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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/215,015	03/16/2014	Gerry McCrory	86423-0001	1638
29693	7590	02/03/2020	EXAMINER	
WILEY 1776 K STREET N.W. WASHINGTON, DC 20006			WHITAKER, ANDREW B	
			ART UNIT	PAPER NUMBER
			3629	
			NOTIFICATION DATE	DELIVERY MODE
			02/03/2020	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte GERRY McCRORY,
KEVIN McCLOSKEY,
LINDA F. MONTEMAYOR, and
MATTHEW EVAN SHERMAN

Appeal 2019–004090
Application 14/215,015
Technology Center 3600

Before HUBERT C. LORIN, CYNTHIA L. MURPHY, and
ROBERT J. SILVERMAN, *Administrative Patent Judges*.
LORIN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner’s decision to reject claims 11–15 and 21–27. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

¹ We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as SCOIR, Inc. Appeal Br. 2.

CLAIMED SUBJECT MATTER

The claimed subject matter “relates to methods and systems for managing an application process, such as the college application process. In particular, the instant disclosure relates to methods and systems for matching the attributes of applicants (e.g., high school students) to the attributes of institutions to which they are applying (e.g., colleges and universities).” (Spec., para. 2). Claim 23, reproduced below with emphasis added, is illustrative of the claimed subject matter:

23. A method of matching applicant attributes to institutional attribute criteria, comprising:

- (a) establishing a user interface via a server device;
- (b) *receiving at the server device, through the user interface, a response by an applicant to an assessment question, wherein the assessment question is written to require application of the applicant's creative intelligence (CQ);*
- (c) *publishing the response by the applicant to the assessment question to a plurality of users other than the applicant;*
- (d) *receiving at the server device, through the user interface, feedback on the published response from the plurality of users other than the applicant;*
- (e) *quantifying the CQ of the applicant using the received feedback;*
- (f) *storing the quantified CQ of the applicant as an applicant profile in an applicant database;*
- (g) *repeating steps (b), (c), (d), (e), and (f) at least one time, thereby storing a plurality of applicant profiles in the applicant database;*
- (h) *receiving at the server device, through the user interface, a search query including a quantified CQ criterion;*
and
- (i) *outputting from the server device, through the user interface, a subset of the plurality of applicant profiles, wherein*

the subset of the plurality of applicant profiles includes applicant profiles satisfying the quantified CQ criterion.

Appeal Br. 16 (Claims Appendix).

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Tatsuoka	US 6,260,033 B1	July 10, 2001
Thompson	US 2004/0210661 A1	Oct. 21, 2004
Blaze	US 2009/0187473 A1	July 23, 2009
Galimore	US 2011/0306028 A1	Dec. 15, 2011
Hocking	US 2014/0081768 A1	Mar. 20, 2014
Colliander	US 2015/0161903 A1	June 11, 2015

REJECTIONS

Claims 11–15 and 21–27 are rejected under 35 U.S.C. § 101 as being directed to judicially-excepted subject matter.

Claims 15, 21–23, 26 and 27 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Galimore, Tatsuoka, and Colliander.

Claims 24 and 25 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Galimore, Tatsuoka, Colliander, and Thompson.

Claims 11 and 12 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Galimore, Tatsuoka, Colliander, and Blaze.

Claims 13, 14, 18 and 19 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Galimore, Tatsuoka, Colliander, and Hocking.

OPINION

The rejection of claims 11–15 and 21–27 under 35 U.S.C. § 101 as being directed to judicially-excepted subject matter.

Claims 13 and 14 are indefinite for the reasons discussed below. Accordingly, the rejection of claims 13 and 14 under 35 U.S.C. § 101 for claiming patent-ineligible subject matter must fall, *pro forma*, because they necessarily are based on speculative assumptions as to the meaning of the claims. *See In re Steele*, 305 F.2d 859, 862–63 (CCPA 1962).

The Appellant argued the claims as a group. *See* Appeal Br. 9–11. We select claim 23 as the representative claim for this group, and the remaining claims 11, 12, 15, 21, 22, and 24–27 stand or fall with claim 23. 37 C.F.R. § 41.37(c)(1)(iv).

Preliminary comment

Previous Office guidance on patent subject matter eligibility has been superseded by the 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019), hereinafter “2019 Revised 101 Guidance”. *Id.* 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, we will not address arguments on the sufficiency of the Examiner’s position relative to prior guidance but rather our analysis that follows will comport with the 2019 Revised 101 Guidance. We will address in particular Appellant’s arguments made in the Reply Brief which are raised in the context of the 2019 Revised 101 Guidance.

Introduction

35 U.S.C. § 101 provides that “[w]hoever 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.”

In that regard, claim 23 covers a “process” and is thus statutory subject matter for which a patent may be obtained.² This is not in dispute.

However, the § 101 provision “contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable.” *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014) (quoting *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (2013)).

In that regard, notwithstanding claim 23 covers statutory subject matter, the Examiner has raised a question of patent–eligibility on the ground that claim 23 is directed to an abstract idea.

Alice identifies a two-step framework for determining whether claimed subject matter is directed to an abstract idea. *Id.* at 217.

Alice step one – the “directed to” inquiry

According to *Alice* step one, “[w]e must first determine whether the claims at issue are *directed to* a patent-ineligible concept.” *Id.* at 218 (emphasis added).

The Examiner determined, *inter alia*, that claim 23

recite[s], in part, a method and system for receiving profile criterion inputs from an applicant, defining a plurality of applicant attributes from the profile criterion inputs, including a quantified attribute, storing the plurality of attributes as an applicant profile, receiving a search query comprising a quantified applicant attribute criterion, and outputting a subset of

² This corresponds to Step 1 of the 2019 Revised 101 Guidance which requires determining whether “the claim is to a statutory category.” *Id.* at 53. *See also* sentence bridging pages 53 and 54 (“consider[–] whether the claimed subject matter falls within the four statutory categories of patentable subject matter identified by 35 U.S.C. 101.”).

applicant profiles that satisfy a quantified applicant attribute criterion. These steps describe the concept of organizing human activities, which corresponds to concepts identified as abstract ideas by the courts

Final Act. 5.

Appellant argues that the claims are not directed to an abstract idea but rather “on an improvement in the art (e.g., college admissions).” Appeal Br. 10.

Accordingly, there is a dispute over whether claim 23 is directed to an abstract idea. Specifically, is claim 23 directed to steps that describe a concept of organizing human activities (Final Act. 5) or an improvement in the art?

*Claim Construction*³

³ “[T]he important inquiry for a § 101 analysis is to look to the claim.” *Accenture Glob. Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1345 (Fed. Cir. 2013). “In *Bancorp Servs., L.L.C. v. Sun Life Assurance Co. of Can.*, 687 F.3d 1266, 1273 (Fed. Cir. 2012), the court observed that ‘claim construction is not an inviolable prerequisite to a validity determination under § 101.’ However, the threshold of § 101 must be crossed; an event often dependent on the scope and meaning of the claims.” *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1347–48 (Fed. Cir. 2015).

We consider the claim as a whole⁴ giving it the broadest reasonable construction⁵ as one of ordinary skill in the art would have interpreted it in light of the Specification⁶ at the time of filing.

Claim 23 sets a scheme for facilitating the selection of applicant profiles satisfying a “quantified creative intelligence [‘CQ’] criterion.” The steps are

1. “receiving” A “by an applicant”;
2. “publishing” A “to a plurality of users other than the applicant”;
3. “receiving” B “from the plurality of users other than the applicant”;
4. “quantifying” C “of the applicant using” B;
5. “storing” C “of the applicant as” D “in an applicant database”;
6. “repeating steps (b), (c), (d), (e), and (f) at least one time, thereby storing” E “in the applicant database”; and,
7. “receiving” F “including” G; and,
8. “outputting” H;

⁴ “In determining the eligibility of respondents’ claimed process for patent protection under § 101, their claims must be considered as a whole.” *Diamond v. Diehr*, 450 U.S. 175, 188 (1981).

⁵ 2019 Revised 101 Guidance, page 53, footnote 14 (“*If a claim, under its broadest reasonable interpretation*”)

⁶ “First, it is always important to look at the actual language of the claims. . . . Second, in considering the roles played by individual limitations, it is important to read the claims ‘in light of the specification.’” *Smart Sys. Innovations, LLC v. Chicago Transit Auth.*, 873 F.3d 1364, 1387 (Fed. Cir. 2017) (J. Linn, dissenting in part and concurring in part), *citing Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016), among others.

where,

A is “a response ... to an assessment question, wherein the assessment question is written to require application of the applicant's creative intelligence (CQ)”;

B is “feedback on the published response”;

C is “the CQ”;

D is “an applicant profile”;

E is “a plurality of applicant profiles”;

F is “a search query”;

G is “a quantified CQ criterion”; and,

H is “a subset of [E], wherein the subset of [E] includes applicant profiles satisfying [G].

Claim 23 is reasonably broadly construed as a scheme for facilitating the selection of particular applicant profiles; that is, those which satisfy a “quantified creative intelligence [‘CQ’] criterion.”

The Specification describes various limitations in application processes, such as for colleges and universities. Paras. 2–22. For example,

Colleges have limited or no measurement methods to validate whether a student is truly committed to attending their institution, other than making an offer and awaiting the response. This is, alas, at the end of the application process and often results in colleges making offers to students who do not accept the offer, or in colleges neglecting to make offers to qualified students who are very interested in attending their institution. There is a need to manage/gauge the true intent of applicants.

Id. at 22. The invention contemplates the consideration of “psychometric attribute[s] other than an analytical intelligence (IQ) attribute [such as] ... creative intelligence (CQ) attribute, a practical intelligence (EQ) attribute, or a personality attribute” in the assessment questions of the application process. *Id.* at para 25. The assessment includes publishing the response to

the application to parties other than the applicant and using the feedback to place the applicant according to a desired criterion. *Id.* at para. 27. This procedure facilitates the selection of certain applicants.

Given the method as claimed as reasonably broadly construed above and in light of the Specification’s description of the invention, based on the record before us, we reasonably broadly construe claim 23 as being directed to a scheme for facilitating the selection of particular applicants.

*The Abstract Idea*⁷

Above, where we reproduce claim 23, we identify in italics the limitations we believe recite an abstract idea. Based on our claim construction analysis (above), we determine that the identified limitations describe a scheme for facilitating the selection of particular applicants.

Facilitating the selection of particular applicants is a matter of managing interactions between people which falls within the enumerated “[c]ertain methods of organizing human activity” grouping of abstract ideas set forth in the 2019 Revised 101 Guidance.⁸

⁷ This corresponds to Step 2A of the 2019 Revised 101 Guidance. Step 2A determines “whether a claim is ‘directed to’ a judicial exception,” such as an abstract idea. Step 2A is two prong inquiry.

⁸ 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)”:

*Improvement In the Functioning of a Computer*⁹ (Appellant’s Argument)

The Examiner’s characterization of what the claim is directed to set forth in the Answer is similar to ours, albeit ours is at a lower level of abstraction. “An abstract idea can generally be described at different levels of abstraction.” *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1240 (Fed. Cir. 2016). *Cf. Id.* at 1241 (The Board’s “slight revision of its abstract idea analysis does not impact the patentability analysis.”)

(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.

⁹ 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).

We have reviewed the record and are unpersuaded as to error in our or the Examiner’s characterization of what claim 23 is directed to.

Appellant’s arguments are unpersuasive principally because they are not commensurate in scope with what is claimed. *Cf. In re Self*, 671 F.2d 1344, 1348 (CCPA 1982) (“Many of appellant’s arguments fail from the outset because, . . . they are not based on limitations appearing in the claims”)

Appellant argues that “[j]ust as in *McRO* [*McRO, Inc. v. Bandai Namco Games America Inc.*, 837 F.3d 1299 (Fed. Cir. 2016)], the instant claims require specific characteristics — specific types of user inputs (e.g., application of creative intelligence, feedback from users other than the applicant) that result in specific types of outputs (e.g., the quantification of creative intelligence through crowdsourcing).” Appeal Br. 10. *See also* Reply Br. 4 (“The claims on appeal, however, address these challenges ‘by offering, *inter alia*, objective quantifications of creative intelligence arrived at through the application of crowdsourcing.’”) (quoting from the Bishop Declaration).

Claim 23 makes no mention of quantifying creative intelligence through crowdsourcing. The claim calls for the use of “feedback . . . *from [a] plurality of users* other than the applicant” in “quantifying the CQ of the applicant.” It is not limited to crowdsourcing. Crowdsourcing is “the practice of obtaining needed services, ideas, or content by soliciting contributions from a large group of people and especially from the online community rather than from traditional employees or suppliers” (<https://www.merriam-webster.com/dictionary/crowdsourcing>; accessed Jan.

17, 2020). The claim reasonably broadly covers feedback from any plurality of users, such as two persons related to the applicant.

Appellant argues that the claim provides a specific method that improves “the art (e.g., of college admissions).” Appeal Br. 10. However, there is no mention of college admissions in the claim.

Appellant directs our attention to paras. 12–15 of the May 31, 2018 Declaration of Mr. Don Bishop which are said to “explain[that] the present invention addresses the problem of assessing creative intelligence as part of the college admissions process.” Appeal Br. 10. Setting aside claim 23 is not directed to a college admissions process, the relevance of what Mr. Bishop says in paras. 12–15 of the Declaration to the question of whether claim 23 is directed to an abstract idea is unclear to us. It is true that Mr. Bishop states, for example, that

Indeed, those of ordinary skill in the art recognize the difficulties associated with assessing creative intelligence. As a result, despite the value of creative intelligence as a predictor of future success, many educational institutions do not consider creative intelligence as part of their admissions process, and may indeed punish creativity in the admissions.

Para. 14 of the Bishop Declaration. There may be a value to creative intelligence and it may be desirable to consider it in the college admissions process, as Mr. Bishop testifies. But the question is what claim 23 is directed to and whether that which the claim is directed to is an abstract idea. The Bishop Declaration does not address that question.

In citing *McRO*, Appellant may be intending to make the argument that claim 23 “is directed to a patentable, technological improvement over the existing” art. *Id* at 837. F.3d 1317.

In that regard, we have carefully reviewed the claim. Per our previous claim construction analysis, claim 23 is reasonably broadly construed as covering a scheme for facilitating the selection of particular applicants. We see no specific asserted technological improvement recited in the claim. Nor does the Specification discuss any in the context of a method as broadly as claim 23 currently presents it. Rather than being directed to any asserted improvement in technology over the art, the claim and specification support the opposite view – that the claimed subject matter is directed to a scheme for facilitating selection of applicants.

Claim 23 mentions a “user interface,” “server device,” and a “database” but the claim does not otherwise provide any structural details¹⁰ that would distinguish them from what was well known at the time the application was filed. *See, e.g.*, Spec., para. 49 (“general purpose computers”).

With respect to the “receiving,” “publishing,” “quantifying,” “storing,” “repeating,” and “outputting” steps, the Specification attributes no special meaning to any of these operations, individually or in the combination as claimed. In our view, consistent with the Specification, these are common computer processing functions that one of ordinary skill in the art at the time of the invention would have known generic computers were capable of performing and would have associated with generic computers.

¹⁰ *Cf. Move, Inc. v. Real Estate Alliance Ltd.*, 721 F. App’x. 950, 954 (Fed. Cir. 2018) (Non-precedential). “Claim 1 is aspirational in nature and devoid of any implementation details or technical description that would permit us to conclude that the claim as a whole is directed to something other than the abstract idea identified by the district court.”

Cf. OIP Techs., Inc. v. Amazon.com, Inc., 788 F.3d 1359, 1363 (Fed. Cir. 2015):

Beyond the abstract idea of offer-based price optimization, the claims merely recite “well-understood, routine conventional activit[ies],” either by requiring conventional computer activities or routine data-gathering steps. *Alice*, 134 S. Ct. at 2359 (*quoting Mayo*, 132 S.Ct. at 1294) (alterations in original). . . . For example, claim 1 recites “sending a first set of electronic messages over a network to devices,” the devices being “programmed to communicate,” storing test results in a “machine-readable medium,” and “using a computerized system . . . to automatically determine” an estimated outcome and setting a price. Just as in *Alice*, “all of these computer functions are ‘well-understood, routine, conventional activit[ies]’ previously known to the industry.” *Alice*, 134 S.Ct. at 2359 (*quoting Mayo*, 132 S.Ct. at 1294) (alterations in original); *see also buySAFE[, Inc. v. Google, Inc.]*, 765 F.3d [1350,] 1355 [(Fed. Cir. 2014)] (“That a computer receives and sends the information over a network—with no further specification—is not even arguably inventive.”).

At best, the “user interface,” “server device,” and a “database” distinguish over other generic devices known at the time the application was filed in the *type* of electronic information being processed – that is, for example, the “database” of claim 23 contains “the quantified CQ of the applicant as an applicant profile.” But that is not alone a patentably consequential distinction. This is so because “[c]laim limitations directed to the content of information and lacking a requisite functional relationship are not entitled to patentable weight because such information is not patent eligible subject matter under 35 U.S.C. § 101.” *Praxair Distribution, Inc. v. Mallinckrodt Hosp. Prods. IP Ltd.*, 890 F.3d 1024, 1032 (Fed. Cir. 2018).

For these reasons, we do not find that claim 23 is directed to a technological improvement over the existing art.

Accordingly, within the meaning of the 2019 Revised 101 Guidance, we find there is no integration of the abstract idea into a practical application.

We note the discussion in the Reply Brief (pages 4–5) on this question of whether there is in claim 23 an integration of the abstract idea into a practical application. The discussion does not adequately explain in what way claim 23 *integrates* the abstract idea (i.e., facilitating selection of applicants) into a practical application. Relying on the Bishop Declaration, Appellant makes a case for the value of including information about an applicant’s creative intelligence in an admissions process. But Appellant does not adequately explain how that *meaningfully* limits the abstract idea, i.e., facilitating the selection of particular applicants.

According to the 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.” 2019 Revised 101 Guidance 53 (emphasis added). Adding consideration of creative intelligence into an admissions process may be an improvement over what was done before but it is not a technical improvement. The record evidence weighs in favor of the view that the claim’s focus is on nontechnical improvements, such as identifying applicants with certain levels of creative intelligence. *Cf. Trading Tech. Int’l, Inc. v. IBG LLC*, 921 F.3d 1378, 1384 (Fed. Cir. 2019) (“The claims are focused on providing information to traders in a way that helps

them process information more quickly, ‘556 patent at 2:26–39, not on improving computers or technology.’”)

We have considered Appellant’s other arguments challenging the Examiner’s determination under step one of the *Alice* framework and find them unpersuasive. For the foregoing reasons, the record supports the Examiner’s determination that claim 23 is directed to an abstract idea.

*Alice step two – Does the Claim Provide an Inventive Concept?*¹¹

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)).

In that regard, the Examiner determined that “[t]he claim does not include additional elements that are sufficient to amount to significantly more than the judicial exception because the additional elements when considered both individually and as an ordered combination do not amount to significantly more than the abstract idea.” Final Act. 5–6. We agree.

We addressed the matter of whether there were any purported specific technological improvements in our analysis above under step one of the *Alice* framework. This is consistent with the case law. *See Ancora Techs.*,

¹¹ This corresponds to Step 2B of the 2019 Revised 101 Guidance 56:

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

Inc. v. HTC Am., Inc., 908 F.3d 1343, 1347 (Fed. Cir. 2018) (“We have several times held claims to pass muster under *Alice* step one when sufficiently focused on such improvements.”) Such an argument can also challenge a determination under step two of the *Alice* framework. *See buySAFE*, 765 F.3d at 1354–55. “[R]ecent Federal Circuit jurisprudence has indicated that eligible subject matter can often be identified either at the first or the second step of the *Alice/Mayo* [framework].” 2019 Revised 101 Guidance at 53; *see also id.* n.17.

Be that as it may, we are unpersuaded that claim 23 presents an element or combination of elements indicative of a specific asserted improvement in computer capabilities, thereby rendering the claimed subject matter sufficient to ensure that the patent in practice amounts to significantly more than a patent upon a scheme for facilitating a credit decision employing a “user interface,” “server device,” and a “database”.

We have reviewed the Specification and, as explained above, we can find no suggestion of any technical improvements as a result of performing the steps as broadly as they are recited.

We cited the Specification in our earlier discussion. It is intrinsic evidence that the claimed “user interface,” “server device,” and a “database” as claimed are conventional. In doing so, we have followed “Changes in Examination Procedure Pertaining to Subject Matter Eligibility, Recent Subject Matter Eligibility Decision (*Berkheimer v. HP Inc.*[, 881 F.3d 1360 (Fed. Cir. 2018)],” USPTO Memorandum, Robert W. Bahr, Deputy Commissioner For Patent Examination Policy, April 19, 2018 (the “Berkheimer Memo”).

The court in *Berkheimer* held that “[t]he patent eligibility inquiry may contain underlying issues of fact.” *Berkheimer*, 881 F.3d at 1365 (quoting *Mortgage Grader, Inc. v. First Choice Loan Servs. Inc.*, 811 F.3d 1314, 1325 (Fed. Cir. 2016) (“The § 101 inquiry ‘*may* contain underlying factual issues.’”)). But the court also held that “[w]hen there is *no genuine issue of material fact* regarding whether the claim element or claimed combination is well-understood, routine, [and] conventional to a skilled artisan in the relevant field, this issue can be decided on summary judgment as a matter of law.” *Id.* at 1368 (emphasis added). This qualification has been subsequently reiterated.

If there is a genuine dispute of material fact, Rule 56 requires that summary judgment be denied. In *Berkheimer*, there was such a genuine dispute for claims 4–7, but not for claims 1–3 and 9 [I]n accordance with *Alice*, we have repeatedly recognized the absence of a genuine dispute as to eligibility for the many claims that 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 v. HP Inc., 890 F.3d 1369, 1371–73 (Fed. Cir. 2018) (Order, On Petition for rehearing en banc, May 31, 2018); *see also Aatrix Software, Inc. v. Green Shades Software, Inc.*, 890 F.3d 1354, 1368 (Fed. Cir. 2018) (“A factual allegation or dispute should not automatically take the determination out of the court’s hands; rather, there needs to be justification for why additional evidence must be considered—the default being a legal determination.”).

Here, the Specification indisputably shows the recited “user interface,” “server device,” and a “database” individually and in the context

as claimed were conventional at the time of filing. *See e.g.*, para. 49.

Accordingly, there is adequate factual support for the well-understood, routine, or conventional nature of the “user interface,” “server device,” and a “database” as broadly recited in claim 23.

Appellant argues that

as discussed in the Bishop Declaration, the claims recite methods and systems that gather and quantify what has heretofore been considered subjective information (e.g., by using crowdsourcing to quantify information that has heretofore been subjective), leveraging this new data in unconventional fashion. This recitation of a solution that did not previously exist limits the scope of the claims in a manner sufficient to transform them from an abstract idea writ large into a patent-eligible invention.

Appeal Br. 11. The argument is unpersuasive for the reasons already discussed.

No other persuasive arguments having been presented, we conclude that no error has been committed in the determination under *Alice* step two that claim 23 does not include an element or combination of elements circumscribing the patent-ineligible concept it is directed to so as to transform the concept into an inventive application.

We have considered all of the Appellant’s arguments (including those made in the Reply Brief) and find them unpersuasive.

Accordingly, because we are not persuaded as to error in the determinations that representative claim 23, and claims 11, 12, 15, 21, 22, and 24–27 which stand or fall with claim 23, are directed to an abstract idea and do not present an “inventive concept,” we sustain the Examiner’s conclusion that they are directed to patent-ineligible subject matter for being

judicially-excepted from 35 U.S.C. § 101. *Cf. LendingTree, LLC v. Zillow, Inc.*, 656 F. App'x. 991, 997 (Fed. Cir. 2016) (“We have considered all of LendingTree’s remaining arguments and have found them unpersuasive. Accordingly, because the asserted claims of the patents in suit are directed to an abstract idea and do not present an ‘inventive concept,’ we hold that they are directed to ineligible subject matter under 35 U.S.C. § 101.”); *see, e.g., OIP Techs.*, 788 F.3d at 1364; *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1098 (Fed. Cir. 2016).

The rejection of claims 15, 21-23, 26 and 27 under 35 U.S.C. § 103(a) as being unpatentable over Galimore, Tatsuoka, and Colliander.

We will sustain the rejection. Appellant’s only argument is that the cited prior art does not disclose crowdsourcing. *See e.g., Appeal Br. 12* (“Claim 23 recites, *inter alia*, a series of steps (e.g., steps (b), (c), (d), and (e)) that utilize third party crowdsourced responses to an applicant's response to an assessment question to quantify the applicant's creative intelligence (CQ). Claim 27 contains similar recitations.”) As we have pointed out above, the claims are not so limited. Accordingly, the argument cannot be persuasive as to error in the rejection.

There being no other argument challenging the rejection, the rejection is sustained.

The rejection of claims 24 and 25 under 35 U.S.C. § 103(a) as being unpatentable over Galimore, Tatsuoka, Colliander, and Thompson.

The rejection of claims 11 and 12 under 35 U.S.C. § 103(a) as being unpatentable over Galimore, Tatsuoka, Colliander, and Blaze.

These rejections are sustained for the same reasons we sustained the rejection of the independent claims from which they depend.

The rejection of claims 13, 14, 18, and 19 under 35 U.S.C. § 103(a) as being unpatentable over Galimore, Tatsuoka, Colliander, and Hocking.

Claims 13 and 14 are indefinite for the reasons discussed below. Accordingly, the rejection of claims 13 and 14 under 35 U.S.C. § 103(a) must fall, *pro forma*, because they necessarily are based on speculative assumptions as to the meaning of the claims. *See In re Steele*, 305 F.2d 859, 862–63 (CCPA 1962).

The rejection of claims 18 and 19 are sustained for the same reasons we sustained the rejection of the independent claims from which they depend.

NEW GROUND OF REJECTION

Claims 13 and 14 are rejected under 35 U.S.C. § 112(b) (AIA), as being indefinite for failing to particularly point out and distinctly claim the subject matter which Appellant regards as the invention. Claims 13 and 14 depend from claim 1 which has been cancelled.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/ Basis	Affirmed	Reversed	New Ground
11–15, 21–27	101	Eligibility	11, 12, 15, 21–27	13, 14	

15, 21–23, 26, 27	103(a)	Galimore, Tatsuoka, Colliander	15, 21–23, 26, 27		
24, 25	103(a)	Galimore, Tatsuoka, Colliander, Thompson	24, 25		
11, 12	103(a)	Galimore, Tatsuoka, Colliander, Blaze	11, 12		
13, 14, 18, 19	103(a)	Galimore, Tatsuoka, Colliander, Hocking	18, 19	13, 14	
	112(b) (AIA)	Indefiniteness			13, 14
Overall Outcome			11, 12, 15, 21–27	13, 14	13, 14

NEW GROUND

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b). 37 C.F.R. § 41.50(b) provides “[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review.” 37 C.F.R. § 41.50(b) also provides that the Appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

- (1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new Evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the prosecution will be remanded to the examiner. . . .

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(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same Record. . . .

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED–IN–PART; 37 C.F.R. § 41.50(b)