

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VIGLINK, INC.,
and
SKIMLINKS, INC. and SKIMBIT, LTD.,
Petitioner,

v.

LINKGINE, INC.,
Patent Owner.

Case CBM2014-00184
Patent 7,818,214 B2¹

Before KEVIN F. TURNER, PHILLIP J. KAUFFMAN, and
KRISTINA M. KALAN, *Administrative Patent Judges*.

KALAN, *Administrative Patent Judge*.

FINAL WRITTEN DECISION
35 U.S.C. § 328(a) and 37 C.F.R. § 42.73

¹ Case CBM2015-00086 has been joined with this proceeding.

I. INTRODUCTION

A. Background

VigLink, Inc. (“VigLink”) filed a Petition (Paper 9, “Pet.”) to institute a covered business method patent review of claims 1–7 of U.S. Patent No. 7,818,214 B2 (Ex. 1001; “the ’214 patent”) pursuant to 35 U.S.C. §§ 321–329. Linkgine, Inc. (“Patent Owner”) filed a Preliminary Response. Paper 11. Based on these submissions, we instituted trial as to claims 1–7 of the ’214 patent. Paper 13 (“Dec.”).

Skimlinks, Inc. and Skimbit, Ltd. (collectively, “Skimlinks”), filed a Petition for *inter partes* review of claims 1–7 of the ’214 patent, which Petition was accorded a filing date of March 10, 2015. Case CBM2015-00086, Paper 1, Paper 10. On April 17, 2015, Skimlinks also filed a Motion for Joinder to join the case with the previously instituted proceeding in *VigLink, Inc. v. Linkgine, Inc.*, Case CBM2014-00184. Case CBM2015-00086, Paper 13. On June 12, 2015, we instituted trial in CBM2015-00086 and joined the case with Case CBM2014-00184. Case CBM2015-00086, Paper 17.

After institution, Patent Owner filed a Response (Paper 21, “PO Resp.”). VigLink and Skimlinks (collectively, “Petitioner”) filed a Reply (Paper 29, “Reply”). A consolidated oral hearing for CBM2014-00184 and CBM2014-00185 was held on December 4, 2015. A transcript of the argument is entered in the record. Paper 43 (“Tr.”).

We have jurisdiction under 35 U.S.C. § 6(c). This Final Written Decision is entered pursuant to 35 U.S.C. § 328(a). We conclude for the reasons that follow that Petitioner has shown by a preponderance of the

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evidence that claims 1–7 of the '214 patent are unpatentable. Petitioner's Motion to Exclude (Paper 30) is dismissed.

B. Related Matters

The parties indicate that the '214 patent is the subject of the following district court proceeding: *Linkgine, Inc. v. VigLink, Inc.*, No. 1:14-cv-00570 (E.D. Va.). Ex. 1003, Pet. 1; Paper 5, 1. In addition, U.S. Patent 8,027,883 B2 is the subject of a covered business method patent review in Case CBM2014-00185.

C. The '214 Patent (Ex. 1001)

The '214 patent relates to an affiliate manipulation system that permits consumers, Internet Service Providers (ISPs), search engines, and intermediaries to maximize affiliate program participation in transactions by or through them. Ex. 1001, Abstract. The operation of the affiliate manipulation system is illustrated in Figure 4 from the patent reproduced below:

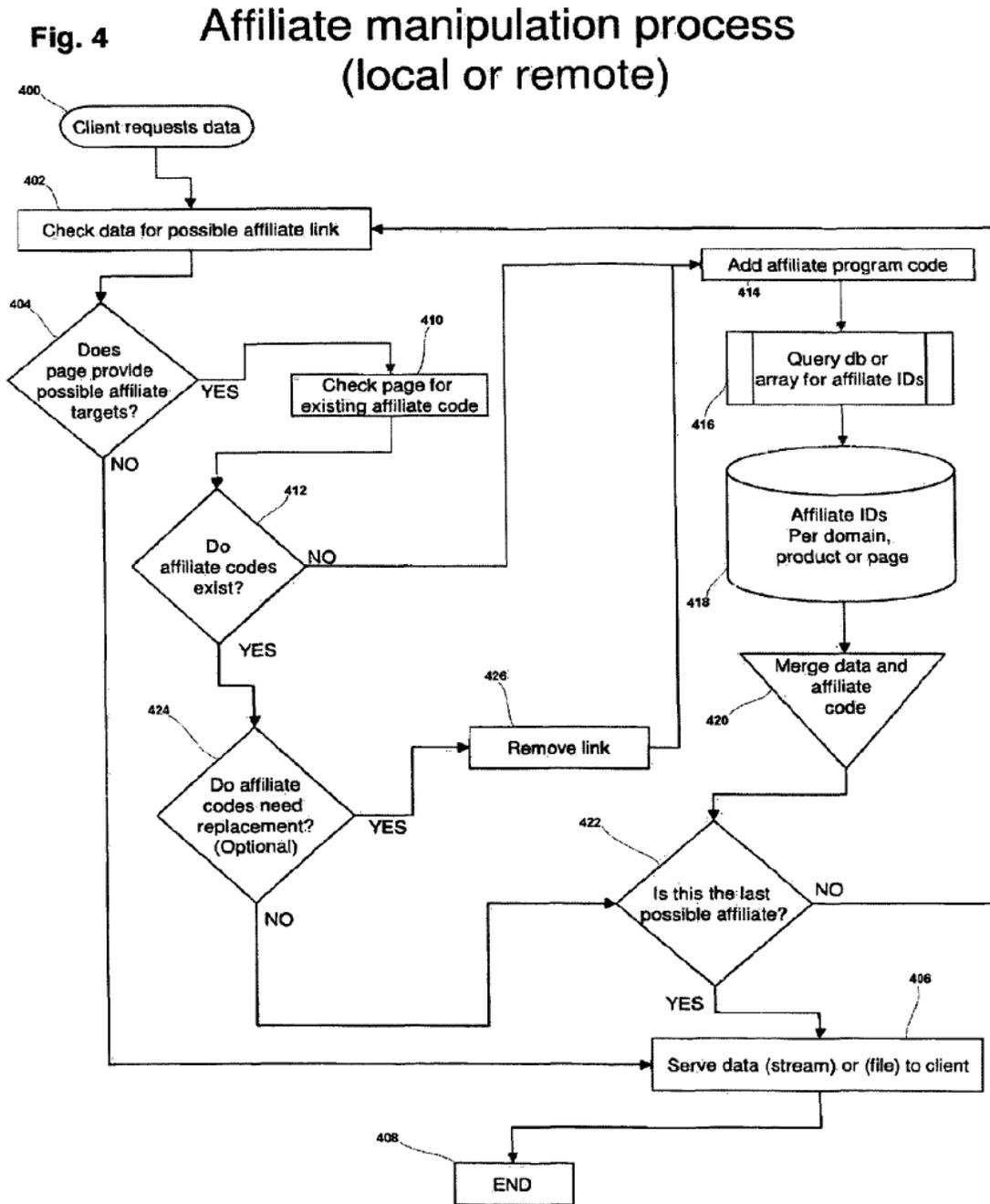


Figure 4 is a process flowchart for an embodiment of the affiliate manipulation system. *Id.* at 2:26–27. In the flowchart reproduced above, the user requests data through the Internet at step 400. *Id.* at 8:8–10. At step 402, the system checks the data for a possible affiliate link. *Id.* at 8:13–14. Affiliate links that contain URLs that participate in affiliate programs are

affiliate targets. *Id.* at 8:17–18. If there are no possible affiliate targets 404, the system serves the data to the user in step 406 and ends the process in step 408. *Id.* at 8:18–20. If there are possible affiliate targets, the system checks the URLs for existing affiliate codes in step 410; if no affiliate codes exist, the system adds the affiliate program code to the affiliate target information in step 414. *Id.* at 8:21–25. If affiliate codes exist, the system determines if the affiliate codes need to be replaced at step 424. *Id.* at 8:40–42. If the affiliate codes are not for a preferred commercial agent, then the existing affiliate code is removed in step 426, and the system continues to step 414. *Id.* at 8:42–45. At step 416, the system queries the database or array for affiliate information based on the affiliate target information; retrieves the affiliate information in step 418, and merges the data and affiliate code in step 420. *Id.* at 8:28–33. The system may then serve the data to the user and end the process if this is the last possible affiliate, or go back to step 402 to analyze the data for additional possible affiliate links. *Id.* at 8:33–37.

D. Illustrative Claim

Claims 1 and 7 are independent method claims. Claims 2–6 depend directly from claim 1. Claim 1 is reproduced below:

1. A method for operating an automated affiliate manipulation system comprising:
 - receiving a request for preexisting data from a first computer,
 - identifying the requested preexisting data at an intermediary computer, the intermediary computer being separate from the first computer, analyzing the requested preexisting data at the intermediary computer to automatically identify at least one data element corresponding to an affiliate-capable merchant,
 - determining that the at least one data element comprises an existing affiliate code

determining that the existing affiliate code does not comprise the preferred affiliate code,

creating modified data at the intermediary computer by automatically associating the preferred affiliate code with the data element, and removing any existing affiliate code associated with the data element, the modified data comprising at least one affiliate link, wherein the affiliate link comprises a URL associated with the affiliate-capable merchant, delivering the modified data to the first computer, and communicating the affiliate code to the affiliate-capable merchant upon selection of the affiliate link.

Ex. 1001, 8:56–9:12.

E. The Prior Art

Petitioner relies on US Patent No. 6,804,660 B2, issued October 12, 2004 (“Landau”) (Ex. 1010). Petitioner also relies on the Declaration of Dr. Michael Shamos (the “Shamos Declaration”) (Ex. 1007) in support of its arguments.

F. Instituted Grounds

References	Basis	Claims Instituted
	§ 101	1–7
Landau	§ 102(a)	1–7

G. Standing

We determined, in the Decision on Institution, that the ’214 patent is a covered business method patent, as defined in § 18(a)(1)(E) of the America Invents Act and 37 C.F.R. § 42.301, because at least one claim of the ’214 patent is directed to a covered business method. Dec. 8–12. Patent Owner does not dispute our previous analysis in its Patent Owner Response. Thus,

after considering the record again, we reaffirm our determination in the Decision on Institution and conclude that the '214 patent is eligible for a covered business method patent review.

II. ANALYSIS

A. Claim Construction

The Board interprets claims in an unexpired patent using the broadest reasonable construction in light of the specification of the patent in which they appear. 37 C.F.R. § 42.100(b); *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268, 1277–79 (Fed. Cir. 2015) (“We conclude that Congress implicitly approved the broadest reasonable interpretation standard in enacting the AIA.”), *cert. granted sub nom. Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 890 (mem.) (2016). Under the broadest reasonable interpretation standard, claim terms are given their ordinary and customary meaning in view of the specification, as would be understood by one of ordinary skill in the art at the time of the invention. *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007). Claim terms generally are given their ordinary and customary meaning, unless it appears from the specification or the file history that they were used differently by the inventor, in a clear, deliberate, and precise manner. *In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994).

In instituting trial, we expressly construed the terms “automatic/automatically” to mean “without human intervention.” Dec. 7–8. Neither party specifically addresses or contests this claim construction. Accordingly, we maintain our construction of the terms “automatic/automatically” to mean “without human intervention.”

B. Patentability of Claims 1–7 Under 35 U.S.C. § 101

1. Overview

Section 101 of the Patent Statute defines the subject matter eligible for patenting: “Whoever 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.

The Supreme Court, however, has “long held that this provision contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable.” *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2354 (2014) (quoting *Assoc. for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2116 (2013) (internal quotation marks and brackets omitted)). “The ‘abstract ideas’ category embodies the longstanding rule that ‘[a]n idea of itself is not patentable.’” *Id.* at 2355 (quoting *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972) (quotations omitted)).

In *Alice Corp.*, the Supreme Court emphasized the importance of the “*Mayo* framework,” which provides “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.” *Id.* (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1296–97 (2012)). Under the *Mayo* framework, first, we “determine whether the claims at issue are directed to a patent-ineligible concept.” *Id.* Next, “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.* (citing *Mayo*, 132 S. Ct. at 1298, 1297).

Under *Mayo*, to be patentable, a claim must do more than simply state the law of nature or abstract idea and add the words “apply it.” *Mayo*, 132 S. Ct. at 1294; *Benson*, 409 U.S. at 67. Furthermore, “the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.” *Alice Corp.*, 134 S. Ct. at 2358. “Thus, if a patent’s recitation of a computer amounts to a mere instruction to ‘implemen[t]’ an abstract idea ‘on . . . a computer,’ that addition cannot impart patent eligibility.” *Id.* (internal citation omitted). Thus, we first analyze the claims of the ’214 patent to determine whether the claims embody an abstract idea. If they do, then we proceed to determine whether the claims are meaningfully limited to a patent-eligible application of an abstract idea or cover nothing more than the abstract idea itself.

2. *Whether Claims 1–7 Are Directed to an Abstract Idea*

As the first step of our analysis, we must determine whether the claims at issue are directed to a patent-ineligible concept, such as an abstract idea. *See Alice Corp.*, 134 S. Ct. at 2355.

Petitioner contends that “[t]he ’214 Patent claims are directed to the basic mental process of identifying a string of characters and replacing the identified string of characters with a preferred string of characters.” Pet. 25. Petitioner focuses its § 101 arguments on claims 1 and 7, arguing that the claims are not meaningfully limited because they are directed to mental processes. *Id.* at 27–32. Petitioner asserts that the steps of “reading a web address, determining whether an affiliate code is appended to the end of the web address, and replacing the affiliate code with a preferred affiliate code”

are steps that can be performed by a person. *Id.* at 25; *see also* Reply 4–5 (discussing example of sales associate ID being replaced in a brick-and-mortar context). Petitioner supports this assertion by referring to the file history, in which “the then-Applicant analogized the claimed invention to the interaction between a bookstore and its salesperson.” Pet. 26; Ex. 1004, 356–57 (Patent Owner’s Reply, discussing bookstore example and stating “if this process [payment of commission] were repeated using (x) number of commissioned salespeople each automatically/dynamically receiving the commission for their applicable sale, it would demonstrate Applicant’s dynamic utility as an offline process.”); Tr. 16:14–21. Petitioner emphasizes that “the disclosed system is simply a way to capture commissions for sales leads by replacing the affiliate ID of the entity that generated the sales lead with an affiliate ID chosen by an intermediary.” Reply 1.

Patent Owner argues that the claims “are not directed to an abstract idea, and thus are patentable” and are not directed to a generic internet business practice, but rather are “drawn to such a specific computer-implemented method that transforms data in this specific way (thereby changing the normal operation of the Internet so that a preferred affiliate rather than another is given credit for a referral).” PO Resp. 18. However, “[a]n abstract idea does not become nonabstract by limiting the invention to a particular field of use or technological environment such as the Internet.” *Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1366 (Fed. Cir. 2015) (citations omitted). We are, therefore, not convinced by Patent Owner’s argument that the claims are not abstract because they are limited to a specific application.

We note that the fundamental issue at hand, allocating commissions, can be performed by humans, or with the aid of pencil and paper. *See, e.g., Mortgage Grader, Inc. v. First Choice Loan Servs.*, 811 F.3d 1314, 1324 (Fed. Cir. 2016) (noting that the steps of the claims could be performed by a human without the use of a computer in concluding that the claims at issue were drawn to an abstract idea); Tr. 17:16–21. Although we have considered Patent Owner’s arguments to the contrary, we see little difference between replacing one character set with another character set to denote the recipient of a commission and the type of fundamental economic practices considered to be abstract ideas in *Alice Corp.* and *Bilski*.² As established by the record, the concept of commissions, as well as the practice of allocating commissions, existed long before the internet. *See, e.g.,* Pet. 8–9 (citing Ex. 1004, 128, 132, 356–57).

Patent Owner argues that the ’214 patent claims “cover a method of operating an automated affiliated manipulation system” and thus are like the claims in *Diamond v. Diehr*, 450 U.S. 175 (1981), which also were not directed to a mathematical formula or any other abstract concept in isolation. PO Resp. 12. Patent Owner contends that, as in *Diehr*, “even if a limitation

²In *Alice Corp.*, the Supreme Court determined that the claims at issue were “drawn to the concept of intermediated settlement,” i.e., the use of a third party to mitigate settlement risk. *Id.* at 2356. Furthermore, the Supreme Court determined that “[l]ike the risk hedging in *Bilski*, the concept of intermediated settlement is ‘a fundamental economic practice long prevalent in our system of commerce.’” *Id.* (citations omitted). With respect to the first step of the “*Mayo* framework,” the Supreme Court concluded in *Alice Corp.* that “there is no meaningful distinction between the concept of risk hedging in *Bilski* and the concept of intermediated settlement” in *Alice Corp.*, and that “[b]oth are squarely within the realm of ‘abstract ideas’ as we have used that term.” *Id.* at 2357.

of the claims, in isolation, are directed to an abstract idea, the claims here are not abstract because they are directed to a claimed process performed on a system as a whole.” *Id.* at 13. Petitioner responds that the two “non-conventional steps” that rendered *Diehr* patentable are unlike the computer systems recited in the ’214 patent claims. Reply 7–8. We are unpersuaded by Patent Owner’s reliance on the outcome in *Diehr*. *Diehr* involved use of a well-known mathematical equation to solve a technological problem (curing rubber) in conventional industry practice. See *Versata Dev. Grp. v. SAP Am. Inc.*, 793 F.3d 1306, 1332–33 (Fed. Cir. 2015). Here, in contrast, the problem purportedly addressed by the ’214 patent, the allocation of commissions, is a business need, not a technological problem. The steps recited in the ’214 patent claims disclose few technological details, but rather focus on conventional computers performing the steps of receiving, delivering, and communicating data, none of which represent technological advances.

Patent Owner also analogizes the invention of the ’214 patent to the invention at issue in *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014), stating that the ’214 patent claims “recite ‘modified data’ that includes at least one affiliate link, wherein the affiliate link comprises a URL associated with the affiliate-capable merchant.” PO Resp. 14. Petitioner disagrees with this analogy, in that *DDR Holdings* “has no applicability” to patent claims that do not address problems unique to the internet. Reply 9. *DDR Holdings* “drew a distinction between the patent-eligible claims at issue and patent-ineligible claims in the past that had merely recited commonplace business methods aimed at processing business information, applying known business processes to particular technological

environments.” *Versata*, 793 F.3d at 1333. Patent Owner’s argument overlooks the distinction made in *DDR Holdings* between technical solutions and claims reciting “commonplace business methods,” such as commission allocation. Unlike the claims in *DDR Holdings*, there is nothing in Patent Owner’s claims that makes them “Internet-centric.” The mere reference in the claims to an automated system or method having a first computer, a second computer, and an intermediary computer does not suffice. The claims “are not rooted in computer technology to solve a problem specifically arising in some aspect of computer technology.” *Versata*, 793 F.3d at 1334.

Patent Owner also argues that the ’214 patent claims are like the claims at issue in *PNC Bank, Nat’l Assoc. v. Secure Access, LLC.*, CBM2014-00100, slip op. at 19–21 (PTAB Sept. 9, 2014) (Paper 10), which were found not to recite an abstract idea in that they related to a computer-implemented method to transform data in a particular manner. PO Resp. 16. Petitioner responds that the abstract idea embodied in the ’214 patent “permeates the claims,” and thus the *PNC Bank* decision, in which the petitioner failed to adequately tie the abstract idea to the claim language, is inapplicable. Reply 10–11. Petitioner states that steps 1–3 of claim 1 can be reduced to “the mental process of identifying a web address that includes an affiliate code,” “step 4 involves the mental process of determining that the detected affiliate code is not a preferred affiliate code,” and “step 5 merely consists of replacing the detected affiliate code with the preferred affiliate code.” Pet. 28, 30–31. We are not persuaded that the case at hand resembles the situation in *PNC Bank*, in that Petitioner here has identified

sufficiently how each step of the challenged claims ties in to the abstract idea. *Id.* at 27–32; Reply 10–12.

We conclude, therefore, that Petitioner has demonstrated that the ’214 patent claims, like the claims in *Bilski* and *Alice*, are directed to an abstract idea, namely, replacing one character set with another character set to denote the recipient of a commission.

3. *Whether Claims 1–7 Are Meaningfully Limited*

The second step of the Supreme Court’s “*Mayo* framework” requires that we consider the elements of the claim and determine whether there is 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.’” *Alice Corp.*, 134 S. Ct. at 2355 (quoting *Mayo*, 132 S. Ct. at 1294).

A challenged patent claim, properly construed, must incorporate enough meaningful limitations to ensure that it claims more than just an abstract idea and not just a mere “‘drafting effort designed to monopolize the [abstract idea].’” *Id.* at 2357 (quoting *Mayo*, 132 S. Ct. at 1297). “Simply appending conventional steps, specified at a high level of generality,” is not “*enough*” for patent eligibility. *Id.* (quoting *Mayo*, 132 S. Ct. at 1297, 1300).

Petitioner argues that, other than the claimed mental process, “claim 1 includes nothing but the conventional computer operations of ‘receiving a request for preexisting data from a first computer,’ ‘delivering [] modified data to the first computer, and communicating [an] affiliate code to [an] affiliate-capable merchant upon selection of [an] affiliate link.’” Pet. 28.

Petitioner further argues that “no novel or otherwise unique machine is needed to perform the claimed methods.” *Id.* at 32.

Patent Owner argues that the ’214 patent claims are “drawn to such a specific computer-implemented method that transforms data in this specific way (thereby changing the normal operation of the Internet so that a preferred affiliate rather than another is given credit for a referral).” PO Resp. 18. Patent Owner argues that the claimed subject matter “solves technical problems and improved technical systems.” PO Resp. 19. Patent Owner faults Petitioner for overlooking the express requirement of the “intermediate computer” performing express requirements of the claims. *Id.* at 20. Patent Owner also argues that the claims represent a specific application of particular devices to perform the alleged abstract idea. *Id.* at 21. For example, Patent Owner argues that the “altering of the usual operation of the Internet (where affiliate credits are given to the merchant whose code is originally present, Ex. 1001 at 1:23–28) is significantly more than mere character string replacement.” *Id.* at 21–22.

Petitioner responds that recitation of a generic computer component, such as an “intermediate computer,” does not pass step two of *Alice*. Reply 12. Petitioner also argues that the ’214 patent does not change the usual operation of the internet through its disclosure of the intermediary computer, as its claims “do not recite any technological improvements to the operation of computers, routers, or any of the other hardware used to implement the Internet.” *Id.* at 14; *see also* Tr. 20:4–9.

Patent Owner’s argument that the claims are meaningfully limited because they recite steps performed by an intermediate computer is unavailing. PO Resp. 22–23. We are not convinced that reciting a standard

computer performing a standard computer operation imposes meaningful limitations on the abstract idea. We agree with Petitioner that the disclosures regarding the technical details of the “intermediary computer” are sparse, and do not make the intermediary computer specialized. Claims do not become patent-eligible under § 101 simply for reciting a known, general purpose computer. *Benson*, 409 U.S. at 67 (invalidating as patent-ineligible claimed processes that “can be carried out in existing computers long in use, no new machinery being necessary,” or “can also be performed without a computer”). The Supreme Court rejected a similar argument, determining that “the claims at issue amount to ‘nothing significantly more’ than an instruction to apply the abstract idea of intermediated settlement using some unspecified, generic computer.” *Alice Corp.*, 134 S. Ct. at 2360 (quoting *Mayo*, 132 S. Ct. at 1298).

Finally, we address Patent Owner’s argument that the patents should stand under § 101 because there is no preemption. PO Resp. 23. We are not convinced that this argument has merit. As the Federal Circuit recently explained in *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015), “questions on preemption are inherent in and resolved by the § 101 analysis.” Thus, “[w]hile preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility.” *Id.* Accordingly, the issue of preemption is “resolved” by our analysis and resolution of the § 101 issues, and Patent Owner’s separate argument based on the asserted absence of preemption is unavailing.

In the context of patent-eligible subject matter, we discern no meaningful distinction between independent claim 1, a method claim, and

independent claim 7, also drawn to a method, as claim 7 recites the same functions as the method steps of claim 1, with differences in certain limitations. Claims 2–5 involve permutations of retrieving the preexisting data from either a plurality of sources or a single source, and delivering modified data to either a single user or to a plurality of users. Ex. 1001, 9:13–24. Claim 6 further comprises “defining the intermediary computer as a server.” *Id.* at 9:25–26. We have also reviewed these dependent claims, and, for similar reasons as discussed above, we determine that claims 2–6 do not add any limitations that would transform the claims into patent-eligible subject matter. Well-understood, routine, conventional activity does not add significantly more to the abstract idea. *Mayo*, 132 S. Ct. at 1298. Moreover, Patent Owner does not point to any specific limitation in any of the dependent claims that would change the patent-eligibility analysis.

In summary, Petitioner has demonstrated by a preponderance of the evidence that the claims of the ’214 patent are not patentable because they are directed to ineligible subject matter under 35 U.S.C. § 101.

C. Asserted Ground of Unpatentability Under 35 U.S.C. § 102

Landau discloses a method, system, and computer program for affording “Virtual Affiliates” access to an existing affiliate system. Ex. 1010, Abstract. Virtual affiliates are affiliates that are not registered with a particular Merchant’s affiliate system. *Id.* at 7:49–50. In Landau, a Webmaster operates a web site, through which a request for a target Merchant web site triggers a correlation function, such that “the source Webmaster unique identifier [source Webmaster ID] is correlated to a target Webmaster unique identifier [target Webmaster ID] functional within the unique identification system of the requested Merchant system.” *Id.* at

Abstract. The request may contain the “source Webmaster ID” and the “target system identifier,” and may also contain information identifying the source affiliate system of the Webmaster (a “source system identifier”), either within the URL or based on other information in the URL (such as the source Webmaster ID). *Id.* at 10:20–29. Then, a properly formatted entry mechanism URL is returned, enabling a hand off to the target Merchant affiliate system and including the correlated target Webmaster unique identifier. *Id.* at Abstract.

Petitioner argues that claims 1–7 are anticipated by Landau, cites to support in the Shamos Declaration, and presents a claim chart that it argues shows how Landau discloses “each and every element of the limitations of claims 1–7, which are therefore anticipated by Landau.” Pet. 32–51. Petitioner argues that “claim 7 is anticipated by Landau for at least the reasons stated above with regard to claim 1” and that “the difference in claim language is not sufficient to alter the above analysis of Claim 1 with respect to Landau.” *Id.* at 42. Petitioner’s Landau claim chart refers back to its claim 1 analysis to disclose the claim 7 elements. *Id.* at 49–52.

Patent Owner responds that Landau, which is directed to a “pre-arranged hub or pool of affiliate networks in which a webmaster in one affiliate network is able to access merchants in other affiliate networks” does not “automatically search for affiliate-capable data elements in data requested from users nor does it make any attempt to dynamically obtain a preferred affiliate code for any particular request.” PO Resp. 24–25.

Claim 1 requires “determining that the existing affiliate code does not comprise the preferred affiliate code.” Ex. 1001, 8:66–67, 9:1–2. Petitioner identifies the “target Webmaster ID” of Landau as disclosing the “preferred

affiliate code” of claim 1, alleging that the “determining that the existing affiliate code does not comprise the preferred affiliate code” claim element is disclosed by Landau’s “lookup operation to determine a target Webmaster ID (i.e., the preferred affiliate code).” Pet. 35, 44–45. Specifically, Petitioner argues that Landau discloses a URL containing a unique identifying code for the Webmaster within his origin affiliate system (i.e., an existing affiliate code), which is then subjected to a database lookup to correlate the source Webmaster ID (existing affiliate code) to a target Webmaster ID (the preferred affiliate code). *Id.* (citing Ex. 1010, 14:46–66). Regarding these limitations, Patent Owner discusses, first, how the specification of the ’214 patent determines that “the data element is not associated with a preferred affiliate code.” *See* PO Resp. 25–26. Patent Owner then argues that Landau does not disclose the “preferred affiliate code,” and that “Petitioner does not point to anything in Landau that discloses a preferred affiliate code whatsoever.” *Id.* at 26. Petitioner, in turn, faults Patent Owner for basing its argument on the specification’s process for determining if an existing affiliate code is the preferred affiliate code, arguing that “Patent Owner’s distinctions are not based on the claim language and have no bearing on the anticipation analysis.” Reply 16–17.

Based on Petitioner’s argument and the record before us, we are persuaded that Landau discloses a preferred affiliate code. Landau’s lookup operation determines that the existing affiliate code (Landau’s source Webmaster ID) is present, but recognizes that it is not the preferred affiliate code to complete the transaction. The existing affiliate code (Landau’s source Webmaster ID) is swapped out for the preferred affiliate code (Landau’s target Webmaster ID). The target Webmaster ID is the preferred

affiliate code used by Landau to complete the transaction. Use of the word “preferred” to modify the term “affiliate code” indicates that the preferred affiliate code is a different element than existing affiliate code, and is preferred to the existing affiliate code within the affiliate manipulation system. We have not been directed by Patent Owner to any portion of the specification that persuasively indicates otherwise.³ Thus, Landau’s identification of the target Webmaster ID as the preferred alternative affiliate code to the existing affiliate code meets this limitation of the claims.

Second, regarding the same claim 1 limitation of “determining that the existing affiliate code does not comprise the preferred affiliate code,” Patent Owner argues that the lookup operation and replacement of source Webmaster ID in Landau is performed automatically, such that Landau does not disclose “determining whether to replace the webmaster ID.” *Id.* at 27. In Landau, Patent Owner argues, the source Webmaster ID is always replaced. *Id.* Preliminarily, we agree with Petitioner that the claim does not require “determining whether to replace the webmaster ID,” and we instead look to the actual language of the claims. Reply 17–18. To disclose “determining that the at least one data element comprises an existing affiliate code” and “determining that the existing affiliate code does not comprise the

³ At oral hearing, Patent Owner was asked whether existing affiliate code and preferred affiliate code contained non-functional descriptive material; the issue was not resolved at hearing. Tr. 45:4–49:3. Petitioner, when asked whether these terms were “not just nonfunctional descriptive material,” and whether “there is some function to the word ‘preferred’” responded “Yes.” Tr. 63:21–64:1. We do not find for the purposes of this decision that our determination relies on whether the terms “existing affiliate code and preferred affiliate code” are non-functional descriptive material.

preferred affiliate code,” Petitioner relies on the steps disclosed in Figure 6 of Landau. Pet. 34–35 (citing Ex. 1010, 14:46–66), 43–45. These steps include receiving operation 604, in which the received URL contains a source Webmaster ID (existing affiliate code), followed by lookup operation 606, in which the lookup function determines a correlating target Webmaster ID (preferred affiliate code) for the source Webmaster ID (existing affiliate code). Figure 6 “is a flowchart showing a method 508 for processing and correlating user request data.” Ex. 1010, 14:38–39. Method 508 is described elsewhere in Landau as a “correlation operation” in which “the affiliate pooling system parses the request to determine the unique ID of the referring Webmaster (source Webmaster ID).” Ex. 1010, 10:44–50; *see also* Tr. 27:19–22 (stating that Landau “actually uses the language ‘determine’ in the patent itself”). Petitioner argues that, in other words, “the method of FIG. 6 continues *if a determination is made that the data element comprises an existing affiliate code.*” Reply 18. We are persuaded that Landau determines that the data element comprises an existing affiliate code, and determines that the existing affiliate code does not comprise the preferred affiliate code, in operation 508 and in steps 604 and 606. Ex. 1010, 14:44–66.

Claim 1 also requires “analyzing the requested preexisting data at the intermediary computer to automatically identify at least one data element corresponding to an affiliate-capable merchant.” Petitioner relies on Landau’s receiving operation 604, which discloses that the URL received includes information including a source Webmaster ID and a target system identifier (identifier for the Merchant whose product or service is offered). Pet. 34–35 (citing Ex. 1010, 14:45–51). Petitioner reiterates in its Reply that

it relies on Landau's disclosure of an affiliate pooling method including receiving a URL (i.e., at least one data element) that includes "1) the unique identifying code for the Webmaster within his origin affiliate system or pool (source Webmaster ID), and 2) some identifier for the Merchant whose product or service is offered [i.e., *corresponding to an affiliate-capable merchant*]." Reply 18 (citing Ex. 1010, 14:46–51). Patent Owner challenges this reliance, stating that because "the data received is required to be a URL to an affiliate-capable merchant (i.e., such URLs are the *only* permitted forms of URLs in Landau), Landau does not disclose anything that identifies 'at least one data element corresponding to an affiliate-capable merchant.'" PO Resp. 29. Patent Owner also argues that Landau does not disclose this limitation because, in part, Landau presumes the data it is receiving correspond to an affiliate-capable merchant. *Id.* at 28. Petitioner disagrees, stating that the "target system identifier" included in the preexisting data is analyzed in lookup operation 606, which involves finding "the database assigned to the target Merchant affiliate system (target system identifier)." Reply 18 (citing Ex. 1010, 14:58–61). The claim language requires "analyzing the requested preexisting data . . . to automatically identify." Receiving operation 604 of Landau receives the incoming data and proceeds to lookup operation 606, which identifies at least one data element corresponding to an affiliate capable-merchant. Patent Owner does not identify any reason that the "analyzing" portion of "analyzing . . . to automatically identify" means "analyzing" for any other purpose. Patent Owner does not point to any further analysis required in this step of the claim, in addition to identifying a data element corresponding to an affiliate-

capable merchant. Landau, through steps 604 and 606, discloses this limitation.

Claim 1 also requires “creating modified data at the intermediary computer by automatically associating the preferred affiliate code with the data element.” Ex. 1001, 9:3–5. To disclose this limitation, Petitioner relies on Landau’s creation of a new, transformed URL in “new URL determination operation 612,” in which the “new URL is determined based on the target Merchant and the target Webmaster ID.” Pet. 35–36, 45 (citing Ex. 1010, 15:29–34; 15:42–45); Tr. 31:15–19 (“Landau discloses two different ways of substituting the target for the source. The first is returning a new URL. . . . the second is it refers to a transformation or a change of the URL to reflect the target webmaster ID.”). Regarding this limitation, Patent Owner argues that Landau does not disclose the modified data. PO Resp. 30–31. Landau, according to Patent Owner, generates an entirely new URL directed to the target merchant, rather than preserving the original URL, and thus “does not modify data, but rather replaces it completely.” *Id.* at 31. Petitioner’s citations and argument support its assertion that Landau removes the existing affiliate code (i.e., the source Webmaster ID) and associates the preferred affiliate code (i.e., the target Webmaster ID) with the data element to create modified data (i.e., the new or changed URL). Petitioner argues that Landau expressly states: “In one instance of real time use, the user begins by requesting one URL, but by the time the lookup function is done, the URL is transformed [i.e., modified], thus re-directing the user to another URL immediately.” Reply 19 (citing Ex. 1010, 15:42–45). We are in agreement with Petitioner’s argument that the data of Landau are modified and result in modified data containing the preferred affiliate code.

Claim 7 requires, in part, “determining that the existing affiliate code is not associated with a preferred commercial agent.” Ex. 1001, 10:12–13. Petitioner’s arguments for claim 7 are substantially similar to its arguments for claim 1, particularly with respect to this limitation, about which Petitioner states that the phrases “determining that the existing affiliate code is not associated with a preferred commercial agent” from claim 7 and “determining that the existing affiliate code does not comprise the preferred affiliate code” from claim 1 “appear to be equivalent.” Pet. 39. Petitioner identifies a URL disclosed in Landau, “<http://www.cdmerchant.com/affiliate/1001/product.html>,” as disclosing an affiliate link associated with both the preferred commercial agent (i.e., the affiliate suffix/code) and the affiliate-capable merchant (i.e., the domain). *Id.* at 41.

Patent Owner’s arguments for claim 7 are similar to those for claim 1, with the exception of the “preferred commercial agent” limitation. PO Resp. 31. Patent Owner faults Petitioner’s identification as “[a]t best” including an affiliate-capable merchant and an affiliate code or ID. PO Resp. 32. Petitioner replies that “a URL associated with the affiliate-capable merchant that is associated with a preferred affiliate code necessarily discloses “an affiliate link associated with the preferred commercial agent.” Reply 20.

The specification provides that “preferred commercial agent” is “the party or parties designated to receive credit for the commercial transactions.” Ex. 1001, 6:24–26. The example URL in Landau cited by Petitioner includes an affiliate suffix/code 1001. This affiliate suffix/code 1001 (i.e., source Webmaster ID) identifies “Webmaster Fred.” Ex. 1010, 17:10–17. In this same example, however, the new URL returned by Landau is

“<http://www.musicmemorabilia.com/affiliatepartners/cd1001/poster.html>.”

This URL includes an affiliate suffix/code cd1001. *Id.* at 18:37–38. This affiliate suffix/code cd1001 (i.e., target Webmaster ID), also identifies Webmaster Fred. *Id.* at 18:28–30 (“In this example, Fred’s CDMerchant.com code is 1001. Essociate’s server looks up this source Webmaster ID and correlates it with the target Webmaster ID ‘cd1001.’”) Ultimately, Webmaster Fred is the party designated to receive credit for the commercial transaction. *Id.* at 19:25–26 (“In this example, the Essociate system calculates Fred’s commission as \$5.00.”) Thus, Fred is the preferred commercial agent.

Claim 7, however, requires “determining that the existing affiliate code is *not* associated with a preferred commercial agent.” In the Landau example cited by Petitioner, the data element comprises an existing affiliate code associated with a preferred commercial agent (i.e., 1001, associated with Webmaster Fred). Thus, Petitioner has not shown that Landau discloses “determining that the existing affiliate code is *not* associated with a preferred commercial agent,” because Landau determines that the existing affiliate code is associated with a preferred commercial agent.

As noted above, claims 2–5 involve permutations of retrieving the preexisting data from either a plurality of sources or a single source, and delivering modified data to either a single user or to a plurality of users. Ex. 1001, 9:13–24. Claim 6 further comprises “defining the intermediary computer as a server.” *Id.* at 9:26. Petitioner presents separate arguments directed to whether Landau anticipates claims 2–6. Pet. 37–39, 46–49. Specifically, Petitioner argues that Landau “discloses these claim limitations to the extent the system of Landau is usable to retrieve data from multiple

sources and to provide modified data to multiple users” and also “inherently discloses the limitations of claims 2–5 in that the system of Landau is usable to retrieve data from any number of a plurality of sources including a single source and to provide modified data to any number of a plurality of users including a single user.” *Id.* at 37. Petitioner also cites to specific examples in Landau in which the various permutations of claims 2–5 are disclosed. *Id.* at 38–39, 46–48. Regarding claim 6, Petitioner cites to Landau’s example in which an intermediate computer, namely, the Essociate server, is defined as a server. *Id.* at 39 (citing Ex. 1010, 18:15–17). We have also reviewed these dependent claims in view of Petitioner’s arguments of anticipation based on Landau, and adopt Petitioner’s reasoning regarding these claims. Based on the record before us, we are persuaded that Petitioner has demonstrated by a preponderance of the evidence that claims 1–6 are anticipated by Landau. Petitioner has not established by a preponderance of the evidence that claim 7 is anticipated by Landau.

D. Conclusion

We determine that Petitioner has established by a preponderance of evidence that claims 1–7 are unpatentable.

III. MOTION TO EXCLUDE

Petitioner filed a Motion to Exclude (Paper 30, “Mot. to Excl.”), to which Patent Owner responded (Paper 36) and on which Petitioner filed a Reply (Paper 37). Petitioner’s motion seeks to exclude Exhibits 2003 and 2004 as irrelevant. Mot. to Excl. 1–4. The moving party has the burden of proof to establish that it is entitled to the requested relief. 37 C.F.R. § 42.20(c). Patent Owner does not cite to Exhibits 2003 and 2004 in its Response, and we do not rely upon Exhibits 2003 and 2004 in our present

determination. The Motion to Exclude, therefore, need not be decided as to these Exhibits. Accordingly, the Motion to Exclude is *dismissed* as to Exhibits 2003 and 2004.

IV. ORDER

In consideration of the foregoing, it is hereby
ORDERED that claims 1–7 of U.S. Patent No. 7,818,214 B2 are unpatentable;
FURTHER ORDERED that Petitioner’s Motion to Exclude is dismissed; and

FURTHER ORDERED that this is a Final Decision. Parties to the proceeding seeking judicial review of the decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

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