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Paper 14
Entered: October 18, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FANDUEL, INC.
DRAFTKINGS, INC.
BWIN.PARTY DIGITAL ENTERTAINMENT PLC,
Petitioner,

v.

CG TECHNOLOGY DEVELOPMENT, LLC,
Patent Owner.

Case IPR2017-00902
Patent RE39,818

Before THOMAS L. GIANNETTI, BARRY L. GROSSMAN, and MITCHELL G. WEATHERLY, *Administrative Patent Judges*.

GROSSMAN, *Administrative Patent Judge*.

DECISION
Institution of *Inter Partes* Review
*35 U.S.C. § 314; 37 C.F.R. § 42.108*

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# I. INTRODUCTION

## *A. Background*

FanDuel, Inc., DraftKings, Inc., and bwin.party Digital Entertainment PLC (collectively, "Petitioner"), filed a petition, Paper 1("Pet."), to institute an *inter partes* review of claims 1, 16, 20, 21, 24, 25, 31, and 32 (the "challenged claims") of U.S. Patent RE39,818 (the "'818 patent"). 35 U.S.C. § 311. CG Technology Development, LLC ("Patent Owner") timely filed a Preliminary Response. Paper 13 ("Prelim. Resp.").

We conclude that Petitioner has satisfied the burden, under 35 U.S.C. § 314(a), to show that there is a reasonable likelihood that Petitioner would prevail with respect to at least one of the challenged claims. Accordingly, on behalf of the Director (37 C.F.R. § 42.4(a)), we institute an *inter partes* review as stated in the accompanying Order.

## *B. Related Proceedings*

Petitioner each state that the '818 patent has been asserted in the following patent infringement lawsuits: *CG Technology Development, LLC et al. v DraftKings, Inc.*, Case No. 2:16-cv-00781 (D. Nevada); *CG Technology Development, LLC et al. v FanDuel, Inc.*, Case No. 2:16-cv-00801 (D. Nevada); *CG Technology Development, LLC et al. v bwin.party digital entertainment PLC et al.*, Case No. 2:16-cv-00871 (D. Nevada); *CG Technology Development, LLC et al. v Double Down Interactive, LLC,* Case No. 2: 16-cv-00858 (D. Nevada); *CG Technology Development, LLC et al. v Big Fish Games, Inc.,* Case No. 2:16-cv-00857 (D. Nevada); *CG Technology Development, LLC et al. v 888 Holdings PLC,* Case No. 2:16-cv-00856 (D. Nevada); and *CG Technology Development, LLC et al. v Zynga, Inc.,* Case

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No. 2:16-cv-00859 (D. Nevada). Pet. 1–2; Paper 7, 2–3. The parties also state that the ’818 patent is involved in an ownership dispute in *Russell Slifer v. CG Technology Development, L.P.*, Case No. 1:14-cv- 09661 (S.D.N.Y). Pet. 2; Paper 7, 3.

### *C. Asserted Grounds of Unpatentability*

Petitioner challenges claims on the following three grounds (Pet. 5):

| References | Basis | Claims Challenged |
|---|---|---|
| Walker[1] and Kelly[2] | § 103(a)[3] | 20, 21, 24, and 31, 32 |
| Walker, Kelly, and Viescas[4] | § 103(a) | 25 |
| Kelly and Walker | § 103(a) | 1, 16 |

The order in which references are listed is of no significance to the substance of the asserted basis of unpatentability. Thus, Petitioner’s Ground 1 and Ground 3 are the same and will be combined and considered as a single asserted basis of unpatentability. *See, e.g., In re Bush*, 296 F.2d 491, 496 (CCPA 1961) (“[i]n a case of this type where a rejection is predicated on two references each containing pertinent disclosure which has been pointed out to the applicant, we deem it to be of no significance, but

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[1] U.S. Pat. 5,779,549, issued July 14, 1998. Ex. 1007

[2] U.S. Pat. 5,816,918, issued Oct. 6, 1998. Ex. 1008.

[3] The Leahy-Smith America Invents Act (“AIA”), Pub. L. No. 112-29, 125 Stat. 284, 296–07 (2011), took effect on September 16, 2012. Because the application for the patent at issue in this proceeding has an effective filing date before that date, we refer to the pre-AIA versions of the statute.

[4] John L. Viescas, *The Official Guide to the Prodigy Service*, Microsoft Press (1991). Ex. 1009.

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merely a matter of exposition, that the rejection is stated to be on A in view of B instead of B in view of A, or to term one reference primary and the other secondary."); *see also In re Cook*, 372 F.2d 563, 566 n.4 (CCPA 1967).

Petitioner also adds the phrase "in further view of the Knowledge of a PHOSITA" to Petitioner's Grounds 2 and 3. *Id.* This phrase is superfluous. The applicable statute states that the determination of patentability is based on whether "the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." 35 U.S.C. § 103(a). Thus, the knowledge, skill, and creativity of a person having ordinary skill in the art ("PHOSITA") is a factor in every determination of patentability under § 103(a). *See KSR Int'l v. Teleflex Inc.*, 550 U.S. 398, 421 (2007) ("A person of ordinary skill is also a person of ordinary creativity.").

Thus we consider whether claims 1, 16, 20, 21, 24, 31, and 32 would have been obvious based on Walker and Kelly; and whether claim 25 would have been obvious based on Walker, Kelly, and Viescas.

## II. ANALYSIS

### *A. The '818 Patent*

The '818 patent discloses an interactive video system, such as a video game system, that allows the system to recognize individual users and adjust the game to each individual player, such as by varying the skill level. Ex. 1001, 1:21–24; 2:55–57. The disclosed system uses wireless game controllers that allow for personalized operation of an interactive video

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system based upon personal data transmitted from the controller. *Id.* at 1:49–53.

The disclosed video game system includes a central processing unit (CPU) connected to a video screen, and a wireless game controller. *Id.* at 2:60–67. The wireless controller transmits control signals to the CPU. *Id.* at 2:67–3:1. The controller can include a number of inputs, or switches, for providing signals to operate a video game. *Id.* at 3:1–3.

The controller includes a non-volatile memory device used to store personal information regarding the user, such as name, age, previous video game scores and statistics, and current skill level for a video game. *Id.* at 3:29–37. Each user can have a "personalized controller." *Id.* at 3:41–42. By including the age of a user as part of the stored personal information, operation of a video game can be prohibited based on the user's age, or adjusted to the age of the user. *Id.* at 3:42–48. .

The CPU also can contain a memory device that stores personal data corresponding to the personal data stored in the controller. This allows the wireless controller to transmit a user identification code to the CPU, which allows the CPU to retrieve stored personalized information for a specific user from the CPU memory. *Id.* at 3:49–58.

### *B. Illustrative Claim*

The challenged claims are all independent. They are directed to a "video game system" (claim 1); a "method of operating an interactive video system" (claim 16); a "game apparatus" (claim 20); a "method of playing an interactive game" (claim 21); a "gaming system" (claims 24 and 25); a "method of playing a game" (claim 31); and a "method of operating a game" (claim 32). Ex. 1001, 5:40–8:48. All of the challenged claims include a

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