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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte HENRIETTE COETZER

Appeal 2017-007651
Application 13/940,971¹
Technology Center 3600

Before CARL W. WHITEHEAD JR. JEFFREY S. SMITH and
JOHN R. KENNY, *Administrative Patent Judges*.

WHITEHEAD JR., *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant is appealing the Examiner’s Final rejection of claims 11–26 under 35 U.S.C. § 134(a). Appeal Brief 1. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

Introduction

The invention is directed to, “using a processor, a set of inpatient treatment records, and processing the set of inpatient treatment records to identify index admissions, where an index admission for a patient is an

¹ Appellant identifies Health Dialog Services Corporation as the real party in interest. Appeal Brief 1.

initial admission to an inpatient treatment facility and any associated admissions within a single program of care.” Appeal Brief 25.

Illustrative Claim

13. A system for evaluating health care provider performance, comprising:
 - a computer processor arranged to:
 - receive a set of inpatient treatment records;
 - process the set of inpatient treatment records to identify index admissions, wherein an index admission for a patient is an initial admission to an inpatient treatment facility and any associated admissions within a single program of care;
 - identify, based on the set of inpatient treatment records, a set of unnecessary admissions, including for each unnecessary admission in the set of unnecessary admissions:
 - identifying a clinical history associated with the unnecessary admission, wherein the clinical history for the unnecessary admission includes medical records associated with at least a predetermined period preceding the unnecessary admission,
 - based on the clinical history, identify, for each unnecessary admission, one or more interaction codes identifying a health problem;
 - cross-reference the one or more interaction codes with interaction codes in a diagnostic map, wherein the diagnostic map cross-references one or more interaction codes associated with at least one unnecessary admission, and corresponding one or more health care providers associated with the unnecessary admission;
 - based on the cross-referencing, determine the corresponding one or more healthcare providers associated with the one or more interaction codes, wherein the corresponding one or more providers are associated with the unnecessary admission;

calculating an unnecessary admission evaluation for each health care provider in the corresponding health care providers based on the one or more interaction codes associated with the unnecessary admission;
assigning accountability for each unnecessary admission to a health care provider based on the one or more associated interaction codes and the unnecessary admission evaluation of the health care provider; and
generate a report based on the unnecessary admission evaluation of each health care provider.

Rejections on Appeal

Claims 11–26 stand rejected under 35 U.S.C. § 101 because the claimed invention is directed to non-statutory subject matter. The claimed invention is directed to non-statutory subject matter because the claims as a whole, considering all claim elements both individually and in combination, do not amount to significantly more than an abstract idea. Final Action 2–6.

Claims 13–24 stand rejected under 35 U.S.C. § 103 as being unpatentable over Bigby et al. (“*Assessing the Preventability of Emergency Hospital Admissions — A Method of Evaluating the Quality of Medical Care in a Primary Care Facility*,” *The American Journal of Medicine*, Vol. 83, 1031–1036 (1987)) and Rastogi (U.S. Patent Application Publication 2009/0125348 A1; published May 14, 2009). Final Action 6–23.

Claims 11–12 stand rejected under 35 U.S.C. § 103 as being unpatentable over Bigby, Rastogi and Examiner’s Official Notice. Final Action 23–24.

Claims 25–26 stand rejected under 35 U.S.C. § 103 as being unpatentable over Bigby, Rastogi and Callas (U.S. Patent Application

Publication 2011/0238441 A1; published September 29, 2011). Final
Action 24–26

ANALYSIS

Rather than reiterate the arguments of Appellant and the Examiner, we refer to the Appeal Brief (filed December 14, 2016), the Reply Brief (filed April 21, 2017), the Answer (mailed February 24, 2017) and the Final Action (mailed July 25, 2016) for the respective details.

35 U.S.C. § 101 Rejection

Section 101 defines patentable subject matter: “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. The Supreme Court, however, has “long held that this provision contains an important implicit exception” that “[l]aws of nature, natural phenomena, and abstract ideas are not patentable.” *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 70 (2012) (quotation omitted). To determine patentable subject matter, the Supreme Court has set forth a two-part test.

“First, we determine whether the claims at issue are directed to one of those patent-ineligible concepts” of “laws of nature, natural phenomena, and abstract ideas.” *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S.Ct. 2347, 2355 (2014). “The inquiry often is whether the claims are directed to ‘a specific means or method’ for improving technology or whether they are simply directed to an abstract end-result.” *RecogniCorp, LLC v. Nintendo*

Co., 855 F.3d 1322, 1326 (Fed. Cir. 2017) (citation omitted). A court must be cognizant 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), and “describing the claims at . . . a high level of abstraction and untethered from the language of the claims all but ensures that the exceptions to § 101 swallow the rule.” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1337 (Fed. Cir. 2016). Instead, “the claims are considered in their entirety to ascertain whether their character as a whole is directed to excluded subject matter.” *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1346 (Fed. Cir. 2015).

The Supreme Court has identified as abstract ideas claims employing mathematical relationships or formulas, which are similar to the instant claimed invention. Specifically, the Supreme Court stated that the concept of applying a mathematical formula to hedging risk and the application of that concept to energy markets was not patentable because of similarities to *Gottschalk v. Benson*, 409 U.S. 63 (1972), *Parker v. Flook*, 437 U.S. 584 (1978); *Diamond v. Diehr*, 450 U.S. 175 (1981); and *Bilski v. Kappos*, 561 U.S. 593, 611–12 (2010). Further, the Supreme Court noted that the claims, like those in *Flook*, were unpatentable because “*Flook* established that limiting an abstract idea to one field of use or adding token postsolution components did not make the concept patentable.” *Bilski*, 561 U.S. at 612.

Additionally, the Federal Circuit has identified abstract ideas that do not describe an inventive concept that is more than an abstract idea, even when embodied in specific system or structure. Specifically, the Federal Circuit stated “not every claim that recites concrete, tangible components escapes the reach of the abstract-idea inquiry,” including a finding that

“claims reciting an ‘interface,’ ‘network,’ and a ‘database’ are nevertheless directed to an abstract idea.” *In re TLI Commc’ns LLC Patent Litig.*, 823 F.3d 607, 611 (Fed. Cir. 2016) (citing *Mortg. Grader, Inc. v. First Choice Loan Serv. Inc.*, 811 F.3d 1314, 1324–25 (Fed. Cir. 2016)). The Federal Circuit found the “eleven steps for displaying an advertisement in exchange for access to copyrighted media” was directed to an abstract idea, despite the claim at issue reciting “certain additional limitations [that] add a degree of particularity.” *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 714–15 (Fed. Cir. 2014). Further, the Federal Circuit noted “the concept embodied by the majority of the limitations describes only the abstract idea of showing an advertisement before delivering free content,” and the addition of novel or non-routine components did not “necessarily turn[] an abstraction into something concrete.” *Ultramercial, Inc.* 772 F.3d at 715.

In contrast, the Federal Circuit has found claims that “are not simply directed to *any* form of storing tabular data, but instead are specifically directed to a *self-referential* table for a computer database” are “directed to an improvement of an existing technology . . . achiev[ing] other benefits over conventional databases, such as increased flexibility, faster search times, and smaller memory requirements.” *Enfish*, 822 F.3d at 1337. However, the heart of the claimed invention must be focused on the underlying technology itself and *how* the underlying technology is altered “in a way that leads to an improvement in the technology.” *Intellectual Ventures I v. Erie Indem. Co.*, 850 F.3d 1315, 1328 (Fed. Cir. 2017) (citing *Enfish*, 822 F.3d 1327); *see also TLI Commc’ns*, 823 F.3d at 612.

If the claims are not directed to a patent-ineligible concept, the inquiry ends. Otherwise, the inquiry proceeds to the second step, where we

“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*, 566 U.S. at 79, 78). The Supreme Court has “described step two of this analysis 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.” *Id.* (quotation omitted). For computer-related technology, the Federal Circuit has held that a claim may pass the second step if “the claimed solution is necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer [technology],” e.g., “a challenge particular to the Internet.” *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257 (Fed. Cir. 2014).

In *Bilski*, the Supreme Court rejected the machine-or-transformation test as the exclusive test for determining patentability, but nonetheless held the claims were ineligible because the claims were preemptory of risk hedging in all fields. *Bilski*, 561 U.S. at 612–13 (citing *Flook*, 437 U.S. 584; *Benson*, 409 U.S. 63). The Federal Circuit has also identified when abstract ideas do not amount to significantly more than the judicial exception. The Federal Circuit held the abstract idea of classifying and storing digital images in an organized manner was not significantly more than an abstract idea because “the recited physical components behave exactly as expected according to their ordinary use” and the claimed invention “fails to provide the requisite details necessary to carry out th[e] idea.” *TLI Commc ’ns*, 823 F.3d at 615. Moreover, the Federal Circuit held the idea of “receiving copyrighted media, selecting an ad, offering the media in exchange for

watching the selected ad, displaying the ad, allowing the consumer access to the media, and receiving payment from the sponsor of the ad” was not significantly more than the abstract idea because “the claims simply instruct the practitioner to implement the abstract idea with routine, conventional activity.” *Ultramercial, Inc.*, 772 F.3d at 715. Additionally, the Federal Circuit noted “[n]one of these eleven individual steps, viewed ‘both individually and ‘as an ordered combination,’” transform the nature of the claim into patent-eligible subject matter.” *Id.* (citations omitted).

In contrast, the Federal Circuit held claims directed to methods of organizing human activity may be significantly more “when the claim limitations were considered individually and as an ordered combination, they recited an invention that is not merely the ‘routine or conventional use’ of technology.” *Amdocs (Israel) Ltd. v. Openet Telecom, Inc.*, 841 F.3d 1288, 1301–02 (Fed. Cir. 2016) (citing *DDR Holdings*, 773 F.3d at 1259; *BASCOM Global Internet Serv., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016)). Additionally, the Federal Circuit held the ordered combination of the claim limitations recited an inventive concept because “the distributed, remote enhancement that *produced an unconventional result*,” which represented “a technical improvement over prior art technologies and served to improve the performance of the system itself.” *Amdocs*, 841 F.3d at 1302 (emphasis added); *see also BASCOM*, 827 F.3d at 1352 (“[A]n inventive concept can be found in the ordered combination of claim limitations that transform the abstract idea of filtering content into a particular, practical application.”).

Step One: Whether the Claims Are Directed to a Patent-Ineligible Concept (Abstract Idea)

The Examiner finds claims 11–26 are directed to an abstract idea and identifies the abstract idea as:

[E]valuating a clinical history of a patient to cross-reference health care providers, interactions codes and preventable admissions and calculating a preventable admission evaluation based on the cross-referenced health care providers, interactions codes and preventable admissions to assign accountability of a preventable admission to a health care provider. Evaluating a clinical history of a patient to cross-reference health care providers, interactions codes and preventable admissions is simply data recognition and storage, such as recognizing and storing interactions codes, preventable admissions and healthcare providers, and calculating a preventable admissions evaluation based on the cross-referenced health care providers, interactions codes and preventable admissions to assign accountability of a preventable admission to a health care provider is simply comparing new and stored information and using rules to identify options, and comparing data to determine a risk level, such as comparing interaction codes to stored interaction codes to identify preventable admissions and responsible healthcare providers and comparing interaction codes to healthcare providers to determine a responsibility level, which has been found by the courts to be abstract ideas in *Content Extraction*, *SmartGene* and *Perkin-Elmer*. The additional verbiage and limitations all describe the abstract idea.

Final Action 3.

Appellant argues, the Examiner oversimplified the breadth of the claims and “[c]ontrary to the Examiner’s assertions, [the limitations recited in the claims] cannot be reduced to the allegedly abstract ideas of ‘data recognition and storage,’ or ‘comparing new and stored information using rules to identify options and comparing data to determine a risk level.’”

Appeal Brief 26 (citing Final Action 3). Appellant contends the Examiner has improperly generalized the claims to a “high level of abstraction untethered from the language of the claim” and therefore the 35 U.S.C. § 101 rejection is improper. Appeal Brief 24 (citing Memorandum dated, May 19, 2016, regarding the recent subject matter eligibility decisions of *Enfish, LLC v. Microsoft Corp.* and *TLI Communications LLC v. A. V. Automotive, LLC*, p 1).

The Federal Circuit has repeatedly noted 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 court has, thus, held that the Office carries its procedural burden of establishing a prima facie case when its rejection satisfies the requirements of 35 U.S.C. § 132 by notifying the applicant of the reasons for rejection, “together with such information and references as may be useful in judging of the propriety of continuing the prosecution of [the] application.” *See In re Jung*, 637 F.3d 1356, 1362 (Fed. Cir. 2011).

All that is required of the Office is that it set forth the statutory basis of the rejection in a sufficiently articulate and informative manner as to meet the notice requirement of 35 U.S.C. § 132. *Id.*; *see also Chester v. Miller*, 906 F.2d 1574, 1578 (Fed. Cir. 1990) (Noting that section 132 “is violated when a rejection is so uninformative that it prevents the applicant from recognizing and seeking to counter the grounds for rejection.”).

Appellant argues “the claims do not attempt to cover all measures of evaluating healthcare provider performance” and “contrary at least to the

McRO decision, the Examiner has not adequately considered preemption at Step 2A of the subject matter eligibility analysis.” Appeal Brief 26–27.

The Supreme Court has described “the concern that drives this exclusionary principle [i.e., the exclusion of abstract ideas from patent eligible subject matter] as one of pre-emption.” *Alice*, 134 S.Ct. at 2354. Nonetheless, characterizing preemption as a driving concern for patent eligibility is not the same as characterizing preemption as the sole test for patent eligibility. As our reviewing court has explained, “[t]he Supreme Court has made clear that the principle of preemption is the basis for the judicial exceptions to patentability” and “[f]or this reason, questions on preemption are inherent in and resolved by the [section] 101 analysis.” *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015) (citing *Alice*, 134 S.Ct. at 2354). And although “preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility.” *Id.* Moreover, “[w]here a patent’s claims are deemed only to disclose patent ineligible subject matter under the [*Alice/Mayo*] framework[], preemption concerns are fully addressed and made moot.” *Id.*; see also *OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1362–63 (Fed. Cir. 2015), *cert. denied*, 136 S.Ct. 701 (2015) (“[T]hat the claims do not preempt all price optimization or may be limited to price optimization in the ecommerce setting do not make them any less abstract.”).

Appellant contends, “[t]he inventors' mention of conventional solutions confirm the above characterization of the invention for § 101 purposes as providing a specific improvement over the prior art in the field of improving healthcare provider accountability, which had not existed before.” Appeal Brief 28. As the Federal Circuit has explained, a “claim for

a new abstract idea is still an abstract idea.” *SAP Am., Inc. v. Investpic, LLC*, No. 2017-2081, 2018 WL 2207254, at *1 (Fed. Cir. May 15, 2018) (quoting *Synopsis, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1151 (Fed. Cir. 2016)). Even assuming the technique claimed was “innovative, or even brilliant,” that would not be enough for the claimed abstract idea to be patent eligible. See *SAP America*, 2018 WL 2207254 at *1.

Further, our reviewing court has repeatedly held that information collection and analysis, including when limited to particular content, is within the realm of abstract ideas. See, e.g., *Elec. Power Grp.*, 830 F.3d at 1353 (Holding that “collecting information, analyzing it, and displaying certain results of the collection and analysis” are “a familiar class of claims ‘directed to’ a patent-ineligible concept.”); *Fair Warning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1093-94 (Fed. Cir. 2016) (Claims directed to collecting information and analyzing it according to certain rules were directed to an abstract idea.); *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1370 (Fed. Cir. 2011) (Computer-implemented system for “verifying the validity of a credit card transaction[] over the Internet” was patent-ineligible.).

We agree with the Examiner’s finding that at step one of the *Alice* analysis, the claims are directed to one or more abstract ideas, we turn to the second step of the *Alice* analysis, in which we must determine whether the additional elements of the claims transform them into patent-eligible subject matter.

Step Two: Whether Additional Elements Transform the Idea into Patent-Eligible Subject Matter

The Examiner finds:

When viewed as a whole, the claims do not include additional limitations that are sufficient to amount to significantly more than the judicial exception because the claims recite processes that are routine and well-understood in the art of health care provider evaluation and simply implementing the process on a computer is not enough to qualify as “significantly more.” Specifically, the applicant is taking the well-understood process of using a clinical history to determine if a healthcare provider is accountable for preventable admissions and implementing it on a computer, which does not qualify as significantly more.

Final Action 4.

Appellant contends the cited prior art “do not teach or suggest the claimed subject matter” and “[t]hus, the claims are directed to ‘significantly more’ than the alleged abstract idea and satisfy the second step of the two-step analysis.” Appeal Brief 29. As we stated above, novelty is not an indication that the claimed invention is not an abstract idea. *See SAP America*, 2018 WL 2207254 at * 1. Appellant further contends, “[t]he Examiner improperly dismissed additional claim elements as generic computer structure and generic computer functions. *See* Action, pages 5–6.”

Appeal Brief 30. Appellant states:

Under the McRO Memo, an improvement in computer related technology is not limited to improvements in the operation of a computer or a computer network *per se*, but may also be claimed as a set of rules that improve computer-related technology by allowing computer performance of a function not previously performable by a computer. *See* McRO Memo at page 2.

Appeal Brief 30.

Despite characterizing the claimed invention as using computer technology to overcome a problem specific to the operation of a computer or a computer network *per se*, Appellant does not present sufficient persuasive

evidence or argument that the claims are directed to an improvement specific to a computer network or the Internet *itself* (e.g., improving the network’s operation or configuration, or retaining website visitors). *Compare, e.g., Elec. Power*, 830 F.3d at 1354, *with DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257 (Fed. Cir. 2014). We find Appellant’s claims are distinguished from those claims that our reviewing court has found to be patent eligible by virtue of reciting technological improvements to a computer system. *See, e.g., DDR Holdings*, 773 F.3d at 1249, 1257 (Holding that claims reciting computer processor for serving “composite web page” were patent eligible because “the claimed solution is necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks.”). Accordingly, we do not find that the claims recite *significantly more* to transform the abstract idea into a patent-eligible application.

We sustain the Examiner’s 35 U.S.C. §101 rejection of claims 11–26.

35 U.S.C. § 103 (a) Rejection

Appellant contends the obviousness rejection of claims 13–24 is erroneous because Rastogi fails to address the noted deficiency of Bigby.

Appeal Brief 32. Appellant contends:

Rastogi does not teach or suggest cross-referencing the one or more interaction codes with interaction codes in a diagnostic map, wherein the diagnostic map cross-references one or more interaction codes associated with at least one unnecessary admission, and corresponding one or more healthcare providers

associated with the unnecessary admission, as required by Claim 13.

Appeal Brief 32.

Appellant argues, “[t]here is simply no indication in Rastogi that the flowchart in Figure 1 includes interaction codes associated with unnecessary admissions, and corresponding healthcare providers, much less that the flowchart in Rastogi cross-references the interaction codes with healthcare providers.” Appeal Brief 32.

We do not find Appellant’s argument persuasive because the Examiner relied upon Rastogi’s paragraph 23 in conjunction with Rastogi’s Figure 1. *See* Final Action 10. Rastogi discloses in paragraph 23:

[C]laims may be grouped using an APR-DRG grouper, such as that designed by 3M® Corporation, which assigns a base class to each medical claim based upon the DRG and primary diagnosis codes. The grouper further may assign a severity of illness (SOI) class 1–4 depending on the secondary diagnosis codes and other member characteristics in the claims.

Accordingly, we sustain the Examiner’s obviousness rejection of claims 13–24.

Appellant argues the obviousness rejection of dependent claim 25 is improper because the Examiner relied upon Callas to disclose “*determining whether a medical procedure was appropriate based the timing of the medical procedure relative to a date of injury or the like, [construed as] ‘if the procedure is performed within the appropriate time window.’*” Appeal Brief 33; *see also* Final Action 25. Appellant contends, “[h]owever, a

timing determination of whether a procedure did take place within an appropriate time window is different from determining when the procedure should have taken place to prevent a preventable admission as required by Appellant[']s claim.” Appeal Brief 33. We find Appellant’s argument persuasive. We reverse the Examiner’s obviousness rejection of claim 25.

Appellant contends “[c]laim 26 requires that the threshold that is compared to the preventable admission evaluation is a ‘threshold specific to both a preventable admission and each type of healthcare provider responsible for the preventable admission.’” Appeal Brief 33. Appellant argues, “the reasonableness threshold in Callas merely refers to a determination of whether the requested medical service is statistically reasonable. *See* Callas at [0176]-[0178]. Callas is simply silent with respect to a threshold specific to both a preventable admission and each type of healthcare provider responsible for the preventable admission, as required by claim 26.” Appeal Brief 33–34; *see also* Final Action 26. We find Appellant’s argument persuasive. We reverse the Examiner’s obviousness rejection of claim 26.

Appellant does not argue the merits of the obviousness rejection of dependent claims 11–12 and therefore we sustain the Examiner’s obviousness rejection of the claims.

DECISION

The Examiner’s 35 U.S.C. § 101 rejection of claims 11–26 is affirmed.

Appeal 2017-007651
Application 13/940,971

The Examiner's 35 U.S.C. § 103 rejection of claims 13–24 is affirmed.

The Examiner's 35 U.S.C. § 103 rejection of claims 11–12 is affirmed.

The Examiner's 35 U.S.C. § 103 rejection of claims 25–26 is reversed.

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)(v).

AFFIRMED