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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JASON LANGHEIER and DAVID KIM TCHENG

Appeal 2018-005334
Application 13/106,845
Technology Center 3700

Before MICHAEL C. ASTORINO, NINA L. MEDLOCK, and
PHILIP J. HOFFMANN, *Administrative Patent Judges*.

ASTORINO, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1–22. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We REVERSE.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. The Appellant identifies the real party in interest as Zipongo. Appeal Br. 1.

STATEMENT OF THE CASE

Claimed Subject Matter

Claims 1 and 13 are the independent claims on appeal. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A system for nutritional management, comprising:
one or more computing devices;

a nutritional management unit that is capable of being connected to and interacting with each of the one or more computing devices over a link, each of the one or more computing devices communicating data directly to the nutritional management unit; and

the nutritional management unit further comprising a nutritional tracking unit that uses multimodal recognition including image analysis of pixel color and texture and distance of the image to determine the identity, portion size, caloric value and nutritional value of a food from an image, and by using geolocation data, barcode analysis and voice recordings to subset the image analysis search space to the available foods at a particular food venue, and a recommendation unit that delivers personalized recommendations to a user, based on user data, to balance the caloric and nutritional value, wherein the personalized recommendations include physical activity, sleep duration recommendations for the user, recommended recipes, recommended grocery list items and recommended prepared meals from restaurants, and connect such recommendations to actions the user can take in real-time, such as the digital purchase of a food or activity gear.

REJECTION

Claims 1–22 stand rejected under 35 U.S.C. § 101 as being directed to a judicial exception without significantly more.

ANALYSIS

35 U.S.C. § 101 Framework

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: “[I]aws of nature, natural phenomena, and abstract ideas” are not patentable. *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.”).

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 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.*

After Appellant’s briefs were filed and the Examiner’s Answer was mailed, the U.S. Patent and Trademark Office (the “USPTO”) published revised guidance on the application of § 101. 2019 REVISED PATENT SUBJECT MATTER ELIGIBILITY GUIDANCE, 84 Fed. Reg. 50 (Jan. 7, 2019) (“2019 Revised Guidance”). That guidance revised the USPTO’s examination procedure with respect to the first step of the *Mayo/Alice* framework by (1) providing groupings of subject matter that are considered an abstract idea; and (2) clarifying that a claim is not “directed to” a judicial exception if the judicial exception is integrated into a practical application of that exception. *Id.* at 50. The 2019 Revised Guidance, by its terms, applies to all applications, and to all patents resulting from applications, filed before, on, or after January 7, 2019. *Id.*²

Under the 2019 Revised 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* MANUAL OF PATENT EXAMINING

² The 2019 Revised Guidance supersedes MANUAL OF PATENT EXAMINING PROCEDURE (“MPEP”) § 2106.04(II) and also supersedes all versions of the USPTO’s “Eligibility Quick Reference Sheet Identifying Abstract Ideas.” *See* 2019 Revised Guidance, 84 Fed. Reg. at 51 (“Eligibility-related guidance issued prior to the Ninth Edition, R–08.2017, of the MPEP (published Jan. 2018) should not be relied upon.”).

PROCEDURE (MPEP) §§ 2106.05(a)–(c), (e)–(h) (9th Ed., Rev. 08.2017, Jan. 2018)).

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 is 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 2019 Revised Guidance, 84 Fed. Reg. at 54, 56.

Independent Claims 1 and 13, and Dependent Claims 2–12 and 14–22

Under the first step of the *Mayo/Alice* framework, the Examiner determines that the claims are directed to managing nutrition of a user. *See* Ans. 4–5; *see also* Final Act. 2–3.

Even assuming the propriety of the Examiner’s determination as to whether the claims are directed to the identified abstract idea, we agree with the Appellant’s argument that the Examiner’s rejection fails to adequately demonstrate that the additional claim elements would not amount to significantly more than the abstract idea. *See* Appeal Br. 9–11, Reply Br. 1–2.

The inquiry into whether additional claim elements — i.e., claim elements other than those that describe any judicial exception to which a claim might be directed — amount to significantly more than the judicial exception itself considers whether the claim limitations “involve more than performance of ‘well-understood, routine, [and] conventional activities previously known to the industry.’” *Content Extraction & Transmission*

LLC v. Wells Fargo Bank, Nat'l Ass'n, 776 F.3d 1343, 1347–48 (Fed. Cir. 2014) (quoting *Alice*, 573 U.S. at 225). Further, this step “requires more than recognizing that each claim element, by itself, was known in the art,” because “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). Notably, “[w]hether something is well-understood, routine, and conventional to a skilled artisan at the time of the patent is a factual determination.” *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1369 (Fed. Cir. 2018).

With regard to the second step of the *Mayo/Alice* framework, the Examiner determines that the claims include additional elements. Final Act. 3–4. The Examiner explains that to amount to significantly more than an abstract idea, the additional elements must be involved in more than the performance of routine, well understood, and conventional activities previously known in industry. *Id.* at 4. In this regard, the Examiner determines that the nutritional management unit and its “use of image analysis to determine the identity and size of an item is old and well known in the art” and that “the identification of objects using image analysis is routine in the field.” *Id.*; *see* Ans. 7.

The Appellant argues that the nutritional management unit’s use of “multimodal recognition including image analysis of pixel color and texture and distance of the image to determine the identity, portion size, caloric value and nutritional value of a food from an image,” as recited in claim 1, is not well-understood, routine, and conventional activity in the health

industry. Reply Br. 1–2; *see also* Appeal Br. 10. The Appellant’s argument is persuasive.

The Examiner’s determination is based on a general proposition that image analysis for identity and size of an item is well-understood, routine, and conventional activity. *Supra*. However, the claimed imaging analysis is more specific than that general proposition. Independent claim 1 recites, “a nutritional tracking unit that uses multimodal recognition including image analysis of pixel color and texture and distance of the image to determine the identity, portion size, caloric value and nutritional value of a food from an image.” Hence, claim 1 recites a specific type of image analysis, i.e., analysis of pixel color and texture and distance of an image of food. The Examiner does not find, on this record, that analysis of an image in this specifically claimed manner is old and well known in the art or well-understood, routine, and conventional activity in the health industry. Independent claim 13 includes a similar recitation as the aforementioned recitation of claim 1.

Further, we note that the Examiner presents a general statement that “the courts have held that when a claimed process can be carried out in existing computers in use, with no new machinery being used, then even ‘highly particularized functionality’ is insufficient to render the invention patent-eligible (see *Dietgoal*).”³ Final Act. 4–5. This general statement is not adequate to support a determination that the nutritional management unit’s more specific use of “multimodal recognition including image analysis of pixel color and texture and distance of the image to determine the

³ We understand the Examiner’s citation to “*Dietgoal*” to refer to *DietGoal Innovations LLC v. Bravo Media LLC*, 599 F. App’x 956 (Fed. Cir. 2015).

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identity, portion size, caloric value and nutritional value of a food from an image,” as recited in claim 1, is well-understood, routine, or conventional. *See* Reply Br. 1–2.

For the foregoing reasons, we are persuaded that the Examiner fails to adequately establish that the claims on appeal survive the second step of the *Mayo/Alice* framework. Thus, we do not sustain the rejection of claims 1–22 under 35 U.S.C. § 101.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–22	101	Eligibility		1–22

REVERSED