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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* LISA A. PICKELSIMER

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Appeal 2017-009096  
Application 13/188,004<sup>1</sup>  
Technology Center 3600

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Before DEBRA K. STEPHENS, DANIEL J. GALLIGAN, and  
DAVID J. CUTITTA II, *Administrative Patent Judges*.

CUTITTA, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134(a) from a final rejection of claims 2–5 and 41–51, which are all of the claims pending in the application.<sup>2</sup> Appellant identifies Application No. 13/187,878 (Appeal No. 2017-005820, decided November 27, 2017) as related. *See* Appeal Br. 2. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> Appellant identifies the real party in interest as Ms. Lisa A. Pickelsimer. App. Br. 2.

<sup>2</sup> Claims 1 and 23 have been cancelled. Claims 6–22 and 24–40 have been withdrawn.

## STATEMENT OF THE CASE

According to Appellant, the claims are directed to systems for categorizing wines, recommending wines, recommending foods, and pairing wines with foods based on individual taste profiles. Abstract.<sup>3</sup> Claim 41, reproduced below, is representative of the claimed subject matter:

41. A system for recommending wines and foods to a consumer, said system comprising:

a master wine database for storing a set of intrinsic wine flavor characteristics for each of a plurality of wines, wherein said set of intrinsic wine flavor characteristics is not based on subjective wine tasting experiences, and wherein said set of intrinsic wine flavor characteristics comprises values correlated to each of one or more of sweet, oaked, acidic, light-bodied, earthy, and tannic;

a master food database for storing a set of food flavor characteristics for each of a plurality of foods, wherein each said set of food flavor characteristics is substantially correlated to one of said sets of intrinsic wine flavor characteristics;

a master user database for storing an individual taste profile for a consumer, wherein said individual taste profile is based on said consumer's preferences of one or more human-detectable flavors found in foods or in beverages other than wine, and wherein said individual taste profile comprises one or more scores indicating a preference associated with one or more of said values;

a wine recommendation engine communicatively coupled with said master wine database, said master food database, and said master user database, said wine recommendation engine comprising a first non-transitory computer-readable medium

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<sup>3</sup> This Decision refers to: (1) Appellant's Specification filed July 21, 2011 (Spec.); (2) the Final Office Action (Final Act.) mailed June 8, 2016; (3) the Appeal Brief (App. Br.) filed February 6, 2017; (4) the Examiner's Answer (Ans.) mailed April 10, 2017; and (5) the Reply Brief (Reply Br.) filed June 9, 2017.

containing first program instructions for recommending wines to said consumer;

one or more first processors of a first computer system coupled to said first non-transitory computer-readable medium executing said first program instructions and implementing the following steps:

(a) retrieve said individual taste profile from said master user database;

(b) select one or more first wines from said master wine database having values that match said one or more scores of said individual taste profile; and

(c) recommend to said consumer said one or more first wines; and

a food pairing engine communicatively coupled with said master wine database, said master food database, said master user database, and said wine recommendation engine, said food pairing engine comprising a second non-transitory computer-readable medium containing second program instructions for recommending foods to said consumer;

one or more second processors of a second computer system coupled to said second non-transitory computer-readable medium executing said second program instructions and implementing the following steps:

(i) select at least a first food from said master food database based on said individual taste profile, wherein a first set of food flavor characteristics associated with said first food matches said one or more scores of said individual taste profile; and

(ii) recommend said first food to said consumer.

#### REJECTION

Claims 2–5 and 41–51 stand rejected under 35 U.S.C. § 101 as directed to patent-ineligible subject matter. Final Act. 10.

Our review in this appeal is limited only to the above rejection and the issues raised by Appellant. Arguments not made are waived. *See* MPEP § 1205.02; 37 C.F.R. §§ 41.37(c)(1)(iv) and 41.39(a)(1).

## ANALYSIS

### 35 U.S.C. § 101

Section 101 provides that “[w]hoever 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 provision, however, “contains an important implicit exception: [l]aws of nature, natural phenomena, and abstract ideas are not patentable.” *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2354 (2014) (quoting *Assoc. for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2116 (2013)). The “abstract ideas” category embodies the longstanding rule that an idea, by itself, is not patentable. *Alice*, 134 S. Ct. at 2355 (quoting *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972)).

In *Alice*, the Supreme Court sets forth an analytical “framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts.” *Alice*, 134 S. Ct. at 2355 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1296–97 (2012)). The first step in the analysis is to “determine whether the claims at issue are directed to one of those patent-ineligible concepts,” and if so, the second step in the analysis considers the elements of the claims “individually and ‘as an ordered combination’” to determine whether there are additional elements that

“transform the nature of the claim’ into a patent-eligible application.” *Id.* (quoting *Mayo*, 132 S. Ct. at 1298, 1297).

*Step One*

As an initial matter, we observe that independent claims 41, 42, and 47 recite systems. As such, the claims are directed to a statutory class of invention within 35 U.S.C. § 101.

Turning to the first step of the Alice analysis, we agree with the Examiner’s determination that the claims recite an abstract idea directed to “certain methods involving human activity,” in particular, the “concept of recommending wines and foods and pairing wines with foods,” which is “a well-known concept being practiced by human operators in restaurants.” Ans. 3; *see* Final Act. 5. Indeed, Appellant’s Specification supports the Examiner’s determination that recommending wine, food, and wine pairings is a human activity. Spec. 2 (“Advice from a trained sommelier and/or a culinary expert is typically only available when dining in a fine restaurant”).

The Examiner also determines, and we agree, that the claims further recite abstract concepts of “collecting information, analyzing it and outputting/displaying certain results of the collection and analysis” to provide the wine and food recommendations. Ans. 3–4. In determining the claims recite a combination of those abstract-idea processes, among other cases, the Examiner relies on *Electric Power Group, LLC v. Alstom S.A.*, 830 F.3d 1350 (Fed. Cir. 2016). Ans. 3. Like *Electric Power*, Appellant’s claimed recommendation system recites the abstract ideas of “collecting information, analyzing it, and displaying certain results of the collection and analysis.” *Elec. Power*, 830 F.3d at 1353.

Appellant’s first argument that “the Examiner erred by considering only independent claim 41, instead of all fifteen pending claims” (App. Br. 11) is not persuasive. The Examiner thoroughly analyzes independent claim 41 (*see* Final Act. 2–10; *see also* Ans. 2–10) and “consider[s] claim 41 as the representative claim” (Final Act. 10). The Examiner determines that “there is no meaningful distinction between the independent and dependent claims [and] the same analysis will be applicable to all the claims as . . . claim 41” (Final Act. 10; Ans. 5–6). Indeed, all claims similarly recite “a master wine database,” “a master food database,” “a master user database for storing an individual taste profile,” “a wine recommendation engine” that “recommend[s] to said consumer . . . wine,” and “a food pairing engine” that “recommend[s] said . . . food to said consumer.” Appellant has not provided substantive, persuasive argument as to why the recited limitations would render the claim patent eligible for any claims other than claim 41. Upon review of the remaining claims, we agree with the Examiner that the analysis of claim 41 applies to the other remaining claims and that the recommendations recited by those claims are all similarly directed to the abstract idea of “certain methods involving human activity,” in particular the “concept of recommending wines and foods and pairing wines with foods” (Ans. 3). Specifically, none of the remaining claims adds sufficient limitations so as to render the respective claim non-abstract.

Because the Examiner determines that the claims are directed to the abstract idea of recommending wines, foods, and wine pairings, i.e., “certain methods involving human activity” (*id.*), Appellant’s argument that the claims are not directed to *other* abstract ideas, i.e., “‘business aspects’ or ‘fundamental economic practices’” (App. Br. 10 (emphasis omitted)), does

not persuade us the Examiner erred in determining the claims are directed to an abstract idea. In a relevant case, our reviewing court has confirmed that systems that generate recommendations for a user by correlating a user preference profile to a database of items to be recommended are patent ineligible. *Netflix, Inc. v. Rovi Corporation*, 114 F. Supp. 3d 927 (N.D. Cal. 2015), *aff'd*, 670 Fed. Appx. 704 (Fed. Cir. 2016) (Rule 36) (affirming the district court’s holding that “generating a viewing history database . . . determining at least one of the associated program criteria from the viewing history database that meets a user preference profile . . . [and] applying the at least one of the associated program criteria” in order “to generate at least one personal viewing recommendation” is directed to an abstract idea that is patent ineligible); *Hemopet v. Hill’s Pet Nutrition, Inc.*, 2014 WL 10317302 (C.D. Cal. 2014), *aff'd*, 617 Fed. Appx. 997 (Fed. Cir. 2015) (Rule 36) (affirming the district court’s holding that comparing sets of data to determine a relationship and providing a recommendation based on the relationship is directed to an abstract idea that is patent ineligible), cert. denied, 136 S. Ct. 1679 (2016), rehearing denied, 136 S. Ct. 2481 (2016).

Further, Appellant’s argument that the Examiner “writ[es] an oversimplified summary of the claims and then analyz[es] *his own summary* rather than doing an analysis of the actual claim language and all the limitations recited therein” (App. Br. 12) is not persuasive of Examiner error. A concept (to which a claim is directed) may be characterized properly in various ways because “[a]n abstract idea can generally be described at different levels of abstraction.” *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1240 (Fed. Cir. 2016). The Examiner’s explanation that the abstract ideas encompassed by the claims include the “human activity” of

“recommending wines and foods and pairing wines with foods” by performing the abstract processes of “collecting information, analyzing it[,] and outputting/displaying certain results of the collection and analysis” (Ans. 3–4) fairly characterizes the recited “master wine database for storing a set of intrinsic wine flavor characteristics,” “master food database for storing a set of food flavor characteristics,” and “master user database for storing an individual taste profile,” (all collecting information) and “wine recommendation engine” that “recommend[s]. . . wine,” and “food pairing engine” that “recommend[s] . . . food” (analyzing and outputting results of the collection and analysis).

Although Appellant argues that the claimed databases and engines “recite[] a number of intricate relationships between and among a set of discrete and concrete claim elements” (App. Br. 19) and so “cannot be accomplished by human[s]” (App. Br. 15), Appellant’s invention is not directed to improvements to a database or other computing technology. Instead, as the Examiner points out (Ans. 10), Appellant’s invention uses data stored in databases, to provide the human activity of recommending wine, food, and wine pairings based on taste preferences. The “master wine database,” “master food database,” “master user database,” and “correlations” between those databases used to “produce the desired results” describe additional abstract-idea processes, i.e., collecting, analyzing, and displaying information, that perform the abstract idea of wine, food, and wine pairing recommendations, but do not make the claims patent-eligible.

Still further, Appellant argues “the final rejection is not supported by substantial evidence, which is required for Section 101 rejections.” App. Br. 10; Reply Br. 2–3.

We are unpersuaded of error. Patent eligibility under 35 U.S.C. § 101 is a question of law that is reviewable *de novo*. See *Dealertrack Inc. v. Huber*, 674 F.3d 1315, 1333 (Fed. Cir. 2012). Appellant has provided no controlling authority that requires the Office to provide factual evidence to support a determination that a claim is directed to an abstract idea under step one of the Alice framework. Instead, 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 held that the USPTO 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.” *In re Jung*, 637 F.3d 1356, 1362 (Fed. Cir. 2011) (alteration in original). Thus, 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) (“Section 132 is violated when [the] rejection is so uninformative that it prevents the applicant from recognizing and seeking to counter the grounds for rejection.”). Here, as discussed above, we determine the Examiner has adequately articulated the rejection and provided sufficient reasoning as to why the recited claim recites patent ineligible matter thus, notifying Appellant of the rejection and the reasons for the rejection.

Accordingly, we are not persuaded the Examiner erred in determining the claims are directed to an abstract idea.

*Step Two*

Turning to step two of the *Alice* framework, we agree with the Examiner that, “[v]iewing the claim limitations both individually and in combination,” the claims do not recite significantly more than the abstract idea itself because the claims “are directed to [the] use of generic programmed computers implementing generic computer functions [for] implementing an abstract idea.” Ans. 9; Final Act. 8–9.

We disagree with Appellant that the Examiner “includes no analysis of whether [recited] additional limitations amount to ‘significantly more’ than an abstract idea.” App. Br. 24. Stripping the claims of the recited abstract concepts, the Examiner determines what remains in the claims, i.e., the additional limitations, recite “generic computer functions merely used to implement an abstract idea” (Ans. 8–9) or to define the context in which the abstract idea is applied (*id.* (the claims “describ[e] the data stored in each database”)).

Appellant’s arguments that the “particular characteristics that are stored in databases and used to make correlations and associations with other characteristics, and then used to make particular recommendations . . . are not ‘well understood’” (App. Br. 20) and that the claims recite “a technical advance in the field of wine and food science” (App. Br. 25) highlight the context in which the abstract idea is applied. But, defining the context in which the abstract idea is applied does not save the claims from patent-ineligibility. *Elec. Power*, 830 F.3d at 1356 (“specify[ing] what information . . . is desirable to gather, analyze, and display” and “performing

the claimed functions of gathering, analyzing, and displaying . . . by . . . entirely conventional, generic technology” does “not state an arguably inventive concept in the realm of application of the information-based abstract ideas.”). Rather than creating a new technical field or improving a technical field such as computing technology, Appellant’s claimed invention applies existing computer technology to recommend wine and food based on user taste preferences. In particular, the recitation of databases storing wine, food, and taste data applies generic database technology to store specific types of data. Further, the claimed features of identifying wines, foods, and wine pairings that suit a user’s tastes, apply generic computer functionality — correlating and comparing data between databases — to identify recommended wines and foods.

In addition, we are not persuaded that the Examiner erred by “not supply[ing] any evidence in the record to support his factual assertions that the claims recite limitations that ‘well-understood, routine and conventional activities’ in the field.” Reply Br. 6. Appellant’s Specification supports the Examiner’s finding that the additionally recited claim limitations merely recite the “use of generic programmed computers implementing generic computer functions.” Ans. 9. In particular, the Specification discloses that “one skilled in the art will appreciate that any of a variety of computer system configurations may be implemented” to provide the claimed invention (Spec. 31) and proceeds to describe generic computing components (*id.* (“multiprocessor systems, microprocessor-based or programmable consumer electronics, mainframe computers, minicomputers, hand-held devices and the like”) and typical computing functions (*id.* (“computer program instructions may be loaded onto a general purpose

computer . . . such that the instructions which execute on the computer or other programmable data processing apparatus create means for implementing the functions specified”)). Thus, because each of the limitations is merely a conventional computer operation used to implement the abstract idea itself on a generic computer, the limitations cannot be said to amount to significantly more than the abstract idea itself under the second step of the *Alice* inquiry.

Additionally, Appellant’s argument that “the claims will not preempt others from using any abstract idea or set of ideas” (App. Br. 19), does not persuade us the claims are directed to patent-eligible subject matter. Although preemption is characterized as a driving concern for patent eligibility, preemption itself is not the test for patent eligibility. Rather, “[w]hile preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility.” *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015). Where claims are deemed to recite only patent-ineligible subject matter under the two-step *Alice* analysis, as they are here, “preemption concerns are fully addressed and made moot.” *Id.*

Accordingly, we are not persuaded the Examiner erred in concluding claims 2–5 and 41–51 are directed to patent-ineligible subject matter. Therefore, we sustain the Examiner’s rejections of claims 2–5 and 41–51.

## DECISION

For the reasons above, we affirm the Examiner’s decision rejecting claims 2–5 and 41–51.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 41.50(f).

AFFIRMED