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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte HOWARD W. LUTNICK

Appeal 2018-004632
Application 13/847,805
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

CFPH, LLC (“Appellant”¹) appeals under 35 U.S.C. § 134(a) from the Examiner’s rejection under 35 U.S.C. § 101. 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 CFPH, LLC. Appeal Br. 3.

TECHNOLOGY

The claims relate to an auction to determine a delivery service provider to provide delivery of an order. Claim 1 is illustrative and reproduced below:

1. A method comprising:

registering, by a computing device of a referral service, each of a plurality of delivery service providers to be part of an auction system a geographic area^[2];

receiving, from a remote device of a user by a communication interface of the computing device, an indication of an order of physical goods from a merchant that does not have a proprietary delivery service;

in response to receiving the indication of the order for the plurality of physical goods from the merchant that does not have the proprietary delivery service, performing, by the computing device, an auction to determine the delivery service provider from a plurality of delivery service providers to provide a delivery service for the order by:

determining the plurality of delivery service providers based on a geographic location of the merchant being in the geographic area;

providing, through the communication interface, information about the order to populate a user interface of each of the plurality of delivery service providers, in which the information includes inexact location information for the merchant and the user,

receiving, through the communication interface, a first bid of a first amount of money and a first time frame from a first remote mobile device of a first delivery service

² We note that “an auction system a geographic area” appears to be missing one or more words between “an auction system” and “a geographic area.”

provider of the plurality of service provider^[3] and a second bid of a second amount of money and a second time frame from a second remote mobile device of a second delivery service provider of the plurality of delivery service providers, and

determining, by the computing device, based on the first amount of money and the first time frame and the second amount of money and second time frame, that the first delivery service provider should provide the delivery service for the order; and

in response to determining that the first delivery service provider should provide the delivery service, facilitating, by the computing device, delivery of the order to the user by the first delivery service provider, in which facilitating delivery includes providing, through the communication interface, the first delivery service provider with exact location information for the merchant and the user and performing payment processing for the order.

REJECTION

All pending claims⁴ stand rejected under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter without significantly more. Final Act. 4.

³ Appellant and the Examiner may wish to consider whether an “s” is missing here for a “plurality of service provider[s].”

⁴ The Appeal Brief states that the pending, rejected, and appealed claims are claims 1–4, 8–14, and 28. Appeal Br. 3; *see also id.* 12–17. The Final Office Action at various points likewise rejects “Claims 1-4, 8-14, and 28.” *E.g.*, Final Act. 7, 1. Elsewhere, the Final Office Action erroneously lists “Claims 1–3, 5–7, 10–12, 15, 22, and 23” and “claims 1-14 and 28” (*id.* at 4), but we treat that as harmless error. Based on the Appeal Brief and the amendment dated March 29, 2017, the pending and rejected claims are claims 1–4, 8–14, and 28.

ANALYSIS

Section 101 defines patentable subject matter: “Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.” 35 U.S.C. § 101. The Supreme Court, however, 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). Moreover, “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).

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 that integrate 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 1

Claim 1 recites:

registering . . . each of a plurality of delivery service providers to be part of an auction system [in] a geographic area;

receiving . . . an indication of an order of physical goods from a merchant that does not have a proprietary delivery service;

in response to receiving the indication of the order for the plurality of physical goods from the merchant that does not have the proprietary delivery service, performing . . . an auction to determine the delivery service provider from a plurality of delivery service providers to provide a delivery service for the order by:

determining the plurality of delivery service providers based on a geographic location of the merchant being in the geographic area;

providing . . . information about the order to . . . each of the plurality of delivery service providers, in which the information includes inexact location information for the merchant and the user,

receiving . . . a first bid of a first amount of money and a first time frame from . . . a first delivery service provider of the plurality of service provider[s] and a second bid of a second amount of money and a second time frame from . . . a second delivery service provider of the plurality of delivery service providers, and

determining . . . based on the first amount of money and the first time frame and the second amount of money and second time frame, that the first delivery service provider should provide the delivery service for the order; and

in response to determining that the first delivery service provider should provide the delivery service, facilitating . . . delivery of the order to the user by the first delivery service provider, in which facilitating delivery includes providing . . . the first delivery service provider with exact location information for the merchant and the user and performing payment processing for the order.

Thus, claim 1 recites a reverse auction (or solicitation of bids) for delivery of a physical good to a customer. Specifically, after a customer has ordered a physical good, delivery service providers in the area are provided with partial information (including inexact locations for the merchant and customer) and each provider can submit a bid. Each bid specifies an amount of money and a time frame. A winner is selected, and the winning provider is then provided with exact location information for the merchant and customer. Payment is also processed.

The claim as a whole therefore recites a commercial or legal interaction, which falls within the grouping of “certain methods of organizing human activity” that are abstract ideas. Guidance 52. Moreover, the reverse auction (or solicitation of bids) itself is a fundamental economic practice, which also falls within the grouping of “certain methods of organizing human activity” that are abstract ideas. We note that in one non-precedential case, the Federal Circuit affirmed under Rule 36 that claims for “conducting a . . . reverse auction” were ineligible under § 101. *Am.’s Collectibles Network, Inc. v. Jewelry Channel, Inc. USA*, 672 F. App’x 997 (Fed. Cir. 2017), *aff’g* No. CBM2014-00119, 2014 WL 5386840 (PTAB Oct. 20, 2014). More generally, the Federal Circuit has held that claims “squarely about creating a contractual relationship” were ineligible under § 101. *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1355 (Fed. Cir. 2014). Here, the contract between the merchant and the customer entails a sub-contract with a delivery service provider to deliver the purchased good, and the sub-contract is created based upon the winning bid of the reverse auction. Thus, claim 1 recites an abstract idea.

