

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

LINKGINE, INC.,
Patent Owner.

Case CBM2015-00087
Patent 8,027,883 B2

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

KALAN, *Administrative Patent Judge*.

DECISION

Institution of Covered Business Method Review and
Grant of Motion for Joinder

37 C.F.R. § 42.208

37 C.F.R. § 42.222(b)

I. INTRODUCTION

Skimlinks, Inc. and Skimbit, Ltd. (“Petitioner”) filed a Petition to institute a covered business method (“CBM”) review of claims 1–8 of U.S. Patent No. 8,027,883 B2 (Ex. 1002, “the ’883 patent”). Paper 1 (“Pet.”). On April 17, 2015, Petitioner filed a Motion for Joinder (“Mot.,” Paper 10) seeking to join this proceeding with *VigLink, Inc. v. Linkgine, Inc.*, Case CBM2014-00185 (the “VigLink CBM”). Mot. 1. Linkgine, Inc. (“Patent Owner”) did not file an opposition to Petitioner’s Motion. Patent Owner filed a Waiver of Preliminary Response. Paper 13. We have jurisdiction under 35 U.S.C. § 324, which provides that a post-grant review may not be instituted “unless . . . it is more likely than not that at least 1 of the claims challenged in the petition is unpatentable.”

For the reasons that follow, we determine that the ’883 patent qualifies as a covered business method patent under § 18(d)(1) of the Leahy-Smith America Invents Act (“AIA”). Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284, 331 (Sept. 16, 2011). We further determine that it is more likely than not that at least one claim of the ’883 patent is unpatentable. We, therefore, (1) institute a covered business method patent review of claims 1–8, *see* 35 U.S.C. § 324(a), and (2) grant Petitioner’s Motion for Joinder.

A. *Related Cases*

The ’883 patent is at issue in *Linkgine, Inc. v. Skimlinks, Inc. and Skimbit, Ltd.*, No. 1:14-cv-00571 (E.D. Va.) (“the district court proceeding”). Paper 9, 2; Pet. 5. We instituted trial in the VigLink CBM on March 20, 2015. VigLink CBM, Paper 12. In addition, Petitioner has filed a

petition for covered business method patent review of U.S. Patent 7,818,214 B2 (CBM2015-00086).

B. The '883 Patent

The '883 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. 1002, Abstract. The operation of the affiliate manipulation system is illustrated in Figure 4 from the patent reproduced below:

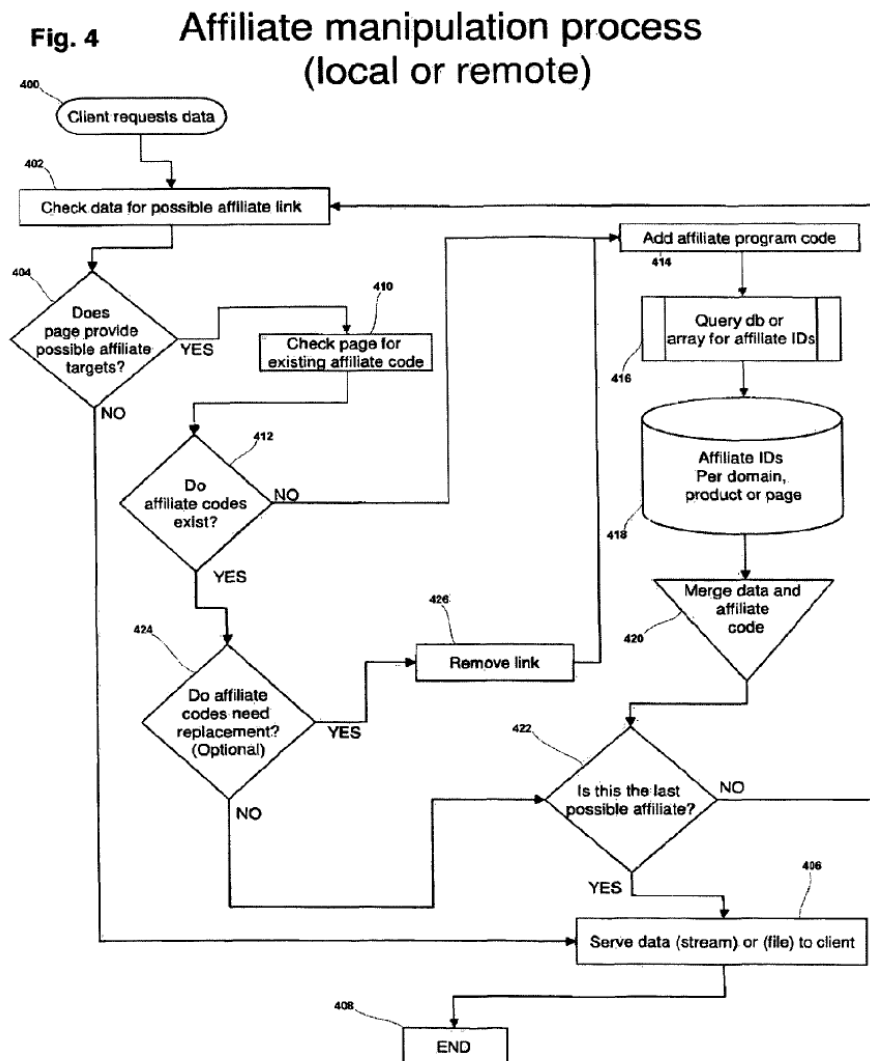


Figure 4 is a process flowchart for an embodiment of the affiliate manipulation system. *Id.* at 2:31–32. In the flowchart reproduced above, the user requests data through the Internet at step 400. *Id.* at 8:11–13. At step 402, the system checks the data for a possible affiliate link. *Id.* at 8:16–17. Affiliate links that contain Uniform Resource Locators (“URLs”) that participate in affiliate programs are affiliate targets. *Id.* at 8:20–21. 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 8:21–23. 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 8:25–29. If affiliate codes exist, the system determines if the affiliate codes need to be replaced at step 424. *Id.* at 8:44–46. If the existing affiliate code is 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 8:46–49. 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 8:32–37. 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 8:37–43.

C. Illustrative Claim

Claims 1 and 8 are independent method claims. Claims 2–7 depend directly from claim 1. Claim 1 is illustrative:

1. A method for operating an automated affiliate manipulation system comprising:
 - identifying a transmission of preexisting data directed toward a first computer over a communication network,
 - identifying the preexisting data at an intermediary computer, the intermediary computer being separate from the first computer,
 - analyzing the 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 data element is not associated with a preferred affiliate code,
 - removing the existing affiliate code associated with the data element,
 - creating modified data at the intermediary computer by associating the preferred affiliate code with the data element, the modified data comprising at least one affiliate link associated with the affiliate-capable merchant,
 - delivering the modified data to the first computer, and
 - communicating the preferred affiliate code to the affiliate-capable merchant upon selection of the affiliate link.

Ex. 1002, 8:60–9:16.

D. The Asserted References

Petitioner relies on the following references:

1. U.S. Patent No. 6,804,660 B2, issued October 12, 2004 (“Landau”) (Ex. 1010);
2. Int’l Pub. No. WO 00/58861 A1, published October 5, 2000 (“Priest”) (Ex. 1012); and
3. Robert McRackan, “Overture Partnering with Gator,” *The LED Digest*, 1576, 1 (May 8, 2003), *available at* <http://www.abestweb.com/forums/suspicious-activity-161/led-digest-articleoverture-gator-partnership-29873.html>. (“McRackan”) (Ex. 1013).

E. The Asserted Grounds

Petitioner challenges claims 1–8 of the '883 patent on the following grounds:

Reference(s)	Basis	Claims Challenged
	§ 101	1–8
Landau	§ 102(a)	1–8
Priest	§ 102(a)	1–8
Priest and McRackan	§ 103	1–8

II. ANALYSIS

A. Claim Construction

Consistent with the statute and the legislative history of the AIA, the Board will interpret claims in an unexpired patent using the broadest reasonable construction. *See* 37 C.F.R. § 42.300(b); *Office Patent Trial Practice Guide*, 77 Fed. Reg. 48,756, 48,766 (Aug. 14, 2012); *see also In re Cuozzo Speed Techs., LLC*, No. 778 F.3d 1271, 1281 (Fed. Cir. 2015) (“We conclude that Congress implicitly adopted the broadest reasonable interpretation standard in enacting the AIA.”). There is a “‘heavy presumption’ that a claim term carries its ordinary and customary meaning.” *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002).

Petitioner proposes constructions for four claim terms: “first computer,” “intermediary computer,” “server,” and “serving.” Pet. 21–24.

For the purposes of this decision, and on this record, we determine that no claim term needs express interpretation apart from the following. *See Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir.

1999) (holding that only those terms that are in controversy need to be construed, and only to the extent necessary to resolve the controversy).

“automatic/automatically”

The term “automatically” appears in claim 1. In the VigLink CBM, Patent Owner proposed that we interpret the term “automatic/automatically” as “without human intervention.” VigLink CBM, Paper 12, 7–8. The Specification provides that “the process may appear to be seamless and instantaneous to a user or buyer.” Ex. 1002, 4:28–29.

Based on the disclosure in the Specification and on our comparable analysis in the VigLink CBM, and applying the broadest reasonable interpretation, we construe “automatic/automatically” to mean “without human intervention.”

B. Whether Petitioner Has Standing to Seek Covered Business Method Patent Review of the '883 Patent

Under § 18(a)(1)(E) of the AIA, the Board may institute a transitional proceeding only for a patent that is a covered business method patent. Section 18(d)(1) of the AIA defines the term “covered business method patent” to mean:

a patent that claims a method or corresponding apparatus for performing data processing or other operations used in the practice, administration, or management of a financial product or service, except that the term does not include patents for technological inventions.

AIA, 125 Stat. at 331; *see also* 37 C.F.R. § 42.301(a) (restating this definition).

The determination of whether a patent is eligible for covered business method patent review is based on what the patent claims. *See Liberty Mutual Ins. Co. v. Progressive Casualty Ins. Co.*, Case No. CBM2012-

00004, slip op. at 5 (PTAB Jan. 25, 2013) (Paper 10). A patent having even one claim directed to a covered business method is eligible for review, even if the patent includes additional claims. *See Transitional Program for Covered Business Method Patents — Definitions of Covered Business Method Patent and Technological Invention; Final Rule*, 77 Fed. Reg. 48,734, 48,736 (Aug. 14, 2012) (Response to Comment 8).

1. Petitioner Has Been Sued for Infringement of the '883 Patent

Section 18 of the AIA limits reviews to persons or their privies that have been sued or charged with infringement of a covered business method patent. AIA §§ 18(a)(1)(B), 18(d)(1).

Petitioner represents that it has been sued for infringement of the '883 patent in the district court proceeding. Pet. 5. Patent Owner acknowledges that the '883 patent is at issue in that case. Paper 9, 2. Therefore, Petitioner has met this requirement. *See* 37 C.F.R. § 42.302(a).

2. Claims 1–8 are Directed to Financial Products and Services

The AIA legislative history explains that the definition of a covered business method patent was drafted to encompass patents “claiming activities that are financial in nature, incidental to a financial activity or complementary to a financial activity” and that “financial product or service” should be interpreted broadly. 157 Cong. Rec. S5432 (daily ed. Sept. 8, 2011) (statement of Sen. Schumer).

Petitioner argues that claims 1–8 are directed to financial products or services because the claims are directed to “methods for crediting an agent for a commission from a sale using ‘affiliate programs for commercial websites.’” Pet. 12 (citing Ex. 1002, 1:17–20; 2:62–3:1). Petitioner adds that the file history of the '883 patent states that the claimed system is

analogous to the financial arrangement between a retail store and a salesperson in which the salesperson is awarded a commission. *Id.* at 13 (citing Ex. 1004, 356–57). Based on the record before us, we are persuaded that claims 1–8 are directed to financial products or services.

3. Claims 1–8 Are Not Directed to a Technological Invention

The definition of “covered business method patent” in § 18(d)(1) of the AIA excludes patents for “technological inventions.” AIA, 125 Stat. at 331. For guidance, we look to 37 C.F.R. § 42.301(b), which defines the term “technological invention” and requires a case-by-case consideration of “whether the claimed subject matter as a whole recites a technological feature that is novel and unobvious over the prior art; and solves a technical problem using a technical solution.” The following claim drafting techniques, for example, typically do not render a patent a “technological invention”:

(a) Mere recitation of known technologies, such as computer hardware, communication or computer networks, software, memory, computer-readable storage medium, scanners, display devices or databases, or specialized machines, such as an ATM or point of sale device.

(b) Reciting the use of known prior art technology to accomplish a process or method, even if that process or method is novel and non-obvious.

(c) Combining prior art structures to achieve the normal, expected, or predictable result of that combination.

Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,764. Therefore, to qualify under the “technological invention” exception to covered business method patent review, it is not necessarily enough that the claimed invention makes use of technological systems, features, or components.

Petitioner contends that the '883 patent is not directed to a technological invention. Pet. 13–20. Specifically, Petitioner argues that the claims include only generic technology that was well-known in the art. *Id.* at 14. Petitioner contends, with supporting evidence, that the hardware elements and claimed steps were known at the time of the invention. *Id.* at 14–18 (citing the Declaration of Dr. Michael Shamos, Ex. 1007). Petitioner contends that the '883 patent claims do not solve a technical problem with a technical solution, but rather that the patent “merely recites using well-known technology (computers and a communication network) to perform the well-known functions of identifying a character string associated with an existing affiliate code and replacing the character string with a second character string associated with a preferred affiliate code to attribute sales to the preferred affiliate.” *Id.* at 19.

“Mere recitation of known technologies, such as computer hardware, communication or computer networks, software, memory, computer-readable storage medium, scanners, display devices or databases, or specialized machines,” typically is not enough to show a technological invention. *Office Patent Trial Practice Guide*, 77 Fed. Reg. at 48,764. Nor is “[r]eciting the use of known prior art technology to accomplish a process or method, even if that process or method is novel and non-obvious.” *Id.* The recitations of generic computer elements to accomplish the process or method of the '883 patent claims are insufficient to show that the claimed invention is technological.

In sum, we are persuaded, on this record, that the invention of the '883 patent, as claimed, does not recite a novel or non-obvious technological feature, nor does it solve a technical problem using a technical solution and,

thus, is not a technological invention. Accordingly, the '883 patent is eligible for covered business method patent review.

C. Whether Claims 1–8 Are More Likely Than Not Unpatentable Under 35 U.S.C. § 101

1. Overview

Section 101 of the Patent Statute (35 U.S.C. § 101) defines the subject matter eligible for patenting. The Supreme Court 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) (citing *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 (citing *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972) (quotations omitted)).

In *Alice Corp.*, the Supreme Court emphasized the importance of the so-called “*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 (2012)). Under the *Mayo* framework, “[w]e must first 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 1297–1298).

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; *see 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).

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.* (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.* at 2357 (quoting *Mayo*, 132 S.Ct. at 1300, 1297, 1294). Thus, we analyze the claims of the ’883 patent to determine whether the claims embody a patent-eligible application of an abstract idea or merely nothing more than the abstract idea itself.

2. *Whether Claims 1–8 Are Directed To an Abstract Idea*

In accordance with the Supreme Court’s “framework for distinguishing patents that claim . . . abstract ideas from those that claim patent-eligible applications of those concepts,” we must first “determine whether the claims at issue are directed to one of those patent-ineligible concepts.” *Alice Corp.*, 134 S.Ct. at 2355. In *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 v. Kappos*, 561 U.S. 593 (2010)], 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.

The ’883 Patent describes “an affiliate manipulation system and method that permits computers users, ISPs, search engines and other intermediaries to maximize affiliate program participation in transactions by or through them.” Ex. 1002, 1:66–2:2. Petitioner contends that “[t]he ’883 Patent claims are directed to the abstract idea of redirecting affiliate commissions.” Pet. 27.

Petitioner asserts that the “solution proposed here to the problem of manipulating sales commissions has a direct preexisting analog in the physical world,” namely, “replacing one affiliate’s name with another, allowing the second named affiliate to receive credit for the sale.” *Id.* at 29–30. 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.” *Id.* at 30. We are persuaded on the present record that the ’883 patent claims an abstract idea. Under *Alice Corp.*, the concept of intermediated settlement was determined to be “a fundamental economic practice long prevalent in our system of commerce.” 134 S.Ct. at 2356 (quoting *Bilski*, 561 U.S. at 611). This led the Court to conclude that intermediated settlement, like the concept of “hedging” in *Bilski*, is an

abstract idea under § 101. *Id.* 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*. We conclude on the present record, therefore, that the '883 patent claims are directed to an abstract idea.

3. *Whether Claims 1–8 are Meaningfully Limited Under 35 U.S.C. § 101*

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).

Petitioner focuses its § 101 arguments on independent claims 1 and 8. Pet. 33–38. The main argument is that the claims are not meaningfully limited because they are directed to mental processes, as steps 1–4 of claim 1 can be reduced to "the mental process of identifying a web address that includes an affiliate code"; "[s]tep 5 involves the mental process of determining that the detected data element is not associated with a preferred affiliate code"; and "[s]teps 6 and 7 merely consist of replacing or otherwise associating the detected affiliate code with the preferred affiliate code, and delivering the modified data." Pet. 34.

We are not persuaded on the present record that these are meaningful limitations on the abstract idea. As the Supreme Court held in *Benson*, 409 U.S. 63, claims do not become patent-eligible under § 101 simply for reciting a known, general purpose computer. *See id.* 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.”). And in *Alice Corp.*, 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).

Petitioner contends that independent claim 8 (also directed to a method) is only nominally different than claim 1 and, therefore, both are ineligible under § 101 for the same reasons. Pet. 37–38. Petitioner also argues that the dependent claims recite actions that can be performed as mental processes. *Id.* at 36–37. We agree, on the present record, that these claims do not provide meaningful limitations to the abstract idea.

We do not need to reach, and, therefore, do not address for the purposes of this Decision, Petitioner’s secondary arguments based on the “machine or transformation” test. Pet. 38–39.

D. Asserted Grounds of Unpatentability Under 35 U.S.C. § 102

1. Landau

Petitioner argues that claims 1–8 are anticipated by Landau. Pet. 39–50. 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 presents claim charts that it argues show how Landau discloses “each and every element of the limitations of claims 1–8, which are therefore anticipated by Landau.” Pet. 50–57.

Petitioner alleges that 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. 42. Specifically, Petitioner argues that Landau “discloses that the requested URL does not include the target Webmaster ID (i.e., *the preferred affiliate code*), thus a correlation process is performed that includes a database lookup to correlate the received source Webmaster ID (i.e., *an existing affiliate code*) to a target Webmaster ID (i.e., *the preferred affiliate code*).” *Id.* at 42–43 (citing Ex. 1010, 14:46–66). Based on Petitioner’s argument and the record before us, we are persuaded that Landau’s lookup operation would determine whether the data element is or is not associated with a preferred affiliate code.

To disclose modified data as required by claim 1, which requires “removing the existing affiliate code associated with the data element, [and] creating modified data at the intermediary computer by associating the

preferred affiliate code with the data element,” Petitioner relies on Landau’s creation of a new, transformed URL in “new URL (i.e., *creating modified data*) determination operation 612,” in which the “new URL is determined based on the target Merchant and the target Webmaster ID (i.e., *the preferred affiliate code*).” Pet. 43, 53 (citing Ex. 1010, 15:29–34).

Petitioner’s citations and argument support its assertion that Landau appears to remove the existing affiliate code (i.e. the source Webmaster ID) and associate the preferred affiliate code (i.e. the target Webmaster ID) with the data element to create modified data (i.e. the new URL).

To disclose “identifying the preexisting data at an intermediary computer” and “analyzing the preexisting data at the intermediary computer to automatically identify at least one data element corresponding to an affiliate-capable merchant,” as required by claim 1, 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, and lookup operation 606, which finds the database assigned to the target Merchant affiliate system and its three fields of information, namely, source system information, source Webmaster ID, and target Webmaster ID. Pet. 51–52 (citing Ex. 1010, 10:4–10, 46–49, 14:45–51, 58–66). We are persuaded that Petitioner has demonstrated Landau’s disclosure of analyzing and identifying at least one data element corresponding to an affiliate-capable merchant.

With respect to claim 8, Petitioner argues that the “difference[s] in claim language between claim 8 and claim 1 are non-substantive and are not sufficient to alter the above analysis of Claim 1 with respect to Landau.” Pet. 47. Petitioner’s Landau claim chart refers back to its claim 1 analysis to

disclose the claim 8 elements. *Id.* at 56–57. For the purposes of institution, we adopt substantially the same analysis for claim 8 as for claim 1, *supra*. With respect to claims 2–7, each depend directly from claim 1. Petitioner contends these claims are also anticipated by Landau. Pet. 44–47.

Concerning these claims, we determine that the supporting evidence demonstrates a reasonable likelihood that Petitioner would prevail in its showing.

Based on the record before us, we are persuaded that Petitioner has demonstrated that it is more likely than not that claims 1–8 would be anticipated by Landau.

2. Priest

Petitioner argues that claims 1–8 are anticipated by Priest. Pet. 57–70. Priest provides “a method and apparatus for use in e-commerce for returning to a consumer all or a portion of commissions earned by a third party when the consumer purchases goods or services from a vendor that is affiliated with the third party.” Ex. 1012, 2:16–19. Priest summarizes its invention:

The vendor and the third party first enter into an affiliate relationship in which they agree to a commission payable by the vendor to the third party for sales made to customers who have reached the vendor by or through the third party. Thereafter, the consumer forms a relationship with the third party whereby the consumer makes purchases from the vendor through the third party’s affiliation with the vendor so that commissions are generated for the third party. Moreover, the consumer allows the third party to monitor the consumer’s behavior so that the third party may ascertain the commissions generated by the consumer without relying on information supplied by the vendor or the consumer. Finally, the third party returns to each individual consumer all or a portion of the commission generated by his purchases.

Id. at 2:19–29.

Petitioner argues that Priest discloses each and every element of the limitations of claims 1–8, cites to support in the Shamos Declaration as appropriate, and presents a claim chart in support of its arguments. Pet. 70–77.

Petitioner argues that, in Priest, the “affiliate identification is accomplished by providing an affiliate ID in the Uniform Response Locator (URL).” Pet. 60 (citing Ex. 1012, 10:18–21). Petitioner submits that the “vendor links/URL described in Priest disclose the claim element of ‘at least one data element corresponding to an affiliate-capable merchant.’” *Id.* Petitioner also argues that, in Priest “the disclosed process could be performed using software that is ‘resident on a computer at the third party’s site, executed as needed by the consumer over the network connection.’” *Id.* (citing Ex. 1012, 5:15–18). We are persuaded that the system of Priest would automatically identify the URL, which contains the affiliate ID as well as other information, as containing at least one data element corresponding to an affiliate-capable merchant, and could do so at an intermediary computer.

Petitioner supports its allegation that Priest discloses “automatically associating the preferred affiliate code with the data element” by stating: “For example, Priest discloses: ‘[I]f the affiliate ID is not a Whypaythem.com affiliate ID, [...] the URL is replaced with the Whypaythem.com affiliate URL in step 416.’” Pet. 62 (citing Ex. 1012, 17:5–20). Petitioner argues that this step requires “automatically associating,” whereas Claim 1 in fact requires “creating modified data at the intermediary computer by associating the preferred affiliate code with the

data element.” Ex. 1002, 9:10–12. The term “automatically” does not appear in this step. The complete portion of Priest, of which Petitioner relies on an excerpt, explains that the user is prompted to determine whether or not to replace the affiliate code. Nevertheless, we are persuaded that the totality of Priest discloses “creating modified data at the intermediary computer by associating the preferred affiliate code with the data element.”

With respect to claim 8, Petitioner argues that the “difference[s] in claim language between claim 8 and claim 1 are non-substantive and are not sufficient to alter the above analysis of Claim 1 with respect to Priest.”

Pet. 65. Petitioner’s Priest claim chart, in large part, refers back to its claim 1 analysis to disclose the claim 8 elements. *Id.* at 75–77. For the purposes of institution, we adopt substantially the same analysis for claim 8 as for claim 1, *supra*. With respect to claims 2–7, which depend directly from claim 1, Petitioner contends these claims are also anticipated by Priest. Pet. 63–65. Concerning these claims, we determine that the supporting evidence demonstrates a reasonable likelihood that Petitioner would prevail in its showing.

Based on the record before us, we are persuaded that Petitioner has demonstrated that it is more likely than not that claims 1–8 are anticipated by Priest.

E. Asserted Ground of Unpatentability Under 35 U.S.C. § 103

Petitioner challenges claims 1–8 as obvious over Priest and McRackan (Ex. 1013). Pet. 77–80. Petitioner argues that the combination of Priest with non-patent literature prior art references that discuss the concept of affiliate hijacking disclose “modifying an affiliate code to make it

appear that a referral is coming from a particular affiliate, regardless of its true source.” *Id.* at 77.

McRackan is a post from the ABestWeb Affiliate Marketing Forum detailing Mr. McRackan’s views about Gator software. Ex. 1013. Petitioner argues that McRackan discloses the elements of claim 1, apart from expressly disclosing that the affiliate ID number is identified at an intermediary computer, and that it “would have been obvious to one of skill in the art to operate a system such as Priest with Priest’s “agent” being a system like Gator on a server or other intermediate computer (e.g., in a thin-client environment).” Pet. 78–79 (citing Ex. 1007, ¶ 74). Petitioner also argues that “a person of ordinary skill in the art would have been motivated to combine McRackan in view of either Priest or Landau because they relate to the same problems of replacing affiliate codes in URLs to redirect commissions.” *Id.* at 79 (citing Ex. 1007, ¶ 71, 73). Petitioner further argues that, “specifically, an affiliate implementing the system of Priest would be motivated to combine that system with McRackan to broaden the applicability of the Priest system to include additional users and thus expand the revenue base for the affiliate.” *Id.* (citing Ex. 1007, ¶ 74)

A petition must specify where each element of the claim is found in the prior art. 37 C.F.R. § 42.304(b)(4). Similarly, a petition must identify specific portions of the evidence that support the challenge. 37 C.F.R. §42.304(b)(5). The Petition’s analysis of claim 1 fails to identify the location of each element of claim 1 in the McRackan reference. Additionally, the Petition does not adequately explain or support its arguments relying on inherency (Pet. 78), the premise that replacing an affiliate ID as in McRackan “necessarily involve[s]” a number of steps of

claim 1 (*id.* at 79), and statements regarding the purpose of the affiliate ID replacement algorithm in McRackan (*id.* at 79–80). The Petition fails to provide any analysis for the elements of claims 2–7, and relies on its claim 1 arguments for claim 8. *Id.* at 80.

Finally, Petitioner’s presentation of reasoning to combine the teachings of McRackan with Priest with respect to independent claim 1 is also deficient. To support a showing of obviousness, there has to be some articulated reasoning with rational underpinnings to support a motivation to combine teachings. *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006). To that end, Petitioner asserts, essentially, that one of ordinary skill in the art could make Priest’s “agent” a system like Gator on a server or other intermediate computer, or could look to Priest or Landau because all the references relate to the same problems. Pet. 78–79. Although Petitioner provides an additional sentence of reasoning as to motivation to combine Priest and McRackan, we are not persuaded that this constitutes articulated reasoning with rational underpinnings as to why one of ordinary skill would or would not modify McRackan with the teachings of Priest. Petitioner has failed to demonstrate a reasonable likelihood that it would prevail on the ground that independent claim 1 is unpatentable over McRackan and the knowledge of one of ordinary skill in the art and Priest. For the same reasons, Petitioner also has failed to demonstrate a reasonable likelihood that it would prevail with respect to claims 2–8.

After carefully considering the Petition and the record before us, we are not persuaded that Petitioner has demonstrated that it is more likely than not that claims 1–8 would have been obvious over McRackan in

combination with either the knowledge of one of ordinary skill in the art, or Priest.

F. Conclusion

We conclude that Petitioner has demonstrated that it is more likely than not that claims 1–8 of the '883 patent are unpatentable. We have not made a final determination with respect to the patentability of the challenged claims.

IV. JOINDER

A. Background

The VigLink CBM concerns the same patent as at issue here, namely, the '883 patent. We instituted trial in the VigLink CBM on March 20, 2015. *VigLink, Inc. v. Linkgine, Inc.*, Case CBM2014-00185, Paper 12 (“Dec.”). The Motion for Joinder was filed on April 17, 2015. Mot. Petitioner indicates that VigLink, Inc. does not oppose the Motion for Joinder, and that Petitioner is “continuing to meet and confer with Patent Owner in an effort to harmonize the existing VigLink CBM schedule with the Skimlinks schedule.” Mot. 2.

The Petition in this proceeding asserts four grounds, all of which were asserted in the VigLink CBM. We instituted a trial in the VigLink CBM on three grounds:

1. Whether claims 1–8 are unpatentable under 35 U.S.C. § 101;
2. Whether claims 1–8 are unpatentable under 35 U.S.C. § 102(a) as anticipated by Landau; and
3. Whether claims 1–8 are unpatentable under 35 U.S.C. § 102(a) as anticipated by Priest.

Dec. 28. We exercised our discretion in the VigLink CBM not to institute on several other grounds, namely, claims 1–8 as obvious over McRackan alone or in view of Landau or Priest, claims 1–8 as obvious over Huggins alone or in view of Landau or Priest, and claims 1–8 as obvious over Smith alone or in view of Landau or Priest.

B. Joinder Analysis

A decision whether to institute a covered business method patent review is a necessary precursor to joining the review to another review. *See* 35 U.S.C. § 325(c) (indicating that, if the Director determines two petitions warrant the institution of a post-grant review, the Director may consolidate the two reviews into a single post-grant review). Institution of a covered business method review requires determination that the information filed in the petition, if such information is not rebutted, would demonstrate that it is more likely than not that at least one of the claims challenged in the petition is unpatentable, and consideration of a preliminary response, if one is filed by Patent Owner. *See* 35 U.S.C. § 324(a), (c)(1).

As the moving party, Petitioner bears the burden of proving that it is entitled to the requested relief. 37 C.F.R. § 42.20(c). A motion for joinder should: (1) set forth the reasons joinder is appropriate; (2) identify any new grounds of unpatentability asserted in the petition; and (3) explain what impact (if any) joinder would have on the trial schedule for the existing review. *See* Frequently Asked Question H5, <http://www.uspto.gov/patents-application-process/appealing-patent-decisions/trials/patent-review-processing-system-prps-0> (last visited June 2, 2015).

The Motion for Joinder was filed on April 17, 2015. Thus, the Motion for Joinder in this proceeding satisfies the requirement of being filed within

one month of the date, March 20, 2015, on which we instituted a trial in the VigLink CBM. *See* 37 C.F.R. § 42.222(b) (requiring any request for joinder to be filed, as a motion under § 42.22, no later than one month after the institution date of any post grant review for which joinder is requested).

In its Motion for Joinder, Petitioner contends that its “petition involves the same patent, the same claims, the same claim constructions, and the same declaration evidence from the same expert as involved in the VigLink CBM.” Mot. 6. Specifically, Petitioner requests that we join the first three grounds with the VigLink CBM, and permit the present proceeding to continue with respect to the fourth ground. *Id.* at 1. Keeping in mind that Petitioner only requests the first three already-instituted grounds be joined in the VigLink CBM, Petitioner represents that joinder is appropriate “because it will promote efficient resolution of the validity of the involved patent, and it will not prejudice the parties to the VigLink CBM.” *Id.* Based on these representations, Petitioner contends that, in the event of joinder, “Petitioner anticipates no significant impact on the joint trial schedule.” *Id.*

As reflected in our Order dated May 21, 2015, Patent Owner indicated that it did not intend to file or seek authorization to file oppositions to Petitioner’s Motions for Joinder, and was in agreement with Petitioner and VigLink, Inc. regarding the Motions for Joinder. Paper 12, 2.

C. Conclusion

Based on the present record, we agree that joinder with the VigLink CBM would promote the efficient resolution of these proceedings. In its Motion for Joinder, Petitioner notes that both proceedings involve the same prior art, the same claims, and essentially the same arguments and evidence.

Petitioner has brought the same challenges in this proceeding as VigLink did in the VigLink CBM, and joinder simplifies addressing the overlap of the first three grounds. We note that this proceeding was filed before we instituted a trial in the VigLink CBM. Prejudice to Patent Owner in this regard is minimal, because Petitioner did not have the benefit of our analysis and decision for this proceeding. Petitioner's Petition is, therefore, an independent presentation of the same prior art and related evidence addressing the same claims.

To the extent there are differences in Petitioner's evidence and arguments regarding claim construction and the substantive application of the prior art to the claims, resolving these differences in a single proceeding is the most efficient course of action. Substantive issues in this covered business method review would not be unduly complicated by joining with the VigLink CBM because joinder merely introduces the same grounds presented originally in the VigLink CBM where all the same prior art is of record. In addition, scheduling of the joined proceeding, as set forth below, will occur so as to minimize impact to Patent Owner, yet maintain the current DUE DATE 7 (December 4, 2015) for oral hearing. Patent Owner will be able to address the overlapping grounds in a single proceeding.

Regarding Petitioner's requests for procedures to simplify briefing and discovery (Mot. 10–12), the Board presently does not see any need for expanded page limits. VigLink and Petitioner shall file consolidated filings, for which VigLink is primarily responsible. Regarding Petitioner's proposals regarding discovery and oral argument (*id.* at 12), the Board agrees that no additional time is needed, and VigLink and Petitioner shall cooperate to manage their allotted time for each.

D. Scheduling

The Revised Scheduling Order in the VigLink CBM (Paper 14) sets the oral hearing for December 4, 2015. Final hearing and final determination shall not be delayed by joining the two proceedings. In view of our joinder order below and our previously issued revised scheduling order in the VigLink CBM, DUE DATE 1 is June 30, 2015. The remaining DUE DATES are unchanged. The parties may stipulate to different dates for DUE DATES 1 through 5 (earlier or later, but no later than DUE DATE 6). A notice of the stipulation, specifically identifying the changed due dates, must be promptly filed. The parties may not stipulate to an extension of DUE DATES 6 and 7.

V. CONCLUSION

Based on the record before us, we institute a covered business method review in CBM2015-00087 and grant Petitioner's motion to join this proceeding to CBM2014-00185.

VI. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that trial is instituted as to claims 1–8 of the '883 patent on the following grounds:

1. Whether claims 1–8 are unpatentable under 35 U.S.C. § 101;
2. Whether claims 1–8 are unpatentable under 35 U.S.C. § 102(a) as anticipated by Landau; and
3. Whether claims 1–8 are unpatentable under 35 U.S.C. § 102(a) as anticipated by Priest.

FURTHER ORDERED that pursuant to 35 U.S.C. § 324(d) and 37 C.F.R. § 42.4, notice is hereby given of the institution of a trial commencing on the entry date of this decision;

FURTHER ORDERED that Petitioner's Motion for Joinder with respect to the three grounds identified above is *granted*, Petitioner's request to maintain a fourth ground as a separate proceeding is *denied*, and that all instituted grounds in this proceeding are joined with CBM2014-00185;

FURTHER ORDERED that the Revised Scheduling Order in place for CBM2014-00185 (Paper 14) shall govern the joined proceedings;

FURTHER ORDERED that VigLink is primarily responsible for filing papers, engaging in discovery, and conducting depositions and oral argument in CBM2014-00185. Petitioner, however, is permitted to play a secondary role in CBM2014-00185, as agreed by the parties, and may receive notification of filings and may participate in depositions and oral hearing in CBM2014-00185. No expansion of page limits or time limits is authorized. Should Petitioner believe it necessary to take any further action, Petitioner should request a conference call to obtain authorization from the Board;

FURTHER ORDERED that CBM2015-00087 is terminated under 37 C.F.R. § 42.72 and all further filings in the joined proceeding are to be made in CBM2014-00185;

FURTHER ORDERED that a copy of this Decision be entered into the file of CBM2014-00185; and

FURTHER ORDERED that the case caption in CBM2014-00185 shall be changed to reflect joinder with this proceeding in accordance with the attached example.

CBM2015-00087
Patent 8,027,883 B2

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CBM2015-00087
Patent 8,027,883 B2

Example Case Caption for Joined Proceeding

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 CBM2014-00185¹
Patent 8,027,883 B2

¹ Case CBM2015-00087 has been joined with this proceeding.