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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 GORDON BLACKWELL,
BRENT ARASIMOWICZ, and TIMOTHY EARLY RIELY

_____

Appeal 2018-001042
Application 14/043,420
Technology Center 3600

_____

Before CARL L. SILVERMAN, MATTHEW J. McNEILL, and
ALEX S. YAP, *Administrative Patent Judges*.

YAP, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants[1] appeal under 35 U.S.C. § 134(a) from the final rejection of claims 1, 5–14, and 18.[2] December 15, 2016 Final Office Action ("Final Act."). We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

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[1] Claims 2–4 and 15–17 have been cancelled. (App. Br. 3.)
[2] Appellants identify "Allscripts Healthcare Solutions, Inc." as the real party in interest. (*Id*.)

STATEMENT OF THE CASE

Introduction

According to the Specification, Appellants' invention "generally relates to rapid reporting of meaningful use of electronic health records and related technology within a healthcare organization." (October 4, 2016 Specification ("Spec.") 1.) Claim 1 is illustrative, and is reproduced below (with minor reformatting):

1. A system comprising a non-transitory computer-readable medium containing computer-executable instructions for providing a method related to rapid reporting of meaningful use in electronic health records, the method including:

    storing patient encounter data in a database;

    pre-calculating first data related to a first meaningful use measure;

    storing the pre-calculated first data in a first small staging table;

    pre-calculating second data related to a second meaningful use measure;

    storing the pre-calculated second data in a second small staging table;

    compiling the pre-calculated and stored data from the first and second small staging tables into a single table that is adapted to be accessed by reporting software,

    wherein boolean data related to the first meaningful use measure is stored in a first data column in such a manner that a value of true is represented by a unique patient identifier, and a value of false is represented by a null value;

    calculating a meaningful use metric related to the first meaningful use measure, the calculation

comprising determining a number of unique values
contained in the first data column.

Rejection on Appeal

Claims 1, 5–14, and 18 stand rejected under 35 U.S.C. § 101 as not
being directed to patent-eligible subject matter. (*See* Final Act. 3–5.)

ANALYSIS

We have reviewed the Examiner's rejection in light of Appellants'
arguments that the Examiner has erred. We are not persuaded the Examiner
erred in rejecting the claims on appeal.

101 Rejection Legal Framework

An invention is patent eligible if it claims a "new and useful process,
machine, manufacture, or composition of matter." 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. Pty. Ltd. v. CLS Bank Int'l*, 573
U.S. 208, 216 (2014).

In determining whether a claim falls within an excluded category, our
inquiry focuses on 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 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 (1853))); 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 (internal quotation marks
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 Office recently published revised guidance on the application of
§ 101. USPTO's January 7, 2019 Memorandum, *2019 Revised Patent
Subject Matter Eligibility Guidance* ("Memorandum"), 84 Fed. Reg. 50.
Under that guidance, 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); and

> (2) additional elements that integrate the judicial exception into a
> practical application (*see* MPEP § 2106.05(a)–(c), (e)–(h)).

Only if a claim recites a judicial exception and 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.

See generally Memorandum.

Applying the guidance set forth in the Memorandum, we conclude
that claims 1, 5–14, and 18 do not recite patent-eligible subject matter.

Step 1 – Statutory Claims and Memorandum

Alice involves determining whether the claims recite an exception to
an otherwise statutory category under 35 U.S.C § 101. *See Alice*, 573 U.S.
at 216–17. Similarly, under the Memorandum, the PTO first determines
"whether the claim is to a statutory category (Step 1)." Memorandum, 84
Fed. Reg. at 53. Here, the challenged claims recite a statutory system,
namely a system "comprising a non-transitory computer-readable medium
containing computer-executable instructions for providing a method related
to rapid reporting of meaningful use in electronic health records."

Step 2a Prong 1 – Abstract Idea

The Memorandum instructs us first to determine whether each claim
recites any judicial exception to patent eligibility. 84 Fed. Reg. at 54. The
Memorandum identifies three judicially-excepted groupings:
(1) mathematical concepts, (2) certain methods of organizing human activity
such as fundamental economic practices, and (3) mental processes. *Id.* at 52.

The Examiner finds that the claims (as represented by claim 1) are
directed to an abstract idea "for calculating metric data implemented using
generic computer technology." (Ans. 3; Final Act. 3–4.) Appellants
contend that claim 1 is "clearly not a drafting effort designed to monopolize

the identified abstract idea of 'calculating metric data.'" (App. Br. 9–12,

emphasis omitted.) According to Appellants:

> any methodology which does not involve storing "boolean data
> related to [a] first meaningful use measure . . . in a first data
> column in such a manner that a value of true is represented by a
> unique patient identifier, and a value of false is represented by a
> null value," and "calculating a meaningful use metric related to
> the first meaningful use measure, the calculation comprising
> determining a number of unique values contained in the first
> data column[.]"

(*Id*. at 12.) The Examiner, however, contends that "Boolean operators are

well-understood, routine, and conventional in the field[, such as u]sing a

'Count' function in excel or using other systems that count a number of

values contained in a data column is also well-understood, routine, and

conventional in the field." (Ans. 3.)

When analyzing a claim under section 101, it is imperative to "ensure

. . . that we articulate what the claims are directed to with enough specificity

to ensure the . . . inquiry is meaningful." *Thales Visionix Inc. v. U.S.*, 850

F.3d 1343, 1347 (Fed. Cir. 2007). Further, "it is not enough to merely

identify a patent-ineligible concept underlying the claim[s]; we must

determine whether the patent-ineligible concept is what the claim is

'directed to.'" *Id.* at 1349, internal citation omitted.

Claim 1 recites "computer-executable instructions for providing a

method related to rapid reporting of meaningful use in electronic health

records." Specifically, claim 1 recites steps for (step a) "*storing* patient

encounter data in a database," (step b) "*pre-calculating* first data related to a

first meaningful use measure," (step c) "*storing* the pre-calculated first data

in a first small staging table," (step d) "*pre-calculating* second data related to

a second meaningful use measure," (step e) "*storing* the pre-calculated

second data in a second small staging table," (step f) "*compiling* the pre-calculated and stored data from the first and second small staging tables into a single table . . . ," (step g) "wherein boolean data related to the first meaningful use measure is stored in a first data column in such a manner that a value of true is represented by a unique patient identifier, and a value of false is represented by a null value," and (step h) "calculating a meaningful use metric related to the first meaningful use measure, the calculation comprising determining a number of unique values contained in the first data column." In other words, claim 1 recites steps for storing data and calculating or compiling the stored data in order to, eventually, calculate a "meaningful use metric" based on the data calculated or complied in the prior steps. These steps, individually and collectively, recite mental processes that can be performed by a human with pen and paper. Step a—storing patient encounter data in a database—is a step of storing data, which is a mental process. Step b—pre-calculating first data related to a first meaningful use measure—is a step of evaluation or judgment, which is a mental process. Step c—storing the pre-calculated first data in a first small staging table—is a step of storing data, which is a mental process. Step d—pre-calculating second data related to a second meaningful use measure—is a step of evaluation or judgment, which is a mental process. Step e—storing the pre-calculated second data in a second small staging table—is a step of storing data, which is a mental process. Step f—compiling the pre-calculated and stored data from the first and second small staging tables into a single table that is adapted to be accessed by reporting software—is a step of organizing the data, which is a mental process. Step g—wherein boolean data related to the first meaningful use measure is

stored in a first data column in such a manner that a value of true is represented by a unique patient identifier, and a value of false is represented by a null value—is a step of evaluation or judgment and storing, which is a mental process. Step h—calculating a meaningful use metric . . . the calculation comprising determining a number of unique values contained in the first data column—is a step of evaluation or judgment, which is a mental process. In sum, steps a–h recite mental processes that can be conducted by a human using a pen and paper.[3] As such, the claimed steps recite a patent-ineligible abstract idea. Memorandum, 84 Fed. Reg. at 52, n.14; *see also Mayo*, 566 U.S. at 71 ("[M]ental processes[]. . . are not patentable, as they are the basic tools of scientific and technological work"); *Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1139 (Fed. Cir. 2016) (holding that claims to the mental process of "translating a functional description . . . into a hardware component description" are directed to an abstract idea, because the claims "read on an individual performing the claimed steps mentally or with pencil and paper").

We are also not persuaded by Appellants' contention that "the Office Action failed to identify [the] particular abstract idea" because this belies the facts. (App. Br. 22–23, emphasis omitted.) For example, the Final Action states that "[t]he steps[, of claim 1,] recite 'Mathematical Relationship/Formulas[,]' which is one of the four types of abstract ideas set

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[3] Nothing forecloses the performance of these steps by a human, mentally or with pen and paper (Memorandum, 84 Fed. Reg. at 52, n.14; *see also Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1318 (Fed. Cir. 2016); *Mortg. Grader, Inc. v. First Choice Loan Servs. Inc.*, 811 F.3d 1314, 1324 (Fed. Cir. 2016); *Versata Dev. Grp. v. SAP Am., Inc.*, 793 F.3d 1306, 1335 (Fed. Cir. 2015); *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1372, 1373 (Fed. Cir. 2011)).

forth in *Alice*. Furthermore[,] they describe the concept of calculating metric data, which corresponds to concepts identified as abstract ideas by the courts, such as . . . ." (Final Act. 3–4.)

Step 2a Prong 2 – Integration of the Judicial Exception
into a Practical Application

In applying step 2, prong 2 of the Memorandum, we determine that the independent claims do not integrate the recited judicial exception into a practical application because the claims do not apply, rely on, or use the judicial exception in a manner that imposes a meaningful limit on the exception. Memorandum, 84 Fed. Reg. at 54–55; *see also* MPEP § 2106.05(a)–(c), (e)–(h).

If a claim recites a judicial exception, we determine whether the recited judicial exception is integrated into a practical application of that exception by: (a) identifying whether there are any additional elements recited in the claim beyond the judicial exception(s); and (b) evaluating those additional elements individually and in combination to determine whether they integrate the exception into a practical application. If the recited judicial exception is integrated into a practical application, the claim is not directed to the judicial exception. "[T]he term 'additional elements' . . . refer[s] to claim features, limitations, and/or steps that are recited in the claim *beyond the identified judicial exception*." Memorandum, 84 Fed. Reg. at 55, n.24, emphasis added.

Claim 1, directed to a system comprising a non-transitory computer-readable medium containing computer-executable instructions for providing a method related to rapid reporting of meaningful use in electronic health records, does not recite beyond the preamble (reproduced above) additional

elements beyond the steps that constitute the identified abstract idea. Even assuming the preamble is limiting, it merely recites a non-transitory computer-readable medium containing computer-executable instructions; therefore, the preamble does not integrate the exception into a practical application.

Appellants next contend that "[c]laim 1 is clearly not a drafting effort designed to monopolize the identified abstract idea of 'calculating metric data.'" (App. Br. 9–12, emphasis omitted.) According to Appellants, "the claim poses no risk of pre-empting the identified abstract idea." (*Id*. at 21.) Appellants' pre-emption arguments are not persuasive. First, the abstract idea encompasses what is set forth by Appellants as further elements as these are steps of the method employing mental processes identified as the abstract idea. Second, the question of pre-emption is not grounded on whether all methods for accomplishing the intended goal are pre-empted, but rather on whether the claim pre-empts application of the abstract idea embodied in the claim. (*See* App. Br. 9–12 (arguing that the claim does not monopolize "calculating metric data").) It is, accordingly, of no import that the claims do not read on existing, generic methods. Third, the absence of complete pre-emption does not demonstrate patent eligibility because even though the principle of pre-emption is the basis for the judicial exceptions to patentability, the concern is fully addressed and rendered moot where the claim is determined to disclose patent ineligible subject matter under the two-part framework described in *Mayo* and *Alice*. *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015). As explained in *Alice*, "the prohibition against patenting abstract ideas cannot be circumvented by attempting to limit the use of [the idea] to a particular

technological environment." *Alice*, 573 U.S. at 222–23 (internal citations and quotations omitted).

Furthermore, the alleged improvement ("allow[ing] the database to leverage common aggregation functions, such as: COUNT(DISTINCT(...)) . . . to easily count distinct values") does not improve the functioning of a computer itself. (Reply Br. 5–6.) For claims directed to computer software, the issue is whether "the focus of the claims is on [a] specific asserted improvement *in computer capabilities* . . . or, instead, on a process that qualifies as an 'abstract idea' for which computers are invoked merely as a tool." *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335–36 (Fed. Cir. 2016), emphasis added. Here, the computer capabilities are not improved. Rather, any alleged improvement is still using the computer as a tool. In other words, the alleged improvement, *i.e.*, tagging data in a certain way so that other supposedly more efficient functions of a computer can be used, does not improve on the capabilities of the computer itself. The allegedly more efficient functions are already available in the computer and the claimed invention do not improve on these functions. Therefore, unlike the claims in *Enfish*, which were directed to a "self-referential table for a computer database" that operated differently from generic databases and improved the computer's function, claim 1, in contrast, is merely implemented on a general purpose computer and does not provide an improvement in the function of the computer.[4]

Accordingly, even in combination with all the other recited elements, the addition of the preamble (*i.e.*, "A system comprising a non-transitory

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[4] Appellants cite to the 1804 Supreme Court case in *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804) and additionally argues that the claimed

computer-readable medium containing computer-executable instructions for

providing a method related to rapid reporting of meaningful use in electronic

invention would be patent eligible under international agreements and that
Congressional statutes cannot be interpreted to violate these international
agreements. (App. Br. 23–27.) Specifically, Appellants argue that under the
Agreement on Trade-Related Aspects of Intellectual Property Rights
("TRIPS agreement"), "patents shall be available for any inventions,
whether products or processes, in all fields of technology, provided that they
are new, involve an inventive step and are capable of industrial application."
(TRIPS, Section 5, Article 27). Appellants reason that because the "Office
Action does not question the novelty or non-obviousness of the claimed
inventions" and because the TRIPS agreement allows for novelty or non-
obviousness inventions to be patented, 35 U.S.C. § 101 "ought not be
construed to violate this international agreement." (App. Br. 23–27.)

As a general matter, administrative agencies do not have jurisdiction
to decide the constitutionality of congressional enactments" where
consideration of the question would "require the agency to question its own
statutory authority or to disregard any instructions Congress has given
it." *Riggin v. Off. of Senate Fair Emp. Prac.*, 61 F.3d 1563, 1569–70 (Fed.
Cir. 1995); *see also Elgin v. Dept. of Treasury*, 567 U.S. 1, 16 (2012) ("It is
well settled that administrative agencies are without authority to determine
the constitutionality of statutes." (internal quotation marks, bracketed
alteration, and citations omitted)). To the extent Appellants ask us to
determine the proprietary of Patent Office policy with respect to
congressional statutes and international agreements, we decline to consider
that argument.

We also decline Appellants' invitation to ignore recent Supreme Court
precedents regarding subject matter patentability. As discussed above, even
if novel, judicial exceptions are patent ineligible absent further elements
amounting to significantly more that transforms them into eligible subject
matter. *Flook*, 437 U.S. at 591–92 ("[T]he novelty of the mathematical
algorithm is not a determining factor at all."); *Ass'n Mol. Pathology*, 569
U.S. at 591 ("Groundbreaking, innovative, or even brilliant discovery does
not by itself satisfy the § 101 inquiry."); *Genetic Techs. Ltd.*, 818 F.3d at
1376 ("[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.").

health records") does not integrate the abstract idea into a practical application because it does not impose any meaningful limits on practicing the abstract idea. For these reasons, we determine that claim 1 does not integrate the recited abstract idea into a practical application.

Step 2b – Inventive Concept

Because we agree with the Examiner that claim 1 is directed to an abstract idea, we consider whether an additional element (or combination of elements) adds a limitation that is not well-understood, routine, conventional ("WURC") activity in the field or whether the additional elements simply append WURC activities previously known to the industry, specified at a high level of generality, to the judicial exception. Memorandum, 84 Fed. Reg. at 56. The Examiner's finding that an additional element (or combination of elements) is WURC activity must be supported with a factual determination. *Id.* (citing MPEP § 2106.05(d), as modified by the *Berkheimer* Memorandum[5]).

Whether the additional elements ("a non-transitory computer-readable medium containing computer-executable instructions") are WURC activity is a question of fact. *See Berkheimer v. HP Inc.*, 881 F.3d 1360, 1369 (Fed. Cir. 2018) ("Whether something is well-understood, routine, and conventional to a skilled artisan . . . is a factual determination."). Here, it is known that "a non-transitory computer-readable medium containing computer-executable instructions" is WURC.

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[5] R. W. Bahr, Changes in Examination Procedure Pertaining to Subject Matter Eligibility, Recent Subject Matter Eligibility Decision (*Berkheimer v. HP, Inc.*) (2018) (hereinafter "*Berkheimer* Memorandum").

Appellants, however, contend that steps g and h "represent specific limitations other than what is well-understood, routine, and conventional in the field, and further represent unconventional steps that confine the claim to the particular useful application of rapid reporting of meaningful use in electronic healthcare records." (App. Br. 13.) According to Appellants, these steps "not only represents unconventional steps other than what is well-understood, routine, and conventional, but in fact provides improvement to the functioning of a computer itself." (*Id.* at 14.) Specifically, Appellants state that:

> the Specification specifically describes how "unique IDs (e.g., patient identifiers, encounter identifiers, or the like) are stored as flags or indicators for each Meaningful Use measure rather [than] storing the standard Boolean values of True and False[,]" which "allows the database to leverage common aggregation functions . . . to easily count distinct values."[] The Specification explicitly notes that "[a] measure itself may then be calculated extremely rapidly by merely aggregating a count of distinct patient identifiers."

(*Id.* at 15.)

Appellants' arguments are not persuasive because they address the recited judicial exception itself, rather than any additional element. The analysis in the second step of the *Alice/Mayo* framework is a search for "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.'" *Alice*, 573 U.S. at 217–18, internal citation omitted. Even if novel, judicial exceptions are patent ineligible absent further elements amounting to significantly more that transforms them into eligible subject matter. *Flook*, 437 U.S. at 591–92 ("[T]he novelty of the mathematical algorithm is not a determining factor at all."); *Ass'n for Mol.*

Pathology v. Myriad Genetics, Inc., 569 U.S. 576, 591 (2013) ("Groundbreaking, innovative, or even brilliant discovery does not by itself satisfy the § 101 inquiry."); *Genetic Techs. Ltd. v. Merial L.L.C.*, 818 F.3d 1369, 1376 (Fed. Cir. 2016) ("[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."). The relied upon steps Appellants contend are not conventional do not, accordingly, transform the ineligible subject matter, because they are not something more than, but are, rather, part of the ineligible concept.

Accordingly, we sustain the Examiner's rejection of claims 1, 5–14, and 18 under 35 U.S.C. § 101 as directed to patent-ineligible subject matter.

DECISION

We affirm the Examiner's rejection of claims 1, 5–14, and 18 under 35 U.S.C. § 101.

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. § 1.136(a)(1)(iv).

AFFIRMED