USPTO Step 2A, Prong 2

Claim 1 does recite additional limitations beyond the abstract idea, specifically that the steps are performed by a “computing device”; from a “remote device” or “remote mobile device”; through a “communication interface”; or in a “user interface.”

Appellant argues that such limitations help the method “operate more efficiently and quickly.” Appeal Br. 8; *see also id.* at 10. However, “the fact that the required calculations could be performed more efficiently via a computer does not materially alter the patent eligibility of the claimed

subject matter.” *Bancorp Servs., L.L.C. v. Sun Life Assurance Co.*, 687 F.3d 1266, 1278 (Fed. Cir. 2012). This is because “the speed increase comes from the capabilities of a general-purpose computer, rather than the patented method itself.” *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1095 (Fed. Cir. 2016). When claimed at such a high level, such computing “devices” and “interfaces” do no more than automate a bid-solicitation system that previously could have been done manually using telephones or postal mail. *See Credit Acceptance Corp. v. Westlake Servs.*, 859 F.3d 1044, 1055 (Fed. Cir. 2017) (“mere automation of manual processes using generic computers does not constitute a patentable improvement in computer technology”). We therefore are not persuaded that the additional limitations, whether alone or in ordered combination, provide any improvement to the functioning of a computer or any particular machine. *See* MPEP §§ 2106.05(a), (b).

Appellant further argues that “[t]he claims clearly do not preempt an entire area.” Appeal Br. 8. However, we agree with the Examiner that preemption is not the test. Ans. 4. “While preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility.” *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015). “Where a patent’s claims are deemed only to disclose patent ineligible subject matter under the *Mayo* framework, as they are in this case, preemption concerns are fully addressed and made moot.” *Id.* Moreover, Appellant understates the preemption concerns in this case. Other than the generic computer components listed above, the claims here would preempt, for example, an ancient shepherd or baker asking his

friends about who can deliver a sheep or loaf of bread to a customer for the lowest price.

Appellant also argues that the lack of prior art indicates eligibility under § 101. Appeal Br. 9. However, “[t]he ‘novelty’ of any element or steps in a process, or even of the process itself, is of no relevance in determining whether the subject matter of a claim falls within the § 101 categories of possibly patentable subject matter.” *Diamond v. Diehr*, 450 U.S. 175, 188–89 (1981). “Groundbreaking, innovative, or even brilliant discovery does not by itself satisfy the § 101 inquiry.” *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2117 (2013).

Therefore, claim 1 does not integrate the recited abstract idea into a practical application.

USPTO Step 2B

As the Supreme Court has said, “the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.” *Alice*, 573 U.S. at 222–23. Here, the Specification goes to great lengths to emphasize that the claimed functionality can be performed on any type of computing device with any processor. *E.g.*, Spec. ¶¶ 63 (“It will be readily apparent to one of ordinary skill in the art that the various processes described herein may be implemented by, e.g., appropriately programmed general purpose computers”), 64 (any processor “regardless of the architecture”), 73–74 (similar for networked devices). The claimed “computing device”; “remote device”; and “remote mobile device” therefore are generic, and were well-understood, routine, and conventional.

Claim 1 also generically recites a “communication interface” and a “user interface.” According to the Specification, this “communication interface” is generic and broad: “Such a communication interface may include a network interface, a SIM card for cellular access, a telephone line, and so on.” Spec. ¶ 99. “Such a communication interface may include a telephone line (e.g., a cell phone), a fax machine, a computer and / or another means of electronic communication.” *Id.* ¶ 102 (further discussing “a telephone call or text message” or “an electronic message such as an SMS, MMS, or email message”); *see also id.* ¶ 107 (“a communication interface such as a wi-fi connection, a SIM card, an Ethernet port, a telephone plug, a modem, and so on”).

The claimed “user interface” likewise is described generically and broadly: “a user interface may include for example, a website, mobile device interface and so on.” Spec. ¶ 123.

The Federal Circuit has explained that “generic computer components such as an ‘interface’” without more “do not satisfy the inventive concept requirement.” *Mortg. Grader, Inc. v. First Choice Loan Servs. Inc.*, 811 F.3d 1314, 1324–25 (Fed. Cir. 2016). Given the broad language in the Specification here, we agree that high-level recitations of the additional limitations, whether alone or in ordered combination, were well-understood, routine, and conventional.

Accordingly, we sustain the Examiner’s rejection of claim 1, and the remaining pending claims, which Appellant does not argue separately. *See* Appeal Br. 6–10; 37 C.F.R. § 41.37(c)(1)(iv).

DECISION

The following table summarizes the outcome of each rejection:

Claims Rejected	35 U.S.C.	Basis	Affirmed	Reversed
1-4, 8-14, 28	§ 101	Eligibility	1-4, 8-14, 28	

No time for taking 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