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A new hope for inventors? Emerging liberalization of subject matter eligibility in *Trading Technologies v. CQG*

Last week, the Federal Circuit handed down an opinion in the case of *Trading Technologies International, Inc. v. CQG, Inc.*, affirming the lower court's decision that the asserted patent claims, which covered a software invention relating to improved graphical user interfaces for electronic stock trading, were patent eligible subject matter. Subject matter eligibility for software inventions has been an issue for some patent applicants in recent years, particularly for software inventions in business and financial fields. In handing down this opinion, the Federal Circuit designated it as being non-precedential, which is usually done when a decision "does not add significantly to the body of law." However, notwithstanding the designation of this case as non-precedential, it should still be seen as noteworthy as it indicates that the Federal Circuit may be coalescing around a relatively inventor-friendly approach to determining subject matter eligibility.

The change in approach which this case represents can be seen by contrasting it with the Federal Circuit's initial opinions applying the Supreme Court's decision in *Alice v. CLS Bank* to software inventions. In those early decisions, the Federal Circuit almost seemed poised to adopt a per-se rule that software-implemented inventions which solved business problems were not patent eligible.¹ However, *Trading Technologies* not only made clear that there was no such per-se rule,² it also demonstrated that an invention which solves a problem specific to a particular computer-enabled business context could be patent eligible even if it didn't include any further inventive concept to limit the scope of its claims.³ This result was consistent with, and built on, several recent Federal Circuit cases dealing with software-implemented inventions, including *Enfish LLC v. Microsoft Corp.*, which established that a software invention could be patent eligible even if it didn't include any

additional hardware-based inventive concept,⁴ and [*Bascom Global Internet Services, Inc. v. AT&T Mobility LLC*](#), which made clear that an invention which solved a business problem could be patent eligible if it was claimed in a manner which included an additional inventive concept.⁵ Accordingly, while non-precedential, the decision in *Trading Technologies* could be very useful as an inventor-friendly demonstration of how the Federal Circuit's precedential decisions (e.g., *Enfish* and *Bascom*) should be applied.

For further information, please contact [Doug Gastright](#), [William Morriss](#) or any other member of Frost Brown Todd's [Intellectual Property Practice Group](#).

¹ See, e.g., *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 721 (Fed. Cir. 2014) (Mayer, J. concurring):

A rule holding that claims are impermissibly abstract if they are directed to an entrepreneurial objective, such as methods for increasing revenue, minimizing economic risk, or structuring commercial transactions, rather than a technological one, would comport with the guidance provided in both *Alice* and *Bilski*.

² Indeed, *Trading Technologies* left no room for doubt that the problems solved by the invention it held to be patent eligible were business problems. *Trading Technologies International, Inc. v. CQG, Inc.*, No. 2016-1616 (Fed. Cir., Jan. 18 2017) at 3:

The '132 and '304 patents describe and claim a method and system for the electronic trading of stocks, bonds, futures, options and similar products. The patents explain problems that arise when a trader attempts to enter an order at a particular price, but misses the price because the marked moved before the order was entered and executed. It also sometimes occurred that trades were executed at different prices than intended, due to rapid market movement. This is the problem to which these patents are directed.

³ This was demonstrated by the fact that *Trading Technologies* concluded that the invention in question was patent eligible at step 1 of the *Alice* analysis (i.e., when determining whether it was "directed to" an abstract idea, and before considering whether it

included any additional inventive concept). See *Trading Technologies* at 6 (“The district court concluded that the patented subject matter meets the eligibility standards of *Alice* Step 1. We agree with this conclusion.”)

⁴ *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016):

Software can make non-abstract improvements to computer technology just as hardware improvements can, and sometimes the improvements can be accomplished through either route. We thus see no reason to conclude that all claims directed to improvements in computer-related technology, including those directed to software, are abstract and necessarily analyzed at the second step of *Alice*, nor do we believe that *Alice* so directs.

⁵ See *Bascom Global Internet Services, Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1348, 1350 (Fed. Cir. 2016):

Filtering content is an abstract idea because it is a longstanding, well-known method of organizing human behavior, similar to concepts previously found to be abstract...The claims do not merely recite the abstract idea of filtering content along with the requirement to perform it on the Internet, or to perform it on a set of generic computer components. Such claims would not contain an inventive concept... they recite a specific, discrete implementation of the abstract idea of filtering content. Filtering content on the Internet was already a known concept, and the patent describes how its particular arrangement of elements is a technical improvement over prior art ways of filtering such content.

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