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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JEFFREY S. COTTON

Appeal 2017-007359
Application 14/500,890
Technology Center 3600

Before ERIC S. FRAHM, JOHN A. EVANS, and CARL L. SILVERMAN,
Administrative Patent Judges.

EVANS, *Administrative Patent Judge.*

DECISION ON APPEAL

Appellant¹ seeks our review under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 2–6. App. Br. 1. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.²

¹ Appellant states the real party in interest is AutoAlert, LLC. App. Br. 4.

² Rather than reiterate the arguments of the Appellant and the Examiner, we refer to the Appeal Brief (filed August 26, 2016, "App. Br."), the Reply Brief (filed April 7, 2017, "Reply Br."), the Examiner's Answer (mailed February 9, 2017, "Ans."), the Final Action (mailed February 1, 2016, "Final Act."), and the Specification (filed September 29, 2014, "Spec.") for their

STATEMENT OF THE CASE

The claims relate to methods for generating customer-specific vehicle proposals based on ongoing vehicle finance pay-off information. *See* Abstract.

INVENTION

An understanding of the invention can be derived from a reading of Claim 2, the sole independent claim, reproduced below with some formatting added:

2. A method of automatically generating leads for automotive sales and leases by data mining from large pre-existing computer databases, the method comprising:

using a computer to automatically retrieve, from one or more electronic sources consisting of large pre-existing databases of sales and financing records, each of the

following:

information relating to a large group of potential customers;

information relating to large number of current vehicles of the potential customers in the large group of potential customers; and

information relating to a large set of current financial terms for the large number of current vehicles;

automatically determining a customized deal for each potential customer by performing the following steps for each potential customer in the large group:

respective details.

identifying a current vehicle of the potential customer from within the large number of current vehicles;

determining a trade-in value for the current vehicle;

identifying current financial terms for the current vehicle from within the large set of current financial terms;

automatically determining a payoff amount for the current vehicle from the current financial terms;

using stored associations between vehicle types to limit required calculations by, without receiving a request from the potential customer, automatically selecting a potential replacement vehicle that is predicted to be of interest to the potential customer, the automatic selection based on an association between vehicle types stored in the computer and the current vehicle of the potential customer;

retrieving potential financial terms available for the potential replacement vehicle; and

calculating a potential payment amount for the potential replacement vehicle, based on the potential financial terms, the trade-in value, and the payoff amount;

for each of the potential customers, automatically evaluating the customized deal to predict whether the deal is likely to be desirable, without receiving a request from the potential customer, by:

retrieving a current payment amount for the current vehicle from the current financial terms;

automatically subtracting the current payment amount for the current vehicle from the potential payment amount for the potential replacement vehicle to determine a difference in payments; and

predicting, if the difference in payments is less than or equal to a preset threshold, that the deal will be desirable to the potential customer; and

automatically generating one or more electronic messages alerting the dealer to each potential customer for whom there is a deal that is predicted to be desirable.

App. Br. 57–8 (Claims Appx.).

*The Prior Art Supporting the Rejection on Appeal*³

As evidence of unpatentability, the Examiner relies on the following prior art:

Ahuja, <i>et al.</i> , (Ahuja '711)	US 2002/0013711 A1	Jan. 31, 2002
Brown, <i>et al.</i> , (Brown '691)	US 2004/0039690 A1	Filed Aug. 25, 2003
Cotton '099	US 7,827,099 B1	Nov. 2, 2010
Cotton '752	US 8,005,752 B1	Aug. 23, 2011
Cotton '461	US 8,095,461 B2	Jan. 10, 2012
Cotton '791	US 8,396,791 B2	Mar. 12, 2013

*The Rejections on Appeal*⁴

1. Claims 2–6 stand rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter. Final Act. 4–8.

New Grounds of Rejection.

In the Answer, the Examiner applies the following new grounds of rejection:

1. Claims 2–6 stand rejected under the judicial doctrine of obviousness-type double patenting over Cotton '791 (Claims 1–4, 6,

³ The present application and the various patents to Cotton each claim the priority of U.S. Application 60/525,233, filed November 25, 2003.

⁴ The Examiner has withdrawn the rejection of Claims 2–6 under the judicial doctrine of obviousness-type double patenting over Cotton '791 (Claims 1–11), Cotton '461 (Claims 1–20), Cotton '752 (Claims 1–24), and Cotton '099 (Claims 1–3, 5–8, 11–15, and 22–30). Ans. 3; Reply Br. 4.

and 7), Sheinson (US 7,050,982 B2 issued May 26, 2006), and Chandran (US 7,555,443 B2 issued Jun. 30, 2009). Ans. 14–23.

2. Claims 2–6 stand rejected under the judicial doctrine of obviousness-type double patenting over Cotton '461 (Claims 1–5, 9–13, and 17–21), Sheinson , and Chandran . Ans. 23–32.

3. Claims 2–6 stand rejected under the judicial doctrine of obviousness-type double patenting over Cotton '752 (Claims 1–5, 9–13, and 17–21), Sheinson , and Chandran . Ans. 32–42.

4. Claims 2–6 stand rejected under the judicial doctrine of obviousness-type double patenting over Cotton '099 (Claims 1–3, 5–8, 12–15, and 22–30), Sheinson , and Chandran . Ans. 42–55.

ANALYSIS

We have reviewed the rejections of claims 2–6 in light of Appellant’s arguments that the Examiner erred. We have considered in this Decision only those arguments Appellant actually raised in the Brief. Any other arguments which Appellant could have made but chose not to make in the Briefs are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(iv). We are not persuaded that Appellant’s identify reversible error.

Upon consideration of the arguments presented in the Appeal Brief and the Reply Brief, we agree with the Examiner that all the pending claims are unpatentable under 35 U.S.C. § 101. We adopt as our own the findings and reasons set forth in the rejections from which this appeal is taken and in the Examiner’s Answer, to the extent consistent with our analysis below. We provide the following explanation to highlight and address specific arguments and findings primarily for emphasis.

We consider Appellant's arguments *seriatim*, as they are presented in the Appeal Brief, pages 11–55.

NEW GROUND OF REJECTION, CLAIMS 2–6: JUDICIAL OBVIOUSNESS-TYPE
DOUBLE PATENTING OVER COTTON '791, SHEINSON, AND CHANDRAN.

In view of these “new grounds,” we consider the double patenting rejections entered in the final rejection as having been withdrawn.

The Examiner finds Sheinson fails to teach: “automatically determining a payoff amount for the current vehicle from the current financial terms.” As recited in independent Claim 2. Ans. 21; Reply Br. 5. To supply this limitation, the Examiner finds Chandran teaches where a customer purchases an automobile from a retail dealer, e.g., a Mazda dealership, the customer makes monthly payments. Ans. 21. The Examiner further finds Chandran discloses an “equity point” which is the point in the repayment term where the amount owed is substantially equal to the value of the vehicle. *Id.* The Examiner then concludes:

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the invention of '791 to include the teaching(s) of Sheinson for the motivation of providing an incentive for an entity to accept an offer in association with the purchase/lease of a vehicle through the offer of more attractive and/or affordable financing terms which may be facilitated by the settling of any outstanding loan balance which can be performed readily and easily by any person of ordinary skill in the art, with neither undue experimentation, nor risk of unexpected results.

Id.

Appellant contends that the “equity point” disclosure fails to teach the claimed “automatically determining a payoff amount for the current vehicle

from the current financial terms.” Reply Br. 6. Appellant argues rather, Chandran teaches a standard financing model where a consumer has the option to purchase at the “equity point” of the lease. *Id.* We disagree.

Appellant admits Chandran teaches an equity point, i.e., the point during the financing of the car wherein the value of the car is equal to the remaining balance on the loan which is the payoff amount automatically determined from the current financial terms. We note there is a second such point, i.e., the point at which the remaining balance is zero, i.e., when the loan is paid off. Appellant’s arguments seem to imply that the payoff amount must be automatically determined at each point during repayment of the loan. However, the claims do not impose such a limitation. We are not persuaded the Examiner errs.

NEW GROUND OF REJECTION, CLAIMS 2–6: JUDICIAL OBVIOUSNESS-TYPE
DOUBLE PATENTING OVER COTTON ’752, SHEINSON, AND CHANDRAN.

Essentially as for the rejection based on Cotton ’791, The Examiner finds Sheinson fails to teach: “automatically determining a payoff amount for the current vehicle from the current financial terms.” As recited in independent Claim 2. Ans. 40. Similarly, the Examiner cites Chandran’s disclosure of an “equity point” to teach the disputed limitation.

For the reasons discussed above, we are not persuaded the Examiner errs.

NEW GROUND OF REJECTION, CLAIMS 2–6: JUDICIAL OBVIOUSNESS-TYPE
DOUBLE PATENTING OVER COTTON ’461, OR ALTERNATIVELY OVER COTTON
’099, IN VIEW OF SHEINSON, AND CHANDRAN.

