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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* LEE AMAITIS

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Appeal 2016-006317  
Application 14/058,450  
Technology Center 3700

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Before ANTON W. FETTING, BIBHU R. MOHANTY, and  
KENNETH G. SCHOPFER, *Administrative Patent Judges*.  
FETTING, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE<sup>1</sup>

Lee Amaitis (Appellant) seeks review under 35 U.S.C. § 134 of a final rejection of claims 26-40 and 42-46, the only claims pending in the application on appeal. Oral arguments were presented July 10, 2018. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b).

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<sup>1</sup> Our decision will make reference to the Appellant's Appeal Brief ("App. Br.," filed October 27, 2015) and Reply Brief ("Reply Br.," filed June 6, 2016), and the Examiner's Answer ("Ans.," mailed April 6, 2016), and Final Action ("Final Act.," mailed January 27, 2015).

The Appellant does not describe what is invented, but instead describes various embodiments, some of which are claimed. Exemplary claim 45 is reproduced below (bracketed matter and some paragraphing added).

45. A method comprising:

[1] determining, by at least one computer processor, that the first player is a winner of a first game in a first tier of a plurality of non-overlapping tiers of game play, in which the first player is assigned to the first tier;

[2] in response to determining that the first player is a winner of the first game, assigning, by the at least one computer processor, the first player to a second of the plurality of tiers of game play, in which the second tier of game play is higher than the first tier of game play;

[3] after assigning the first player to the second tier, determining, by the at least one computer processor, that the first player is a winner of a second game in the second tier;

[4] causing, by the at least one computer processor, a second player to be assigned to the first tier of game play;

[5] determining, by the at least one computer processor, that the second player has paid a fee to move from the first tier of game play to the second tier of game play;

and

[6] in response to determining that the second player has paid the fee, causing, by the at least one computer processor, the second player to be assigned to the second tier of game play.

The Examiner relies upon the following prior art:

Amaitis US 8,562,401 B2

Oct. 22, 2013

Claims 26-40 and 42-46 stand rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter.

Claims 1-5 and 7-21 under the judicially created doctrine of obviousness type double patenting as claiming the patentably indistinguishable subject matter as another U.S. Patent.

## ISSUES

The issues of eligible subject matter turn primarily on whether the claims recite more than abstract conceptual advice of what a computer is to provide without implementation details.

The issues of obviousness type double patenting turn primarily on whether the instant claims are patentably distinct from those of a prior patent.

## FACTS PERTINENT TO THE ISSUES

The following enumerated Findings of Fact (FF) are believed to be supported by a preponderance of the evidence.

### *Facts Related to the Prior Art*

#### *Amaitis*

01. Amaitis claim 23 is:

A method comprising: assigning, by at least one computing device operatively coupled to at least one server, a first player to a first tier of game play of a plurality of tiers of game play; receiving, by the at least one computing device, an indication that a first player desires to play a first game; determining, by the at least one computing device, that the first player is a

winner of the first game, in which the game is against a second player assigned to the first tier of game play; in response to determining that the first player is the winner of the first game, assigning, by the at least one computing device, the first player to a second tier of game play of the plurality of tiers of game play, in which the second tier includes a highest tier of the plurality of tiers; receiving, by the at least one computing device, an indication that the first player desires to play a second game; determining, by the at least one computing device, that there are sufficient players in the second tier ready to play the second game; in response to determining that there are sufficient players and in response to receiving the indication that the first player desires to play the second game, facilitating, by the at least one computing device, play of the second game between the first player and a third player assigned to the second tier of game play; determining, by the at least one computing device, that the first player is a winner of the second game; in response to determining that the player is the winner of the second game, providing, by the at least one computing device, the player with an award; assigning, by the at least one computing device, a fourth player to the first tier of game play, in which the fourth player is assigned to the first tier after the first player is determined to be the winner; determining, by the at least one computing device, that the fourth player has paid a fee to move from the first tier of game play to the second tier of game play; and in response to determining that the fourth player has paid the fee, assigning, by the at least one computing device, the player to the second tier of game play.

Amaitis Claim 23.

## ANALYSIS

*Claims 26-40 and 42-46 rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter*

Method claim 45 recites determining a winner, assigning a player, again determining a winner, again assigning a player, determining fee payments,

and again assigning a player. Thus, claim 45 recites receiving, analyzing, and modifying data. None of the limitations recite implementation details for any of these steps, but instead recite functional results to be achieved by any and all possible means. Data retrieval, analysis, and modification are all generic, conventional data processing operations to the point they are themselves concepts awaiting implementation details. The sequence of data reception-analysis-modification is equally generic and conventional. The ordering of the steps is therefore ordinary and conventional. The remaining claims merely describe process parameters, with no implementation details.

#### The Supreme Court

set forth a framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts. First, [] determine whether the claims at issue are directed to one of those patent-ineligible concepts. [] If so, we then ask, “[w]hat else is there in the claims before us? [] To answer that question, [] consider the elements of 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. [The Court] described step two of this analysis as 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.”

*Alice Corp., Pty. Ltd. v CLS Bank Intl.*, 134 S.Ct. 2347, 2355 (2014) (citing *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012)).

To perform this test, we must first determine whether the claims at issue are directed to a patent-ineligible concept. The Examiner determines the claims to be directed to a method of playing a game. Final Act. 2.

Although the Court in *Alice* made a determination as to what the claims were directed to, we find that this case's claims themselves and the Specification provide enough information to inform one as to what they are directed to.

The preamble to claim 45 does not recite what it is directed to, but the steps in claim 45 result in assigning players to a game absent any technological mechanism other than a conventional computer for doing so. The Specification does not describe what the invention relates to other than the embodiments so described. The claims describe individual such embodiments. Thus, all this evidence shows that claim 45 is directed to assigning players to a game, i.e. game playing. This is consistent with the Examiner's determination.

It follows from prior Supreme Court cases, and *Bilski* (*Bilski v Kappos*, 561 U.S. 593 (2010)) in particular, that the claims at issue here are directed to an abstract idea. The concept of game playing is a fundamental recreational practice long prevalent in our system of society. The use of game playing is also a building block of ingenuity in human entertainment. Our reviewing court has found rules for games to be abstract ideas. "We conclude that Applicant's claims, directed to rules for conducting a wagering game, compare to other 'fundamental economic practice[s]' found abstract by the Supreme Court." *In re Smith*, 815 F.3d 816, 818 (Fed Cir 2016). Thus, game playing, like hedging, is an "abstract idea" beyond the scope of §101. *See Alice Corp. Pty. Ltd.* at 2356.

As in *Alice Corp. Pty. Ltd.*, we need not labor to delimit the precise contours of the "abstract ideas" category in this case. It is enough to

recognize that there is no meaningful distinction in the level of abstraction between the concept of risk hedging in *Bilski* and the concept of game playing at issue here. Both are squarely within the realm of “abstract ideas” as the Court has used that term. *See Alice Corp. Pty. Ltd.* at 2357.

Further, claims involving data collection, analysis, and display, without more, are directed to an abstract idea. *Elec. Power Grp. v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016) (holding that “collecting information, analyzing it, and displaying certain results of the collection and analysis” are “a familiar class of claims ‘directed to’ a patent ineligible concept”); *see also 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). Claim 45, unlike the claims found non-abstract in prior cases, uses generic computer technology to perform data retrieval, analysis, and modification and does not recite an improvement to a particular computer technology. *See, e.g., McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1314–15 (Fed. Cir. 2016) (finding claims not abstract because they “focused on a specific asserted improvement in computer animation”). As such, claim 45 is directed to the abstract idea of receiving, analyzing, and modifying data.

The remaining claims merely describe process parameters. We conclude that the claims at issue are directed to a patent-ineligible concept.

The introduction of a computer into the claims does not alter the analysis at Mayo step two.

the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.

Stating an abstract idea “while adding the words ‘apply it’” is not enough for patent eligibility. Nor is limiting the use of an abstract idea “to a particular technological environment.” Stating an abstract idea while adding the words “apply it with a computer” simply combines those two steps, with the same deficient result. Thus, if a patent’s recitation of a computer amounts to a mere instruction to “implement[t]” an abstract idea “on . . . a computer,” that addition cannot impart patent eligibility. This conclusion accords with the preemption concern that undergirds our §101 jurisprudence. Given the ubiquity of computers, wholly generic computer implementation is not generally the sort of “additional feature[e]” that provides any “practical assurance that the process is more than a drafting effort designed to monopolize the [abstract idea] itself.”

*Alice Corp. Pty. Ltd.*, 134 S.Ct. at 2358 (citations omitted).

“[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 Corp. Pty. Ltd.*, 134 S.Ct. at 2359. 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 for receiving, analyzing, and modifying data 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, conventional activities previously known to the industry. *See Elec. Power Grp. v. Alstom S.A.*, *supra*. Also see *In re Katz Interactive Call Processing Patent Litigation*, 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. As to the data operated upon, “even if a process of collecting and analyzing information is ‘limited to particular content’ or a particular ‘source,’ that limitation does not make the collection and analysis other than abstract.” *SAP America Inc. v. InvestPic LLC*, 890 F.3d 1016, 1022 (Fed. Cir. 2018).

Considered as an ordered combination, the computer components of Appellant’s method add nothing that is not already present when the steps are considered separately. The sequence of data reception-analysis-modification 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) (sequence of data retrieval, analysis, modification, generation, display, and transmission), *Two-Way Media Ltd. v. Comcast Cable Communications, LLC*, 874 F.3d 1329, 1339 (Fed. Cir. 2017) (sequence of processing, routing, controlling, and monitoring). The ordering of the steps is therefore ordinary and conventional.

Viewed as a whole, Appellant’s method claims simply recite the concept of game playing as performed by a generic computer. To be sure, the claims recite doing so by advising one to assign game players based on game tier winners. But this is no more than abstract conceptual advice on the parameters for such game playing and the generic computer processes necessary to process those parameters, and do not recite any particular implementation.

The method claims do not, for example, purport to improve the functioning of the computer itself. Nor do they effect an improvement in any other technology or technical field. The Specification spells out different generic equipment<sup>2</sup> and parameters that might be applied using this concept and the particular steps such conventional processing would entail based on the concept of game playing under different scenarios. They do not describe any particular improvement in the manner a computer functions. Instead, the claims at issue amount to nothing significantly more than an instruction to apply the abstract idea of game playing using some unspecified, generic computer. Under our precedents, that is not enough to transform an abstract idea into a patent-eligible invention. *See Alice Corp. Pty. Ltd.* at 2360.

As to the structural claims, they

are no different from the method claims in substance. The method claims recite the abstract idea implemented on a generic computer; the system claims recite a handful of generic computer components configured to implement the same idea. This Court has long “warn[ed] ... against” interpreting § 101 “in ways that make patent eligibility ‘depend simply on the draftsman’s art.’”

*Alice Corp. Pty. Ltd.* at 2360.

As to Appellant’s Appeal Brief arguments, we adopt the Examiner’s determinations and analysis from Final Action 2 and Answer 7–8 and reach similar legal conclusions. We now turn to the Reply Brief.

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<sup>2</sup> The Specification describes a general purpose computer. Spec. para. 77.

We are not persuaded by Appellant's argument that

Each of Applicant's independent claims recites a series of actions wherein a player is assigned to different tiers of play, and specifies two different ways to reach the same tier of play, and recites multiple different games. Nonetheless, the Office Action provides no analysis of the claim limitations other than merely quoting the body of a claim and asserting that the claim generally recites "game rules," and makes no attempt to show how the specific claim limitations are directed to an abstract idea. Rather, the Office Action chooses to ignore the claim limitations and indeed completely mischaracterizes the claims, thereby resulting in an over generalization that is untethered to the claim language.

Reply Br. 2–3. The actions Appellant describes are, as we determined *supra*, some determination, i.e. decision, followed by an assignment. The method claim is not even a complete game method, but a method of assigning players to a game. This is even more abstract than a game itself. Simply reciting rules for a game or part of a game is an abstraction. *See In re Smith, supra*. The claim limitations are specific only in the sense they are specified with words. The words themselves are broad and of immense scope. Each determination and assignment is expressed as a function to be performed by any and all possible means. Indeed, the first 94 Specification paragraphs describe how little the claims are meant to be tied to any particular technological implementation.

We are not persuaded by Appellant's argument that the Examiner's determination of what the claims are drawn to

fails to even recognize that the claims are directed at different tiers of play for multiple different games. This is because the Office Action chooses to ignore the claim limitations in attempting to identify an abstract idea, indeed completely recharacterizing the claims from a multi-tier multi-game

hierarchy to a simple "method of playing a game." Simply put, the Office Action's inaccurate overgeneralization of the claims never takes the claim limitations into account.

Reply Br. 4. Appellant appears to take issue with not distinguishing game tiers from games. As a hierarchy is itself an abstract concept, simply characterizing a game as being of a tiered hierarchy does not aid the Appellant. "Adding one abstract idea . . . to another abstract idea . . . does not render the claim non-abstract." *RecogniCorp, LLC v. Nintendo Co., Ltd.*, 855 F.3d 1322, 1327 (Fed. Cir. 2017).

We are not persuaded by Appellant's argument that the apparatus claims recite using computer components and so cannot be done with paper and pencil. The issue is whether the recited operations could be done with paper and pencil even though the claims recite using a computer. *See Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1368–1369 (Fed. Cir. 2015). The recited limitations of assigning players after making simple determinations are within the scope of such paper and pencil operation.

We are not persuaded by Appellant's argument that the remaining claims recite significantly more. As we determined *supra*, the remaining claims do no more than recite various parameters such as fees and payments and are equally devoid of technological implementation details.

*Claims 26-40 and 42-46 rejected under the judicially created doctrine of obviousness type double patenting as claiming the patentably indistinguishable subject matter as another U.S. Patent*

A mechanical document comparison of the instant claims with those of U.S. Patent No. 8,562,401 shows that the instant claims are essentially similar to those in the patent, but broadened by removing limitations. Appellant does not contend otherwise. Thus, we agree with the Examiner that the instant claims are not patently distinguishable from those of the issued patent.

#### CONCLUSIONS OF LAW

The rejection of claims 26-40 and 42-46 under 35 U.S.C. § 101 as directed to non-statutory subject matter is proper.

The rejection of claims 26-40 and 42-46 under the judicially created doctrine of obviousness type double patenting as claiming the patentably indistinguishable subject matter as another U.S. Patent is proper.

#### DECISION

The rejection of claims 26-40 and 42-46 is affirmed.

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) (2011).

Appeal 2016-006317  
Application 14/058,450

AFFIRMED