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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte GLEN DE VRIES and MICHELLE MARLBOROUGH

Appeal 2018-008613
Application 14/140,734
Technology Center 3600

Before JASON J. CHUNG, JOYCE CRAIG, and STEPHEN E. BELISLE,
Administrative Patent Judges.

CRAIG, *Administrative Patent Judge.*

DECISION ON REQUEST FOR REHEARING

STATEMENT OF THE CASE

Appellant filed a Request for Rehearing (hereinafter “Request”) dated May 26, 2020, seeking reconsideration of our Decision, mailed March 25, 2020 (“Decision”), in which we affirmed the rejection of claims 1–4, 7, 9, 11–14, and 20–23 under 35 U.S.C. § 101.

ANALYSIS

Appellant in the Request contends the Board overlooked several of Appellant’s points, any one of which supports reversal of the Examiner’s § 101 rejection. Appellant asks the Board to address Appellant’s arguments

directed to *Koninklijke KPN N.V. v. Gemalto M2M GmbH*, 942 F.3d 1143 (Fed. Cir. Nov. 15, 2019) (“KPN”) and Example 38 of the PTO’s 2019 Eligibility Examples. Request 3–6. Appellant also asks the Board to address Appellant’s argument that the claimed invention does not recite a “certain method of organizing human activity” as contemplated by the 2019 Revised Guidance, including the subgroup of “commercial or legal interactions.” *Id.* at 6.

Turning first to Appellant’s argument that the claimed invention does not recite a “certain method of organizing human activity,” we reiterate our agreement with the Examiner that it does. *See* Decision 7–8. To the extent it is not clear from our Decision (*see* Decision at 7), claim 1 describes steps that would be performed by people involved in submitting a clinical study for regulatory approval, which is a commercial activity. Appellant’s Specification describes that:

[d]uring the course of a clinical study, a large amount of clinical data and information may be gathered at various investigator sites, such as hospitals and clinics, by personnel such as doctors, patients, nurses, and technicians. These data may be inputted into a system where they may be recorded and stored. These data may then be transmitted by the sites to, for example, [contract research organizations “CROs”], sponsors, and/or regulatory agencies. In some cases, an investigator site may transmit the data to a CRO, which may in turn forward that data to a sponsor that may finally submit the data to a regulatory agency, such as the FDA or [European Medicines Agency “EMA”].

Spec. ¶ 2. The Specification further describes that:

Regulatory agencies also often require site personnel to certify at the end of a study or when a patient completes his or her participation in a study that the data transmitted from the site to the sponsor are the same as the data that were entered by site

personnel into various eClinical systems during the course of the study, i.e., that the site has been in control of its data throughout the process of data capture, cleaning, and submission to the agency.

Id. at ¶ 11. Moreover, claim 1 describes activity that involves multiple parties, i.e., a commercial interaction or business relations. For example, claim 1 recites that information is received from an eClinical system, information is transmitted to a data provider, and other information is transmitted to a data checker. The Specification describes that “data providers are not limited to just sponsors, but may include providers, CROs, and other third parties.” Spec. ¶ 24. Similarly, “not only may a regulatory agency be a data checker, but any entity downstream from where the data are collected may be a data checker, including a provider, a CRO, a patient, a sponsor, or another third party.” *Id.* The problem of verifying data is one that existed prior to the Internet. The recited processors are generic and operate in their normal capacities to receive, generate, transmit, and compare information. *See, e.g.*, Spec. ¶ 10. Therefore, the claim recites a commercial interaction, which is a method of organizing human activity, and an abstract idea. *See* 2019 Revised Guidance, 48 Fed. Reg. at 52.

Appellant argues that the decision in *KPN* “dictates” that Appellant’s invention does not recite an abstract idea. Supp. Br. 3. Appellant proceeds to compare the language of the pending claims with that of the *KPN* claims. As we explained in our Decision, the 2019 Revised Guidance “extracts and synthesizes key concepts identified by the courts as abstract ideas” (84 Fed. Reg. at 52) and

does not require comparing claims to those already found to recite an abstract idea. Decision at 8.

Nevertheless, claim 1 is distinguishable from the claims in *KPN*. *KPN*'s claim 1, for example, is directed to a device comprising other devices. From the plain language of *KPN* claim 1, no recited element can be construed reasonably as a party or commercial entity. In contrast, as explained above, Appellant's claim 1 recites a commercial interaction.

For these reasons, we make no change to our Decision with regard to whether representative claim 1 recites an abstract idea.

We next turn to Appellant's argument that claim 1 is not *directed to* an abstract idea in light of the *KPN* decision. The *KPN* court reiterated that, in cases involving software innovations, the inquiry as to whether a claim is directed to an abstract idea "often turns on whether the claims focus on 'the specific asserted improvement in computer capabilities ... or, instead, on a process that qualifies as an abstract idea for which computers are invoked merely as a tool.'" *KPN*, 942 F.3d at 1150 (quoting *Finjan, Inc. v. Blue Coat System, Inc.*, 879 F.3d 1299, 1303 (Fed. Cir. 2018) (quoting *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335–36 (Fed. Cir. 2016) (internal quotation marks omitted)). As we determined in the Decision, this case is the latter.

The *KPN* court determined that the claims are not directed to an abstract idea because they are directed to a non-abstract improvement in an existing technological process (i.e., error checking in data transmissions). *Id.* The court explained that, by requiring that a

permutation applied to original data be modified “in time,” the claims recite a specific implementation of varying the way check data is generated that improves the ability of prior art error detection systems to detect systematic errors. *Id.* The court determined that “the claims sufficiently capture the inventors’ asserted technical contribution to the prior art by reciting how the solution specifically improves the function of prior art error detection systems.” *Id.* at 1151.

Appellant points to no such improvement in the claims on appeal. Rather, Appellant argued in a conclusory manner that “the claims in both cases ‘recite a specific means or method that solves a problem in an existing technological process.’” Supp. Br. 4. Appellant, however, does not explain how the improvement in the *KPN* claims—that a permutation applied to original data be modified “in time”—applies to the claims at issue here.

Nor does Appellant direct our attention to anything in the Specification to indicate that claim 1 provides a technical improvement to the functioning of a computer or to another technology. *See Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2359 (2014); *see also* MPEP 2106.05(a). Appellant points to paragraph 11 of the Specification, which describes the data verification needs of a regulatory agency. Request at 4; Spec. ¶ 11. Appellant further identifies paragraph 13 of the Specification, which describes using a generic hashing algorithm on a generic computer to verify data. Request at 4; Spec. ¶ 13. Neither paragraph articulates an improvement in sufficient detail that one of ordinary skill would have recognized that the claimed invention improves the relevant existing technology.

For these reasons, we are not persuaded that we overlooked anything in the *KPN* decision in determining claim 1 is directed to an abstract idea.

Appellant next argues that Example 38 of the 2019 Eligibility Examples necessitates a different outcome in this appeal. Request at 5; *see* Subject Matter Eligibility Examples: Abstract Ideas, Examples 37 to 42, 6–7 (Jan. 7, 2019). The 2019 Eligibility Examples are not binding on this panel. But even assuming *arguendo* that the 2019 Eligibility Examples were binding, the claim in Example 38 is different than claim 1 at issue in the present appeal. According to Example 38, the claim is described as follows:

A method for providing a digital computer simulation of an analog audio mixer comprising:

[1] initializing a model of an analog circuit in the digital computer, said model including a location, initial value, and a manufacturing tolerance range for each of the circuit elements within the analog circuit;

[2] generating a normally distributed first random value for each circuit element, using a pseudo random number generator, based on a respective initial value and manufacturing tolerance range; and

[3] simulating a first digital representation of the analog circuit based on the first random value and the location of each circuit element within the analog circuit.

Id. at 6 (bracketing added). Appellant argues that the claimed invention's generation of hash numbers is similar to Example 38's generation of random numbers, and, because the claim in Example 38 was found not to recite any abstract idea, pending claim 1 does not recite one either. Request 5–6; Supp. Br. 7.

We are not persuaded by Appellant's argument. Example 38 describes an improved digital computer simulation of an analog audio mixer to address

poor sound quality replication of previously known prior art digital simulation techniques. *See* Subject Matter Eligibility Examples: Abstract Ideas, Examples 37 to 42, 6–7 (Jan. 7, 2019). As in *KPN*, from the plain language of the claim in Example 38, no recited element can be construed reasonably as a party or a commercial entity. In contrast, as explained above, Appellant’s claim 1 recites, and is directed to, a commercial interaction, which is a certain method of organizing human activity, and an abstract idea.

For these reasons, we deny Appellant’s request and make no change to our Decision with regard to whether representative claim 1 is directed to a judicial exception, without significantly more.

DECISION

We have reconsidered our Decision in light of Appellant’s arguments in the Request. In view of the foregoing, Appellant’s Request for Rehearing is denied.

Outcome of Decision on Rehearing:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Granted	Denied
1–4, 7, 9, 11–14, 20–23	101	Eligibility		1–4, 7, 9, 11–14, 20–23

Final Outcome of Appeal after Rehearing:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–4, 7, 9, 11–14, 20–23	101	Eligibility	1–4, 7, 9, 11–14, 20–23	

DENIED