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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JOSHUA BUFFORD, CHRISTINE LANDI, and JON LINTVET

Appeal 2019-002316
Application 14/297,809
Technology Center 2800

Before JEFFREY T. SMITH, JEFFREY W. ABRAHAM, and
MICHAEL G. McMANUS, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 29, 32, 37, 40, and 45. 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 CAPITAL ONE SERVICES, LLC. Appeal Br. 3.

STATEMENT OF THE CASE

Appellant's invention is generally directed to systems and methods for providing incentives to customers, including flexible incentive awards for financial products. (Spec. ¶ 8.) More specifically Appellant's invention is directed to systems for incentivizing use of financial accounts, wherein the system comprises a processor and a storage device storing non-transitory instructions that, when executed by the processor, cause the system to perform certain operations. (Spec. ¶¶ 24, 25, 49.)

Claim 29 illustrates the subject matter on appeal and is reproduced below:

29. A system for incentivizing use of financial accounts comprising:
a processor; and
a storage device storing non-transitory instructions that, when executed by the processor, cause the system to perform operations comprising:
identifying a financial account associated with a customer and provided by a financial account issuer;
determining a profitability score with respect to the customer indicating a predicted profit made by the financial account issuer based upon at least a profitability model formula and historical data associated with at least one of the identified financial account and one or more other financial accounts of the customer, wherein the profitability model formula is a multivariate logistic regression model configured to minimize an error of the profitability score;
creating a profitability grid by dividing profitability score determinations for a plurality of customers into a predetermined number of profitability groups, the profitability groups having group scores and corresponding to ranges of profitability scores;
allocating the customer to one of the profitability groups based on the profitability score of the customer;

associating an incentive with the profitability group based on the group score of the profitability group of the customer;

providing the incentive to the customer based on purchase transactions made using the financial account;

identifying a set of preferred merchants;

providing, via a computing device of the customer, a webpage displaying the set of preferred merchants;

receiving a selection of the preferred merchants from the computing device of the customer;

removing display of the selected preferred merchants from the webpage;

determining a merchant profitability based on statistics regarding transactions made by a plurality of customers at the selected preferred merchants, the statistics comprising number of transactions made, frequency of transactions and forecasts of projected transactions;

determining a preferred incentive for the customer for transactions at the selected preferred merchants based on the group score and the merchant profitability; and

providing the preferred incentive to the computing device of the customer based on purchase transactions made using the financial account at one or more of the selected preferred merchants.

Appeal Br. 30–31, Claims Appendix.

The following rejection is presented for our review:²

Claims 29, 32, 37, 40, and 45 are rejected under 35 U.S.C. § 101 as directed to a judicial exception without significantly more.

² The complete statement of the rejection on appeal appears in the Final Office Action. (Final Act. 2–5.)

OPINION

After review of the respective positions provided by Appellant and the Examiner, we AFFIRM the Examiner’s rejection under 35 U.S.C. § 101. The Examiner has reproduced the rejections on appeal in the Examiner’s Answer. (Ans. 3–6.)

We limit our discussion to the independent claims 29, 37, and 45. 37 C.F.R. § 41.37(c)(1)(iv).

PRINCIPLES OF LAW

Rejection 35 U.S.C. § 101

Patent-eligible subject matter is defined in 35 U.S.C. § 101 of the Patent Act, which recites:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

There are, however, three judicially created exceptions to the broad categories of patent-eligible subject matter in 35 U.S.C. § 101: “[l]aws of nature, natural phenomena, and abstract ideas.” *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 70 (2012).

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*. *Alice*, 573 U.S. at 217–18 (citing *Mayo*, 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 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. (15 How.) 252, 267–68 (1853))); 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 176; *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 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 (citation 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.*

The PTO published revised guidance on the application of § 101. USPTO’s *2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (Jan. 7, 2019) (“Revised 101 Guidance”). Under that guidance, we first look to whether the claim is directed to a judicial exception because:

- (1) the claim recites a judicial exception, 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) the claim as a whole fails to recite additional elements that integrate the judicial exception into a practical application (*see* MANUAL OF PATENT EXAMINING PROCEDURE (MPEP) § 2106.05(a)–(c), (e)–(h) (9th ed. 2018)).

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, 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 Revised 101 Guidance, 84 Fed. Reg. at 56.

ANALYSIS

With respect to the first step under *Alice*, we determine that the claims fall under a statutory category, a “new and useful process, machine, manufacture, or composition of matter.” 35 U.S.C. § 101. Specifically, claim 29 is directed to a system for incentivizing use of financial accounts; claim 37 is directed to a computer-implemented method for incentivizing use of financial accounts; and claim 45 is directed to non-transitory computer readable medium comprising the instructions to be implemented by a computer. We now follow the Revised 101 Guidance to analyze claims 29, 37, and 45 to determine if they are directed to patent-ineligible subject matter (Step 2A, prong 1).³

³ Appellant limits its arguments to independent claim 29, we will do likewise. The issues addressed regarding independent claim 29 also apply to independent claims 37 and 45.

Applying the guidance set forth in the Revised 101 Guidance, we conclude that claims 29, 32, 37, 40, and 45 do not recite patent-eligible subject matter.

The Examiner finds that the claims are directed to ineligible subject matter (business transaction/fundamental economic practice) for determining rewards, that is, the claims are directed towards determining a profitability score and associating and providing incentives to customers based on the profitability score and a merchant profitability using modeling/mathematical algorithms. (Final Act. 2.) The Examiner finds that the claimed providing incentives or rewards is a basic fundamental economic practice. (Final Act. 2.) The Examiner specifically states:

The limitations of providing the incentive based on statistics is merely calculations that could be performed by human or a general purpose computer as determining profitability scores or merchant profitability is merely an abstract idea/ mathematical algorithm and grouping data based on customer or merchant profitability is merely collecting and organizing data, and such concepts are similar to those identified as abstract by the courts (*Alice Corp. Pty. Ltd. V CLS Bank Int'l*, 134 S. Ct. 2347+ (2014) and *Content Extraction and Transmission LLC V. Wells Fargo Bank, Natl' Assoc.*- F.3d-, 2014 WL 7272219, at *3, *buySafe, Inc. v. Google, Inc.*, 765 F. 3d at 1354-55, *Digitech Image Techs., LLC v Elecs for Imaging, Inc.* (2014), and “Methods which can be performed entirely in the human mind are unpatentable . . . because computational methods which can be performed entirely in the human mind are the types of methods that embody the ‘basic tools of scientific and technological work’ that are free to all men and reserved exclusively to none.” (quoting *Benson*, 409 U.S. at 67)). Additionally, the abstract idea can be seen as the organization and manipulation of data which could be performed mentally, as well, and is similar to other concepts identified as abstract by the courts, such as comparing new and stored information and using rules to identify options in *SmartGene, Inc. v Advanced Biological Labs.*, 555 Fed. Appx. 950 (Fed. Cir. 2014) or creating contractual relationships in

BuySafe (above). The limitations regarding merchant profitability and profitability are merely improving the judicial exception, when or why to give a reward, and thus are grouped with the limitations for the judicial exception and not as part of significantly more than the judicial exception.

(Final Act. 2–3.)

We agree with the Examiner’s conclusion that the claims recite an abstract idea. The independent claims recite a certain method of organizing human activity (an abstract idea); we also consider the claims to include citations directed to collecting/gathering information and analyzing it, which broadly recites an abstract mental process. For example, claim 29 recites: “incentivizing use of financial accounts” (directed to managing personal behavior); “determining a preferred incentive for the customer for transactions at the selected preferred merchants based on the group score and the merchant profitability” and “providing the preferred incentive to the computing device of the customer” (steps directed to managing personal behavior); “determining a profitability score with respect to the customer indicating a predicted profit made by the financial account issuer based upon at least a profitability model formula and historical data associated with at least one of the identified financial account and one or more other financial accounts of the customer, wherein the profitability model formula is a multivariate logistic regression model configured to minimize an error of the profitability score” (evaluation or judgement steps which could be performed in the mind); “creating a profitability grid by dividing profitability score determinations for a plurality of customers into a predetermined number of profitability groups, the profitability groups having

group scores and corresponding to ranges of profitability scores; and allocating the customer to one of the profitability groups based on the profitability score of the customer” (steps directed to organizing and manipulating data).

These limitations are all directed to certain methods of organizing human activity as they are directed to incentivizing actions of the user (managing human behavior).⁴ It falls within the enumerated “Certain methods of organizing human activity” as grouping of abstract ideas set forth in the 2019 Revised 101 Guidance.⁵ Our reviewing court has concluded that the concepts of collecting, displaying, and manipulating data often are ineligible subject matter. *Intellectual Ventures I LLC v. Capital*

⁴ This corresponds to Prong One (a) of Step 2A of the 2019 Revised 101 Guidance. “To determine whether a claim recites an abstract idea in Prong One, examiners are now to: (a) Identify the specific limitation(s) in the claim under examination (individually or in combination) that the Examiner believes recites an abstract idea” *Id.* at 54.

⁵ This corresponds to Prong One ["Evaluate Whether the Claim Recites a Judicial Exception"] (b) of Step 2A of the 2019 Revised 101 Guidance. “To determine whether a claim recites an abstract idea in Prong One, examiners are now to: . . . (b) determine whether the identified limitation(s) falls within the subject matter groupings of abstract ideas enumerated in Section 1 of the [2019 Revised 101 Guidance].” *Id.* at 54. This case implicates subject matter grouping “(b)”:

(b) Certain methods of organizing human activity-fundamental economic principles or practices (including hedging, insurance, mitigating risk); commercial or legal interactions (including agreements in the form of contracts; legal obligations; advertising, marketing or sales activities or behaviors; business relations); managing personal behavior or relationships or interactions between people (including social activities, teaching, and following rules or instructions);

Id. at 52.

One Fin. Corp., 850 F.3d 1332, 1340 (Fed. Cir. 2017); *see also Content Extraction, LLC v. Wells Fargo Bank Nat’l Ass’n*, 776 F.3d 1343, 1347 (Fed. Cir. 2016); *Elec. Power Grp. v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016).

Further, merely combining several abstract ideas does not render the combination any less abstract. *RecogniCorp, LLC v. Nintendo Co.*, 855 F.3d 1322, 1327 (Fed. Cir. 2017) (“Adding one abstract idea (math) to another abstract idea . . . does not render the claim non-abstract.”); *see also FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1093–94 (Fed. Cir. 2016) (determining the pending claims were directed to a combination of abstract ideas).

Appellants argue that claim 29 recites an improvement in a computer related technology.⁶ Appeal Br. 25–28 (citing *BASCOM Global Internet Services, Inc. v. AT&T Mobility LLC*, 119 USPQ2d 1236 1244 (Fed. Cir. 2016)). Specifically, Appellants argue:

[I]nstead of directly using a customer’s profitability score, which may be different for each customer, to determine a preferred incentive for the customer, the claimed method first allocates each customer to a profitability group according to the

⁶ This corresponds to Prong Two [“If the Claim Recites a Judicial Exception, Evaluate Whether the Judicial Exception Is Integrated Into a Practical Application”] of Step 2A of the 2019 Revised 101 Guidance. “A claim that integrates a judicial exception into a practical application will 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.” *Id.* at 54. One consideration, implicated here, that is “indicative that an additional element (or combination of elements) may have integrated the exception into a practical application” (*id.* at 55) is if “[a]n additional element reflects an improvement in the functioning of a computer, or an improvement to other technology or technical field” (*id.* at 55).

customer's profitability score, and then determines the preferred incentive for the customer using a group score associated with the respective profitability group. By classifying the diverse profitability scores into a set of different levels, i.e., group scores, the claimed method avoids considering or creating too many levels of incentives. *See* specification, ¶ [063]. This way, the algorithm used for determining the preferred incentives can be simplified and the computation speed is improved. Therefore, the claimed method improves the computer efficiencies. . . .

By removing the selected preferred merchants from the webpage, the claimed method removes a potential source of confusion from the customer and prevents the customer from selecting the same merchant multiple times. *Id.*, ¶ [048]. This way, the claimed method not only improves the efficiency of the incentive computer system by reducing the user's error rate, but also improves the user experience of the system.

(Appeal Br. 27.)

Appellant further argues the computer's ability of predicting profitability associated with a customer and tailoring a rewards program according to a customer's preference over certain merchants are functions which similar systems "could not do before," and are therefore "directed to a *non-abstract improvement in computer functionality.*" (Appeal Br. 20).

The record does not adequately support the argument that the claimed system provides a technical improvement. The record does not suggest any such added computer functionality. The Specification does not describe the claimed system as providing additional computer functionality that incentivizes use of financial accounts. No technical improvement is mentioned. Rather, the Specification discloses only non-technical improvements, such as providing the customer additional rewards or benefits for purchases made at the selected merchant. *See e.g.*, Spec. para. 27

("[T]he present invention may obtain a list of merchant(s) selected by the customer and provide the customer additional rewards or benefits for purchases made at the selected merchant(s.)"); *see also* para. 7 ("[A] need exists for improved systems and methods for providing incentives to customers, including incentives to attract or retain customers.") These improvements may help the customer receive a promoted incentive or reward but that alone is insufficient to show that there is an improvement to computer functionality. The Specification does not describe improving computer functionality. Specifically *see* Spec. para. 63 ("The formula and profitability grid may then be used to determine the reward points and/or reward incentive parameters for a particular customer.") Appellant's technical improvement argument is unpersuasive as to error in the Examiner's, or our, characterization of what the claim is directed to because the record evidence fails to support it. Appellant's attorney's arguments in a brief cannot take the place of evidence in the record. *See generally In re Glass*, 474 F.2d 1015, 1019 (CCPA 1973); *see also In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974); *In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984); *Meitzner v. Mindick*, 549 F.2d 775 (CCPA 1977), and *In re Schulze*, 346 F.2d 600, 602 (1965).

Appellant argues the claims focus on specific means or methods and not merely on a "result or effect." Specifically, Appellant argues the claimed invention recites "specific steps for providing incentives to a customer in relation to one or more preferred merchants selected by the customer." Appeal Br. 22–23 (citing *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299 (Fed. Cir. 2016)). Appellant further argues the claimed invention recites an ordered combination of elements, and an

incentive concept that improves the technology of providing preferred incentives to customers. (Appeal Br. 27–28.)

Our reviewing court addressed this in *McRO* in which the court reviewed claims which use “a combined order of specific rules that renders information into a specific format that is then used and applied to create desired results: a sequence of synchronized, animated characters” *McRO*, 837 F.3d at 1315 . The court found that the claims did not “simply use a computer as a tool to automate conventional activity,” but instead used the computer to “perform a distinct process” that is carried out in a different way than the prior non-computer method to improve the technology of (3-D animation techniques). *See McRO*, 837 F.3d at 1314–16. Here, we do not find that the claims recite such an ordered set of rules carried out in a different way than the non-computer method. The claimed steps, discussed above with respect to the abstract idea analysis, are not steps which are unique to a use of a computer. Thus, we do not find that the claims recite and improve a technological process in a manner analogous to that in *McRO*.

The limitations of claim 29 taken alone or in ordered combination are nothing more than the fundamental economic business practice of collecting and organizing data as it pertains to rewards including various data manipulations and calculations. Providing customers with incentives for particular merchants is a routine business practice and displaying a webpage is not significantly more.

Alice step two-Does the Claim Provide an Inventive Concept?⁷

⁷ This corresponds to Step 2B of the 2019 Revised 101 Guidance (*see* p. 56).

[I]f a claim has been determined to be directed to a judicial exception under revised Step 2A, examiners should then

Step two is “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*, 573 U.S. at 217–18 (quoting *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 73 (2012)).

The Examiner finds that the additional claimed elements do not amount to significantly more than the abstract idea. The Examiner states:

[T]he claim(s) does/do not include additional elements that are sufficient to amount to significantly more than the judicial exception (providing rewards) because the recitations of the processor and storage device are broad recitations of a generic computer performing generic computer functions. The addition of the computer/memory does not add any meaningful limitation beyond generally linking the abstract idea to a general purpose computer as it is adding a nominal recitation of a computer and memory. Thus, though the processor and memory are real world elements they are not significantly more and thus are insufficient to change a patent-ineligible abstract idea into a patent eligible invention (*See Alice Corp.*, 134 S. Ct. at 2350 (quoting *Mayo*, 132 S. Ct. at 2353) and *Bancorp Servs. v. Sun Life Assurance Co.*, 687 F.3d1266, 1278 (Fed. Circ. 2012)). Therefore the claims do not include additional inventive features such that the claim scope does not solely capture the abstract idea. Providing rewards to customers based on data manipulation/organization/collection including basic displaying by generic computer devices is not significantly more than the abstract idea but merely is an improvement specifying details of the abstract idea (specific computations, specific displaying and organizing of data which are nothing more than the abstract idea).

evaluate the additional elements individually and in combination under Step 2B to determine whether they provide an inventive concept (i.e., whether the additional elements amount to significantly more than the exception itself).

(Final Act. 3–4.)

Consistent with the Examiner’s findings and analysis, , and considering the claim elements both individually and as an ordered combination, we determine that claim 29 is directed to a certain method of organizing human activity, and simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, and thus, fails to provide an inventive concept sufficient to transform the abstract idea into patent-ineligible subject matter.

In summary, Appellant’s arguments have not persuaded us of error in the Examiner’s determination that representative claim 29 is directed to an abstract idea; both to a certain method of organizing human activity (an abstract idea of organizing human activity) and collecting/gathering information and analyzing it (a mental processes). Further, Appellant’s arguments have not persuaded us that the Examiner erred in finding that the claims are not: directed to an improvement in the functioning of the computer or to other technology or other technical field; directed to a particular machine; directed to performing or affecting a transformation of an article to a different state or thing; or directed to using a judicial exception in some meaningful way beyond linking the exception to a particular technological environment such that the claim as a whole is more than a drafting effort to monopolize the judicial exception. For these reasons, we are unpersuaded that the claims recite additional elements that integrate the judicial exception into a practical application. Revised 101 Guidance, 84 Fed. Reg. at 54. Appellant has not presented separate arguments with respect to claims 32, 37, 40, and 45, and thus these claims are grouped with claim 29.

Accordingly, we sustain the Examiner's rejection of claims 29, 32, 37, 40, and 45 under 35 U.S.C. § 101 as being directed to patent ineligible subject matter.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
29, 32, 37, 40, 45	101	Eligibility	29, 32, 37, 40, 45	

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).

AFFIRMED