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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DAVID GERARD LEDET

Appeal 2018-003288
Application 13/790,439
Technology Center 3600

Before ALLEN R. MacDONALD, MICHAEL J. ENGLE, and
IFTIKHAR AHMED, *Administrative Patent Judges*.

ENGLE, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Open Invention Network LLC (“Appellant”¹) appeals under 35 U.S.C. § 134(a) from the Examiner’s decision rejecting claims 1–20, which are all of the claims pending in the application. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ We use the word “Appellant” to refer to “Applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Open Invention Network LLC. Appeal Br. 3.

TECHNOLOGY

The claims relate to sending a broadcast message to different tiers of users and summarizing the responses. Claim 1 is illustrative and reproduced below with the limitation at issue emphasized:

1. A method, comprising:

identifying, by at least one mobile processor, a group of participants to receive at least one broadcast message transmitted from a wireless device;

establishing, by said at least one mobile processor, a first tier of participants among the group of participants and designating at least one participant of the group of participants as part of the first tier of participants, by said at least one mobile processor establishing said first tier of participants is based on a first tier selection criteria based on a relational proximity, a correspondence type and a correspondence frequency of said first tier of participants;

establishing, by said at least one mobile processor, at least one additional tier of participants among the group of participants and designating at least one additional participant of the group of participants as part of a second tier of participants, said at least one mobile processor establishing at least one additional tier of participants is based on at least one additional tier selection criteria based on at least one of the relational proximity, the correspondence type and the correspondence frequency of said at least one additional tier of participants;

transmitting, by a transmitter, said at least one broadcast message from the wireless device to a plurality of computing devices corresponding to said first tier of participants and the at least one additional tier of participants; and

transmitting, by said transmitter, additional data to at least one member of said first tier of participants based on predefined relationship data identifying a relationship between the at least one member of the first tier of participants and said wireless device,

wherein, based on analysis of responses received to the at least one broadcast message, at least one summary message is sent to the wireless device containing one of a most popular response, a most important response, and a most concise information received based on all received responses.

REJECTIONS

Claims 1–20 stand rejected under 35 U.S.C. § 101 for claiming patent-ineligible subject matter. Final Act. 7.

Claims 1–5, 7–12, and 14–19 stand rejected under 35 U.S.C. § 103(a) as obvious over Bird (US 2008/0278740 A1; Nov. 13, 2008), Vance (US 2010/0246789 A1; Sept. 30, 2010), Turski (US 2011/0010182 A1; Jan. 13, 2011), and Bagga (US 2005/0262214 A1; Nov. 24, 2005). Final Act. 11.

Claims 6, 13, and 20 stand rejected under 35 U.S.C. § 103(a) as obvious over Bird, Vance, Turski, Bagga, and Stovicek (US 2009/0313555 A1; Dec. 17, 2009). Final Act. 18–19.

Claims 1–5, 7–12, and 14–19 stand rejected for non-statutory double patenting over claims 1, 8, and 15 of U.S. Patent No. 9,313,623 B1 (Apr. 12, 2016) (“the ’623 patent”) in view of Bird, Vance, Turski, and Bagga. Final Act. 3–4.

Claims 6, 13, and 20 stand rejected for non-statutory double patenting over claims 1, 8, and 15 of the ’623 patent in view of Bird, Vance, Turski, Bagga, and Stovicek. Final Act. 5.

ISSUES

1. Did the Examiner err in concluding that claim 1 is directed to patent-ineligible subject matter without significantly more?
2. Did the Examiner err in finding Bagga teaches or suggests “based on analysis of responses received to the at least one broadcast

message, at least one summary message is sent to the wireless device containing one of a most popular response, a most important response, and a most concise information received based on all received responses,” as recited in claim 1?

ANALYSIS

§ 101

35 U.S.C. § 101 defines patentable subject matter, but the Supreme Court has “long held that this provision contains an important implicit exception” that “[l]aws of nature, natural phenomena, and abstract ideas are not patentable.” *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 70 (2012) (quotation omitted). “Eligibility under 35 U.S.C. § 101 is a question of law, based on underlying facts.” *SAP Am., Inc. v. InvestPic, LLC*, 898 F.3d 1161, 1166 (Fed. Cir. 2018). To determine patentable subject matter, the Supreme Court has set forth a two part test.

“First, we determine whether the claims at issue are directed to one of those patent-ineligible concepts” of “laws of nature, natural phenomena, and abstract ideas.” *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 217 (2014). A court must be cognizant that “all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas” (*Mayo*, 566 U.S. at 71), and “describing the claims at . . . a high level of abstraction and untethered from the language of the claims all but ensures that the exceptions to § 101 swallow the rule.” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1337 (Fed. Cir. 2016). Instead, “we evaluate the focus of the claimed advance over the prior art to determine if the character of the claim as a whole, considered in light of the specification, is directed to excluded subject matter.” *Trading Techs. Int’l, Inc. v. IBG LLC*, 921 F.3d

1084, 1092 (Fed. Cir. 2019) (quotation omitted). “The inquiry often is whether the claims are directed to ‘a specific means or method’ for improving technology or whether they are simply directed to an abstract end-result.” *RecogniCorp, LLC v. Nintendo Co.*, 855 F.3d 1322, 1326 (Fed. Cir. 2017).

If the claims are directed to an abstract idea or other ineligible concept, then we continue to the second step and “consider the elements of each claim both individually and ‘as an ordered combination’ to determine whether the additional elements ‘transform the nature of the claim’ into a patent-eligible application.” *Alice*, 573 U.S. at 217 (quoting *Mayo*, 566 U.S. at 79, 78). The Supreme Court has “described step two of this analysis as a search for an ‘inventive concept’—*i.e.*, 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.” *Id.* at 217–18 (quotation omitted). However, “[t]he abstract idea itself cannot supply the inventive concept, no matter how groundbreaking the advance.” *Trading Techs.*, 921 F.3d at 1093 (quotation omitted).

In 2019, the U.S. Patent & Trademark Office published revised guidance on the application of § 101. USPTO, *2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (Jan. 7, 2019) (“Guidance”); USPTO, *October 2019 Update: Subject Matter Eligibility*, available at https://www.uspto.gov/sites/default/files/documents/peg_oct_2019_update.pdf (“Oct. Update”). Under that guidance, we look to whether the claim recites

- (1) a judicial exception, such as a law of nature or any of the following groupings of abstract ideas:
 - (a) mathematical concepts, such as mathematical formulas;
 - (b) certain methods of organizing human activity, such as a fundamental economic practice; or
 - (c) mental processes, such as an observation or evaluation performed in the human mind;
- (2) any additional limitations such that the claim as a whole integrates the judicial exception into a practical application (*see* MPEP § 2106.05(a)–(c), (e)–(h)); and
- (3) any additional limitations beyond the judicial exception that, alone or in combination, were not “well-understood, routine, conventional” in the field (*see* MPEP § 2106.05(d)).

See Guidance 52, 55, 56.

USPTO Step 2A, Prong One

Here, claim 1 recites:

identifying . . . a group of participants to receive at least one broadcast message . . . ;

establishing . . . a first tier of participants among the group of participants and designating at least one participant of the group of participants as part of the first tier of participants, . . . establishing said first tier of participants is based on a first tier selection criteria based on a relational proximity, a correspondence type and a correspondence frequency of said first tier of participants;

establishing . . . at least one additional tier of participants among the group of participants and designating at least one additional participant of the group of participants as part of a second tier of participants, . . . establishing at least one additional tier of participants is based on at least one additional tier

selection criteria based on at least one of the relational proximity, the correspondence type and the correspondence frequency of said at least one additional tier of participants;

transmitting, by a transmitter, said at least one broadcast message . . . to a plurality . . . corresponding to said first tier of participants and the at least one additional tier of participants; and

transmitting, by said transmitter, additional data to at least one member of said first tier of participants based on predefined relationship data identifying a relationship between the at least one member of the first tier of participants and [the sender],

wherein, based on analysis of responses received to the at least one broadcast message, at least one summary message is sent . . . containing one of a most popular response, a most important response, and a most concise information received based on all received responses.

“[W]ith the exception of generic computer-implemented steps, there is nothing in the claims themselves that foreclose them from being performed by a human, mentally or with pen and paper.” *Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1318 (Fed. Cir. 2016). Here, other than the generic computer components discussed below (specifically, the “mobile processor”; “wireless device”; and “computing devices”), the “identifying” and “establishing” steps can be performed mentally. For example, before physically mailing holiday cards, you might mentally decide that everyone on your list will receive your holiday card but you want your closest friends and family to also receive a handwritten sentence or two. You therefore have mentally divided a group into two tiers based on a correspondence type (e.g., a mailed holiday card) as well as relational proximity and correspondence frequency (e.g., your closest friends and family). *See also* Final Act. 8 (determining that “[o]rganizing the distribution of messages

using a group and tiers of participants in a group as claimed is an abstract idea” because it is similar to collecting data, analyzing that data, and displaying results).

Similarly, the “analysis of responses received to the at least one broadcast message” and a “summary” containing “one of a most popular response, a most important response, and a most concise information received based on all received responses” can be done mentally. For example, you might mentally note which picture or news in your holiday card garnered the most comments from recipients. As the Federal Circuit has said, “analyzing information by steps people go through in their minds,” without more, constitutes “mental processes within the abstract-idea category.” *Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1146 (Fed. Cir. 2016) (quotation omitted).

Claim 1 therefore recites mental processes, which are an abstract idea.

Other than the generic computer components, the “transmitting” steps also can be performed verbally by humans talking (e.g., verbally saying “Happy holidays!” to everyone you meet but “Happy holidays! Would you like to come to our holiday party?” to your closest friends and family) or via physical methods of communication (e.g., a mailed holiday card). Claim 1 therefore recites a form of “managing personal behavior or relationships or interactions between people (including social activities . . .),” which falls within “certain methods of organizing human activity” that forms one grouping of abstract ideas. Guidance 52; *see also Interval Licensing LLC v. AOL, Inc.*, 896 F.3d 1335, 1344 (Fed. Cir. 2018) (holding that “the act of providing someone an additional set of information without disrupting the ongoing provision of an initial set of information is an abstract idea,” such as

“the nontechnical human activity of passing a note to a person who is in the middle of a meeting or conversation”).

Moreover, “[a]dding one abstract idea . . . to another abstract idea . . . does not render the claim non-abstract.” *RecogniCorp*, 855 F.3d at 1327.

Accordingly, claim 1 recites an abstract idea.

USPTO Step 2A, Prong Two

Appellant points to the limitation “based on analysis of responses received to the at least one broadcast message, at least one summary message is sent to the wireless device containing one of a most popular response, a most important response, and a most concise information received based on all received responses.” Appeal Br. 16. Appellant relies on this limitation to argue that the “claims are clearly directed to a technological improvement in the field of medical analysis and response. The claims teach this improvement by detecting accuracy and value in a plurality of response messages to a broadcasted question or problem.” *Id.* In particular, “[p]revious multiple messaging processes . . . generate a large amount of output but not necessarily in any logical order and also likely . . . produce a significant amount of unintelligible or worthless material,” whereas “[t]he present disclosure takes advantage of more advanced search technologies by analyzing received content and analyzing and prioritizing the content in ways that illustrate the value of substantive responses and exclude worthless or repetitive responses.” *Id.*

We are not persuaded by Appellant’s argument that the problem or solution is technological. The Federal Circuit is clear that “[t]he abstract idea itself cannot supply the inventive concept, no matter how groundbreaking the advance.” *Trading Techs. Int’l, Inc. v. IBG LLC*, 921

F.3d 1084, 1093 (Fed. Cir. 2019) (quotation omitted). As discussed above, the steps can be performed mentally or verbally, other than the computer components of a “mobile processor”; “wireless device”; and “computing devices.” Thus, Appellant cannot rely on the abstract idea as providing significantly more.

Moreover, the Federal Circuit “look[s] to whether the claims in these patents focus on a specific means or method that improves the relevant technology or are instead directed to a result or effect that itself is the abstract idea and merely invoke generic processes and machinery.” *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1314 (Fed. Cir. 2016). Here, the computer components do not provide a specific means or method that improves technology. For example, claim 1 does not provide any technological way to determine what is “a most popular response”; “a most important response” or “a most concise information received.” Instead, the claim recites only an abstract idea that is to be performed “by” a mobile processor, “from” a wireless device, or “to” computing devices. We agree with the Supreme Court that “the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.” *Alice*, 573 U.S. at 223.

In reply, Appellant further argues that the use of “configuration tables”; “natural language processing”; and “the Python language” provide “technological solutions to technological problems.” Reply Br. 5. However, none of these are recited in claim 1 and “features that are not claimed are irrelevant as to step 1 or step 2 of the *Mayo/Alice* analysis.” *Am. Axle & Mfg., Inc. v. Neapco Holdings LLC*, 939 F.3d 1355, 1363 (Fed. Cir. 2019).

Finally, to the extent a “transmitter” transmitting or a “broadcast message” were limited to an electronic implementation rather than verbal or physical communication, those would be insignificant extra-solution activity or field of use, akin to merely automating a manual process. *See, e.g.*, MPEP § 2106.05(g), (h).

Thus, we are not persuaded that any additional limitation, alone or in combination, reflects an improvement in the functioning of a computer or other technology. Accordingly, claim 1 does not integrate the abstract idea into a practical application.

USPTO Step 2B

The additional limitations in claim 1 such as a “mobile processor”; “wireless device”; and “computing devices” were well-understood, routine, and conventional. The Specification explains that they can be any generic device. *E.g.*, Spec. ¶¶ 97 (“the plurality of computing devices may include at least one of a smartphone, cell phone, tablet computing device, personal computer, and a laptop computer”), 21 (“a wireless user device . . . may be a computer, laptop, mobile, wireless or cellular phone, a PDA, a tablet, a client[,] a server or any device that contains a processor and/or memory”), 21 (“The present application discussed throughout the disclosure may work with any device, such as a personal computer with a touch screen, a laptop with a touch screen, a personal computing tablet, a smartphone or any device with a processor, memory and a touch screen.”), 57 (similar), 99 (“The processor and storage medium may reside in an application specific integrated circuit (‘ASIC’)” or “[i]n the alternative . . . as discrete components.”).

In sum, whether the additional limitations are considered individually or in ordered combination, claim 1 fails to recite an inventive concept beyond the abstract idea.

Accordingly, we sustain the rejection under § 101 of claim 1, and claims 2–20, which Appellant argue are patentable for similar reasons. *See* Appeal Br. 13–18; 37 C.F.R. § 41.37(c)(1)(iv).

§ 103

All of the independent claims, including claim 1, recite “based on analysis of responses received to the at least one broadcast message, at least one summary message is sent to the wireless device containing one of a most popular response, a most important response, and a most concise information received based on all received responses.”

Appellant argues that Bagga teaches each *individual* message in a thread gets condensed down to a single sentence representing that particular message, but that nothing in Bagga teaches creating a single summary message containing the most popular response, most important response, or most concise information across *all* received responses. Appeal Br. 25. Appellant illustrates this point with Figure 3 of Bagga, reproduced below.

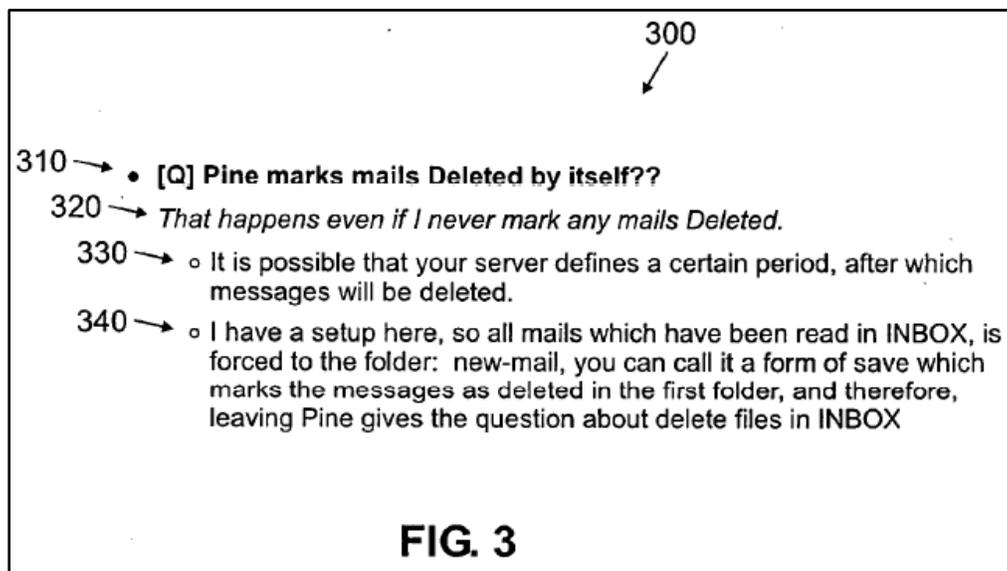


Figure 3 of Bagga depicts an “exemplary thread overview” that includes (1) “an indication 310 of the original subject of the initial posting”; (2) “an indicative summary 320 of the initial posting”; and (3) “indicative summaries 330, 340 of one or more follow up email messages.” Bagga ¶ 19. As can be seen, summaries 330 and 340 constitute *multiple* single-sentence summaries (i.e., one for each message) rather than one summary for all messages.

The Examiner counters by determining that “the claim does not require any distillation of the multiple responses into one message” and “no particulars of the analysis requires any comparative analysis between messages.” Ans. 8.

However, the Examiner has not sufficiently explained how Bagga teaches or suggests this claim limitation. In Bagga, each “follow-up email” gets divided up into sentences and each sentence gets a score for how much it overlaps with the original message (called the “root message”). Bagga ¶ 24. “The sentence with [the] highest score is extracted . . . as an indicative summary for the follow-up message.” *Id.* Thus, each follow-up message

gets summarized by a single sentence within that message, such that one sentence from each follow-up message will be displayed in the thread, as seen in Figure 3 of Bagga.

The Examiner has not sufficiently explained how each single-sentence summary in Bagga is “based on *all* received responses,” as recited in the claims. Rather, it appears that each individual response is based on *only one* follow-up message.

Further, the Examiner appears to rely on Bagga’s selected sentence containing the “most important *information bearing word types*,” Ans. 9–10 (emphasis added), but the claims recite a “summary message . . . containing . . . a most important *response* . . . based on all received responses.” To the extent the claimed “response” is Bagga’s “follow-up email,” Bagga’s single sentence summary does not contain “a most important [follow-up email].” Thus, the Examiner has not sufficiently explained how Bagga’s summary message “contain[s] . . . a most important *response*.”

Accordingly, given the record here, we are constrained to reverse the rejection of claims 1–20.

Double Patenting

Appellant asks that the double patenting rejection “be held in abeyance pending disposition . . . on this appeal.” Appeal Br. 13. The Examiner notes that “Appellant does not dispute the propriety of the double patenting rejection in the appeal brief.” Ans. 3.

Accordingly, we sustain the double patenting rejections of claims 1–20 *pro forma*.

DECISION

The following table summarizes the outcome of each rejection:

Claims Rejected	Statute	Basis	Affirmed	Reversed
1–20	§ 101	Eligibility	1–20	
1–5, 7–12, 14–19	§ 103	Bird, Vance, Turski, Bagga		1–5, 7–12, 14–19
6, 13, 20	§ 103	Bird, Vance, Turski, Bagga, Stovicek		6, 13, 20
1–5, 7–12, 14–19		Double patenting – '623 patent, Bird, Vance, Turski, Bagga	1–5, 7–12, 14–19	
6, 13, 20		Double patenting – '623 patent, Bird, Vance, Turski, Bagga, Stovicek	6, 13, 20	
OVERALL			1–20	

TIME TO RESPOND

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. § 1.36(a)(1)(iv).

AFFIRMED