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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MALCOLM B. DAVIS

Appeal 2017-009376
Application 14/269,923¹
Technology Center 3700

Before JEREMY M. PLENZLER, LISA M. GUIJT, and
SEAN P. O'HANLON, *Administrative Patent Judges*.

PLENZLER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant seeks our review under 35 U.S.C. § 134 of the Examiner's
Final Decision rejecting claims 17, 20–32, and 35–37 under 35 U.S.C.

§ 101. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ Appellant is the Applicant, Brain Games, L.C., identified by the Appeal Brief as the real party in interest. Br. 1.

CLAIMED SUBJECT MATTER

Claims 17, 27, and 32 are independent, with claims 20–26, 28–31, and 35–37 depending from claim 17, 27, or 32. Claim 17 is representative of the claims on appeal, and is reproduced below:

17. A system for simulating a gaming tournament with a quasi-tournament utilizing a plurality of electronic game machines wherein a plurality of human users each play a machine-implemented game on an electronic game machine, the system including:

a plurality of electronic game machines configured with a machine-implemented game whereby a plurality of human users may play the game using the electronic game machines and wager using wagering units to participate in the quasi-tournament, each of the electronic game machines including (i) a display device for displaying indicia representative of a game state, (ii) means for receiving an input from the human user in response to a display of indicia representing a game state;

wherein the system is operative to enable a human user entering the quasi-tournament to provide differing amounts of value a single time as an entry fee, the differing amounts of value corresponding to prize pots of differing value whereby the human user is eligible to receive a payout from multiple prize pots at the conclusion of the tournament and wherein each human user entering the quasi-tournament is provided with the same number of wagering units independent of the amount of value provided by the human user;

a central processor connected to each of the electronic game machines, the central processor operative to receive an input from each of the electronic game machines corresponding to the outcome of games played on the electronic game machines by the human users and to determine one or more winners of the quasi-tournament based upon the outcome of games played by the human users on the electronic game machines;

wherein the human users may select, as input, after the machine-implemented game is initiated and value received from

the human user, from one of at least two different potentially winning actions at a single stage in each game played by the human users; and

wherein the system is operative to provide a human user winning the quasi-tournament with a payout from one or more prize pots upon winning the quasi-tournament.

OPINION

Appellant argues claims 17, 20–32, and 35–37 as a group.² Br. 13–21. We select claim 17 as representative. Claims 20–32 and 35–37 stand or fall with claim 17. *See* 37 C.F.R. 41.37(c)(1)(iv).

Under 35 U.S.C. § 101, we must first identify whether an invention fits within one of the four statutorily provided categories of patent-eligibility: “processes, machines, manufactures, and compositions of matter.” *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 713–714 (Fed. Cir. 2014). Here, the claims each fall within one of those categories. Section 101, however, “contains an important implicit exception [to subject matter eligibility]: Laws of nature, natural phenomena, and abstract ideas are not patentable.” *Alice Corp. Pty. Ltd. v. CLS Bank Int’l.*, 134 S. Ct. 2347, 2354 (2014) (citing *Assoc. for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2116 (2013) (internal quotation marks and brackets omitted)). In *Alice*, the Supreme Court reiterated the framework set forth previously in *Mayo Collaborative Servs. v. Prometheus Labs*, 132 S. Ct. 1289, 1293 (2012) “for distinguishing patents that claim laws of nature, natural

² In its arguments, Appellant recites the limitations of claims 27 and 32 (Br. 13–15), which does not amount to separate argument for those claims. *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.”).

phenomena, and abstract ideas from those that claim patent-eligible applications of these concepts.” *Alice*, 134 S. Ct. at 2355. We first “determine whether the claims at issue are directed to one of those patent-ineligible concepts.” *Id.* If so, 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.” *Id.* (quoting *Mayo*, 132 S. Ct. at 1298, 1297).

The Examiner finds that the steps recited in claim 17 “simply amount to managing a tournament game, which is in essence managing a group of players in a game (i.e., organizing human activity),” and explains that “[t]his is similar to ‘managing a game of Bingo’, which was determined to be an abstract idea.” Final Act. 3–4 (citing *Planet Bingo, LLC v. VKGS LLC*, 576 Fed. App’x 1005 (Fed. Cir. 2014)).

Appellant disputes the Examiner’s determination that claim 17 is directed to an abstract idea, arguing that the Examiner has characterized the claim too broadly. *See* Br. 16–17. There is no definitive rule to determine what constitutes an “abstract idea.” Rather, the Federal Circuit has explained that “both [it] and the Supreme Court have found it sufficient to compare claims at issue to those claims already found to be directed to an abstract idea in previous cases.” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1334 (Fed. Cir. 2016); *see also Amdocs (Israel) Ltd. v. Openet Telecom, Inc.*, 841 F.3d 1288, 1294 (Fed. Cir. 2016) (explaining that, in determining whether claims are patent-eligible under § 101, “the decisional mechanism courts now apply is to examine earlier cases in which a similar or parallel descriptive nature can be seen—what prior cases were about, and which way they were decided”).

Regardless of the exact characterization of the abstract idea at issue in the pending claims, we agree with the Examiner that claim 17 is like those at issue in *Planet Bingo*. In *Planet Bingo*, “[t]he claims at issue recite[d] computer-aided methods and systems for managing the game of bingo” and included “storing a player’s preferred sets of bingo numbers; retrieving one such set upon demand, and playing that set; while simultaneously tracking the player’s sets, tracking player payments, and verifying winning numbers.” *Planet Bingo*, 576 Fed. App’x at 1006. Claim 17 similarly manages a gaming tournament, including entering player entry fees, tracking play selections, and providing a payout to a winner. We are not apprised of error in the Examiner’s determination that claim 17 is directed to an abstract idea because Appellant does not even acknowledge, let alone address in any persuasive manner, the Examiner’s comparison of claim 17 to those found to be directed to an abstract idea in *Planet Bingo*.

Appellant’s arguments related to a lack of complete preemption are also unpersuasive of Examiner error. *See* Br. 15. “While 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).

The Examiner additionally finds that “[t]ournament style play has long existed in both electronic and non-electronic forms” and, rather than being “rooted in game machine technology[,] . . . the claimed game machines merely recite technology that is generic and well known in the art and attempt to limit the abstract idea to this technological environment.” Final Act. 5. The Examiner finds that “this electronic implementation would be routine and conventional and would not add significantly more to the

abstract idea identified above.” *Id.* Appellant does not dispute the Examiner’s findings and, instead, simply alleges that “[t]he gaming machines of the present application are not generic computers, but are in fact machines built and used specifically for gaming, rather than a general-purpose computer on which gaming software is installed, for instance,” without any meaningful explanation. Br. 20.

We agree with the Examiner that the additional elements of the claim fail to transform the claim into a patent-eligible application. Claim 17 simply recites generic “game machines” that “display[] indicia representative of a game state” and “receiv[e] an input from the human user in response to a display of indicia representing a game state,” as well as a generic “central processor connected to each of the electronic game machines” with “the system . . . operative to provide a human user winning the quasi-tournament with a payout.” Again, similar to *Planet Bingo*, “the claims recite a generic computer implementation of the covered abstract idea.” *Planet Bingo*, 576 Fed. App’x at 1008.

For at least these reasons, we are not apprised of Examiner error in the rejection of claims 17, 20–32, and 35–37.

DECISION

We AFFIRM the Examiner’s decision to reject claims 17, 20–32, and 35–37 under 35 U.S.C. § 101.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED