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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 and ANDREW GARROOD
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Appeal 2018-004250
Application 13/113,479
Technology Center 3700
_____

Before BENJAMIN D. M. WOOD, JILL D. HILL,
and FREDERICK C. LANEY, *Administrative Patent Judges*.

HILL, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant[1] appeals from the

Examiner's decision to reject claims 4, 5, 7–9, 24–29, and 31–40. We have

jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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[1] We use the word Appellant to refer to "applicant" as defined in 37 C.F.R.
§ 1.42. Appellant identifies the real party in interest as CFPH, LLC. Appeal
Br. 3.

THE CLAIMED SUBJECT MATTER

Independent claims 4, 28, and 33 are pending. Claim 4, reproduced below, illustrates the claimed subject matter:

4. An apparatus comprising:
a memory;
a display device;
a network interface;
at least one processor to:
        display at least one live game on the display
    device;
        store in the memory a selection of first elements
for a parlay wager received via the network interface, in
which the first elements include games that begin and
end at a future time;
        receive, via the network interface, real-time game
    data;
        determine real-time odds for each first element of
    the parlay wager based at least partially on the real-
    time game data received via the network interface;
        add each of the first elements to the parlay wager
in the memory[;]
        detect, via the display device, selection of an
image of a live game participant;
        store in the memory a second selection of second
elements for the parlay wager, in which the second
elements include wagers on one or more future events
related to the image selected on the display device that
could occur during the game;
        determine real-time second odds for each second
element of the parlay wager based at least partially on the
real-time game data received via the network interface;
        add each of the second elements to the parlay
wager in the memory;
        determine odds for the parlay wager based on the
real-time odds and the real-time second odds; and
        provide an indication of the odds for the parlay wager.

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Brenner	US 5,830,068	Nov. 3, 1998
Simon	US 2005/0227757 A1	Oct. 13, 2005

REJECTIONS

I.   Claims 4, 5, 7–9, 24–29, and 31–40 stand rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter.

II.   Claims 4, 5, 7–9, 24–29, and 31–40 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Simon and Brenner.

ANALYSIS

Section 101

The Examiner finds that claims 4, 5, 7–9, 24–29, and 31–40 are directed to (1) "a method of forming parlay wagers . . . that can be performed by a person using pen and paper and is therefore an abstract idea," (2) "a fundamental economic practice (i.e., wagering . . .)," and (3) "a method of organizing human activity (i.e., creating contractual relationships)." Final Act. 3 (citing *In re Smith*, 815 F.3d 816 (Fed. Cir. 2016)). The Examiner determines that the claims "do not include additional elements that are sufficient to amount to significantly more than the judicial exception because the non-transitory medium and processor amount to nothing more than a generic computer performing routine data-processing functions." *Id*. According to the Examiner, Appellant "has merely presented an abstract idea and said 'implement it' on a computer." *Id*. The

Examiner continues that "[p]rior to the computer age, bookmaker[s] performed these steps using pen and paper on a daily basis." *Id*. at 4.

Appellant argues claims 4, 5, 7–9, 24–29, and 31–40 as a group. Appeal Br. 9–13. We select claim 4 as representative. Claims 5, 7–9, 24–29, and 31–40 stand or fall with claim 4.

Appellant argues that the facts of *In re Smith*, cited by the Examiner, are not reasonably tied to the facts of the present case, because *Smith*'s claims were directed to a method of playing black jack and the claims recited "physical playing cards" being shuffled and dealt manually in a particular pattern – a manual process. Appeal Br. 9. The claims in *In re Smith* did not require a computer apparatus or a network. In contrast, the claims of the present case do require a computer memory, processor, and network interface. Also, the claims recite "receive, via the network interface, real-time game data" and "determine real-time odds for each first element of the parlay wager based at least partially on the real-time game data received via the network interface." *Id*.

The Examiner responds that, "[w]hile *In re Smith* is directed to card games, it was found to be abstract because it was a method of determining financial obligations," which is what Appellant's betting game determines. Ans. 11.

Appellant replies that the Examiner overgeneralizes the claimed subject matter in deciding that the claims are directed to determining financial obligations. Reply Br. 2. Appellant contends that the claims recite technological components, not financial activity, and the Examiner is overlooking the technological components. *Id.* at 3 (discussing *Unwired Planet LLC v. Google Inc.*, 841 F.3d 1376 (Fed. Cir. 2016)).

Appellant also argues that the claimed subject matter does not recite an organization of human behavior. Instead, the claims recite computer operations that provide an improvement to the computer that is a benefit to users. Appeal Br. 9.

The Examiner responds that "[m]erely implementing an abstract idea on a computer will not save the claims from abstractness." Ans. 11.

Appellant then argues that the claimed subject matter cannot be performed by the human mind with the aid of pen and paper because the claimed storing in memory, receiving real-time data, determining real-time odds, an detecting image selection "are integral to the claimed subject matter." Appeal Br. 10.

The Examiner responds that "sports betting is of immemorial antiquity," and "[b]ookmakers have been processing bets, including parlay bets, since ancient times . . . without a computer." Ans. 11. According to the Examiner, "[t]he mere fact that Applicant has said, 'implement it' on a generic computer does not rescue the claims." *Id.* at 12.

Appellant replies that the claims recite a display screen allowing "selection of a player of a live game and calculation of real-time odds for in-game events," making the Examiner's "pen and paper" argument unreasonable. Reply Br. 3. Appellant contends that the claims do not recite generic computer components "because a generic computer does not permit a user to select a player of a live game displayed on a screen and does not calculate real-time odds;" rather, the claims are "directed to a special purpose machine designed for wagering on live in-game events." *Id.* at 4.

Appellant further argues that the claims "recite a concept that is an improvement to computer related technology by protecting users betting

online," which is support by their Specification's statement that "the quick timing of such a bet may prevent gaming operators and bettors from comparing the different odds offered," causing the gaming operator to set odds "based entirely on the operator's best assessment of the probabilities of the various outcomes." Appeal Br. 11 (quoting Spec. ¶ 95) (emphasis omitted).

The Examiner responds that, "[a]t best, Appellant's argument shows that the computer performs calculations quicker and more efficiently than humans." Ans. 12 (citing *Intellectual Ventures I LLC v. Capital One Financial*, 792 F.3d 1363 (Fed. Cir. 2015) (citing B*ancorp Servs., LLC v. Sun Life Assurance Co. of Can.*, 687 F.3d 1266, 1278 (Fed. Cir. 2012) ("[T]he fact that the required calculations could be performed more efficiently via a computer does not materially alter the patent eligibility of the claimed subject matter."); *CLS Bank, Int'l v. Alice Corp.*, 717 F.3d 1269, 1286 (Fed. Cir. 2013) (en banc) aff'd, 134 S. Ct. 2347 (2014) ("[S]imply appending generic computer functionality to lend speed or efficiency to the performance of an otherwise abstract concept does not meaningfully limit claim scope for purposes of patent eligibility." (citations omitted))).

Appellant still further argues that the claims are not directed to an abstract idea because they do not preempt all ways of playing the online game. Appeal Br. 13.

The Examiner responds that, when claims are directed only to patent ineligible subject matter, as they are in this case, lack of preemption does not cause subject matter to become patent eligible. See Ans. 13 (citing *Ariosa Diagnostics, Inc., v. Sequenom, Inc.*, 726 F.3d 1296 (Fed. Cir. 2015)).

We have considered each and all of Appellant's arguments in the Appeal Brief and the Reply Brief.

Section 101 of the Patent Act provides, "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." *See* 35 U.S.C. § 101. However, the Supreme Court has long interpreted 35 U.S.C. § 101 to include implicit exceptions: "[l]aws of nature, natural phenomena, and abstract ideas' are not patentable. *E.g.*, *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014).

In determining whether a claim falls within an excluded category, we are guided by the Supreme Court's two-step framework, described in *Mayo* and *Alice*. *Id.* at 217–18 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 75–77 (2012)). In accordance with that framework, we first determine what concept the claim is "directed to." *See Alice*, 573 U.S. at 219 ("On their face, the claims before us are drawn to the concept of intermediated settlement, i.e., the use of a third party to mitigate settlement risk."); *see also Bilski v. Kappos*, 561 U.S. 593, 611 (2010) ("Claims 1 and 4 in petitioners' application explain the basic concept of hedging, or protecting against risk.").

Concepts determined to be abstract ideas, and thus patent ineligible, include certain methods of organizing human activity, such as fundamental economic practices (*Alice*, 573 U.S. at 219–20; *see also Bilski*, 561 U.S. at 611); mathematical formulas (*Parker v. Flook*, 437 U.S. 584, 594–95 (1978)); and mental processes (*Gottschalk v. Benson*, 409 U.S. 63, 67 (1972)). If the claim is "directed to" an abstract idea, we turn to the second

step of the *Alice* and *Mayo* framework, where "we must examine the elements of the claim to determine whether it contains an 'inventive concept' sufficient to 'transform' the claimed abstract idea into a patent-eligible application." *Alice*, 573 U.S. at 221 (quotation marks omitted).

The PTO recently published revised guidance on the application of § 101. USPTO's January 7, 2019 Memorandum, 2019 *Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (Jan. 7, 2019) ("2019 Revised Guidance, 84 Fed. Reg."). Under that guidance, we first look to whether the claim recites:

(1) any judicial exceptions, including certain groupings of abstract ideas (i.e., mathematical concepts, certain methods of organizing human activity such as a fundamental economic practice, or mental processes); and

(2) additional elements that integrate the judicial exception into a practical application (*see* MPEP § 2106.05(a)–(c), (e)–(h)).

Only if a claim: (1) recites a judicial exception; and (2) does not integrate that exception into a practical application, do we then look to whether the claim;

(3) adds a specific limitation beyond the judicial exception that is not "well-understood, routine, conventional" in the field (*see* MPEP § 2106.05(d)); or

(4) simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception.

See 2019 Revised Guidance, 84 Fed. Reg.

Step 2A, Prong One

Under the 2019 Revised Guidance, we begin our analysis by first turning to the first prong of *Alice* step one (Step 2A, Prong 1 of the 2019 Revised Guidance). The 2019 Revised Guidance teaches that "[i]f a claim, under its broadest reasonable interpretation, covers performance in the mind but for the recitation of generic computer components, then it is still in the mental processes category unless the claim cannot practically be performed in the mind." 2019 Revised Guidance, 84 Fed. Reg. n.14, and 54–55. We agree with the Examiner that the claims are directed to "a method of forming parlay wagers" (Final Act. 3). We also agree with the Examiner that the steps can be performed by a person using pen and paper.

The claimed memory, display device, network interface, and processor are conventional computer components. The steps of displaying a game, storing information in memory, receiving data, detecting selection, and providing an indication are conventional steps of collecting, storing, and displaying data. The claimed determinations are steps of analyzing/comparing the information/data that is input, stored, and displayed. Further, we agree with the Examiner that the input, storage, and display steps can be performed by a human with pen and paper. Further, we agree with the Examiner that, although a computer can provide expediency, the claimed determining steps can be performed in the human mind. If a claim, under its broadest reasonable interpretation, covers performance in the mind but for the recitation of generic computer components, then it is still in the mental processes category unless the claim cannot practically be performed in the mind. *See Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1318 (Fed. Cir. 2016) ("[W]ith the exception of generic

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computer implemented steps, there is nothing in the claims themselves that foreclose them from being performed by a human, mentally or with pen and paper.").

Regarding the "determining" limitations, claim 4 recites determining: (1) real-time odds for a first element of a parlay wager based at least partially on real-time game data received from a network interface; (2) real-time odds for a second element of the parlay wager based at least partially on the real-time game data received via the network interface; and (3) odds for the parlay wager based on the real-time odds determined in steps (1) and (2) above. Although the data is received in real-time from a network interface, we are not persuaded that the above-listed determining steps could not be performed in the human mind. A person can display/watch a game, decide elements of the game for which players can wager, check odds for those elements, and even determine parlay wager odds for multiple elements. We note that automating bet selection by first selecting a visual image is also appending generic computer functionality to lend speed or efficiency.

We, thus, agree with the Examiner that claim 4 recites the abstract idea of a mental process.

Step 2A, Prong Two

Because we determine that claim 4 recites an abstract idea, we turn to prong two of the first step of the *Alice* analysis and consider whether claim 4 integrates the abstract idea into a practical application. *See* 2019 Revised Guidance, 84 Fed. Reg. 51. In doing so, we consider whether there are any additional elements beyond the abstract idea that, individually or in combination, "integrate the [abstract idea] into a practical application, using

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one or more of the considerations laid out by the Supreme Court and the Federal Circuit." *See* 2019 Revised Guidance, 84 Fed. Reg. 54–55.

We agree with the Examiner that claim 4 requires only generic computer components performing routine steps. Final Act. 5. "[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*, 573 U.S. at 225. They do not. *See, e.g.*, Spec. ¶¶ 40–69.

We are not persuaded by Appellant's argument that the claims do not recite generic computer components "because a generic computer does not permit a user to select a player of a live game displayed on a screen and does not calculate real-time odds;" rather, the claims are "directed to a special purpose machine designed for wagering on live in-game events" (Reply Br. 4). As stated above, automating bet selection by first selecting a visual image is also appending generic computer functionality to lend speed or efficiency.

We determine that neither the processor recited in claim 4 that performs the claimed steps, nor the steps themselves, integrate the recited abstract ideas into a practical application. *See* 2019 Revised Guidance, 84 Fed. Reg. 55 (explaining that courts have identified "merely us[ing] a computer as a tool to perform an abstract idea" as an example of when a judicial exception may not have been integrated into a practical application). Further, consistent with the Examiner's findings, and in view of Appellants' Specification (e.g., ¶ 95, 100), we conclude that no aspect of claim 4 integrates the judicial exception into a practical application. In particular, we determine claim 4 does not recite:

(i) an improvement to the functioning of a computer;

(ii) an improvement to another technology or technical field;

(iii) an application of the abstract idea with, or by use of, a particular machine;

(iv) a transformation or reduction of a particular article to a different state or thing; or

(v) other meaningful limitations beyond generally linking the use of the abstract idea to a particular technological environment.

See MPEP §§ 2106.05(a)–(c), (e)–(h).

Step 2B — Inventive Concept

Finally, we consider whether claims 1 and 8 incorporate an inventive concept, that is, whether any additional claim elements "'transform the nature of the claim' into a patent-eligible application." *Alice*, 573 U.S. at 217 (quoting *Mayo*, 566 U.S. at 78, 79). This requires us to evaluate whether the additional claim elements add "a specific limitation or combination of limitations that are not well-understood, routine, conventional activity in the field" or "simply append [] well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality." *See* 2019 Revised Guidance, 84 Fed. Reg. 56.

As stated *supra*, the claims require a generic computer system with a generic processor that carries out the abstract idea itself. As such, the claims, when considered as a whole, are nothing more than the instruction to implement the abstract idea in a particular routine and conventional technical environment.

Although Appellant contends that the claims cover an improvement to computer related technology "by protecting users betting online" (Appeal Br. 11), we agree with the Examiner that the claimed conventional computer

components, including processor performing the claimed steps, merely performs calculations quicker and more efficiently than humans (Ans. 12), which does not meaningfully limit claim scope for purposes of patent eligibility. Automating bet selection by first selecting a visual image merely employs generic computer functionality to lend speed or efficiency to such betting.

Claim 4, therefore, does not provide an improvement in computer technology. Nothing in the claims or the Specification suggests that the claimed memory, display device, network interface, and processor are anything but generic computer components that perform well-understand, routine, and conventional activities. In fact, the Specification indicates that the components are routine and conventional generic computer components. *See* Spec. ¶¶ 57–69.

Thus, considering the claims as a whole, we determine that the additional elements recited in claim 4 do not provide "a specific limitation or combination of limitations that are not well-understood, routine, conventional activity in the field." *See* 2019 Revised Guidance, 84 Fed. Reg. 56. Rather, these elements "simply append[] well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality." *Id.* Accordingly, we agree with the Examiner that claim 4 does not have an inventive concept.

Because we determine that claim 4 is directed to an abstract idea and does not contain an inventive concept, we sustain the Examiner's rejection of claim 4 under 35 U.S.C. § 101. Claims 4, 6, 7–9, 24–29 and 31–40 fall with claim 4.

Section 103

Appellant argues claims 4, 6, 7–9, 24–29 and 31–40 as a group. Appeal Br. 16. We select claim 4 as representative. Claims 6, 7–9, 24–29 and 31–40 stand or fall with claim 4.

Regarding claim 4, the Examiner finds that Simon discloses, *inter alia*, "displaying at least one live game on the display device," and storing, in memory, "first elements for a wager via [a] network interface," the first elements including "games that begin and end in the future," so that a player can "make bets on games prior to the start of the game." Final Act. 6 (citing Simon ¶ 21). The Examiner finds that Simon also discloses receiving "second elements for the wager," the second elements including "wagers related to whether each respective particular event occurs during the game." *Id*. The Examiner then finds that Simon teaches players using "a menu system to make wagers," which Appellant's Specification discloses is "equivalent to detecting a selection of an image of a live player on the screen." *Id.* at 7 (citing Spec. ¶ 100). The Examiner concludes that it would have been obvious to modify "Simon in view of [Appellant's] admission to detect the selection of the image of a live player on the screen because Applicant describes them as equivalent and the use of equivalent methods to achieve predictable results is obvious." *Id*.

Appellant argues that neither Simon nor Brennan disclose detecting the selection of "an image of a live game participant" and wagering on an event related to the selected image. Appeal Br. 14. According to Appellant, in Simon, a group of players 10 uses a terminal, as the group watches "a football game broadcast on television" to place bets on events selected by the bartender that are displayed on the terminal as a Captain's Screen. *Id*.

(citing Simon ¶ 113, Fig. 2). Appellant contends that, even given the broadest reasonable interpretation, "the claimed 'selection of an image of a live game participant' does not correspond to the mere selection of a menu item to enter a bet as provided in Simon." *Id.* at 14–15. Thus, Appellant contends, the Examiner's interpretation of is unreasonably broad. *Id.* at 15.

According to the Examiner, Appellant disputes whether one of ordinary skill in the art would see selecting a player to wager on using a menu is equivalent to selecting a player image. Ans. 10. The Examiner responds that, based on the disclosure of Appellant's Specification (¶ 100), a user can "touch an image of Barry Bonds on the screen or equivalently, touch some other image or icon," and "a menu is another image or icon and is thus equivalent to the selection of a player image on the screen." Ans. 11. The Examiner concludes, based on this disclosure, that it would have been obvious to substitute these equivalent methods. *Id.*

The Examiner's reliance on Appellant's own Specification for identifying alternative/equivalent structure, and determining the obviousness thereof, employs improper hindsight. Although obviousness is in a sense always a reconstruction based on hindsight, it must not "include knowledge gleaned only from [Appellant's] disclosure." *In re McLaughlin*, 443 F.2d 1392, 1395 (CCPA 1971). Because the Examiner erred in basing the obviousness determination on knowledge gleaned from Appellant's invention description, we do not sustain the rejection of claim 4. Claims 6, 7–9, 24–29 and 31–40 fall with claim 4.

DECISION SUMMARY

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
4, 6, 7–9, 24–29, 31–40	101		4, 6, 7–9, 24–29, 31–40	
4, 6, 7–9, 24–29, 31–40	103	Simon, Brenner		4, 6, 7–9, 24–29, 31–40
Overall Outcome:			4, 6, 7–9, 24–29, 31–40	

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