Recentive Analytics, Inc. v. Fox Corp.: The sky is not falling!

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The sky is not falling! Last week's *Recentive Analytics* Federal Circuit case, which used the patentable-subject-matter axe to strike down some machine learning (ML) claims, easily fits within the Federal Circuit's existing patentable subject matter jurisprudence. I have been warning for years that the *Electric Power Group* line of cases could be used to invalidate AI inventions. Well, now it has. The result is not surprising.

The patents involve scheduling of live events (kind of a business method or at least an age-old human activity), and the ML is both generically and functionally described and claimed. In fact, the specification describes the ML as a black box: "[T]he performer model 116 includes or utilizes a machine learning model 210 or other predictive tool …. Any suitable machine learning technique can be used, such as, for example…." US11386367 ('367 Patent), 5:65-5; see also 7:55-62. The specification generically and functionally describes the ML model's operation as training, receiving input parameters, and then scheduling the live events, just about as high level as you can be and not specific to any ML model. '367 Patent, 6:5-21; 8:5-11. What few technical steps exist are all described functionally, without describing "how" anything is done. Indeed, each step is described as a mere possibility by using the verb "can."

At one point, the specification claims to achieve "a significant improvement in computer functionality" through improved accuracy, automation, and being able to automatically update the schedule based on changes to the input parameters. '367 Patent 9:7-25. However, Recentive had to admit that its functionally drafted patents "do not claim a specific method for 'improving the mathematical algorithm or making machine learning better.'" Slip op., at 12. The court noted that even if Recentive had not made this admission, "neither the claims nor the specifications describe how such an improvement was accomplished." *Id.*, at 12-13. Ultimately, the court held that the patents are not eligible simply by applying machine learning to a new field of use. *Id.*, at 14. In light of the Supreme Court's *Alice* decision

(2014) and the Federal Circuit's *Electric Power Group* decision (2016), this is not surprising.

Although the result isn't surprising, the court could be seen as possibly raising the bar on software inventions. We need to keep an eye on this. In its opinion, the court states:

> In the context of software patents (which includes machine learning patents), the step one inquiry determines 'whether the claims focus on "the specific asserted improvement in computer capabilities … or, instead, on a process that qualifies as an abstract idea for which computers are invoked merely as a tool."'

Slip op., at 10 (citations omitted, emphasis added).

When I read this, I thought it was rather strong—either the claimed software improves the computer capabilities or else it is dead. Certainly, there are software patent cases where specific details or a claimed solution necessarily rooted in computer technology were enough, *e.g.*, *DDR Holdings*. So, I looked up the case to which the court cited, and it appears the *Recentive* court did perhaps move the bar a bit. There, the court made no such ultimatum:

> In cases involving software innovations, this inquiry often turns on whether the claims focus on 'the specific asserted improvement in computer capabilities ... or, instead, on a process that qualifies as an abstract idea for which computers are invoked merely as a tool.'

Koninklijke KPN N.V. v. Gemalto M2M GmbH, 942 F.3d 1143, 1149 (citations omitted, emphasis added).

It is unfortunate that the Federal Circuit's first patentable subject matter test for AI involved these facts. But, I see no reason why practitioner's need to be concerned with this case as long as they follow the basic drafting tips, which I mention below.

TIPS

Key arguments:

1. The invention improves the functioning of the computer itself;
2. The invention affects an improvement in another technology or technical field;
3. The invention improves over the prior art; and
4. The invention addresses a technical solution to a technical problem.

Specification suggestions:

- Draft the specification with sufficient technical details, not just functionally. In other words, describe not only what the system does, but how it does it. *See e.g.*, *ChargePoint*. Include system diagram, flowcharts, and important interfaces/data structures.
- Support key arguments – *e.g.,* describe the technological improvements over the prior art.

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TIPS (Cont'd)

Claim suggestions:

- Avoid functional claiming and add specifics
- Recite the technical improvements, etc., described in specification (*See e.g., Amdocs)*
- Be particularly careful when the invention involves data gathering, analysis, and display

Other:

- The PTO guidelines are not binding on the Federal Circuit
- Know where the guidelines and Fed. Cir. case law are not co-extensive
- Make arguments for both the PTO as well as the Fed. Cir.
- Preserve the arguments you want to make to the Fed. Cir. by making them to the PTAB