In the Answer, the Examiner newly-rejects Claims 2–6 over either Cotton ’461 (Claims 1–5, 9–13, and 17–21), or Cotton ’099 (Claims 1–3, 5–8, 12–15, and 22–30), in view of Sheinson, and Chandran.

Appellant contends the Examiner’s findings are defective at least because Cotton ’461 does not comprise a claim 21 and because Cotton ’099 does not comprise a claim 30. Reply Br. 4. We agree. The disputed claims are not found in the cited patents. We do not sustain these rejections.

INDEPENDENT CLAIM 2: NON-STATUTORY SUBJECT MATTER⁵.

Appellant contends Claims 2–6 recite eligible subject matter under 35 U.S.C. § 101 as interpreted by *Alice Corp. v. CLS Bank Int’l*, 134 S. Ct. 2347 (2014). *See* App. Br. 11–51. The Examiner extensively responds to Appellant’s contentions. *See* Ans. 4–8.

Appellant’s Reply Brief “maintains [Appellant’s] position regarding the [rejection of Claims 2-6 under Section § 101 as being allegedly directed to nonstatutory subject matter] as set forth in Appellant’s Appeal Brief dated August 26, 2016. *See* Reply Br. 3–4. However, the Reply Brief presents no

⁵ The bulk of the Examiner’s findings under § 101 relate to Claim 1. Final Act. 5. However, the Examiner notes that Appellant’s prior “cancellation of claim 1 renders its rejection under 35 U.S.C. § 101 moot,” and quotes Claim 2 in the body of the rejection. *Id.*, 2, 5–6; *see* App. Br. 12, n. 2. Thus, we find the Examiner’s remarks to pertain to Claim 2 and hold such reference to Claim 1 to be harmless error.

arguments that specifically address any findings presented in the Examiner's Answer.

Prima facie case.

Appellant contends the Examiner failed to establish a prima facie case of patent-ineligible subject matter under 35 U.S.C. §101 because “the Office Action makes a number of baseless allegations that it does not attempt to support with further explanation or evidence.” App. Br. 17. We disagree.

The Federal Circuit has explained repeatedly that “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) (citing *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992)). The Examiner carries the burden of establishing a prima facie case when its rejection satisfies 35 U.S.C. § 132 by setting forth a rejection in a sufficiently articulate and informative manner. *In re Jung*, 637 F.3d 1356, 1363 (Fed. Cir. 2011). If the Examiner “adequately explain[s] the shortcomings . . . the burden shifts to the applicant to rebut the prima facie case with evidence and/or argument.” *Hyatt*, 492 F.3d at 1370. The Final Office Action adequately explains the § 101 rejection. *See* Final Act. 4–8. The Examiner's statements satisfy § 132(a) because they apply the *Mayo/Alice* analytical framework and apprise Appellant of the reasons for the § 101 rejection under that framework. Appellant has not responded by alleging a failure to understand the rejection. To the contrary, Appellant clearly identifies an abstract idea as found by the Examiner: “facilitating customer identification thru data mining.” App. Br. 22. For these reasons, we are not persuaded the Examiner failed to make a prima facie case of patent ineligibility under § 101.

Preemption.

Appellant contends Claim 2 does “not seek to tie up any judicial exception such that others cannot practice it.” App. Br. 36.

While preemption may denote patent ineligibility, its absence does not demonstrate patent eligibility. *See FairWarning, IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1098 (Fed. Cir. 2016). For claims covering a patent-ineligible concept, preemption concerns “are fully addressed and made moot” by an analysis under the *Mayo/Alice* framework. *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015). We conduct such an analysis below.

Improper Examination.

Throughout the Appeal Brief, Appellant argues the Examiner has improperly applied various USPTO examination guidance documents. *See e.g.*, App. Br. 14–15.

The Director of the United States Patent and Trademark Office, not the Board, supervises examination and examiners.⁶ If an examiner has procedurally erred, the remedy lies exclusively in petitioning the Director for supervisory review.⁷ The Director has not delegated this supervisory authority to the Board.⁸

⁶ 35 U.S.C. 3(a)(2)(A) and 132(a).

⁷ 37 C.F.R. § 1.181; *cf.* 35 U.S.C. 6(b) (giving substantive review powers directly to the board).

⁸ *Cf.* 37 C.F.R. § 41.3 (delegating some petition authority to the Chief Administrative Patent Judge, not the board) and § 41.50(b) (delegating to the board the discretion to enter a new ground, propose a curative amendment or

35 U.S.C. § 101.

Section 101 provides that a patent may be obtained for “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” 35 U.S.C. § 101. The Supreme Court has long recognized, however, that § 101 implicitly excludes “laws of nature, natural phenomena, and abstract ideas” from the realm of patent-eligible subject matter, as monopolization of these “basic tools of scientific and technological work” would stifle the very innovation that the patent system aims to promote. *Alice Corp. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2354 (2014) (quoting *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2116 (2013)); *see also Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1294-97 (2012); *Diamond v. Diehr*, 450 U.S. 175, 185 (1981).

Mayo-Alice Step 1.

The Supreme Court has instructed us to use a two-step framework to “distinguish[] 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. At the first step, we determine whether the claims at issue are “directed to” a patent-ineligible concept. *Id.*

The Examiner finds that Claim 1 [*sic* “Claim 2”] recites a method of automatically generating leads for automotive sales through a data-mining technique comprising various computers and databases. Final Act. 5. The Examiner finds the claims describe steps for facilitating customer

order additional briefing).

identification thru data mining. *Id.* The Examiner finds the claimed scheme is similar to other concepts that have been identified by the courts as abstract, such a fundamental economic practice (e.g., concepts relating to the economy and commerce; performance of financial transactions), as well as certain methods of organizing human activity (e.g., mental processes or steps that a person should follow). *Id.* The Examiner finds the claimed scheme is one that can be performed in the human mind, or manually and is a process of collecting and comparing known information, similar to *Classen*⁹, or of obtaining and comparing intangible data, similar to *Cybersource*,¹⁰ or of using categories to organize, store and transmit information, similar to *Cyberfone* or *Content Extraction*. *Id.* The Examiner finds the claims generate a financial analysis output, similar to *Freddie Mac*¹¹. *Id.* The Examiner's Answer re-iterates these findings and more closely relates them to the recitations of the claims. *See* Ans. 58–68.

Appellant contends Claim 2 does not describe any economic practice, much less a fundamental one. App. Br. 15. Appellant argues that automatically generating leads for automotive sales, as found by the Examiner, is not a concept that is found in the *July 2015 Quick Reference Sheet*. *Id.*

Appellant's Reply Brief does not respond to the Examiner's findings respecting the rejections under § 101. *See* Reply Br. 4–6.

⁹ *Classen Immunotherapies, Inc. v. Biogen IDEC*, 659 F.3d 1057 (2011).

¹⁰ *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366 (2011).

¹¹ *Federal Home Loan Mortg. Corp., AKA Freddie Mac v. Graff/Ross Holdings LLP* (Fed. Cir. 2015).

Appellant characterizes the claims by quoting from Claim 2 the claims “*automatically determin[es] a customized deal* for each potential customer by performing the following steps for each potential customer in the large group.” App. Br. 24. But such “customization” or “tailoring” of a presentation to a customer is a long prevalent economic practice. *See e.g., Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1369–71 (Fed. Cir. 2015) (invalidating claims calling for tailoring web-page content based on user information and navigation histories; observing that newspaper inserts had long been tailored to customers’ locations and television commercials had long been tailored to the time of day, and holding that “merely adding computer functionality to increase the speed or efficiency of the process d[id] not confer patent eligibility on an otherwise abstract idea”). We find, under Step 1, the claims are “directed to” an abstract idea.

Mayo/Alice Step 2.

Where, as here, the claims are found to be “directed to” a patent-ineligible concept, we then “consider the elements of each claim both 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*, 132 S. Ct. at 1298). This analysis has been characterized as the search for an “inventive concept”—something sufficient to ensure that the claim amounts to “significantly more” than the abstract idea itself. *Id.* (quoting *Mayo*, 132 S. Ct. at 1294).

Appellant contends the claims, similar to those of *DDR Holdings*, are rooted in computer technology. App. Br. 29. As characterized by Appellant, the claimed system retrieves information from a plurality of sources, performs a unique set of operations, and determines whether a particular customized deal is likely to be desirable to a particular potential customer. App. Br. 29–30. The system then “automatically generat[es] one or more electronic messages alerting the dealer to each potential customer for whom there is a deal that is predicted to be desirable.” *Id.*, 30.

