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EXAMINER

PAULSON, SHEETAL R.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte THOMAS DORSETT and TUSHAR JAIN

Appeal 2018-002344
Application 14/162,743
Technology Center 3600

Before ALLEN R. MacDONALD, JASON V. MORGAN, and
MICHAEL M. BARRY, *Administrative Patent Judges*.

Opinion for the Board filed by *Administrative Patent Judge* MacDONALD.

Opinion Concurring filed by *Administrative Patent Judge* MORGAN.

MacDONALD, *Administrative Patent Judge*.

DECISION ON APPEAL¹

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from a non-final rejection of claims 1–6, 8–10, 12–16, and 18–23, which are all of the pending claims. Non-Final Act. 1. Appellants have cancelled claims 7, 11, and 17. Amendment (June 26, 2017) 7, 10, 14, 17. We have jurisdiction under 35 U.S.C. § 6(b). We REVERSE.

¹ Appellants indicate the real party in interest is ePatientFinder, Inc. App. Br. 1.

Illustrative Claim

Illustrative claim 1 (reproduced in-part) under appeal reads as follows (emphasis, formatting, and bracketed materials added):

1. A method for matching patients with a specific medical treatment comprising:
 - [A.] receiving ***specified information about a specific medical treatment*** from a company ***looking for potential candidates*** for said specific medical treatment at a server, wherein said specified information about said specific medical treatment is determined by a software application residing on said server and provided by said company over a network by said company's system;
 - [B.] accessing said specified information about said specific medical treatment on said server by the administrator of said server, wherein said administrator approves said specified information about said specific medical treatment and thereafter creates[:]
 - [i.] a medical treatment specific query record . . . ,
 - [ii.] a medical treatment specific patient screening survey record . . . ,
 - [iii.] a medical treatment specific physician consultation questionnaire record . . . ,
 - [iv.] a medical treatment specific patient information record . . . , and
 - [v.] a medical treatment specific physician information record . . . ;
 - [C.] browsing said medical treatment specific physician information records using a browser connected to the system of a referring physician's office to connect to said server through said network, wherein said system of a referring physician's office includes a patient database;

- [D.] selecting at least one said specific medical treatment;
- [E.] ***launching an applet from said server, wherein said applet runs in said browser, connects to said patient database, and accesses said medical treatment specific query record relating to said selected medical treatment;***
- [F.] using the medical treatment specific query record, querying said patient database, ***wherein said applet runs said medical treatment specific query and compares;*** patient records in said patient database with said inclusion and exclusion criteria of said medical treatment specific query, returning said patient records from said patient database that match said inclusion and exclusion criteria of said medical treatment specific query through said network to said server and storing said patient records on said server;
...
- [J.] ***scoring answers in said medical treatment specific patient screening survey record using said software application*** and scheduling said patient that has a predetermined minimum score for a consultation with said referring physician's office;
- [K.] completing the medical treatment specific physician consultation questionnaire record, . . . ;
- [L.] sending said patient record to said company looking for potential candidates for said specific medical treatment using said software application.

Rejections²

A.

The Examiner rejects claims 1–6, 8–10, 12–16, and 18–23 under 35 U.S.C. § 101 because “the claimed invention is directed to a judicial exception (i.e., a law of nature, a natural phenomenon, or an abstract idea) without significantly more,” that is, because the subject matter of the claimed invention is patent-ineligible. Non-Final Act. 3–7.

As to this rejection, our decision as to the § 101 rejection of claim 1 is determinative as to the § 101 rejection of all the claims. Therefore, except for our ultimate decision, we do not discuss further herein the § 101 rejection of claims 2–6, 8–10, 12–16, and 18–23.

B.

The Examiner rejects claims 1–6, 8–10, and 12–16, under 35 U.S.C. § 112(a) as failing to comply with the written description requirement.³ Non-Final Act. 7–8.

As to this rejection, our decision as to the § 112(a) rejection of claim 1 is determinative as to the § 112(a) rejection of all the claims. Therefore,

² All citations herein to the “Non-Final Action” are to a Non-Final Action mailed on April 18, 2017.

³ Appellants’ Appeal Brief and Reply Brief overlook that the rejection under 35 U.S.C. § 112(a) for failing to comply with the *enablement* requirement (August 15, 2016, Final Action) has been replaced by this rejection. All Appellants’ § 112(a) arguments in the appeal are directed to the withdrawn enablement rejection. We consider those arguments to the extent that we find them relevant to the § 112(a) written description rejection on appeal.

except for our ultimate decision, we do not discuss further herein the § 112(a) rejection of claims 2–6, 8–10, and 12–16.

Issues on Appeal

Has the Examiner erred in rejecting claim 1 as being directed to patent-ineligible subject matter?

Has the Examiner erred in rejecting claim 1 as failing to comply with the written description requirement?

ANALYSIS⁴

We have reviewed the Examiner’s rejections in light of Appellants’ Appeal Brief and Reply Brief arguments that the Examiner has erred.

A. Section 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. 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. 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,

⁴ Any Manual of Patent Examining Procedure (MPEP) citations herein are to MPEP Rev. 08.2017, January 2018.

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 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 187; *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.* (citation omitted) (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 and 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.* (alterations in original) (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.*

B. USPTO Section 101 Guidance

The United States Patent and Trademark Office (USPTO) recently published revised guidance on the application of § 101. USPTO’s January 7, 2019 Memorandum, *2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (“Memorandum”). Under that guidance, we first look to whether the claim recites:

- (1) (*see* Memorandum Step 2A – Prong One) 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) (*see* Memorandum Step 2A – Prong Two) additional elements that integrate the judicial exception into a practical application (*see* MPEP §§ 2106.05(a)–(c), (e)–(h)).⁵

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 (*see* Memorandum Step 2B):

(3) adds a specific limitation beyond the judicial exception that are 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 Memorandum.

C. Requirement to Provide Sufficient Articulated Reasoning

The requirement that the Examiner must provide a proper notice of rejection is set forth by 35 U.S.C. § 132:

Whenever, on examination, any claim for a patent is rejected, . . . the Director shall notify the applicant thereof, stating the reasons for such rejection . . . together with such information and references as may be useful in judging of the propriety of continuing the prosecution of his application.

The Federal Circuit has held that the Office carries its procedural burden when its rejection satisfies the requirements of 35 U.S.C. § 132 by

⁵ We acknowledge that some of these considerations may be properly evaluated under Step 2 of *Alice* (Step 2B of Office guidance). Solely for purposes of maintaining consistent treatment within the Office, we evaluate it under Step 1 of *Alice* (Step 2A of Office guidance). *See* USPTO’s January 7, 2019 Memorandum, “2019 Revised Patent Subject Matter Eligibility Guidance.”

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.” *See In re Jung*, 637 F.3d 1356, 1362 (Fed. Cir. 2011) (brackets in original, quoting 35 U.S.C. § 132).

Put simply, the Office is required to set forth the statutory basis of the rejection in a sufficiently articulate and informative manner as to meet the notice requirement of § 132. *Id.*; *see also Chester v. Miller*, 906 F.2d 1574, 1578 (Fed. Cir. 1990) (noting that § 132 “is violated when a rejection is so uninformative that it prevents the applicant from recognizing and seeking to counter the grounds for rejection”).

D. Examiner’s §101 Rejection - Alice/Mayo - Steps 1 and 2

D.1. Memorandum Step 2A – Prong One

Applying step 1 of the *Alice/Mayo* analysis, the Examiner concludes claim 1 is directed to an abstract idea.

Claim[1 is] directed to the abstract idea of collecting information about a specific medical treatment, analyzing the collected information to create a medical treatment specific query record, collect patient information matching medical treatment specific query record, collect patient screening survey record and consultation questionnaire record from matched patients, collecting consent to the specific medical treatment from matched patients, collecting answers to patient screening survey, analyzing the survey to provide scoring to the answers, displaying patients that are potential candidates for the specific medical treatment, which is an example identified by the courts to be abstract ideas.

Non-Final Act. 3 (emphasis omitted).

This merely encompasses the abstract idea of collecting information (collecting information about a specific medical treatment, collect patient information matching medical treatment specific query record, collect patient screening survey

record and consultation questionnaire record from matched patients, collecting consent to the specific medical treatment from matched patients, collecting answers to patient screening survey), analyzing it (analyzing the collected information to create a medical treatment specific query record, analyzing the survey to provide scoring to the answers), and displaying certain results of the collection and analysis (displaying patients that are potential candidates for the specific medical treatment) (*Electric Power Group*).

Non-Final Act. 5.

As the court explained in *Electric Power*, “merely selecting information, by content or source, for collection, analysis, and display does nothing significant to differentiate a process from **ordinary mental processes**, whose implicit exclusion from § 101 undergirds the information-based category of abstract ideas.” *Elec. Power Grp.*, 830 F.3d at 1355.

Ans. 12 (emphasis added).

D.2. *Memorandum Step 2A – Prong Two*

Applying step 2 of the *Alice/Mayo* analysis, the Examiner concludes:

A claim directed to a judicial exception (an abstract idea), must be analyzed to determine if the claim as a whole amounts to significantly more than the judicial exception itself. Limitations that may be enough to qualify as significantly more include: improvements to another technology or technical field; improvements to the functioning of the computer itself; applying the judicial exception with, or by use of, a particular machine; effecting a transformation or reduction of a particular article to a different state or thing; adding a specific limitation other than what is well-understood, routine and conventional in the field, or adding unconventional steps that confine the claim to a particular useful application.

In this case, the claims do not include limitations that meet the criteria listed above. The claims do not include improvements to another technology or technical field; nor do they include improvements to the functioning of the computer itself. The specification fails to provide any technical details for the tangible

components, but instead predominately describes the system and methods in purely functional terms.

Non-Final Act. 6–7.

D.3. *Memorandum Step 2B*

Further applying step 2 of the *Alice/Mayo* analysis, the Examiner concludes:

The abstract idea per se, amount[s] to no more than a recitation of (a) generic computer structure that serves to perform generic computer functions that serve to merely link the abstract idea to a particular technological environment (i.e. server, network, data storage device, database, *an applet*, interactive voice response system, etc.) Applicant’s specification, paragraphs 28–29 discuss the generic computer structure used to implement the invention[]; (b) functions that are well-understood, routine, and conventional activities previously known to the pertinent industry (i.e. receiving, accessing, browsing, selecting, launching, comparing, contacting, completing, scoring, sending, etc.). Generic computer components recited as performing generic computer functions that are well-understood, routine and conventional activities amount to no more than implementing the abstract idea with a computerized system.

Non-Final Act. 6 (emphasis modified).

E. *Appellants’ § 101 Arguments*⁶

Appellants contend:

[T]he present claims as a whole amount to significantly more than a judicially recognized exception. The claims . . . add specific limitations other than what is well-understood, or routine in the field . . . that confine the claims to a particular useful application.

...

⁶ The contentions we discuss herein are determinative as to the § 101 rejection on appeal. Therefore, we do not discuss Appellants’ other § 101 contentions herein.

Though the Examiner has cited various case law on pages 4–5 of the April 2017 Office Action, this case law is merely utilized by the Examiner to provide a general argument that abstract ideas are not patentable. And, the case law cited by the Examiner on page 5 of the April 2017 Office Action is merely utilized to provide general arguments that abstract ideas implemented on a computer are insufficient to make the claimed invention patent eligible.

App. Br. 24.

F. *Panel’s § 101 Analysis*

Applying the *Alice/Mayo* analysis, we agree with the Examiner that claim 1 *recites* a judicial exception in the form of a mental process (i.e., a concept that can be performed in the human mind). We agree, however, with Appellants’ argument (App. Br. 24) that the Examiner has improperly concluded “[t]he claims do not include additional elements that are sufficient to amount to significantly more than the judicial exception.” Non-Final Act. 6.

While we agree with the Examiner’s conclusion as to a mental process, we find no basis for the “not significantly more” conclusion as to the explicitly claimed “applet” limitations. *Id.* We find no analysis in the rejection to support the claimed use of (i.e., functions performed by) the “applet” being well-understood, routine, and conventional. *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1369 (Fed. Cir. 2018) (“Whether something is well-understood, routine, and conventional to a skilled artisan at the time of the patent is a factual determination”).⁷

⁷ We note Appellants’ Specification describes both an applet-based embodiment (¶ 33) and an alternative, non-applet based embodiment (¶ 35). This is not a case of a claim directed to an abstract idea that otherwise recites “just do it with a computer.” *Alice*, 573 U.S. at 223 (“mere recitation of a

We conclude, given the functionality of Appellants’ “applet” claim limitations, there is insufficient articulated reasoning to support the Examiner’s finding that “[t]he claims do not include additional elements that are sufficient to amount to significantly more than the judicial exception.” Non-Final Act. 6. Therefore, we conclude that there is insufficient articulated reasoning to support the Examiner’s final legal conclusion that claim 1 is directed to a judicial exception without significantly more (Non-Final Act. 3), i.e., that the claimed invention is directed to non-statutory subject matter.

We do not sustain the rejection under 35 U.S.C. § 101 of claim 1.

G. Section 112(a)

G.1. Examiner’s Rejection

The Examiner rejected claims 1 and 15 under 35 U.S.C. § 112(a) as failing to comply with the written description requirement. Non-Final Act. 9–10.

Claims 1, 8, and 13 recite the limitation “scoring answers in . . . patient screening survey record . . . and scheduling said patient that has a predetermined minimum score for a consultation.” Examiner is unable to determine the support regarding scoring of the answers; is there an algorithm that scores specific answers and how is the minimum score determined for scheduling. Furthermore, how does the scheduling occur once the minimum score is met; through a phone call, a browser, email, or text, etc.

Non-Final Act. 8

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.”)

G.2. Appellants' Appeal Brief Contention

Appellants raise the following argument in contending that the Examiner erred in rejecting claim 1 under 35 U.S.C. § 112(a).

Appellants respectfully assert that such a scoring process is well known in the art, and that one skilled in the art for identifying candidates for specific medical treatments, such as clinical research trials, would clearly be able to produce a scoring technique for the claimed process based on the descriptions within the Specification.

As noted within paragraph [0003] of the Specification, potential candidates for a given clinical trial (or any specified medical treatment) “must meet certain criteria established by the sponsor and/or the investigator.” Examples of such criteria are then noted within paragraph [0003], with a particular example noted in paragraph [0047].

Furthermore, such criteria are also generally categorized as inclusive or exclusive, again as is well known in the art, meaning that whether a potential candidate meets a particular aspect of the criteria can be based on whether the particular criteria factor would include the person as a potential candidate for the specific medical treatment, or would exclude such person as being a candidate for such a specified medical treatment. See, paragraph [0003].

App. Br. 63–64.

G.3. Examiner's Answer

In the Answer, the Examiner states:

Appellant[s] within the specification must provide how to score the answers to the survey in order to *enable* the invention. Para. 3 of the specification merely recites meeting a certain criteria, but fails to provide how the scoring of answers is performed in a survey record.

Ans. 25.

G.4. *Panel Determination*

The Federal Circuit explained that “[t]he test for the sufficiency of the written description ‘is whether the disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.’” *Vasudevan Software, Inc. v. MicroStrategy, Inc.*, 782 F.3d 671, 682 (Fed. Cir. 2015) (quoting *Ariad Pharms., Inc. v. Eli Lilly and Co.*, 598F.3d 1336, 1351 (Fed. Cir. 2010) (en banc)).

The Examiner’s assertions that the “Examiner is unable to determine the support” (Non-Final Act. 8) is not the test for the sufficiency of the written description. The Examiner has not presented an articulated reasoning as to why those skilled in the art would conclude that the inventor did not have possession of the claimed subject matter as of the filing date. Further, in response to Appellants’ at least minimally pertinent arguments (App. Br. 63–64), the Examiner does not stick to the written description issue on appeal and instead states the specification must “enable the invention.” Ans. 25.

We conclude there is insufficient articulated reasoning to support the Examiner’s conclusion that claim 1 fails to comply with the written description requirement.

CONCLUSIONS

(1) Appellants have established that the Examiner erred in rejecting claims 1–6, 8–10, 12–16, and 18–23 under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter.

(2) Appellants have established that the Examiner erred in rejecting claims 1–6, 8–10, and 12–16 as being unpatentable under 35 U.S.C. § 112(a) as failing to comply with the written description requirement.

(3) Claims 1–6, 8–10, 12–16, and 18–23 have not been shown to be unpatentable.

DECISION

The Examiner’s rejection of claims 1–6, 8–10, 12–16, and 18–23 under 35 U.S.C. § 101, as being directed to patent-ineligible subject matter is **reversed**.

The Examiner’s rejection of claims 1–6, 8–10, and 12–16, as being unpatentable under 35 U.S.C. § 112(a) is **reversed**.

REVERSED

MORGAN, Administrative Patent Judge, CONCURRING

I write separately to take note of evidence that is not before us that may be pertinent and to explain in more detail why I support reversal of the Examiner’s 35 U.S.C. § 101 rejection.

Specifically, I note that—although the record before this panel evinces insufficient analysis or evidence showing the claimed use of an applet was well-understood, routine, and conventional—ample evidence exists outside the record that applet technologies were well-understood, routine, and conventional. *See, e.g., JAVASOFT SHIPS JAVA 1.0*, available at <https://web.archive.org/web/20070310235103/http://www.sun.com/smi/Press/sunflash/1996-01/sunflash.960123.10561.xml> (Jan. 23, 1996) (“Since its announcement in May 1995, Java has been widely used to create hundreds of ‘applets’ or small applications which can be downloaded across a network and can run locally”). While particular applet-based technologies have become or are becoming obsolete (*see, e.g., JEP 289: Deprecate the Applet API*, available at <http://openjdk.java.net/jeps/289> (created Feb. 9, 2016; updated Oct. 19, 2017)), their role in increasing the flexibility of functionality distribution over a network (e.g., shifting functionality from server-side to client-side) would have been familiar to artisan of ordinary skill.

Despite Appellants’ argument that the claimed invention “require[s] an arguably inventive distribution of functionality within one or more networks” (Appeal Br. 28; *see also* Reply Br. 2, 5), the Examiner summarily finds “[t]he arrangement of computer and network components seem to function in a generic manner and the tiered methodology is simply gathering information through a network and analyzing that information of [sic]

patient eligibility for a medical treatment or clinical trial” (Ans. 13). That is, the Examiner fails both: (1) to proffer evidence that the recited applets were well-known, routine, and conventional and (2) to provide sufficient analysis showing that their claimed use merely represents performing an abstract idea using generic computer or network technologies.

Such lack of analysis is particularly problematic given that “an inventive concept can be found in the non-conventional and non-generic arrangement of known, conventional pieces.” *Bascom Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1350 (Fed. Cir. 2016). The line can be fine between applying an abstract idea on generic technologies and arranging or using conventional technologies in a patent-eligible manner. *Compare id.* at 1348 (“filtering content is an abstract idea because it is a longstanding, well-known method of organizing human behavior, similar to concepts previously found to be abstract”) *with id.* at 1352 (claims that carved “out a specific location for the filtering system (a remote ISP server) and require[d] the filtering system to give users the ability to customize filtering for their individual network accounts” were deemed patent-eligible). Therefore, it is incumbent on the Examiner to analyze the specific arrangement of claim elements rather than rely on vague, cursory characterizations alone.

Accordingly, although I believe applets were well-understood, routine, and conventional, I agree with the majority that the Examiner’s determinations fail to show that their claimed use was also well-understood, routine, and conventional; therefore, I concur in the reversal of the Examiner’s 35 U.S.C. § 101 rejection.