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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte RICHARD BENNETT WHITNER

Appeal 2018-005542
Application 14/868,184[1]
Technology Center 2100

Before ERIC S. FRAHM, DENISE M. POTHIER, and JOHN A. EVANS, *Administrative Patent Judges*.

Opinion for the Board filed by *Administrative Patent Judge* FRAHM.

Opinion Concurring-in-Part and Dissenting-in-Part filed by *Administrative Patent Judge* POTHIER.

FRAHM, *Administrative Patent Judge*

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134(a) from the Examiner's Final Rejection of claims 1–20, which are all the claims pending and rejected in the application. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

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[1] Appellant identifies CA, Inc., as the real party in interest (App. Br. 3).

STATEMENT OF THE CASE

Disclosed and Claimed Invention

According to the Specification, the present invention relates to computer systems, and more particularly to an event management system and a method of providing back-up event management in case of a fault (Spec. ¶¶ 1, 2; Abstract), i.e., a "fault tolerant event management system" (Title). According to Appellant:

> Events are generated by a variety of sources or components, including hardware and software. Events include messages that can indicate numerous activities, such as an application finishing a task or a server failure. An event management system collects and processes events generated by components. For example, an event management system may distribute events to network monitoring applications, trigger alerts based on events, assign events to an administrator, filter and consolidate events, etc.

Spec. ¶ 2.

Independent claim 1, with bracketed lettering and emphasis added, is exemplary:

> 1. A method comprising:
>
> [A] *receiving a first batch of events into a first buffer of a first event manager and receiving the first batch of events into a second buffer of a second event manager, wherein the first batch of events are received into the first buffer from a communication bus which receives events from a plurality of components of a network*;
>
> communicating, by the first event manager to the second event manager, *first state data that at least indicates state of processing of the first batch of events by the first event manager*;
>
> based on indication of the first state data from the first event manager to the second event manager,
>
> the first event manager discarding the first batch of events from the first buffer;

without processing the first batch of events, the second event manager discarding the first batch of events from the second buffer; and

receiving a second batch of events into the first buffer of the first event manager from the communication bus and receiving the second batch of events into the second buffer of the second event manager;

determining, by the second event manager, that the first event manager is not operational; and

based on determining that the first event manager is not operational,

processing, by the second event manager, the second batch of events from the second buffer based, at least in part, on the first state data; and

updating, by the second event manager, the first state data based, at least in part, on processing the second batch of events.

Remaining independent claims 11 (non-transitory machine-readable media having code with instructions to perform the method of claim 1) and 13 (apparatus including a processor and machine-readable medium having code executable to perform the method of claim 1) recite limitations commensurate in scope with claim 1.

Examiner's Rejections

(1) Claims 1–20 were rejected under 35 U.S.C. § 112(b) as being indefinite for failing to particularly point out and distinctly claim the subject matter which Appellant regards as the invention (Final Act. 2). Because this rejection has been withdrawn by the Examiner (*see* Ans. 8; *see also* Reply Br. 9), this rejection is not before us on appeal.

(2) Claims 1–20 are rejected under 35 U.S.C. § 101 because they are directed to patent-ineligible subject matter. Final Act. 3–4; Ans. 6–7.

(3) Claims 1–20 are rejected under 35 U.S.C. § 102(a)(1) as being anticipated by Chiu (US 2013/0179729 A1; published July 11, 2013). Final Act. 5–9; Ans. 2–6.

ANALYSIS[2]

35 U.S.C. § 101

We have reviewed the Examiner's rejection in light of Appellant's contentions and the evidence of record. We concur with Appellant's contention that the Examiner erred in this case.

Section 101 of the Patent Act provides "[w]hoever 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. 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

[2] Appellant raises additional arguments. Because the identified issues are dispositive of the appeal, we do not need to reach the additional arguments.

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. 252, 267–68 (1853))); 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 191 ("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 (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.* (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 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019) ("Memorandum"). Under the guidance set forth in the Memorandum, 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 interactions such as a fundamental economic practice, or mental processes) (hereinafter, "Step 1 of the Memorandum"); and (2) additional elements that integrate the judicial exception into a practical application (*see* MPEP § 2106.05(a)–(c), (e)–(h)) (9th ed. 2018) (hereinafter, "Step 2 of the Memorandum").

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)) (hereinafter, "Step 3 of the Memorandum"); 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 (hereinafter, "Step 4 of the Memorandum").

See Memorandum at 54–56.

Turning to the *Alice* analysis (which relates to Steps 3 and 4 of the Memorandum), "[t]he second step of the *Alice* test is satisfied when the claim limitations 'involve more than performance of []well-understood, routine, [and] conventional activities previously known to the industry.'" *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1367 (Fed. Cir. 2018) (quoting *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat'l Ass'n*, 776 F.3d 1343, 1347–48 (Fed. Cir. 2014) and *Alice*, 573 U.S. at 225).

In this case, Appellant argues "that this § 101 rejection by the Examiner fails to have any basis in law, reason, or fact and asserts that the claims clearly recite a concrete improvement to technology and are directed toward patent eligible subject matter" (Reply Br. 7). With respect to the *Alice* step-two analysis (and thus, *Berkheimer* and Steps 3 and 4 of the Memorandum), Appellant argues that the Examiner fails to provide the "required support for dismissing claim elements as 'well-understood, routine or conventional" (Reply Br. 9), such as "an express statement in the specification, court decisions, or a publication that demonstrates the element at issue is well-understood." (Reply Br. 9). Appellant contends "[t]he Examiner failed to provide any such support and has therefore failed to satisfy his burden" (Reply Br. 9).

We agree with Appellant's arguments. The Examiner does not respond with the requisite evidence (*see* Final Act. 4 and Ans. 8 addressing the additional elements of buffers, event managers, a processor, and a communication bus). Because the *Berkheimer* court held "[w]hether something is well-understood, routine, and conventional to a skilled artisan at the time of the patent is a factual determination" (*Berkheimer*, 881 F.3d at 1369), the Examiner erred with respect to Steps 3 and/or 4 of the Memorandum by not providing the required evidence and/or factual support.

Therefore, we are constrained by the record to reverse the Examiner's rejection of claims 1–20 on procedural grounds.

35 U.S.C. § 102

We have reviewed the Examiner's anticipation rejection (Final Act. 5–9) in light of Appellant's arguments (App. Br. 7–12; Reply Br. 3–7) that the Examiner has erred, as well as the Examiner's response to Appellant's arguments in the Briefs (Ans. 2–6). We concur with Appellant's contention (App. Br. 8–9) that the Examiner erred in finding claims 1–20 as anticipated by Chiu because Chiu fails to disclose specifically limitation [A] recited in claim 1, and as commensurately recited in claims 11 and 13.

Disputed limitation [A] in claim 1 recites:

> receiving a first batch of events into a first buffer of a first event manager and receiving the first batch of events into a second buffer of a second event manager, wherein the first batch of events are received into the first buffer from a communication bus which receives events from a plurality of components of a network

Claim 1. As further recited in claim 1, the event managers discard the batches of events based on indication of the state data.

The Examiner finds (Final Act. 5–6) that Figures 1 and 3 of Chiu, showing event managers 302a and 302b and connection 130, discloses limitation [A]. The Examiner additionally finds (Ans. 3 citing Chiu Fig. 2) that Chiu's log entry 212a corresponds to the recited state data, and Chiu's checkpoints 210a and 210b correspond to the recited first and second batches of events. The Examiner also finds (*see* Ans. 5–6 citing Chiu ¶¶ 70, 71) that Chiu's replicating services (*see* Fig. 3, 304a and 304b) operate in conjunction with the event managers 302a and 302b to perform the steps of claim 1.

The Examiner states in the Examiner's Answer that replicating services 304a and 304b (*see* Fig. 3) are "responsible for duplicating the checkpoint and the log entries in different selected nodes" (Ans. 5). The Examiner then states:

> The batch of events recited in the claim are mapped [sic][to] the checkpoints and the log entries to state data. Thus, both limitation[s] concerning the first batch of event[s], and state data being sent from a first event manager to a second manager are met by the present reference because the replicating service plays this role.

Ans. 5–6.

However, Chiu discloses (*see* ¶ 44) a checkpoint that is a collection of application data generated by application 108a that indicates a state of processing of data for application 108a stored in local storage 106a. Thus, Chiu's checkpoints and application data are therefore more akin to the "first state data" recited in claim 1 (and not the log entries 212a relied on by the

Examiner) as indicating a state of processing of the first batch of events by the first event manager as set forth in claims 1, 11, and 13. Chiu also discloses (i) "generat[ing] log entries **212***a* of changes in the application data for the application **108***a* that occur between checkpoints **210** of the application data" (¶ 46); and (ii) deleting log entries 212a when a new checkpoint 210 is taken (*see* ¶ 48). However, claim 1 recites that *events* are discarded, not log entries.

Appellant contends:

> The Examiner's mapping of 'checkpoints' to events and 'log entries' to state data is (1) not supported by Chiu nor consistent with the claim language and (2) not consistent with the Examiner's own application of Chiu to the claims.

Reply Br. 3. Appellant further contends (Reply Br. 4) that "the Examiner's proposed mapping of elements is unreasonable," because "it is unreasonable to construe 'application data that is in a consistent state on the computing device 102a' as 'events from a plurality of components of a network.'" Appellant argues that such a construction (of the recited "batches of events") "requires ignoring the plain language of the claims as well as the context and definition of 'events' found in the specification" (Reply Br. 4 citing Spec. ¶¶ 2, 10). We agree with Appellant's arguments and contention enumerated above.

We are also persuaded by Appellant's arguments (*see* App. Br. 7–12; Reply Br. 3–7) because the Examiner's findings (*see* Final Act. 5–6; Ans. 3–6) are insufficient to establish anticipation. A claim is anticipated only if each and every element as set forth in the claims is found, either expressly or inherently described in a single prior art reference, and arranged as required

by the claim. *Verdegaal Bros., Inc. v. Union Oil Co. of Cal.,* 814 F.2d 628, 631 (Fed. Cir. 1987).

We note that the Board is a reviewing body and not a place of initial examination. Moreover, it is our view that the rigorous requirements of 35 U.S.C. § 102 essentially require a one-for-one mapping of each argued limitation to the corresponding portion of the reference, which the Examiner must identify with particularity. Here, in that the Examiner's anticipation rejection is not well supported by the express disclosure of the Chiu reference and relies on conjecture, such conjecture would require us to resort to speculation, unfounded assumptions, or hindsight reconstruction. *See In re Warner*, 379 F.2d 1011, 1017 (CCPA 1967). We will not resort to such speculation or assumptions to cure the deficiencies in the factual basis in order to support the Examiner's anticipation rejection.

The prior art excerpts cited by the Examiner do not provide sufficient details to teach limitation [A], including first and second event managers and first and second batches of events, as required by claim 1, and as similarly required by claims 11 and 13. Absent further explanation from the Examiner, we do not see how the cited prior art portions teach the disputed claim limitation.

In view of the above, we cannot sustain the rejection of independent claim 1, and independent claims 11 and 13 which recite limitations commensurate with limitation [A] in claim 1. We also do not sustain the rejection of claims 2–10, 12, and 14–20 which depend from independent claims 1, 11, or 13. *Cf. In re Fritch*, 972 F.2d 1260, 1266 (Fed. Cir. 1992) ("[D]ependent claims are nonobvious if the independent claims from which they depend are nonobvious . . ."). Because our decision with regard to the

disputed limitation (*see e.g.*, limitation [A] in claim 1) is dispositive of the rejection of all pending claims, we do not address additional arguments raised by Appellant.

DECISION

We reverse the Examiner's decision rejecting claims 1–20.

REVERSED

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte RICHARD BENNETT WHITNER

Appeal 2018-005542
Application 14/868,184
Technology Center 2100

Before ERIC S. FRAHM, DENISE M. POTHIER, and JOHN A. EVANS, *Administrative Patent Judges*.

POTHIER, *Administrative Patent Judge*, concurring-in-part and dissenting-in-part.

I concur with the majority's decision to reverse the rejection of claims 1–20 under 35 U.S.C. § 102 but disagree with the reason for reversing the rejection of the claims under 35 U.S.C. 101.

Specifically, I concur that Chiu fails to disclose "the first event manager discarding the first batch of events from the first buffer" in independent claim 1[3] as argued. *See* Reply Br. 5. The Examiner cites Figure 5 for this teaching. Final Act. 6. As the majority indicates, the Examiner has mapped Chiu's checkpoint data to the recited "first batch of events" and Chiu's log entry data to the recited "first state data." Ans. 3, 5. Given this mapping, Chiu needs to teach its checkpoints are discarded from

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[3] Independent claims 11 and 13 recite similar limitations.

a buffer to disclose the recited "discarding the first batch of events from the first buffer" step. However, as noted by the majority opinion, Chiu discloses deleting log entries and not checkpoints. Chiu ¶ 48; *see id.* ¶ 86, Fig. 5 (step 512).

On the other hand, I dissent regarding the reason for reversing the rejection under 35 U.S.C. § 101. Appellant asserts the Examiner has failed to provide any of the support outlined in "the USPTO recently issued" memorandum[4] concerning claim elements found to be well-understood, routine, or conventional. Reply Br. 9. I respectfully disagree.

The 2018 Memorandum states an additional element (or combination of elements) is not well-understood, routine or conventional to one skilled in the art unless the Examiner finds and supports the § 101 rejection with one or more the following: (1) a citation to an express statement in the Specification or to statement made by applicants during prosecution demonstrating the well-understood, routine, and conventional nature of the additional elements, (2) a citation to one or more court decisions in MPEP § 2106.05(d)(II) as noting the well-understood, routine and conventional nature of the additional elements, (3) a citation to a publication that demonstrates the well-understood, routine, and conventional nature of the additional elements, and (4) a statement that the Examiner is taking official notice of the well-understood, routine, and conventional nature of the additional elements. 2018 Memorandum 3–4. This latter option (i.e., a

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[4] *Changes in Examination Procedure Pertaining to Subject Matter Eligibility, Recent Subject Matter Eligibility Decision (Berkheimer v. HP, Inc.)* (Apr. 10, 2018) ("2018 Memorandum"), *available at* https://www.uspto.gov/sites/default/files/documents/memo-berkheimer-20180419.PDF.

statement taking official notice) outlined in the 2018 Memorandum is noticeably absent from the Reply Brief. *See* Reply Br. 9 (stating "the examiner may cite an express statement in the specification, court decisions, or a publication . . . .").

On the record, I believe the Examiner has taken official notice that the additional claimed elements to the first buffer, the second buffer, the first event manager, the second event manager, and communication bus in claims 1, 11, and 13 are well-known, routine, and conventional and perform well-known, routine, and conventional functions. That is, the Examiner states the additional claimed elements to the first buffer, the second buffer, the first event manager, the second event manager, and communication bus are well-known, routine, and conventional and, as claimed, perform well-known, routine, and conventional functions. *See* Final Act. 4; *see also* Ans. 8. Admittedly, the Examiner has not explicitly stated that official notice is being taken. However, in this instance, the statements made by the Examiner suffice.

Additionally, Appellant has not challenged the Examiner's specific underlying findings related to what is well-understood, routine and conventional. At best, Appellant states the Examiner identifies "nine other claim elements as well-understood." Reply Br. 9. What these "nine other claim elements" (*id.*) are is not clear from the record because the Examiner has only addressed five or six additional elements (i.e., the first and second buffers, the first and second event managers, communication bus, and a processor (claim 13)) are well-understood, routine and conventional and perform well-known, routine, and conventional functions in the rejection. *See* Final Act. 4; *see also* Ans. 8.

For all these reasons, I am not persuaded to reverse the Examiner's rejection of claims 1–20 on the procedural grounds noted by the majority.