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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte FEDOR N. DZEGILENKO

Appeal 2019-000269
Application 14/473,294
Technology Center 3600

Before BRADLEY W. BAUMEISTER, ADAM J. PYONIN, and
MICHAEL M. BARRY, *Administrative Patent Judges*.

BAUMEISTER, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134(a) from the Examiner’s final rejection of claims 1–16, which constitute all of the pending claims.¹ Appeal Br. 6; Final Action mailed Nov. 8, 2017 (“Final Act.”), 2. These claims stand rejected under 35 U.S.C. § 101 as being directed to a judicial exception to patent-eligible subject matter without significantly more. Final Act. 4. Claims 1–16 also stand rejected as unpatentable under 35 U.S.C. § 103. Final Act. 6. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

¹ 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 SurveyMonkey Inc. Appeal Brief filed May 9, 2018 (“Appeal Br.”), 3.

STANDARD OF REVIEW

We review the appealed rejections for error based upon the issues identified by Appellant, and in light of the arguments and evidence produced thereon. *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential).

THE SECTION 101 REJECTION

The Claimed Subject Matter

Appellant describes the present invention as relating to “improvements in [methods for] evaluating online survey questions, particularly with regard to their potential suitability for use in connection with various benchmarking functionalities.” Spec. 1.

Independent claim 1 illustrates the subject matter of the appealed claims.² This claim is reproduced below with formatting modified for clarity, bracketed element numbering added, and emphasis added to the claim language that recites an abstract idea:

1. An electronic device-controlled method, comprising:
 - [i] an electronic device *receiving a plurality of responses to a first question of an online survey*;
 - [ii] the electronic device *determining a plurality of average daily responses for the first question of the online survey based on the plurality of received responses*;
 - [iii] the electronic device *determining an upper confidence level based on the plurality of received responses*;
 - [iv] the electronic device *determining a lower confidence level based on the plurality of received responses*; and

² Appellant argues all of the claims together as a group. *See* Appeal Br. 6; Reply Brief filed October 10, 2018 (“Reply Br.”), 2. Accordingly, we select independent claim 1 as representative. *See* 37 C.F.R. § 41.37(c)(1)(iv) (2017).

[v] the electronic device *determining whether the first question of the online survey is stable based on the plurality of average daily responses in relation to the upper and lower confidence levels over a specified period of time.*

Principles of Law

A. SECTION 101:

Inventions for a “new and useful process, machine, manufacture, or composition of matter” generally constitute patent-eligible subject matter. 35 U.S.C. § 101. However, the U.S. 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. *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 Court’s two-step framework, described in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012), and *Alice*. *Alice*, 573 U.S. at 217–18 (citing *Mayo*, 566 U.S. at 75–77). 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. 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 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 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.* at 191 (citing *Benson* and *Flook*) (citation omitted); *see also, 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 (internal 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.* (alterations in original) (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.*

B. USPTO SECTION 101 GUIDANCE:

In January 2019, the United States Patent and Trademark Office (“USPTO”) published revised guidance on the application of 35 U.S.C. § 101. 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019) (“2019 Guidance”), *updated by USPTO, October 2019 Update: Subject Matter Eligibility* (available at https://www.uspto.gov/sites/default/files/documents/peg_oct_2019_update.pdf) (jointly referred to as “the 2019 Guidance”); *see also* October 2019 Patent Eligibility Guidance Update, 84 Fed. Reg. 55942 (Oct. 18, 2019) (notifying the public of the availability of the October update).

Under the 2019 Guidance, we first look to whether the claim recites the following:

- (1) any judicial exceptions, including certain groupings of abstract ideas (i.e., mathematical concepts, certain methods of organizing human activities 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) (9th Ed., Rev. 08.2017, Jan. 2018)).

2019 Guidance, 84 Fed. Reg. at 52–55.

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, [and] 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.

2019 Guidance, 84 Fed. Reg. at 56.

Analysis

STEP 2A, PRONG 1:

Under step 2A, prong 1, of the 2019 Guidance, we first look to whether the claim recites any judicial exceptions, including certain groupings of abstract ideas (i.e., mathematical concepts, certain methods of organizing human activities such as a fundamental economic practice, or mental processes). 84 Fed. Reg. at 52–54.

Limitation [i] recites “receiving a plurality of responses to a first question of an online survey.” Receiving responses regarding a survey reasonably can be characterized as a certain method of organizing human activities. More specifically, receiving such responses reasonably can be characterized as advertising, marketing or sales activities or behaviors. The 2019 Guidance expressly recognizes certain methods of organizing human activities including advertising, marketing, or sales activities as constituting a patent-ineligible abstract idea. 84 Fed. Reg. at 52. Accordingly,

limitation [i] reasonably can be characterized as reciting a patent-ineligible abstract idea.

Limitation [ii] recites “determining a plurality of average daily responses for the first question of the online survey based on the plurality of received responses.” Limitation [iii] recites “determining an upper confidence level based on the plurality of received responses.” Limitation [iv] recites “determining a lower confidence level based on the plurality of received responses.” Limitation [v] recites “determining whether the first question of the online survey is stable based on the plurality of average daily responses in relation to the upper and lower confidence levels over a specified period of time.”

The act of making determinations, which is recited in each of limitations [ii]–[v], reasonably can be characterized as a mental process that that can be performed in the human mind, including evaluations and judgments. The 2019 Guidance expressly recognizes mental processes, including evaluations and judgments, as constituting a patent-ineligible abstract idea. 84 Fed. Reg. at 52. Accordingly, limitations [ii]–[v] reasonably can be characterized as reciting patent-ineligible abstract ideas.

For these reasons, each of limitations [i]–[v] reasonably can be characterized as reciting a judicial exception to patent-eligible subject matter under step 2A, prong 1, of the 2019 Guidance.

STEP 2A, PRONG 2:

Under step 2A, prong 2, of the 2019 Guidance, we next analyze whether claim 1 recites additional elements that, individually or in combination, integrate the judicial exception into a practical application. 2019 Guidance, 84 Fed. Reg. at 53–55. The 2019 Guidance provides

exemplary considerations that are indicative of an additional element or combination of elements integrating the judicial exception into a practical application, such as an additional element reflecting an improvement in the functioning of a computer or an improvement to other technology or technical field. *Id.* at 55; MPEP § 2106.05(a).

In the present case, the only language of claim 1 that is directed to an additional element beyond the above-mentioned abstract ideas is that “an electronic device” is what performs the mentioned abstract ideas.

Appellant argues that the claims are directed to patent-eligible subject matter because the claims present the unconventional combination of an electronic device determining an upper confidence level and a lower confidence level based on received online survey responses. Appeal Br. 6.

This argument is unpersuasive because the acts of determining an upper confidence level and lower confidence level based on received survey responses entail the claim’s underlying abstract ideas. *See BSG Tech LLC v. BuySeasons, Inc.*, 899 F.3d 1281, 1290 (Fed. Cir. 2018) (“It has been clear since *Alice* that a claimed invention’s use of the ineligible concept to which it is directed cannot supply the inventive concept that renders the invention ‘significantly more’ than that ineligible concept.”); *Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1151 (Fed. Cir. 2016) (“[A] claim for a new abstract idea is still an abstract idea.”) (emphasis omitted); *SAP Am., Inc. v. InvestPic, LLC*, 898 F.3d 1161, 1168 (Fed. Cir. 2018) (“What is needed is an inventive concept in the non-abstract application realm.”).

Furthermore, claim 1’s first step of “receiving a plurality of responses to a first question of an online survey,” as claimed, also can be reasonably

can be characterized as merely constituting insignificant pre-solution activity:

An example of pre-solution activity is a step of gathering data for use in a claimed process, *e.g.*, a step of obtaining information about credit card transactions, which is recited as part of a claimed process of analyzing and manipulating the gathered information by a series of steps in order to detect whether the transactions were fraudulent.

MPEP § 2106.05(g).

For these reasons, Appellant does not persuade us that claim 1 is directed to an improvement in the function of a computer or to any other technology or technical field. MPEP § 2106.05(a). Nor is claim 1 directed to a particular machine or transformation. MPEP §§ 2106.05(b), (c). Nor has Appellant persuasively demonstrated that claim 1 adds any other meaningful limitations. MPEP § 2106.05(e). Accordingly, Appellant has not persuaded us that claim 1 integrates the recited abstract ideas into a practical application within the meaning of the 2019 Guidance. 84 Fed. Reg. at 52–55.

STEP 2B:

Under step 2B of the 2019 Guidance, we next analyze whether claim 1 adds any specific limitation beyond the judicial exception that is not “well-understood, routine, conventional” in the field. 84 Fed. Reg. at 56; MPEP § 2106.05(d).

The Examiner determines that “the claims recite only one generic device that is programmed to determine aspects of information, such [as] upper and lower confidence levels and question stability.” Final Act. 2.

Appellant’s arguments lack persuasive evidence that a generic computer cannot be used for determining upper and lower confidence levels.

Appeal Br. 6. Furthermore, Appellant's Specification supports the Examiner's determination that a generic computer may be employed for the claimed "electronic device" that receives the responses and makes the claimed determinations:

FIGURE 2 illustrates an example of an electronic device 200, such as the devices 104-112 of the networked system 100 of FIGURE 1, in which certain aspects of various embodiments of the disclosed technology may be implemented. The electronic device 200 may include, but is not limited to, a personal computing device such as a desktop or laptop computer, a mobile electronic device such as a PDA or tablet computing device, a mobile communications device such as a smartphone, an industry-specific machine such as a self-service kiosk or automated teller machine (ATM), or any other electronic device suitable for use in connection with certain embodiments of the disclosed technology.

Spec. 3.

For these reasons, we determine that claim 1 does not recite additional elements that amount to significantly more than the judicial exception within the meaning of the 2019 Guidance. 84 Fed. Reg. at 52–55; MPEP § 2106.05(d).

Accordingly, we sustain the Examiner's rejection of claim 1 under 35 U.S.C. § 101 as being directed to a judicial exception to patent-eligible subject matter without reciting significantly more. We, likewise, sustain the § 101 rejection of claims 2–16, which Appellant does not argue separately.
Appeal Br. 6.

THE SECTION 103 REJECTION

Claims 1–16 stand rejected under 35 U.S.C. § 103 as being unpatentable over Bhaskaran (US 2013/0004933 A1; published Jan. 3, 2013)

and Klein (US 2014/0310062 A1; published Oct. 16, 2014). Final Act. 6–10.

In rejecting claim 1, the Examiner finds that Bhaskaran discloses all of the limitations except for the last step of the electronic device determining whether the first question of the online survey is stable. Final Act. 6. The Examiner finds that Klein teaches this limitation. *Id.* at 6–7 (citing Klein ¶¶ 31, 32, 38). The Examiner additionally finds that motivation existed “to evaluate the quality of the question as disclosed by Klein . . . for the benefit of improving the accuracy of responses and the ability to gain the intelligence the marketer intends to understand.” *Id.* at 7.

Appellant presents two arguments regarding the obviousness rejection of claim 1. We address these arguments separately.

I.

First, Appellant argues that Bhaskaran does not teach or suggest the electronic device determining both upper and lower confidence levels based on the plurality of received responses. Appeal Br. 7. Appellant argues that the cited portions of Bhaskaran instead “merely describe a system *receiving* ‘a confidence threshold that identifies a relationship between a confidence score and a valid response.’” *Id.*

This argument is unpersuasive. In addition to teaching that the threshold may include a minimum value, Bhaskaran additionally teaches that the threshold may include a range of values. Bhaskaran ¶ 31, *cited in* Final Act. 6. A range, by definition includes upper and lower endpoints. *See In re Bond*, 910 F.2d 831, 832 (Fed. Cir. 1990) (explaining that there is no *ipsissimis verbis* test for determining whether a reference discloses a claim element and that identity of terminology is not required).

II.

Appellant next argues that neither of the cited references “teach or suggest ‘the electronic device *determining whether the first question of the online survey is stable* based on the plurality of average daily responses in relation to the upper and lower confidence levels *over a specified period of time.*’” Appeal Br. 7. According to Appellant,

the [cited] paragr[a]phs merely provide that “[i]nformation and feedback received from the end users 104 can be used in an iterative manner by other end users and business user 108 to develop further surveys, inspire new observations, and request further information in an effort to refine and gain confidence in information and intelligence for the project.” Klein simply does not disclose *determining whether an online survey question is stable*, let alone based on average daily responses in relation to multiple confidence levels over a certain period of time.

Appeal Br. 7 (third bracketed change in original).

Appellant’s arguments are persuasive. Claim 1 specifically requires that the electronic device is the entity that determines whether the survey question is stable. The Examiner has not sufficiently demonstrated that Klein teaches the last limitation of claim 1. Klein teaches a *human* making determinations regarding the survey’s confidence. *E.g.*, Klein ¶¶ 31, 32. But even if we understand the Examiner to be interpreting the claim term “stable” to mean that the survey responses are valid over some period of time (Examiner’s Answer mailed Aug. 10, 2018 (“Ans.”), 4), the Examiner has still not sufficiently demonstrated that Klein teaches a *computer* making determinations regarding the survey’s stability, as claimed.

Conclusion Regarding the Obviousness Rejection

For the foregoing reasons, Appellant has persuaded us of error in the Examiner's obviousness rejection of independent claim 1. Accordingly, we do not sustain the Examiner's rejection of that claim or of claims 2-16, which depend from claim 1.

CONCLUSION

Claims Rejected	35 U.S.C. §	Reference(s)/ Basis	Affirmed	Reversed
1-16	101	Eligibility	1-16	
1-16	103	Bhaskaran, Klein		1-16
Overall Outcome			1-16	

TIME PERIOD FOR RESPONSE

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). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED