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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BLAKE STANTON SUTHERLAND¹

Appeal 2018-008517
Application 14/266,701
Technology Center 3600

Before JEREMY J. CURCURI, ADAM J. PYONIN, and
JOSEPH P. LENTIVECH, *Administrative Patent Judges*.

PYONIN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134(a). We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ Trend Micro Incorporation is listed as the real party in interest. App. Br. 2.

STATEMENT OF THE CASE

Introduction

The Application is directed to a “method for determining the licensing/billing fees for computer security software.” Spec. 17:17–19. Claims 1–20 are pending; claims 1 and 11 are independent. App. Br. 23–28. Claim 1 is reproduced below for reference (formatting and emphasis added):

1. A computerized method for determining a billing fee for a security software, the method comprising: in a computer having a processor configured for:
 - determining a vulnerability time gap for an asset during which the asset has been exposed to a vulnerability attack;
 - the vulnerability time gap being measured from a time instance when the vulnerability attack has become known to a time instance when a security software for protecting against the vulnerability attack has been released or deployed;
 - determining a period of time during which the asset has been protected against the vulnerability attack, measured from a time instance when the security software has been released to a time instance when the security software has been deployed;
 - determining the billing fee for the security software as being inversely proportional to the vulnerability time gap, and being proportional to the period of time during which the asset has been protected against the vulnerability attack; and*
 - storing the billing fee in a memory device.

References and Rejections

Claims 1–20 stand rejected under a judicial exception to 35 U.S.C. § 101 as being patent ineligible. Final Act. 4.

ANALYSIS

We have reviewed the Examiner’s rejections in light of Appellant’s arguments. Arguments Appellant could have made but chose not to make

are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(iv). We adopt the Examiner’s findings and conclusions as our own, and we add the following primarily for emphasis.

The Examiner determines the claims are patent ineligible under 35 U.S.C. § 101, because “the claimed invention is directed to a judicial exception (i.e., law of nature, natural phenomenon, or abstract idea) without significantly more.” Final Act. 4; *see also Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 573 U.S. 208, 217 (2014) (Describing the two-step framework “for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts.”).

After the docketing of this Appeal, the USPTO published revised guidance on the application of § 101 (“Guidance”). *See* USPTO’s 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019) (“Memorandum”). Under Step 2A of the Guidance, the office looks to whether the claim recites:

- (1) Prong One: 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) Prong Two: additional elements that integrate the judicial exception into a practical application (see MPEP § 2106.05(a)–(c), (e)–(h)).

Only if a claim (1) recites a judicial exception and (2) does not integrate that exception into a practical application, does the Office then look, under Step 2B, 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 Memorandum, 84 Fed. Reg. at 56.

We are not persuaded the Examiner's rejection is in error. We adopt the Examiner's findings and conclusions as our own, and we add the following primarily for emphasis and clarification with respect to the Guidance.

A. *Step 2A, Prong One*

Pursuant to the Guidance, we agree with the Examiner that claim 1 recites an abstract concept. *See Final Act. 8.* The claim, comprising a "method for determining a billing fee for a security software," recites a mental process and a method of organizing human activity such as a fundamental economic practice. *See Final Act. 5; Ans. 4.*

Specifically, the claim recites determining time periods in order to calculate the billing fee: "determining a vulnerability time gap for an asset during which the asset has been exposed to a vulnerability attack; the vulnerability time gap being measured from a time instance when the vulnerability attack has become known to a time instance when a security software for protecting against the vulnerability attack has been released or deployed," and "determining a period of time during which the asset has been protected against the vulnerability attack, measured from a time instance when the security software has been released to a time instance when the security software has been deployed." These limitations are steps of "observation, evaluation, judgment, opinion," and thus are the abstract

concept of “[m]ental processes” pursuant to the Guidance. Memorandum, 84 Fed. Reg. at 52.

Claim 1 further recites “determining the billing fee for the security software as being inversely proportional to the vulnerability time gap, and being proportional to the period of time during which the asset has been protected against the vulnerability attack.” This billing fee determination is similarly a step of “observation, evaluation, judgment, opinion,” and recites the abstract concept of “[m]ental processes” pursuant to the Guidance. *Id.* Additionally, the billing fee determination is an example of “legal obligations; advertising, marketing or sales activities or behaviors; business relations”, which are “commercial or legal interactions.” *Id.* Pursuant to the Guidance, the limitation recites the abstract concept of “[c]ertain methods of organizing human activity.” *Id.*

Accordingly, we conclude the claim recites an abstract idea under Prong One of the Guidance. Memorandum, 84 Fed Reg. at 52, 54.

B. Step 2A, Prong Two

Appellant argues claim 1 “provide[s] a technological advancement” (App. Br. 9) which is “directed toward a more accurate time determination for the start/stop of the vulnerability time gap” (App. Br. 12). Appellant contends the claim thus provides various benefits: “[t]he claims provide an improvement of computation time” because of extremely long log files; “the productivity of the billing system” is improved; and the incentives provided by the unique billing structure result in “keeping the computer system as

secure as possible, and for dealing with new computer attacks as quickly as possible.” App. Br. 9–10.

We are not persuaded the Examiner’s rejection is in error, pursuant to Step 2A, Prong Two of the Guidance. The claimed calculations of time—used to determine a billing fee—are part of the judicial exception discussed above. That is, the Guidance provides the recited *determining* steps are not “additional elements” that confer patent eligibility to the claims.

Memorandum, 84 Fed. Reg. at 54–55 (Prong Two requires “[i]dentifying whether there are any additional elements recited in the claim beyond the judicial exception(s)”). Other than the abstract idea, the claim recites “a computer having a processor” and “storing the billing fee in a memory device.” These elements, considered individually and in combination, do not “use[] the judicial exception in some other meaningful way beyond generally linking the use of the judicial exception to a particular technological environment.” Memorandum, 84 Fed. Reg. at 55; *see Alice*, 573 U.S. at 226. For at least this reason, we are not persuaded by Appellant’s arguments regarding any purported technical benefits.

Further, we determine the disputed claim limitations, even considered as additional elements, do not provide a “meaningful limit on the judicial exception.” Memorandum, 84 Fed. Reg. at 54. As correctly determined by the Examiner, “[p]roviding an incentive based on a billing fee does not improve the overall performance of a computing system.” App. Br. 6. Appellant’s asserted improvements are financial (e.g., higher billing fees) and rely on a computer’s normal functionality. *See* App. Br. 10; *see also Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1370 (Fed. Cir. 2015) (“[M]erely adding computer functionality to increase

the speed or efficiency of the process does not confer patent eligibility on an otherwise abstract idea.”).

Accordingly, we determine claim 1 does not integrate the judicial exception into a practical application. *See* Memorandum, 84 Fed. Reg. at 54. As the “claim recites a judicial exception and fails to integrate the exception into a practical application” (*id.* at 51), “the claim is directed to the judicial exception” (*id.* at 54).

C. Step 2B

Appellant argues claim 1 “include[s] a set of conditions, or rules, that . . . are not merely routine in any computer implementation of an abstract idea.” App. Br. 12.

We are not persuaded the Examiner’s rejection is in error, pursuant to Step 2B of the Guidance. Other than the recited judicial exception, claim 1 recites a computer, a processor, and storing the billing fee in a memory device. These additional elements are all recited at a high level of generality and are implemented by well-understood, routine, and conventional components, as shown by the record before us. *See* Ans. 9–11; *see also* Spec. 10:14–11:18; *Alice*, 573 U.S. at 226 (“Nearly every computer will include a ‘communications controller’ and ‘data storage unit’ capable of performing the basic calculation, storage, and transmission functions required by the method claims”). We agree with the Examiner that the additional elements, individually and combination, do not provide for an inventive concept that is significantly more than the recited judicial exception. *See* Final Act 5; Memorandum, 84 Fed. Reg. at 56. Accordingly,

we sustain the Examiner’s patent eligibility rejection of independent claim 1, as well as independent claim 11 not separately argued. *See* App. Br. 13.

Appellant argues the dependent claims are patent eligible. *See* App. Br. 13–21. These arguments, however, consist of quoting the dependent claim limitations, and asserting these limitations are “technology-based improvements” for the same reasons stated for the independent claims. *Id.* Such statements are insufficient to show error in the Examiner’s rejection. *See In re Lovin*, 652 F.3d 1349, 1357 (Fed. Cir. 2011) (“[W]e hold that the Board reasonably interpreted Rule 41.37 to require more substantive arguments in an appeal brief than a mere recitation of the claim elements and a naked assertion that the corresponding elements were not found in the prior art.”). Based on the record before us, we conclude the dependent claims are not meaningfully different from the independent claims for purposes of the *Alice* analysis. *See* Ans. 12–22. Accordingly, we sustain the Examiner’s patent eligibility rejection of dependent claims 2–10 and 12–20.

DECISION

The Examiner’s decision rejecting claims 1–20 is affirmed.

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

AFFIRMED