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23 March 2013

PATENTS ACT 1977

APPLICANT	WMS Gaming Inc.
ISSUE	Whether patent application number GB0921575.7complies with Section 1(2)
HEARING OFFICER	Dr. Stephen Brown

DECISION

Introduction

1 This decision concerns the issue of whether the invention claimed in patent application GB0921575.7 relates to non-excluded subject matter as required by section 1(2) of the Act. It is entitled "Sourcing of electronic wagering games accessed through unaffiliated hosts" and was filed via the PCT route with a priority date of 29th June 2007. The application was republished as GB2467821 on 18th August 2010.

2 The examiner has maintained throughout that the invention claimed in this application is excluded from patentability as some combination of a program for a computer and/or a method of doing business as such. A decision on the papers on this matter was requested on 25th January 2013.

The Invention

3 The claims relate to a system for allowing a user to select and play a plurality of wagering games without having to navigate to a plurality of different websites.

4 The most current claims were filed on 31st October 2012. There are 14 claims, five of which are independent. Claim 1 relates to "a method implemented by a host server which supports wagering on games", claim 4 to the host server itself, claim 8 to "a method implemented by a *source* server which supports wagering on games", and claims 11 & 12 each relate to "a tangible computer readable storage medium encoded with instructions for controlling" said host, or source, server, respectively.

5 While these different independent claims have some minor variations in scope they all express the same underlying concept and thus will stand or fall subject

to the conclusions reached in respect of any one of them. For simplicity therefore, the following discussion will deal primarily with claim 1.

6 The wording of claim 1 is as follows:

A method implemented by a host server which supports wagering on games comprising the steps of:

transmitting a web page to a user's computing device, the web page including a plurality of icons, each icon of said plurality of icons associated with a corresponding wagering game of a plurality of wagering games, each available for play on the user's computing device under the control of a source server of a plurality of source servers, the plurality of source servers comprising at least a first source server and a second source server distinct from the first source server, the plurality of icons comprising at least one icon associated with a wagering game available for play under the control of the first source server and at least one icon associated with a wagering game available for play under the control of the second source server, the web page configured for display on a screen of the user's computing device;

hosting by the host server the web page, wherein the host server is not affiliated with the plurality of source servers, said host server configured for hosting the plurality of wagering games and displaying the corresponding icons on the webpage;

downloading to the user's computing device for one of the wagering games an applet of an application support service that supports play of the wagering game, upon receipt of a signal from the user's computing device indicating a selection of the respective icon, the application support service being part of a software structure that is supported by system level software;

causing a window to be displayed within the web page on the screen of the user's computing device where the window presents the wagering game for play, the applet including instructions and data for rendering images of the wagering game in the window and for handling active objects displayed in the window independently of the need for the receipt of instructions or data from the source server of said wagering game except with regard to critical information required for play of the wagering game, the respective icon not being contained within the window;

the host server causing material outside of the window on the web page to be displayed on the screen of the user's computing device, wherein the material is controlled by the host server independently of the source server of said wagering game such that the material cannot be controlled by said source server, the material including the respective icon associated with the wagering game;

receiving from the applet downloaded to the user's computing device a request for the critical information and routing the request to said source server, wherein the critical information includes instructions or data associated with controlling the outcome of the wagering game; and

receiving from the source server of said wagering game a reply to the critical information request and routing the reply to the user's computing device for display in the window, thereby permitting play of the wagering game within said window of the web page as displayed on the screen of the user's computing device.

The law and its interpretation

7 Section 1(2) of the Patents Act reads:

> *It is hereby declared that the following (among other things) are not inventions for the purposes of this Act, that is to say, anything which consists of:*
>
> *…*
>
> *(c) a scheme, rule or method for performing a mental act, playing a game or doing business, or a program for a computer;*
>
> *...*
>
> *but the foregoing provision shall prevent anything from being treated as an invention for the purposes of this Act only to the extent that a patent or application for a patent relates to that thing as such*

8 In addition to the above there is also the case law established in the UK in *Aerotel/Macrossan*[1], and further elaborated in *Symbian*[2] and *AT&T/CVON*[3]. In Aerotel the Court of Appeal reviewed the case law on the interpretation of section 1(2) and approved a four-step test for the assessment of patentability, namely:

1) Properly construe the claim

2) Identify the actual (or alleged) contribution

3) Ask whether it falls solely within the excluded matter

4) Check whether the contribution is actually technical in nature.

The operation of the test is explained at paragraphs 40-48 of the judgment. Paragraph 43 confirms that identification of the contribution is essentially a

[1] Aerotel Ltd v Telco Holdings Ltd (and others) and Macrossan's Application [2006] EWCA Civ 1371
[2] Symbian Limited's Application [2008] EWCA Civ 1066
[3] AT&T Knowledge Ventures LP and CVON Innovations Limited [2009] EWHC 343

matter of determining what it is the inventor has really added to human knowledge, and involves looking at substance, not form. Paragraph 47 adds that a contribution which consists solely of excluded matter will not count as a technical contribution.

Application of the *Aerotel* test

Properly construe the claim

9 I do not think that this step poses any problems. The claims all comprise a host server which transmits a web page to a user's computer, said page having a plurality of icons, each icon associated with a corresponding wagering game under the control of one of a plurality of source servers. The system routes data between the computer and the various servers such that the user can select and play any one of the games.

Identify the actual contribution

10 From the description as a whole I have no doubt that the invention is implemented on standard computing devices connected by a standard communication network. Furthermore, it is clear that the contribution requires a computer program for its implementation.

11 I thus construe the contribution to be a computer implemented system for displaying a web page having a plurality of icons, each icon allowing access to a corresponding wagering game under the control of one of a plurality of source servers.

12 However, the mere fact that the invention is effected as a computer program does not of course mean that it is automatically excluded as the thing as such. What matters is whether or not the invention provides a technical contribution beyond that of a mere program running on a conventional computer.

Ask whether it falls solely within excluded matter

13 In their various letters to the Office, the attorneys for the applicants have argued that the invention is not excluded for a number of specific reasons, namely that the following are all valid technical contributions:

i. The provision of a better user interface and better user experience as games from different vendors can be accessed quickly from within one web page;

ii. That the system requires less bandwidth than the alternative of navigating to and from different web pages in order to play a variety of games.

iii. The demarcation of which server (host or source) controls the presentation of critical and non-critical information in different segregated areas of the web page;

iv. That all of the above occur irrespective of what proprietary data is processed by the source servers;

v. The independence and non-affiliation of the host server and the source servers;

14 I will address these arguments in order. Firstly, whether or not the interface provides a "better user experience" must be purely subjective and dependent upon each particular user and what they desire to do. Further, a better user interface, in itself, is arguably not enough to confer the required technical contribution. In paragraph 50 of *Gemstar*[4] Mann J. stated that;

> *So the case comes down to a consideration of whether there is a technical effect as required by step 4 (or perhaps step 3) of Aerotel. The technical effect relied on by Gemstar is a better interface, or a different interface if "better" is not relevant. That is an abstract concept. It does not in terms describe some physical activity or effect. There is a different display on the screen, but that is not enough, in my view. That is still part of the computer program and is not an external effect (Mr Birss did not rely on any internal effect). Many computers running a program are likely to have a display output, and if that were enough to be a technical effect then every program in such a computer would be likely to fall outside the exclusion, which is unlikely to have been the intention of the draftsman of the Act. A different display to that shown before does not seem to me to go far enough to amount to a technical effect which makes a difference. Mr Birss describes the technical content as being a better user interface (usually) or a user interface (sometimes). That way of describing it does not overcome the difficulty he faces. Ultimately they are both ways of describing, in different terms from the patent, what the invention is said to achieve. But they are both judgmental, the first more so than the second. The fact that what the user perceives and interacts with is "better" does not make the advance technical at all (nor is it part of the claims). Nor does characterising it as an interface give it a technical effect that it would not otherwise have had. One has to look to see what the effect actually is, and in my view it is not technical. In fact, in the sense in which Mr Birss uses the expression, "interface" confirms this - it is an abstract, not a physical, concept.*

15 Thus , following *Gemstar*[4], I do not think that a 'better' interface can be enough. Moving on to the second argument, if the invention does reduce the bandwidth required then it would appear to do so as no more than a side effect of what is being claimed. Nowhere can I see any disclosure of how the invention deliberately and directly reduces the bandwidth required to play a variety of games. I do not think that such an incidental by-product, which may, or may not, occur at any given time can provide the required technical contribution.

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[4] Gemstar v Virgin [2009] EWHC 3068, [2010] RPC 10.

16 Moving on to the third argument, as I have numbered them, I believe it would be useful to bring in the decision in *Symbian*[2]. Paragraphs 54 & 56 of that decision state that:

> *More positively, not only will a computer containing the instructions in question "be a better computer", as in Gale, but, unlike in that case, it can also be said that the instructions "solve a 'technical' problem lying with the computer itself". Indeed, the effect of the instant alleged invention is not merely within the computer programmed with the relevant instructions. The beneficial consequences of those instructions will feed into the cameras and other devices and products, which, as mentioned at [3] above, include such computer systems. Further, the fact that the improvement may be to software programmed into the computer rather than hardware forming part of the computer cannot make a difference – see Vicom; indeed the point was also made by Fox LJ in Merrill Lynch.*
>
> and:
>
> *Putting it another way, a computer with this program operates better than a similar prior art computer. To say "oh but that is only because it is a better program – the computer itself is unchanged" gives no credit to the practical reality of what is achieved by the program. As a matter of such reality there is more than just a "better program", there is a faster and more reliable computer.*

17 In my opinion there are number of differences between this case and the invention in *Symbian*[2]. Firstly, the use of different servers to control the presentation of information in different segregated areas of a web page does not appear to solve a technical problem lying with the computing system itself. Rather, it is done to realise a ‘better’ interface. Neither does the identified contribution result in a faster or more reliable computing system. In short, the computing system itself does not appear to be better as a matter of practical reality.

18 This conclusion is reinforced if I turn to CVON[3]. In paragraphs 39-41 of this case Lewison J states:

> *It seems to me, therefore, that Lord Neuberger's reconciliation of the approach in Aerotel (by which the Court of Appeal in Symbian held itself bound, and by which I am undoubtedly bound) continues to require our courts to exclude as an irrelevant "technical effect" a technical effect that lies solely in excluded matter.*
>
> *As Lord Neuberger pointed out, it is impossible to define the meaning of "technical effect" in this context, but it seems to me that useful signposts to a relevant technical effect are:*
>
> *i) whether the claimed technical effect has a technical effect on a process which is carried on outside the computer;*

ii) whether the claimed technical effect operates at the level of the architecture of the computer; that is to say whether the effect is produced irrespective of the data being processed or the applications being run;

iii) whether the claimed technical effect results in the computer being made to operate in a new way;

iv) whether there is an increase in the speed or reliability of the computer;

v) whether the perceived problem is overcome by the claimed invention as opposed to merely being circumvented.

And, if there is a technical effect in this sense, it is still necessary to consider whether the claimed technical effect lies solely in excluded matter.

19 In respect of the first signpost, there is no effect outside of the computer system, other than possibly that of a 'better' interface. However, following Gemstar[4] that does not seem to amount to a non-excluded technical effect.

20 In respect of the second signpost, the identified contribution does not operate at the level of the architecture of the computer system. While it does operate irrespective of what proprietary data is processed by the servers, it does not operate irrespective of the *applications* being run. It only occurs when the claimed interface is being used.

21 In respect of the third signpost, what the computer is actually doing is deciding which server controls which information in different segregated areas of a web page. As far as I can see the computer system itself is not operating in any new way. The fact that the host server and the source servers are non-affiliated does not alter this conclusion. Who owns which server is purely a business related decision.

22 In respect of the fourth signpost, I can see no evidence that the computer system itself is operating faster or with greater reliability. As discussed above, while the invention may reduce the bandwidth required when accessing different games, it only does so as a possible side effect of its 'better' interface. In the case of *Symbian*[2] it was accepted that an overall improvement in reliability was achieved. The contribution in this case does not seem to operate with anything like the same level of generality.

23 Finally, there is the fifth signpost. In this case the problem being solved is how to allow a user to play different wagering games without having to navigate to different web pages. To my mind, this is purely a business related problem. The application advances no technical reasons for solving it. Thus while the invention arguably does solves this problem, I still cannot see any non-excluded contribution.

24 So to summarise: the contribution is a web page having a plurality of icons, each icon allowing access to a different game under the control of one of a plurality of servers. I can see no technical effect outside the computer system. Neither is the computer system operating in a new way. The contribution does

not, in my opinion, create a better computer system, rather it creates a 'better' gaming interface. I am therefore forced to conclude that the contribution is excluded as no more than a program for a computer as such.

Check whether the contribution is actually technical in nature

25 As reasoned above, the contribution does not have a relevant technical effect. Thus the application fails the fourth *Aerotel* step.

Method of doing business

26 As I have decided that the invention is excluded as a program for a computer as such I do not need to consider any other excluded categories in any detail. There are business related aspects to the claimed invention, such as who owns which server and the fact that the stated reason for the invention is to allow improved access to wagering games. However, in my opinion, none of these aspects can result in a non-excluded contribution.

Decision

27 I have found that the contribution made by the invention defined in the independent claims falls solely in subject matter excluded under section 1(2) as a program for a computer as such. I have read the specification carefully and I can see nothing that could be reasonably expected to form the basis of a valid claim. I therefore refuse this application under section 18(3).

Appeal

28 Under the Practice Direction to Part 52 of the Civil Procedure Rules, any appeal must be lodged within 28 days.

Dr. Stephen Brown

Deputy Director, acting for the Comptroller