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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DALE W. MALIK and RICHARD A. ANDERSON

Appeal 2019-005502
Application 13/687,068
Technology Center 3600

Before JOSEPH L. DIXON, JOHN A. JEFFERY, and JOHN D. HAMANN,
Administrative Patent Judges.

DIXON, *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 1–23. Final Act. 1. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42 (2017). Appellant identifies the real party in interest as Facebook, Inc. Appeal Br. 1.

CLAIMED SUBJECT MATTER

The claims are directed to facilitating a communication between users.

Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A method, comprising:
identifying a communication that utilizes a communication path between an origination device and a destination device;
determining an origination device descriptor and a destination device descriptor;
determining that an alternative communication path is available for use between the origination device and the destination device based on a comparison between the origination device descriptor and the destination device descriptor;
in response to determining the alternative communication path is available for use between the origination device and the destination device, providing a selectable communication option corresponding to the alternative communication path on the destination device; and
initiating communication between the destination device and the origination device using the alternative communication path in response to detecting a selection of the selectable communication option corresponding to the alternative communication path.

Claim 1 (emphases added).

REFERENCES

The prior art relied upon by the Examiner is:

Bado et al. ("Bado")	US 4,703,423	Oct. 27, 1987
Hidary	US 5,852,775	Dec. 22, 1998
Meier et al. ("Meier")	US 2001/0027478 A1	Oct. 4, 2001

REJECTIONS

Claims 1–23 stand rejected under 35 U.S.C. § 101 because the claimed invention is directed to a judicial exception (*i.e.*, a law of nature, a natural phenomenon, or an abstract idea) without significantly more.

Claims 1–23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hidary in view of Bado in further view of Meier.

OPINION

I. 35 U.S.C. § 101

a. Legal Principles

An invention is patent eligible if it claims a “new and useful process, machine, manufacture, or composition of matter.” 35 U.S.C. § 101. However, the Supreme Court has long interpreted 35 U.S.C. § 101 to include implicit exceptions: “[l]aws of nature, natural phenomena, and abstract ideas” are not patentable. *E.g.*, *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014).

In determining whether a claim falls within an excluded category, we are guided by the Supreme Court’s two-step framework, described in *Mayo* and *Alice*. *Alice*, 573 U.S. at 217–18 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 75–77 (2012)). In accordance with that framework, under Step 2A, we first determine what concept the claim is “directed to.” *See Alice*, 573 U.S. at 219 (“On their face, the claims before us are drawn to the concept of intermediated settlement, *i.e.*, the use of a third party to mitigate settlement risk.”); *see also Bilski v. Kappos*, 561 U.S. 593, 611 (2010) (“Claims 1 and 4 in petitioners’ application explain the basic concept of hedging, or protecting against risk.”).

Concepts determined to be abstract ideas and, thus, patent ineligible, include certain methods of organizing human activity, such as fundamental economic practices (*Alice*, 573 U.S. at 219–20; *Bilski*, 561 U.S. at 611); mathematical formulas (*Parker v. Flook*, 437 U.S. 584, 594–95 (1978)); and mental processes (*Gottschalk v. Benson*, 409 U.S. 63, 67 (1972)). Concepts determined to be patent eligible include physical and chemical processes, such as “molding rubber products” (*Diamond v. Diehr*, 450 U.S. 175, 191 (1981)); “tanning, dyeing, making water-proof cloth, vulcanizing India rubber, smelting ores” (*id.* at 182 n.7 (quoting *Corning v. Burden*, 56 U.S. 252, 267–68 (1854))); and manufacturing flour (*Benson*, 409 U.S. at 69 (citing *Cochrane v. Deener*, 94 U.S. 780, 785 (1876))).

If, under Step 2A, the claim is “directed to” an abstract idea, then, under Step 2B, “we must examine the elements of the claim to determine whether it contains an ‘inventive concept’ sufficient to ‘transform’ the claimed abstract idea into a patent-eligible application.” *Alice*, 573 U.S. at 221 (quotation marks omitted). “A claim that recites an abstract idea must include ‘additional features’ to ensure ‘that the [claim] is more than a drafting effort designed to monopolize the [abstract idea].’” *Id.* (quoting *Mayo*, 566 U.S. at 77). “[M]erely requir[ing] generic computer implementation[] fail[s] to transform that abstract idea into a patent-eligible invention.” *Id.*

On January 7, 2019, the U.S. Patent and Trademark Office (“USPTO”) published revised patent subject matter eligibility guidance. *See* 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50, 2019 (“Revised Guidance”). Under the Revised Guidance, Step 2A of the *Alice* two-step framework is divided in two prongs. For Step 2A, Prong 1,

we look to whether the claim recites any judicial exceptions falling into certain groupings of abstract ideas (*e.g.*, mathematical concepts, certain methods of organizing human activity such as a fundamental economic practice, or mental processes). For Step 2A, Prong 2, if the claim recites such a judicial exception, we look to whether the claim recites any additional elements that integrate the judicial exception into a practical application (*see* Manual of Patent Examining Procedure (“MPEP”) § 2106.05(a)–(c), (e)–(h)).

Only if a claim recites a judicial exception and does not integrate that exception into a practical application, do we then determine, under Step 2B of the *Alice* two-step framework, whether the claim adds a specific limitation beyond the judicial exception that is not “well-understood, routine, conventional” in the field (*see* MPEP § 2106.05(d)) or simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception.

b. Examiner’s Findings and Conclusions²

In the Final Action, for Step 2A of the *Alice* two-step framework, the Examiner finds that “Claims 1–23 are directed to sending and receiving data

² We note that the Final Action was mailed before the USPTO published the Revised Guidelines and, therefore, does not rely on the Revised Guidelines. However, Appellant’s arguments in the Appeal and Reply Briefs and the Examiner’s conclusions in the Examiner’s Answer indeed rely on the Revised Guidelines. While recognizing the Examiner’s conclusions in the Final Action, our analysis is based on the Revised Guidelines. Patent eligibility under 35 U.S.C. § 101 is a question of law that is reviewable *de novo*. *See Dealertrack, Inc. v. Huber*, 674 F.3d 1315, 1333 (Fed. Cir. 2012).

to select and send targeted advertising.” Final Act. 3. The Examiner maintains that the “determining that an alternative communication path” limitation of Claim 1 (and similar limitations of Claims 8 and 15) is akin to the information management features found abstract in *Classen* and *Electric Power Group* and the organizing human activity features found abstract in *Intellectual Ventures*.³ Final Act. 4. The Examiner further maintains that “Appellant’s claims are following rules to select a communication path,” which is distinguished from *Core Wireless* because the claims “[do] NOT change the operation of the mobile device/system.”⁴ Ans. 10, 11.

In the Answer, for Step 2A, Prong 1 of the Revised Guidelines, the Examiner maintains that certain limitations of Claim 1 recite concepts that fall “within the Methods of Organizing Human Activity grouping” of the Revised Guidelines. Ans. 8. Thus, the Examiner maintains Claim 1 recites an abstract idea. Ans. 8.

Also, in the Answer, for Step 2A, Prong 2 of the Revised Guidelines, the Examiner maintains that Claim 1 requires additional elements, but that those additional elements are simply elements of a computer. Ans. 8. Relying on Appellant’s Specification, the Examiner, however, finds that the recited computer components are generic and simply result in the abstract idea being implemented on a generic computer. Ans. 8. The Examiner further maintains that Claim 1 also requires elements that “simply generally

³ *Classen Immunotherapies, Inc. v. Biogen IDEC*, 659 F.3d 1057 (Fed. Cir. 2011); *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350 (Fed. Cir. 2016); *Intellectual Ventures I LLC v. Capital One Financial Corp.*, 850 F.3d 1332 (Fed. Cir. 2017).

⁴ *Core Wireless Licensing S.A.R.L. v. LG Elecs., Inc.*, 880 F.3d 1356 (Fed. Cir. 2018)

link the use of the judicial exception to a particular technological environment.” Ans. 8, 9. Thus, the Examiner maintains that Claim 1 does not integrate the abstract idea into a practical application and, therefore, is directed to an abstract idea. Ans. 9.

For Step 2B of the *Alice* two-step framework, the Examiner maintains that the remaining limitations of Claim 1 correspond to “functions the courts have recognized to be well-understood, routine, conventional, and normal computer operation.” Final Act. 5. Relying on Appellant’s Specification, *Symantec* and *Versata*, the Examiner finds that the additional elements of Claim 1, when viewed individually and in an ordered combination, correspond to “conventional computer functions” and “generic computer structure” that “do not add a meaningful limitation to the abstract idea because they would be routine in any computer implementation.”⁵ Final Act. 6; *see also* Ans. 9. The Examiner also maintains that the elements of Claim 1 do not improve the functioning of a computer or any other technology. Final Act. 6. Thus, the Examiner maintains that Claim 1 is directed to an abstract idea without significantly more. Final Act. 7; Ans. 9, 10.

Finally, the Examiner maintains that even though dependent Claims 2–7, 9–14, and 16–23 recite additional limitations, these additional limitations do not add significantly more than the abstract idea. Final Act. 6; *see also* Ans. 10.

⁵ *Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307 (Fed. Cir. 2016); *Versata Dev. Group, Inc. v. SAP Am., Inc.*, 793 F.3d 1306 (Fed. Cir. 2015).

c. Appellant's Arguments

For Step 2A of the *Alice* two-step framework, and Prong 1 of the Revised Guidelines, Appellant contends that “the claims are directed toward removing the number of steps needed to access data or functionality compared to conventional systems — similar to the claims determined not to be an abstract idea in *Core Wireless*.” Appeal Br. 17 (emphasis maintained). Specifically, Appellant contends, “[s]imilar to the user interface in *Core Wireless*, the current independent claims recite a user interface that improves the functioning of a computer by reducing the number of steps a user needs to access data or functionality compared to conventional user interfaces.” Appeal Br. 19 (emphasis maintained); *see also* Reply Br. 9. Appellant further contends “the independent claims recite limitations that enable a user to reach data and/or functionality (e.g., initiate communication between the destination device and the origination device using the alternative communication path) with fewer steps,” and are thereby not directed to an abstract idea. Appeal Br. 20. For Prong 2 of the Revised Guidelines, Appellant contends, *arguendo*, that should the limitations of the pending independent claims recite an abstract idea,

the pending independent claims integrate any alleged abstract idea into a graphical user interface that determines an alternative communication path between two specific devices and facilitates initiating that alternative communication path via a selectable option, presented to the user, to initiate the alternative communication path between the two specific devices

(i.e., a practical application). Appeal Br. 22; *see also* Reply Br. 12.

For Step 2B of the *Alice* two-step framework, Appellant contends that “[e]ven if the pending independent claims were directed to an abstract idea

under step one, *arguendo*, the claims are still patentable because the claim limitations set forth an ‘ordered combination’ that amount to significantly more than the concept articulated by the *Office Action*.” Appeal Br. 24. Citing *BASCOM*, Appellant contends, “it is the ‘ordered combination’ of all elements that comprise a unique way of initiating communication between a destination device and an origination device using an alternative communication path that transform the abstract idea alleged in the *Office Action* into a ‘particular, practical application.’”⁶ Appeal Br. 25; *see also* Reply Br. 14.

d. Discussion

Appellant argues Claims 1–23 as a group. Appeal Br. 26. We select Claim 1 to represent the group. *See* 37 C.F.R. § 41.37(c)(1)(iv).

i. Step 2A, Prongs 1 and 2

For Step 2A, Prong 1, of the Revised Guidance, we find that the emphasized portions of Claim 1, reproduced above (*see supra* at 2), recite elements that fall within the abstract idea grouping of mental processes. The Revised Guidance requires us to evaluate whether the claim recites a judicial exception (e.g., an abstract idea). According to the Revised Guidance, to determine whether a claim recites an abstract idea, we must identify limitations that fall within one or more of the designated subject matter groupings of abstract ideas. According to the October 2019 Patent Eligibility Guidance Update produced by the USPTO, “a claim recites a judicial exception when the judicial exception is ‘set forth’ or ‘described’ in the claim.” *See* October 2019 Patent Eligibility Guidance Update Revised

⁶ *BASCOM Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016)

Patent Subject Matter Eligibility Guidance,

https://www.uspto.gov/sites/default/files/documents/peg_oct_2019_update.pdf (“October Update”). The Revised Guidance lists mental processes as one such grouping and characterizes mental processes as including, *inter alia*, “concepts performed in the human mind (including observation, evaluation, judgment, opinion).” 84 Fed. Reg. at 52. We find that the elements of Claim 1 describe this judicial exception.

Specifically, we find that the emphasized portions of Claim 1 (see *supra* at 2) set forth the basic mental steps a human would take when desiring to communicate with another person. For example, suppose two individuals are attending a large gathering (*e.g.*, wedding reception) and one of them wants to initiate communication with the other. The initiating party would, in their mind, identify a communication path between themselves and the other party, determine features of themselves and the other party that may or may not facilitate the anticipated communication, determine a suitable alternative communication paths (*e.g.*, talking loudly across the room or placing themselves closer to the other party) based on the determined features, decide which of those alternative communication paths are feasible (*i.e.*, selectable), select a feasible communication path (*e.g.*, deciding to talk loudly across the room because the room is too crowded to place themselves closer and the other party is not particularly mobile), and initiate communication. We find that the limitations of Claim 1 essentially describe a mental process.

We acknowledge that Claim 1 specifies that the communication path is between an origination device and a destination device. However, these additional device elements do not further define or otherwise limit these

additional device elements to any particular thing or environment, such as the environment of “targeted contextual advertisement or communication devices and services.” Spec. 4. Even if these additional device elements were construed to correspond to a targeted contextual advertising environment, a corporate marketer, for example, would brainstorm, using a mental process, various communication paths to reach their target audience prior to actually implementing a desired communication path. Thus, we find Claim 1 recites elements that fall within the abstract idea grouping of mental processes.

For Step 2A, Prong 2, of the Revised Guidance, we find that Claim 1, as a whole, does not integrate the recited mental process into a practical application of the abstract idea. The Revised Guidance states that “[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.” 84 Fed. Reg. at 53. The Revised Guidance further states that integration should be evaluated by “[i]dentifying whether there are any additional elements recited in the claim beyond the judicial exception(s)” and, based on certain considerations, “evaluating those additional elements individually and in combination to determine whether they integrate the exception into a practical application.” 84 Fed. Reg. at 54–55. The Revised Guidance identifies considerations such as whether additional elements yield an improvement to a particular technology or a computer itself, correspond to the implementation of the judicial exception with a particular machine, and/or apply the judicial exception in some way beyond simply linking the judicial exception to a

particular technological environment. *See* MPEP § 2106.05(a)–(c), (e)–(h).

Here, as discussed above, Claim 1 incorporates additional device elements. However, we find that these additional device elements do not integrate the mental process of Claim 1 into a practical application. For instance, we do not find that these additional device elements yield an improvement in the functioning of a computer itself or to the particular technology of target contextual advertising, neither do we find that these additional device elements are any particular machine that is necessary to implement the judicial exception or transform something to a different state. Additionally, we do not find that these additional device elements apply the abstract idea in a meaningful way to any particular technological environment. We agree with the Examiner’s finding for Step 2B of the *Alice* two-step framework that these additional device elements, as claimed, correspond at most to a generic computing structure. *See* Final Act. 6; *see also* Ans. 9. Thus, we find that Claim 1, as a whole, does not integrate the recited mental process into a practical application of the abstract idea.

Additionally, we do not find Appellant’s argument that Claim 1 “improves the functioning of a computer by reducing the number of steps a user needs to access data or functionality compared to conventional user interfaces” persuasive. *See* Appeal Br. 19; *see also* Reply Br. 9. Additionally, we do not find Appellant’s argument that Claim 1 “enable[s] a user to reach data and/or functionality (e.g., initiate communication between the destination device and the origination device using the alternative communication path) with fewer steps” persuasive. *See* Appeal Br. 20. First, and notably, Claim 1 does not recite these argued features. Second, Appellant’s Specification is directed towards the targeted advertising of

communication devices and services. Spec. 4. We find that Appellant’s invention is implemented, in part, with a communications and information resource (CIR) manager, which is a software program running on any computing device having a memory for software storage and a processor. Spec. 6, 7. Furthermore, we find that, in one particular embodiment, that contextual information is provided to a user when a communication is initiated with the user and that such contextual information provides the user “with an option(s) of responding to or returning the call or communication by communication paths that are selected based on the data about the call.” Spec. 13–14. However, this particular embodiment suggests an increase in the number of steps to facilitate a communication between users and, certainly, does not suggest reducing the numbers of steps to “reach data,” as Appellant contends.

Therefore, based on our analysis under the Revised Guidance, we agree with the Examiner that Claim 1 is directed to an abstract idea. However, we find that Claim 1 is directed to the abstract idea of mental processes. As result, we focus our attention on Step 2B of the *Alice* two-step framework.

ii. Step 2B

For Step 2B, we are not persuaded by Appellant’s argument that Claim 1 recites significantly more than the abstract idea itself. Step 2B of the *Alice* two-step framework requires us to determine whether any element, or combination of elements, in the claim is sufficient to ensure that the claim amounts to significantly more than the judicial exception. *Alice*, 573 U.S. at 221. As discussed in the previous section, we agree with the Examiner’s findings that the additional device elements, when considered individually

and in an ordered combination, correspond to nothing more than a generic computing structure used to implement the mental process. In other words, these components, as claimed, are well-understood, routine, and conventional and “behave exactly as expected according to their ordinary use.” *See In re TLI Commc’ns LLC Patent Litig.*, 823 F.3d 607, 615 (Fed. Cir. 2016). As discussed in the previous section, Appellant’s Specification describes the computing environment in which the invention is performed. Spec. 7, 8. However, Appellant’s Specification gives no indication that such a computing environment is anything other than a well-understood, routine, and conventional computing environment. Thus, implementing the abstract idea with these generic computer components “fail[s] to transform that abstract idea into a patent-eligible invention.” *Alice*, 573 U.S. at 221. Therefore, we agree with the Examiner that Claim 1 does not provide significantly more than the abstract idea itself.

iii. Conclusion

Therefore, because Claim 1 is directed to the abstract idea of mental processes and does not provide significantly more than the abstract idea itself, we agree with the Examiner that Claim 1 is ineligible for patenting and affirm the Examiner’s rejections of Claims 1–23 under 35 U.S.C. § 101.

2. 35 U.S.C. § 103

a. Claims 1, 8, 15

Appellant argues independent Claims 1, 8, and 15 as a group. Appeal Br. 6. We select Claim 1 to represent the group. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Appellant argues that Hidary “relates to providing an ad to a subscriber before, during, or after a phone call based on a user profile of a subscriber,” and does not teach or suggest “determining an alternative communication path between two specific devices and presenting a selectable option to initiate the alternative communication path between the two specific devices.” Appeal Br. 6, 7. Appellant contends that Hidary teaches that an advertising subscriber can have an identifier, their location known, and participate in phone calls with non-subscribers, but that Hidary does not teach or suggest “determining an alternative communication path” between the subscribers or between subscribers and non-subscribers. Appeal Br. 7. Appellant additionally argues that Bado and Meier do not compensate for the deficiencies of Hidary. Appeal Br. 8, 10.

Moreover, Appellant argues that the Final Action does not address the “determining that an alternative communication path” limitation of Claim 1 “with respect to Hidary.” Appeal Br. 12 (emphasis omitted). Appellant also contends that the Final Action relies on Bado to teach “a descriptor of device” and relies on Meier, without context, to simply teach, “an alternative communication path.” Appeal Br. 12. Appellant further contends, “simply considering whether Meier teaches the existence of an alternative communication path is not close to considering the claim as a whole that includes the” above-recited claim limitation. Appeal Br. 13 (emphasis omitted). As a result, Appellant argues,

nowhere does the Office Action address the actual claim language of ‘determining that an alternative communication path is available for use between the origination device and the destination device based on a comparison between the origination device descriptor and the destination device descriptor,’ as recited in the independent claim 1.

Appeal Br. 13.

In response, the Examiner maintains that “the Specification is silent on ‘communication path’ . . . and Hidary teaches a selectable option of communication and Meier teaches an automatic selection of a communication path based upon user set rules, hence the combination teaches the limitation.” Ans. 5. Specifically, the Examiner finds in Hidary, namely in column 3, lines 55–61, that when “[a] subscriber calls a nonsubscriber and an advertisement message is presented after the phones are connected, further the communication option during a phone call is the user may answer or not based on the caller ID.” Final Act. 10. The Examiner further finds that Meier teaches, in paragraphs 67–70, alternative communication paths. Final Act. 12.

We are persuaded by Appellant’s arguments. First, we agree with Appellant’s contention regarding the Final Action; namely we find that the Final Action does not address the “determining that an alternative communication path” limitation recited in Claim 1. Second, we agree with Appellant’s contention that Hidary does not teach or suggest determining an alternative communication path between the subscribers or between subscribers and non-subscribers. Based on our review of Hidary, Hidary teaches a communication path between an advertising subscriber and a non-advertising subscriber. Hidary, column 2, lines 51–53. During a phone call, the advertising subscriber of the call is given the option to receive advertisements or not receive advertisements. Hidary, column 2, lines 63–67, column 3, lines 1–3. When the advertising subscriber elects to receive advertisements, advertisements are delivered to the subscriber during the call. Hidary, column 3, lines 24–45. The advertisements provided to the

subscriber are targeted to the subscriber based on a profile of the subscriber. Hidary, column 3, lines 24–45. Based on our review, the Examiner has not identified how Hidary teaches or suggests “determining that an alternative communication path is available for use between the origination device and the destination device based on a comparison between the origination device descriptor and the destination device descriptor,” as is required by Claim 1. Moreover, we are persuaded by Appellant’s contention that the Examiner has not identified how the teachings of Bado or Meier remedy Hidary’s deficiency. Therefore, we reverse the Examiner’s rejections of Claims 1, 8, and 15 under 35 U.S.C. § 103(a) in view of Hidary, Bado, and Meier.

b. Claims 2–7, 9–14, and 16–23

Appellant argues Claims 2–7, 9–14, and 16–23 on the same basis as Appellant’s arguments for Claims 1, 8, and 15. Appeal Br. 16. Therefore, based on the same reasoning set forth for Claims 1, 8, and 15 in the preceding section, we reverse the Examiner’s rejections of Claims 2–7, 9–14, and 16–23 under 35 U.S.C. § 103(a) in view of Hidary, Bado, and Meier.

DECISION SUMMARY

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–23	101	Eligibility	1–23	
1–23	103(a)	Hidary, Bado, Meier		1–23
Overall Outcome			1–23	

Appeal 2019-005502
Application 13/687,068

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED