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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ROBERT B. EISENHUTH and STEPHEN P. VAN AKEN

Appeal 2018-006955
Application 15/202,123
Technology Center 2100

Before ERIC S. FRAHM, JOYCE CRAIG, and
MATTHEW J. McNEILL, *Administrative Patent Judges*.

FRAHM, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant[1] appeals under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1 and 2, 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] We use the word "Appellant" to refer to "applicant" as defined in 37 C.F.R. § 1.42. "The word 'applicant' when used in this title refers to the inventor or all of the joint inventors, or to the person applying for a patent as provided in §§ 1.43, 1.45, or 1.46." 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Ovonyx Memory Technology, LLC (Amended Appeal Br. 2).

STATEMENT OF THE CASE

Introduction

The present invention generally relates to digital systems for storing digital data in the form of a data structure called a "codeword" (*see* Spec. ¶ 175) in nonvolatile memory, and use a Reel Solomon (RS) encoder (Fig. 1, 20) using Trellis Coded Modulation (TCM) convolution coding (*see* Spec. ¶ 6, 17, 175).

A data structure (Fig. 1, 970; Fig. 2; Spec. ¶ 23, 41) may contain codewords (Fig. 1, 972–980), where "[a] codeword is a collection of multilevel symbols of a particular length and a particular bit density setting, each of which may vary from codeword to codeword" (Spec. ¶ 175). "The length of the codeword is the number of TCM symbols that make up the codeword" (Spec. ¶ 175; *see also* Fig. 2). Appellant's Figure 1 shows a data structure 970 "made up of five codewords that are indicated by the reference numbers 972, 974, 976, 978, and 980" (Spec. ¶ 176). Appellant describes a data structure (Fig. 2, 100) having RS symbols (see e.g., Fig. 2, RS1–13) allocated onto a TCM symbol stream with a four bits per cell density (Spec. ¶ 41), where the TCM symbols are made up of four bits (*see e.g.*, Fig. 2, TCM 1–3, $b_{o–3}$). "[T]he TCM symbols make up a series of Reed Solomon symbols forming a series of codewords" (Spec. ¶ 16).

Appellant uses an encoder/decoder arrangement to allow change in coding efficiency based on input parameters on a codeword-by-codeword basis (Abstract; claim 1). This provides performance benefits like "increased storage capacity" and increased "reliability and longevity of the data storage systems" (Spec. ¶ 34), by allowing for adjustment of code efficiency "on a codeword by codeword basis" (Spec. ¶ 61). "Such

flexibility enhances the operation of the system, for example, with respect to data throughput, memory storage capacity and accommodation of memory degradation over time" (Spec. ¶ 98).

Sole independent claim 1 is exemplary, with bracketed lettering/numbering, formatting, and emphases added:

> 1. A digital system, comprising:
> a host device;
> a nonvolatile memory including a plurality memory cells; and
> [A] *an encoder/decoder arrangement* for interfacing the host device with the nonvolatile memory for transferring read data and write data therebetween in a series of codewords with each codeword having a codeword size such that an encoded data flow from the host device to the nonvolatile memory and a decoded data flow from the nonvolatile memory to the host device are each [A1] subject at least to *a code efficiency that is based on extra code bits introduced by a convolutional code* and [A2] the encoder/decoder arrangement is configured for receiving one or more input parameters *such that the code efficiency is changeable responsive to a change in the input parameters on a codeword to codeword basis*.

Appeal Br. 14, Claims Appendix (emphases, bracketed lettering/numbering, and formatting added).

Examiner's Rejections

(1) Claims 1 and 2 are rejected under 35 U.S.C. § 101 because they are directed to patent-ineligible subject matter. Final Act. 2–3; Ans. 2–5.

(2) Claim 1 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Sommer (US 2009/0199074 A1; published Aug. 6, 2009) and Liikanen

et al. (US 8,627,165 B2; issued Jan. 7, 2014 and filed March 13, 2009) (hereinafter, "Liikanen"). Final Act. 4–6; Ans. 6–8.[2]

Appellant's Contentions

(1) With regard to the patent eligibility rejection, Appellant contends that the rejection of claims 1 and 2 should be reversed (Appeal Br. 8–11; Reply Br. 2–4), *inter alia*, because *Recognicorp, LLC v. Nintendo Co., Ltd.*, 855 F.3d 1322 (Fed. Cir. 2017) should not apply (Appeal Br. 8), and claim 1 recites a technological improvement, such as to computer functionality itself (Appeal Br. 9–10; Reply Br. 2–4).

Based on Appellant's patent eligibility arguments, and because claims 1 and 2 contain commensurate limitations, we will only discuss claim 1 in our analysis under 35 U.S.C. § 101 for patent-ineligibility.

(2) With regard to the obviousness rejection of claims 1 and 2, Appellant primarily argues the merits of independent claim 1 (*see* Appeal Br. 8–10), and makes similar arguments as to the patentability of dependent

[2] Notably, dependent claim 2 was rejected in the Non-Final Office Action mailed January 16, 2017 (*see* p. 5), and Appellant argued claim 2 in the (i) response filed on April 4, 2017 (*see* Appellant's Response filed April 4, 2017 at 5–6); and (ii) Appeal Brief (Appeal Brief 13) and Reply Brief (Reply Br. 4–6). In addition, the Examiner responds to the arguments made as to claim 2 in the Appeal Brief at pages 8 through 10 of the Answer. Based on the arguments made by Appellant, claim 2 (which depends from claim 1) would stand/fall with claim 1. However, (i) page 4 of the Final Rejection (heading of the statement of the rejection), as well as the body of the explanation of the rejection (*see* Final Act. 4–6); and (ii) page 2 of the Advisory Action mailed October 18, 2017, clearly omit any rejection, discussion, or rejection of claim 2. In view of the foregoing, we consider the rejection of claim 2 to have been withdrawn by the Examiner. But even if claim 2 were before us as being rejected under 35 U.S.C. § 103(a), we would decide claim 2 on the same basis as claim 1.

claim 2 (*see* Appeal Br. 8–11; Reply Br. 4–6). As to independent claim 1, Appellant contends (Appeal Br. 8–10; Reply Br. 2–4) that the Examiner erred in rejecting claim 1 under 35 U.S.C. § 103(a), because the combination of Sommer and Liikanen, and particular Liikanen, fails to teach or suggest limitation A, including limitation A1 ("code efficiency is changeable responsive to a change in the input parameters on a codeword to codeword basis"), as recited in claim 1. As per the discussion set forth *supra* in footnote 2 of this Decision, we will only discuss the obviousness of claim 1 in our analysis below.

Principal Issues on Appeal

Based on Appellant's arguments in the Appeal Brief (Appeal Br. 6–10), the following issues are presented on appeal:

(1) Has Appellant shown the Examiner erred in rejecting claims 1 and 2 under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter (i.e., a judicial exception such as an abstract idea, without significantly more)?

(2) Did the Examiner err in rejecting claim 1 as being unpatentable over the combination of Sommer and Liikanen, because Liikanen fails to teach or suggest limitation A, including limitation A1 ("code efficiency is changeable responsive to a change in the input parameters on a codeword to codeword basis"), as recited in claim 1?

ANALYSIS

Patent Eligibility Under 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. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014) (internal quotation marks and citation omitted).

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, 67 (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 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 published revised guidance on the application of § 101. USPTO, *2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (Jan. 7, 2019) ("Guidance"). Under the 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) (Step 2A, Prong 1); and
>
> (2) additional elements that integrate the judicial exception into a practical application (*see* MANUAL OF PATENT EXAMINING PROCEDURE ("MPEP") § 2106.05(a)–(c), (e)–(h)) (9th Ed., Rev. 08.2017, 2018) (Step 2A, Prong 2).

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. (Step 2B.)

See Guidance, 84 Fed. Reg. at 54–56.

Even if claim 1 recites an abstract idea, the Federal Circuit explains:

> The "directed to" inquiry . . . cannot simply ask whether the claims *involve* a patent-ineligible concept, because essentially every routinely patent-eligible claim involving physical products and actions *involves* a law of nature and/or natural phenomenon—after all, they take place in the physical world. *See Mayo*, 132 S.Ct. at 1293 ("For all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas."). Rather, the "directed to" inquiry applies a stage-one filter to claims, considered in light of the specification, based on whether "their character as a whole is directed to excluded subject matter."

Enfish, LLC v. Microsoft Corp., 822 F.3d 1327, 1335 (Fed. Cir. 2016); *see also Diehr*, 450 U.S. at 188 ("In determining the eligibility of respondents' claimed process for patent protection under § 101, their claims must be considered as a whole."); *McRO, Inc. v. Bandai Namco Games Am. Inc*., 837 F.3d 1299, 1314 (Fed. Cir. 2016) (the question is whether the claims as a whole "focus on a specific means or method that improves the relevant technology or are instead directed to a result or effect that itself is the abstract idea and merely invoke generic processes and machinery").

Step 1 – Statutory Subject Matter

Under Step 1 of the patent-eligibility inquiry under § 101, we determine whether a claim is directed to one of the four statutory categories of invention, i.e., a process, machine, manufacture, or composition of matter. In the instant case on appeal, claims 1 and 2 recite "[a] digital system comprising a host device; a nonvolative memory including a plurality of

memory cells; and an encoder/decoder arrangement" (claim 1). Therefore, claims 1 and 2, as apparatus claims, recite at least one of the enumerated categories (e.g., machine or manufacture) of eligible subject matter in 35 U.S.C. § 101. Appellant does not argue the Examiner erred in concluding claims 1 and 2 fall within the four statutory categories of patentable subject matter.

As a result, as to claim 1, as well as claim 2 depending therefrom, we continue our analysis under Step 2A of the Guidance to determine whether the claims recite (1) a judicial exception (a law of nature, natural phenomenon, or subject matter within the enumerated groupings of abstract ideas above); and/or (2) additional elements that integrate the abstract idea into a practical application, and thus, are patent-eligible.

Step 2A – Abstract Idea

The Examiner concludes claim 1 is directed to a judicial exception such as an abstract idea, without significantly more (*see* Final Act. 2–3; Ans. 3–4). The Examiner concludes the claims are consistent with "a process that starts with data, added an algorithm, and ended with a new form of data," which was determined to be directed to an abstract idea in *Recognicorp, LLC v. Nintendo Co., Ltd.*, 855 F.3d 1322 (Fed. Cir. 2017). *See* Final Act. 2.

Appellant contends that the rejection of claims 1 and 2 should be reversed (Appeal Br. 8–11; Reply Br. 2–4), *inter alia*, because *Recognicorp* should not apply (Appeal Br. 8), and claim 1 recites a technological improvement, such as to computer functionality itself, as demonstrated by paragraph 98 of the Specification (Appeal Br. 9–10; Reply Br. 2–4).

Under the Revised Guidance, abstract ideas include "mathematical concepts," "certain methods of organizing human activity," and "mental

processes." Guidance at 52. These "certain methods of human activity" include:

> [F]undamental economic principles or practices (including hedging, insurance, mitigating risk); commercial or legal interactions (including agreements in the form of contracts; legal obligations; advertising, marketing or sales activities or behaviors; business relations); managing personal behavior or relationships or interactions between people (including social activities, teaching, and following rules or instructions).

Id.

At a high level, claim 1 recites encoding and decoding data using an encoder/decoder arrangement in a digital system having non-volatile memory (*see* claim 1). More specifically, the encoder/decoder arrangement allows change in coding efficiency based on input parameters on a codeword-by-codeword basis (Abstract; claim 1). This provides performance benefits like "increased storage capacity" and increased "reliability and longevity of the data storage systems" (Spec. ¶ 34), by allowing for adjustment of code efficiency "on a codeword by codeword basis" (Spec. ¶ 61). "Such flexibility enhances the operation of the system, for example, with respect to data throughput, memory storage capacity and accommodation of memory degradation over time" (Spec. ¶ 98).

In this light, Appellant's contentions that claim 1 is not directed to an abstract idea, but to an improvement in computer-related technology (Appeal Br. 9–10; Reply Br. 2–4), are persuasive.

Appellant's argument that *Recognicorp* should not apply (Appeal Br. 8), is also persuasive. Claim 1 in *Recognicorp* recited a method of creating a composite image using coding, and the court in that case found claim 1 to be "directed to encoding and decoding image data, an abstract idea."

Recognicorp, LLC v. Nintendo Co., Ltd., 855 F.3d at 1328. Claim 1 in *Recognicorp* also differed from the instant claim 1 in that claim 1 of the instant application requires a computer, i.e., a digital system having a host device, nonvolatile memory, and an encoder/decoder arrangement. Furthermore, the case before us, unlike *Recognicorp* (which dealt with coding generally), solves a specific technical problem to provide a technical improvement/solution.

Neither the concept (i) found by the Examiner (*see* Final Act. 2) to be abstract (a process that start with data, adds an algorithm, and ends with a new form of data); nor (ii) of changing of coding efficiency on a codeword to codeword basis responsive to changing input parameters recited in claim 1 before us on appeal, fit within any of the categories identified in the Revised Guidance.

Even if we were to agree with the Examiner that claim 1 recites an abstract idea (e.g., such as a mental process), the additional elements of the claim (digital system, host device, nonvolatile memory, and encoder/decoder arrangement) integrate the abstract idea into a practical application.

In particular, claim 1 recites an encoder/decoder arrangement that allows for changing the coding efficiency on a codeword to codeword basis that serves to provide performance benefits like increased storage capacity, reliability, and longevity of the digital storage system (*see* Spec. ¶ 34), and enhances data throughput and accommodates memory degradation over time (*see* Spec. ¶ 98). Our reviewing court has held that claims which recite rules that allow automation of animation tasks that could only be performed manually were not directed to an abstract idea. *See McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1313–14 (Fed. Cir. 2016); *see also*

MPEP 2106.015(a). Like *McRO*, the claims here improve an existing technology and are, therefore, not directed to an abstract idea.

For these reasons, we do not sustain the Examiner's rejection of independent claim 1 as directed to patent-ineligible subject matter. We also do not sustain the rejection of dependent claim 2, which recites commensurate subject matter.

Because the present claims do not recite an abstract idea, we need not proceed to Step 2A, Prong 2 and/or Step 2B. Rather, our analysis ends here.

Obviousness Under 35 U.S.C. § 103(a)

We have reviewed the Examiner's rejection (Final Act. 4–6) in light of Appellant's contentions (Appeal Br. 11–13; Reply Br. 4–6), and evidence of record. We have also considered the Examiner's response to Appellant's arguments in the Appeal Brief (Ans. 6–8). With regard to claim 1, we concur with Appellant's contentions (*see* Appeal Br. 11–13; Reply Br. 5) that the Examiner erred in finding the cited portions of Liikanen teach or suggest the encoder/decoder arrangement recited in limitation A, including the feature of limitation A2 "that the code efficiency is changeable responsive to a change in the input parameters *on a codeword to codeword basis*" (claim 1, limitation A2) (emphasis added).

The USPTO "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted); *see Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309, 1322 (Fed. Cir. 2016) (stating that, as an

administrative agency, the PTAB "must articulate logical and rational reasons for [its] decisions" (internal quotation marks and citation omitted)). We will not resort to speculation or assumptions to cure the deficiencies in the Examiner's fact finding. *See In re Warner*, 379 F.2d 1011, 1017 (CCPA 1967).

The Examiner cites Liikanen's column 19, lines 47 through 51 for teaching the above claim limitation (*see* Final Act. 5), and states that: "Liikanen et al do not specifically disclose that the encoder/decoder arrangement is configured for receiving one or more input parameters such that . . ." (Final Act. 5) limitation A2 is met, however, changing coding efficiency on a codeword to codeword basis would have been obvious (*see* Final Act. 5–6). In response to Appellant's arguments, the Examiner cites column 6, lines 33 through 67 and of Liikanen (*see* Ans. 6–7), but does not adequately explain why this portion of Liikanen supports the Examiner's finding.

In fact, the Examiner describes Liikanen's coding process as being changeable on a *bit to bit* basis, not a *codeword to codeword* basis as claimed (*see* Ans. 7). In addition, Liikanen is entitled "*Bitwise* Operations And Apparatus In A Multi-Level System" (Title) (emphasis added), and describes "a bitwise code" (col. 7, l. 2) used in a digital memory and coding system that is "customized for the error probability of each bit" (col. 6, ll. 59–60). At best, the Examiner's proposed combination teaches or suggests changing coding efficiency on a *bit to bit* basis, leaving us to speculate as to how or why one of ordinary skill in the art would modify Liikanen to meet the disputed limitation A recited in claim 1, including changing coding efficiency on a *codeword to codeword* basis instead of a bit to bit basis (*see*

claim 1, limitation A2). *See In re Warner*, 379 F.2d at 1017; *Ex parte Braeken*, 54 USPQ2d 1110, 1112 (BPAI 1999) (unpublished) ("The review authorized by 35 U.S.C. [§] 134 is not a process whereby the examiner . . . invite[s] the [B]oard to examine the application and resolve patentability in the first instance.").

Although Appellant's data structure (Fig. 2, 100) has RS symbols (*see e.g.*, Fig. 2, RS1–13) allocated onto a TCM symbol stream with a four bits per cell density (Spec. ¶ 41), where the TCM symbols are made up of four bits (*see e.g.*, Fig. 2, TCM 1–3, $b_{o–3}$), and "the TCM symbols make up a series of Reed Solomon symbols forming a series of codewords" (Spec. ¶ 16), we are left speculate as to how or why one of ordinary skill in the art would modify Liikanen, and Sommer, to change coding efficiency on a codeword, instead of a bit, basis.

Similarly, the Examiner's conclusion in the Answer that

> it would have been obvious to a person of ordinary skill in the art, before the effective fil[sic]ing date of the claimed invention, based on the teaching of Liikanen et al to modify the encoder/decoder arrangement for receiving one or more input parameters such that the code efficiency is changeable responsive to a change in the input parameters on a codeword to codeword basis

(Ans. 7), lacks a rational underpinning.

In view of the foregoing, Appellant's contention that

> Liikanen does not disclose changing code efficiency from symbol to symbol, much less make the leap to changing code efficiency from codeword to codeword. In Liikanen, symbols are transmitted with the same code efficiency

(Reply Br. 5), is persuasive.

Because the Examiner fails to provide sufficient evidence or explanation to support the rejection, we are constrained by the record to reverse the Examiner's rejection of claim 1.

CONCLUSION

We reverse the Examiner's decision rejecting (i) claims 1 and 2 under 35 U.S.C. § 101 as being patent ineligible; and (ii) claim 1 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Sommer and Liikanen.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 2	101	Eligibility		1, 2
1	103(a)	Sommer, Liikanen		1
Overall Outcome				**1, 2**

REVERSED