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Is a Snoring Detection Device Patentable?

Not the one below - according to the Patent Trial and Appeal Board.

The patent application determined a difference in noise levels during inhaling and exhaling, and based on the difference, determined an occurrence of a snore.

The patent applicant argued that the approach in the patent application was non-conventional because it only sensed noise during inhalation and expiration, rather than all sources of noise, to detect a snore.

The Board determined that the patent application employed a sensor in a "generic and ordinary way, and for an ordinary purpose." "Such sound sensing" was an abstract idea of mental processes.

Further, according to the Board, the processor merely performed "generic computer functions".

Finally, according to the Board, the claimed invention was not integrated into a "practical application".

COMMENT:

The Board noted that there was only "attorney argument" to support the claim that the invention improved computer technology and/or functionality. Perhaps this was a message that these arguments need to be a part of the patent application itself to carry persuasive weight.

What is "Immediate and Sustained Relief" From Medication

Brigham and Women's Hospital licensed a patent for treating heartburn by co-administering two known heartburn medications - H2 blockers and antacids.

H2 blockers were known to provide slow but long lasting relief. Antacids were known to provide fast but momentary relief. The patent claimed that the combination of the foregoing provided "immediate and sustained relief" from heartburn. The patent claim described immediate relief as being within 5-10 minutes.

Perrigo marketed a generic product. Brigham argued that since Perrigo's product had the same active ingredients and dosages, Perrigo's product must also provide "immediate relief".

The Federal Circuit found that Perrigo's clinical study "at most . . . suggests that [Perrigo's product] might provide immediate and sustained relief; such speculative data, however, cannot sustain Brigham's burden of proof."

Further, Perrigo's clinical study did not measure relief within 5-10 minutes, according to the patent claim.

Thus, the Federal Circuit concluded that Brigham failed to prove that Perrigo's product provided immediate relief within 5-10 minutes.

COMMENT:

It is not clear whether the Federal Circuit decided what was "sustained relief" and whether it was in Perrigo's product.

Is This Really a Surprise - Another Diagnostic Patent is Found Unpatentable

Athena is a licensee of a patent for methods of diagnosing neurological disorders by detecting antibodies MuSK. Athena and Mayo marketed competing test kits.

Before the invention, no one had associated MuSK with a disease. However, the patent disclosed that the steps of detecting MuSK were known techniques in the art.

The Federal Circuit began by reciting that "laws of nature are not patentable, but applications of such laws may be patentable." However, "adding 'conventional steps, specified at a high level of generality,' to a law of nature does not make a [patent] claim to the law of nature patentable."

The Federal Circuit found that the invention was "directed to a natural law" - a "correlation between the presence of naturally occurring MuSK autoantibodies in bodily fluid and MuSK-related neurological diseases."

Further, the present patent claims were "directed to a natural law because the claimed advance was only in the discovery of a natural law, and that the additional recited steps only apply conventional techniques to detect that natural law."

COMMENT:

Patenting diagnostics continues to be a challenge. If the diagnostic is merely a correlation that exists between two things, the discovery may not be patentable. On the other hand, if the diagnostic involves new laboratory techniques, as Athena tried to argue, one can increase the probability of patentability.

Treatment Method to Increase Human Exercise Capacity - Patentable

In contrast to diagnostics, treatment methods may generally fare better in terms of patentability.

In *Natural Alternatives v. Creative Compounds,* Natural owned patents to dietary supplements containing beta-alanine.

The Federal Circuit found that "administering certain quantities of beta-alanine to a human subject alters that subject's natural state. . . . This, in turn, results in specific physiological benefits for athletes engaged in certain intensive exercise."

Importantly, the court explained that the patent claims "not only embody this discovery, they require that an infringer actually administer the dosage form claimed in the manner claimed. . . These are treatment claims and as such are patent eligible." "They cover using a natural product in unnatural quantities to alter a patient's natural state, to treat a patient with specific dosages outlined in the patents."

COMMENT:

Here, the patent was not just to the discovery of a natural law, but using the natural law to treat a human.

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