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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* STUART STRUMWASSER  
and THEODORE JAY WERTH

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Appeal 2018-004568  
Application 13/831,375<sup>1</sup>  
Technology Center 2400

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Before DENISE M. POTHIER, JASON J. CHUNG, and  
JOHN D. HAMANN, *Administrative Patent Judges*.

CHUNG, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134(a) of the Final Rejection of claims 1–4, 8–14, 17, 18, and 26–30.<sup>2</sup> We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

INVENTION

The invention relates to inputting end-user selected electronic data, inputting end-user selected gradation values of the electronic data, and creating correlation outputs of the inputted gradation values. Spec. 1. Claim

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<sup>1</sup> According to Appellants, Tengrade, Inc. is the real party in interest. Br. 2.

<sup>2</sup> Claims 5–7, 15, 16, and 19–25 are canceled. Br. 17–18, 21–22. Note, the Brief's Appendix A contains no page numbering. We use the page sequence that follows from the last page of the Brief.

1 is illustrative of the invention and is reproduced below:

1. A computer system enabling a computer to automatically identify variable-length user inputted alphanumeric topic and valuation data and to generate visual representations related thereto, comprising:

a) at least one server computer configured to receive user submissions from remote end users including both a) user-created topics, each said user created topic having user-selected alphanumeric data of a user-selected length, and b) a corresponding user-selected valuation associated with each said user-created topic, each said user-selected valuation having an alphanumeric value from a set of at least three potential alphanumeric values, wherein said at least one server is configured to receive said user submissions as electronic messages and to identify corresponding portions of said electronic messages as said user created topics and as said user-selected valuations based on the following syntax:

said user-created topic is preceded by a symbol#, and said user-created topic is an alphanumeric character string of a variable length, the end of which length is identified by said at least one server computer;

said user-selected valuation is preceded by an identifier including a\*, said valuation being an integer no less than 0 and no greater than 10;

b) said server computer being configured to store said user submissions along with associated data, including associated time data, and along with end user data;

c) said server computer being configured to determine an average or mean value of said user-selected valuations for corresponding topics;

d) said server computer being configured to present a graphical display of values of said user-selected valuations for corresponding topics over a time period, said graphical display being presented in a tornado-like format including

rows of discs which are stacked from lowest to

highest valuation, with a respective disc corresponding to a respective valuation level;

each of said discs including visual depictions of topics therein, and being configured to visually rotate for display of said topics therein.

Br. 17–18 (Claims Appendix).<sup>3</sup>

#### REJECTIONS AT ISSUE<sup>4</sup>

Claims 1–4, 8–14, 17, 18, and 26–30 stand rejected under 35 U.S.C. § 101 as being directed to patent ineligible subject matter. Final Act. 4–5.

Claims 1, 11, and 26 stand rejected under 35 U.S.C. § 112(b) as being indefinite. Final Act. 6.

Claims 1–4, 8–14, 17, 18, and 26–30 stand rejected under 35 U.S.C. § 103 as being unpatentable over the combination of Barnes (US 2009/0299824 A1; published Dec. 3, 2009), Passmore (US 2012/0240062 A1; filed Mar. 14, 2012), Ramakrishnan (US 2009/0239505 A1; published Sept. 24, 2009), and Mikytuck (US 2004/0128112 A1; published July 1, 2004). Final Act. 7–17.

#### ANALYSIS

*I. Claims 1–4, 8–14, 17, 18, and 26–30 Rejected Under 35 U.S.C. § 101*

*A. Legal Principles*

An invention is patent-eligible if it claims a “new and useful process, machine, manufacture, or composition of matter.” 35 U.S.C. § 101.

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<sup>3</sup> Appellants filed two Appeal Briefs; the first was filed on April 2, 2017 and the second was filed on October 9, 2017. In our Decision, all of our citations are to the second Appeal Brief filed on October 9, 2017.

<sup>4</sup> The rejection of claims 1, 11, and 26 under 35 U.S.C. § 112(a) was withdrawn. Ans. 3.

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

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

Concepts determined to be abstract ideas, and thus patent ineligible, include certain methods of organizing human activity, such as fundamental 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. (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 187; *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.”). 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 (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 PTO recently published revised guidance on the application of § 101. USPTO’s January 7, 2019 Memorandum, *2019 Revised Patent Subject Matter Eligibility Guidance* (“Memorandum”). *See*

<https://www.federalregister.gov/documents/2019/01/07/2018-28282/2019-revised-patent-subject-matter-eligibility-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 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 (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 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.

*B. The Examiner’s Conclusions and Appellants’ Arguments*

The Examiner concludes the present claims are directed to certain methods of organizing human activity. Final Act. 2, 4. The Examiner also determines the present claims do not amount to significantly more than an abstract idea because the Examiner finds the abstract idea is implemented on generic components that are well-understood, routine, and conventional previously known to the industry. Ans. 4–5.

Appellants argue the Examiner’s final rejection is improper because

the rejection originally rejected only claims 1, 11, and 22 and later included all pending claims in the rejection. Br. 6. Appellants argue, similar to *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016) and *McRO, Inc. v. Bandai Namco Games America Inc.*, 837 F.3d 1299, 1308–14 (Fed. Cir. 2016), the present claims are directed to automating computer identification of sentiments and values in textual data, which is a technological improvement. Br. 7–9. Appellants also argue the present claims are directed to a technological improvement because they provide novel and unique syntax within messages so that a computer system can precisely and quickly identify sentiments and values, and create advantageous graphical displays based on computer analysis of the computer identified sentiments and values. *Id.* at 10. Appellants argue, similar to *BASCOM*, the present claims are directed to a non-conventional and non-generic arrangement of known, conventional pieces, which results in an inventive concept. *Id.* at 9. We disagree with Appellants.

### *C. Discussion*

#### *1. Step 2A, Prong 1 (Alice Step 1)*

The present claims, as a whole, are directed to receiving user submissions including user-created topics and a corresponding user-selected valuation associated with the user-created topic, wherein a server computer stores the user submissions, determines an average value of the user-selected valuations, and presents a graphical display of user-selected valuations. Stated differently, these claims are directed to managing personal behavior or relationships (including social activities). According to the Memorandum, managing personal behavior or relationships (including social activities) fall into the category of certain methods of organizing

human activity, which the Memorandum explains is one category of abstract ideas. *See* Memorandum.

When claimed in a certain way, like in this case, the present claims are analogous to the claims in *Electric Power Group, LLC v. Alstom S.A.*, 830 F.3d 1350 (Fed. Cir. 2016). In *Electric Power*, the court held that the claims were drawn to “collecting information, analyzing it, and displaying certain results of the collection and analysis,” which is similar to the present claims. *Id.* at 1353. In both cases, they are drawn to certain methods of organizing human activity, which is an abstract idea.

Lastly, we disagree with Appellants’ argument that the Examiner’s 101 rejection should be withdrawn because the Examiner’s rejection is improper (Br. 6); we note the issue of whether an Examiner improperly introduced a new ground of rejection is a petitionable matter and not an appealable matter. *See* 37 C.F.R. § 41.40(a). Appellants’ failure to file timely such a petition waives the argument. *See id.*

Because the present claims recite an abstract idea, we proceed to prong 2.

2. *Step 2A, Prong 2 (Alice Step 1)*

The present claims do not integrate the abstract idea into a practical application because they do not impose any meaningful limits on practicing the abstract idea. In particular, for reasons discussed below, we disagree with Appellants’ argument that the present claims recite a technological improvement by automating computer identification of sentiments and values in textual data. Br. 7–9. We also disagree with Appellants’ argument that the present claims are directed to a technological improvement because they provide novel and unique syntax within messages so that a computer

system can precisely and quickly identify sentiments and values, and create advantageous graphical displays based on computer analysis of the computer identified sentiments and values. *Id.* at 10.

Unlike the claims of *McRO*, the present claims are not directed to rules for lip sync and facial expression animation or an improvement in computer technology. Also unlike the claims of *Enfish*, the present claims are not directed to a specific improvement to the way computers operate, embodied in the self-referential table. Instead, the present claims are directed to an abstract idea as discussed *supra*, in § I.C.1. or at best, improving an abstract idea—not a technological improvement. The Specification indicates the additional elements (i.e., server computer) recited in the present claims are merely tools used to implement the abstract idea. Spec. 17, 24.

Appellants do not make any other arguments pertaining to step 2A, prong 2. Because the present claims are directed to an abstract idea, we proceed to Step 2B.

### 3. *Step 2B (Alice Step 2)*

We agree with the Examiner's determination that the abstract idea is implemented on generic components that are well-understood, routine, and conventional previously known to the industry. Ans. 4–5. Also, the Specification supports the determination that “server computer” is a generic components. Spec. 17, 24. Appellants' Specification indicates these elements were well-understood, routine, and conventional components previously known to the industry because it describes them at a high level of generality and in a manner that indicates that they are sufficiently well-known.

We disagree with Appellants' argument that the present claims are directed to a non-conventional and non-generic arrangement of known, conventional pieces, which results in an inventive concept. Br. 9. Rather, the present claims are directed to an abstract idea using additional generic elements as tools to implement the abstract idea as discussed *supra*, in §§ I.C.1., I.C.2.—not an inventive concept. Moreover, Appellants' argument amounts to a mere assertion with inadequate support that the present claims are non-conventional and non-generic arrangement of known, conventional pieces. *See* Br. 9.

Appellants do not argue claims 2–4, 8–14, 17, 18, and 26–30 separately with particularity, but assert the rejections of those claims should be withdrawn for at least the same reasons as argued for independent claim 1. Br. 6–10. Accordingly, we sustain the Examiner's rejection of: (1) independent claims 1, 11, and 26; and (2) dependent claims 2–4, 8–10, 12–14, 17, 18, and 27–30 under 35 U.S.C. § 101.

*II. Claims 1, 11, and 26 Rejected Under 35 U.S.C. § 112(b)*

The Examiner concludes claims 1, 11, and 26 are indefinite.<sup>5</sup> Final Act. 5–6. Appellants do not proffer arguments pertaining to this rejection. Br. 5–16. We, therefore, summarily sustain the Examiner's rejection. *See* 37 C.F.R. § 41.39(a)(1).

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<sup>5</sup> Although the dependent claims usually are rejected under 35 U.S.C. § 112(b) when the independent claims are rejected, the Examiner did not reject the dependent claims. In the event of further prosecution, the Examiner may want to consider whether to include dependent claims 2–4, 8–10, 12–14, 17, 18, and 27–30 in this rejection.

*III. Claims 1–4, 8–14, 17, and 18 Rejected Under 35 U.S.C. § 103*

The Examiner finds Mikytuck teaches a graphical display presented in a tornado-like format including rows of discs, each of the discs corresponding to visual depictions of topics, which the Examiner maps to the limitation

said graphical display being presented in a tornado-like format including rows of discs . . . each of said discs including visual depictions of topics therein, and being configured to visually rotate for display of said topics therein[,]

recited in claims 1 and 11. Ans. 7–9; Final Act. 11 (citing Mikytuck ¶¶ 4, 21–22, 28, 30, 38).

Appellants argue that while Mikytuck may teach a tornado chart, Mikytuck does not teach or suggest that the graphical display in tornado-like format is “configured to visually rotate for display of said topics therein.” Br. 12 (emphasis omitted). We agree with Appellants.

We disagree with the Examiner’s finding that the cited portions of Mikytuck teaches or suggests the limitation “configured to visually *rotate* for display of said topics therein” (emphasis added) recited in claims 1 and 11. Final Act. 11 (citing Mikytuck ¶¶ 4, 21–30, 38, Fig. 6). In particular, the cited portions of Mikytuck relied upon by the Examiner merely teach a tornado chart with discs and topics, but fail to teach the recited “rotate” feature. Nor does the Examiner provide sufficient rationale as to why the cited portions of Mikytuck teach this “rotate” feature.

Accordingly, we do not sustain the Examiner’s rejection of:  
(1) independent claims 1 and 11; and (2) dependent claims 2–4, 8–10, 12–14, 17, and 18 under 35 U.S.C. § 103.

*IV. Claims 26–30 Rejected Under 35 U.S.C. § 103*

Unlike the above claims, independent claim 26 does not recite the above discussed “rotate” feature. The Examiner finds Barnes teaches a user providing a rating between 0 and 5 and Passmore teaches a hashtag preceding a user created topic, which the Examiner maps to the limitation

receive said user submissions as electronic messages and to identify corresponding portions of said electronic messages as said user created topics and as said user-selected valuations based on the following syntax: said user-created topic is preceded by a first identifier including a first pre-defined single character alphanumeric symbol, and said user-created topic is an alphanumeric character string of a variable length,

recited in claim 26. Final Act. 13–15 (citing Barnes ¶ 26; Passmore ¶¶ 55, 57, 61).

The Examiner maps Ramakrishnan’s teaching of an asterisk preceding a user valuation of 21 in combination with Barnes’ user rating between 0 and 5 to the limitation “said user-selected valuation is preceded by a second identifier including a second pre-defined character alphanumeric symbol, said valuation being integers values within a pre-defined range,” recited in claim 26. Final Act. 13, 16 (citing Barnes ¶ 26; Ramakrishnan ¶ 30). The Examiner finds Mikytuck teaches a graphical display presenting a graph in a tornado-like format including rows of discs, each of the discs corresponding to visual depictions of topics, which the Examiner maps to the limitation a “server computer being configured to present a graphical display of values of said user-selected valuations for corresponding topics, said graphical display including different images corresponding to different valuation levels,” recited in claim 26. Final Act. 17 (citing Mikytuck ¶¶ 21–30, 38).

Appellants first argue that Barnes fails to teach parsing a message to identify user-selected topics and valuations where the topic is preceded by a “#” identifier and the valuation is preceded by a “\*” identifier. Br. 11. Second, Appellants argue Passmore fails to teach a user-selected valuation preceded by a “\*” identifier followed by an integer between 0 and 10. *Id.* Appellants’ third argument is Ramakrishnan teaches using a number greater than 10 that is shared among many users, but fails to teach a unique pairing identifier that is “assigned for use by the recipient” using an “\*” along with a number between 0 and 10. *Id.* at 11–12. Fourth, Appellants argue Mikytuck teaches a tornado chart, but does not teach the any sentiment identifier, values between 0 and 10, the claim 1 limitation “rows of discs which are stacked from lowest to highest valuation,” and the claim 1 limitation “configured to visually rotate for display of said topics therein.” Lastly, Appellants argue the combination of references fail to teach the emphasized claim 26 limitations on pages 15 and 16 of the Appeal Brief. Br. 15–16. We disagree with Appellants.

Regarding Appellants’ first four arguments, “[A]ppellant’s arguments fail from the outset because . . . they are not based on limitations appearing in the claims.” *See In re Self*, 671 F.2d at 1348 (CCPA 1982). In particular, although the limitations “#,” “\*,” an “integer no less than 0 and no greater than 10,” “rows of discs which are stacked from lowest to highest valuation,” “configured to visually rotate for display of said topics therein” are recited in independent claims 1 and 11, these limitations are not recited in independent claim 26.

As for Appellants' last argument, Barnes teaches a user providing a rating between 0 and 5 and Passmore teaches a hashtag preceding a user created topic, which teaches the limitation

receive said user submissions as electronic messages and to identify corresponding portions of said electronic messages as said user created topics and as said user-selected valuations based on the following syntax: said user-created topic is preceded by a first identifier including a first pre-defined single character alphanumeric symbol, and said user-created topic is an alphanumeric character string of a variable length

recited in claim 26. Final Act. 13–15 (citing Barnes ¶ 26; Passmore ¶¶ 55, 57, 61).

Ramakrishnan's teaching of an asterisk preceding a user valuation of 21 in combination with Barnes' user rating between 0 and 5 teaches the limitation "said user-selected valuation is preceded by a second identifier including a second pre-defined character alphanumeric symbol, said valuation being integers values within a pre-defined range" recited in claim 26. Final Act. 13, 16 (citing Barnes ¶ 26; Ramakrishnan ¶ 30). Mikytuck teaches a graphical display presenting a graph in a tornado-like format including rows of discs, each of the discs corresponding to visual depictions of topics, which teaches the limitation a "server computer being configured to present a graphical display of values of said user-selected valuations for corresponding topics, said graphical display including different images corresponding to different valuation levels" recited in claim 26. Final Act. 17 (citing Mikytuck ¶¶ 21–30, 38). Thus, collectively the references teach and suggest the emphasized limitations.

Appellants do not argue claims 27–30 separately with particularity, but assert the rejections of those claims should be withdrawn for at least the

same reasons as argued for independent claim 26. Br. 10–16. Accordingly, we sustain the Examiner’s rejection of: (1) independent claim 26; and (2) dependent claims 27–30 under 35 U.S.C. § 103.

We have only considered those arguments that Appellants actually raised in the Briefs. Arguments Appellants could have made, but chose not to make, in the Briefs have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).

#### DECISION

We affirm the Examiner’s decision rejecting claims 1–4, 8–14, 17, 18, and 26–30 under 35 U.S.C. § 101.

We affirm the Examiner’s decision rejecting claims 1, 11, and 26 under 35 U.S.C. § 112(b).

We reverse the Examiner’s decision rejecting claims 1–4, 8–14, 17, and 18 under 35 U.S.C. § 103.

We affirm the Examiner’s decision rejecting claims 26–30 under 35 U.S.C. § 103.

Because we affirm at least one ground of rejection with respect to each claim on appeal, we affirm the Examiner’s decision to reject claims 1–4, 8–14, 17, 18, and 26–30. *See* 37 C.F.R. § 41.50(a)(1).

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