



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
**United States Patent and Trademark Office**  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/964,633	08/12/2013	Howard W. Lutnick	07-2177CIP-C1	9634
63710	7590	09/10/2019	EXAMINER	
INNOVATION DIVISION CANTOR FITZGERALD, L.P. 110 EAST 59TH STREET (6TH FLOOR) NEW YORK, NY 10022			YOO, JASSON H	
			ART UNIT	PAPER NUMBER
			3715	
			NOTIFICATION DATE	DELIVERY MODE
			09/10/2019	ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

lkorovich@cantor.com  
patentdocketing@cantor.com  
phowe@cantor.com

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

*Ex parte* HOWARD W. LUTNICK  
and ZOE CHARLOTTE GREENBERG

---

Appeal 2019-001396  
Application 13/964,633  
Technology Center 3700

---

Before DANIEL S. SONG, JAMES P. CALVE, and  
WILLIAM A. CAPP, *Administrative Patent Judges*.

CAPP, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant,<sup>1</sup> CFPH, LLC, seeks our review under 35 U.S.C. § 134(a) of the final rejection of claims 1, 3–5, 7–13, and 16–26. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

---

<sup>1</sup> We use the word “Appellant” to refer to “Applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as CFPH, LLC. App. Br. 3.

## THE INVENTION

Appellant's invention relates to keeping track of points allocated among people. Spec. ¶ 63. Claim 1, reproduced below, is illustrative of the subject matter on appeal.

1. A method comprising:

receiving, by at least one processor, from a plurality of devices an indication of a wager based on an outcome of a first event, the wager including an amount of points wagered, wherein the at least one processor communicates with the plurality of devices over an electronic communications network;

determining, by the at least one processor, a first allocation of points among the plurality of devices;

generating in a memory, by the at least one processor, a table with a points column;

associating, by the at least one processor, a first row of the table with a first subset of the plurality of devices and a second row of the table with a second subset of the plurality of devices;

receiving, by the at least one processor, at least one indication of a point adjustment from at least one of the plurality of devices; and

updating, by the at least one processor, the points column in the memory of the first row and the second row, in response to receiving the at least one indication of the point adjustment.

## THE REJECTIONS

The following rejections are before us for review:

1. Claims 1, 3–5, 7–13, and 16–26 are rejected for being directed to a judicial exception to patent eligible subject matter under 35 U.S.C. § 101.

2. Claims 1, 3–5, 7–13, and 16–26 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Walker (US 2003/0064807 A1, pub. Apr. 3, 2003) (hereinafter “Walker”).

3. Claims 1, 3–5, 7–13, and 16–26 are rejected on the ground of nonstatutory double patenting as being unpatentable over claims 1–32 of Lutnick ’423 (U.S. 8,454,423 B2, iss. June 4, 2013) and Walker.

4. Claims 1, 3–5, 7–13, and 16–26 are rejected on the ground of nonstatutory double patenting as being unpatentable over claims 1–32 of Lutnick ’465 (U.S. 8,262,465 B2, iss. Sept. 11, 2012) and Walker.

5. Claims 1, 3–5, 7–13, and 16–26 are rejected on the ground of nonstatutory double patenting as being unpatentable over claims 1–32 of Lutnick ’854 (US 9,192,854 B2, iss. Nov. 24, 2015) and Walker.

6. Claims 1, 3–5, 7–13, and 16–26 are rejected on the ground of nonstatutory double patenting as being unpatentable over claims 1–32 of Lutnick ’393 (U.S. Patent US 8,506,393 B2, iss. Aug. 13, 2013) and Walker.

## OPINION

### *35 U.S.C. § 101*

#### *Judicial Exception to Patent Eligible Subject Matter*

Appellant argues claims 1, 3–5, 7–13, and 16–26 as a group. Appeal Br. 8–9. We select claim 1 as representative. 37 C.F.R. §41.37(c)(1)(iv).

An invention is patent-eligible if it claims a “new and useful process, machine, manufacture, or composition of matter.” 35 U.S.C. § 101.

However, the courts recognize certain judicial exceptions to Section 101, namely: (1) laws of nature, (2) natural phenomena, and (3) abstract ideas. *See Mayo Collaborative Svc. v. Prometheus Labs, Inc.*, 566 U.S. 66, 70–71 (2012).

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*

*Corp. v. CLS Bank Int'l*, 573 U.S. 208, 217 (2014) (citing *Mayo Collaborative Servs. v. Prometheus Labs, Inc.*, 566 U.S. 66, 72–73 (2012)). According to the Supreme Court’s *Alice/Mayo* framework, we must first determine whether the claims at issue are directed to one of those concepts (*i.e.*, laws of nature, natural phenomena, and abstract ideas). *Id.* If so, we must 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.* The Supreme Court characterizes the second step 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.* (quoting *Mayo*, 566 U.S. at 72–73).

The Examiner determines that claim 1 is directed to an abstract idea. Final Action 2–5. More particularly, the Examiner finds that claim 1 entails:

- (a) a management scheme by which wager points are received and adjusted for a plurality of participants, and
- (b) acts enabled by the program for effecting the scheme (e.g. processor, devices, memory).

*Id.* at 3. The Examiner finds that such management scheme can be performed mentally or in a computer, similar to the organizing of human activity in the *Alice* case. *Id.* The Examiner further finds that allocating points based on an exchange of goods, service, and money entails organizing human activity in general and, more particularly, that adjusting a price, correcting a payment, or providing a refund are well-known human activities that can be performed mentally. *Id.* at 3–4. The Examiner also analogizes the claim to the abstract rules for conducting a wagering game that was

determined to involve a patent ineligible abstract idea in the case of *In re Smith*, 815 F.3d 816 (Fed. Cir. 2016). *Id.* at 4.

The Examiner further determines that any additional elements in the claims other than the abstract idea, when considered separately and in combination, are not sufficient to amount to significantly more than the abstract idea. *Id.* at 5–6.

Appellant argues that claim 1 does not recite an abstract idea and that the Examiner’s rejection is not in accordance with certain patent eligibility guidelines published by the PTO in May of 2016. Appeal Br. 8. Appellant further argues that the cases of *In re Bilski*, 561 U.S. 593 (2010) and *In re Smith*, 815 F.3d 816, 819 (Fed. Cir. 2016), relied on by the Examiner, do not reasonably correspond to Appellant’s point allocation data structures. *Id.*

The PTO recently published revised guidance on the application of Section 101. *See* USPTO’s January 7, 2019 Memorandum, *2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (“*2019 Guidelines*”). Under that guidance, in conducting step one of the *Alice* framework, we first look to whether the claim recites:

- (1) any judicial exceptions, including certain groupings of abstract ideas; and
- (2) additional elements that integrate the judicial exception into a practical application.

*Step 1, Prong 1*

The *2019 Guidelines* identifies three key concepts identified as abstract ideas:

- (a) mathematical concepts such as mathematical relationships, formulas, equations, or calculations;

(b) certain methods of organizing human activity, such as “fundamental economic principles or practices,” “commercial or legal interactions,” and “managing personal behavior or relationships or interactions between”; and

(c) mental processes including observation, evaluation, judgment, and opinion.

*Id.*

Claim 1 recites a number of computerized method steps that are reproduced, in abbreviated form, below:

- (1) receiving . . . a wager . . . [of] points;
- (2) determining . . . [an] allocation of points;
- (3) generating . . . a table with a points column;
- (4) associating . . . [table rows] with . . . devices;
- (5) receiving . . . a point adjustment from . . . [a] device;
- (6) updating . . . the points column.

*See* Claims App. claim 1. Summarized succinctly, Appellant’s invention uses computer technology to manage information related to wagering in a group environment.<sup>2</sup> More particularly, it uses computers to help keep score among gamblers, including making allocations of gambling payoffs among group participants. This type of score keeping can be performed entirely within the human mind. Furthermore, tabulating scores in a table format with columns for points and rows for devices can be performed by a human with pen and paper.

---

<sup>2</sup> “[T]able 201 may be useful, for example, to track points among a group of individuals that share a common point pool (e.g., people in a common participant group). For example, PERSON 1, PERSON 2, and PERSON 3 may agree that points may be assigned and adjusted among all three of them together. PERSON 1, PERSON 2, and PERSON 3 may for example be friends, co-workers, acquaintances or otherwise associated.” Spec. ¶ 43.

Methods which can be performed entirely in the human mind are unpatentable not because there is anything wrong with claiming mental method steps as part of a process containing non-mental steps, but rather because computational methods which can be performed entirely in the human mind are the types of methods that embody the “basic tools of scientific and technological work” that are free to all men and reserved exclusively to none.

*CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1373 (Fed. Cir. 2011) (also noting, at page 1372, that the mental processes can be performed by a human using pen and paper).

In the case of *In re Guldenaar*, 911 F.3d 1157 (Fed. Cir. 2018), the Federal Circuit held that a method of playing a wagering game falls under the concept of methods of organizing human activity. *Id.* at 1160. In the *Bilski* case, the Supreme Court held that a method of hedging market risk entailed a patent ineligible abstract idea. In the *Alice* case, the patent ineligible abstract idea, entailed a computer implemented method of mitigating against the risk that only one party to a financial exchange will satisfy its obligation.

The instant case entails at least two abstract ideas under the *2019 Guidelines*: (1) mental processes (in the form of score keeping); and (2) methods of organizing human activity (facilitating gambling in a group environment). Appellant’s naked assertion that claim 1 does not entail an abstract idea has no foundation in the evidentiary record before us. In Appellant’s method, data is obtained, calculations are performed on the data, results of the calculations are tabulated, and points are apportioned among a group of participants. See *Smart Systems Innovations, LLC v. Chicago Transit Authority*, 873 F.3d 1364, 1372 (Fed. Cir. 2017) (“claims directed to the collection, storage, and recognition of data are directed to an abstract

idea”). We are mindful that merely performing the method on a computer does not remove it from the realm of abstract ideas. *See Bancorp Servs., L.L.C. v. Sun Life Assur. Co. of Canada (U.S.)*, 687 F.3d 1266, 127778 (Fed. Cir. 2012) (performance by computer does not convert an abstract idea into eligible subject matter). Apart from using generic computer technology, Appellant identifies nothing of a “concrete” nature that is added to its abstraction.

Appellant’s attempt to distinguish the instant case from *Bilski* and *Smith* is not persuasive. Essentially, all claim 1 does is what every risk based economic practice does, namely: (1) determines a probabilistic outcome; (2) generates a payout scheme based on the probabilistic outcome; and (3) apportions the payout among participants in accordance with a predetermined scheme. We agree with the Examiner that claim 1 recites an abstract idea.

*Step 1, Prong 2*

Under Prong 2 of Step 1 of the *2019 Guidelines*, we do not assume that such claims are directed to patent ineligible subject matter because “all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas.” *In re TLI Commc’ns LLC Patent Litig.*, 823 F.3d 607, 611 (Fed. Cir. 2016) quoting *Alice*. Instead, “the claims are considered in their entirety to ascertain whether their character as a whole is directed to excluded subject matter.” *McRO, Inc. v. Bandai Namco Games America Inc.*, 837 F.3d 1299, 1312 (Fed. Cir. 2016). If the claims are not directed to an abstract idea, the inquiry ends. *2019 Guidelines*. If the claims are “directed to” an abstract idea, then the inquiry proceeds to the second step of the *Alice* framework. *Id.*

Consequently, we consider whether the claimed method of allocating points among gamblers includes additional elements that integrate the judicial exception into a practical application. A claim that integrates a judicial exception into a practical application will apply, rely on, or use the judicial exception in a manner that imposes a meaningful limit on the judicial exception, such that the claim is more than a drafting effort designed to monopolize the judicial exception. *See 2019 Guidelines*.

Here, Appellant essentially rests its case after making a naked and unsupported assertion that claim 1 does not recite an abstract idea. *See* Appeal Br. 8–9. If there is a practical application of the abstract idea recited in claim 1, Appellant does not tell us what it is. *Id.* In particular, there is no indication that Appellant’s abstract idea furthers an advance in technology. *See McRO*, 837 F.3d at 1314 (finding that claim focused on a specific asserted improvement in computer animation); *see also Thales Visionix Inc. v. United States*, 850 F.3d 1343, 1348–49 (Fed. Cir. 2017) (finding that claims are directed to using inertial sensors in a non-conventional manner to measure position and orientation of a moving object on a moving reference frame); *see also Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1334 (Fed. Cir. 2016) (finding that claims were directed to a specific improvement to the way computers operate).

In the *Enfish* case, the court explained that the claims are not simply directed to any form of storing tabular data, but instead are specifically directed to a self-referential table for a computer data that functions differently than conventional databases. *Enfish*, at 1336–37. *Enfish*, and cases like it, are in direct contrast to the instant case where there is no evidence that the use of database technology and tabulation of point data

occurs in a manner that functions differently, much less better, than conventional computer database technology.

Where, as here, Appellant fails to identify any evidence to support a contention that the claim is directed to a practical application, we are hard pressed to do little more than recognize the absence of a practical application. We find no additional elements in claim 1 that tie the abstract ideas to a particular machine that is integral to claim 1, transform or reduce a particular article to a different state or thing, or apply the abstract ideas in a meaningful way beyond merely linking them to a particular technological environment. *See 2019 Guidelines*. Consequently, we determine that Appellant's method fails to integrate the judicial exception into a practical application and, therefore, is "directed to" an abstract idea.

### *Step 2*

Turning to step two of the *Alice/Mayo* framework, 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. *Alice Corp.*, 573 U.S. at 217. Here, we search for an inventive concept such that the claim, in practice, amounts to significantly more than the abstract idea itself. *Id.*

With respect to Step 2, the Examiner provides the following findings of fact and accompanying analysis.

A person or persons can perform the steps of determining a first allocation of points; generating a table with a points column, associating a first row and second row with plurality of devices, receiving an indication of point adjustments, and updating the points column, resulting a third allocation of points. These steps can be performed mentally. In addition, Applicant's specification discloses that the steps of "determining" does not

imply that a particular device must be used . . . Information may be determined by a person or computing device from the indication of the information (paragraph 17 of published specification). The use of a computer is not integral to the claimed invention and does not facilitate the process in a way that a person making calculations or computations could not because each of the claim limitations can be implemented by a person without the computer system.

Final Action 6.

As previously discussed, Appellant essentially “rested its case” at the Step 1, abstract idea stage of the *Alice* analysis. Appellant offers neither evidence nor argument that claim 1 provides an ordered combination of elements that amounts to something “significantly more” than the abstract idea itself. *See* Appeal Br. 8–9.

We have independently reviewed Appellant’s Specification and find that the Examiner’s position is amply supported by the record. Elements such as computers, processors, servers are described in a generic manner.

The term “determining” does not imply that mathematical processing must be performed, and does not imply that numerical methods must be used, and does not imply that an algorithm or process is used. The term “determining” does not imply that any particular device must be used. For example, a computer need not necessarily perform the determining.

Spec. ¶ 14.

[W]here more than one device or article is described herein . . . , a single device/article may alternatively be used in place of the more than one device or article that is described. For example, a plurality of computer-based devices may be substituted with a single computer-based device.

*Id.* ¶ 22.

It should be appreciated that the various processes described herein may be implemented by, e.g., appropriately programmed computer systems, e.g., general purpose computers 101 and/or

computing devices 103, such as those illustrated in Figure 1. A computing device 103 may include a specialized or general purpose computing device such as a cellular phone, a personal digital assistant, and/or any other portable or non-portable computing system that is not a general purpose computer.

*Id.* ¶ 34.

The processor and operating system together may define a computer platform for which programs stored on a machine-readable medium may be written in various programming languages.

*Id.* ¶ 39.

Various embodiments may include a network environment including one or more computing systems (e.g., general purpose computers 101, other computing devices 103) in communication through one or more communication networks (e.g., a LAN 119, the Internet 121). The computer systems may communicate directly or indirectly, via any wired or wireless medium.

*Id.* ¶ 40.

[O]ne or more computer systems may act as one or more database servers. The database server may respond to database requests such as structured query language (SQL) queries by providing access to a database (e.g., searching of the database, writing to the database). The database server may maintain one or more database tables having information stored therein to facilitate the operation of some embodiments.

*Id.* ¶ 42.

Where databases are described, it will be understood by one of ordinary skill in the art that . . . alternative database structures to those described may be readily employed.

*Id.* ¶ 54.

Any descriptions of any sample databases presented herein are illustrative arrangements for stored representations of information. Any number of other arrangements may be employed besides those suggested herein.

*Id.*

Computers, processors, computing devices and like products are structures that can perform a wide variety of functions. Such products can be operable to perform a specified function by executing one or more programs, such as a program stored in a memory device of that product or in a memory device which that product accesses. Unless expressly specified otherwise, such a program need not be based on any particular algorithm, such as any particular algorithm that might be disclosed in the present application.

*Id.* ¶ 58.

It is well known to one of ordinary skill in the art that a specified function may be implemented via different algorithms, and any of a number of different algorithms would be a mere design choice for carrying out the specified function.

*Id.*

In summary, the computer implementation of Appellant's abstract idea is described at a high level of generality that presumes familiarity with the underlying technology on the part of the reader. In essence, Appellant lists a number of method steps that could be performed manually and then claims that the steps be performed by a "processor." Claims App. claim 1. It is now well settled that mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention. *See Alice*, 573 U.S. at 223. Thus, merely stating an abstract idea while adding the words "apply it" is not enough to confer patent eligibility. *Id.*

[I]f that were the end of the § 101 inquiry, an applicant could claim any principle of the physical or social sciences by reciting a computer system configured to implement the relevant concept.

*Id.* at 224. There is nothing in claim 1 or in the accompanying Specification description of the computer equipment, software, and user interface

components that purports to be a breakthrough or advancement in computer technology. *Alice*, 573 U.S. at 224–25.

A patent applicant is required to submit a specification that contains a written description of the invention in “full, clear, concise, and exact terms.” *See* 35 U.S.C. § 112(a). For purposes of the *Alice/Mayo* analysis, a specification demonstrates the well-understood, routine, conventional nature of step 2 “*additional elements*” when it describes them in a manner that indicates they are sufficiently well-known that they need not be described with particularity to satisfy 35 U.S.C. § 112(a).<sup>3</sup> That is the case here.

Essentially, all Appellants have done here is use generic computer data gathering and processing technology to manage the financial aspects of gambling in a group environment.<sup>4</sup> As in *Alice*, “each step does no more than require a generic computer to perform generic computer functions.” *Alice*, 573 U.S. at 225. Accordingly, we sustain the Examiner’s Section 101 rejection of claims 1, 3–5, 7–13, and 16–26.

*Unpatentability of Claims 1, 3–5, 7–13, and 16–26  
over Walker*

Appellant argues claims 1, 3–5, 7–13, and 16–26 as a group. Appeal Br. 11–13. Again, claim 1 is representative. 37 C.F.R. § 41.37(c)(1)(iv).

---

<sup>3</sup> Memorandum from the U.S. Patent & Trademark Office, *Changes in Examination Procedure Pertaining to Subject Matter Eligibility, Recent Subject Matter Eligibility Decision (Berkheimer v. HP, Inc.)* (Apr. 19, 2018).

<sup>4</sup> “PERSON 1, PERSON 2, and PERSON 3 may for example be friends, co-workers, acquaintances or otherwise associated. PERSON 1, PERSON 2, and PERSON 3 may be participants in a single wager or a common group of wagers. PERSON 1, PERSON 2, and PERSON 3 may agree to be in a grouping before being placed in such a grouping.” Spec. ¶ 43.

The Examiner finds that Walker discloses the invention substantially as claimed except for a table with a points column that is updated as claimed. Final Action 12–13. The Examiner concludes that it would have been obvious to a person of ordinary skill in the art at the time the invention was made to so modify Walker. *Id.* at 13. According to the Examiner, a person of ordinary skill in the art would have done so as only ordinary skill is required to change the contents of a database table according to a user’s preference. *Id.* at 14.

Appellant argues that the rejection is deficient because Walker fails to disclose “every” feature of the claim. Appeal Br. 12. This argument is tantamount to asserting that any single reference rejection under 35 U.S.C. § 103 must also anticipate a claim under 35 U.S.C. § 102. This assertion does not comport with prevailing law.

The obviousness analysis contemplates that there will be differences between the prior art and the claimed invention and yet the claimed invention may be unpatentable. *See* U.S.C. § 103. It is well settled that a determination of obviousness does not require the claimed invention to be expressly suggested by any one or all of the references. *See e.g., In re Keller*, 642 F.2d 413, 425 (CCPA 1981). Furthermore, what a reference teaches a person of ordinary skill is not limited to what a reference specifically “talks about” or what is specifically “mentioned” or “written” in the reference. *Syntex (U.S.A.) LLC v. Apotex, Inc.*, 407 F.3d 1371, 1380 (Fed. Cir. 2005). Thus, a “reference must be considered not only for what it expressly teaches, but also for what it fairly suggests.” *In re Baird*, 16 F.3d 380, 383 (Fed. Cir. 1994) (quoting *In re Burckel*, 592 F.2d 1175, 1179 (CCPA 1979)).

In light of the foregoing, “we do not ignore the modifications that one skilled in the art would make to a device borrowed from the prior art.” *In re Icon Health & Fitness, Inc.*, 496 F.3d 1374, 1382 (Fed. Cir. 2007).

Therefore, “the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

This follows from the observation a person of ordinary skill is also a person of ordinary creativity, not an automaton. *Id.* at 421. Moreover, “[t]he diversity of inventive pursuits and of modern technology counsels against confining the obviousness analysis by . . . overemphasizing the importance of published articles and the explicit content of issued patents.” *Id.* at 419.

Therefore, a claim can be obvious even where all of the claimed features are not found in specific prior art references, where there is a suggestion or motivation to modify the teachings of the prior art to the claimed invention. *Ormco Corp. v. Align Tech., Inc.*, 463 F.3d 1299, 1307 (Fed. Cir. 2006).

In the Answer, the Examiner explains that the only difference between Appellant’s claimed invention and Walker is the format or layout of the table. Ans. 20. The Examiner finds that Walker explicitly discloses using a single table and using different table layouts. *Id.* The Examiner concludes that:

[It] would have been obvious to one of ordinary skilled art at the time the invention was made to modify Walker's invention and incorporate the table arrangement as claimed since Walker discloses any number of tables and functionally equivalent databases can be used with different number and content. In addition, it would have been obvious to one of ordinary skilled in the art to change the number and contents of the database/table as claimed according to a user’s preference.

*Id.* (citing Walker ¶ 81).

In reply, Appellant, in abbreviated and conclusory fashion, “disagrees” with the Examiner’s Answer. Reply Br. 2.

Walker discloses gaming in a group environment. Walker, Abstract. Walker discloses a server in communication with gaming devices via a network. *Id.* ¶ 62, Fig. 2. The server includes a processor that communicates with gaming devices and a data storage device. *Id.* ¶¶ 76–77. The data storage device stores a program that, among other things, executes routines to identify players at gaming devices, register a group, and associate players within the group. *Id.* ¶¶ 78–79. The program determines whether group objectives were achieved. Also, the program controls databases that track information regarding users, gambling results, group data, gaming devices, and awarding prizes. *Id.* The storage device stores user database information, group database information, and group session information. *Id.* ¶ 81. Thus, Walker collects and processes the same basic types of information as that of Appellant’s invention.

Contrary to Appellant’s position, we do not view Appellant’s use of “points” as imparting patentability to the claimed invention. Appeal Br. 11–12. A “point” is merely a unit of value that may be accumulated or expended in the course of engaging in a wagering game. It is nothing more than a medium of exchange as is every other form of cash or currency. It is no more or less a medium of exchange in a casino gambling environment than the use of poker chips or slot machine tokens.

Furthermore, we do not view the specifically claimed tabular column and row format as imparting patentability to Appellant’s invention. Walker processes and associates user/gaming device data and reward/point data in a

manner that is substantially similar to that of claim 1. Thus, in view of Walker, it would have been obvious to one of ordinary skill in the art to utilize the claimed tabular column and row format. Moreover, we note that claim 1 contains no limitation directed to how the information is displayed to users, if at all. Claims App. claim 1. Thus, as long as the computer can internally correlate user/device data to reward/point data, we see no patentable distinction in how the data is formatted into rows and columns.

Thus, although we agree with Appellant that there is a difference between the prior art and the claimed invention, we agree with the Examiner that bridging that difference would have required no more than ordinary skill. For the foregoing reasons, we determine that the Examiner's findings of fact are supported by a preponderance of the evidence and that the Examiner's legal conclusion of unpatentability is well-founded. Accordingly, we sustain the Examiner's unpatentability rejection of claims 1, 3–5, 7–13, and 16–26 over Walker.

#### *Double Patenting Rejections*

Appellant's application is part of a parent/child chain of continuation and continuation-in-part applications. Spec. ¶ 1. The Examiner rejects all pending claims under the doctrine of nonstatutory double patenting over the claims of various issued patents in the aforementioned parent/child chain (*i.e.*, Lutnick '423, Lutnick '465, Lutnick '854, and Lutnick '393) each in combination with Walker. Final Action 6–10.

Appellant's sole argument in traverse of all four grounds of double patenting rejections is contained in a single, half-page, paragraph. Appeal Br. 7. Appellant's sole argument is that the double patenting rejections are

Appeal 2019-001396  
Application 13/964,633

improper because the Walker reference is not commonly owned with the instant application. *Id.* citing MPEP § 805.

In response, the Examiner observes that Section 805 is irrelevant to the instant rejections. Appeal Br. 17. The Examiner notes, correctly, that the double patenting rejections before us are proper under MPEP § 804. It is well settled that, in determining whether there is a patentable difference, prior art may be considered and that fact does not convert a double patenting rejection to a Section 103 rejection so as to exclude consideration of patents issued on applicant's own co-pending applications. *See In re Ornitz*, 347 F.2d 586, 590 (CCPA 1965).

Appellant's argument does not comport with controlling legal authority and, therefore, fails to apprise us of Examiner error. Accordingly, we sustain each of the Examiner's four grounds of double patenting rejections over a Lutnick related patent considered in combination with Walker.

#### DECISION

The decision of the Examiner to reject claims 1, 3–5, 7–13, and 16–26 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)(1)(iv). *See* 37 C.F.R. § 41.50(f).

AFFIRMED