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TOPIC:	J00	Meaning of Art
	J50	Mere Plan
SUJET:	J00	Signification de la technique
	J50	Simple plan

Application No. : 2,507,310

Demande nº 2 507 310

IN THE CANADIAN PATENT OFFICE

DECISION OF THE COMMISSIONER OF PATENTS

Patent application number 2,507,310, having been rejected under subsection 30(3) of the *Patent Rules* (SOR/96–423) as they read immediately before October 30, 2019, has been reviewed in accordance with paragraph 199(3)(c) of the *Patent Rules* (SOR/2019–251). The recommendation of the Patent Appeal Board and the decision of the Commissioner is to notify the Applicant that a specific amendment is necessary for compliance with the *Patent Act* and *Patent Rules*.

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INTRODUCTION

[1] This recommendation concerns the review of rejected patent application number 2,507,310, entitled "Capturing Insight of Superior Users of a Contact Center" and owned by British Telecommunications PLC and Accenture Global Services Limited.

[2] A review of the rejected application has been conducted by the Patent Appeal Board (the Board) pursuant to paragraph 199(3)(c) of the *Patent Rules*. The issue to be considered is whether the claims are directed to non-patentable subject matter. As explained in more detail below, our recommendation is to notify the Applicant that an amendment is necessary for compliance with the *Patent Act* and *Patent Rules*.

BACKGROUND

The application

[3] Patent application 2,507,310 (the instant application), based on a previously filed Patent Cooperation Treaty application, is considered to have been filed in Canada on November 26, 2003 and was laid open to the public on June 17, 2004.

[4] The instant application relates to capturing insight of a user (for example, an employee of a contact center) performing at a superior level, which may include comparing a key performance indicator (KPI) for a user against a reference KPI. If the user's KPI exceeds the reference KPI, then the user is queried for an insight on why he or she is performing exceptionally well. The insight gained from the high performing users can be used in many ways, for example, information gleaned from these insights may be used to create an informational message that is presented to users that are not performing in such a superior fashion.

Prosecution history

[5] On December 7, 2016, a Final Action (FA) was written pursuant to subsection 30(4) of the *Patent Rules* (SOR/96–423) as they read immediately before October 30, 2019 (the former *Patent Rules*). The FA stated that the application was defective on the grounds that claims 1-64 dated March 6, 2015 on file at the time of the FA (the claims on file) encompass subject matter that lies outside the definition of "invention" and does not comply with section 2 of the *Patent Act*.

[6] In a May 18, 2017 response to the FA (RFA), the Applicant submitted a first set of proposed claims and corresponding proposed amendments to the description reflecting the proposed claim language. The Applicant argued for allowance of the proposed claims, which defined with greater particularity the subject matter of the claimed invention.

[7] As the Examiner considered the application not to comply with the *Patent Act* and *Patent Rules*, the application was forwarded to the Board for review on November 23, 2017, pursuant to subsection 30(6) of the former *Patent Rules*, along with an explanation outlined in a Summary of Reasons (SOR) that maintained the rejection based on the defect identified in the FA.

[8] With a letter dated November 26, 2017, the Board sent the Applicant a copy of the SOR and asked the Applicant to confirm continued interest in having the application reviewed. In a response dated February 21, 2018, the Applicant confirmed its continued interest in having the application reviewed by the Board.

[9] A Panel was formed to review the application under paragraph 199(3)(c) of the *Patent Rules* and to make a recommendation to the Commissioner as to its disposition.

[10] In a Preliminary Review letter (PR letter) dated February 1, 2021, the Panel set out its preliminary analysis and rationale as to why, based on the written record, claims 1-34 on file and the first set of proposed claims are directed to non-patentable subject matter prohibited under subsection 27(8) of the *Patent Act* and falling outside the definition of "invention" in section 2 of the *Patent Act*. The PR letter also noted that claims 35-64 on file appeared to be directed to patentable subject matter. The PR letter offered the Applicant the opportunities to attend an oral hearing and to make further written submissions.

[11] In a response to the PR letter (RPR) dated April 7, 2021, the Applicant argued that the claims 1-34 on file are directed to patentable subject matter. The Applicant also submitted a second set of proposed claims, claims 1-76, and asserted that the second set of proposed claims are also directed to patentable subject matter.

