UNITED STATES PATENT AND TRADEMARK OFFICE

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

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/586,551	12/30/2014	Ashley Vivlamore	26295-27315/US	2779

87851 7590 09/20/2019

Facebook/Fenwick
Silicon Valley Center
801 California Street
Mountain View, CA 94041

EXAMINER	
REFAI, SAM M	

ART UNIT	PAPER NUMBER
3681	

NOTIFICATION DATE	DELIVERY MODE
09/20/2019	ELECTRONIC

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

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

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

fwfacebookpatents@fenwick.com
ptoc@fenwick.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ASHLEY VIVLAMORE

Appeal 2018-005298
Application 14/586,551
Technology Center 3600

Before MURRIEL E. CRAWFORD, PHILIP J. HOFFMANN, and BRADLEY B. BAYAT, *Administrative Patent Judges*.

BAYAT, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellant filed a Request for Rehearing ("Req.") in accordance with 37 C.F.R. § 41.52 on August 19, 2019, seeking reconsideration of our Decision on Appeal mailed June 17, 2019 ("Decision"), in which we affirmed the Examiner's rejection of claims 1–20 under 35 U.S.C. § 101 as directed to non-statutory subject matter.

A request for rehearing "must state with particularity the points believed to have been misapprehended or overlooked by the Board." 37 C.F.R. § 41.52(a)(1). Arguments not raised in the briefs before the Board and evidence not previously relied on in the briefs are not permitted in a request for rehearing except in limited circumstances set forth in 37 C.F.R.

§§ 41.52(a)(2) through (a)(4). Under these limited circumstances, Appellants may present a new argument based on a recent relevant decision of either the Board or a federal court, new arguments responding to a new ground of rejection designated as such under § 41.50(b), and new arguments that the Board decision contains an undesignated new ground of rejection also are permitted.

DISCUSSION

Appellant generally argues "the Decision misapprehends the revised guidance" concerning subject matter eligibility, "incorrectly discounts the additional limitations that are recited in the claims," and "finds that the additional limitations are not technical," Req. 2. Appellant also asserts our "Decision does not address or apply the Federal Circuit's recent opinion in *Berkheimer v. HP Inc*., 881 F.3d 1360 (Fed Cir. 2018)." *Id.*

Arguing that the claims provide "something more" than just an abstract idea, Appellant asserts the claims "provide[] a more efficient solution for use and allocation of computing resources when implementing the abstract idea," which "recite how to prioritize the review of advertisements when there are not sufficient computing resources to process all of them." Req. 4. Appellant asserts we misapprehend the scope of the claims as to claimed steps to "obtain information about impressions of a plurality of advertisements and then select a subset of those advertisements to review based on the number of impressions," and that these steps "are related to technical problem of allocating limited resources," which are "inherent" in the claimed computers. Req. 4–5.

Appellant is thus asserting that because the claimed method samples advertisements, based on the number of times an advertisement has been presented, the claims are directed to an improvement in computers by prioritizing which advertisements to examine, rather than examining all advertisements, and this improves computers performing the claimed steps over computers that do a brute-force examination of all advertisements.

In our Decision, when addressing essentially the same argument, we stated that "[t]his does not concern an improvement to computer capabilities, but instead relates to an improvement to the abstract idea." Dec. 8. This response is appropriate here as well. Appellant is arguing an improvement to computers, but the steps of sampling, rather than examining everything in a population, is essentially the basis of the field of statistics, which extrapolates information about a population from a sample subset. Further, basing the prioritization on the number of advertisements presented of each type merely weights the inputs based on their share of the general population of presented advertisement impressions.

Clearly having computers perform less work by sampling, rather than examining all items in a population, would mean the computer would have less work to do. But applying this sampling vs. brute-force approach would also result in a manual process of examining advertisements having less work to do by the people performing the task mentally. The improvement by sampling based on the "number of impressions" is a variation within the abstract idea of "reviewing displayed advertisements for compliance with one or more advertising policies," and is thus not an "additional limitation" beyond the abstract idea.

Selecting a subset of ads to sample based on the number of impressions of each advertisement thus cannot be "something more" when it is part of the abstract idea itself. Rather than improving computers by having them do less work, Appellant has an improved abstract idea over the brute-force analysis it is based on. Spec. ¶ 4. Thus the claimed solution is the abstract idea itself. "[A] claim for a new abstract idea is still an abstract idea." *Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1151 (Fed. Cir. 2016) (emphasis omitted). "What is needed is an inventive concept in the non-abstract application realm." *SAP Am., Inc. v. InvestPic, LLC*, 898 F.3d 1161, 1168 (Fed. Cir. 2018). However, none of the claimed limitations provide an inventive concept in the non-abstract application realm.

Next, based on the recent decision in *Berkheimer*, Appellant argues that "the Final Office Action fails to address additional elements that refine the claims beyond the purported abstract idea of 'reviewing displayed advertisements for compliance with one or more advertising policies.'" Req. 9. Referring to the claim limitation of "selecting a subset of the advertisements from the plurality of advertisements . . . by sampling the plurality of advertisements by the number of impressions of each advertisement in of the plurality of advertisements," Appellant argues we ignored these "additional elements" without providing sufficient evidence the "additional elements" are well-understood, routine, and conventional. Req. 9.

First, as we stated above, we do not consider sampling a subset of advertisements based on the number of times an advertisement has been displayed is an "additional element," because it is merely part of the abstract idea of reviewing advertisements.

Second, Appellant does not assert that it has developed new statistical methods for analyzing a population of data. It is inarguable that selecting a subset of a population based on the number of occurrences of a data element is one of several "familiar statistical approaches." *Bilski v. Kappos*, 561 U.S. 593 (2010). "[A]pplying traditional statistical tools to data cannot possibly provide the inventive step necessary to become patent-eligible." *eResearchTechnology, Inc. v. CRF, Inc.*, 186 F. Supp. 3d 463, 475 (W.D. Pa. 2016), *aff'd sub nom. EResearchTechnology, Inc. v. CRF, Inc.*, 681 F. App'x 964 (Fed. Cir. 2017). Further, in *OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359 (Fed. Cir. 2015), the court held that "well-understood, routine conventional activit[ies]," such as "gathering . . . statistics generated during said testing," are insufficient to transform an abstract idea into a patent-eligible application. *Id.* at 1363–64.

Thus, even if sampling advertisements, rather than examining all advertisements, was not a part of the abstract idea of examining advertisements for compliance, a step applying a basic statistical technique is not an inventive concept. Because our reviewing courts have ruled on this issue, we need not demonstrate that such a basic statistical technique, as claimed, is well-understood, routine, and conventional, even under *Berkheimer*.

Appellant's request to reverse the rejection of claims under § 101 is denied.

DENIED