Appellant contends the claimed system attempts “to overcome problems specifically arising in the realm of automotive computer databases, such as mining various records and data available and then extracting and analyzing that information to determine specific potential transactions.” *Id.* Appellant further contends the claims “bear substantial similarities to the claims at issue in *Enfish*¹²” which were deemed eligible because they describe an improvement in computer technology, i.e., a particular logical model for a computer database. *Id.*

We disagree with Appellant because we find the claims to be closer to those of *TLI Communications*.¹³ In contrast to the claims in *Enfish*, the Federal Circuit explained that the claims at issue in *TLI Communications* are not directed to a specific improvement to computer functionality, and therefore, they are not patent eligible. *The patent at issue in TLI Communications* is related to an apparatus and method for storing and organizing digital images using classification data, such as a date or a

¹² *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (2016).

¹³ *In re TLI Communications LLC Patent Litigation*, 823 F.3d 607 (2016).

timestamp. While the Federal Circuit performed the same analysis it did in *Enfish*, it found instead that “the claims are directed to an abstract idea of classifying and storing digital images in an organized manner.” *TLI Communications*, at 611. The Federal Circuit explained that the claims are not directed to “a specific improvement to computer functionality” because the specification (1) does not describe any new apparatus, (2) fails to provide any technical details, (3) and generally describes the system and methods in “purely functional terms” performing “generic computer functions such as storing, receiving, and extracting data.” *Id.*, at 612.

Appellant fails to direct our attention to any disclosure of a new apparatus or technical detail, nor, other than by conclusory allegation, has Appellant describes the claimed system and methods in other than “purely functional terms” and other than as performing “generic computer functions such as storing, receiving, and extracting data.”

Appellant’s remaining arguments.

We have considered all of the Appellant’s remaining arguments and have found them unpersuasive. Accordingly, because independent Claim 2, and Claims 3–6 which stand or fall therewith, are directed to an abstract idea and do not present an “inventive concept,” we sustain the Examiner’s determination that they are directed to ineligible subject matter under 35 U.S.C. § 101. *Cf. LendingTree, LLC v. Zillow, Inc.*, 656 Fed. Appx. 991, 997 (Fed. Cir. 2016) (“We have considered all of LendingTree’s remaining arguments and have found them unpersuasive. Accordingly, because the asserted claims of the patents in suit are directed to an abstract idea and do not present an “inventive concept,” we hold that they are directed to ineligible subject matter under 35 U.S.C. § 101.”); *see also, e.g., OIP*

Technologies, Inc. v. Amazon.com, Inc., 788 F.3d 1359, 1364 (Fed. Cir. 2015) (“We have considered all of OIP’s arguments and find them unpersuasive. Because the ’713 patent claims the abstract idea of offer-based price optimization and lacks an “inventive concept” sufficient to “transform” the claimed subject matter into a patent-eligible application of that idea, we affirm.”) and *FairWarning IP, LLC v. Iatric Systems, Inc.*, 839 F.3d 1089, 1098 (Fed. Cir. 2016) (“We have considered FairWarning’s remaining arguments and find them unpersuasive. For the forgoing reasons, we affirm the district court’s determination that the claims of the ’500 patent recite patent-ineligible subject matter under § 101 and its dismissal of FairWarning’s infringement suit”).

INDEPENDENT CLAIMS 3–6: NON-STATUTORY SUBJECT MATTER.

Appellant contends the arguments made above in respect of Claim 2 apply equally to, and are incorporated by reference in support of, the dependent claims. *See* App. Br. 45–51.

We find the dependent claims describe various [information gathering and/or processing] schemes which do not patentably transform the abstract idea found for independent Claim 2. *Cf. Apple, Inc. v. Ameranth, Inc.*, 2016 WL 6958650, *10 (Fed. Cir. 2016) (“These claims depend from independent claims which were found to be directed to unpatentable subject matter, as discussed above. Merely appending this preexisting practice to those independent claims does not make them patentable. It is an insignificant post-solution activity”). Also, where all claims are directed to the same abstract idea, “addressing each claim of the asserted patents ... [is]

unnecessary.” *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat’l Ass’n*, 776 F.3d 1343, 1348 (Fed. Cir. 2014).

DECISION

The rejection of Claims 2–6 under the judicial ground of obviousness-type double patenting is AFFIRMED.

The rejection of Claims 2–6 under 35 U.S.C. § 101 is AFFIRMED.

Because we affirm at least one ground of rejection with respect to each claim on appeal, the Examiner’s decision rejecting Claims 1–4 and 6–36 is affirmed. *See* 37 C.F.R. § 41.50(a)(1).

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). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED