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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JONATHAN HELLER, JINGCHUN (DIANE) YU, and
MICHAEL HENRY EVANGELISTA

Appeal 2019-004562
Application 11/966,893
Technology Center 3600

Before JEFFREY S. SMITH, ERIC B. CHEN, and
AMBER L. HAGY, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

This is an appeal under 35 U.S.C. § 134(a) from the rejection of claims 1, 40–52, 59–73, 75–82, and 85–89. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

Representative Claim

1. A method, comprising:

responsive to a user selecting a digital content asset comprising an advertisement slot, determining, by at least one processor of a computing device, a delivery platform, of a network comprising a plurality of delivery platforms, via which the digital content asset was selected by the user;

accessing, by the at least one processor of the computing device and from a database, data correlating each of the plurality of delivery platforms to one or more advertisements;

determining, by the at least one processor of the computing device, based on the delivery platform via which the digital content asset was selected by the user, and based on the accessed data, an advertisement for the advertisement slot;

inserting, by the at least one processor of the computing device, the determined advertisement in the advertisement slot;

delivering, to a device associated with the user and via the delivery platform of the network comprising the plurality of delivery platforms, the digital content asset comprising the determined advertisement inserted in the advertisement slot;
and

determining, by the at least one processor of the computing device, an allocation of revenue for the advertisement between a party having rights in the digital content asset and a party that contributed to the user selecting the digital content asset.

Prior Art

Linehan	US 2004/0249726 A1	Dec. 09, 2004
Buchanan	US 2005/0119936 A1	June 02, 2005
Herley	US 2006/0092282 A1	May 04, 2006
Yan	US 2008/0091524 A1	Apr. 17, 2008
Fassett	US 2008/0109363 A1	May 08, 2008
Anderson	US 8,108,895 B2	Jan. 31, 2012

Examiner's Rejections

Claims 1, 40–52, 59–73, 75–82, and 85–89 stand rejected under 35 U.S.C. § 101 as directed to patent ineligible subject matter.

Claims 1, 40–41, 44–48, 60–62, 65–69, 75, 77–79, and 85–89 stand rejected under 35 U.S.C. § 103 as unpatentable over Linehan, Anderson, Herley, and Buchanan.

Claims 42, 43, 63, 64, and 76 stand rejected as unpatentable over Linehan, Anderson, Herley, Buchanan, and Yan.

Claims 49–52, 70–73, and 80–82 stand rejected as unpatentable over Linehan, Anderson, Herley, Buchanan, and Fassett.

ANALYSIS

I. Section 101 Rejection

The Examiner rejects all of the pending claims under 35 U.S.C. § 101 as patent-ineligible because they are directed to a judicial exception without significantly more. Final Act. 3–5. Appellant argues that the claims are not directed to an abstract idea, recite significantly more than an abstract idea, and the Examiner's rejection should be reversed. Appeal Br. 6–14. For the reasons explained below, we are not persuaded of Examiner error in the § 101 rejection, and we, therefore, sustain that rejection.

A. Principles of Law

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 U.S. Supreme Court, however, has 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) (citation omitted).

The Court, in *Alice*, reiterated the two-part framework previously set forth in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66, 75–77 (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*, 573 U.S. at 217. The first part in the analysis is to “determine whether the claims at issue are directed to one of those patent-ineligible concepts.” *Id.* For example, abstract ideas include, but are not limited to, fundamental economic practices, methods of organizing human activities, an idea of itself, and mathematical formulas or relationships. *Id.* at 218–20. The “directed to” inquiry asks not whether “the claims *involve* a patent-ineligible concept,” but instead whether, “considered in light of the specification, . . . ‘their character as a whole is directed to excluded subject matter.’” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016) (internal citations omitted). In that regard, we determine whether the claims “focus on a specific means or method that improves the relevant technology” or are “directed to a result or effect that itself is the abstract idea and merely invoke generic processes and machinery.” *McRO, Inc. v. Bandai Namco Games America Inc.*, 837 F.3d 1299, 1314 (Fed. Cir. 2016).

If, in the first part of the *Alice/Mayo* analysis, we conclude that the claims are not directed to a patent-ineligible concept, they are considered patent eligible under § 101 and the inquiry ends. *Rapid Litig. Mgmt. Ltd. v. CellzDirect, Inc.*, 827 F.3d 1042, 1047 (Fed. Cir. 2016). If the claims are directed to a patent-ineligible concept, the second part in the *Alice/Mayo* analysis is to consider the elements of the claims “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.” *Alice*, 573 U.S. at 217 (quoting *Mayo*, 566 U.S. at 79, 78). In other words, the second part is to “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 (brackets in original) (quoting *Mayo*, 566 U.S. at 72–73). The prohibition against patenting an abstract idea “‘cannot be circumvented by attempting to limit the use of the formula to a particular technological environment’ or adding ‘insignificant postsolution activity.’” *Bilski v. Kappos*, 561 U.S. 593, 610–11 (2010) (internal citation omitted).

The U.S. Patent and Trademark Office (the “Office”) has published revised guidance on the application of 35 U.S.C. § 101. 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50–57 (Jan. 7, 2019) (“Guidance”). Under the Guidance, the Office first looks to whether the claim recites: (1) any judicial exceptions, including certain groupings of abstract ideas (*i.e.*, mathematical concepts, certain methods of organizing human activity such as a fundamental economic practice, or mental processes); and (2) additional elements that integrate the judicial exception

into a practical application. *See* Guidance at 52, 54–55; *see also* MPEP § 2106.05(a)–(c), (e)–(h).

Only if a claim (1) recites a judicial exception, and (2) does not integrate that exception into a practical application, does the Office then look to whether the claim: (3) adds a specific limitation beyond the judicial exception that are not “well-understood, routine, conventional” in the field (*see* MPEP § 2106.05(d)); or (4) simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception. *See* Guidance at 56.

B. Application of Legal Principles

1. Step 2A of the Guidance

Prong 1: Do the Claims Recite an Abstract Idea

In applying the framework set out in *Alice/Mayo*, and as the first part of that analysis, the Examiner concludes the claims are directed to the abstract idea of allocating revenue from advertising. Final Act. 3–4. According to the Examiner, the steps recited in claim 1 “describe the concept of using advertising as an exchange or currency, which corresponds to concepts identified as abstract by the courts.” *Id.* at 4 (citing *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709 (Fed. Cir. 2014)).

In challenging the Examiner’s determination that the claims recite an abstract idea, Appellant argues that the Examiner “ignores the vast majority of features recited in claim 1” and “improperly overgeneralizes the claims.” Appeal Br. 7. According to Appellant, the Federal Circuit’s decision in “*Ultramercial* does not support the alleged abstract idea of ‘allocating revenue from advertising.’” *Id.* at 8; *see* Reply Br. 3–4.

We evaluate the Examiner’s § 101 rejection by applying the Guidance, which uses enumerated groupings of abstract ideas that are rooted in U.S. Supreme Court precedent, as well as Federal Circuit decisions interpreting that precedent. *See* Guidance at 51–52. By grouping the abstract ideas, the Guidance synthesizes the holdings of various court decisions to facilitate examination. The Guidance describes one category of abstract ideas as including “[c]ertain methods of organizing human activity” such as “commercial or legal interactions (including agreements in the form of contracts; legal obligations; advertising; marketing or sales activities or behaviors; business relations).” *Id.* at 52. We agree with the Examiner that the claims recite steps that fall within the category of organizing human activity (*see* Ans. 3–5), consistent with the Guidance. *See* Guidance at 52.

Appellant’s contention that the steps are not directed to organizing human activity, such as commercial interactions, is not persuasive. As the Guidance states, “commercial interactions” include “advertising.” *See* Guidance at 52 n.13 (citing, *inter alia*, *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709 (Fed. Cir. 2014) (holding that a claim “describ[ing] only the abstract idea of showing an advertisement before delivering content” is patent ineligible)). Here, claim 1 recites the steps of “responsive to a user selecting a digital content asset comprising an advertisement slot, determining . . . a delivery platform;” “accessing . . . data correlating . . . delivery platforms to one or more advertisements;” “determining . . . an advertisement for the advertisement slot;” “inserting . . . the advertisement in the advertisement slot;” “delivering . . . the determined advertisement inserted in the advertisement slot;” “and determining . . . an allocation of

revenue for the advertisement,” which all fall within the category of organizing human activity, such as commercial interactions (advertising).

Thus, we find that the claims recite an abstract idea.

Prong 2: Do the Claims Integrate the Abstract
Idea Into a Practical Application

In accordance with Prong 2 of Step 2A of the Guidance, we evaluate the claims to determine whether they recite *additional elements beyond the abstract idea*, and, if so, we evaluate the additional elements to determine whether they integrate the abstract idea into a practical application.

Guidance at 54. The Guidance at page 55 provides exemplary considerations, including whether an additional element:

- “reflects an improvement in the functioning of a computer, or an improvement to other technology or technical field”;
- “implements a judicial exception with, or uses a judicial exception in conjunction with, a particular machine or manufacture that is integral to the claim”;
- “effects a transformation or reduction of a particular article [or thing] to a different state or thing”; or
- “applies or uses the judicial exception in some other meaningful way beyond generally linking the use of the judicial exception to a particular technological environment.”

The Guidance also highlights certain examples in which courts have held that “a judicial exception has *not* been integrated into a practical application,” such as where the claims “merely use[] a computer as a tool to perform an abstract idea” or the additional element adds “insignificant extra-

solution activity” to the abstract idea. Guidance at 55 (emphasis added); *see also* October 2019 Update at 11–15.

The Examiner determines that the “claim recites the additional limitations of a processor of a computing device.” Final Act. 4. Appellant argues that the method of claim 1 reflects an improvement in the functioning of a computer by solving the problem of delivering content assets across a distributed set of access points, and improves upon prior methods for determining advertisements. Reply Br. 4; *see* Appeal Br. 11–12.

We find the claims do not reflect an improvement in the functioning of a computer or other technology or technical field. *See* Guidance, 84 Fed. Reg. at 55; *cf. Trading Techs. Int’l, Inc. v. IBG LLC*, 921 F.3d 1084, 1090 (Fed. Cir. 2019) (“This invention makes the *trader* faster and more efficient, not the computer. This is not a technical solution to a technical problem.”). Further, we do not find Appellant’s arguments persuasive because the claims utilize general purpose hardware, such as a processor of a computing device and a delivery platform. *See Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335–36 (Fed. Cir. 2016) (“[W]e find it relevant to ask whether the claims are directed to an improvement to computer functionality versus being directed to an abstract idea . . . the focus of the claims is on the specific asserted improvement in computer capabilities (i.e., the self-referential table for a computer database) or, instead, on a process that qualifies as an ‘abstract idea’ for which computers are invoked merely as a tool.”); *Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d at 1370 (“[M]erely adding computer functionality to increase the speed or efficiency of the process does not confer patent eligibility on an otherwise abstract idea.”).

We agree with the Examiner that the claimed additional elements (e.g., a processor of a computing device, a delivery platform, and a device associated with the user) encompass general purpose computer components that merely provide conventional computer implementation. *See* Ans. 5 (citing Linehan, Fig. 1); *see* Spec. 16–19 (disclosing an exemplary architecture of the invention as modules for performing functions). As the U.S. Supreme Court has explained, “if a patent’s recitation of a computer amounts to a mere instruction to ‘implemen[t]’ an abstract idea ‘on . . . a computer,’ that addition cannot impart patent eligibility.” *Alice*, 573 U.S. at 223 (quoting *Mayo*, 566 U.S. at 84).

Consistent with the Examiner’s determination, we determine that the claims do not include an improvement to another technology or technical field or an improvement to the functioning of the computer itself; we also find that the claims do not include a transformation of an article or meaningful limitations beyond generally linking the use of an abstract idea to a particular technological environment. *See* Ans. 3–6.

We conclude that the claims are directed to an abstract idea that is not integrated into a practical application.

2. Step 2B of the Guidance – Do the Claims Recite Significantly More Than the Abstract Idea

Regarding the second part of the *Alice/Mayo* analysis, the Examiner finds the elements of the claims, when considered individually or as an ordered combination, do not recite significantly more than the abstract idea. Final Act. 4–5. We agree with the Examiner that the claimed additional elements (e.g., a processor of a computing device, a delivery platform, and a device associated with the user) encompass general purpose computer

components that perform well-understood, routine, and conventional steps, and merely provide conventional computer implementation. *See* Ans. 5 (citing Linehan, Fig. 1); *see* Spec. 16–19 (disclosing an exemplary architecture of the invention as modules for performing functions).

Here, the claim elements beyond the abstract idea, “at least one processor of a computing device, a delivery platform,” and “a device associated with the user,” where the processor performs “determining,” “accessing,” “determining,” “inserting,” and “determining,” recite only generic computer functions and components that are well-understood, routine, and conventional, and do not convey an inventive concept. *See Alice*, 573 U.S. at 217. Appellant is reminded that in most cases, “relying on a computer to perform routine tasks more quickly or more accurately is insufficient to render a claim patent eligible.” *OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1363 (citing *Alice*, 573 U.S. at 224 (holding that “use of a computer to create electronic records, track multiple transactions, and issue simultaneous instructions” is not an inventive concept)); *Intellectual Ventures I LLC v. Capital One Bank*, 792 F.3d 1363, 1370 (“[M]erely adding computer functionality to increase the speed or efficiency of the process does not confer patent eligibility on an otherwise abstract idea.”).

To the extent Appellant relies on the particular manipulation of data recited as indicative of an inventive concept, we have determined above that such steps amount to organizing human activity, which is categorized in the Guidance as abstract ideas. Appellant is reminded that “the ‘inventive concept’ [under the second part of the *Mayo/Alice* test] 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). “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.” *BSG Tech LLC v. Buyseasons, Inc.*, 899 F.3d 1281, 1290 (Fed. Cir. 2018). Further, as the Federal Circuit has explained, a “claim for a *new* abstract idea is still an abstract idea.” *Synopsis, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1151 (Fed. Cir. 2016). Even assuming the technique claimed was “[g]roundbreaking, innovative, or even brilliant,” that would not be enough for the claimed abstract idea to be patent eligible. *See Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 591 (2013).

We determine that the components and functions recited in Appellant’s claims do not add any meaningful limitations beyond generally linking the abstract idea to the particular technological environment.

Accordingly, we sustain the Examiner’s rejection of claims 1, 40–52, 59–73, 75–82, and 85–89 under 35 U.S.C. § 101 as patent-ineligible.

II. Section 103 rejections

We adopt the findings of fact made by the Examiner in the Final Action and Examiner’s Answer as our own. We agree with the conclusions reached by the Examiner for the reasons given in the Final Action and Examiner’s Answer. We address the following arguments to complete the record.

Claim 1 recites “responsive to a user selecting a digital content asset comprising an advertisement slot, determining, by at least one processor of a computing device, a delivery platform, of a network comprising a plurality of delivery platforms, via which the digital content asset was selected by the user.” The Examiner finds that Appellant’s Specification “lack[s] any specific definition of the term ‘platform,’” and that a channel of Anderson teaches a “delivery platform” as claimed. Ans. 7–8 (citing Anderson 15:15–27, Figs. 5 and 6). In contrast, Appellant contends that there is no reasonable basis to interpret the claimed “delivery platform” to encompass the channel disclosed by Anderson. Reply Br. 8.

Appellant asserts support for the claimed “delivery platform” in the Specification’s disclosure of an access point to access content such as a video. *See* Appeal Br. 3 (citing, *inter alia*, Spec. 9:7–12 (“[T]he audience accesses the content [such as video] from many aggregator/distributor access points.”)). Appellant’s Specification gives an example of an access point as a programming channel. *See id.* at 2:5–11 (an “access point” is, for example, a “network, broadcast affiliate, or cable programming channel”). We agree with the Examiner that Appellant’s Specification does not expressly define the claimed “delivery platform,” but rather, gives non-limiting examples, including a cable programming channel. *See* Ans. 7. We find that the broadest reasonable interpretation of the claimed “delivery platform,” read in light of Appellant’s Specification, encompasses a channel. *See In re Morris*, 127 F.3d 1048, 1056 (Fed. Cir. 1997) (“Absent an express definition in their specification, the fact that appellants can point to definitions or usages that conform to their interpretation does not make the PTO’s

definition unreasonable when the PTO can point to other sources that support its interpretation.”).

Appellant also contends that even if the claimed “delivery platform” does encompass a channel, Anderson’s disclosure of a user viewing a specific channel does not teach the claimed steps of “determining . . . a delivery platform,” “accessing . . . data correlating each of the plurality of delivery platforms to one or more advertisements,” and “determining [an advertisement] based on the delivery platform [and] the accessed data.” Appeal Br. 8–9. Appellant contends that Anderson lacks disclosure, anywhere in the 78 columns or 51 drawing sheets of Anderson, of a digital content asset being selected via a programming channel. *Id.* at 9.

We disagree. Anderson discloses selecting a sports program “digital content asset” via a sports channel “delivery platform.” *See* Anderson, 69:66–70:12. Anderson discloses designating ads relating to men’s shaving products, such as ads for razors and shaving cream, to the sports channel. *Id.* We find that Anderson’s teaching of a user selecting a sports program delivered on a sports channel, correlating the sports channel with ads for men’s shaving products, determining, from the ads for men’s shaving products, ads for razors and shaving cream, inserting the ads for razors and shaving cream into the sports program, and delivering the sports program along with the ads for razors and shaving cream, teaches the “selecting . . . determining . . . accessing . . . determining . . . inserting . . . and delivering” steps as claimed. *Id.*; *see id.* at Fig. 6, 15:48-51 (“[I]t is likely that different users (such as 600-602 shown in Figure 6) will receive different [advertisements] due to differences in classification parameters.”).

We also find that the scope of the claimed “delivery platform” encompasses customer premises equipment (CPE) such as a set top box as taught by Anderson. The title of Anderson is “content selection based on signaling from customer premises equipment in a broadcast network.” Anderson teaches inserting assets into content, such as video programming, according to specific audience classifications (e.g., gender, income level, locale, or age). Anderson, Abstract. The CPE monitors channel selections or video-on-demand selections of its user and determines a user profile of classification parameters, using the monitored user selections and the audience classifications. *Id.* at 3:11–28, 5:32–35. The classification parameters are also associated with assets such as advertisements, so that an asset can be delivered to a CPE user with matching classification parameters. *Id.* at 3:31–38, 5:35–39, 14:50–15:15, 69:36–65.

For example, Figure 5 shows three different users each receiving the same content, the movie of the week, but with different advertisement assets. *Id.* at 15:16–24. In particular, along with receiving the movie, user 500 receives an ad for a digital music player, user 501 receives an ad for a luxury car, and user 502 receives an ad for a minivan. *Id.* at 15:24–28. In this manner, ads are better tailored to particular viewers of a given program who fall into different demographic groups. *Id.* at 15:36–38; *see id.* at 74:3–63, Figs. 39A and 39B.

The broadest reasonable interpretation of the claimed “responsive to a user selecting a digital content asset comprising an advertisement slot, determining, by at least one processor of a computing device, a delivery platform, of a network comprising a plurality of delivery platforms, via which the digital content asset was selected by the user,” read in light of the

Specification, encompasses a user using a set top box “delivery platform” to select a movie (on a channel or on demand), and in response, determining, by the system, the set top box and associated user profile as taught by Anderson. We also find that the “accessing . . . determining . . . inserting . . . and delivering” steps as claimed are taught by Anderson’s teaching of accessing the user profile, determining an advertisement by matching classification parameters from the user profile with classification parameters of advertisements, inserting the advertisement into breaks in the movie, and delivering the movie along with the advertisement to the user’s set top box. *See* Anderson 3:8–38, 5:32–39, 14:50–15:40, 15:48–16:3, 74:3–63, Figs. 5, 6, 39A, and 39B.

Appellant contends that the cited art does not teach “determining . . . an allocation of revenue for the advertisement between **a party having rights in the digital content asset** and a party that contributed to the user selecting the digital content asset” as claimed. Appeal Br. 17. We agree with the Examiner that Linehan’s disclosure of providing payment to a cable provider who is providing the broadcast, and providing a payment to the ad agency responsible for the advertisement, teaches “determining . . . an allocation of revenue for the advertisement between a party having rights in the digital content asset and a party that contributed to the user selecting the digital content asset” as claimed. *See* Ans. 10–11 (citing Linehan, Abstract).

Appellant contends that the Examiner did not articulate how the combination of Linehan, Anderson, Herley, and Buchanan is supposed to work. Appeal Br. 18. As discussed above, we find that Anderson teaches the steps of the claimed method except for “determining, by the at least one processor of the computing device, an allocation of revenue for the

advertisement between a party having rights in the digital content asset and a party that contributed to the user selecting the digital content asset,” which is taught by Linehan. We find that the teachings of Herley and Buchanan are cumulative to the teachings of Anderson. We agree with the Examiner that adding the method of television commerce payments taught by Linehan to the method of selecting content based on signaling from customer premises equipment taught by Anderson yields the predictable benefit of allowing the creators and distributors of advertisements delivered to Anderson’s customer premises equipment to realize a profit. Ans. 12; Linehan, Abstract.

We sustain the rejection of claim 1 under 35 U.S.C. § 103. Claims 40–48, 60–73, 75–82, and 85–89, which were not separately argued, fall with claim 1.

DECISION

Claims Rejected	35 U.S.C. §	Reference(s)/ Basis	Affirmed	Reversed
1, 40–52, 59–73, 75–82, 85–89	101	patent-ineligible	1, 40–52, 59–73, 75–82, 85–89	
1, 40–41, 44–48, 60–62, 65–69, 75, 77–79, 85–89	103	Linehan, Anderson, Herley, Buchanan	1, 40–41, 44–48, 60–62, 65–69, 75, 77–79, 85–89	
42, 43, 63, 64, 76	103	Linehan, Anderson, Herley, Buchanan, Yan	42, 43, 63, 64, 76	
49–52, 70–73, 80–82	103	Linehan, Anderson, Herley, Buchanan, Fassett	49–52, 70–73, 80–82	
Overall Outcome			1, 40–52, 59–73, 75–82, 85–89	

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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. § 41.50(f).

AFFIRMED