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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* RICK A. HAMILTON II, WILLIAM J. HUIE, JENNY S. LI, and  
CLIFFORD A. PICKOVER

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Appeal 2017-011201  
Application 14/016,369<sup>1</sup>  
Technology Center 3600

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Before DENISE M. POTHIER, CATHERINE SHIANG, and  
JASON J. CHUNG, *Administrative Patent Judges*.

SHIANG, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1, 3, 5–9, 11, 13–15, 17, 19, and 20, which are all the claims pending in the application. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

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<sup>1</sup> Appellants identify International Business Machines Corporation as the real party in interest. App. Br. 2.

## STATEMENT OF THE CASE

### *Introduction*

The present invention relates to “the field of computer systems and software, and more specifically to a method, system and computer program product for enabling distribution or sharing of feedback among customers in a retail environment, in real-time.” Spec. ¶ 2. Claim 1 is exemplary:

1. A method for providing distribution of customer feedback in a retail environment, said method comprising the steps of:

receiving, into a tool, feedback inputted by one or more customers using a plurality of portable devices that are configured to communicate with said tool, said feedback inputted pertaining to at least one aspect of a retail environment;

identifying, using said plurality of portable devices and a global positioning system (GPS), respective locations of said one or more customers by continuously tracking, in real-time, movement of said plurality of portable devices;

collecting, using said tool, said feedback, wherein said feedback comprises a first tag for inputting the feedback into said tool, said first tag being configured to extrapolate on said feedback inputted;

determining whether said feedback inputted pertains to either a product or a location within said retail environment;

adding, by said tool, based on said determining, in order to facilitate retrieval of said feedback collected, one or more additional tags to said feedback, wherein said one or more additional tags are extrapolated from said first tag in order to facilitate retrieval of said feedback inputted;

providing a user access to said feedback collected, including said one or more additional tags based on either an inquiry submitted to said tool by said user or based on a current location of said user identified by said tool; and

presenting said user with additional information besides said feedback collected based on either said inquiry submitted to said tool by said user or based on said current location of said user identified by said tool.

*Rejection*<sup>2</sup>

Claims 1, 3, 5–9, 11, 13–15, 17, 19, and 20 are rejected under 35 U.S.C. § 101 because they are directed to patent-ineligible subject matter. Final Act. 5–7.<sup>3</sup>

ANALYSIS

We disagree with Appellants’ arguments. To the extent consistent with our analysis below, we adopt the Examiner’s findings and conclusions in (i) the action from which this appeal is taken and (ii) the Answer.<sup>4</sup>

The Examiner rejects the claims under 35 U.S.C. § 101 because they are directed to patent-ineligible subject matter. *See* Final Act. 5–7; Ans. 7–9. In particular, the Examiner concludes the claims are directed to a patent-ineligible method of organizing human activity. *See* Final Act. 5; Ans. 7. The Examiner determines the claims do not identify an inventive concept to

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<sup>2</sup> Throughout this opinion, we refer to the (1) Final Rejection dated November 10, 2016 (“Final Act.”); (2) Appeal Brief dated March 13, 2017 (“App. Br.”); (3) Examiner’s Answer dated July 3, 2017 (“Ans.”); and (4) Reply Brief dated September 1, 2017 (“Reply Br.”).

<sup>3</sup> We review the Examiner’s comments about adding “non-transitory” to claims 15, 17, and 19–20 (Final Act. 7–8) as recommendations and not a separate 35 U.S.C. § 101 rejection.

<sup>4</sup> To the extent Appellants advance new arguments in the Reply Brief without showing good cause, Appellants have waived such arguments. *See* 37 C.F.R. § 41.41(b)(2).

transform the nature of the claims into a patent-eligible application. *See* Final Act. 5–7; Ans. 7–9. Appellants argue the Examiner erred. *See* App. Br. 5–9; Reply Br. 1–3.<sup>5</sup>

Appellants have not persuaded us of error. Section 101 of the Patent Act provides “[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. However, the Supreme Court has long interpreted 35 U.S.C. § 101 to include implicit exceptions: “[l]aws of nature, natural phenomena, and abstract ideas” are not patentable. *E.g., Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014).

In determining whether a claim falls within an excluded category, we are guided by the Supreme Court’s two-step framework, described in *Mayo* and *Alice*. *Id.* at 217–18 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 75–77 (2012)). In accordance with that framework, we first determine what concept the claim is “directed to.” *See Alice*, 573 U.S. at 219 (“On their face, the claims before us are drawn to the concept of intermediated settlement, *i.e.*, the use of a third party to mitigate settlement risk.”); *see also Bilski v. Kappos*, 561 U.S. 593, 611 (2010) (“Claims 1 and 4 in petitioners’ application explain the basic concept of hedging, or protecting against risk.”).

Concepts determined to be abstract ideas, and thus patent ineligible, include certain methods of organizing human activity, such as fundamental

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<sup>5</sup> Appellants assert the Examiner took Official Notice to determine the claims are directed to an abstract idea (App. Br. 6), but do not persuasively explain why the Examiner’s legal determination constitutes Official Notice.

economic practices (*Alice*, 573 U.S. at 219–20; *Bilski*, 561 U.S. at 611); mathematical formulas (*Parker v. Flook*, 437 U.S. 584, 594–95 (1978)); and mental processes (*Gottschalk v. Benson*, 409 U.S. 63, 69 (1972)). Concepts determined to be patent eligible include physical and chemical processes, such as “molding rubber products” (*Diamond v. Diehr*, 450 U.S. 175, 191 (1981)); “tanning, dyeing, making water-proof cloth, vulcanizing India rubber, smelting ores” (*id.* at 182 n.7 (quoting *Corning v. Burden*, 56 U.S. 252, 267–68 (1854))); and manufacturing flour (*Benson*, 409 U.S. at 69 (citing *Cochrane v. Deener*, 94 U.S. 780, 785 (1876))).

In *Diehr*, the claim at issue recited a mathematical formula, but the Supreme Court held that “[a] claim drawn to subject matter otherwise statutory does not become nonstatutory simply because it uses a mathematical formula.” *Diehr*, 450 U.S. at 176; *see also id.* at 191 (“We view respondents’ claims as nothing more than a process for molding rubber products and not as an attempt to patent a mathematical formula.”). Having said that, the Supreme Court also indicated that a claim “seeking patent protection for that formula in the abstract . . . is not accorded the protection of our patent laws, . . . and this principle cannot be circumvented by attempting to limit the use of the formula to a particular technological environment.” *Id.* (citing *Benson* and *Flook*); *see, e.g., id.* at 187 (“It is now commonplace that an *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection.”).

If the claim is “directed to” an abstract idea, we turn to the second step of the *Alice* and *Mayo* framework, where “we must examine the elements of the claim to determine whether it contains an ‘inventive

concept’ sufficient to ‘transform’ the claimed abstract idea into a patent-eligible application.” *Alice*, 573 U.S. at 221 (citation omitted). “A claim that recites an abstract idea must include ‘additional features’ to ensure ‘that the [claim] is more than a drafting effort designed to monopolize the [abstract idea].’” *Id.* (quoting *Mayo*, 566 U.S. at 77). “[M]erely requir[ing] generic computer implementation[] fail[s] to transform that abstract idea into a patent-eligible invention.” *Id.*

The PTO recently published revised guidance on the application of § 101. USPTO’s 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019) (“Memorandum”). Under the guidance set forth in the Memorandum, we first look to whether the claim recites:

- (1) any judicial exceptions, including certain groupings of abstract ideas (i.e., mathematical concepts, certain methods of organizing human activity such as a fundamental economic practice, or mental processes) (Step 2A, Prong 1); and
- (2) additional elements that integrate the judicial exception into a practical application (*see* MPEP § 2106.05(a)–(c), (e)–(h)) (9th ed. 2018) (Step 2A, Prong 2).

Only if a claim (1) recites a judicial exception and (2) does not integrate that exception into a practical application, do we then look to whether the claim:

- (3) adds a specific limitation beyond the judicial exception that is not “well-understood, routine, conventional” in the field (*see* MPEP § 2106.05(d)); or
- (4) simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception. (Step 2B).

*See* Memorandum at 54–56.

Turning to Step 2A, Prong 1 of the Memorandum (*Alice* step one), claim 1 (with emphases) recites:

1. A method for providing distribution of customer feedback in a retail environment, said method comprising the steps of:

*receiving, into a tool, feedback inputted by one or more customers using a plurality of portable devices that are configured to communicate with said tool, said feedback inputted pertaining to at least one aspect of a retail environment;*

*identifying, using said plurality of portable devices and a global positioning system (GPS), respective locations of said one or more customers by continuously tracking, in real-time, movement of said plurality of portable devices;*

*collecting, using said tool, said feedback, wherein said feedback comprises a first tag for inputting the feedback into said tool, said first tag being configured to extrapolate on said feedback inputted;*

*determining whether said feedback inputted pertains to either a product or a location within said retail environment;*

*adding, by said tool, based on said determining, in order to facilitate retrieval of said feedback collected, one or more additional tags to said feedback, wherein said one or more additional tags are extrapolated from said first tag in order to facilitate retrieval of said feedback inputted;*

*providing a user access to said feedback collected, including said one or more additional tags based on either an inquiry submitted to said tool by said user or based on a current location of said user identified by said tool; and*

*presenting said user with additional information besides said feedback collected based on either said inquiry submitted to said tool by said user or based on said current location of said user identified by said tool.*

All of the italicized limitations are associated with marketing activities. For example, “receiving, into a tool, feedback . . .” and “collecting, using said tool, said feedback . . .” improve marketing activities by soliciting and collecting customer feedback. Likewise, “determining

whether said feedback inputted pertains to either a product or a location . . . ,” “adding . . . one or more additional tags to said feedback . . . ,” “providing a user access to said feedback collected,” and “presenting said user with additional information . . .” improve marketing activities by organizing feedback information for easy access. Our determination is supported by the Specification, which describes the need to provide better marketing (customer service) in business, and a new system to provide customer feedback to fulfill that need:

In today’s business environment, businesses rely on customer feedback in order to improve customer service and to maintain or increase their customer base. Typically, if a feedback or comment box exists, a customer seeking to leave feedback can leave their feedback or comments in the box. However, access to such feedback is limited and, as such, there is a need for a business and/or organization to provide a cost-effective way to access customer feedback in order to provide better customer service.

Spec. ¶ 3.

[T]he retail establishment feedback tool is deployed on a system employed by a store to allow customer feedback to be inputted in real-time within a store or to be inputted via a website, so that the feedback is provided or made available to all customers and/or management.

Spec. ¶ 17.

Because marketing activities are commercial interactions (Memorandum, Step 2A, Prong 1 (Groupings of Abstract Ideas)),<sup>6</sup> we conclude claim 1 is directed to commercial interactions, which is one

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<sup>6</sup> As a result, we disagree with Appellants’ assertion that “the Examiner has over-generalized and mischaracterized” the claims (App. Br. 6; *see also* Reply Br. 1).

certain methods of organizing human activity identified in the Memorandum, and thus an abstract idea.

Claims 9 and 15 recite similar functions and processes. *See* claims 9 and 15. Therefore, for similar reasons, we conclude each of claims 9 and 15 is directed to commercial interactions, which is one certain methods of organizing human activity identified in the Memorandum, and thus an abstract idea.

Turning to Step 2A, Prong 2 of the Memorandum (*Alice* step two), contrary to Appellants’ assertion (App. Br. 5–9; Reply Br. 1–3), Appellants have not shown the rejected claims 1, 9, and 15 recite additional elements that integrate the judicial exception into a practical application.<sup>7</sup>

In particular, Appellants’ argument about “an innovative way” to “provide better customer service” (App. Br. 8) is unpersuasive because “a claim for a *new* abstract idea is still an abstract idea.” *Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1151 (Fed. Cir. 2016). “[U]nder the *Mayo/Alice* framework, a claim directed to a newly discovered law of nature (or natural phenomenon or abstract idea) cannot rely on the novelty of that discovery for the inventive concept necessary for patent eligibility . . . .” *Genetic Techs. Ltd. v. Merial L.L.C.*, 818 F.3d 1369, 1376 (Fed. Cir. 2016) (citations omitted). Contrary to Appellants’ arguments, claim 1 is directed to an abstract idea—not an improvement to “computer functionality,” as Appellants assert (App. Br. 8).

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<sup>7</sup> Appellants state they “do not reach the second part of the analysis set forth by the Interim Eligibility Guidance[, which relates to the *Alice* step-two analysis].” App. Br. 9.

Contrary to Appellants’ assertion (App. Br. 7–8; Reply Br. 1–2), claims 1, 9, and 15 are unlike the claims of *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335–36 (Fed. Cir. 2016). In *Enfish*, the court determines:

The . . . patents are directed to an innovative logical model for a computer database. . . . A logical model generally results in the creation of particular tables of data, but it does not describe how the bits and bytes of those tables are arranged in physical memory devices. Contrary to conventional logical models, the patented logical model includes all data entities in a single table, with column definitions provided by rows in that same table. The patents describe this as the “self-referential” property of the database.

*Enfish*, 822 F.3d at 1330.

[T]he plain focus of the claims is on an improvement to computer functionality itself, not on economic or other tasks for which a computer is used in its ordinary capacity.

[T]he claims . . . are directed to a specific improvement to the way computers operate, embodied in the self-referential table.

*Enfish*, 822 F.3d at 1336.<sup>8</sup>

Unlike the claims of *Enfish*, claims 1, 9, and 15 are not directed to “a specific improvement to the way computers operate, embodied in the self-referential table” or similar improvements. *Enfish*, 822 F.3d at 1336.

Instead, as described by the Specification (Spec. ¶¶ 3, 17), those claims focus on abstract ideas that merely use computers as tools. Indeed, Appellants acknowledge “the claims are directed to a computerized method *for providing distribution of customer feedback.*” App. Br. 7 (emphasis added).

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<sup>8</sup> The *Enfish* court explains the case is determined under *Alice* step one: “Because the claims are not directed to an abstract idea under step one of the *Alice* analysis, we do not need to proceed to step two of that analysis.” *Enfish*, 822 F.3d at 1339.

Appellants’ arguments (App. Br. 8–9; Reply Br. 2–3) about *SiRF Technology, Inc. v. International Trade Commission*, 601 F.3d 1319 (Fed. Cir. 2010) are unpersuasive, as that case predates *Alice* and does not employ the *Alice* two-step inquiry. Further, in *SiRF*, the court determines:

Claim 1 of the ’801 patent is expressly directed in its preamble to “calculating *an absolute position* of a GPS receiver.” . . . Further, *claim 1 requires “pseudoranges”* that estimate the distance from “the GPS receiver to a plurality of GPS satellites.” . . . It is clear that the methods at issue could not be performed without the use of a GPS receiver; *indeed without a GPS receiver it would be impossible to generate pseudoranges* or to determine the position of the GPS receiver whose position is the precise goal of the claims.

*Id.* at 1332 (emphases added).

Unlike the claims of *SiRF*, the rejected claims do not require an “absolute position” of a GPS receiver, “pseudoranges,” or similar items that require a GPS. *Id.* at 1332. As a result, unlike the claims of *SiRF*, the functions and processes of claims 1, 9, and 15 can be performed without using a GPS. For example, claim 1 (and similarly, claims 9 and 15) recites:

*identifying, using said plurality of portable devices and a global positioning system (GPS), respective locations of said one or more customers* by continuously tracking, in real-time, movement of said plurality of portable devices;

. . .

providing a user access to said feedback collected, including said one or more additional tags based on either an inquiry submitted to said tool by said user *or based on a current location of said user identified by said tool*; and

presenting said user with additional information besides said feedback collected based on either said inquiry submitted to said tool by said user *or based on said current location of said user identified by said tool.*

Claim 1 (emphases added).

Unlike the claims of *SiRF*, “identifying . . . respective locations of said one or more customers” does not require a GPS, as a customer can identify his location by looking up the address or checking a map. In any event, the limitation “based on a current location of said user identified by said tool” is optional—not required, as claim 1 recites (i) “providing a user access to said feedback collected, including said one or more additional tags based on either an inquiry submitted to said tool by said user *or based on a current location of said user identified by said tool*” and (ii) “presenting said user with additional information besides said feedback collected based on either said inquiry submitted to said tool by said user *or based on said current location of said user identified by said tool*” (emphases added). As a result, contrary to Appellants’ arguments, *SiRF* is inapplicable here.

Further, Appellants’ argument about the absence of a prior art rejection (App. Br. 8) is unpersuasive, because a prior art rejection is determined under 35 U.S.C. § 102 and § 103, which are different statutory requirements. As the Supreme Court emphasizes: “[t]he ‘novelty’ of any element or steps in a process, or even of the process itself, is of *no relevance* in determining whether the subject matter of a claim falls within the § 101 categories of possibly patentable subject matter.” *Diamond v. Diehr*, 450 U.S. 175, 188–89 (1981) (emphasis added). Our reviewing court further guides that “[e]ligibility and novelty are separate inquiries.” *Two-Way Media Ltd. v. Comcast Cable Commc’ns, LLC*, 874 F.3d 1329, 1340 (Fed. Cir. 2017).

As a result, we conclude the rejected claims do not recite additional elements that integrate the judicial exception into a practical application. *See Memorandum, Step 2A, Prong 2.*

Turning to Step 2B of the Memorandum (*Alice* step two), Appellants do not persuasively argue any specific limitation is not well-understood, routine, or conventional in the field. Nor do Appellants persuasively argue the Examiner erred in that aspect. As a result, Appellants have not persuaded us the Examiner erred with respect to the Memorandum's Step 2B analysis. *See* Memorandum, Step 2B.

Because Appellants have not persuaded us the Examiner erred, we sustain the Examiner's rejection of claims 1, 9, and 15 under 35 U.S.C. § 101.

We also sustain the Examiner's rejection of corresponding dependent claims 3, 5–8, 11, 13, 14, 17, 19, and 20 under 35 U.S.C. § 101, as Appellants do not advance separate substantive arguments about those claims.

#### DECISION

We affirm the Examiner's decision rejecting claims 1, 3, 5–9, 11, 13–15, 17, 19, and 20.

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