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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte TROY L. WALKER, MEHDI SHARIFZADEH,
LUKAS RUTISHAUSER, THOMAS J. MURRAY IV, and
SASANK MUDUNURI

Appeal 2020-003604
Application 15/426,514
Technology Center 3600

Before, MURRIEL E. CRAWFORD, JOSEPH A. FISCHETTI, and
BRADLEY B. BAYAT, *Administrative Patent Judges*.

FISCHETTI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant¹ seeks our review under 35 U.S.C. § 134 of the Examiner's final rejection of claims 2–21. We have jurisdiction under 35 U.S.C. § 6(b).

SUMMARY OF DECISION

We reverse and enter a new ground of rejection pursuant to our authority under 37 C.F.R. § 41.50(b).

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

THE INVENTION

Appellant states the invention relates to “[m]ethods, systems, and apparatus, including computer programs encoded on a computer storage medium, for collecting and applying visibility statistics in online advertising are disclosed.” Spec., Abstr.

Claim 2, reproduced below, is representative of the subject matter on appeal.

2. A method comprising:

determining, by one or more servers and for a particular block of a resource that is rendered at a remote device, an initial visibility state specifying whether the particular block is visually presented within a viewport of the remote device when the resource is initially rendered at the remote device, including:

determining a portion of the resource that is initially visually presented within the viewport based on dimensions of the viewport and a zoom level setting used to initially display the resource at the remote device; and

determining the initial visibility state based on whether a location of the particular block is within the portion of the resource that is initially visually presented within the viewport;

collecting, by the one or more servers, visibility states of the particular block over a duration of a given presentation of the resource, including determining that the visibility state of the particular block of the resource changes between visible and not visible during the given presentation of the resource based on changes to display characteristics of the resource made by a user of the remote device causing the particular block of the resource to be located outside of the viewport for part of the given presentation; and

filtering, based on the collected visibility states, an automated bot interaction with content presented in the particular block, the filtering being performed based on a given interaction occurring when the visibility state of the particular

block indicates that the particular block was not visible when the given interaction occurred.

Appeal Br. 13 (Claims App.).

THE REJECTION

The following rejection is before us for review.

Claims 2–21 are rejected under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Callaghan et al. (US 2009/0326966, published Dec. 31, 2009) (hereinafter “Callaghan”) in view of Linden et al. (US 2006/0136294, published June 22, 2006) (hereinafter “Linden”).

ANALYSIS

35 U.S.C. § 103(a) REJECTION

Each of independent claims 2, 12, and 17, recites in pertinent part:

filtering, based on the collected visibility states, an automated bot interaction with content presented in the particular block, the filtering being performed based on a given interaction occurring when the visibility state of the particular block indicates that the particular block was not visible when the given interaction occurred.

See generally Appeal Br. (Claims App.).

To meet this limitation, the Examiner cited to Linden at page 1, paragraphs 12–13; page 2, paragraphs 18–19; and page 3, paragraph 25.

Final Act. 5. In support, the Examiner explains:

Linden teaches ‘Types of click fraud detected by this method (of Linden) include: webpage framing (‘invisible clicks’); robot/automated clicks (BOT); user simulated clicks; PPA (Pay per Action) transaction stealing by affiliates; and fraudulent creation of transaction credit by affiliates, for example’. The fraudulent clicks identified by the bots (as well

as other sources of fraudulent clicks) are sent to a safe URL, making sure the advertiser is not charged for the clickthrough transaction. (L: Paras 48-49).

(Ans. 5–6).

Appellant argues, however, in Linden:

when the automated click occurs due to the code of page R, the window presenting the target page T is hidden from the user ‘e.g., behind the window containing pageR.html or in a frame so small the user cannot see it.’ Linden at 0016). Thus, according to Linden, the page R is visible to the user and actually includes the code that generates the automated click, which then hides the page T from the user. There is no mention in Linden that there is any interaction with the page T that is hidden from the user. As such, Linden’s description of the problem of a hidden window does not suggest the claimed method of “collecting . . . visibility states” and ‘filtering . . . an automated bot interaction with content presented in the particular block . . . based on a given interaction occurring when the visibility state of the particular block indicates that the particular block was not visible when the given interaction occurred,’ as claimed. (Claim 2). Furthermore, Linden’s discussion of the ‘hidden window’ problem does not even suggest that a click occurs on this hidden window. In fact, this hidden window is the result of a simulated user click (i.e., the hidden window is created because of the simulated user click on the page R that causes the user device to request page T). (See Linden at 0016).

(Appeal Br. 4–5).

We agree with Appellant. As is clear from Linden, the mechanism used to determine whether hit inflation occurs is accomplished by “the webmaster of T periodically visit[ing] the Web pages of the referrers.” Linden ¶ 16. T denotes the advertiser site and R denotes an affiliate site which are the referrers to T. *Id.* ¶ 12. Thus, the client T is the beneficiary of the hit inflation: “a common form of hit inflation is one in which the referrer

R forces the user to visit the target T by constructing pageR.html so as to automatically ‘click’ the user to pageT.html.” *Id.* ¶ 16. But, the referral to T, according to Linden, is automatic. Thus, except for the automatic click of the referrer R, there is no data with which to conduct an inquiry of the visibility states of the particular block of content over a duration of a given presentation of the resource in Linden.

It is not apparent, and the Examiner does not adequately explain, how the presentation of the resource on the claimed user device of Callaghan can be modified to incorporate the feature of periodically visiting the Web pages of the referrers R, as taught by Linden, to result in the claimed “filtering, based on the collected visibility states, based on a given interaction occurring when the visibility state of the particular block indicates that the particular block was not visible when the given interaction occurred.” Therefore, we will not sustain the obviousness rejection of the independent claims.

Because claims 3–11, 13–16, and 18–21 depend from independent claims 2, 12, and 17, respectively—which we did not sustain—the rejection of claims 3–11, 13–16, and 18–21, likewise, are not sustained.

35 U.S.C. § 101 REJECTION

Pursuant to our authority under 37 C.F.R. § 41.50(b), we enter a new grounds of rejection of claims 2–21 under 35 U.S.C. § 101.

We reject claims 2–21 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.

Concerning independent claim 2, we find the following:

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. Pty. Ltd. 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, we first determine what concept the claim is “directed to.” *See id.* 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))).

In *Diehr*, the claim at issue recited a mathematical formula, but the Supreme Court held that “a claim drawn to subject matter otherwise statutory does not become nonstatutory simply because it uses a mathematical formula.” *Diehr*, 450 U.S. at 187; *see also id.* at 191 (“We view respondents’ claims as nothing more than a process for molding rubber products and not as an attempt to patent a mathematical formula.”). Having said that, the Supreme Court also indicated that a claim “seeking patent protection for that formula in the abstract . . . is not accorded the protection of our patent laws, . . . and this principle cannot be circumvented by attempting to limit the use of the formula to a particular technological environment.” *Id.* (citing *Benson* and *Flook*); *see, e.g., id.* at 187 (“It is now commonplace that an *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection.”).

If the claim is “directed to” an abstract idea, we turn to the second step of the *Alice* and *Mayo* framework, where “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.* (alterations in original) (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.*

In January 2019, the U.S. Patent and Trademark Office (USPTO) published revised guidance on the application of § 101. 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019) (“Guidance”).¹ “All USPTO personnel are, as a matter of internal agency management, expected to follow the guidance.” *Id.* at 51; *see also* October 2019 Update at 1.²

Under the 2019 Revised Guidance and the October 2019 Update, we first look 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) (“Step 2A, Prong One”); and
- (2) 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 Two”).³

¹ In response to received public comments, the Office issued further guidance on October 17, 2019, clarifying the 2019 Revised Guidance. USPTO, *October 2019 Update: Subject Matter Eligibility* (the “October 2019 Update”) (available at https://www.uspto.gov/sites/default/files/documents/peg_oct_2019_update.pdf).

² The 2019 Revised Guidance supersedes MANUAL OF PATENT EXAMINING PROCEDURE (“MPEP”) § 2106.04 and also supersedes all versions of the USPTO’s “Eligibility Quick Reference Sheet Identifying Abstract Ideas.” *See* Guidance, 84 Fed. Reg. at 51 (“Eligibility-related guidance issued prior to the Ninth Edition, R-08.2017, of the MPEP (published Jan. 2018) should not be relied upon.”). Accordingly, Appellant’s arguments challenging the sufficiency of the Examiner’s rejection will not be addressed to the extent those arguments are based on now superseded USPTO guidance.

³ 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

Guidance, 84 Fed. Reg. at 52–55.

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

(3) adds a specific limitation beyond the judicial exception that is 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.

Guidance, 84 Fed. Reg. at 52–56.

The U.S. Court of Appeals for the Federal Circuit has explained that “the ‘directed to’ inquiry applies a stage-one filter to claims, considered in light of the [S]pecification, based on whether ‘their character as a whole is directed to excluded subject matter.’” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016) (quoting *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1346 (Fed. Cir. 2015)). It asks whether the focus of the claims is on a specific improvement in relevant technology or on a process that itself qualifies as an “abstract idea” for which computers are invoked merely as a tool. *See Enfish*, 822 F.3d at 1335–36.

In so doing, as indicated above, we apply a “directed to” two prong test: 1) evaluate whether the claim recites a judicial exception, and 2) if the claim recites a judicial exception, evaluate whether the claim “appl[ies], rel[ies] on, or use[s] the judicial exception in a manner that imposes a meaningful limit on the judicial exception,

practical application. *See* Guidance - Section III(A)(2), 84 Fed. Reg. at 54–55.

such that the claim is more than a drafting effort designed to monopolize the judicial exception.” Guidance, 84 Fed. Reg. at 53; *see also* MPEP §§ 2106.04–2106.05.

The Specification states that

the impression count does not reflect whether the advertisement has actually been viewed by a user. Sometimes, a publisher may be paid according to the total number [of] click-throughs (e.g., user selecting the presented ads) generated on the publisher's webpages. However, advertisers and publishers receive little guidance on whether a low click-through rate for an advertisement was due to a lack of user interest or a lack of actual visibility of the advertisement on the webpages.

Spec. ¶ 5.

Understood in light of the Specification, claim 2 recites in pertinent part,

determining, . . . for a particular block of a resource . . . an initial visibility state specifying whether the particular block is visually presented . . . the resource is initially rendered . . . , including:

determining a portion of the resource that is initially visually presented within the viewport based on dimensions of the viewport and a zoom level setting used to initially display the resource . . . ; and

determining the initial visibility state based on whether a location of the particular block is within the portion of the resource that is initially visually presented within the viewport;

collecting . . . , visibility states of the particular block over a duration of a given presentation of the resource, including determining that the visibility state of the particular block of the resource changes between visible and not visible during the given presentation of the resource based on changes to display characteristics

of the resource made by a user . . . causing the particular block of the resource to be located outside of the viewport for part of the given presentation; and

filtering, based on the collected visibility states. . . with content presented in the particular block, the filtering being performed based on a given interaction occurring when the visibility state of the particular block indicates that the particular block was not visible when the given interaction occurred.

Accordingly, we find that claim 2 recites a mental process using mathematical sizing and relative location comparisons between plural content presentations made concurrently in a given space to determine actual human viewing of one of the displayed contents. Steps such as, “determining a portion of the resource that is initially visually presented within the viewport based on dimensions of the viewport and a zoom level setting used to initially display the resource,” “determining the initial visibility state based on whether a location of the particular block is within the portion of the resource that is initially visually presented within the viewport,” and “determining that the visibility state of the particular block of the resource changes between visible and not visible during the given presentation of the resource based on changes to display characteristics of the resource made by a user . . . causing the particular block of the resource to be located outside of the viewport for part of the given presentation,” are concepts performed in the human mind as mental processes. They are like the steps of receiving, transmitting, storing, and analyzing data that mimic human thought processes of observation, evaluation, judgment, and opinion, perhaps with paper and pencil, where the data interpretation is perceptible only in the human mind. *See In re TLI Commc’ns LLC Patent Litig.*, 823

F.3d 607, 611 (Fed. Cir. 2016); *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1093–94 (Fed. Cir. 2016); *see also* Guidance, 84 Fed. Reg. at 52.

As to the filtering step recited in claim 5, we note that content filtering is abstract. *See BASCOM Global Internet v. AT&T Mobility, LLC*, 827 F.3d 1341, 1345-46 (Fed. Cir. 2016) (finding that filtering content was an abstract idea under step 2A)

Turning to the second prong of the “directed to” test, claim 2 only generically requires “one or more servers” and “a remote device” with a view port. These components are described in the specification at a high level of generality. *See* Spec. ¶¶ 39–40, Figs. 1–4. We fail to see how the generic recitations of these most basic computer components and/or of a system so integrates the judicial exception as to “impose[] a meaningful limit on the judicial exception, such that the claim is more than a drafting effort designed to monopolize the judicial exception.” Guidance, 84 Fed. Reg. at 53. We find no indication in the Specification that the operations recited in independent claim 2 invoke any assertedly inventive programming, require any specialized computer hardware or other inventive computer components, i.e., a particular machine, or that the claimed invention is implemented using other than generic computer components to perform generic computer functions. *See DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1256 (Fed. Cir. 2014) (“[A]fter *Alice*, there can remain no doubt: recitation of generic computer limitations does not make an otherwise ineligible claim patent-eligible.”).

Thus, we find that claim 2 is directed to the judicial exception of a mental process and is not integrated into a practical application.

That the claims do not preempt all forms of the abstraction or may be limited to a visibility state, does not make them any less abstract. *See OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1362–63 (Fed. Cir. 2015) (“And that the claims do not preempt all price optimization or may be limited to price optimization in the e-commerce setting do not make them any less abstract.”).

Turning to the second step of the *Alice* analysis, because we determine that the claims are directed to abstract ideas/judicial exceptions, the claims must include an “inventive concept” in order to be patent-eligible, i.e., there must be an element or combination of elements sufficient to ensure that the claim in practice amounts to significantly more than the abstract idea itself. *See Alice*, 573 U.S. at 217–18 (quoting *Mayo Collaborative Servs.*, 566 U.S. at 72–73).

Concerning this step in the *Alice* framework, we find the “one or more servers and a remote device with a view port” themselves amount to mere generic devices instructed to implement the recited data-gathering and displaying scheme on a generic computer. *Cf. Alice* 573 U.S. at 225–26 (“Instead, the claims at issue amount to ‘nothing significantly more’ than an instruction to apply the abstract idea of intermediated settlement using some unspecified, generic computer.”) That is, the claims here do not include additional elements that are sufficient to amount to significantly more than the judicial exception because the computer as recited is a generic computer component that performs functions that are generic computer functions that are well-understood, routine, and conventional activities previously known to the industry.

“[T]he relevant question is whether the claims here do more than simply instruct the practitioner to implement the abstract idea . . . on a generic computer.” *Alice*, 573 U.S. at 225. They do not.

Taking the claim elements separately, the function performed by the computer at each step of the process is purely conventional. Using a computer to retrieve, select, and apply decision criteria to data and modify the data as a result amounts to electronic data query and retrieval—one of the most basic functions of a computer. All of these computer functions are well-understood, routine, and conventional activities previously known to the industry. *See Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1354 (Fed. Cir. 2016); *see also In re Katz Interactive Call Processing Patent Litig.*, 639 F.3d 1303, 1316 (Fed. Cir. 2011) (“Absent a possible narrower construction of the terms ‘processing,’ ‘receiving,’ and ‘storing,’ . . . those functions can be achieved by any general purpose computer without special programming”). In short, each step does no more than require a generic computer to perform generic computer functions. The claims do not, for example, purport to improve the functioning of the computer itself. In addition, as we stated above, the claims do not effect an improvement in any other technology or technical field. The Specification spells out different generic equipment and parameters that might be applied using this concept and the particular steps such conventional processing would entail based on the concept of information access under different scenarios (*see, e.g.*, Spec. ¶¶ 39–40, Figs. 1–4.). Thus, the claims at issue amount to nothing significantly more than instructions to apply the abstract idea using some unspecified, generic computer. Under our precedents, that is not enough to

transform an abstract idea into a patent-eligible invention. *See Alice*, 573 U.S. at 225–226.

Considered as an ordered combination, the computer components of Appellant’s claims add nothing that is not already present when the steps are considered separately. The sequence of data reception-analysis (determine – successively/collect/filter) and storing is equally generic and conventional or otherwise held to be abstract. *See Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014) (sequence of receiving, selecting, offering for exchange, display, allowing access, and receiving payment recited an abstraction), *Inventor Holdings, LLC v. Bed Bath & Beyond, Inc.*, 876 F.3d 1372, 1378 (Fed. Cir. 2017) (holding that sequence of data retrieval, analysis, modification, generation, display, and transmission was abstract), *Two-Way Media Ltd. v. Comcast Cable Commc’ns, LLC*, 874 F.3d 1329, 1339 (Fed. Cir. 2017) (holding sequence of processing, routing, controlling, and monitoring was abstract). The ordering of the steps is, therefore, ordinary and conventional.

Independent claims 12 and 17 are directed to the same subject matter of claim 1, and thus our analysis above applies equally to independent claim 12. As the Federal Circuit has made clear “the basic character of a process claim drawn to an abstract idea is not changed by claiming only its performance by computers, or by claiming the process embodied in program instructions on a computer readable medium.” *See CyberSource*, 654 F.3d at 1375–76 (*citing In re Abele*, 684 F.2d 902 (CCPA 1982)).

Claims 3–11 and 13–16, and 18–21 depend from independent claims 2, 12, and 17, respectively, and are directed to the same abstract idea as claim 1. *See Content Extraction & Transmission LLC v. Wells Fargo Bank*,

Nat. Ass'n, 776 F.3d 1343, 1348 (Fed. Cir. 2014) (explaining that when all claims are directed to the same abstract idea, “addressing each claim of the asserted patents [is] unnecessary”). These dependent claims recite additional features of mental steps, e.g., “calculating an expected initial visibility state for the particular block based on the initial visibility states of the particular block; and selecting content for display in the particular block on a particular remote device, the selection being based on the expected initial visibility state of the particular block.” Appeal Br. 16 (Claims App. (Claims 8, 18)). “A first predictive model that indicates whether the particular block is visible using dimensions as input,” as recited in claims 3, 13, and 18; and “a second predictive model that indicates whether the particular block is visible to a user of a browser on the remote device for at least a threshold amount of time, the second predictive model being trained on the display characteristics of the resource,” as recited in claims 5, 15, and 20.

Accordingly, we enter a New Ground of Rejection for claims 2–21 under 35 U.S.C. § 101.

DECISION

The Examiner’s rejection of claims 2–21 under 35 U.S.C. § 103(a) is reversed.

A new ground of rejection is entered for claims 2–21 under 35 U.S.C. § 101.

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b). 37 C.F.R. § 41.50(b) provides “[a] new ground of

rejection pursuant to this paragraph shall not be considered final for judicial review.”

37 C.F.R. § 41.50(b) also provides that the appellants, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

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

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

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

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/ Basis	Affirmed	Reversed	New Ground
2-21	103	Callaghan, Linden		2-21	
2-21	101	Eligibility			2-21
Overall Outcome				2-21	2-21

REVERSED; 37 C.F.R. § 41.50(b)