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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MICHAEL A. MARTH and KEN BEATON

Appeal 2019-005649
Application 14/630,342
Technology Center 3600

Before JOHNNY A. KUMAR, JENNIFER S. BISK, and JOYCE CRAIG,
Administrative Patent Judges.

BISK, *Administrative Patent Judge.*

DECISION ON APPEAL¹

¹ Throughout this Decision we have considered the Specification filed February 24, 2015 (“Spec.”), the Non-Final Office Action mailed December 3, 2018 (“Non-Final Act.”), the Appeal Brief filed April 22, 2019 (“Appeal Br.”), the Examiner’s Answer mailed May 13, 2019 (“Ans.”), and the Reply Brief filed July 15, 2019 (“Reply Br.”).

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant² appeals from the Examiner’s decision to reject claims 1–3, 5–7, and 22–35. *See* Non-Final Act. 1. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

CLAIMED SUBJECT MATTER

The claims are directed to managing content for marketing, including content creation, deployment collaboration, activity stream, and task management. Spec. ¶ 4. Claims 1, 24, and 32 are independent. Claim 1, reproduced below, is illustrative of the claimed subject matter (bracketed numbers added):

1. In a digital medium environment, a system comprising one or more modules implemented by a processing system and computer readable storage medium of at least one computing device to perform operations including:

[1] generating a plurality of digital content that includes:

[a] metadata that describes an image editing operation of a plurality of image editing operations used to create respective digital content of the plurality of digital content; and

[b] usage tracking monitors;

[2] receiving deployment data from the usage tracking monitors of the plurality of digital content, the deployment data describing user interaction with the respective digital content of the plurality of digital content;

[3] generating feedback data describing inclusion of the plurality of image editing operations in metadata of the plurality of digital content and the user interaction with the respective digital content of the plurality of digital content based on the deployment data; and

² We use the term “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Adobe Inc. Appeal Br. 2.

[4] outputting the feedback data.

Appeal Br. 59 (Claims App.).

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Walker	US 2004/0174434 A1	Sept. 9, 2004
Baskaran	US 2010/0146269 A1	June 10, 2010
Ogishi	US 2013/0290840 A1	Oct. 31, 2013
O'Donnell	US 9,396,279 B1	July 19, 2016
Dudas	WO 2008/033840 A2	Mar. 20, 2008

REJECTIONS

Claims 24–31 are rejected under 35 U.S.C. § 112(a), for failing to comply with the written description requirement.³ Non-Final Act. 7–8.

Claims 1–3, 5–7, and 22–35 are rejected under 35 U.S.C. § 101 because the claimed invention is not directed to patent eligible subject matter. Non-Final Act. 4–7.

Claims 1–3, 5–7, 22–28, and 31–35 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Dudas, Baskaran, O'Donnell, and Ogishi. Non-Final Act. 8–14.

³ In the Final Action, independent claims 1 and 32 and their dependent claims (2–7, 22, 23, and 33–35) are also rejected under 35 U.S.C. § 112(a) based on the limitation “feedback data describing inclusion of the plurality of image editing operations.” Final Act. 7–8. The Examiner, however, withdrew the rejection as to this limitation, leaving only independent claim 24 and its dependent claims (claims 25–31) rejected as lacking written description. Ans. 4.

Claims 29 and 30 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Dudas, Baskaran, O'Donnell, Ogishi, and Walker. Non-Final Act. 14–16.

We review the appealed rejections for error based upon the issues identified by Appellant, and in light of the arguments and evidence produced thereon. *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential). To the extent Appellant has not advanced separate, substantive arguments for particular claims, or other issues, such arguments are waived. 37 C.F.R. § 41.37(c)(1)(iv).

We have considered all of Appellant's arguments and any evidence presented. We highlight and address specific findings and arguments for emphasis in our analysis below.

Rejection of Claims 24–31 under 35 U.S.C. § 112

The Examiner rejects dependent claims 24–31 under 35 U.S.C. § 112(a) as failing to comply with the written description requirement because the term “ranking . . . the plurality of operations” as recited in claim 24 “has no support in the specification, drawings[,] or initial set of claims.” Final Act. 8. According to the Examiner, “[t]he specification discloses ranking metadata and ranking content,” but “does not disclose ranking operations.” *Id.*

Appellant disagrees, arguing that the term “ranking . . . the plurality of operations” is sufficiently described by the Specification. Appeal Br. 11–12 (citing Spec. ¶¶ 86–91); Reply Br. 2–3. Specifically, Appellant points to paragraph 86, which discloses that metadata describes characteristics of content “and/or creation of the content, including . . . image editing operations performed” and paragraph 90, which discloses that ratings may

Appeal 2019-005649
Application 14/630,342

be based on metadata. Spec. ¶¶ 86, 90. According to Appellant, the Specification’s disclosure “that metadata is ranked and that the metadata can describe image editing operations performed” equates to “express support” of “ranking . . . the plurality of operations.” Appeal Br. 12.

The Examiner does not agree, explaining that “ranking metadata could refer to any of the metadata constitutive elements” and, therefore, “ranking metadata, whatever it entails, cannot be equated with ranking operations as defined by Appellant’s specification.” Ans. 4. In addition, the Examiner explains that “the specification is silent about how the ranking of the metadata, or of the operations for this matter, is performed” and, thus, does not “reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.” *Id.*

We agree with Appellant that the Specification describes the claimed invention in sufficient detail that one skilled in the art can reasonably conclude that the inventor had possession of “ranking . . . the plurality of operations” at the time of filing. *See Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010). Although we agree with the Examiner that ranking metadata could entail ranking types of metadata other than image editing operations, we also agree with Appellant that a person of ordinary skill in the art would understand that ranking metadata could include ranking primarily or solely based on image editing operations. Moreover, the claim language is broad enough that a person of ordinary skill in the art would understand that any method of ranking could be used to implement this feature. Therefore, the lack of specificity on this implementation detail would not result in a person of ordinary skill in the art concluding that the inventor does not have possession of the limitation.

We, therefore, do not sustain the Examiner's rejection of claims 24–31 under U.S.C. § 112(a).

Rejection of Claims 1–3, 5–7, and 22–35 under 35 U.S.C. § 101

Section 101 of the Patent Act provides that “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof” is patent eligible. 35 U.S.C. § 101. But the Supreme Court has long recognized an implicit exception to this section: “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)). To determine whether a claim falls within one of these excluded categories, the Court has set out a two-part framework. The framework requires us first to consider whether the claim is “directed to one of those patent-ineligible concepts.” *Alice*, 573 U.S. at 217. If so, we then examine “the elements of each claim both individually and ‘as an ordered combination’ to determine whether the additional elements ‘transform the nature of the claim’ into a patent-eligible application.” *Alice*, 573 U.S. at 217 (quoting *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 78, 79 (2012)). That is, we examine the claims for an “inventive concept,” “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 (alteration in original) (quoting *Mayo*, 566 U.S. at 72–73).

The Patent Office recently issued guidance regarding this framework. See USPTO, *2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (Jan. 7, 2019) (“Revised Guidance”). Under the Revised

Appeal 2019-005649
Application 14/630,342

Guidance, to decide whether a claim is “directed to” an abstract idea, we evaluate whether the claim (1) recites subject matter falling within an abstract idea grouping listed in the Revised Guidance and (2) fails to integrate the recited abstract idea into a practical application. *See* Revised Guidance, 84 Fed. Reg. at 51. If the claim is “directed to” an abstract idea, as noted above, we then determine whether the claim recites an inventive concept. The Revised Guidance explains that when making this determination, we should consider whether the additional claim elements add “a specific limitation or combination of limitations that are not well-understood, routine, conventional activity in the field” or “simply append[] well-understood, routine, conventional activities previously known to the industry.” Revised Guidance, 84 Fed. Reg. at 56.

For the § 101 rejections, Appellant argues claims 1–16 and 21–24 together. *See* Appeal Br. 8–14. As permitted by 37 C.F.R. § 41.37, we decide the appeal for this rejection based on claim 1. *See* 37 C.F.R. §41.37(c)(1)(iv). Noting claims 1 and 21 recite systems and claim 13 recites a method and, therefore, fall within the process category of § 101, we turn to the Examiner’s § 101 rejection.

The Judicial Exception—Abstract Idea

The Examiner determined that the claims “are directed to receiving deployment data, generating feedback, ranking operations and outputting the feedback data” similar to steps found to be an abstract idea in *Electric Power*. Final Act. 4 (citing *Elec. Power Grp., LLC v. Alstom, S.A.*, 830 F.3d 1350 (Fed. Cir. 2016)). The Examiner also states that “each of the foregoing activities” of claims 1, 13, and 21 “could have been performed by a human

being, or by a ‘human analog’ mentally or manually, i.e. with pen and paper.” *Id.* at 5.

Between the mailing of the Non-Final Office Action and the Answer, the Office issued the Revised Guidance. In response to this guidance, the Examiner added that “[t]he limitations, as drafted, constitute a process that, under its broadest reasonable interpretation, covers performance of the limitations in the mind, but for the recitation of generic computer components (‘by the at least one computing device).’” Ans. 7. The Examiner, therefore, explains that the claims falls within the category of “Mental Processes—Concepts Performed in the Human Mind (e.g. observation, evaluation, judgment, opinion)” and, therefore, recites an abstract idea. *Id.*; see Revised Guidance, 84 Fed. Reg. at 53. For the reasons explained below, we agree that the claims recite an abstract idea.

According to the Specification, the invention overcomes problems related to having to select content for inclusion in marketing activities “from scratch.” Spec. ¶ 3. This often requires marketing professionals to create new marketing material by guessing why other marketing activities have been successful, “which could be complicated, time consuming, and may not be accurate.” *Id.* The Specification describes “[c]ontent and deployment collaboration techniques,” which use a “content creation service” and a “content deployment service,” so that deployment data may be tracked and reused in future marketing activities. *Id.* ¶ 5. Providing data to be used in creating marketing material falls within “advertising, marketing, or sales activities.” Revised Guidance, 84 Fed. Reg. at 52.

As quoted and enumerated above, claim 1 includes four main limitations. These limitations recite, in part, the following steps: generating content including metadata and usage tracking (limitation [1]) and

Appeal 2019-005649
Application 14/630,342

generating feedback data based on deployment data (limitation [3]). Appeal Br. 59 (Claims App.). Except for the recitation that the generated content is digital, under their broadest reasonable interpretation, these limitations ([1] and [3]) could be performed in the mind or with pencil and paper. For example, the Specification describes usage tracking as “determin[ing] a number of times [the content is] accessed by potential[] customers, how and when accessed, [and] identities of who accessed the content, and so forth.” Spec. ¶ 43. This type of determination can be done in the mind or using pencil and paper. The same is true of metadata, which describes characteristics of the content (*id.* ¶ 42) and feedback data (*id.* ¶ 54). Similar claims have been found ineligible by the Federal Circuit. For example, the Federal Circuit continues to “treat[] analyzing information by steps people go through in their minds, . . . without more, as essentially mental processes within the abstract-idea category.” *Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1146–47 (Fed. Cir. 2016) (quoting *Electric Power Group*, 830 F.3d at 1354).

When claimed in a manner similar to the claims here, gathering and analyzing information using conventional techniques has been determined to be an abstract idea. *In re TLI Commc’ns LLC Patent Litig.*, 823 F.3d 607, 612–13 (Fed. Cir. 2016). Also, more recently, our reviewing court has also concluded that some acts of collecting, analyzing, manipulating, and displaying data are patent ineligible. *Univ. of Fl. Research Found., Inc. v. General Electric Co.*, 916 F.3d 1363, 1367 (Fed. Cir. 2019) (citing *Intellectual Ventures I LLC v. Capital One Fin. Corp.*, 850 F.3d 1332, 1340 (Fed. Cir. 2017); *Electric Power Group*, 830 F.3d at 1353–54).

Accordingly, we conclude claim 1 recites concepts performed in the human mind as identified in the Revised Guidance, and thus, an abstract

idea.⁴ Revised Guidance, 84 Fed. Reg. at 52, 53 (listing “[c]ertain methods of organizing human activity . . . commercial or legal interactions” and “[m]ental processes—concepts performed in the human mind (including an observation, evaluation, judgment, opinion)” each as one of the “enumerated groupings of abstract ideas”).

Integration of the Judicial Exception into a Practical Application

If a claim recites a judicial exception, we determine whether the recited judicial exception is integrated into a practical application of that exception by: (a) identifying whether there are any additional elements recited in the claim beyond the judicial exception(s); and (b) evaluating those additional elements individually and in combination to determine whether they integrate the exception into a practical application. If the recited judicial exception is integrated into a practical application, the claim is not directed to the judicial exception.

Here, the claims recite the additional elements of “processing system and computer readable storage medium of at least one computing device,” “digital content,” receiving deployment data (limitation [1]), and “outputting

⁴ Our reviewing court recognizes that “[a]n abstract idea can generally be described at different levels of abstraction.” *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1240 (Fed. Cir. 2016). That need not and, in this case does not, “impact the patentability analysis.” *Id.* at 1241. Further, “[a]n abstract idea can generally be described at different levels of abstraction. . . . The Board’s slight revision of its abstract idea analysis does not impact the patentability analysis.” *Id.* Moreover, merely combining several abstract ideas does not render the combination any less abstract. *RecogniCorp, LLC v. Nintendo Co.*, 855 F.3d 1322, 1327 (Fed. Cir. 2017) (“Adding one abstract idea (math) to another abstract idea . . . does not render the claim non-abstract.”); *see also FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1093–94 (Fed. Cir. 2016) (determining the pending claims were directed to a combination of abstract ideas).

Appeal 2019-005649
Application 14/630,342

the feedback data” (limitation [4]). Appeal Br. 59 (Claims App.).

Considering the claims as a whole, the additional elements do not apply or use the abstract idea in a meaningful way such that the claim as a whole is more than a drafting effort designed to monopolize the exception. The Supreme Court guides that the “prohibition against patenting abstract ideas ‘cannot be circumvented by attempting to limit the use of the formula to a particular technological environment’ or [by] adding ‘insignificant postsolution activity.’” *Bilski*, 561 U.S. at 610–11 (quoting *Diamond v. Diehr*, 450 U.S. 175, 191–92 (1981)).

The Specification describes each of these elements as generic components. For example, the Specification states that “[c]omputing devices that are used to implement the content creation service 102, content deployment service 104, and the client device 106 are configurable in a variety of ways,” ranging from “full resource devices with substantial memory and processor resources (e.g., personal computers, game consoles) to a low-resource device with limited memory and/or processing resources (e.g., mobile devices).” Spec. ¶ 48; *see also id.* ¶¶ 153–166 (describing the system in terms of conventional computer hardware and software). The Specification also describes “a display device (e.g., a monitor or projector).” *Id.* ¶ 157; *see also id.* ¶ 154 (“The example computing device 3502 as illustrated includes . . . one or more I/O interface 3508 that are communicatively coupled, one to another.”). The recited “digital content” simply limits the abstract idea to a particular technological environment. *See* MPEP 2106.05(e). Moreover, we determine limitations [1] and [4] constitute insignificant extra-solution activity of receiving and displaying data. *See* MPEP 2106.05(g).

Appellant’s arguments have not persuaded us claim 1 is “directed to” a patent-eligible concept. Appellant also argues that in analyzing patent eligibility, the Examiner oversimplified the claims. Appeal Br. 18–21 (citing *McRO*). According to Appellant, similar to *McRO*, “the specific language of claim 1 preempts preemption of all processes for collecting information.” *Id.* at 21. This argument is not persuasive. An examiner can describe an abstract idea at different levels of generality without affecting the patent-eligibility analysis. *Cf. Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1240–41 (Fed. Cir. 2016) (“An abstract idea can generally be described at different levels of abstraction. . . . The Board’s slight revision of its abstract idea analysis does not impact the patentability analysis.”). That is the case here. Regardless of the level of generality used to describe the abstract idea recited in claim 1, the result is the same—claim 1 recites an abstract idea. *Cf. Accenture Glob. Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1344 (Fed. Cir. 2013) (“Although not as broad as the district court’s abstract idea of organizing data, it is nonetheless an abstract concept.”).

Moreover, rather than preemption, the Federal Circuit instructs that the Alice two-step analysis is the test for whether claims are statutory. “While preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility.” *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015). “Where a patent’s claims are deemed only to disclose patent ineligible subject matter under the *Mayo* framework, as they are in this case, preemption concerns are fully addressed and made moot.” *Id.*

Appellant also argues that the claims are directed to “a technological improvement that clearly distinguishes the claim from an abstract idea.”

Appeal 2019-005649
Application 14/630,342

Appeal Br. 17. To support this argument, Appellant cites to each of the limitations of claim 1. *Id.* According to Appellant, the limitations of claim 1 “improve[] computer-related technology by providing recitation of specific functionality regarding the operation of the suggestion protocol, and the various inventive features associated therewith,” which “is simply not possible to be obtained by a human without the improvements in the computer-related technology recited in the claims.” *Id.* at 18. Appellant adds that the claims are similar to those found patentable in *Core Wireless* because they “improve efficiency of a computing device by providing users with feedback data describing deployment of digital content and operations used to create the deployed digital content.” Appeal Br. 22 (citing *Core Wireless Licensing S.A.R.L. v. LG Electronics, Inc.*, 880 F.3d 1356 (Fed. Cir. 2018)).

We disagree that the availability of data to users describes an improvement to a user interface for displaying that data. The fact that users may find data displayed on a user interface to be useful has no bearing on whether there has been a technological improvement to the user interface itself. Appellant does not point to, and we do not see, any disclosure in the Specification that describes improving the user interface itself, but instead describes what data should be displayed by a conventional user interface. *See* Spec. ¶ 44 (“Content creators, in one such instance, receive this data to determine which of their content has been successfully employed as part of marketing activities and use this information in the creation of future content.”).

In contrast to the claims at issue here, in *Core Wireless*, the claims recited an improved interface for a mobile device that displayed a summary of applications in unlaunched states so that users could quickly navigate to

Appeal 2019-005649
Application 14/630,342

desired applications from the start up menu to find data of interest unlike known devices that required a user to switch views many times and drill through many layers to find the right data or functionality. *Core Wireless*, 880 F.3d at 1362–63. The interface displayed “a limited list of common functions and commonly accessed stored data” that were accessible directly from the main menu “rather than using conventional user interface methods to display a generic index on a computer.” *Id.* at 1363.

Here, claim 1 recites generating feedback and displaying that data. In other words, the display itself functions generically; it displays data. What data is displayed and how it is arranged is described by the claims at issue, but not the mechanism of how that data is displayed.

We find persuasive and applicable the decision in *Trading Technologies International v. IBG*. There, the court held:

The claims of the '999 patent do not improve the functioning of the computer, make it operate more efficiently, or solve any technological problem. Instead, they recite a purportedly new arrangement of generic information that assists traders in processing information more quickly. . . . We conclude that the claims are directed to the abstract idea of graphing bids and offers to assist a trader to make an order.

Trading Techs. Int'l, Inc. v. IBG LLC, 921 F.3d 1084, 1093 (Fed. Cir. 2019). Like the claims in *Electric Power Group*, the claims here purport to advance a “process of gathering and analyzing information of a specified content, then displaying the results, and not any particular assertedly inventive technology for performing those functions.” *Electric Power Grp.*, 830 F.3d at 1354.

Finally, Appellant argues that the claims are integrated into a practical application because they are directed to “addressing a digitally-rooted

Appeal 2019-005649
Application 14/630,342

challenge that is particular to the Internet, . . . enabling marketing professional to know which of their marketing activities has been successfully or unsuccessfully employed and why.” Appeal Br. 24–27 (citing *DDR Holdings, LLC v. Hotels.com*, 773 F.3d 1245, 1258 (Fed. Cir. 2014)).

In *DDR Holdings*, the Court evaluated the eligibility of claims “address[ing] the problem of retaining website visitors that, if adhering to the routine, conventional functioning of Internet hyperlink protocol, would be instantly transported away from a host's website after ‘clicking’ on an advertisement and activating a hyperlink.” *Id.* at 1257. There, the Court found that the claims were patent eligible because they transformed the manner in which a hyperlink typically functions to resolve a problem that had no “pre-Internet analog.” *Id.* at 1258. The Court cautioned, however, “that not all claims purporting to address Internet-centric challenges are eligible for patent.” *Id.* For example, in *DDR Holdings* the Court distinguished the patent-eligible claims at issue from claims found patent-ineligible in *Ultramercial*. *See id.* at 1258–59 (citing *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715-16 (Fed. Cir. 2014)). As noted there, the *Ultramercial* claims were “directed to a specific method of advertising and content distribution that was previously unknown and never employed on the Internet before.” *Id.* at 1258 (quoting *Ultramercial*, 772 F.3d at 715–16). Nevertheless, those claims were patent ineligible because they “merely recite[d] the abstract idea of ‘offering media content in exchange for viewing an advertisement,’ along with ‘routine additional steps such as updating an activity log, requiring a request from the consumer to view the ad, restrictions on public access, and use of the Internet.’” *Id.*

Appellant's asserted claims are analogous to claims found ineligible in *Ultramercial* and distinct from claims found eligible in *DDR Holdings*. The ineligible claims in *Ultramercial* recited "providing [a] media product for sale at an Internet website;" "restricting general public access to said media product;" "receiving from the consumer a request to view [a] sponsor message;" and "if the sponsor message is an interactive message, presenting at least one query to the consumer and allowing said consumer access to said media product after receiving a response to said at least one query." 772 F.3d at 712. Similarly, Appellant's asserted claims recite collecting data and outputting certain of that data depending on content. This is the type of activity found ineligible in *Ultramercial*. The invention as a whole does not solve problems specifically arising in some aspect of computer technology, nor is it solving an Internet centric problem, but rather the computer in the instant claims is used as a mechanism to improve efficiency. See *FairWarning*, 839 F.3d at 1095 (citing *Bancorp Services, LLC v. Sun Life Assurance Co.*, 687 F.3d 1266, 1278 (Fed. Cir. 2012) ("[T]he fact that the required calculations could be performed more efficiently via a computer does not materially alter the patent eligibility of the claimed subject matter.")); see also *Intellectual Ventures I LLC v. Erie Indemnity Co.*, 711 F. App'x 1012, 1017 (Fed. Cir. 2017) (unpublished) ("Though the claims purport to accelerate the process of finding errant files and to reduce error, we have held that speed and accuracy increases stemming from the ordinary capabilities of a general-purpose computer 'do[] not materially alter the patent eligibility of the claimed subject matter.'" (alteration in original) (citation omitted)).

Accordingly, even in combination with all the other recited elements, the addition of "a processing system and computer readable storage medium

Appeal 2019-005649
Application 14/630,342

of at least one computing device,” “digital content,” receiving deployment data (limitation [1]), and “outputting the feedback data” (limitation [4]) does not integrate the abstract idea into a practical application because it does not impose any meaningful limits on practicing the abstract idea. For these reasons, we determine that claim 1 does not integrate the recited abstract idea into a practical application.

Inventive Concept

Because we agree with the Examiner that claim 1 is “directed to” an abstract idea, we consider whether an additional element (or combination of elements) adds a limitation that is not well-understood, routine, conventional (“WURC”) activity in the field or whether the additional elements simply append WURC activities previously known to the industry, specified at a high level of generality, to the judicial exception. Revised Guidance, 84 Fed. Reg. at 23. The Examiner’s finding that an additional element (or combination of elements) is WURC activity must be supported with a factual determination. *Id.* (citing MPEP § 2106.05(d), as modified by the *Berkheimer* Memorandum⁵).

Whether the additional elements (of “processing system and computer readable storage medium of at least one computing device,” “digital content,” receiving deployment data (limitation [1]), and “outputting the feedback data” (limitation [4])) are WURC activity is a question of fact. *See Berkheimer v. HP Inc.*, 881 F.3d 1360, 1369 (Fed. Cir. 2018) (“Whether

⁵ Robert W. Bahr, *Changes in Examination Procedure Pertaining to Subject Matter Eligibility, Recent Subject Matter Eligibility Decision* (*Berkheimer v. HP, Inc.*) (2018) (hereinafter “*Berkheimer* Memorandum”).

something is well-understood, routine, and conventional to a skilled artisan . . . is a factual determination.”).

On the record before us, Appellant has not shown that the claims on appeal add a specific limitation beyond the judicial exception that is not “well-understood, routine, and conventional” in the field, whether the limitations are considered individually or as an ordered combination (*see* MPEP § 2106.05(d)). Appellant does not point to any particular claimed element, or combination of elements, that does not qualify as WURC, but instead points to the “recited features” of the claim as being an inventive concept. *See* Reply Br. 4–5.

In fact, as explained by the Examiner (Final Act. 9–10), Appellant’s Specification demonstrates the WURC “processing system and computer readable storage medium of at least one computing device,” “digital content,” receiving deployment data (limitation [1]), and “outputting the feedback data” (limitation [4]). Spec. ¶¶ 153–166.

For these reasons, we conclude that the claims, considered as a whole, do not include an inventive concept.

Therefore, we sustain the Examiner’s § 101 rejection of independent claims 1, 24, and 32. For the reasons discussed above, we also sustain the Examiner’s § 101 rejection of dependent claims 2–5, 7–9, 11–15, and 22–27, for which Appellant relies on the same arguments made with respect to the independent claims. Appeal Br. 30.

Rejection of Claims 1–3, 5–7, 22–28, and 31–35 under 35 U.S.C. § 103

Claims 1–3, 5–7, 22, 23, and 32–35

The Examiner rejects claims 1–3, 5–7, 22, 23, and 32–35 as obvious over the combination of Dudas, Baskaran, O’Donnell, and Ogishi. Final

Act. 8–14. Specifically, the Examiner relies on Dudas as teaching the majority of the limitations of independent claims 1 and 32 (Final Act. 8–9), but relies on Baskaran “to illustrate the functionality of tracking content in the same or similar context,” (*id.* at 9) on O’Donnell “to illustrate the functionality of an operation used to create content in the same or similar context” (*id.* at 10) and on Ogishi “to illustrate the functionality of image editing and user interaction feedback data in the same or similar context.” (*id.* at 11).

Appellant argues that O’Donnell does not teach or suggest “generating feedback data describing inclusion of image editing operations in metadata of digital content and inclusion of user interaction with the digital content based on deployment data” (the “generating feedback” limitation) as recited in claims 1 and 32. Appeal Br. 31–34 (claim 1), 40–42 (claim 32); Reply Br. 5. According to Appellant, “Ogishi fails to mention the inclusion of the claimed ‘deployment data,’” but instead “describes handwritten data updated by edited content data within a comment area.” *Id.* at 32–33, 41.

The Examiner responds that it is the combination of Dudas, O’Donnell, and Ogishi that discloses the generating feedback limitation. Ans. 11–13. Specifically, the Examiner relies on Dudas’s disclosure of usage tracking monitors. *Id.* at 12 (citing Dudas, Fig. 4, ¶¶ 62, 79). The Examiner relies on O’Donnell’s disclosure of metadata that describes an image editing operation. *Id.* at 13 (citing O’Donnell, Figs. 4A, 4B, 10B, 6:65–7:22, 11:37–52, 12:51–60). And the Examiner relies on Ogishi for image editing and feedback data. *Id.* at 11 (citing Ogishi, Fig. 4, ¶¶ 7–9, 42, 56–58, 85). Together the Examiner combines teachings from the three

references to teach the entirety of the generating feedback limitation. *Id.* at 11–13.

We do not agree with Appellant’s contention that “the Examiner admits that [the generating feedback limitation] are not disclosed by Dudas, Baskaran, and O’Donnell.” Reply Br. 5. Appellant’s arguments do not persuade us of Examiner error because they attack the references individually, while the Examiner relies on the combined disclosures in the references to reject the independent claims. *See* Ans. 11–13. Where a rejection rests on the combined disclosures in the references, an appellant cannot establish nonobviousness by attacking the references individually. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). Here the Examiner relies on the teachings of three references—Dudas, O’Donnell, and Ogishi—but Appellant addresses only Ogishi. *See* Appeal Br. 31–34, 40–42; Reply Br. 5. We, therefore, are not persuaded of error in the Examiner’s finding that the combined references render obvious the generating feedback limitation.

Appellant argues that the references does not teach or suggest “receiving deployment data from usage tracking monitors of the plurality of digital content, the deployment data describing user interaction with respective digital content” (the “receiving limitation”). Appeal Br. 34–37 (claim 1), 42–45 (claim 32). According to Appellant, [t]here is no indication in Dudas of tracking deployment of data *after* generating digital content.” *Id.* at 35, 42–43. Appellant adds that “O’Donnell stores *markup data to edit* a webpage *prior to publication*.” *Id.* at 36, 44.

In response, the Examiner explains that both Dudas and Baskaran disclose this limitation. Ans. 13–14. In particular, the Examiner points to Baskaran’s disclosure of usage tracking monitors. *Id.* at 14 (citing Baskaran,

Fig. 2, ¶ 50). Because Appellant does not address the disclosure of Baskaran with respect to this limitation, we are not persuaded of error in the Examiner’s finding that Baskaran teaches or suggests the receiving limitation. *See* Reply Br. 5–6 (discussing only Dudas with respect to this limitation).

Appellant argues that the references do not teach or suggest “generating a plurality of digital content that includes usage tracking monitors” (the “generating content limitation”). Appeal Br. 37–39 (claim 1), 45–47 (claim 32). According to Appellant, “there is no indication in Baskaran of tracking user interactions with digital content by a usage tracking monitor *included in the digital content*.” *Id.* at 37–38, 45. We do not find this argument persuasive because the claim language is not as limited as alleged by Appellant. We find that Baskaran teaches an activity tracking module that “monitors and tracks the activities of the user 206 on the electronic content.” Baskaran ¶ 50. No matter how the activity tracking module is stored—either separate from or somehow contained within the electronic content it monitors and tracks—it qualifies as digital content. Thus, generating Baskaran’s activity tracking module satisfies the generating content limitation. In other words, the generating content limitation does not define the storage implementation details of digital content, but instead requires the generation, in some form, of usage tracking and metadata be generated. This reading of the claim language is consistent with the Specification, which does not define how the claimed usage tracking monitor is stored in relation to any other digital content, but instead simply states that content is “associated with a tracking monitor.” Spec. ¶¶ 43, 124. Based on this understanding of the language, we are not persuaded of error

Appeal 2019-005649
Application 14/630,342

in the Examiner’s finding that Baskaran teaches or suggests the generating content limitation.

Accordingly, we are not persuaded of error in the Examiner’s rejection of claims 1 and 32 as obvious over the combination of Dudas, Baskaran, O’Donnell, and Ogishi. Appellant does not make any additional arguments for claims 2, 3, 5–7, 22, 23, and 33–35, which depend from claims 1 and 32. Appeal Br. 39, 47. Accordingly, we are not persuaded of error in the Examiner’s rejection of claims 2, 3, 5–7, 22, 23, and 33–35 as obvious over the combination of Dudas, Baskaran, O’Donnell, and Ogishi.

Claims 24–28 and 31

Independent claim 24 differs slightly from independent claims 1 and 31. It is similar in that it includes the generating content and receiving limitations, but instead of the generating feedback limitation, claim 24 recites “ranking, by the at least one computing device, the plurality of operations used to create the plurality of digital content based on the received deployment data” (the “ranking limitation”). Appeal Br. 61 (Claims App.).

Appellant reiterates the arguments for the generating content and receiving limitations made with respect to claims 1 and 32. Appeal Br. 48–51 (receiving limitation), 54–56 (the generating content limitation). As discussed above, we do not find those arguments persuasive.

In addition, Appellant argues that the references do not teach or suggest the ranking limitation. Appeal Br. 51–54. According to Appellant, Dudas does not disclose “digital content *based on the received deployment data*” and O’Donnell limits markup data to those made “*prior to publication.*” *Id.* at 52–53.

In response, the Examiner explains that it is the combination of Dudas and O'Donnell that teaches this limitation. Ans. 18–19.

As discussed above, Appellant's arguments that attack the references individually, while the Examiner relies on the combined disclosures in the references do not persuade us of error. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). Here, the Examiner relies on the teachings of the combined disclosures of Dudas and O'Donnell, but Appellant addresses only the two references independently. *See* Appeal Br. 51–54; Reply Br. 7–8. We, therefore, are not persuaded of error in the Examiner's finding that the combined references render obvious the ranking limitation.

Accordingly, we are not persuaded of error in the Examiner's rejection of claim 24 as obvious over the combination of Dudas, Baskaran, O'Donnell, and Ogishi. Appellant does not make any additional arguments for claims 25–28 and 31, which depend from claim 24. Appeal Br. 56. Accordingly, we are not persuaded of error in the Examiner's rejection of claims 24–28 and 31 as obvious over the combination of Dudas, Baskaran, O'Donnell, and Ogishi.

Claims 29 and 30

The Examiner rejects dependent claims 29 and 30 over Dudas, Baskaran, O'Donnell, Ogishi, and Walker. Final Act. 14–16. Claims 29 and 30 depend from claim 24. Appellant does not make additional arguments for claims 29 and 30. Appeal Br. 57. Accordingly, we are not persuaded of error in the Examiner's rejection of claims 29 and 30 as obvious over the combination of Dudas, Baskaran, O'Donnell, Ogishi, and Walker.

CONCLUSION

We reverse the rejection of claims 24–31 under 35 U.S.C. § 112(a).

Appeal 2019-005649
Application 14/630,342

We sustain the rejection of claims 1–3, 5–7, and 22–35 under 35 U.S.C. § 101.

We sustain the rejection of claims –3, 5–7, and 22–35 under 35 U.S.C. § 103.

Because we affirm at least one ground of rejection with respect to each claim on appeal, we affirm the Examiner’s rejection of claims 1–3, 5–7, and 22–35.

DECISION SUMMARY

Claims Rejected	35 U.S.C. §	Basis/ Reference(s)	Affirmed	Reversed
24–31	112(a)			24–31
1–3, 5–7, 22–35	101	Eligibility	1–3, 5–7, 22–35	
1–3, 5–7, 22–28, 31–35	103(a)	Dudas, Baskaran, O’Donnell, Ogishi	1–3, 5–7, 22–28, 31–35	
29, 30	103(a)	Dudas, Baskaran, O’Donnell, Ogishi, Walker	29, 30	
Overall Outcome			1–3, 5–7, 22–35	

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) (1)(iv). *See* 37 C.F.R. § 41.50(f).

AFFIRMED