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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JEFFREY D. BRANDSTETTER

Appeal 2020-003207
Application 14/694,414
Technology Center 3600

Before JEFFREY N. FREDMAN, DEBORAH KATZ, and JOHN G. NEW,
Administrative Patent Judges.

KATZ, *Administrative Patent Judge.*

DECISION ON APPEAL

Appellant¹ seeks our review,² under 35 U.S.C. § 134(a), of the Examiner's decision to reject claims 1, 2, 4, 5, 11, and 14 (Appeal Br. 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. Appellant identifies the Real Party in Interest as the inventor, Jeffrey D. Brandstetter. (*See* Appeal Br. 1.)

² We consider the Specification dated April 23, 2015 ("Spec."), Final Office Action issued November 29, 2019 ("Final Act."), the Appeal Brief filed January 22, 2020 ("Appeal Br."), the Examiner's Answer issued March 18, 2020 ("Ans."), and the Reply Brief filed March 26, 2020 ("Reply Br.").

INTRODUCTION

Appellant’s Specification provides a system for determining the economic viability of creating media content by measuring and reporting audience metrics related to the media content. (Spec. 4:10–14.) The Specification explains that considerable time may pass between releasing a first media content, e.g., film, television program, or video game, and a second related media content, e.g., a sequel. (*Id.* at 1:5–10.) Due to waning interest over time, the Specification states that it is difficult to predict the economic viability of the second media content. (*Id.* at 1:8–2:4.)

The Specification describes using “interstitial” content of a different media type to measure and evaluate interest in creating related media content. (*Id.* at 4:17–5:1.) The Specification defines “interstitial” as “content that is released/aired in between related content in a different medium; it does not refer to the length or run time of any such interstitial/‘in between’ content, and is not in any way limited to short content or programming in between longer content segments.” (*Id.* at 5:2–5.) As an example, the Specification explains that interstitial content may be video games released in the time between a movie (first media content) and a later sequel (second media content). (*Id.* at 6:5–21.) In this example, the video games may include multiple storylines, wherein the audience popularity of a particular storyline indicates economic potential for a film sequel based on the storyline. (*See id.*)

Appellant's claim 1 recites:³

A system for automatically generating a second item of media content after release of the first item of media content, comprising:

[1] a computing platform configured to transmit an interactive multi-path interstitial content item related to the first item of media content over a computer network, wherein the first item of media content is a video, a movie, a television program, or a video game;

[2] one or more computer-readable mediums configured for storage of:

[2a] a first item data record, wherein the first item data record identifies the first item of media content and an activity level associated with the first item of media content;

[2b] an interstitial content data record, wherein the interstitial content data record identifies the first item of media content, the interstitial content item, and an activity level associated with each of a plurality of paths in the interstitial content item;

[3] one or more data processors configured to:

[3a] distribute the interstitial content item over the computer network;

[3b] snoop interactions with the interstitial content item to extract data regarding traversals of different paths of the interstitial content item across multiple interactions with the interstitial content item by multiple users over a period of time and storing snooped interaction data in the interstitial content data record;

[3c] execute a second item generation model using the activity level associated with the first item and the activity level data associated with each of the plurality of paths;

³ The claim is annotated with bracketed numbers and letters to reference the specific limitations discussed in this decision.

[3d] automatically generate the second item of media content based on output of the second item generation model, wherein content of the second item of media content is based on the activity levels associated with the plurality of paths in the interstitial content item;

[4] wherein the second item of media content is produced and stored in a non-transitory computer-readable medium for distribution over a computer network based on the recommendation.

(Appeal Br. 9–10.)

The Examiner rejects claims 1, 2, 4, 5, 11, and 14 under 35 U.S.C. § 101 as being directed to an abstract idea without significantly more. (Final Act. 2–4.) The Examiner also rejects claims 1, 2, 4, 5, 11, and 14 under 35 U.S.C. § 102(a)(2) as anticipated by Ramer.⁴ (Final Act. 5–9.)

ANALYSIS

Claims 1, 2, 4, 5, 11, and 14 rejected under 35 U.S.C. § 101

The Examiner rejects claims 1, 2, 4, 5, 11, and 14 under § 101 as being directed to patent-ineligible subject matter. (Final Act. 2–4.) Appellant argues claims 1, 2, 4, 5, 11, and 14 together. (See Appeal Br. 4–5.) We therefore analyze claim 1 as exemplary below.

Standard for Subject Matter Eligibility

For issues involving subject matter eligibility under § 101, we apply the two-step test set forth in *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014). In the first step, we “determine whether the claims at issue are directed to a patent-ineligible concept.” (*Id.* at 218.) If the initial threshold is met, we move to the second step, in which we “consider the elements of

⁴ Ramer et al., U.S. Patent Application Publication 2009/0240586 A1, published September 24, 2009.

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.” (*Id.* at 217) (quoting *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 78–79 (2012)). The second step is “a search for an ‘inventive concept’—*i.e.*, an element or combination of elements that is ‘sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.’” (*Id.* at 217–18) (quoting *Mayo*, 566 U.S. at 72–73) (alteration in original).

The USPTO has published revised guidance on the application of § 101. *2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (Jan. 7, 2019) (“Revised Guidance”). Under the 2019 Revised Guidance and the October 2019 Update, we first look to whether the claim recites: 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) (“Step 2A, Prong 1”). If so, we next look to whether the claim recites any additional elements that integrate the judicial exception into a practical application (*see* MPEP § 2106.05(a)–(c), (e)–(h) (9th ed. Rev. 08.2017, Jan. 2018)) (“Step 2A, Prong 2”).⁵

2019 Revised Guidance, 84 Fed. Reg. at 52–55.

⁵ This evaluation is performed by (a) identifying whether there are any additional elements recited in the claim beyond the judicial exception, and (b) evaluating those additional elements individually and in combination to determine whether the claim as a whole integrates the exception into a practical application. *See* 2019 Revised Guidance - Section III(A)(2), 84 Fed. Reg. 54–55.

Only if a claim: (1) recites a judicial exception; and (2) does not integrate that exception into a practical application, do we then look, in Step 2B, to 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.

2019 Revised Guidance, 84 Fed. Reg. at 52–56.

Step 2A, Prong 1

Under Step 2A, Prong 1, of the Revised Guidance, we determine whether the claims recite any judicial exceptions, including certain groupings of abstract ideas (i.e., mathematical concepts, certain methods of organizing human activity, or mental processes). 84 Fed. Reg. at 52, 54. The Examiner finds the claimed functions of “distributing, snooping, storing, [and] generating” data cover certain methods of organizing human activity and thus, the claims recite an abstract idea. (Final Act. 3.)

Appellant contends that each of the functions “is technical in nature [and] unrelated to commercial or legal interactions.” (Appeal Br. 5.) Appellant argues that the functions are not methods of organizing human activity, and therefore, the claims do not recite an abstract idea. (*Id.*)

We agree with the Examiner that the claims recite an abstract idea, namely, the concept of market research for media content, which is a method of certain method of organizing human activity, similar to advertising or marketing activities. *See* 84 Fed. Reg. at 52; *see also Cellspin Soft, Inc. v.*

Fitbit, Inc., 927 F.3d 1306, 1315 (Fed. Cir. 2019) (claimed distribution of multimedia content was directed to an abstract idea).

To obtain the desired market research, the claims recite a system configured to perform numerous data processing functions. For example, the system transmits and distributes data in the form of an interstitial content item to multiple users (limitations [1], [3a]). The system records data in the form of activity levels associated with a first media content item and “different paths” of the interstitial media content item (limitations 2[a], 2[b], [3b]). The system evaluates activity level data and generates additional data, in the form of a second item of media content, based on the evaluation (limitations [3c], [3d], [f]). Each of these functions relate to the collection, transfer, and publishing of data, which are abstract ideas in that they are methods of organizing human activity. *See, e.g., Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1367 (Fed. Cir. 2015) (holding that “tracking financial transactions to determine whether they exceed a pre-set spending limit (i.e., budgeting)” is an abstract idea that “is not meaningfully different from the ideas found to be abstract in other cases ... involving methods of organizing human activity”); *see also Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat. Ass’n*, 776 F.3d 1343, 1347 (Fed. Cir. 2014) (finding that “1) collecting data, 2) recognizing certain data within the collected data set, and 3) storing that recognized data in a memory” was an abstract idea because “data collection, recognition, and storage is undisputedly well-known” and “humans have always performed these functions”); *Digitech Image Techs., LLC v. Elecs. for Imaging, Inc.*, 758 F.3d 1344, 1350 (Fed. Cir. 2014) (finding that “a process of organizing information through mathematical correlations” is an abstract idea).

Accordingly, the claims recite multiple abstract ideas under Step 2A, Prong 1 of the Guidance.

Step 2A, Prong 2

Under Step 2A, Prong 2, of the Revised Guidance, we determine whether the claims as a whole integrate the judicial exception into a practical application. 84 Fed. Reg. at 54–55. The Examiner finds that the claimed abstract ideas are not integrated into a practical application. (Final Act. 3) The Examiner finds that the additional elements of the claim are generic computer components performing generic computer functions. (*Id.*) The Examiner concludes that the additional elements do not integrate the abstract ideas into a practical application because the additional elements do not impose any meaningful limitations on practicing the abstract idea. (*Id.*)

Appellant contends the alleged abstract idea is integrated into a practical application because of: (1) “the express recitation of a particular machine/manufacture (*e.g.*, . . . content distributing computing platform, data structures, and manipulations thereof)”; and (2) “a transformation of a particular article to a different state or thing (*e.g.*, . . . automatic generation of the second item of media content).” (Appeal Br. 5.)

We are not persuaded by Appellant’s arguments. The additional elements of the claims, namely, a computing platform (limitation [1]), one or more computer readable medi[a] (limitations [2], [4]), and one or more data processors (limitation [3]), are merely tools for data collection and analysis. The focus of the claims is not any improved computer or technology, but improved data collection and analysis, performed with off-the-shelf computer technology as described by the Specification at pages 11–14. *See SAP Am., Inc. v. InvestPic, LLC*, 898 F.3d 1161, 1168 (Fed. Cir. 2018); *see*

also Bascom Global Internet Servcs., Inc. v. AT&T Mobility LLC, 827 F.3d 1341, 1348 (2016) (holding that “[a]n abstract idea on ‘an Internet computer network’ or on a generic computer is still an abstract idea”). Accordingly, the additional elements do not implement the abstract idea with a particular machine that is integral to the claims. *See* 84 Fed. Reg. 55.

Likewise, automatically generating a second item of media content does not involve the transformation of a particular article to a different state or thing. Rather, the claim involves producing a new form of data, and “information as such is an intangible.” *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016) (“[W]e have treated collecting information, including when limited to particular content (which does not change its character as information), as within the realm of abstract ideas.”). Accordingly, the additional element of automatically generating more media content is insignificant extra-solution activity to the abstract ideas of market research using data collection and analysis. *See* 84 Fed. Reg. 55. Because the claimed abstract ideas are not integrated into a practical application, we find that the claims as a whole are directed to a judicial exception.

Step 2B

Under Step 2B of the Revised Guidance, we determine whether the claims add a specific limitation beyond the judicial exception that is not well-understood, routine, conventional activity in the field or simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception. 84 Fed. Reg. at 56.

The Examiner finds that the additional elements recited by the claims amount to no more than instructions to apply the judicial exception using generic computer components. (Final Act. 4.)

Appellant does not present arguments that the additional elements are significantly more than the judicial exception and thus provide an inventive concept. (*See generally*, Appeal Br.)

We agree with the Examiner that the claims simply append to the judicial exception well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality. As discussed above, the claimed additional elements recite generic computer components that are used for implementing the abstract idea. (*See Spec.* 11:19–15:2.) Accordingly, the claims do not recite an inventive concept sufficient to demonstrate patent eligibility and we sustain the Examiner’s rejection of the claims as ineligible under 35 U.S.C. § 101.

Claims 1, 2, 4, 5, 11, and 14 rejected under 35 U.S.C. § 102

The Examiner rejects claims 1, 2, 4, 5, 11, and 14 under 35 U.S.C. § 102(a)(2) as being anticipated by Ramer. (Final Act. 5–9.) Appellant argues claims 1, 2, 4, 5, 11, and 14 together. (Appeal Br. 5–7.) We therefore analyze claim 1 as exemplary below.

Appellant argues that Ramer does not teach the limitation requiring a data processor configured to “automatically generate the second item of media content based on output of the second item generation model.”⁶ (Appeal Br. 7.) Appellant argues further that Ramer does not generate

⁶ Should prosecution continue in this application, we note for the Examiner’s benefit that the Specification may not support this limitation.

content based on activity levels associated with different paths in a multi-path interstitial content item. (*Id.*) Appellant argues that the Examiner picks and chooses among various paragraphs in Ramer throughout the disclosure, and thus, the rejection does not meet the requirements for anticipation. (*Id.*)

We are persuaded by Appellant’s argument. The Examiner’s anticipation rejection picks and chooses from Ramer’s various embodiments of collecting user data, evaluating the data, and creating user recommendations. (*See* Final Act. 5–7.) However, none of these separate embodiments contain all of the claimed limitations arranged or combined in the same way as claimed. *See Net MoneyIN, Inc. v. VeriSign, Inc.*, 545 F.3d 1359, 1371 (Fed. Cir. 2008)(“it is not enough that the prior art reference discloses part of the claimed invention, which an ordinary artisan might supplement to make the whole, or that it includes multiple, distinct teachings that the artisan might somehow combine to achieve the claimed invention.”) Accordingly, we do not sustain the Examiner’s anticipation rejection.

CONCLUSION

Upon consideration of the record and for the reasons given, we sustain the Examiner’s rejection.

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 2, 4, 5, 11, 14	101	Ineligible subject matter	1, 2, 4, 5, 11, 14	
1, 2, 4, 5, 11, 14	102(a)(2)	Ramer		1, 2, 4, 5, 11, 14
Overall Outcome			1, 2, 4, 5, 11, 14	

Appeal 2020-003207
Application 14/694,414

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

AFFIRMED