



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/625,531	02/18/2015	Michael Dolen	47248-701.201	1030
21971	7590	03/11/2019	EXAMINER	
WILSON, SONSINI, GOODRICH & ROSATI 650 PAGE MILL ROAD PALO ALTO, CA 94304-1050 UNITED STATES OF AMERICA			AIRAPETIAN, MILA	
			ART UNIT	PAPER NUMBER
			3625	
			NOTIFICATION DATE	DELIVERY MODE
			03/11/2019	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patentdocket@wsgr.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MICHAEL DOLEN

Appeal 2018-001764
Application 14/625,531
Technology Center 3600

Before JOHN A. JEFFERY, JOHNNY A. KUMAR, and SCOTT E. BAIN,
Administrative Patent Judges.

JEFFERY, *Administrative Patent Judge.*

DECISION ON APPEAL

Appellant¹ appeals under 35 U.S.C. § 134(a) from the Examiner's decision to reject claims 11–30 and 39–42.² We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

Appellant's invention involves an intermediary application to facilitate and manage negotiations between a buyer and multiple sellers in

¹ Appellant identifies the real party in interest as Bidora, Inc. App. Br. 3.

² Although the Examiner's Final Rejection includes cancelled claims 1-10 and 31–38, the Examiner nonetheless omits these claims in the restatement of the rejection on page 3 of the Answer. Accordingly, we present the correct claim listing here for clarity.

online reverse auctions. Unlike an ordinary auction where buyers compete to purchase a good or service, sellers compete in a reverse auction to sell a good or service to a buyer. To this end, an intermediary application is used to facilitate and manage negotiations and transactions between the buyer and sellers. *See generally* Abstract; Spec. ¶¶ 1–7.

Claim 11 is illustrative:

11. Non-transitory computer-readable storage media encoded with a computer program including instructions executable by a processor to create an intermediary application integrating with an existing online reverse auction environment, the reverse auction environment comprising a database, in a computer memory, of a plurality of sellers, the intermediary application facilitating and managing negotiations between a buyer and the plurality of sellers in the existing online reverse auction environment by providing at least:

- a) a software module configured to receive, from the buyer, an offer to buy prior to the start of the reverse auction or during the reverse auction and transmit the offer to buy to the existing online reverse auction environment while offering an anonymity option for the buyer, wherein the buyer is an individual person or entity, the offer to buy directed to an item, the item having a price, the offer to buy comprising a proposed purchase price for the item from the buyer, the proposed purchase price being equal to or less than the price, wherein an amount less than or equal to the proposed purchase price is disclosed to the plurality of sellers;
- b) a software module configured to verify availability of funds from the buyer in the amount of at least a portion of the proposed purchase price before or concurrent with selection of one or more bidding sellers and transmit the verification of availability of funds to the existing online reverse auction environment while maintaining the anonymity option for the buyer;

- c) a software module configured to receive, from the existing online reverse auction environment, bids from one or more of the plurality of sellers, the bids for sale of the item, each bid having a price for the item, wherein the offer is binding to the buyer if at least two or more of buyer's criteria for winning the reverse auction are satisfied;
- d) a software module configured to select the one or more bidding sellers upon the expiration of a time period, each selected seller bidding on the item at a price equal to or less than the proposed purchase price;
- e) a dynamic sale allocation module configured to apply an algorithm to allocate sale of the item to a selected seller, the seller receiving the allocation based on two or more seller characteristics simultaneously, the two or more seller characteristics selected at beginning of the reverse auction from the group consisting of: price, shipping speed, shipping provider, local delivery availability, local pickup availability, seller rating, seller ranking, number of previous sales, warranty, payment methods accepted, and condition of previously delivered items, the allocation immediately making the sale binding; and
- f) a software module configured to distribute the verified funds to the seller via the existing online reverse auction environment.

THE REJECTION

The Examiner rejected claims 11–30 and 39–42 under 35 U.S.C. § 101 as directed to ineligible subject matter. Final Act. 4–8; Ans. 3 (correcting the claim listing).³

³ Throughout this opinion, we refer to (1) the Final Rejection mailed December 27, 2016 (“Final Act.”); (2) the Appeal Brief filed July 26, 2017

CONTENTIONS

The Examiner finds that the claims are directed to the abstract idea of conducting reverse auctions, which is said to be a method of organizing human activity and/or a fundamental economic practice. Final Act. 4–5. The Examiner adds that the claims do not include additional elements that add significantly more than the abstract idea, but merely recite conventional generic computer functions. *Id.* 6–7. Based on these findings, the Examiner concludes that the claims are ineligible under § 101. *Id.* 4–8.

Appellant argues that the claimed invention is not directed to an abstract idea. App. Br. 12–17; Reply Br. 5–11. According to Appellant, the Examiner not only fails to account for the specific recited limitations that are not directed to an abstract idea, but the recited limitations also add significantly more to the purported abstract idea to render the claims eligible. *See* App. Br. 17–23. Appellant adds that the Examiner’s Answer improperly introduces a new ground of rejection by citing cases different from those relied upon in the Final Office Action; and, consequently, there was no opportunity to react to this “new thrust.” Reply Br. 5.

ISSUE

Under § 101, has the Examiner erred in rejecting claims 11–30 and 39–42 as directed to ineligible subject matter? This issue turns on whether the claims are directed to an abstract idea and, if so, whether recited elements—considered individually and as an ordered combination—

(“App. Br.”); (3) the Examiner’s Answer mailed October 10, 2017 (“Ans.”); and (4) the Reply Brief filed December 6, 2017 (“Reply Br.”).

transform the nature of the claims into a patent-eligible application of that abstract idea.

PRINCIPLES OF LAW

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. *See, e.g., Alice Corp. Pty. 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 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, 192 (1981)); “tanning, dyeing, making waterproof cloth, vulcanizing India rubber, smelting ores” (*id.* at 184 n.7 (quoting *Corning v. Burden*, 56 U.S. (15 How.) 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 192 (“We view respondents’ claims as nothing more than a process for molding rubber products and not as an attempt to patent a mathematical formula.”). That said, 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 (quotation marks and 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.*

In January 2019, the USPTO published revised guidance on the application of § 101. *See 2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (Jan. 7, 2019) (“Guidance”). 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 interactions such as a fundamental economic practice, or mental processes); and
 - (2) additional elements that integrate the judicial exception into a practical application (*see* MANUAL OF PATENT EXAMINING PROCEDURE (MPEP) §§ 2106.05(a)–(c), (e)–(h) (9th ed. Rev. 08.2017, Jan. 2018)).
- 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, and conventional in the field (*see* MPEP § 2106.05(d)); or
 - (4) simply appends well-understood, routine, and conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception.

See Guidance, 84 Fed. Reg. at 56.

ANALYSIS

Claims 11–30 and 39–42: Alice/Mayo Step One

Independent claim 11 recites non-transitory computer-readable storage media encoded with a computer program including instructions executable by a processor to create an intermediary application integrating with an existing online reverse auction environment, where the environment comprises a database in computer memory of plural sellers, and the intermediary application facilitates and manages negotiations between a buyer (which can be an individual person or entity) and the sellers in the environment by providing at least five software modules and a dynamic sale allocation module.

The first software module is configured to (1) receive, from the buyer, an offer to buy an item either before or during the reverse auction, and (2) transmit the offer to the existing online reverse auction environment while offering an anonymity option for the buyer, where the offer comprises a proposed purchase price being equal to or less than the item's price, where an amount less than or equal to the proposed purchase price is disclosed to the sellers.

The second software module is configured to (1) verify availability of funds from the buyer in the amount of at least a portion of the proposed purchase price before or concurrent with selecting one or more bidding sellers, and (2) transmit the verification to the existing online reverse auction environment while maintaining buyer anonymity.

The third software module is configured to receive bids from the online reverse auction environment from sellers, where the offer is binding to the buyer if at least two or more of the buyer's criteria are satisfied.

The fourth software module is configured to select bidding sellers upon expiration of a time period, where each selected seller bids on the item at a price equal to or less than the proposed purchase price.

A dynamic sale allocation module is configured to apply an algorithm to allocate sale of the item to a selected seller, the seller receiving the allocation based on two or more seller characteristics simultaneously, where the characteristics are selected from the recited group when the reverse auction begins, and the allocation immediately makes the sale binding.

The fifth software module is configured to distribute the verified funds to the seller via the existing online reverse auction environment.

As the Specification explains, the claimed invention enables purchasing products and services in reverse auctions via an intermediary application that solves traditional problems associated with these transactions, particularly where it is difficult to discern the buyer's seriousness or veracity, or the buyer may be inexperienced or otherwise lack negotiating skills—factors that could be exploited that may hinder the transaction or render it unfair. *See Spec.* ¶¶ 2–7.

By using an intermediary application, however, sellers only know that a verified buyer is willing to purchase a good or service by committing the money to make that purchase. *Spec.* ¶ 7. Notably, sellers do not know who they are negotiating with, let alone know the buyer's personal information that would indicate the buyer's background, education, and experience, thus yielding a more “democratic” negotiation process. *Id.*

Turning to claim 11, we first note that the claim recites computer-readable storage media and, therefore, falls within the manufacture category of § 101. But despite falling within this statutory category, we must still

determine whether the claim is directed to a judicial exception, namely an abstract idea. *See Alice*, 573 U.S. at 217. To this end, we must determine whether (1) the claim *recites* a judicial exception, and (2) fails to integrate the exception into a practical application. *See Guidance*, 84 Fed. Reg. at 52–55. If both elements are satisfied, the claim is directed to a judicial exception under the first step of the *Alice/Mayo* test. *See id.*

In the rejection, the Examiner finds that claim 11 is directed to the abstract idea of conducting reverse auctions that organizes human activity and is a fundamental economic practice. Final Act. 4. To determine whether a claim recites an abstract idea, we (1) identify the claim’s specific limitations that recite an abstract idea, and (2) determine whether the identified limitations fall within certain subject matter groupings, namely (a) mathematical concepts⁴; (b) certain methods of organizing human activity⁵; or (c) mental processes.⁶

Here, apart from the recited (1) storage media; (2) application; (3) online environment; (4) database; (5) computer memory; (6) software

⁴ Mathematical concepts include mathematical relationships, mathematical formulas or equations, and mathematical calculations. *See Guidance*, 84 Fed. Reg. at 52.

⁵ Certain methods of organizing human activity include fundamental economic principles or practices (including hedging, insurance, mitigating risk); commercial or legal interactions (including agreements in the form of contracts; legal obligations; advertising, marketing or sales activities or behaviors; business relations); managing personal behavior or relationships or interactions between people (including social activities, teaching, and following rules or instructions). *See Guidance*, 84 Fed. Reg. at 52.

⁶ Mental processes are concepts performed in the human mind including an observation, evaluation, judgment, or opinion. *See Guidance*, 84 Fed. Reg. at 52.

modules; and (7) dynamic sale allocation module that can apply an algorithm, every limitation of claim 11 recites an abstract idea, namely organizing human activity, by using an intermediary to facilitate and manage negotiations between a buyer and sellers in a reverse auction. These mediated commercial interactions fit squarely within the human activity organization category of the agency's guidelines. *See* Guidance, 84 Fed. Reg. at 52 (listing exemplary methods of organizing human activity).

That is, the particular functions of the recited modules, namely (1) receiving an offer to buy an item; (2) verifying the buyer's funds availability; (3) receiving bids from sellers; (4) selecting a bidding seller upon time period expiration; (5) allocating the item's sale to the selected seller based on the recited characteristics; and (6) distributing the verified funds to the seller are all functions that a human facilitator or mediator could perform on behalf of the relevant parties, namely the buyer and sellers in the reverse auction.

Although the claim recites an abstract idea based on these methods of organizing human activity, we nevertheless must still determine whether the abstract idea is integrated into a practical application, namely whether the claim applies, relies on, or uses the abstract idea in a manner that imposes a meaningful limit on the abstract idea, such that the claim is more than a drafting effort designed to monopolize the abstract idea. *See* Guidance, 84 Fed. Reg. at 54–55. To this end, we (1) identify whether there are any additional recited elements beyond the abstract idea, and (2) evaluate those elements individually and collectively to determine whether they integrate the exception into a practical application. *See id.*

Here, the recited (1) storage media; (2) application; (3) online environment; (4) database; (5) computer memory; (6) software modules; and (7) dynamic sale allocation module that can apply an algorithm are the only recited elements beyond the abstract idea, but those additional elements do not integrate the abstract idea into a practical application when reading claim 11 as a whole. First, we are not persuaded that the claimed invention improves the computer or its components' functionality or efficiency, or otherwise changes the way those devices functions, at least in the sense contemplated by the Federal Circuit in *Enfish LLC v. Microsoft Corporation*, 822 F.3d 1327 (Fed. Cir. 2016), despite Appellant's arguments to the contrary (App. Br. 14–15; Reply Br. 6–7). The claimed self-referential table in *Enfish* was a specific type of data structure designed to improve the way a computer stores and retrieves data in memory. *Enfish*, 822 F.3d at 1339. To the extent Appellant contends that the claimed invention uses such a data structure to improve a computer's functionality or efficiency, or otherwise change the way that device functions (*see* App. Br. 14–15; Reply Br. 6–7), there is no persuasive evidence on this record to substantiate such a contention.

Appellant's reliance on *DDR Holdings, LLC v. Hotels.Com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014) (App. Br. 17–20; Reply Br. 7–8, 11) is likewise unavailing. There, instead of a computer network operating in its normal, expected manner by sending a website visitor to a third-party website apparently connected with a clicked advertisement, the claimed invention in *DDR* generated and directed the visitor to a hybrid page that presented (1) product information from the third party, and (2) visual “look and feel” elements from the host website. *DDR*, 773 F.3d at 1258–59. Given this

particular Internet-based solution, the court held that the claimed invention did not merely use the Internet to perform a business practice known from the pre-Internet world, but rather was necessarily rooted in computer technology to overcome a problem specifically arising in computer networks. *Id.* at 1257.

That is not the case here. As noted previously, Appellant’s claimed invention, in essence, organizes human activity by using an intermediary to facilitate and manage negotiations between a buyer and sellers in a reverse auction. Despite Appellant’s arguments to the contrary (App. Br. 17–20; Reply Br. 7–8, 11), the claimed invention here is not necessarily rooted in computer technology in the sense contemplated by *DDR* where the claimed invention solved a challenge particular to the Internet. Although the Appellant’s invention uses various computer-based components, including (1) a computer-based processor used to create an intermediary application that integrates with an online reverse auction environment comprising a database in computer memory, and (2) computer-based modules, the claimed invention does not solve a challenge particular to the computer or the network used to implement this functionality.

Although the claimed invention requires computer components, it is the incorporation of those components—not a claimed rule—that purportedly improves the existing process. *Cf. FairWarning IP, LLC v. Iatric Systems, Inc.*, 839 F.3d 1089, 1095 (Fed. Cir. 2016). In short, the claimed invention does not focus on improving computers as tools, but rather certain independently abstract ideas that use computers as tools. *See also Mortgage Grader Inc. v. First Choice Loan Services, Inc.*, 811 F.3d 1314, 1324–25 (Fed. Cir. 2016) (noting that components such an “interface,”

“network,” and “database” are generic computer components that do not satisfy the inventive concept requirement); *see also* Guidance, 84 Fed. Reg. at 55 (citing MPEP § 2106.05(f)).

Therefore, we do not find that the claim recites additional elements improving (1) the computer itself, or (2) another technology or technical field. *See* Guidance, 84 Fed. Reg. at 55 (citing MPEP § 2106.05(a)). Rather, the above-noted additional elements merely (1) apply the abstract idea on a computer; (2) include instructions to implement the abstract idea on a computer; or (3) use the computer as a tool to perform the abstract idea. *See* Guidance, 84 Fed. Reg. at 55 (citing MPEP § 2106.05(f)).

That the claimed invention uses an intermediary to perform various functions—including facilitating anonymous transactions—does not integrate the abstract idea into a practical application. It is well settled that using computer-based, third-party intermediaries, such as brokers, to facilitate transactions is a fundamental economic practice and, therefore, organizes human activity under the agency’s guidelines. *See LendingTree, LLC v. Zillow, Inc.*, 656 F. App’x 991, 993–94, 996 (Fed. Cir. 2016) (unpublished) (holding ineligible claims using a broker to coordinate loan applications between an Internet user and plural lenders to enable the lenders to compete with each other for the user’s business because a third-party intermediary or clearinghouse is a “building block of the modern economy”); *see also Mortgage Grader*, 811 F.3d at 1318, 1324 (holding ineligible claims enabling borrowers to shop for loan packages anonymously using a computer); *Dealertrack, Inc. v. Huber*, 674 F.3d 1315, 1334 (Fed. Cir. 2012) (noting that using a clearinghouse, without more, is of no consequence in determining eligibility); Guidance, 84 Fed. Reg. at 52.

Similar to the computer-based anonymous loan shopping system in *Mortgage Grader*, and the computer-based system in *LendingTree* that enabled multiple lenders to compete simultaneously for a potential borrower's business, the claimed invention here is not directed to specific improvements in the way computers and networks carry out their basic functions. Rather, the claimed invention merely uses computers to facilitate and manage negotiations between a buyer and sellers anonymously—a fundamental economic practice—and does not, therefore, integrate the abstract idea into a practical application.

In conclusion, although the recited functions may be beneficial by using an intermediary to facilitate and manage negotiations between a buyer and sellers in a reverse auction, a claim for a useful or beneficial abstract idea is still an abstract idea. *See Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379–80 (Fed. Cir. 2015).

We, therefore, agree with the Examiner that claim 11 is directed to an abstract idea.

Claims 11–30 and 39–42: Alice/Mayo Step Two

Turning to *Alice/Mayo* step two, claim 11's additional recited elements, namely the (1) storage media encoded with a computer program; (2) an application; (3) an online environment; (4) a database; (5) a computer memory; (6) software modules; and (7) a dynamic sale allocation module that can apply an algorithm—considered individually and as an ordered combination—do not provide an inventive concept such that these additional elements amount to significantly more than the abstract idea. *See Alice*, 573 U.S. at 221; *see also* Guidance, 84 Fed. Reg. at 56. As noted above, the

claimed invention merely uses generic computing components to implement the recited abstract idea.

To the extent that Appellant contends that the recited limitations, including the modules' particular recited functionality, add significantly more to the abstract idea to provide an inventive concept under *Alice/Mayo* step two (*see* App. Br. 17–23; Reply Br. 8–11), these limitations are not *additional* elements *beyond* the abstract idea, but rather are directed to the abstract idea as noted previously. *See* Guidance, 84 Fed. Reg. at 56 (instructing that *additional* recited element(s) should be evaluated in *Alice/Mayo* step two to determine whether they (1) *add* specific limitation(s) that are not well-understood, routine, and conventional in the field, or (2) simply *append* well-understood, routine, and conventional activities previously known to the industry (citing MPEP § 2106.05(d)).

Rather, the (1) storage media encoded with a computer program; (2) an application; (3) an online environment; (4) a database; (5) a computer memory; (6) software modules; and (7) a dynamic sale allocation module that can apply an algorithm are the additional recited elements whose generic computing functionality is well-understood, routine, and conventional. *Accord* Ans. 6–7 (finding that the claims' additional recited *computer*-based elements provide routine *computer* functionality to automate the recited auction functionality and transfer funds). Appellant's arguments in this regard (*see* App. Br. 17–23; Reply Br. 8–11) are, therefore, unpersuasive.

In conclusion, we do not find that the additional recited elements—considered individually and as an ordered combination—add significantly

more to the abstract idea to provide an inventive concept under *Alice/Mayo* step two. *See Alice*, 573 U.S. at 221; *see also* Guidance, 84 Fed. Reg. at 56.

Therefore, we are not persuaded that the Examiner erred in rejecting claim 11, and claims 12–30 and 39–42 not argued separately with particularity.⁷

CONCLUSION

The Examiner did not err in rejecting claims 11–30 and 39–42 under § 101.

DECISION

We affirm the Examiner’s decision to reject claims 11–30 and 39–42.

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).

AFFIRMED

⁷ Although Appellant contends that the Examiner’s Answer improperly introduced a new ground of rejection (Reply Br. 5), this matter is petitionable—not appealable—and is, therefore, not before us. *See* 37 C.F.R. § 41.40; *see also* MPEP 1207.03(b) (explaining this rule); MPEP § 706.01 (“[T]he Board will not hear or decide issues pertaining to objections and formal matters which are not properly before the Board.”); MPEP § 1201 (“The Board will not ordinarily hear a question that should be decided by the Director on petition . . .”).