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BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JOAQUIN TORSIELLO,
JOHN FULBRIGHT,
DAVID C. JELLISON JR.,
and PHILIPPE GENERALI

Appeal 2018-007481
Application 12/539,885
Technology Center 3600

Before ANTON W. FETTING, BIBHU R. MOHANTY, and BRADLEY B. BAYAT, *Administrative Patent Judges*.

FETTING, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE[1]

Joaquin Torsiello, John Fulbright, David C. Jellison Jr., and Philippe Generali (Appellant[2]) seeks review under 35 U.S.C. § 134 of a non–final rejection of claims 1, 4–8, 10–14, 17–19 and 21, the only claims pending in the application on appeal. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b).

The Appellant invented a way of analyzing data related to media audiences, and more particularly evaluating audience responses to particular media content. Specification para. 2.

An understanding of the invention can be derived from a reading of exemplary claim 1, which is reproduced below (bracketed matter and some paragraphing added).

> 1. A method comprising:
>
> [1] receiving, from a first data provider, audience data indicating how many audience members were tuned to a station at different times,
>
> > by executing a program instruction in a processing system, wherein the audience data includes consumer identifiers linking individual records of the audience data with individual consumers;
>
> [2] receiving, from a second data provider, content data indicating broadcast times during which each of a plurality of

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[1] Our decision will make reference to the Appellant's Appeal Brief ("Appeal Br.," filed February 26, 2018) and Reply Brief ("Reply Br.," filed July 19, 2018), and the Examiner's Answer ("Ans.," mailed May 21, 2018), and Non-Final Action ("Non-Final Act.," mailed September 8, 2017).

[2] We use the word "Appellant" to refer to "applicant" as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as iHeart Media Management Services, Inc. (Appeal Br. 3).

content items was broadcast on the station, by executing a program instruction in a processing system;

[3] for each consumer identifier, determining session data for the individual consumers based on the audience data, wherein the session data includes:

a station identifier identifying a media station;

a start value indicating a time at which a particular consumer tuned to the media station;

and

an end value indicating a time at which the particular consumer tuned away from the media station;

[4] comparing first session data associated with a first consumer to subsequent session data associated with the first consumer, wherein:

the first session data includes a first station identifier, a first start value, and a first end value,

and

the subsequent session data includes a second station identifier, a second start value, and a second end value;

[5] determining, in response to the first end value overlapping the second start value, that a station switch occurred;

[6] determining a number of content-switches based on comparing the session data and content data,

wherein the number of content-switches corresponds to a number of audience members who switched away from a station to at least one of a plurality of subsequent stations during a first broadcast of a first content item, by executing a program instruction in a processing system;

[7] determining how many audience members were expected to switch away from the station to at least one of the plurality of subsequent stations during the first broadcast of the first content item, by executing a program instruction in a processing system;

> [8] assigning a performance factor to the first content item based on a relationship between how many audience members switched away from the station to at least one of the plurality of subsequent stations and how many audience members were expected to switch away from the station to at least one of the plurality of subsequent stations, by executing a program instruction in a processing system;
>
> > [8.1] wherein determining how many audience members were expected to switch away from the station to at least one of the plurality of subsequent stations comprises determining a station-average for each minute of a day, each station-average corresponding to an average number of audience members who switched away from the station to at least one of the plurality of subsequent stations during each respective minute of the day, by executing a program instruction in a processing system;
>
> [9] determining an average number of audience members of the station for each minute of the day, by executing a program instruction in a processing system;
>
> [10] determining a station-switch average for a first group of times,
>
> > wherein the station-switch average corresponds to an average of station averages, and the first group of times includes a period of time during the first broadcast of the first content item, by executing a program instruction in a processing system;
>
> and
>
> [11] determining a switch percent for the first group of times, wherein determining the switch percent includes subtracting the station–switch average from the number of content switches, and dividing the result by the average number of audience members, by executing a program instruction in a processing system.

Claims 1, 4–8, 10–14, 17–19 and 21 stand rejected under 35 U.S.C. § 101 as directed to a judicial exception without significantly more.

ISSUES

The issues of eligible subject matter turn primarily on whether the claims recite more than abstract conceptual advice of results desired.

ANALYSIS

STEP 1[3]

Claim 1, as a method claim, nominally recites one of the enumerated categories of eligible subject matter in 35 U.S.C. § 101. The issue before us is whether it is directed to a judicial exception without significantly more.

STEP 2

The Supreme Court

> set forth a framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts. First, . . . determine whether the claims at issue are directed to one of those patent-ineligible concepts. If so, we then ask, "[w]hat else is there in the claims before us? To answer that question, . . . 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. [The Court] 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."

Alice Corp. v. CLS Bank Int'l, 573 U.S. 208, 217–18 (2014) (citations omitted) (*citing Mayo Collaborative Servs. v. Prometheus Labs, Inc*., 566 U.S. 66 (2012)). To perform this test, we must first determine what the

[3] For continuity of analysis, we adopt the steps nomenclature from 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019) ("Revised Guidance").

claims are directed to. This begins by determining whether the claims recite one of the judicial exceptions (a law of nature, a natural phenomenon, or an abstract idea). Then, if the claims recite a judicial exception, determining whether the claims at issue are directed to the recited judicial exception, or whether the recited judicial exception is integrated into a practical application of that exception, i.e., that the claims "apply, rely on, or use the judicial exception in a manner that imposes a meaningful limit on the judicial exception, such that the claim is more than a drafting effort designed to monopolize the judicial exception." Revised Guidance, 84 Fed. Reg. at 54. If the claims are directed to a judicial exception, then finally determining whether the claims provide an inventive concept because the additional elements recited in the claims provide significantly more than the recited judicial exception.

STEP 2A Prong 1

At a high level, and for our preliminary analysis, we note that method claim 1 recites receiving data, determining data, comparing data, determining data attributes such as indications of a station switch, determining actual and expected totals, assigning factor data to content data, determining averages data, and determining percent values data. Determining and comparing data are rudimentary data analysis. Data assignment, totals, averages, and percent computations are just that, mathematical computations. Thus, claim 1 recites receiving, analyzing, and computing data. None of the limitations recite technological implementation details for any of these steps, but instead recite only results desired by any and all possible means.

From this we see that claim 1 does not recite the judicial exceptions of either natural phenomena or laws of nature.

Under Supreme Court precedent, claims directed purely to an abstract idea are patent in-eligible. As set forth in the Revised Guidance, which extracts and synthesizes key concepts identified by the courts, abstract ideas include (1) mathematical concepts[4], (2) certain methods of organizing human activity[5], and (3) mental processes[6]. Among those certain methods of organizing human activity listed in the Revised Guidance are commercial or legal interactions. Like those concepts, claim 1 recites the concept of market research. Specifically, claim 1 recites operations that would ordinarily take place in advising one to compute total, average, and percentage statistics from actual and expected market participant activity. The advice to compute total, average, and percentage statistics from actual and expected market participant activity involves receiving audience data, which is an economic act of market research, and determining market research activities, which is an act ordinarily performed in the stream of commerce. For example, claim 1 recites "receiving . . . audience data,"

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[4] *See, e.g.*, *Gottschalk v. Benson*, 409 U.S. 63, 71–72 (1972); *Bilski v. Kappos*, 561 U.S. 593, 611 (2010); *Mackay Radio & Telegraph Co. v. Radio Corp. of Am.*, 306 U.S. 86, 94 (1939); *SAP America, Inc. v. InvestPic, LLC*, 898 F.3d 1161, 1163 (Fed. Cir. 2018).

