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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JUNE COLAIO and HOWARD W. LUTNICK

Appeal 2016-008483[1]
Application 13/584,437[2]
Technology Center 3600

Before MICHAEL C. ASTORINO, JAMES A. WORTH, and TARA L. HUTCHINGS, *Administrative Patent Judges*.

WORTH, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 35–45, 47–50, 52, 54, and 55 which constitute all the claims pending in this application. Claims 46, 51, 53, and 56 have been canceled. Appeal Br. 2. We have jurisdiction under 35 U.S.C. §§ 134 and 6(b). An oral hearing was held on July 12, 2018.

We AFFIRM.

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[1] Our Decision refers to the Appellants' Appeal Brief filed Nov. 18, 2015 ("Appeal Br.") and Reply Brief filed July 18, 2016 ("Reply Br."), and the Examiner's Final Office Action mailed Feb. 23, 2015 ("Final Act.") and Answer mailed May 17, 2016 ("Ans.").

[2] According to Appellants, Cantor Fitzgerald, L.P. is the real party in interest. (Appeal Br. 2).

Introduction

Appellants' application "relates to a method and system for training traders" "that enables students to trade simulated financial products -- i.e., financial products that have no intrinsic value and, therefore, that have no real-world financial risk -- within the simulated market." (Spec. ¶¶ 1, 6).

Claims 35 and 36, the independent claims on appeal, are reproduced below:

> 35. A method comprising:
>
> simulating, by at least one processor, a trading market;
>
> providing, by the at least one processor, a fixed income product to be traded within the market;
>
> assigning an amount of the fixed income product to a first broker;
>
> assigning an amount of simulated funds to a second broker; and
>
> providing, by the at least one processor, a medium within the market to trade the fixed income product for an amount of simulated funds determined by the first broker and the second broker.
>
> 36. An apparatus comprising:
>
> a processor; and
>
> a memory having instructions stored thereon which, when executed by the processor,
>
> direct the at least one processor to:
>
> cause a graphical user interface (GUI) to be displayed to a first trader;

> receive an indication to sell a simulated fixed income product from a first trader;
>
> receive an indication to buy the simulated fixed income product from a second trader; and
>
> coordinate the indications from the first and second traders to exchange the simulated fixed income product, wherein the act of exchanging the simulated fixed income product comprises processing a transaction based on the received indication to sell and the received indication to buy.

Appeal Br. 16, Claims App.

Rejection on Appeal

The Examiner maintains, and Appellants appeal, the following rejection:

Claims 35–45, 47–50, 52, 54, and 55 under 35 U.S.C. § 101 as being directed to ineligible subject matter.

ANALYSIS

Claim 35

The Court in *Alice* emphasized the use of a two-step framework for analysis of patentability under 35 U.S.C. § 101:

> First, we 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, we 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.

See Alice Corp. Pty. Ltd. v CLS Bank Intl, 134 S. Ct. 2347, 2355 (2014) (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 72 (2012)).

The Examiner determines that claim 35 is directed to a method of simulating a trading market providing a fixed income product to be traded in the market utilizing brokers who are selling the fixed income product to another broker who is buying the fixed income product using simulated funds, and that this is a fundamental economic practice which is an abstract idea. *See* Final Act. 6. The Examiner further determines that the physical components including "at least one processor" considered individually and as an ordered combination merely implement the abstract idea at a high level of generality and fail to impose meaningful limitations to impart patent-eligibility. *Id.* at 6–7.

Appellants argue that the Examiner does not provide tangible evidence that "methods for creating a simulated market to trade fixed income product" would constitute a fundamental economic principle or abstract, and that the Examiner fails to compare the claims to the body of case law. Appeal Br. 6–7, and 10. The Examiner compares the claimed invention to a stock exchange such as the New York Stock Exchange (NYSE), and relies on *Bilski v. Kappos*, 561 U.S. 593, 610 (2010) and *Ultramercial, Inc. v. Hulu, Inc.*, 772 F.3d 709 (Fed. Cir. 2014) for the understanding that using general purpose software and generic computer equipment to implement a market is abstract does not provide significantly more than a fundamental economic practice. *See* Ans. 8–9, and 11. We agree with the Examiner that the claimed invention resembles those at issue in *Bilksi* and *Ultramercial*.

For example, in *Bilski*, claim 1 was directed to "a series of steps instructing how to hedge risk" with examples "how hedging can be used in commodities and energy markets." *Bilski,* 561 U.S. 599, 612. That claim

recited the steps of "initiating a series of transactions between said commodity provider and consumers of said commodity . . . at a fixed rate based upon historical averages"; "identifying market participants for said commodity"; and "initiating a series of transactions between said commodity provider and said market participants at a second fixed rate." *Id.* at 599. The Court in *Bilski* understood the claims to be directed to the basic concept of hedging which is a fundamental economic practice long prevalent in our system of commerce and taught in any introductory finance class. *Id.* at 611–12. We agree with the Examiner that the claims at issue are directed to steps for conducting financial transactions, and that this is a fundamental economic practice, similar to the claims at issue in *Bilski*. *Ultramercial* is also in accord. In that case, the claims were directed to steps for displaying an advertisement in exchange for access to copyrighted media, i.e., as an exchange or currency, and was determined to be abstract. *See Ultramercial,* 772 F.3d at 714–15.

The claim language, which is intrinsic evidence, refers to a "trading market," which is a fundamental economic practice. The method steps variously recite "simulating" and "providing" the market and "providing" and "assigning" a fixed income product to be traded, which are part of the same fundamental economic practice.

Appellants argue that the claims require significantly more than an abstract idea and that the Examiner fails to identify any additional elements and fails to explain why each additional element does not add significantly more to the alleged abstract idea. Appeal Br. 6–8 (citing "USPTO Interim Eligibility Guidance on *Alice* published in the Federal Register on December 16, 2014 (the 'IEG')," § I.B.1, and *Alice Corp.*, 134 S. Ct. at 2355–56).

Appellants assert that, similar to the claims in *DDR Holdings*, the present claims solve a problem rooted in computer technology to improve the functionality of electronic trading by enabling simulated trading. Appeal Br. 10–11 (citing *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014)). We are unpersuaded by Appellants' arguments. The Examiner determines that the "processor" of claim 35 is claimed at a high level of generality. Final Act. 6–7. Further, the Examiner determines that claim 35 implements a market using general purpose software of the type determined to be abstract in *Bilski* and *Ultramercial*. Ans. 10–11. The Examiner determines that the claims at issue for simulating a fixed income trading market do not resemble those at issue in *DDR Holdings*, in which a business method involved the "look and feel" of a website. *Id.* at 11. We agree. The claimed invention is the type of computer processing, applying rules and algorithms, which was held to be abstract in *Bilski* and *Ultramercial*. *See, e.g.*, Spec. ¶ 28 & Fig. 4 (and item 402), Fig. 6. *See also Bancorp Services v. Sun Life*, 687 F.3d 1266, 1278 (Fed. Cir. 2012) ("The computer required by some of Bancorp's claims is employed only for its most basic function, the performance of repetitive calculations, and as such does not impose meaningful limits on the scope of those claims."); *Alice Corp.*, 134 S. Ct. at 2352–53 (creating, updating, and reconciling shadow records); *Versata Development Group, Inc. v. SAP Am., Inc.*, 793 F.3d 1306, 1334 (Fed. Cir. 2015) (storing and retrieving price information); *SAP America, Inc. v. InvestPic, LLC*, 898 F.3d 1161, 1170 (Fed. Cir. 2018) (use of computers to perform mathematical calculations is "well-understood, routine, [and] conventional").

Appellants argue that the claimed invention does not "tie up" the alleged abstract idea or pre-empt others from using the alleged abstract idea. Appeal Br. 9–10. However, a showing of pre-emption is not required for a determination that an idea is directed to non-patentable subject matter. *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015) ("Where a patent's claims are deemed only to disclose patent ineligible subject matter under the *Mayo* framework, as they are in this case, preemption concerns are fully addressed and made moot.").

Appellants further point to the following limitations of claim 35 for additional subject matter:

> simulating, by at least one processor, a trading market;
>
> providing, by the at least one processor, a fixed income product to be traded within the market;
>
> assigning an amount of the fixed income product to a first broker;
>
> assigning an amount of simulated funds to a second broker; and
>
> providing, by the at least one processor, a medium within the market to trade the fixed income product for an amount of simulated funds determined by the first broker and the second broker[.]

Appeal Br. 12–13. However, Appellants do not provide specific arguments thereto, or explain why these limitations claim significantly more than a fundamental economic practice. *See* 37 C.F.R. § 41.37(c)(1)(iv) ("A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim."). In any event, we are not persuaded that the aforementioned claim limitations

provide significantly more than the use of a computer to trade funds based on rules.

We, therefore, sustain the Examiner's rejection under 35 U.S.C. § 101 of independent claim 35.

Claims 36–45, 47–50, 52, 54, and 55

Appellants argue that the Examiner does not separately analyze the remaining claims, but Appellants themselves do not provide specific arguments with respect to the claims, except to reproduce the limitations of claim 36 without providing argument explaining the significance thereof. *See* Appeal Br. 11–12, and 14–15. With respect to claim 36, Appellants reproduce the following claim limitations:

> cause a graphical user interface (GUI) to be displayed to a first trader;
>
> receive an indication to sell a simulated fixed income product from a first trader;
>
> receive an indication to buy the simulated fixed income product from a second trader; and
>
> coordinate the indications from the first and second traders to exchange the simulated fixed income product, wherein the act of exchanging the simulated fixed income product comprises processing a transaction based on the received indication to sell and the received indication to buy.

Appeal Br. 16, Claims App. As above, a statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim. 37 C.F.R. § 41.37(c)(1)(iv). Claim 36 refers to a graphical user interface, but the claims and Specification indicate that the claimed invention relates to the trading of funds and not to an improvement

in the technology of a graphical user interface. Rather, the database merely collects information, as in *Electric Power Group*. *See Elec. Power Grp. v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016) ("The focus of the asserted claims, as illustrated by claim 12 quoted above, is on collecting information, analyzing it, and displaying certain results of the collection and analysis.").

We, therefore, sustain the Examiner's rejection under 35 U.S.C. § 101 of claims 36–45, 47–50, 52, 54, and 55, for similar reasons as for independent claim 35.

DECISION

The Examiner's decision to reject claims 35–45, 47–50, 52, 54, and 55 under 35 U.S.C. § 101 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).

AFFIRMED