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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* GUY HALFTECK and JOHN FUNGE

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Appeal 2017-007296  
Application 13/910,992  
Technology Center 3700

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Before JENNIFER D. BAHR, MICHELLE R. OSINSKI, and  
BRANDON J. WARNER, *Administrative Patent Judges*.

BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant<sup>1</sup> appeals under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 1–26, 36–69, and 81–90. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> Appellant is the Applicant, Knack.it Corp., which, according to the Appeal Brief, is the real party in interest. Appeal Br. 1.

### THE CLAIMED SUBJECT MATTER

Claim 1, reproduced below, is illustrative of the claimed subject matter.

1. A method, comprising:
  - receiving game play data resulting from a player playing a game; and
  - deriving, based at least in part upon the game play data, a profile for the player, wherein the profile for the player includes an assessment for at least one of the following: one or more personality traits of the player, one or more personal preferences of the player, and one or more aptitudes of the player; and
  - wherein the method is performed by one or more computing devices.

### REJECTIONS

- I. Claims 1–26, 36–69, and 81–90 stand rejected under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter.
- II. Claims 1–16, 21, 23–26, 36–50, 55, 57–63, 65–69, 81–85, and 87–90 stand rejected under 35 U.S.C. § 102(b) as anticipated by Post (US 2008/0124687 A1, pub. May 29, 2008).
- III. Claims 17, 18, 51, 52, 64, and 86 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Post and O’Kelley (US 2006/0121990 A1, pub. June 8, 2006).
- IV. Claims 19, 20, 53, and 54 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Post and Murrell (US 7,997,969 B1, iss. Aug. 16, 2011).

- V. Claims 22 and 56 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Post and Brown (US 5,913,310, iss. June 22, 1999).<sup>2</sup>

## DISCUSSION

### *Rejection I*

In contesting Rejection I, Appellant references certain limitations recited in independent claim 1, but otherwise presents arguments without regard to any particular claim. *See* Appeal Br. 10–11; Reply Br. 1. Thus, we select independent claim 1 as representative of the claims subject to this rejection, with claims 2–26, 36–69, and 81–90 standing or falling with claim 1. 37 C.F.R. § 41.37(c)(1)(iv).

Section 101 of the patent law provides that one may obtain a patent for “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” 35 U.S.C. § 101. The Supreme Court has held that this provision includes important exceptions, notably those that prohibit one from patenting abstract ideas, laws of nature, or natural phenomena. *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2354 (2014). Although a law of nature or an abstract idea is not patentable, the application of these concepts may be patentable. *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 70–72 (2012).

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<sup>2</sup> Although Appellant does not list this rejection as one of the grounds to be reviewed on appeal (Appeal Br. 4), we understand Appellant to be requesting review of this rejection and to be relying, for each of the claims subject to this rejection, on the arguments presented in contesting the rejections of their respective independent claims.

The Supreme Court has 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.” *Alice*, 134 S. Ct. at 2355 (citing *Mayo*, 566 U.S. at 71–72). Under that framework, we first “determine whether the claims at issue are directed to one of those patent-ineligible concepts”—i.e., a law of nature, a natural phenomenon, or an abstract idea. *Id.* If so, we secondly “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.” *Id.* (quoting *Mayo*, 566 U.S. at 77–79). The Supreme Court has described the second part of the 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.’” *Id.* (alteration in original) (quoting *Mayo*, 566 U.S. at 72–73).

*Step One: Do the Claims Recite an Abstract Idea?*

The Federal Circuit has described the first step as a determination of the “basic character of the claimed subject matter.” *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1348 (Fed. Cir. 2015) (citing *Bancorp Servs., L.L.C. v. Sun Life Assurance Co. of Canada*, 687 F.3d 1266, 1273–74 (Fed. Cir. 2012)). The Federal Circuit has also indicated that this step should determine whether a claimed method “recites an abstraction—an idea, having no particular concrete or tangible form.” *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014); *see also Alice*, 134 S. Ct. at 2355 (“The ‘abstract ideas’ category embodies ‘the longstanding rule that

“[a]n idea of itself is not patentable.”” (quoting *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972) (further quotations and citations omitted)).

The Examiner determines that independent claim 1 is “directed to deriving video game data, [and embodies] the abstract idea of either a fundamental economic practice, a method of organizing human activities, an idea of itself, or a mathematical relationship or formula.” Final Act. 2. The Examiner also explains that “the invention is directed toward deriving user attributes from game play data, such as traits, preferences and aptitudes; none of these concepts is tangible or quantifiable.” *Id.* at 14.

Appellant argues that the Examiner errs in concluding that the claimed subject matter is directed to an abstract idea. *See* Appeal Br. 10–11. In particular, Appellant asserts that the present claims are similar to the patent eligible claims in *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299 (Fed. Cir. 2016) because they “are directed to improving an existing technological process (analyzing game playing data and deriving a player profile) like the lip synchronization and facial expression control of animated characters” in *McRO*. Appeal Br. 10. According to Appellant, the “present claims are limited to a specific process, do not preempt the general idea of analyzing game data, achieve an improvement to an existing technological process and are patent eligible under the reasoning set forth in the *McRO* case.” *Id.* at 11. These arguments are unpersuasive.

Unlike the claims at issue in *McRO*, claim 1 does not involve an incorporation of claimed rules that allow computers to produce “‘accurate and realistic lip synchronization and facial expressions in animated characters’ that previously could only be produced [in a subject process] by human animators.” *McRO*, 837 F.3d at 1313–14. Rather, Appellant’s claim

is directed to deriving a player profile based on received game play data. Such activity amounts to receiving information (i.e., game play data for a player) and manipulating the information using an algorithm to generate/output additional information (i.e., a profile for the player).<sup>3</sup> Our reviewing courts have held claims ineligible under § 101 when directed to manipulating existing information, such as by using algorithms, to generate additional information. *See Parker v. Flook*, 437 U.S. 584, 585, 594–96 (1978) (rejecting as ineligible claims directed to (1) measuring the current value for a variable in a catalytic conversion process, (2) using an algorithm to calculate an updated “alarm-limit value” for that variable, and (3) updating the limit with the new value); *Gottschalk*, 409 U.S. at 71–72 (rejecting as ineligible claims directed to an algorithm for converting binary-coded decimal numerals into pure binary form); *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353–54 (Fed. Cir. 2016) (discussing how “collecting information” and “analyzing information by steps people go through in their minds, or by mathematical algorithms, without more” are abstract ideas); *Digitech Image Techs., LLC v. Elecs. for Imaging, Inc.*, 758 F.3d 1344, 1351 (Fed. Cir. 2014) (“Without additional limitations, a process that employs mathematical algorithms to manipulate existing information to generate additional information is not patent eligible.”).

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<sup>3</sup> Although claim 1 recites the algorithm in words rather than as a mathematical formula, the claims nevertheless recite an algorithm. *See In re Grams*, 888 F.2d 835, 837 n.1 (Fed. Cir. 1989) (“It is of no moment that the algorithm is not expressed in terms of a mathematical formula. Words used in a claim operating on data to solve a problem can serve the same purpose as a formula.”).

Moreover, to the extent that Appellant argues that the present claims are not a complete preemption of the abstract idea (i.e., manipulating existing information to generate additional information) (*see* Appeal Br. 11), the Federal Circuit has rejected such an argument and noted that, although “the principle of preemption is the basis for the judicial exceptions to patentability,” and “preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility.” *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015) (citing *Alice*, 134 S. Ct. at 2354). The Federal Circuit concluded that “[w]here a patent’s claims are deemed only to disclose patent ineligible subject matter under the *Mayo* framework, . . . preemption concerns are fully addressed and made moot.” *Id.*; *see also id.* (holding that “[i]n this case, Sequenom’s attempt to limit the breadth of the claims by showing alternative uses of cffDNA outside of the scope of the claims does not change the conclusion that the claims are directed to patent ineligible subject matter”). Given this direction from our reviewing court, we decline to apply a separate preemption standard in our analysis, and instead apply the steps set forth by the Supreme Court in *Alice* and *Mayo*.

In sum, for the reasons set forth above, the instant claims are directed to the abstract idea of manipulating existing information to generate additional information.

*Step Two: Is There an Inventive Concept?*

Appellant argues that the claims “are directed to substantially more than the abstract idea.” Appeal Br. 11. In particular, Appellant asserts that the present claims are similar to *BASCOM Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016) because “the present

claims are a particular arrangement of elements (see summary of claims above) that are a technical improvement (including deriving the player profil[e]) over the prior art ways of game data analysis as described in the background of the present patent application.” Appeal Br. 11. This argument is not convincing.

In *BASCOM*, the Federal Circuit found an inventive concept in the ordered combination of limitations providing for “the installation of a filtering tool at a specific location, remote from the end-users, with customizable filtering features specific to each end user.” *BASCOM*, 827 F.3d at 1350. In other words, an inventive concept existed because the claimed Internet filtering improved an existing technological process. *See id.* at 1350–51. However, unlike the claims at issue in *BASCOM*, Appellant’s claim 1 is not directed to a solution that improves the performance of a computer system itself. *See id.* at 1351. Rather, claim 1 is directed to nothing more than a method that qualifies as an abstract idea (i.e., manipulating existing information to generate new information) for which a processor is invoked as a conventional tool.

Appellant has not provided any specificity regarding any particular inventive technology associated with the steps in the claim. The computer elements described in the Specification and claims (e.g., “processor,” “computing devices”) appear to function in a conventional manner to execute program instructions and operations. Receiving data and computing data are steps that are well-understood, routine, and conventional functions of a general-purpose computer, and Appellant does not provide adequate evidence to the contrary. The Specification supports this view by discussing only generic elements used in performing the steps. *See, e.g.*, Spec. 22, ll.

6–25; 25, l. 23 to 26, l. 10. In particular, the Specification describes that “games may be played on one or more computing devices and each computing device may be a processor based system with memory, input/output devices and a display system to interact with and play the game.” *Id.* at 22, ll. 9–11. The Specification also describes:

A system for data extraction 515 includes the storage 540 as well as the other components/units/modules on the left side of the dotted line in Figure 5. In one implementation, the system 515 may be one or more computing resources and each component/unit/module may be a plurality of lines of computer code that are executed by the one or more computing resources to implement the functions and operations described below. The one or more computing resources may be one or more server computers, one or more cloud computing resources or a stand-alone computer if the system 515 is implemented as a stand-alone system.

*Id.* at 22, ll. 20–25. According to the Specification, “[t]he computer system may be any computing device with one or more pro[c]essors, memory, a display and connectivity such that a user can interact with the game and game play data may be captured.” *Id.* at 25, ll. 23–25. In other words, the Specification only lists generic computer hardware elements. There is no further description, in the claims or the Specification, of any particular technology for performing the steps recited in the claims other than generic computer components used in their ordinary capacity as a tool to perform mathematical operations to apply the abstract idea. In this regard, the “recitation of generic computer limitations does not make an otherwise ineligible claim patent-eligible.” *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1256 (Fed. Cir. 2014) (citing *Alice*, 134 S. Ct. at 2358). In sum, claim 1 is directed merely to ordinary functionality of a generic processor (e.g., manipulating data to generate new data), and not to a

specific application of computation and analysis designed to achieve an improved technological result.

For the above reasons, the recited elements, considered individually and as an ordered combination, do not constitute an “inventive concept” that transforms independent claim 1 into patent-eligible subject matter. *See Alice*, 134 S. Ct. at 2355. Accordingly, we sustain the rejection of claim 1, and of claims 2–26, 36–69, and 81–90 falling therewith, under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter.

### *Rejection II*

In contesting Rejection II, Appellant argues for patentability of independent claims 1, 23, 36, 57, and 81 together as a group, and does not assert any separate arguments for dependent claims 2–16, 21, 24–26, 37–50, 55, 58–63, 65–69, 82–85, and 87–90. Appeal Br. 12; Reply Br. 1. We select claim 1 as representative, with claims 2–16, 21, 23–26, 36–50, 55, 57–63, 65–69, 81–85, and 87–90 standing or falling therewith.

The Examiner finds:

Post discloses a method, comprising: receiving game play data resulting from a player playing a game (Fig. 4), and deriving, based at least in part upon the game play data, a profile for the player (Fig. 4), wherein the profile for the player includes an assessment for at least one of one or more personality traits of the player, one or more personal preferences of the player, and one or more aptitudes of the player (Fig. 4), and wherein the method is performed by one or more computing devices (¶ [0024]).

Final Act. 3.

Appellant argues that Post fails to disclose a step of deriving a user profile as recited in the claims. *See* Appeal Br. 12. In particular, Appellant asserts that

the independent claims recite that the . . . system derives a profile of the user that includes an assessment for at least one of the following: **one or more personality traits of the player, one or more personal preferences of the player, and one or more aptitudes of the player** which is not found in Post.

*Id.* This argument is not persuasive.

To the extent that Appellant appears to argue that Post must disclose deriving a profile that includes an assessment for player personality traits, personal preferences, *and* aptitudes (*see* Appeal Br. 12), such an argument is unpersuasive because it is not commensurate with the scope of claim 1, which does not require an assessment for *each and every one of* the listed features. *See In re Self*, 671 F.2d 1344, 1348 (CCPA 1982) (noting that it is well established that limitations not appearing in the claims cannot be relied upon for patentability). Instead, claim 1 only recites that the “profile for the player includes an assessment for *at least one of the following*: one or more personality traits of the player, one or more personal preferences of the player, and one or more aptitudes of the player.” Appeal Br. 14 (Claims App.) (emphasis added).

As discussed above, the Examiner finds that Post discloses an assessment for at least one of player personality traits, personal preferences, and aptitudes. *See* Final Act. 3; *see also* Ans. 5 (finding that “items **470** (traits/preferences), **475** (profile) and **510** (aptitude) of Figures 4 and 5 of Post . . . [are] anticipatory disclosures with respect to each of the limitations in the group”). Appellant makes no attempt to point out where the Examiner’s findings relative to the presence of these elements in the prior art

or the teachings of the prior art articulated by the Examiner with regard to these limitations are deficient. *See* Appeal Br., *passim*; Reply Br., *passim*. Aside from the bald assertion that the disputed limitation “is not found in Post” (Appeal Br. 12), Appellant offers no evidence or persuasive technical reasoning to identify a deficiency in the Examiner’s finding that Post anticipates the subject matter of claim 1, which is supported by a preponderance of the evidence.

For the above reasons, Appellant fails to apprise us of error in the rejection of claim 1. Accordingly, we sustain the rejection of claim 1, and of claims 2–16, 21, 23–26, 36–50, 55, 57–63, 65–69, 81–85, and 87–90 falling therewith, under 35 U.S.C. § 102(b) as anticipated by Post.

#### *Rejections III–V*

Appellant does not assert any separate arguments for patentability of dependent claims 17–20, 22, 51–54, 56, 64, and 86 subject to Rejections III–V, and, instead, relies on the arguments presented for patentability of independent claims 1, 23, 36, 57, and 81 subject to Rejection II. *See* Appeal Br. 12. For the reasons discussed above, Appellant’s arguments fail to apprise us of error in Rejection II, and, thus, likewise, fail to apprise us of error in Rejections III–V. Accordingly, we sustain the rejections of claims 17–20, 22, 51–54, 56, 64, and 86 under 35 U.S.C. § 103(a).

#### DECISION

The Examiner’s decision rejecting claims 1–26, 36–69, and 81–90 under 35 U.S.C. § 101 is affirmed.

Appeal 2017-007296  
Application 13/910,992

The Examiner's decision rejecting claims 1–16, 21, 23–26, 36–50, 55, 57–63, 65–69, 81–85, and 87–90 under 35 U.S.C. § 102(b) is affirmed.

The Examiner's decision rejecting claims 17–20, 22, 51–54, 56, 64, and 86 under 35 U.S.C. § 103(a) 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