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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ANANDHAVELU N, ARCHIT AGRAWAL, SOUMAK DATTA,
SHAIK NASEERBABA, RITWIK SINHA, and ATANU SINHA

Appeal 2019-002472
Application 14/635,811
Technology Center 3600

Before NINA L. MEDLOCK, PHILIP J. HOFFMANN, and
BRUCE T. WIEDER, *Administrative Patent Judges*.

MEDLOCK, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant¹ appeals under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 1, 3, 5–10, and 12–19. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

CLAIMED INVENTION

The claimed invention “relates generally to measuring an impact of promotions on marketing related performance indicators, and more specifically to methods that utilize logistic regression for measuring [an] impact of promotions made over online social media” (Spec. ¶ 1).

Claims 1, 9, and 15 are the independent claims on appeal. Claim 15, reproduced below with bracketed notations added, is illustrative of the claimed subject matter:

15. A non-transitory computer program product having instructions encoded thereon that when executed by one or more computer processors cause a process to be carried out to measure performance of a promotion made by a handle in an online social media platform, the process comprising:

[(a)] identifying followers of the handle on the online social media platform with a web crawler;

[(b)] defining a first subset that includes followers of the handle that have performed further promotion of the promotion;

¹ We use the term “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Our decision references Appellant's Appeal Brief (“Appeal Br.,” filed October 25, 2018) and Reply Brief (“Reply Br.,” filed February 5, 2019), and the Examiner's Answer (“Ans.,” mailed December 13, 2018) and Final Office Action (“Final Act.,” mailed May 17, 2018). Appellant identifies Adobe Systems Incorporated as the real party in interest. Appeal Br. 2.

[(c)] defining a test group that includes followers of members of the first subset;

[(d)] defining a second subset that includes followers of the handle that have abstained from performing further promotion of the promotion;

[(e)] defining a control group that only includes followers of members of the second subset;

[(f)] searching for and collecting, via an electronic communication network communicatively coupled to an online social media platform, online social media features for members of the test group and for members of the control group; and

[(g)] analyzing impact of the promotion by performing regression with a marketing-relevant key performance indicator as a dependent variable and the collected online social media features for the test group and the online social media features for the control group as independent variables.

REJECTION²

Claims 1, 3, 5–10, and 12–19 are rejected under 35 U.S.C. § 101 as directed to a judicial exception without significantly more.

ANALYSIS

Under 35 U.S.C. § 101, an invention is patent eligible if it claims a “new and useful process, machine, manufacture, or composition of matter.” 35 U.S.C. § 101. The Supreme Court, however, has long interpreted § 101 to include an implicit exception: “[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).

The Supreme Court, in *Alice*, reiterated the two-step framework previously set forth in *Mayo Collaborative Services v. Prometheus*

² The rejection of claims 1, 3, 5–10, and 12–19 under 35 U.S.C. § 112(b) has been withdrawn. Ans. 3.

Laboratories, Inc., 566 U.S. 66 (2012), “for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts.” *Alice Corp.*, 573 U.S. at 217. The first step in that analysis is to “determine whether the claims at issue are directed to one of those patent-ineligible concepts.” *Id.* If the claims are not directed to a patent-ineligible concept, e.g., an abstract idea, the inquiry ends. Otherwise, the inquiry proceeds to the second step where the elements of the claims are considered “individually and ‘as an ordered combination’” to determine whether there are additional elements that “‘transform the nature of the claim’ into a patent-eligible application.” *Id.* (quoting *Mayo*, 566 U.S. at 79, 78). This 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.’” *Id.* at 217–18 (alteration in original).

In rejecting the pending claims under 35 U.S.C. § 101, the Examiner determined that claim 1 includes steps for gathering data about promotions and social media features of users of a social network platform, and analyzing the data by (i) identifying a test group of users comprising followers of followers of a handle on an online social media platform that have further promoted a promotion, (ii) identifying a control group that comprises only followers of the handle that have abstained from further promoting the promotion, and (iii) performing an analysis of the data that performs regression using further promotions as a dependent variable and test group and control group as independent variables (Final Act. 4). The Examiner reasoned that claim 1 is, thus, “conceptually similar to ‘a process that started with data, added an algorithm and ended with a new form of

data’ recognized as an abstract idea in *Recognicorp, LLC v. Nintendo Co.*, 855 F.3d 1322, 1330 (Fed. Cir. 2017))” and also “conceptually similar to ‘gathering and analyzing information of a specified content, then displaying the results’ identified as an abstract idea in *Electric Power Group LLC v. Alstom, S.A.*, 830 F.3d 1350, 1351, (Fed. Cir. 2016)” (*id.*). The Examiner also determined that claim 1 does not include additional elements or a combination of elements sufficient to amount to significantly more than the abstract idea itself (*id.* at 4–5).

The Examiner determined that the independent claims 9 and 15 are patent ineligible for the same reasons set forth with respect to claim 1, and that the dependent claims, “when analyzed as a whole, are patent ineligible . . . because the additional recited limitations fail to establish that the claims are not directed to an abstract idea” (*id.* at 5–6).

After Appellant’s Appeal Brief was filed, and the Examiner’s Answer mailed, the U.S. Patent and Trademark Office (the “USPTO”) published revised guidance for use by USPTO personnel in evaluating subject matter eligibility under 35 U.S.C. § 101. 2019 REVISED PATENT SUBJECT MATTER ELIGIBILITY GUIDANCE, 84 Fed. Reg. 50, 57 (Jan. 7, 2019) (the “2019 Revised Guidance”). That guidance revised the USPTO’s examination procedure with respect to the first step of the *Mayo/Alice* framework by (1) “[p]roviding groupings of subject matter that [are] considered an abstract idea”; and (2) clarifying that a claim is not “directed to” a judicial exception if the judicial exception is integrated into a practical application of that exception. *Id.* at 50. The 2019 Revised Guidance, by its terms, applies to all

applications, and to all patents resulting from applications, filed before, on, or after January 7, 2019. *Id.*^{3,4}

Independent Claims 1, 9, and 15 and Dependent Claims 5–8, 10, 12–14, 16, 18, and 19

Appellant argues claims 1, 5–10, 12–16, 18, and 19 as a group (Appeal Br. 7). We select independent claim 15 as representative. The remaining claims stand or fall with claim 15. *See* 37 C.F.R. §41.37(c)(1)(iv).

Step One of the Mayo/Alice Framework (2019 Revised Guidance, Step 2A)

The first step in the *Mayo/Alice* framework, as mentioned above, is to determine whether the claims at issue are “directed to” a patent-ineligible concept, e.g., an abstract idea. *Alice Corp.*, 573 U.S. at 217. This first step, as set forth in the 2019 Revised Guidance (i.e., Step 2A), is a two-prong test; in Step 2A, Prong One, we look to whether the claim recites a judicial exception, e.g., one of the following three groupings of abstract ideas: (1) mathematical concepts; (2) certain methods of organizing human

³ The 2019 Revised Guidance supersedes MANUAL OF PATENT EXAMINING PROCEDURE (“MPEP”) § 2106.04(II) and also supersedes all versions of the USPTO’s “Eligibility Quick Reference Sheet Identifying Abstract Ideas.” *See* 2019 Revised Guidance, 84 Fed. Reg. at 51 (“Eligibility-related guidance issued prior to the Ninth Edition, R-08.2017, of the MPEP (published Jan. 2018) should not be relied upon.”). Accordingly, Appellant’s arguments challenging the sufficiency of the Examiner’s rejection will not be addressed to the extent those arguments are based on now superseded USPTO guidance.

⁴ The USPTO issued an update on October 17, 2019 (the “October 2019 Update: Subject Matter Eligibility,” available at https://www.uspto.gov/sites/default/files/documents/peg_oct_2019_update.pdf) clarifying the 2019 Revised Guidance in response to comments solicited from the public.

activity, e.g., fundamental economic principles or practices, commercial or legal interactions; and (3) mental processes. 2019 Revised Guidance, 84 Fed. Reg. at 54. If so, we next consider whether the claim includes additional elements, beyond the judicial exception, that “integrate the [judicial] exception into a practical application,” i.e., that 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 (“Step 2A, Prong Two”). *Id.* at 54–55. Only if the claim (1) recites a judicial exception and (2) does not integrate that exception into a practical application do we conclude that the claim is “directed to” the judicial exception, e.g., an abstract idea. *Id.*

We are not persuaded by Appellant’s arguments that the Examiner erred in determining that claim 15 is directed to an abstract idea (Appeal Br. 9–15). The Federal Circuit has explained that “the ‘directed to’ inquiry applies a stage-one filter to claims, considered in light of the specification, based on whether ‘their character as a whole is directed to excluded subject matter.’” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016) (quoting *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1346 (Fed. Cir. 2015)). It asks whether the focus of the claims is on a specific improvement in relevant technology or on a process that itself qualifies as an “abstract idea” for which computers are invoked merely as a tool. *See id.* at 1335–36. Here, it is clear from the Specification, including the claim language, that the claims focus on an abstract idea, and not on any improvement to technology and/or a technical field.

The Specification is titled “MEASURING PROMOTION PERFORMANCE OVER ONLINE SOCIAL MEDIA,” and describes, in the

Background section, that “[o]nline social media platforms including Facebook® and Twitter®, among others, are increasingly used to promote brands, products, and services in marketing campaigns” (Spec. ¶ 2).

“Conventional techniques for calculating performance for online social media marketing campaigns have relied on counts of easily measured criteria, e.g., the number of likes, comments, and ReTweets® that a promotion may receive over online social media”; however, the Specification describes that these measures, “suffer from biases” and additionally, “may be wrong because some measures, such as ReTweets®, may be limited to a small audience” (*id.*). “Another conventional approach for quantifying the impact of an online social media . . . includes tracking any purchases made by social media users who have clicked through a promotion in order to purchase an associated product or service”; however, “users rarely make a purchase of a product or service by clicking through a promotion on online social media, thereby reducing the usefulness of this approach as a measure of marketing campaign effectiveness” (*id.* ¶ 3).

According to the Specification, proposals have been made for alternate ways to measure marketing campaign impact across online social media platforms, e.g., measuring the impact of a Tweet® by assessing the time and effort that a user expends in response to a marketing campaign and employing various indirect metrics for quantifying marketing impact; yet, the Specification describes that the former proposal lacks a mechanism to actually quantify user time and effort, and the indirect metrics, employed in the latter approach, cannot be measured in a statistically accurate manner (*id.* ¶ 4).

The claimed invention is ostensibly intended to improve on these prior approaches by providing a technique for directly measuring the impact of an online social media promotion on an online social media audience, “while taking into account any effects of other promotions that have been made or are being made contemporaneously on the online social media platform or other nonsocial media marketing efforts” (*id.* ¶ 10). Claim 15, thus, recites a non-transitory computer program product having instructions encoded thereon that when executed by one or more computer processors cause a process to be carried out to measure the performance of a promotion made by a handle⁵ on an online social media platform, the process comprising: (1) identifying users that follow the handle on the social media platform where a promotion is made, and establishing a test group that includes followers of those users who have further promoted the promotion, i.e., identifying followers of the handle on the online social media platform with a web crawler; defining a first subset that includes followers of the handle that have performed further promotion of the promotion; [and] defining a test group that includes followers of members of the first subset (steps (a), (b)), and (c)); (2) establishing a control group that includes followers of those users who have not further promoted the promotion, i.e., “defining a second subset that includes followers of the handle that have abstained from performing further promotion of the promotion” and “defining a control group that only includes followers of members of the

⁵ The Specification describes that “the term ‘handle’ refers to an entity having an interest in promoting itself to build awareness, including any goods, services, and/or good will that may be associated with the entity” (Spec. ¶ 12).

second subset” (steps (d) and (e)); (3) identifying online social media features for members of the test and control groups, i.e., “searching for and collecting, via an electronic communication network communicatively coupled to an online social media platform, online social media features for members of the test group and for members of the control group” (step (f)); and (4) analyzing the impact of the promotion on a performance indicator by performing regression on the test group and control group, i.e., “analyzing impact of the promotion by performing regression with a marketing-relevant key performance indicator as a dependent variable and the collected online social media features for the test group and the online social media features for the control group as independent variables” (step (g)).

These limitations, given their broadest reasonable interpretation, recite determining the impact of an entity’s online promotion on a social media audience by (1) gathering information, i.e., a first set of users who follow the entity on the social media platform and who have further promoted the promotion over social media; a second set of users who follow the entity but have abstained from further promoting the promotion; a test group of users who follow the first set of users; a control group of users who follow the second set of users; and social media features of the test group and the control group; and (2) analyzing the information, i.e., performing regression on the test group and the control group for a performance indicator, to quantify the impact of the promotion. Simply put, claim 15 recites determining the impact of an online promotion by performing regression analysis, which is a mathematical concept and, therefore, an abstract idea. *See* 2019 Revised Guidance, 84 Fed. Reg. at 52.

Having concluded that claim 15 recites a judicial exception, i.e., an abstract idea (Step 2A, Prong One), we next consider whether the claim recites additional elements that integrate the judicial exception into a practical application (Step 2A, Prong Two).

The only additional elements recited in claim 15, beyond the abstract idea, are a “non-transitory computer readable medium”; “one or more computer processors”; and “a web crawler,” i.e., generic computer components (*see, e.g.*, Spec. ¶¶ 27–33). We find no indication in the Specification, nor does Appellant direct us to any indication, that the operations recited in claim 15 invoke any assertedly inventive programming, require any specialized computer hardware or other inventive computer components, i.e., a particular machine, or that the claimed invention is implemented using other than generic computer components to perform generic computer functions. *See DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1256 (Fed. Cir. 2014) (“[A]fter *Alice*, there can remain no doubt: recitation of generic computer limitations does not make an otherwise ineligible claim patent-eligible.”).

We also find no indication in the Specification that the claimed invention effects a transformation or reduction of a particular article to a different state or thing. Nor do we find anything of record, short of attorney argument, that attributes an improvement in technology and/or a technical field, to the claimed invention or that otherwise indicates that the claimed invention integrates the abstract idea into a “practical application,” as that phrase is used in the Revised Guidance.⁶

⁶ The 2019 Revised Guidance references MPEP § 2106.05(a)–(c) and (e) in describing the considerations that are indicative that an additional element or

Appellant maintains that claim 15 is not directed to an abstract idea but instead is patent eligible at least because the claim provides a non-abstract improvement to existing technology (Appeal Br. 9–10). Appellant asserts that the Specification describes the challenges associated with quantifying the performance of online social media marketing campaigns, (including the challenge involved in choosing metrics that do not suffer from measurement biases, e.g., self-selection bias), and discloses “how [the] effectiveness of an online social media promotion can be measured based on the impact that the promotion is measured to have after the promotion is made” (*id.* at 9). Appellant argues that the Specification, thus, clearly identifies a “technical problem associated with existing technologies for quantifying the impact of an online social media promotion, and further explains the details of an unconventional technical solution to that problem” (*id.*)

Specifically referencing claim 15, Appellant notes that the claim is directed to a process to measure performance of a promotion made by a handle in an online social media platform, and explains that claim 15 achieves this by defining test and control groups that include followers of followers of the handle; collecting online social media features for members of the test and control groups; and analyzing the impact of the promotion by performing regression using the collected online social media features (*id.* at 9–10). Appellant asserts that this combination of claim features makes

combination of elements integrates the judicial exception, e.g., the abstract idea, into a practical application. 2019 Revised Guidance, 84 Fed. Reg. at 55. If the recited judicial exception is integrated into a practical application, as determined under one or more of these MPEP sections, the claim is not “directed to” the judicial exception.

clear that “the impact of the promotion is based on a test group and control group formed post facto — i.e., after the promotion is made” and that the combination of claim features also specifies a specific composition of the test group and a specific composition of the control group that accounts for self-selection bias in the resulting measurement (*id.* at 10).

Appellant ostensibly maintains that by measuring the impact of the promotion based on a test group and a control group formed *after* the promotion is made, and specifying a specific composition of the test and control groups that accounts for self-selection bias and allows for the collection and use of online social media features in performing the regression to measure the impact of the promotion, claim 15 provides a technological improvement (*id.*), i.e., an unconventional technical solution to a technical problem (*id.* at 9; *see also* Reply Br. 3 (arguing that claim 15 “recites a specific process for defining test and control groups in a way that allows such groups to be defined **after** a promotion has been made,” i.e., that claim 15 recites “‘defining a first subset that includes followers of the handle that **have performed** further promotion of the promotion’ and ‘defining a second subset that includes followers of the handle that **have abstained** from further promotion of the promotion,’” which Appellant asserts “makes clear that Claim 15 is focused on a specific technique that ‘improves the relevant technology’ involved in measuring ‘performance of a promotion made by a handle in an online social media platform,’” and is not directed to an abstract idea). But, we are not persuaded that measuring the performance of an online social media promotion is a technical problem as opposed to a business problem, or that forming specific test and control groups and collecting social media features for these groups is a technological solution

where, as here, there is no indication of record that the operations recited in claim 15 invoke any assertedly inventive programming, require any specialized computer hardware or other inventive computer components, or that the claimed invention is implemented using other than generic computer components to perform generic computer functions.

Appellant attempts to draw a parallel between claim 15 and the claims at issue in *McRO, Inc. v. Bandai Namco Games America, Inc.*, 837 F.3d 1299 (Fed. Cir. 2016), arguing that the pending claims are analogous to the *McRO* claims in that they recite “a particular way to solve the problem of quantifying performance of an online social media promotion in a way that accounts for measurement biases” (Appeal Br. 11; *see also* Reply Br. 2 (arguing that “[a]s recited in Claim 15, this process involves a specific way of defining the test and control groups that accounts for multiple simultaneous effects in quantifying marketing lift that is associated with a particular promotion made on an online social media platform”)). Yet, the Federal Circuit premised its determination that the claim in *McRO* was patent eligible, not merely on the specificity of the claimed animation scheme, but on the fact that the claim, when considered as a whole, was directed to a technological improvement over existing, manual 3-D animation techniques and used limited rules in a process specifically designed to achieve an improved technological result in conventional industry practice. *See McRO*, 837 F.3d at 1316.

We are not persuaded that the claimed invention, as recited in claim 15, achieves a comparable improved technological result. To the contrary, the claimed invention, when considered in light of the Specification, clearly appears to be focused on achieving a commercial

objective, i.e., determining the effectiveness of an online social media promotion, and not on any claimed means for accomplishing that goal that improves technology.

We also are not persuaded of Examiner error to the extent Appellant maintains that the claims are patent eligible because they “prevent broad preemption of all online social media promotion measurement techniques” (Appeal Br. 11). Although the Supreme Court has described “the concern that drives [the exclusion of abstract ideas from patent-eligible subject matter] as one of pre-emption,” *Alice Corp.*, 573 U.S. at 216, characterizing preemption as a driving concern for patent eligibility is not the same as characterizing preemption as the sole test for patent eligibility. “The Supreme Court has made clear that the principle of preemption is the basis for the judicial exceptions to patentability” and “[f]or this reason, questions on preemption are inherent in and resolved by the § 101 analysis.” *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015) (citing *Alice Corp.*, 573 U.S. at 216). “[P]reemption may signal patent ineligible subject matter, [but] the absence of complete preemption does not demonstrate patent eligibility.” *Id.*

Responding to the Examiner’s Answer, Appellant argues in the Reply Brief that claim 15 recites an improvement in computer functionality (Reply Br. 7). Appellant notes that “Claim 15 recites a specific way of defining test and control groups **after** a promotion that is being analyzed has occurred (*id.*). And Appellant argues that “this technique allows the claimed process for measuring performance of a promotion to account for multiple simultaneous effects in quantifying marketing lift” (*id.*). Yet, importantly here, there is a fundamental difference between computer functionality

improvements, on the one hand, and uses of existing computers as tools to perform a particular task, on the other — a distinction that the Federal Circuit, in fact, applied in *Enfish*, in rejecting a § 101 challenge at the first stage of the *Mayo/Alice* framework because the claims at issue focused on a specific type of data structure, i.e., a self-referential table, designed to improve the way a computer stores and retrieves data in memory, and not merely on asserted advances in uses to which existing computer capabilities could be put. *See Enfish*, 822 F.3d at 1335–36.

The alleged improvement in measuring the performance of a promotion made by a handle in an online social media platform that Appellant touts does not concern an improvement to computer capabilities but instead relates to an alleged improvement in a business practice — a process in which a computer is used as a tool in its ordinary capacity.

We conclude, for the reasons outlined above, that claim 15 recites a mathematical concept, i.e., an abstract idea, and that the additional elements recited in the claim are no more than generic components used as tools to perform the recited abstract idea. As such, they do not integrate the abstract idea into a practical application. *See Alice Corp.*, 573 U.S. at 223–24 (“[W]holly generic computer implementation is not generally the sort of ‘additional featur[e]’ that provides any ‘practical assurance that the process is more than a drafting effort designed to monopolize the [abstract idea] itself.’” (quoting *Mayo*, 566 U.S. at 77)). Accordingly, we agree with the Examiner that claim 15 is directed to an abstract idea.

Step Two of the Mayo/Alice Framework (2019 Revised Guidance, Step 2B)

Having determined under step one of the *Mayo/Alice* framework that claim 15 is directed to an abstract idea, we next consider under Step 2B of the 2019 Revised Guidance, the second step of the *Mayo/Alice* framework, whether claim 15 includes additional elements or a combination of elements that provides an “inventive concept,” i.e., whether the additional elements amount to “significantly more” than the judicial exception itself.

2019 Revised Guidance, 84 Fed. Reg. at 56.

Directing our attention to steps (b) through (g), as recited in claim 15, Appellant argues that these features make clear that claim 15 does not claim “the functionality of defining test and control groups, collecting features, and performing regression in a merely generic manner” and that claim 15

recites “significantly more,” such as a requirement that the test group “includes followers of members of the first subset [who are followers of the handle that have performed further promotion of the promotion],” that the control group “only includes followers of members of the second subset [who are followers of the handle that have abstained from further promotion of the promotion],” and that the regression is “with a marketing-relevant key performance indicator as a dependent variable and the collected online social media features for the test group and the online social media features for the control group as independent variables”

(Appeal Br. 17 (bracketed material in original)). Yet, these limitations are part of the abstract idea, i.e., measuring the performance of an online social media promotion; they are not additional elements to be considered when determining whether claim 15 includes additional elements or a combination of elements that is sufficient to amount to significantly more than the judicial exception.

It could not be clearer from *Alice*, that under step two of the *Mayo/Alice* framework, the elements of each claim are considered both individually and “as an ordered combination” to determine whether the additional elements, i.e., the elements *other* than the abstract idea itself, “transform the nature of the claim” into a patent-eligible application. *Alice Corp.*, 573 U.S. at 217 (internal quotations and citation omitted); *see Mayo*, 566 U.S. at 72–73 (requiring that “a process that focuses upon the use of a natural law also contain *other* elements or a combination of elements, sometimes referred to as an ‘inventive concept,’ sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the natural law itself” (emphasis added) (internal citation omitted)). In other words, the inventive concept under step two of the *Mayo/Alice* test cannot be the abstract idea itself:

It is clear from *Mayo* that the “inventive concept” cannot be the abstract idea itself, and *Berkheimer* . . . leave[s] untouched the numerous cases from this court which have held claims ineligible because the only alleged “inventive concept” is the abstract idea. *Berkheimer v. HP, Inc.*, 890 F.3d 1369, 1374 (Fed. Cir. 2018) (Moore, J., concurring); *see also 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.”) (internal citation omitted).

Here, the only claim elements beyond the abstract idea are a “non-transitory computer readable medium”; “one or more computer processors”; and “a web crawler,” i.e., generic computer components used to perform

generic computer functions — a determination amply supported by, and fully consistent with the Specification (*see, e.g.*, Spec. ¶¶ 27–33).⁷

Appellant cannot reasonably maintain, nor does Appellant, that there is a genuine issue of material fact regarding whether operation of these components is well-understood, routine, or conventional, where, as here, there is nothing in the Specification to indicate that the operations recited in claim 15 require any specialized hardware or inventive computer components or that the claimed invention is implemented using other than generic computer components to perform generic computer functions, e.g., receiving and processing information. Indeed, the Federal Circuit, in accordance with *Alice*, has “repeatedly recognized the absence of a genuine dispute as to eligibility” where claims have been defended as involving an inventive concept based “merely on the idea of using existing computers or the Internet to carry out conventional processes, with no alteration of computer functionality.” *Berkheimer*, 890 F.3d at 1373 (Moore, J., concurring) (citations omitted); *see also BSG Tech*, 899 F.3d at 1291 (“BSG Tech does not argue that other, non-abstract features of the claimed inventions, alone or in combination, are not well-understood, routine and

⁷ The Office’s April 19, 2018 Memorandum to the Examining Corps from Deputy Commissioner for Patent Examination Policy, Robert W. Bahr, entitled, Changes in Examination Procedure Pertaining to Subject Matter Eligibility, Recent Subject Matter Eligibility Decision (*Berkheimer v. HP, Inc.*), available at <https://www.uspto.gov/sites/default/files/documents/memo-berkheimer-20180419.PDF>, expressly directs that an examiner may support the position that an additional element (or combination of elements) is well-understood, routine or conventional with “[a] citation to an express statement in the specification . . . that demonstrates the well-understood, routine, conventional nature of the additional element(s)” (*id.* at 3).

conventional database structures and activities. Accordingly, the district court did not err in determining that the asserted claims lack an inventive concept.”).

We are not persuaded, on the present record, that the Examiner erred in rejecting independent claim 15 under 35 U.S.C. § 101. Therefore, we sustain the Examiner’s rejection of claim 15, and claims 1, 5–10, 12–14, 16, 18, and 19, which fall with claim 15.

Dependent Claims 3 and 17

Claim 3 depends from claim 1, and recites that “defining the control group,” as called for in claim 1, includes “defining the control group from a second subset of the followers of the handle that have abstained from further promoting the promotion made by the handle in the online social media platform, and excludes members from the control group that are also followers of the handle.” Claim 17 depends from claim 15, and recites that “defining the test group includes excluding members from the test group that are also followers of the handle by sampling with replacement from the first subset.”

Appellant argues that claim 3 “represents an inventive concept that is significantly more than any abstract idea” because the “formation of such a control group in the context of the method of Claim 1 goes beyond what is well-understood, routine conventional activity in the field of logistic regression to measure impact of promotions made over online social media” (Appeal Br. 19–20). Appellant presents a substantial similar argument with respect to the formation of the test group, as called for in claim 17 (*id.* at 20–21).

Appellant's arguments are not persuasive at least because the limitations recited in claim 3 and 17 are part of the abstract idea itself; they are not additional elements to be considered when determining whether these claims include additional elements or a combination of elements that is sufficient to amount to significantly more than the judicial exception. Therefore, for the same reasons described above with respect to claim 15, these limitations cannot supply the inventive concept that renders the claims "significantly more" than the judicial exception.

As described above, the only claim elements beyond the abstract idea "are a "non-transitory computer readable medium"; "one or more computer processors"; and "a web crawler," i.e., generic computer components used to perform generic computer functions, which is not enough for patent eligibility.⁸

We are not persuaded, on the present record, that the Examiner erred in rejecting dependent claims 3 and 17 under 35 U.S.C. § 101. Therefore, we sustain the Examiner's rejection.

⁸ Appellant further argues that the Examiner has failed to establish a prima facie case of patent ineligibility with respect to claims 3 and 17 (Appeal Br. 20, 21). Yet, Appellant cannot reasonably maintain, nor does Appellant, that the Examiner's rejection was not understood or that the Examiner otherwise failed to comply with the notice requirements of 35 U.S.C. § 132. *See In re Jung*, 637 F.3d 1356, 1362 (Fed. Cir. 2011) (holding that USPTO carries its procedural burden of establishing a prima facie case when its rejection satisfies the requirements of 35 U.S.C. § 132 by notifying the applicant of the reasons for the rejection, together with such information and references as may be useful in judging of the propriety of continuing the prosecution of the application).

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 3, 5–10, 12–19	101	Eligibility	1, 3, 5–10, 12–19	

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