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bhayden@computer.org

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ANTONY A. HILTON and GREGORY L. HILTON

Appeal 2017-008086
Application 12/507,529
Technology Center 3600

Before CARL W. WHITEHEAD JR., JEREMY J. CURCURI and
PHILLIP A. BENNETT, *Administrative Patent Judges*.

WHITEHEAD JR., *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants are appealing the final rejection of claims 1–24 under 35 U.S.C. § 134(a). Appeal Brief 2. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

Introduction

The invention is directed to:

[A] computer-implemented method, comprises providing wrap code to a first entity connected to an electronic commerce network. A gadget is provided to the first entity. A request for content from a second entity connected to the electronic commerce network is received when the second entity activates the gadget. The content is transmitted to the second entity.

Specification, paragraph 19.

Instead of trying to entice users to click links and navigate away from the websites and content to which they intently navigate, the present system serves the user, on the page at which they viewed the advertisement, all the content that would be available for review had they clicked/linked/navigated to through the online advertisement. This is done by taking existing ads and enhancing them with an application that displays additional content on demand. This is achieved with an application that produces code intended for integration with the online advertisement, and the code calls to it the display client which presents the information to the user.

Specification, paragraph 25.

Illustrative Claims

1. A computer-implemented communications system, comprising:
an electronic commerce network connected to a first entity having a processor
and a physical memory and a software-enabled second entity having a processor capable of executing software instructions, a physical memory, and a physical display;
said second entity configured to receive over the electronic commerce network enhanced content containing a wrap code containing a means for requesting a display of a gadget;
said second entity configured to display the enhanced content for a user on the physical display, wherein:
said enhanced content contains the wrap code configured to request transmission of the gadget containing additional content; and
said display of the enhanced content including the means for requesting a display of the gadget containing the additional content to the user;

said second entity configured to receive the additional content contained in the gadget over the electronic commerce network; and
said second entity configured to receive and independently display the gadget containing the additional content on the display upon the activation of said gadget through activation of the means for requesting display of the gadget by the user, wherein the additional content is displayed independently of the enhanced content.

9. A computer-based communication system said
executable instructions comprising sets of computer instructions for:
retrieving an enhanced electronic advertisement having a wrap code from a memory;
transmitting the enhanced advertisement to a software-enabled client device; and
retrieving and independently displaying a gadget containing additional content
upon activation of the wrap code by the client device displaying the enhanced advertisement

Rejections on Appeal

Claims 1–24 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 2–3.

Claims 9–11 stand rejected under 35 U.S.C. § 101 because the claimed invention is directed to non-statutory subject matter. Final Action 3.

Claims 1–5, 7, 10 and 21 stand rejected under 35 U.S.C. § 112 (b) or U.S.C. § 112 (pre-AIA), second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which the inventor or a joint inventor, or for pre-AIA the applicant regards as the invention. Final Action 3–4.

Claims 1–22 and 24 stand rejected under 35 U.S.C. § 102 (e) as being anticipated by Synsteliën (U.S. Patent Application Publication 2009/0024482 A1; published January 22, 2009) (here in ‘482) and Synsteliën (U.S. Patent Application Publication 2008/0040426 A1; published February 14, 2008) (here in ‘426). Final Action 6-15.¹

Claim 23 stands rejected under 35 U.S.C. § 103 (a) as being unpatentable over Synsteliën ‘482, Synsteliën ‘426 and Khoo (U.S. Patent Application Publication 2008/0059571 A1; published March 6, 2008). Final Action 15–17.

ANALYSIS

Rather than reiterate the arguments of Appellant and the Examiner, we refer to the Appeal Briefs (filed June 9, 2016; April 28, 2017²), the Reply Brief (filed April 28, 2017), the Answer (mailed February 27, 2017) and the

¹ Synsteliën 2009/0024482 incorporates Synsteliën 2008/004042 by reference. *See* Synsteliën 2009/0024482, paragraph 1.

² “Applicant’s Appeal Brief is resubmitted herewith in response to the Examiner noting that pages were missing in the copy that she had available, presumably through U.S.P.T.O. clerical error.” Appeal Brief 2.

Final Action (mailed November 4, 2015) for the respective details. We cite to the Appeal Brief filed April 28, 2017.

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), and *Diamond v. Diehr*, 450 U.S. 175 (1981). *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.” *Id.* 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.* (brackets and 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. *Id.* at 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 (“an 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)

Appellants ask:

What do gadgets, wrap codes, and transmitting additional content from a first entity having a processor and a physical memory to a second entity having a processor, memory, and physical display for display on that physical display upon request have to do with “*targeted marketing*”?

Appeal Brief 9.

It is evident that the Examiner finds the components in question are employed in target marketing that the Examiners determines to be “a fundamental economic practice and/or a method of organizing human activities.” Final Action 2. We agree with the Examiner’s finding that the mere presence of *generic* components is not sufficient to remove the claimed invention from the realm of abstraction. *See* Final Action 2. However, the lack of specialized components does not *doom* the claims. *See Enfish*, 822 F.3d at 1338 (“Moreover, we are not persuaded that the invention's ability to run on a general-purpose computer dooms the claims.”).

Appellants argue that the claims are not directed to target marketing and therefore they are not abstract under *Alice*, *Mayo* and *Enfish*. Appeal Brief 10. Appellants acknowledged that target marketing was well known in the art at the time of the invention. Specification 2 (“This integrated code can be authored to automatically change to different ads within the server of the advertising entity or representative agent of an advertising entity, and can also be displayed to a specific user based on predetermined demographic information.”). Appellants indicated that approaches like target marketing were limited and Appellants’ claimed invention would not have such limitations. *See* Specification 3-4. We find Appellants’ arguments persuasive. Appellants’ claims disclose a system that attempts to enhance displayed content over a commerce network environment. We do not find that the claims are drawn to target marketing. Accordingly, we do not find the claims are drawn to an abstract idea so the second step of the *Alice/Mayo* test is not required. We reverse the Examiner’s 35 U.S.C. § 101 of claims 1–24.

The Examiner rejected claims 9–11 under 35 U.S.C. § 101 as being directed to non-statutory subject matter because “the broadest reasonable interpretation of the claims reveals that the claims are not directed to a system, but rather to software per se or to people.” Final Action 3. Appellants argue the Examiner’s rejection is erroneous because the structure recited in the claims was ignored and “the rejection was not based on current case law.” Appeal Brief 13. It is noted that Appellants failed to cite any current case law. *See* Appeal Brief 13. We do not find Appellants’ arguments persuasive because claim 9’s preamble clearly states, “A computer-based communication system *said* **executable instructions** comprising sets of **computer instructions** *for*.” (Emphasis added). We agree with the Examiner’s findings that, “The ‘memory’ and ‘device’ are not part of the system.” *See* Final Action 3. The claim, therefore, amounts to software *per se*, and does not fall within one of the statutory categories enumerated in 35 U.S.C § 101 (“process, machine, manufacture, or composition of matter”). Accordingly, we sustain the Examiner’s 35 U.S.C. § 101 rejection of claims 9-11. *See* Appeal Brief 11.

35 U.S.C. § 112 Rejection

The Examiner finds claim 1’s limitation “said display of the enhanced content including a means for requesting a display of a gadget” to be indefinite because “it is unclear if Applicant intended to claim a display as a

component of the system or a piece of software code.” Final Action 4. Appellants acknowledge the claim is “sub-optimally written” and states, “The problem revolves around the failure to include the word ‘physical’ before the word ‘*display*’ at a single location in the last paragraph in independent Claim 1, when it was amended in response to examiner’s previous Office Action.” Appeal Brief 13. Appellants contend the rejection is improper because “going back through the claim, the only plausible antecedent is the ‘*physical display*’ introduced (with ‘a’) as the last element in the first paragraph of the claim after the ‘comprising’ clause.” Appeal Brief 14. We agree with Appellants that claim 1 is not indefinite although the insertion of the *physical* terminology before the noted display term would improve the clarity of the claim. Accordingly, we reverse the Examiner’s 35 U.S.C. §112 rejection of claim 1–5, 7, 10 and 21.

35 U.S.C. § 102 Rejection

Appellants argue, “The fundamental problem with the examiner’s rejection arguments is the Synstelien³ publications disclose an invention that is essentially upside down, as compared to that in the application under appeal.” Appeal Brief 17. Appellants contend, “Much of the Synstelien invention revolves around a user on a remote devices 15, 17, 18, 19, 20 uploading widgets to a server 11 to be stored in a widget database 12.” Appeal Brief 17. We note that Synstelien ‘426, incorporated by reference by Synstelien ‘482, is titled, “SYSTEM AND METHOD FOR PLACING A WIDGET ONTO A DESKTOP” and discloses in the Abstract, “The present

³ Appellants’ arguments are directed to the Synstelien’ 482 publication unless otherwise noted. *See* Appeal Brief 17.

invention provides a system and method for placing a widget onto a remote device.” Synstelién ‘426 is titled, “SYSTEM AND METHOD FOR DEPLOYING AN AD WIDGET” and discloses in the Abstract, “The present invention provides a system and method for deploying a requested widget as an advertisement on a remote device.”

Appellants acknowledge the overlap between Synstelién and the claimed invention and argue, “One of the primary differences is in the downloading of the gadgets or widgets. There is no indication that Synstelién does anything except request a widget upon loading the web page containing the wrap code.” Appeal Brief 18. Appellants cites to Specification, paragraph 28⁴:

Gadget 104b is not implemented like prior art widgets. Prior widgets utilize substantial memory on a web page. Gadget 104b and wrap code 104a, in contrast, take up a small amount of memory. Gadget 104b remains invisible until called and hovers unanchored above the page content, requiring none of the space in the web page’s layout when activated.

Appeal Brief 18.

Appellants argue, “There is no indication that this portion of the present invention is found in Synstelién whatsoever. Rather, there is every reason to believe that in Synstelién, widgets are loaded directly into the web page being displayed.” Appeal Brief 18. We do not find Appellants’

⁴ Appellants cited to paragraph 25 however the quoted passage is actually in paragraph 28. See Appeal Brief 18. We note this as harmless error.

argument persuasive because claim 1 does not denote the gadget's memory consumption.⁵

Appellants contend the “inventor is his own lexicographer” accordingly, “Synstelién[‘s] ‘*wrap code*’ does not qualify as a ‘*wrap code*’ as that term is defined in the instant specification, and is used in the claims under appeal because it does not disclose containing a mechanism for a user to activate a gadget, such as a button, etc.” Appeal Brief 21. However, Synstelién ‘426 also discloses, “if the base program is installed, but not operational, then the pop button will be presented and clicking on the pop button will cause the widget wrapper to cause the base program to be executed, and then operation will proceed as if the base program had been operational all along.” Synstelién ‘426, paragraph 47. We do not find Appellants’ argument persuasive because claim 1 does not require a mechanism such as a button to activate a gadget. Further, Appellants do not explicitly assign a unique definition to the wrap code terminology because the Specification discloses that means for activating a gadget could be in the

⁵ Although giving claims their broadest reasonable interpretation must take into account any definitions given in the Specification, *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997), it is improper to read into the claims limitations from examples given in the Specification. *In re Zletz*, 893 F.2d 319, 321–22 (Fed. Cir. 1989).

form of well-known components such as buttons, links, images, etc.⁶ See Specification, paragraph 48.

Appellants argue the Examiner's determination that Synsteliens' widgets are equivalent to the claimed invention's gadgets is rejected by the Specification. Appeal Brief 21 (*citing again* Specification paragraph 28). Appellants contend, "There is no reason to believe that the Synsteliens' widgets differ from prior art widgets, such as those that the present specification specifically distinguishes from." Appeal Brief 21. However, Synsteliens' 482 discloses in paragraph 4, "Widgets are also known as modules, snippets, gadgets and plug-ins." Synsteliens' 482 also discloses in paragraph 5, "A widget can also be a stand alone or self-contained chunk of code that appears as a mini-application on a user's desktop. This desktop widget runs inside a small footprint application, which resides on the user's desktop using a small desktop space and computer resources, such as the HDD and RAM." We find Appellants' arguments' conclusory because

⁶ See *Helmsderfer v. Bobrick Washroom Equipment, Inc.*, 527 F.3d 1379, 1381 (Fed. Cir. 2008) ("A patentee may act as its own lexicographer and assign to a term a unique definition that is different from its ordinary and customary meaning; however, a patentee must clearly express that intent in the written description." (Citations omitted)). Any special meaning assigned to a term "must be sufficiently clear in the specification that any departure from common usage would be so understood by a person of experience in the field of the invention." *Multiform Desiccants, Inc. v. Medzam, Ltd.*, 133 F.3d 1473, 1477 (Fed. Cir. 1998).

Appellants does not indicate how Synstelién ‘482 widgets differentiate from the claimed inventions gadgets.

Appellants further argue:

[T]he appealed claims require that the transmission of the gadget containing the additional content for display on the physical display be independent of the enhanced content. This element cannot be found in the Synstelién references since there is no mention or suggestion that the download and display of a Synstelién widget would at any time besides during the rendering process for the web page in which it is embedded, which is the standard process well known in the prior art. Thus, since the Synstelién widgets are presumably downloaded and merged into the web page under construction during the rendering process, the Synstelién references cannot disclose displaying the original content independently from the additional content contained in its widgets.

Appeal Brief 21–22.

Claim 1 recites, “said enhanced content contains the wrap code configured to request transmission of the gadget containing additional content.” Appellants contend the enhanced content wrap code contain a mechanism for a user to activate a gadget such as a button. Appeal Brief 21. As noted earlier, Synstelién discloses a pop button that causes the widget wrapper to cause the base program to execute. Synstelién ‘426, paragraphs 46–48. Accordingly, we do not find Appellants’ arguments persuasive because it is evident that Synstelién ‘426’s button or enhanced content is displayed independently of content provided upon activation of the widget. We sustain the Examiner’s anticipation rejection of claim 1, as well as,

claims 2–22 and 24 not argued separately with any specificity. *See* Appeal Brief 22–23.

35 U.S.C. § 103 Rejection

Appellants contend Khoo fails to address the deficiency of Synsteliën and therefore claim 23 is distinguish over of prior art. Appeal Brief 23. We do not find the anticipation rejection to be deficient based upon the arguments set forth by Appellants and thus we are not persuaded of Examiner error. Appellants argue, “If the examiner wishes to utilize the Khoo reference in combination with the Synsteliën references, she should withdraw her Final rejection and reopen prosecution.” Appeal Brief 24. Appellants contend “the examiner added the Khoo (US 2008/0059571) in a final rejection, which never provided Applicants a chance to reply to her assertion that this reference included claimed elements missing from the Synsteliën references.” Appeal Brief 24. This argument relates to a petitionable issue and not an appealable issue. *See In re Schneider*, 481 F.2d 1350, 1356-57, (CCPA 1973) and *In re Mindick*, 371 F.2d 892, 894, (CCPA 1967). *See also* Manual of Patent Examining Procedure (MPEP) (8th Ed., August 2001) § 1002.02(c), item 3(g) and § 1201. Accordingly, we sustain the Examiner’s obviousness rejection of claim 23.

DECISION

The Examiner’s 35 U.S.C. § 101 rejection of claims 1–24 is reversed.

The Examiner’s 35 U.S.C. § 101 rejection of claims 9–11 is affirmed.

The Examiner’s 35 U.S.C. § 112 rejection of claims 1–5, 7, 10 and 21 is reversed.

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The Examiner's 35 U.S.C. § 102 rejection of claims 1–22 and 24 is affirmed.

The Examiner's 35 U.S.C. § 103 rejection of claim 23 is affirmed.

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