posting a notification of the aggregated gift item for publication by an online social network, the notification identifying the first sender, the second sender, the recipient, and the aggregated gift item, and the notification available for viewing and comment among the first sender, the second sender, friends of the first sender, and friends of the second sender,

as recited by independent claim 1, and as similarly recited by independent claim 11. App. Br. 27–28. In particular, Appellants argue that one of ordinary skill would not read O’Sullivan and Morgenstern as teaching posting a notification for viewing by the senders and friends of the senders prior to the sender purchasing the gift item. *Id.* at 29. Appellants further argue neither O’Sullivan nor Morgenstern teaches posting an aggregated gift item prior to the senders purchasing the aggregated gift item. *Id.*

We are not persuaded the Examiner erred because Appellants argue the references separately. Nonobviousness cannot be established by attacking the references individually when the rejection is predicated upon a combination of prior art disclosures. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). Here, the Examiner relied on O’Sullivan as teaching posting a notification of the gift item. Non-Final Act. 6. The Examiner found that O’Sullivan teaches a notification that is sent prior to purchasing the item. Non-Final Act. 7; Ans. 11 (citing O’Sullivan Fig. 3C, ¶¶ 42, 48, 56, 66). O’Sullivan, in describing Figure 3C, explicitly teaches “the transaction manager module **208** or purchase process manager module **204** may notify the gift recipient of the gift giver’s final gift selection prior to

actual purchase of the gift by the gift giver (block 332).” O’Sullivan ¶ 48. The Examiner also found Morgenstern teaches a similar notification that is for publication by an online social network and available for viewing and comment among the first sender, the second sender, friends of the first sender, and friends of the second sender. Ans. 11 (citing Morgenstern Figs. 10–13, ¶¶ 56–59 and 85–89). In addition, the Examiner found Hsu teaches identifying a pending gift item not yet rejected by the recipient. Non-Final Act. 8 (citing Hsu Fig. 10, ¶¶ 174–178). Appellants have not persuasively addressed whether the disputed limitation would have been obvious to those of ordinary skill in the art in light of the combined teachings of those references.

For these reasons, we are not persuaded that the Examiner erred in finding the combination of O’Sullivan, Morgenstern, and Hsu teaches or suggests the disputed limitation recited in claims 1 and 11.

Appellants next contend the disputed subject matter would not have been obvious because O’Sullivan teaches away from the Examiner’s proposed combination. App. Br. 30; Reply Br. 13. In particular, Appellants argue that O’Sullivan teaches away from the disputed “posting” limitation because “*O’Sullivan* warns that sharing direct information about ‘selections, specifications, or rejections’ may undermine the relationship between the sender and the recipient.” App. Br. 30 (citing O’Sullivan ¶ 9). Appellants further argue that “*O’Sullivan* explains that information should be maintained in ‘an anonymous manner’ to avoid violating ‘social norms.’” *Id.* (citing O’Sullivan ¶ 70). Further, Appellants argue that “*O’Sullivan* teaches that ‘explicitness’ would ‘devalue the gift and/or the entire gift giving process.’” *Id.* (citing O’Sullivan ¶ 6).

Appellants' "teaching away" argument fails because Appellants have not identified where O'Sullivan actually criticizes, discredits, or otherwise discourages

in response to approval of the aggregated gift item by the recipient and prior to the first sender or the second sender purchasing the first pending gift item or the second gift item:

posting a notification of the aggregated gift item for publication by an online social network, the notification identifying the first sender, the second sender, the recipient, and the aggregated gift item, and the notification available for viewing and comment among the first sender, the second sender, friends of the first sender, and friends of the second sender.

Claim 1; *See In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004); *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1327 (Fed. Cir. 2009) ("A reference does not teach away, however, if it merely expresses a general preference for an alternative invention but does not 'criticize, discredit, or otherwise discourage' investigation into the invention claimed") (citing *Fulton*).

The paragraphs in O'Sullivan cited by Appellants do not actually criticize, discredit, or otherwise discourage the disputed limitation. Paragraph 6 of O'Sullivan explains, for example, that "having the gift recipient specify a gift to eliminate uncertainty in gift selection removes the element of surprise and may also obligate the gift giver to an uncomfortable price point or type of gift." O'Sullivan ¶ 6. Paragraph 9 describes a "gift incentive engine [that] combines an interactive distributed environment for gathering anonymous (and opaque) gift selection advice from relevant parties" O'Sullivan ¶ 9. Paragraph 70 describes that "knowledge held by one party that would be beneficial to another party is obtained in an anonymous manner (anonymous from the point of view of the non-input

providing parties).” O’Sullivan ¶ 70. As the Examiner points out, “O’Sullivan teaches both anonymous and public notifications and therefore cannot be said to be teaching away from a public notification.” Ans. 12 (citing O’Sullivan ¶ 38).

Appellants also argue the Examiner fails to provide “any cogent” reason that one of ordinary skill in the art would read Morgenstern’s teaching (to post a notification of a purchased gift item) with O’Sullivan’s teaching (to provide a gift suggestion) in combination as teaching” the disputed limitation. App. Br. 29–30.

We disagree. The Examiner provided “articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006); *see* Ans. 11 (citing Morgenstern ¶ 26); Non-Final Act. 7–8 (citing Hsu Fig. 10, ¶¶ 174–178). Thus, we are not persuaded of error in the Examiner’s ultimate conclusion that claims 1 and 11 are obvious over the combined teachings of O’Sullivan, Morgenstern, and Hsu.

Accordingly, we sustain the Examiner’s § 103(a) rejection of independent claims 1 and 11. We also sustain the Examiner’s § 103(a) rejection of dependent claims 2–10 and 12–20, not argued separately with particularity. App. Br. 31–33.

DECISION

We affirm the Examiner’s decision rejecting claims 1–20.

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