[12] An oral hearing was held April 14, 2021.

ISSUES

[13] The issue to be considered by this review is whether the claims 1-64 on file define patentable subject matter.

[14] We will also consider the latest proposed claims, that is, the second set of proposed claims and whether they constitute amendments necessary for compliance with the *Patent Act* and *Patent Rules*.

LEGAL PRINCIPLES AND PATENT OFFICE PRACTICE

Purposive construction

[15] In accordance with *Free World Trust v Électro Santé Inc*, 2000 SCC 66 and *Whirlpool Corp v Camco Inc*, 2000 SCC 67, purposive construction is performed from the point of view of the person skilled in the art in light of the relevant common general knowledge (CGK), considering the whole of the disclosure including the specification and drawings. In addition to interpreting the meaning of the terms of a claim, purposive construction distinguishes the essential elements of the claim from the non-essential elements. Whether or not an element is essential depends on the intent expressed in or inferred from the claim, and on whether it would have been obvious to the skilled person that a variant has a material effect upon the way the invention works.

[16] "Patentable Subject-Matter under the *Patent Act*" (CIPO, November 2020) [*PN2020–04*] also discusses the application of these principles, pointing out that all elements set out in a claim are presumed essential unless it is established otherwise or such presumption is contrary to the claim language.

Patentable subject matter

[17] The definition of invention is set out in section 2 of the *Patent Act*:

> **invention** means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter.

[18] Subsection 27(8) of the *Patent Act* also prescribes that:

> No patent shall be granted for any mere scientific principle or abstract theorem.

[19] *PN2020–04* describes the Patent Office's approach to determining if a claim is patentable subject matter:

> To be both patentable subject-matter and not be prohibited under subsection 27(8) of the *Patent Act*, the subject-matter defined by a claim must be limited to or narrower than an

> actual invention that either has physical existence or manifests a discernible physical effect or change and that relates to the manual or productive arts, meaning those arts involving or concerned with applied and industrial sciences as distinguished in particular from the fine arts or works of art that are inventive only in an artistic or aesthetic sense.

[20] In *Schlumberger Canada Ltd v Commissioner of Patents*, [1982] 1 FC 845 (CA) [*Schlumberger*], the court concluded that, although computers were necessary for the invention to be put into practice, the computer did not form part of "what has been discovered" and thus was not relevant in determining whether the claimed invention was patentable subject matter; the computer was merely being used to make the kind of calculations it was invented to make.

[21] *PN2020–04* further describes the Patent Office's approach to determining if a computer-related invention is patentable subject matter. For example, the mere fact that a computer is among the essential elements of the claimed invention does not necessarily mean that the claimed invention is patentable subject matter. An algorithm itself is abstract and unpatentable subject matter. A computer programmed to merely process the algorithm in a well-known manner without solving any problem in the functioning of the computer will not make it patentable subject matter because the computer and the algorithm do not form part of a single actual invention that solves a problem related to the manual or productive arts. On the other hand, if processing the algorithm improves the functionality of the computer, then the computer and the algorithm would together form a single actual invention that solves a problem related to the manual or productive arts and the subject matter defined by the claim would be patentable.

ANALYSIS

Purposive construction

Overview of the instant application

[22] As explained earlier, the instant application relates to capturing insights of high performing users based on a user's KPI. The insight gained can be used in many ways. In the PR letter we focused on one particular use of these insights, that is, such insights may be used to help improve the performance of underperforming users.

[23] The Applicant highlighted at the hearing that the capturing of insights from high performance users is not only directed to improving the performance of underperforming

users and more generally the captured insights may be disseminated for a variety of purposes.

[24] We agree. The description is clear that such insights can also be used in many ways. For example, the instant application identifies additional uses of captured insights and a user's KPI, such as training or motivation (page 6, lines 11-16).

The person skilled in the art and their relevant common general knowledge

[25] The PR letter at page 4 preliminarily adopted the characterization of the person skilled in the art and the CGK as identified in the FA:

> In the FA at page 2, the person skilled in the art was characterized as follows:
>
> > The skilled person, who may be a team of people, is skilled in the field of customer contact centers such as call centers, and has the knowledge and experience of operations and computer systems of such centers, including software and hardware which are used to carry out this field.
>
> The common general knowledge was also identified:
>
> > The common general knowledge in the art is demonstrated by the background of the invention and includes known centers of contact, such as call centers, used to provide services to customers (description: page 1).
> >
> > Given the lack of detail in the present description, it is assumed that implementing the claimed subject matter on a computer system is well within the reach of a person skilled in the art.

[26] The Applicant did not dispute the above characterizations in either the RPR or during the hearing. The Panel adopts these characterizations in this review.

The representative claims

[27] The instant application includes 64 claims on file, with independent claims 1, 12, 13, 24, 35, 43, and 51 directed to various embodiments of capturing insight of a user of a computer-implemented contact center.

[28] The PR letter at pages 4-6 adopted two representative claims, independent claim 1 and independent claim 35:

> Claim 1 is directed to computer-implemented method steps that capture insight of a user of a contact center. Claim 12 is directed to a computer readable medium encoded with codes for

carrying out the method steps of claim 1 and its dependent claims. System claims 13 and 24 are directed to computer-implemented embodiments for carrying out the method steps equivalent to those of claim 1. Dependent claims 2-11, 14-23, and 25-34 recite refinements of the method steps of claim 1 and defines additional steps for processing the user insights. We consider claim 1 as the representative independent claim of these claims:

> 1. A method for capturing insight of a user of a contact center portal displayed on a user computer, the user computer being in communication with a web server in a computer network, the method comprising:
>
> - reading a user key performance indicator (KPI) associated with the user;
> - reading a reference KPI;
> - determining whether the user KPI meets or exceeds the reference KPI;
> - causing a user insight input window to be displayed on the user computer when the user KPI meets or exceeds the reference KPI, the user insight input window being operable to receive input from the user of at least one reason why the user performs exceptionally well; and
> - receiving the at least one reason at the web server and causing the at least one reason to be stored in a database in communication with the computer network.

Similarly, claim 35 is directed to computer-implemented method steps that captures insight of a user of a contact center. System claim 43 and the computer readable medium of claim 51 are directed to computer-implemented embodiments for carrying out the method steps equivalent to those of claim 35. Dependent claims 36-42, 44-50 and 52-64 recite refinements of the method steps of claim 35 and defines additional steps for processing the user insights. We consider claim 35 as the representative independent claim of these claims:

> 35. A web-based method for capturing insight of a user performing at a superior level within a contact center, comprising:
>
> - recording performance data for a plurality of calls participated in by the user within the contact center using a computer;
> - computing a user key performance indicator (KPI) for the user, using the computer, based on the performance data recorded from the plurality of calls, the key performance indicator measuring performance of the user based on a defined performance objective, the defined performance objective including at least one of an average talk time of the user, an average wrap time of the plurality of calls, a first number representing calls resolved, and a second number representing calls requiring a transfer from the user;
> - comparing a difference between the user KPI and a reference KPI, using the computer;

- querying the user to provide insight when the user KPI exceeds the reference KPI via a first interface, including:
    - displaying to the user an option to provide insight when the user KPI exceeds the reference KPI;
    - presenting a template selected from a plurality of templates to the user responsive to the user selecting the option to provide insight, the plurality of templates relating to at least one reason that the user KPI exceeds the reference KPI;
    - assigning each of the plurality of templates to different users selecting the option to provide insight;
    - storing each template completed by each user providing insight; and
    - determining when the plurality of templates are completed by the users providing insight; and
    - providing corrective material to the user, via a second interface, when the user KPI does not exceed the reference KPI, wherein the corrective material is derived from insight provided by users whose user KPI exceeds the reference KPI.

[29] As the Applicant did not dispute the use of these claims as representative, the Panel adopts these representative claims in this review.

Meaning of claim terms

[30] The PR letter at pages 6-7 construed the representative claim 1 elements "reading a user KPI" and "reading a reference KPI":

> Although no claim terms were at issue during the examination of this application, we construe the step of "reading" a user key performance indicator (KPI) and reference KPI as recited in representative claim 1 (and an equivalent "means for reading" recited in claim 13 and an equivalent "read" step recited in claim 24), as it is relevant to our Analysis.
>
> Embodiments directed to KPIs and capturing insight are described at page 5, line 25 to page 6, line 11 of the instant application:
>
> > While the key performance indicators vary depending on the implementation and use of the contact center, figures 3A-3B show four common KPI's: the average talk time in seconds, the average wrap time in seconds, the number of calls resolved and the number of calls requiring a transfer. For comparison purposes, the user's individual KPI statistics are charted against a reference number. In figures 3A-3B, that reference is the team average. In other embodiments, the base reference could be the user's rating from a previous period, or a predetermined objective, for example. A textual explanation of each chart is provided to the right of the chart.

> In this embodiment for every call attended to by a user, the system records data about that call, which is used to calculate the statistics shown in figures 3A-3B. (One skilled in the art will understand that such data capture and statistical calculations can be done programmatically in a number of ways.) The [Contact Center System] compares the user's KPIs to the team's performance averages (or other base figure). If the user is performing at some pre-established level - such as above the team average, a certain percentage above the median or mean, a standard deviation above the median or mean, etc. - then the system automatically provides a link 330 asking the user to share his or her insight on what causes such good performance. Clicking on that link 330 or 340 opens a window (figure 4), into which the user enters information regarding how he achieves such superior performance levels. Upon clicking the submit button 410, the system stores this information.

This passage explicitly states that the system "records" data about the call and that the person skilled in the art would understand how such data capture would be programmed.

In contrast, the passage does not explicitly define a "reading" step. In our preliminary view, the person skilled in the art with their common general knowledge would understand that certain well-known computer-implemented functions, such as writing and reading input and output data to and from memory, would comprise functions necessary to program such an embodiment that calculates the user KPIs. The person skilled in the art would understand that data, such as the calculated user KPIs, would be written to memory and then be "read" from memory for subsequent comparison with the reference.

In our preliminary view, the person skilled in the art with their common general knowledge of computer-implemented contact centers would construe the step of "reading" as a typical computer-implemented function that "reads" or extracts data from memory for subsequent processing.

[31] As the Applicant did not comment on this claim term as construed, we adopt it in this review.

The essential elements of the claims

[32] The PR letter at page 7 identified the essential elements of the representative claims:

> The FA at pages 2-3 performed a purposive construction that resulted in a set of essential elements for certain claims according to a previous Patent Office practice, now superseded by PN2020-04. We undertake anew the identification of essential elements.
>
> Considering the representative claims 1 and 35, and the whole of the specification, the person skilled in the art would understand that there is no use of language indicating that any of the steps in each claim are optional, a preferred embodiment or one of a list of alternatives.

> Therefore, in our preliminary view, all method steps identified in each of the representative claims 1 and 35 are considered to be essential, including the computer-implemented components that are used for carrying out these method steps as recited in the corresponding computer readable medium and computer-implemented system claims.

[33] The Applicant agreed with this preliminary view in the RPR at pages 3-4 stating that the "all explicitly recited elements of pending claims 1-34 are essential elements".

[34] In light of the above, we consider that all method steps identified in each of the representative claims 1 and 35 are considered to be essential.

Patentable subject matter

[35] The PR letter at page 7 summarized the analysis approach to assessing patentable subject matter:

> In the FA at page 3, having identified that the essential elements of the claims were directed to an abstract scheme, the Examiner concluded that the claims encompass subject-matter that lies outside the definition of "invention" and does not comply with section 2 of the *Patent Act*.
>
> Given that our preliminary view of essential elements differs from that of the FA, we undertake anew the assessment of patentable subject-matter according to *PN2020-04*.
>
> As described above in the section on "Legal Principles and Office Practice" we will assess for each representative claim whether the subject-matter it defines forms a single actual invention having physical existence or a discernible physical effect or change.

[36] We note that although the Applicant did not acquiesce to the validity or correctness in law of the Panel's approach to the assessment of patentable subject or to the preliminary views reached in the PR letter (as stated in the RPR at pages 1 and 5), the Applicant made substantive submissions related to the PR letter's findings on patentable subject matter for our consideration in this review.

Representative claim 1

[37] The PR letter at pages 7-8 set out our preliminary analysis with respect to patentable subject matter of representative claim 1:

> According to representative claim 1 and the specification, it appears that the invention is directed to capturing insights from high performing users and then using those insights to help improve the performance of underperforming users (instant application, claim 1 and page 6, lines 11-16). The Applicant in the RFA at page 7 appears to support this characterization of the actual invention when discussing the problem addressed by the claims: "the problem is one involving the use of computer-based call center to improve the efficiency of a user thereof, and not one of merely enhancing the service to customers and a call center's efficiency in general" (original emphasis removed and new emphasis added).
>
> Representative claim 1 has two data input steps (reading a user KPI and a reference KPI), a data processing step (determining whether the user KPI meets or exceeds the reference KPI) and two output steps (displaying a user insight input window and receiving input from the user of at least one reason why the user performs exceptionally well).
>
> In the Panel's preliminary view, all these essential steps of representative claim 1 cooperate together to capture insights of high performing users where such insights are subsequently used to improve the efficiency of underperforming users of a contact center. The steps

> identify high performing users through a comparison of a user's KPI to a reference KPI and prompt the identified high performing users for their insight. Together, these steps represent the computer implementation of an abstract idea or scheme to capture insight and use it to improve the efficiency of users of a contact center.
>
> The steps of "reading" the user KPI and the reference KPI data, as construed by the skilled person, represent typical computer-implemented data input steps. Similarly, the step of comparing the user KPI to the reference KPI represents a typical computer-implemented data processing step according to input data. Finally, the steps of prompting high performing users for their insight and receiving their insight represent typical computer-implemented data output (and further input) steps.
>
> According to *PN2020-04*, "[i]f a computer is merely used in a well-known manner, the use of the computer will not be sufficient to render the disembodied idea, scientific principle or abstract theorem patentable subject-matter and outside the prohibition under subsection 27(8) of the Patent Act."
>
> As explained in [*Canada (Attorney General) v Amazon.com, Inc*, 2011 FCA 328] (paras 61–63, 66, 69), a computer cannot be used to give an abstract idea a practical application satisfying the physicality requirement implicit in the definition of invention in section 2 of the *Patent Act* simply by programming the idea into the computer by means of an algorithm. This is the situation in [*Schlumberger*] at 205–206, where the computer was merely being used to make the kind of calculations it was invented to make.
>
> This is the situation for representative claim 1, where the abstract scheme is implemented on the computer, but the computer is merely used in a well known manner, does not form a single actual invention with the abstract scheme and thus does not render the scheme patentable subject-matter.
>
> Accordingly, the abstract scheme to capture and share insight from high performing users has no physical existence itself and does not manifest a physical effect or change. Nor does the use of the computer in this case cause it to meet the physicality requirement. Thus, in our preliminary view, the actual invention of representative claim 1 is prohibited under subsection 27(8) of the *Patent Act* and the subject-matter of representative claim 1, representing claims 1-34, is not patentable subject-matter and falls outside the definition of "invention" in section 2 of the *Patent Act*.

[38] The Applicant submitted in the RPR at page 5 and further explained at the hearing that the Panel did not adequately consider the representative claim 1 step of "receiving the at least one reason at the web server and causing the at least one reason to be stored in a database in communication with the computer network". The Applicant argued that the web server and the database are separate computer elements and furthermore, these elements are separate from the computer at which the insights are captured. This arrangement supports both the publication and dissemination of user insights, exemplified by a cited passage in the description at page 17, lines 7-10.

[39] The Applicant further submitted in the RPR at page 6 that this particular recited step is not a generic data input and storage step and represents atypical computer use:

> Applicant further respectfully submits that these are not generic data input and storage steps. For example, they do not simply involve storing user insights for their intellectual significance. Rather, it requires use of a user computer and a separate web server and database, and this storage of user insights separate from the user computer enables the user insights to become accessible to a wide variety of users within a data call centre environment and facilitates the subsequent publication and dissemination of the user insights.
>
> As such, Applicant respectfully submits that the steps of receiving the at least one reason at a web server and storing the at least one reason in a database in communication with the computer network and the computer components of the web server and the database implementing these steps are a part of the "actual invention" of pending independent claims 1, 13 and 24.

[40] The Applicant concludes that as the web server and database are part of the actual invention and these computer elements have physical existence, then the representative claim 1 is directed to patentable subject matter.

[41] As explained in the PR letter at page 8, it was our preliminary view that all the essential steps of representative claim 1 cooperate together as an abstract scheme to capture and share insight from high performing users and such insights are used to improve the efficiency of underperforming users. In our preliminary view, as expressed in the PR letter, this included the step of receiving the one reason at the web server and storing the one reason in a database. Also in our preliminary analysis, this step was considered to represent typical computer-implemented data output steps. We will reconsider our preliminary view in light of the Applicant's arguments.

[42] First, as submitted by the Applicant at the hearing, we acknowledge and accept the Applicant's submissions that such insights may be used for more than improving the efficiency of underperforming users. We concede that the captured data may be used for various purposes and that the use of a separate web server and database enables the dissemination of the captured data for such purposes.

[43] Second, in our view, as guided by *PN2020-04*, we consider the Applicant's submissions on whether the use of a web server and database to store the insights represents non-generic data input and storage steps cooperating together with the abstract scheme to form a single actual invention.

[44] The “computer” in the context of this particular instant application relates to a customer contact center, such as a call center. The technical architecture of the call center system is overviewed in Figure 29 and described in the application (description at page 15, line 28 to page 16, line 10) that makes reference to networked computers, web servers and databases executing “off-the-shelf” applications. The description further details the technical aspects for capturing insight (description at page 17, lines 7-26) that describes the use of predefined templates to capture data that is stored in a database. The application, including these references, does not refer to any problems or challenges in the implementation of capturing or storing user insights beyond what would be required from a person skilled in the art with their CGK.

[45] Regarding the Applicant’s submission that the separate computer-implemented components to capture and then subsequently receive and store insights represent non-generic use of a computer, in our view, the use of a web server and database to receive and store the one reason represents a typical, well-known function of a computer, in this case, a call center comprising distributed computer-implemented elements. The person skilled in the art, having knowledge and experience of the operations and computer systems of such call centers, would understand that a call centre comprises distributed computer-implemented components, including web servers and databases. The use of a distributed computer-implemented components in the call center to perform the recited steps implemented on different components within the call center would have been viewed by the person skilled in the art as a generic computer-implemented call center.

[46] In our view, the web server and database are typical computer-implemented components of a call center and their use in receiving and storing data represents typical computer-implemented functions. Thus, the “computer” in the context of a call center for this application is being used in a well-known manner. The computer does not form a single actual invention with the abstract scheme and does not render the scheme patentable subject-matter.

[47] In light of the above, in our view, the abstract scheme to capture and store insights from high performing users for subsequent dissemination for various purposes has no physical existence itself and does not manifest a physical effect or change. Nor does the use of the distributed computer elements in the context of a call center cause it to meet the physicality requirement. The actual invention of representative claim 1 is prohibited under subsection 27(8) of the *Patent Act* and the subject-matter of representative claim 1, representing

claims 1-34, is not patentable subject-matter and falls outside the definition of “invention” in section 2 of the *Patent Act*.

Representative claim 35

[48] The PR letter at page 9 set out our preliminary analysis with respect to patentable subject matter of representative claim 1:

> Similar to our assessment above, it appears that the invention for representative claim 35 is also directed to capturing insights from high performing users and then using those insights to help improve the performance of underperforming users (instant application, claim 35 and page 6, lines 11-16).
>
> Representative claim 35 has a step of recording call performance data that is generated by the user during a call and computing a user KPI based on that call performance data, a data processing step (comparing the user KPI with a reference KPI) and several output steps (querying the user to provide insight and providing corrective material to the user).
>
> In the Panel's preliminary view, similar to our assessment of representative claim 1, all these essential steps of representative claim 35 cooperate together to capture insights of high performing users where such insights are subsequently used to improve the efficiency of underperforming users of a contact center. Together, these steps represent the computer implementation of an abstract idea or scheme to capture insight and use it to improve the efficiency of users of a contact center.
>
> The step in representative claim 35, namely, the recording of call performance data that is generated by the user, is not a generic data input step. It is not a step of, for example, the computer simply receiving communication or manual input of information of intellectual significance. It instead requires the computer-implemented contact center system to automatically record call data during, or at the conclusion of, a user's call. In the words of the Applicant, "[a] contact center without any computer elements simply cannot record data about user calls in order to calculate user and reference KPIs…" (RFA at page 11). We preliminarily agree.
>
> In our preliminary view, the computer-implemented contact center system, with its call data recording means, is not just a computer being used in a well-known manner to run a mathematical algorithm or otherwise implement an abstract idea. The step of recording the data that is generated by the user during a call, which is part of the actual invention, satisfies the physicality requirement. Accordingly, the subject matter of claim 35, representing claims 35–64, appears to be patentable subject matter.

[49] The Applicant did not contest this preliminary analysis.

[50] In light of the above, in our view, the call data recording means as recited in representative claim 35 is not just a computer being used in a well known manner. Rather, the step of recording data that is generated by the user during a call, which is part of the actual invention, satisfies the physicality requirement. Accordingly, the subject matter of claim 35, representing claims 35–64, is directed to be patentable subject matter and complies with both subsection 27(8) and section 2 of the *Patent Act*.

Conclusion of patentable subject matter

[51] In light of the above, it is our view that claims 1-34 on file are directed to non-patentable subject matter prohibited under subsection 27(8) of the *Patent Act* and that falls outside the definition of "invention" in section 2 of the *Patent Act*.

Proposed claims

[52] Given that claims 1-34 on file are directed to non-patentable subject matter, we will consider the latest proposed claims, that is, the second set of proposed claims, and whether they constitute amendments necessary for compliance with the *Patent Act* and *Patent Rules*.

[53] The Applicant in the RPR at page 7-8 discussed the proposed amendments to the claims on file. Proposed claims 1-49 generally relate to claims 1-34 on file and proposed claims 50-76 generally relate to claims 35-64 on file.

[54] The Applicant proposed amendments to independent claim 1, with similar amendments to proposed independent claims 18 and 34, as follows:

> …
>
> causing the at least one processor to record performance data for a plurality of calls participated in by the user;
>
> ~~reading~~ causing the at least one processor to determine a user key performance indicator (KPI) associated with the user based at least in part on the recorded performance data for the plurality of calls;
>
> causing the at least one processor to determine ~~determining~~ whether the user KPI meets or exceeds a reference KPI;
>
> …

[55] The Applicant submitted that the proposed independent claims 1, 18 and 34 all recite recording of performance data for a plurality of calls participated in by a user. The resulting performance data is then used to determine a KPI for the user. As the recording of performance data is not a generic data input step and is part of the actual invention, so argues the Applicant, it satisfies the physicality requirement for patentable subject matter. A similar step of recording performance data for a plurality of calls participated in by the user is also recited in proposed independent claims 50, 59, and 68.

[56] Consistent with our view above with respect to representative claim 35 on file, we agree

with the Applicant that the step of recording performance data for a plurality of calls participated in by the user is not just a computer being used in a well-known manner. As recited in all the proposed independent claims, this step of recording performance data is part of the actual invention and satisfies the physicality requirement of patentable subject matter. Accordingly, the subject matter of the second set of proposed claims is directed to be patentable subject matter and complies with both subsection 27(8) and section 2 of the *Patent Act*.

CONCLUSIONS

[57] In light of our analysis, the Panel concludes that claims 1-34 on file are directed to non-patentable subject-matter prohibited under subsection 27(8) of the *Patent Act* and falling outside the definition of "invention" in section 2 of the *Patent Act*.

[58] We also conclude that the second set of proposed claims meets the requirements of a necessary amendment under subsection 86(11) of the *Patent Rules*.

RECOMMENDATION OF THE BOARD

[59] In view of the above, the Panel recommends that the Applicant be notified, in accordance with subsection 86(11) of the *Patent Rules*, that the deletion of the claims on file and the insertion of proposed claims 1-76 as presented in the Applicant's letter of April 7, 2021 are necessary for compliance with the *Patent Act* and *Patent Rules*.

Lewis Robart	Marcel Brisebois	Leigh Matheson
Member	Member	Member

DECISION OF THE COMMISSIONER

[60] I concur with the conclusions and recommendation of the Board. In accordance with subsection 86(11) of the *Patent Rules*, I hereby notify the Applicant that the following amendment, and only this amendment, must be made in accordance with paragraph 200(b) of the *Patent Rules* within three (3) months of the date of this decision, failing which I intend to refuse the application:

- the deletion of the claims on file; and
- the insertion of proposed claims 1-76 as presented in the Applicant's letter of April 7, 2021.

Virginie Ethier
Assistant Commissioner of Patents

Dated at Gatineau, Quebec

this 12th day of May, 2021