[5] *See, e.g.*, *Bilski*, 561 U.S. at 628; *Alice*, 573 U.S. at 219-20; *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed Cir. 2014); *Smart Sys. Innovations, LLC v. Chicago Transit Auth.*, 873 F.3d 1364, 1383 (Fed. Cir. 2017); *In re Marco Guldenaar Holding B.V.*, 911 F.3d 1157, 1160–61 (Fed. Cir. 2018).

[6] *See, e.g.*, *Benson*, 409 U.S. at 67; *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1371–72 (Fed. Cir. 2011); *Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1318 (Fed. Cir. 2016).

which is an activity that would take place whenever one is engaging in market research for audience related business. Similarly, claim 1 recites "determining a number of content-switches," which is also characteristic of market research.

The Examiner determines the claims to be directed to determining audience response measurements to broadcast content. Non-Final Act. 5.

The preamble to claim 1 does not recite what it is to achieve, but the steps in claim 1 result in market research by computing total, average, and percentage statistics from actual and expected market participant activity absent any technological mechanism other than a conventional computer for doing so.

As to the specific limitations, limitations 1 and 2 recite receiving data. Limitations 3–9 recite generic and conventional analyzing and computing of audience behavior data, which advise one to apply generic functions to get to these results. The limitations thus recite advice for computing total, average, and percentage statistics from actual and expected market participant activity. To advocate computing total, average, and percentage statistics from actual and expected market participant activity is conceptual advice for results desired and not technological operations.

The Specification at paragraph 2 describes the invention as relating to analyzing data related to media audiences, and more particularly to evaluating audience responses to particular media content. Thus, all this intrinsic evidence shows that claim 1 recites market research. This is consistent with the Examiner's determination.

This in turn is an example of commercial or legal interactions as a certain method of organizing human activity because market research is used

to predict how to influence consumer behavior. The concept of market research by computing total, average, and percentage statistics from actual and expected market participant activity is one idea for quantifying such research. The steps recited in claim 1 are part of how this might conceptually be premised.

Our reviewing court has found claims to be directed to abstract ideas when they recited similar subject matter. *Digitech Image Technologies, LLC v. Electronics for Imaging, Inc.*, 758 F.3d 1344, 1351 (Fed. Cir. 2014) (analyzing data sets); *Accenture Global Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1338 (Fed. Cir. 2013) (generating rule-based tasks for processing an insurance claim); *Bancorp Servs., L.L.C. v. Sun Life Assur. Co. of Canada (U.S.)*, 687 F.3d 1266, 1278 (Fed. Cir. 2012) (managing a stable value protected life insurance policy); *Dealertrack, Inc. v. Huber*, 674 F.3d 1315, 1333 (Fed. Cir. 2012) (processing loan information through a clearinghouse); *Content Extraction and Transmission LLC v. Wells Fargo Bank*, 776 F.3d 1343, 1347 (Fed. Cir. 2014) (collecting data and storing recognized patterns in the data).

Alternately, this is an example of concepts performed in the human mind as mental processes because the steps of receiving, analyzing, and computing data mimic human thought processes of observation, evaluation, judgment, and opinion, perhaps with paper and pencil, where the data interpretation is perceptible only in the human mind. *See In re TLI Commc'ns LLC Patent Litig.*, 823 F.3d 607, 611 (Fed. Cir. 2016); *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1093–94 (Fed. Cir. 2016). Claim 1, unlike the claims found non-abstract in prior cases, uses generic computer technology to perform data reception, analysis, and

computation and does not recite an improvement to a particular computer technology. *See, e.g.*, *McRO, Inc. v. Bandai Namco Games Am. Inc*., 837 F.3d 1299, 1314–15 (Fed. Cir. 2016) (finding claims not abstract because they "focused on a specific asserted improvement in computer animation"). As such, claim 1 recites receiving, analyzing, and computing data, and not a technological implementation or application of that idea.

Alternately, this is an example of a mathematical concept because the steps of determining arithmetic totals, averages, and percentages perform mathematical algorithms. The remaining steps are mere data gathering and incidental post processing steps.

From this we conclude that at least to this degree, claim 1 recites market research by computing total, average, and percentage statistics from actual and expected market participant activity, which is a commercial and legal interaction, one of certain methods of organizing human activity identified in the Revised Guidance, and, thus, an abstract idea.

STEP 2A Prong 2

The next issue is whether claim 1 not only recites, but is more precisely directed to this concept itself or whether it is instead directed to some technological implementation or application of, or improvement to, this concept i.e. integrated into a practical application.[7]

> At the same time, we tread carefully in construing this exclusionary principle lest it swallow all of patent law. At some level, "all inventions ... embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas." Thus, an invention is not rendered ineligible for patent simply because it involves an abstract concept. "[A]pplication[s]" of

[7] *See, e.g., Alice*, 573 U.S. at 223, discussing *Diamond v. Diehr*, 450 U.S. 175 (1981).

> such concepts "'to a new and useful end,' " we have said, remain eligible for patent protection. Accordingly, in applying the § 101 exception, we must distinguish between patents that claim the "'buildin[g] block[s]' " of human ingenuity and those that integrate the building blocks into something more.

Alice, 573 U.S. at 217 (citations omitted).

Taking the claim elements separately, the operation performed by the computer at each step of the process is expressed purely in terms of results, devoid of implementation details. Steps 1 and 2 are pure data gathering steps. Limitations describing the nature of the data do not alter this. Steps 3–5 recite generic computer processing expressed in terms of results desired by any and all possible means and so present no more than conceptual advice. Steps 6–9 recite conventional totaling, averaging, and percentage calculation mathematical algorithms computing result data. All purported inventive aspects reside in how the data is interpreted and the results desired, and not in how the process physically enforces such a data interpretation or in how the processing technologically achieves those results.

Viewed as a whole, Appellant's claim 1 simply recites the concept of performing market research by computing total, average, and percentage statistics from actual and expected market participant activity as performed by a generic computer. This is no more than conceptual advice on the parameters for this concept and the generic computer processes necessary to process those parameters, and do not recite any particular implementation.

Claim 1 does not, for example, purport to improve the functioning of the computer itself. Nor does it effect an improvement in any other technology or technical field. The 24 pages of specification only spell out

different generic equipment[8] and parameters that might be applied using this concept and the particular steps such conventional processing would entail based on the concept of market research by computing total, average, and percentage statistics from actual and expected market participant activity under different scenarios. They do not describe any particular improvement in the manner a computer functions. Instead, claim 1 at issue amounts to nothing significantly more than an instruction to apply market research by computing total, average, and percentage statistics from actual and expected market participant activity using some unspecified, generic computer. Under our precedents, that is not enough to transform an abstract idea into a patent-eligible invention. *See Alice*, 573 U.S. at 225–26.

None of the limitations reflect an improvement in the functioning of a computer, or an improvement to other technology or technical field, applies or uses a judicial exception to effect a particular treatment or prophylaxis for a disease or medical condition, implements a judicial exception with, or uses a judicial exception in conjunction with, a particular machine or manufacture that is integral to the claim, effects a transformation or reduction of a particular article to a different state or thing, or applies or uses the judicial exception in some other meaningful way beyond generally linking the use of the judicial exception to a particular technological environment, such that the claim as a whole is more than a drafting effort designed to monopolize the exception.

We conclude that claim 1 is directed to achieving the result of market research by advising one to compute total, average, and percentage statistics

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[8] The Specification describes a generic a processor, memory, and a communications interface. Spec. para. 13.

from actual and expected market participant activity, as distinguished from a technological improvement for achieving or applying that result. This amounts to commercial or legal interactions, which fall within certain methods of organizing human activity that constitute abstract ideas. The claim does not integrate the judicial exception into a practical application.

STEP 2B

The next issue is whether claim 1 provides an inventive concept because the additional elements recited in the claim provide significantly more than the recited judicial exception.

The introduction of a computer into the claims does not generally alter the analysis at *Mayo* step two.

> the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention. Stating an abstract idea "while adding the words 'apply it'" is not enough for patent eligibility. Nor is limiting the use of an abstract idea "'to a particular technological environment.'" Stating an abstract idea while adding the words "apply it with a computer" simply combines those two steps, with the same deficient result. Thus, if a patent's recitation of a computer amounts to a mere instruction to "implement[t]" an abstract idea "on . . . a computer," that addition cannot impart patent eligibility. This conclusion accords with the preemption concern that undergirds our § 101 jurisprudence. Given the ubiquity of computers, wholly generic computer implementation is not generally the sort of "additional feature[e]" that provides any "practical assurance that the process is more than a drafting effort designed to monopolize the [abstract idea] itself."

Alice, 573 U.S. at 223–24 (citations omitted).

"[T]he relevant question is whether the claims here do more than simply instruct the practitioner to implement the abstract idea [] on a generic computer." *Alice*, 573 U.S. at 225. They do not.

Taking the claim elements separately, the function performed by the computer at each step of the process is purely conventional. Using a computer for receiving, analyzing, and computing data amounts to electronic data query and retrieval—one of the most basic functions of a computer. All of these computer functions are generic, routine, conventional computer activities that are performed only for their conventional uses. *See Elec. Power Grp. v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016). Also s*ee In re Katz Interactive Call Processing Patent Litig.*, 639 F.3d 1303, 1316 (Fed. Cir. 2011) ("Absent a possible narrower construction of the terms 'processing,' 'receiving,' and 'storing,' . . . those functions can be achieved by any general purpose computer without special programming"). None of these activities is used in some unconventional manner nor do any produce some unexpected result. Appellant does not contend they invented any of these activities. In short, each step does no more than require a generic computer to perform generic computer functions. As to the data operated upon, "even if a process of collecting and analyzing information is 'limited to particular content' or a particular 'source,' that limitation does not make the collection and analysis other than abstract." *SAP America, Inc. v. InvestPic LLC*, 898 F.3d 1161, 1168 (Fed. Cir. 2018).

Considered as an ordered combination, the computer components of Appellant's claim 1 add nothing that is not already present when the steps are considered separately. The sequence of data reception-analysis-computation is equally generic and conventional. *See Ultramercial, Inc. v.*

Hulu, LLC, 772 F.3d 709, 715 (Fed. Cir. 2014) (sequence of receiving, selecting, offering for exchange, display, allowing access, and receiving payment recited an abstraction), *Inventor Holdings, LLC v. Bed Bath & Beyond, Inc*., 876 F.3d 1372, 1378 (Fed. Cir. 2017) (sequence of data retrieval, analysis, modification, generation, display, and transmission), *Two-Way Media Ltd. v. Comcast Cable Communications, LLC*, 874 F.3d 1329, 1339 (Fed. Cir. 2017) (sequence of processing, routing, controlling, and monitoring). The ordering of the steps is therefore ordinary and conventional.

We conclude that claim 1 does not provide an inventive concept because the additional elements recited in the claim do not provide significantly more than the recited judicial exception.

REMAINING CLAIMS

Claim 1 is representative. The other independent method claim 8 is substantially similar at least as regards this analysis. The remaining method claims merely describe process parameters. We conclude that the method claims at issue are directed to a patent-ineligible concept itself, and not to the practical application of that concept.

As to the structural claims, they

> are no different from the method claims in substance. The method claims recite the abstract idea implemented on a generic computer; the system claims recite a handful of generic computer components configured to implement the same idea. This Court has long "warn[ed] ... against" interpreting § 101"in ways that make patent eligibility 'depend simply on the draftsman's art.'

Alice, 573 U.S. at 226. As a corollary, the claims are not directed to any particular machine.

LEGAL CONCLUSION

From these determinations we further determine that the claims do not recite an improvement to the functioning of the computer itself or to any other technology or technical field, a particular machine, a particular transformation, or other meaningful limitations. From this we conclude the claims are directed to the judicial exception of the abstract idea of certain methods of organizing human activity as exemplified by the commercial and legal interaction of market research by advising one to compute total, average, and percentage statistics from actual and expected market participant activity, without significantly more.

APPELLANT'S ARGUMENTS

We are not persuaded by Appellant's argument that "the Appellant's claimed advance over the prior art is not 'determining audience response measurements to broadcast content.' Instead, the claims are directed to a technique and devices that indirectly detect physical interactions of users with their media playback devices." Appeal Br. 13. Appellant contends similarly that "the claims recite a detection tool." Appeal Br. 14. No detection is recited in the claims. See also Reply Brief 7–8. Appellant refers to reviewing audience data for data indicating switching away from content, not technological mechanisms for physically observing such behavior. This review is conventional data analysis.

Appellant further argues that the asserted claims are akin to the claims found patent-eligible in *DDR Holdings, LLC v. Hotels.com, L.P.* 773 F.3d 1245 (Fed. Cir. 2014). Appeal Br. 14–15. In *DDR Holdings*, the Court evaluated the eligibility of claims "address[ing] the problem of retaining website visitors that, if adhering to the routine, conventional

functioning of Internet hyperlink protocol, would be instantly transported away from a host's website after 'clicking' on an advertisement and activating a hyperlink." *Id.* at 1257. There, the Court found that the claims were patent eligible because they transformed the manner in which a hyperlink typically functions to resolve a problem that had no "pre-Internet analog." *Id.* at 1258. The Court cautioned, however, "that not all claims purporting to address Internet-centric challenges are eligible for patent." *Id.* For example, in *DDR Holdings* the Court distinguished the patent-eligible claims at issue from claims found patent-ineligible in *Ultramercial*. *See id.* at 1258–59 (citing *Ultramercial,* 772 F.3d at 715–16). As noted there, the *Ultramercial* claims were "directed to a specific method of advertising and content distribution that was previously unknown and never employed on the Internet before." *Id.* at 1258 (quoting *Ultramercial*, 772 F.3d at 715–16). Nevertheless, those claims were patent ineligible because they "merely recite[d] the abstract idea of 'offering media content in exchange for viewing an advertisement,' along with 'routine additional steps such as updating an activity log, requiring a request from the consumer to view the ad, restrictions on public access, and use of the Internet.'" *Id.*

Appellant's asserted claims are analogous to claims found ineligible in *Ultramercial* and distinct from claims found eligible in *DDR Holdings*. The ineligible claims in *Ultramercial* recited "providing [a] media product for sale at an Internet website;" "restricting general public access to said media product;" "receiving from the consumer a request to view [a] sponsor message;" and "if the sponsor message is an interactive message, presenting at least one query to the consumer and allowing said consumer

access to said media product after receiving a response to said at least one query." 772 F.3d at 712. Similarly, Appellant's asserted claims recite receiving, analyzing, and computing data. This is precisely the type of Internet activity found ineligible in *Ultramercial*.

We are not persuaded by Appellant's argument that no evidence is presented that the limitations are conventional and well understood. Reply Br. 5–7. Such evidence is presented *supra* under Step 2B.

CONCLUSIONS OF LAW

The rejection of claims 1, 4–8, 10–14, 17–19 and 21 under 35 U.S.C. § 101 as directed to a judicial exception without significantly more is proper.

CONCLUSION

The rejection of claims 1, 4–8, 10–14, 17–19 and 21 is affirmed.

In summary:

Claims Rejected	35 U.S.C. §	Basis	Affirmed	Reversed
1, 4–8, 10–14, 17–19, 21	101	Eligibility	1, 4–8, 10–14, 17–19, 21	

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2011).

AFFIRMED