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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ANANTHA PRADEEP, ROBERT T. KNIGHT, and RAMACHANDRAN GURUMOORTHY [1]

Appeal 2017-010154
Application 12/410,372
Technology Center 3600

Before MURRIEL E. CRAWFORD, BIBHU R. MOHANTY, and NINA L. MEDLOCK, *Administrative Patent Judges*.

MOHANTY, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

The Appellants seek our review under 35 U.S.C. § 134 of the final rejection of claims 22–43, which are all the claims pending in the application. We have jurisdiction under 35 U.S.C. § 6(b).

SUMMARY OF THE DECISION

We AFFIRM.

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[1] The real party in interest is The Nielsen Company (US), LLC. App Br. 2.

THE INVENTION

The Appellants' claimed invention is directed to determining presentation measures using neurographics (Spec., para. 1). Claim 22, reproduced below, is representative of the subject matter on appeal.

> 22. A method, comprising:
>
> analyzing, via a processor, neuro-response data and physiological response data collected from a subject presented with source material;
>
> determining, via the processor, a neurographic signature for the subject based on the neuro-response data and the physiological response data;
>
> comparing, via the processor, the neurographic signature to a first reference neurographic signature, the first reference neurographic signature based on first reference neuro-response data and first reference physiological response data;
>
> comparing, via the processor, the neurographic signature to a second reference neurographic signature, the second reference neurographic signature based on second reference neuro-response data and second reference physiological response data, the first reference neurographic signature and the second reference neurographic signature belonging to a first neurographic aggregate representing a first population of persons having a first demographic attribute in common;
>
> comparing, via the processor, the neurographic signature to a third reference neurographic signature, the third reference neurographic signature based on third reference neuro-response data and third reference physiological response data;
>
> comparing, via the processor, the neurographic signature to a fourth reference neurographic signature, the fourth reference neurographic signature based on fourth reference neuro-response data and fourth reference physiological response data, the third reference neurographic signature and the fourth reference neurographic signature belonging to a second neurographic aggregate representing a second population of persons having a second demographic attribute in common;

> identifying, via the processor, as a match to the neurographic signature one or more of the first reference neurographic signature, the second reference neurographic signature, the third reference neurographic signature or the fourth reference neurographic signature;
> identifying, via the processor, an emotional expression based on the match;
> selecting, via the processor, an advertisement or entertainment based on the emotional expression; and
> improving an effectiveness of the source material by dynamically inserting the advertisement or entertainment into the source material for presentation to the subject.

App. Br. 40–41 (Claims Appendix).

THE REJECTION

The following rejection is before us for review:

Claims 22–43 are rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter.

FINDINGS OF FACT

We have determined that the findings of fact in the Analysis section below are supported at least by a preponderance of the evidence.[2]

ANALYSIS

Rejection under 35 U.S.C. § 101

The Appellants argue that the rejection of claim 22 is improper because the claim is not directed to an abstract idea (App. Br. 12–29, Reply

[2] *See Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Patent Office).

Br. 2–5). The Appellants also argue the claim is "significantly more" than the alleged abstract idea (App. Br. 30–35, Reply Br. 5, 6).

In contrast, the Examiner has determined that the rejection of record is proper (Final Rej. 4–7, Ans. 3–9).

We agree with the Examiner. Under 35 U.S.C. § 101, an invention is patent-eligible if it claims a "new and useful process, machine, manufacture, or composition of matter." 35 U.S.C. § 101. The Supreme Court, however, has long interpreted § 101 to include an implicit exception: "laws of nature, natural phenomena, and abstract ideas" are not patentable. *See, e.g., Alice Corp. Pty Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2354 (2014).

In judging whether claim 22 falls within the excluded category of abstract ideas, we are guided in our analysis by the Supreme Court's two-step framework, described in *Mayo* and *Alice*. *Id.* at 2355 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1296–97 (2012)). In accordance with that framework, we first determine whether the claim is "directed to" a patent-ineligible abstract idea. If so, we then consider the elements of the 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 of the abstract idea. *Id.* This is a search for an "inventive concept" an element or combination of elements sufficient to ensure that the claim amounts to "significantly more" than the abstract idea itself. *Id.* The Court also stated that "the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention." *Id at* 2358.

Here, we determine that the claim is directed to the concept of selecting material, such as an advertisement or entertainment, based on

neurographics. This is a method of organizing human activities or a fundamental economic practice long prevalent in our system of commerce, and is an abstract idea beyond the scope of § 101. *See Electric Power Group, LLC v. Alstom S.A.*, 830 F.3d 1350 (Fed. Cir. 2016) (collecting information, analyzing it, and displaying results from certain results of the collection and analysis was held to be an abstract idea); *Intellectual Ventures I LLC v. Capital One Bank* (USA) 792 F. 3d 1363, 1369 (Fed. Cir. 2015) (tailoring content on a website based on a user's location and time of day was held to be a fundamental economic practice and an abstract idea).

We next consider whether additional elements of the claim, both individually and as an ordered combination, transform the nature of the claim into a patent-eligible application of the abstract idea, e.g., whether the claim does more than simply instruct the practitioner to implement the abstract idea using generic computer components. We conclude that it does not. The Specification at paragraphs 21 and 85, for example, describes using conventional computer components such as cameras, computers, webcams, DVD's, RAM, and ROM in a conventional manner.

Considering each of the claim elements in turn, the function performed by the computer system at each step of the process is purely conventional. Each step of the claimed method does no more than require a generic computer to perform a generic computer function.

We note the point about pre-emption (App. Br. 26–30) Although pre-emption "might tend to impede innovation more than it would tend to promote it, 'thereby thwarting the primary object of the patent laws"' (*Alice*, 134 S. Ct. at 2354 (quoting *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1293 (2012)), "the absence of complete preemption

does not demonstrate patent eligibility" (*Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015)). *See also OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1362–63 (Fed. Cir. 2015)("[T]hat the claims do not preempt all price optimization or may be limited to price optimization in the e-commerce setting do not make them any less abstract.").

For these above reasons the rejection of claim 22 is sustained. Claim 39 is directed to similar subject matter and the rejection of this claim is sustained as well for which the same arguments have been presented.

We reach the same conclusion as to independent system claim 31 and its dependent claims for which similar arguments have been submitted. Here, as in *Alice*, "the system claims are no different in substance from the method claims. The method claims recite the abstract idea implemented on a generic computer; the system claims recite a handful of generic computer components configured to implement the same idea." *Alice*, 134 S. Ct. at 2351. "[T]he mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention. Stating an abstract idea 'while adding the words 'apply it' is not enough for patent eligibility." *Id.* at 2358 (quoting *Mayo*, 132 S. Ct. at 1294).

The same or similar arguments have been presented for the dependent claims and the rejection of these claims is sustained as well for the same reasons given above.

CONCLUSIONS OF LAW

We conclude that Appellants have not shown that the Examiner erred in rejecting claims 22–43 under 35 U.S.C. § 101.

DECISION

The Examiner's rejection of claims 22–43 is sustained.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv). *See* 37 C.F.R. § 41.50(f).

AFFIRMED