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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte TIMOTHY CHOE, ALAIN RAPPAPORT,
LIKUO LIN, JUSTIN LIN, and JOSHUA BROWN

Appeal 2018-009201
Application 14/920,569
Technology Center 3600

Before DENISE M. POTHIER, JASON J. CHUNG, and
MATTHEW J. McNEILL, *Administrative Patent Judges*.

CHUNG, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals the Final Rejection of claims 3–18.² We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

INVENTION

The invention relates to generating offers for expressions of interest automatically. Abstract. Claim 3 is illustrative of the invention and is reproduced below:

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. According to Appellant, Nudgit, Inc. is the real party in interest. Br. 2.

² According to the Advisory Action filed on April 17, 2018, the Examiner entered Appellant’s Amendment cancelling claims 1, 2, 19, and 20.

3. A consumer-driven method for initiating transactions, the method comprising:

by a computer system comprising computer hardware:

receiving expressions of interest from consumers for one or more of a good, a service, a desire to engage in an activity, or a demand, the expressions of interest comprising a plurality of demand attributes, each expression of interest being associated with more than one good or service;

programmatically organizing the expressions of interest based on the demand attributes to produce aggregated expressions of interest determining relationships between the aggregated expressions of interest;

modifying an ontology based on the relationships such that the ontology is adapted to identify an intent of a user and one or more related intents that are related to the intent of the user based on an expression of interest of the user;

receiving the expression of interest from the user;

determining the intent of the user and at least one related intent of the user using the expression of interest of the user and the ontology;

identifying one or more suppliers associated with the intent of the user and the at least one related intent of the user, wherein the identified suppliers are capable of providing goods or services associated with the expression of interest of the user;
and

enabling the identified suppliers to contact the user regarding the expression of interest of the user by at least performing the following:

outputting the expression of interest of the user for presentation to said identified suppliers; and

providing functionality for the identified suppliers to contact the user regarding the expression of interest of the user.

Br. 26 (Claims Appendix) (emphases added).

REJECTIONS

Claims 3–18³ stand rejected under 35 U.S.C. § 101 as being directed to patent ineligible subject matter. Final Act. 8–10.

Claims 3–18 stand rejected under 35 U.S.C. § 103 as being unpatentable over the combination of Petersen (US 2009/0327034 A1; published Dec. 31, 2009) and de Rubertis (US 2010/0153209 A1; published June 17, 2010). Final Act. 10–18.

ANALYSIS

I. Claims 3–18 Rejected Under 35 U.S.C. § 101

A. Legal Principles

An invention is patent-eligible if it claims a “new and useful process, machine, manufacture, or composition of matter.” 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 U.S. at 219 (“On their face, the claims before us are drawn to the concept of

³ The Examiner refers to claims 1–20 as being rejected, under 35 U.S.C. § 101. Final Act. 8. However, claims 1, 2, 19, and 20 are cancelled. *See* n.2. We, therefore, denote the rejections as claims 3–18 being rejected.

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. (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 192 (“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 (quotation marks 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’s January 7, 2019 Memorandum, 2019 Revised Patent Subject Matter Eligibility Guidance (“Memorandum”). Under that 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); and
- (2) 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, do we then look to whether the claim:

- (3) adds a specific limitation beyond the judicial exception that are 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.

B. The Examiner’s Conclusions and Appellant’s Arguments

The Examiner concludes the present claims recite certain methods of organizing human activity. Ans. 4, 12. The Examiner also determines the present claims do not amount to significantly more than an abstract idea itself because the abstract idea is implemented on additional elements that are well-understood, routine, and conventional. Final Act. 4, 9 (citing Spec. ¶¶ 184, 187).

Appellant argues that, similar to the claims in *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016), the present claims recite a specific implementation of a solution to a problem with demand-driven assisted transaction technologies. Br. 9–12 (citing Spec. ¶¶ 44, 53, 55, 62). Appellant argues that, similar to the claims in *McRO, Inc. v. Bandai Namco Games America Inc.*, 837 F.3d 1299, 1308–14 (Fed. Cir. 2016), the present claims recite an improvement to demand-driven assisted transaction methods. Br. 12–15. Appellant further argues that, similar to *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014), the present claims recite the demand-driven assisted transaction methods that address a business challenge particular to the Internet and that are necessarily rooted in technology. Br. 15–16. Appellant argues the present claims do not preempt any abstract idea. *Id.* at 16. Appellant argues the

Examiner’s conclusory analysis threatens to swallow all consumer lead selecting and vendor matching technology. *Id.* at 17. Appellant argues the present claims recite individual elements or elements taken as a whole that provide an improvement to demand-driven assisted transaction methods. *Id.* at 17–20. Appellant argues the present claims add specific limitations other than what is well-understood, routine, and conventional activities in the field. *Id.* at 20–21. We disagree with Appellant.

C. Discussion

1. Step 2A, Prong 1

The emphasized portions of claim 3, reproduced above (*see supra* at 2), recite commercial interactions including marketing or sales behaviors, because they require receiving expressions of interest from the consumers, receiving the expression of interest from the users, determining the intent of the user, and identifying one or more suppliers associated with the intent of the user to facilitate a transaction of a good or service. According to the Memorandum, commercial interactions, including marketing/sales behavior, fall into the category of certain methods of organizing human activity. *See* Memorandum, 84 Fed. Reg. at 52. Moreover, those certain methods of organizing human activity are a type of an abstract idea. *See id.*

We disagree with Appellant’s argument that the Examiner’s conclusory analysis threatens to swallow all consumer lead selecting and vendor matching technology. Br. 17. As an initial matter, the Examiner’s analysis is not “conclusory” because the Examiner’s analysis addresses the limitations and provides an adequate explanation as to why each limitation is abstract. Final Act. 8–9; Ans. 4–8 (identifying the recited “receiving,” “organizing,” “modifying,” second “receiving,” “determining,”

“identifying,” and “enabling” steps in claim 3 as part of an abstract idea). Moreover, the Examiner’s analysis does not threaten to swallow all consumer lead selecting and vendor matching technology because the Examiner’s analysis pertains to the present claims only. *See id.*

Because the present claims recite commercial interactions, which fall into the category of certain methods of organizing human activity (i.e., an abstract idea), we proceed to prong 2.

2. *Step 2A, Prong 2*

The present claims do not integrate the abstract idea into a practical application because they do not impose any meaningful limits on practicing the abstract idea. In particular, we disagree with Appellant’s argument that, similar to *Enfish*, claim 3 recites a specific implementation of a solution to a problem with demand-driven assisted transaction technologies. Br. 9–12 (citing Spec. ¶¶ 44, 53, 55, 62).

Appellant does not identify persuasively how the Specification sets forth an improvement in technology. The USPTO’s October 2019 Update: Subject Matter Eligibility Guidance (“Update”) addresses how we consider any evidence that is presented to us. The Update states:

[d]uring examination, the examiner should analyze the “improvements” consideration by evaluating the specification and the claims to ensure that a technical explanation of the asserted improvement is present in the specification, and that the claim reflects the asserted improvement. Generally, examiners are not expected to make a qualitative judgment on the merits of the asserted improvement. *If the examiner concludes the disclosed invention does not improve technology, the burden shifts to applicant to provide persuasive arguments supported by any necessary evidence to demonstrate that one of ordinary skill in the art would understand that the disclosed invention improves technology.* Any such evidence submitted under 37 C.F.R.

§ 1.132 must establish what the specification would convey to one of ordinary skill in the art and cannot be used to supplement the specification.¹ For example, in response to a rejection under 35 U.S.C. § 101, an applicant could submit a declaration under § 1.132 providing testimony on how one of ordinary skill in the art would interpret the disclosed invention as improving technology and the underlying factual basis for that conclusion.

Update, 13 (emphasis added).

In this case, the Examiner concludes the present claims do not recite an improvement to technology. Final Act. 4, 6, 9; Ans. 9–17.

Consequently, we focus on evidence Appellant cites as discussed in the Update. Here, although Appellant identifies paragraphs 44, 53, 55, and 62 of the Specification, those paragraphs merely discuss demand-driven assisted transaction methods (i.e., certain methods of organizing human activity), which fall within a category of an abstract idea, not an improvement to technology. Br. 9–12 (citing Spec. ¶¶ 44, 53, 55, 62). Paragraphs 44, 53, 55, and 62 of the Specification are unlike the technological improvements in *Enfish*.

In *Enfish*, the Federal Circuit considered how the present invention was superior to the technology in the prior art. That is, the court considered “the specification’s emphasis that ‘the present invention comprises a flexible, self-referential table that stores data,’” “[t]he specification also teaches that the self-referential table functions differently than conventional database structures,” and “traditional databases, such as ‘those that follow the relational model and those that follow the object oriented model[,]’ are inferior to the claimed invention.” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d at 1337 (internal citations omitted). Moreover, in *Enfish*, “[t]he structural requirements of current databases require a programmer to predefine a

structure and subsequent [data] entry must conform to that structure,’ [and] the ‘database of the present invention does not require a programmer to preconfigure a structure to which a user must adapt data entry.’” *Id.* (internal citation omitted). Based on the foregoing, the court determined the claims “achieve[d] other benefits over conventional databases, such as increased flexibility, faster search times, and smaller memory requirements.” Unlike the claims of *Enfish*, the present claims do not recite “a specific improvement to the way computers operate,” instead focusing on an improvement to the abstract idea itself. *Id.* at 1336.

We disagree with Appellant’s argument that, similar to the claims in *McRO*, the present claims recite an improvement to demand-driven assisted transaction methods. Br. 12–15. Similar to our reasoning in responding to Appellant’s *Enfish* argument, Appellant does not identify persuasively how paragraphs 44, 53, 55, and 62 of the Specification sets forth an improvement in technology. Moreover, the subject claim considered by the *McRO* court concerned a method for automatically animating lip synchronization and facial expressions. *McRO*, 837 F.3d at 1303. The *McRO* court concluded the subject claims did not recite an abstract idea because the computer animation improved the prior art through the use of rules, rather than artists, to set morph weights and transitions between phonemes. *Id.* at 1308. Thus, the claimed invention in *McRO* allowed for computer performance of animation steps that previously had to be performed by human animators. *Id.* at 1313. The subject claims in *McRO* used “limited rules in a process specifically designed to achieve an improved technological result” over “existing, manual 3-D animation techniques.” *Id.* at 1316 (emphasis added). Unlike the claims of *McRO*, the present claims do not recite improvement in

computer technology, instead focusing on an improvement to the abstract idea itself.

Instead, the present claims recite an abstract idea as discussed *supra*, in § I.C.1. or at best, improving an abstract idea—not a technological improvement. The Specification indicates the additional elements beyond the above-identified abstract idea (i.e., “computer system” and “computer hardware” in claim 3) recited in the present claims are merely generic computer components used to implement the abstract idea. Spec. ¶¶ 184, 186, 187. To the extent that the limitation “programmatically organizing” requires an additional element, the Specification indicates that this additional element is a merely generic computer component used to implement the abstract idea. *Id.* Further, the generic computer components individually and in combination, do not integrate the judicial exception into a practical application.

Additionally, “a claim for a *new* abstract idea is still an abstract idea.” *Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1151 (Fed. Cir. 2016) (emphasis added). “[U]nder the *Mayo/Alice* framework, a claim directed to a newly discovered law of nature (or natural phenomenon or abstract idea) cannot rely on the novelty of that discovery for the inventive concept necessary for patent eligibility” *Genetic Techs. Ltd. v. Merial L.L.C.*, 818 F.3d 1369, 1376 (Fed. Cir. 2016) (citations omitted).

We further disagree with Appellant’s argument that, similar to *DDR*, the present claims recite the demand-driven assisted transaction methods that address a business challenge particular to the Internet and that are necessarily rooted in technology. Br. 15–16. The subject claim considered by the *DDR* court pertained to clicking on an advertisement for a third-party

product displayed on a host's website, the visitor is no longer being transported to the third party's website. *DDR Holdings*, 773 F.3d at 1257. In *DDR*, instead of losing visitors to the third-party's website, the host website can send its visitors to a web page on an outsource provider's server that (1) incorporates "look and feel" elements from the host website and (2) provides visitors with the opportunity to purchase products from the third-party merchant without actually entering that merchant's website. *Id.* at 1257–58. In contrast to the claims of *DDR*, the present claims do not recite incorporating "look and feel elements" from a host website and providing visitors with the opportunity to purchase products from a third-party merchant without actually entering the merchant's website.

Appellant's argument that the present claims not preempt any abstract idea does not persuade us that the claims are eligible. Br. 16. Although preemption may denote patent ineligibility, its absence does not demonstrate patent eligibility. *See FairWarning, IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1098 (Fed. Cir. 2016). For claims covering a patent-ineligible concept, preemption concerns "are fully addressed and made moot" by an analysis under the *Mayo/Alice* framework. *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015).

Appellant does not make any other arguments pertaining to step 2A, prong 2. Because the present claims recite an abstract idea that is not integrated into a practical application, we proceed to Step 2B.

3. Step 2B

We agree with the Examiner's determination that the abstract idea is implemented on additional elements that are well-understood, routine, and conventional. Final Act. 4, 9 (citing Spec. ¶¶ 184, 187). The Specification

supports the Examiner's determination in this regard because it explains that "computer system" and "computer hardware" (and to the extent that "programmatically organizing" requires an additional element, this is a generic component) are generic components. Spec. ¶¶ 184, 186, 187.

Appellant's Specification indicates these elements were well-understood, routine, and conventional components because it describes them at a high level of generality and in a manner that indicates that they are sufficiently well-known. *Id.* Moreover, the additional elements recited in the present claims, analyzed individually or in combination, do not result in the claim, as a whole, amounting to significantly more than the judicial exception.

We, therefore, disagree with Appellant's argument that the present claims recite individual elements or elements taken as a whole that provide an improvement to demand-driven assisted transaction methods. Br. 17–20. And we, therefore, disagree with Appellant's argument that the present claims add specific limitations other than what is well-understood, routine, and conventional activities in the field. *Id.* at 20–21. Here, the present claims recite an abstract idea using additional elements that are generic as discussed *supra*, in §§ I.C.1. and I.C.2. or at best, improving an abstract idea—not an inventive concept for the reasons discussed in § I.C.2.

Appellant does not argue claims 4–18 separately, but asserts the § 101 rejection of those claims should be withdrawn for at least the same reasons as argued for independent claim 3. Br. 6–21. Accordingly, we sustain the Examiner's rejection of: (1) independent claim 3; and (2) dependent claims 4–18 under 35 U.S.C. § 101.

II. Claims 3–18 Rejected Under 35 U.S.C. § 103

The Examiner finds Petersen teaches consumers selecting items that they may consider buying for the right price and aggregating consumer interest, which the Examiner maps to the limitation “programmatically organizing the expressions of interest based on the demand attributes to produce aggregated expressions of interest determining relationships between the aggregated expressions of interest” recited in claim 3. Ans. 18–19 (citing Petersen ¶¶ 19, 26). The Examiner finds de Rubertis teaches the limitations “modifying an ontology based on the relationships such that the ontology is adapted to identify an intent of a user and one or more related intents that are related to the intent of the user based on an expression of interest of the user” and “determining the intent of the user and at least one related intent of the user using the expression of interest of the user and the ontology” recited in claim 3. Ans. 19–20 (citing de Rubertis ¶¶ 27, 28, 35).

Appellant argues Petersen merely calculates the sum of all quantities of an item received from consumers, but fails to teach “programmatically organizing the expressions of interest based on the demand attributes to produce aggregated expressions of interest determining relationships between the aggregated expressions of interest” recited in claim 3. Br. 24. Appellant argues the Examiner finds Petersen does not teach the limitations “modifying an ontology based on the relationships such that the ontology is adapted to identify an intent of a user and one or more related intents that are related to the intent of the user based on an expression of interest of the user” and “determining the intent of the user and at least one related intent of the user using the expression of interest of the user and the ontology” recited in claim 3 and de Rubertis fails to cure Petersen’s deficiencies. *Id.* at 23–24.

We disagree with Appellant.

Petersen teaches consumers selecting items that they may consider buying for the right price (i.e., expressions of interest) and aggregating the consumer interest (e.g., item 107 shown in user interface 101 in Fig. 3A), which teaches the limitation “programmatically organizing the expressions of interest based on the demand attributes to produce aggregated expressions of interest determining relationships between the aggregated expressions of interest” recited in claim 3. Petersen ¶¶ 19, 26 (cited at Ans. 18–19).

We disagree with Appellant’s remaining argument that the Examiner finds Petersen does not teach the limitations “modifying an ontology based on the relationships such that the ontology is adapted to identify an intent of a user and one or more related intents that are related to the intent of the user based on an expression of interest of the user” and “determining the intent of the user and at least one related intent of the user using the expression of interest of the user and the ontology” recited in claim 3 and de Rubertis fails to cure Petersen’s deficiencies. Br. 23–24.

In order to rebut a prima facie case of unpatentability, Appellant must point out the supposed Examiner errors distinctly and specifically, and the specific distinctions believed to render the claims patentable over the applied references. *See* 37 C.F.R. § 41.37(c)(vii) (2017) (“A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim.”); *see also 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.”); *cf. In re*

Baxter Travenol Labs., 952 F.2d 388, 391 (Fed. Cir. 1991) (“It is not the function of this court to examine the claims in greater detail than argued by an appellant, looking for [patentable] distinctions over the prior art.”). In this case, the Examiner finds de Rubertis teaches the limitations “modifying an ontology based on the relationships such that the ontology is adapted to identify an intent of a user and one or more related intents that are related to the intent of the user based on an expression of interest of the user” and “determining the intent of the user and at least one related intent of the user using the expression of interest of the user and the ontology” recited in claim 3. Ans. 19–20 (citing de Rubertis ¶¶ 27, 28, 35). We find these unrebutted findings reasonable. However, although Appellant broadly argues de Rubertis fails to cure the deficiencies of Petersen, Appellant does not address de Rubertis specifically. *See* Br. 23–24 (citing Peterson ¶¶ 16–17, 26, 30 and discussing these features in Peterson only). As a result, Appellant does not rebut sufficiently the Examiner’s finding pertaining to de Rubertis.

Appellant does not argue claims 4–18 separately with particularity, but asserts the § 103 rejection of those claims should be withdrawn for at least the same reasons as argued for independent claim 3. Br. 23–24. Accordingly, we sustain the Examiner’s rejection of: (1) independent claim 3; and (2) dependent claims 4–18 under 35 U.S.C. § 103.

We have only considered those arguments that Appellant actually raised in the Briefs. Arguments Appellant could have made, but chose not to make, in the Briefs have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).

CONCLUSION

Claim(s) Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
3-18	101	Eligibility	3-18	
3-18	103	Petersen, de Rubertis	3-18	
Overall Outcome			3-18	

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). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED