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BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte PHILIP M. GINSBERG, HOWARD W. LUTNICK, ANDREW C. GILBERT, and LEWIS FINDLAY

Appeal 2018-007182
Application 14/922,825
Technology Center 3700

Before JENNIFER D. BAHR, MICHAEL J. FITZPATRICK, and ARTHUR M. PESLAK, *Administrative Patent Judges*.

FITZPATRICK, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants[1] appeal under 35 U.S.C. § 134(a) from the Examiner's final decision rejecting claims 1, 2, 6, 9, 13–15, and 29–35. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

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[1] The real party in interest is identified as Interactive Games, LLC. Appeal Br. 3.

STATEMENT OF THE CASE

The Specification

The Specification states that the invention "relates to real-time interactive wagering on event outcomes." Spec. 1:8–9.

> Event outcomes may be based on, for example, financial markets and indices, sporting and entertainment events, political events, games of chance, and natural phenomena such as weather and earthquakes. Wagers can be of a fixed-odds type or a spread-bet type (both described further below). Wagers can be placed on, for example, the change in the Consumer Price Index for a given month; a nation's Gross Domestic Product (GDP); a casino's payout or winnings at blackjack over a given period; the team that will win baseball's World Series; the actor that will win an Academy Award; and the price movement of individual stocks, gold, commodities, or any real-time index.

Id. at 1:9–22.

The Rejected Claims

Claims 1, 2, 6, 9, 13–15, and 29–35 are pending and all are rejected. Final Act. 1. Claims 1 and 29 are independent. Appeal Br. 22–25. Claim 1 is representative and reproduced below.

> 1. An apparatus of a gaming operator, the apparatus comprising:
>
> a memory;
>
> a network interface to communicate with at least one cellular telephone and at least one data source over a communication network;
>
> at least one processor configured to:
>
> transmit information indicative of at least some authorized games to a cellular phone, in which each game has a respective wager amount to play the game, in which the information further indicates each respective wager amount;

receive a customization request from the cellular telephone;

in response to receipt of the customization request, transmit filtered information indicating a subset of the at least some authorized games that meet a wager amount limitation in the customization request to the cellular telephone, in which the filtered information includes a respective time associated with each game of the subset;

determine an availability of a new game;

in response to determining the availability of the new game, update the displayed filtered information to include an indication of the new game;

determine a number of entries into at least one game of the subset;

in response to determining the number of entries, transmit information indicating the number of entries into the at least one game of the subset to the cellular telephone;

receive an entry request from the cellular telephone to enter into a specified game;

in response to receiving the entry request, transmit an interface to the cellular telephone that enables entry of one or more parameters of the game;

receive, via the network interface, data indicating that one or more parameters of the game were entered through the interface on the cellular telephone;

transmit to the cellular telephone a confirmation that the data was received; and

determine that a user of the cellular telephone won the game based on at least one electronic feed of data from the at least one data source, the at least one electronic feed comprising data indicative of an outcome of the game.

Appeal Br. 22.

The Appealed Rejection

The following rejection is before us for review: claims 1, 2, 6, 9, 13–15, and 29–35 under the judicial exception to 35 U.S.C. § 101.

DISCUSSION

Section 101 of Title 35 of the U.S. Code provides that "[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." 35 U.S.C. § 101. However, the Supreme Court has "'long held that this provision contains an important implicit exception: [l]aws of nature, natural phenomena, and abstract ideas are not patentable.'" *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014).

In analyzing patent-eligibility questions under the judicial exception to 35 U.S.C. § 101, we "first determine whether the claims at issue are directed to a patent-ineligible concept." *Alice*, 573 U.S. at 218. If the claims are determined to be directed to an ineligible concept, then 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.* at 217 (quoting *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 77 (2012)).

On January 7, 2019, the Director issued "2019 Revised Patent Subject Matter Eligibility Guidance," which explains how the Director requires that patent-eligibility questions under the judicial exception to 35 U.S.C. § 101 be analyzed. 84 Fed. Reg. 50–57 ("Revised Guidance").

Per the Revised Guidance, the first step of *Alice* (i.e., Office Step 2A) consists of two prongs. In Prong One, we must determine whether the claim

recites a judicial exception, i.e., an abstract idea, a law of nature, or a natural phenomenon. 84 Fed. Reg. at 54 (Section III.A.1.). If it does not, the claim is patent eligible. *Id.* With respect to the abstract idea category of judicial exceptions, an abstract idea must fall within one of the enumerated groupings of abstract ideas in the Revised Guidance or be a "tentative abstract idea," with the latter situation predicted to be rare. *Id.* at 51–52 (Section I, enumerating three groupings of abstract ideas), 54 (Section III.A.1., describing Step 2A Prong One), 56–57 (Section III.D., explaining the identification of claims directed to a tentative abstract idea).

If a claim does recite a judicial exception, we proceed to Step 2A Prong Two, in which we must determine if the "claim as a whole integrates the recited judicial exception into a practical application of the exception." *Id.* at 54 (Section II.A.2.) If it does, the claim is patent eligible. *Id.*

If a claim recites a judicial exception but fails to integrate it into a practical application, we then proceed to the second step of *Alice* (i.e., Office Step 2B). In that step, we then evaluate the additional limitations of the claim, both individually and as an ordered combination, to determine whether they provide an inventive concept. *Id.* at 56 (Section III.B.). In particular, we look to whether the claim:

- Adds a specific limitation or combination of limitations that are not well-understood, routine, conventional activity in the field, which is indicative that an inventive concept may be present; or

- simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception, which is indicative that an inventive concept may not be present.

Id.

The Independent Claims

Appellants argue independent claims 1 and 29 together. Appeal Br. 7–19. Accordingly, we select independent claim 1 as representative. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Claim 1 is directed to an "apparatus," the only required physical components of which are "a memory," "a network interface," and "at least one processor." Appeal Br. 22. The remaining claim language is directed to how the processor is configured. *Id.* More specifically, the processor is configured to do various things with respect to data, namely "transmit" data "receive" data, "filter[]" data, make "determin[ations]," and "update" data.

Revised Guidance Step 2a Prong One

In Prong One of Step 2a, we determine whether claim 1 recites a judicial exception (i.e., a law of nature, natural phenomenon, or abstract idea).

The Examiner determined that claim 1 recites an abstract idea, namely a fundamental economic practice, which is a method of organizing human activity. Final Act. 2. In that regard, claim 1 recites various aspects of facilitating a wagering game, which, as the Examiner noted, the Court of Appeals has held to be patent ineligible. *See* Ans. 11 (citing *In re Smith*, 815 F.3d 816 (Fed. Cir. 2016); *see also* 84 Fed. Reg. 52 n.13 (citing *Smith*).

In particular, claim 1 recites that the processor is configured to do the following:

> transmit *information indicative of at least some authorized games* to a cellular phone, in which *each game has a respective wager amount to play the game*, in which the information further indicates *each respective wager amount*;

receive a customization request from the cellular telephone;

in response to receipt of the customization request, transmit filtered *information indicating a subset of the at least some authorized games that meet a wager amount limitation* in the customization request to the cellular telephone, in which the filtered information includes *a respective time associated with each game of the subset*;

determine an *availability of a new game*;

in response to determining the availability of the new game, update the displayed filtered information to *include an indication of the new game*;

determine *a number of entries into at least one game of the subset*;

in response to determining the number of entries, transmit *information indicating the number of entries into the at least one game of the subset to the cellular telephone*;

receive an *entry request* from the cellular telephone *to enter into a specified game*;

in response to receiving the entry request, transmit an interface to the cellular telephone that *enables entry of one or more parameters of the game*;

receive, via the network interface, *data indicating that one or more parameters of the game were entered* through the interface on the cellular telephone;

transmit to the cellular telephone a confirmation that the data was received; and

determine that a user of the cellular telephone won the game based on at least one electronic feed of data from the at least one data source, the at least one electronic feed comprising *data indicative of an outcome of the game*.

Appeal Br. 22 (emphasis added). As seen, claim 1 is replete with explicit recitations of a wagering game. *See also* Spec 1:8–9 ("The present invention relates to real-time interactive wagering on event outcomes.").

Accordingly, we determine that claim 1 recites a wagering game, which is a fundamental economic practice and, thus, also an abstract idea. *See Smith*, 815 F.3d at 818–19 ("As the Board reasoned here, '[a] wagering game is, effectively, a method of exchanging and resolving financial obligations based on probabilities created during the distribution of the cards.'"); 84 Fed. Reg. 52.

Revised Guidance Step 2a Prong Two

In Prong Two of Step 2a, we determine whether claim 1 as a whole integrates the recited judicial exception (here, an abstract idea) into a practical application of the exception. We determine that claim 1 does not.

This is so because, other than the claim language reciting the facilitation of a wagering game, claim 1 merely recites generic computer components along with certain computer-typical data manipulation capabilities. These capabilities—namely to "transmit," "receive," "filter[]," "determine," and "update" information—constitute insignificant extra-solution activity to the judicial exception, which are insufficient to integrate the judicial exception into a practical application. *See* 84 Fed. Reg. at 55, n.31; MPEP § 2106.05(g).[2]

[2] In *Electric Power Group, LLC v. Alstom S.A.*, 830 F.3d 1350, 1354 (Fed. Cir. 2016), the Court went further than characterizing such data manipulation as insignificant extra-solution activity. There, the Court held that such data manipulation itself could be an abstract idea. *Id.* (Claims directed to "a process of gathering and analyzing information of a specified content, then displaying the results, and not any particular assertedly inventive technology for performing those functions [are] . . . directed to an abstract idea.").

Further, the additional claim language reciting these capabilities does not satisfy any of the exemplary considerations set forth in the Revised Guidance. *See* 84 Fed. Reg. at 55; MPEP § 2106.05(a), (b), (c), (e). For example, the claim language does not set forth or reflect any improvement to computer functionality, such as in *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335–36 (Fed. Cir. 2016), where the court held that "the plain focus of the claims [was] on an improvement to computer functionality itself, not on economic or other tasks for which a computer is used in its ordinary capacity." *Id.*; *see also* MPEP § 2106.05(a).

Revised Guidance Step 2b

In Step 2b, we evaluate the additional limitations of claim 1, both individually and as an ordered combination, to determine whether they provide an inventive concept. *Id.* at 56 (Section III.B.). However, claim 1 does not include any limitations beyond the recitations of the abstract idea, insignificant extra-solution activity, and conventional computer components (i.e., "a memory," "a network interface," and "at least one processor") for performing the extra-solution activity.

Appellants argue that "the claims of the instant case recite operations that improve the efficiency of navigating GUIs for gaming." Appeal Br. 13. As Appellants further this argument, it eventually becomes clear that, by "GUIs," Appellants are referring to cellular telephones of wagering users. *Id.* at 14 ("[T]he server provides filtered gaming information to a cellular phone and the cellular phone displays that filtered information in a way that is easier to navigate for a user."). However, neither cellular telephones nor graphical user interfaces are affirmatively recited in the claims.

As discussed above, claim 1 is directed to an "apparatus," the only required physical components of which are "a memory," "a network interface," and "at least one processor." Appeal Br. 22. Claim 1 does recite, as a purpose of the network interface, "to communicate with at least one cellular telephone," but claim 1 does not recite the cellular telephone as part of the claimed "apparatus."

Moreover, the purported improvement in efficiency—speeding up the wagering process (*see* Appeal Br. 14)—is the inevitable result of using a computer to perform the abstract idea, which is not an inventive concept. *See, e.g.*, *Bancorp 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*, 573 U.S. 208 (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.").

For the foregoing reasons, we affirm the rejection, under the judicial exception to 35 U.S.C. § 101, of claim 1, as well as claim 29, which falls therewith. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The Dependent Claims

Appellants argue the patent eligibility of dependent claims 2, 6, 9, 13–15, and 30–35 under a separate heading. Appeal Br. 20. However, Appellants do not present any additional arguments. *Id.* ("For at least the reasons previously stated, Appellants submit that all the dependent claims are in condition for allowance.").

Accordingly, for reasons already discussed above, Appellants do not apprise us of error in the rejection of claims 2, 6, 9, 13–15, and 30–35 under the judicial exception to 35 U.S.C. § 101 is affirmed.

DECISION

The Examiner's rejection of claims 1, 2, 6, 9, 13–15, and 29–35 is affirmed.

TIME PERIOD

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