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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ERIC EDWARD PEARSON, MICHAEL MENIS,
and DANIEL DELANO ROSS JR.¹

Appeal 2017-010076
Application 11/106,020
Technology Center 3600

Before MICHAEL J. STRAUSS, J. JOHN LEE, and MICHAEL J. ENGLE,
Administrative Patent Judges.

STRAUSS, *Administrative Patent Judge.*

DECISION ON APPEAL

¹ According to Appellants, the real party in interest is Six Continents Hotels, Inc. *See* App. Br. 3.

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from a rejection of claims 1–17, 21, 23, and 24. Claims 18–20 and 22 are withdrawn from consideration. Final Act. 1. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.²

THE INVENTION

The claims are directed to a self-funded commission management system. Spec., Title. Claim 1, reproduced below with a disputed limitation emphasized in *italics*, is representative of the claimed subject matter:

1. A method for generating self-funded commission management for affiliates providing online advertising campaigns targeted to users for products or services offered by merchants associated with a travel industry, the method comprising:

assigning, by a system computing device associated with an administrator, an affiliate identifier to an affiliate providing an online advertising campaign over a data network for a merchant in the travel industry, the affiliate identifier using a format based on a separate system of the travel industry, the separate system configured to track commissions of travel agencies and being different from the system computing device, the format enabling the separate system to be repurposed for tracking commissions of the affiliates such that the travel agencies assume affiliate roles and receive electronic payments via the separate system based on the commissions;

associating, by the system computing device, the affiliate identifier with an online advertisement provided as a part of the online advertising campaign by integrating the affiliate identifier with an advertisement identifier of the online advertisement;

receiving, by the system computing device, a user-initiated transaction over the data network and associated with the

² We refer to the Specification, filed April 14, 2005 (“Spec.”); the Final Office Action, mailed August 15, 2016 (“Final Act.”); Appeal Brief, filed March 16, 2017 (“Br.”); and the Examiner’s Answer, mailed May 24, 2017 (“Ans.”).

merchant in response to the online advertisement of the affiliate, the user-initiated transaction comprising a tracking identifier configured to trace the user-initiated transaction to the online advertisement of the affiliate;

determining, by the system computing device, that the user-initiated transaction is associated with the affiliate based on the tracking identifier and the affiliate identifier;

receiving, by the system computing device, a confirmation that the user-initiated transaction yielded a consumed transaction, the consumed transaction including (i) an online payment for a corresponding product or service offered by the merchant and (ii) consumption of the corresponding product or service and being associated with the corresponding affiliate identifier;

receiving, by the system computing device from a computing device over the data network, a commission provided on behalf of the merchant and associated with the user-initiated transaction in response to receiving the confirmation;

associating, by the system computing device, the commission with the affiliate based on the determining that the user-initiated transaction is associated with the affiliate;

forming an aggregated commission, by the system computing device, by depositing the commission in a central electronic fund storing a plurality of commissions, aggregating the commission with the plurality of commissions, and storing the aggregated commission in the central electronic fund, wherein the plurality of commissions are received by the system computing device and are provided on behalf of the merchant, wherein each commission of the plurality of commissions corresponds to a different affiliate of a plurality of affiliates and is associated with an online advertising campaign of the different affiliate, wherein the central electronic fund is configured to enable the aggregated commission to be shared between the online advertising campaign of the affiliate and respective online advertising campaigns of the plurality of affiliates, wherein the online advertising campaign and the respective online advertising campaigns form a plurality of online advertising campaigns;

determining, by the system computing device, an electronic payment for the affiliate from the aggregated commission based on compensation terms associated with the affiliate, an allocation of the aggregated commission between the affiliate and the plurality of affiliates from the central electronic fund, and a value of the user-initiated transaction;

sending, by the system computing device, the electronic payment to a computing device of the affiliate based on the affiliate identifier;

determining, by the system computing device, a surplus fund from the aggregated commission after completing the electronic payment for the affiliate, the surplus fund available from the central electronic fund; and

reallocating, by the system computing device, the surplus fund from the central electronic fund across the plurality of online advertising campaigns of the affiliate and the plurality of affiliates based on performance variables of the plurality of online advertising campaigns, wherein a performance variable of the online advertising campaign of the affiliate is measured based on the commission and on the value of the user-initiated transaction, wherein the reallocating the surplus fund comprises:

automatically reallocating a portion of the surplus fund equivalent to an amount previously budgeted for a second online advertising campaign of a second affiliate of the plurality of affiliates to the online advertising campaign of the affiliate based on the performance variable of the online advertising campaign of the affiliate and on a second performance variable of the second online advertising campaign of the second affiliate, wherein the automatic reallocation self-funds the online advertising campaign of the affiliate based on the performance variables and the affiliate identifier *and without input of the administrator or the affiliate for funding the online advertising campaign.*

REJECTIONS

The Examiner made the following rejections³:

Claims 1–17, 21, 23 and 24 stand rejected under 35 U.S.C. § 101 because the claimed invention is directed to a judicial exception without significantly more. Final Act. 11–14.

Claims 1–17, 21, 23 and 24 stand rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement. Final Act. 14–16.

ANALYSIS

Appellants' contentions are unpersuasive of reversible Examiner error. We adopt as our own (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken (Final Act. 2–8, 11–16), and (2) the reasons set forth by the Examiner in the Examiner's Answer in response to Appellants' Appeal Brief (Ans. 2–35), and concur with the conclusions reached by the Examiner. We highlight the following for emphasis.

§ 101

An invention is patent-eligible if it claims a “new and useful process, machine, manufacture, or composition of matter.” 35 U.S.C. § 101. However, the Supreme Court has long interpreted 35 U.S.C. § 101 to include implicit exceptions: “[l]aws of nature, natural phenomena, and abstract

³ The rejection of claims 1–17, 21, 23, and 24 under 35 U.S.C. § 103(a), has been withdrawn. Ans. 6.

ideas” are not patentable. *E.g.*, *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014).

In determining whether a claim falls within an excluded category, we are guided by the Supreme Court’s two-step framework, described in *Mayo* and *Alice*. *Id.* at 217–18 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 75–77 (2012)). In accordance with that framework, we first determine what concept the claim is “directed to.” *See Alice*, 573 U.S. at 219 (“On their face, the claims before us are drawn to the concept of intermediated settlement, i.e., the use of a third party to mitigate settlement risk.”); *see also Bilski v. Kappos*, 561 U.S. 593, 611 (2010) (“Claims 1 and 4 in petitioners’ application explain the basic concept of hedging, or protecting against risk.”).

Concepts determined to be abstract ideas, and thus patent ineligible, include certain methods of organizing human activity, such as fundamental economic practices (*Alice*, 573 U.S. at 219–20; *Bilski*, 561 U.S. at 611); mathematical formulas (*Parker v. Flook*, 437 U.S. 584, 594–95 (1978)); and mental processes (*Gottschalk v. Benson*, 409 U.S. 63, 69 (1972)). Concepts determined to be patent eligible include physical and chemical processes, such as “molding rubber products” (*Diamond v. Diehr*, 450 U.S. 175, 192 (1981)); “tanning, dyeing, making waterproof cloth, vulcanizing India rubber, smelting ores” (*id.* at 184 n.7 (quoting *Corning v. Burden*, 56 U.S. 252, 267–68 (1854))); and manufacturing flour (*Benson*, 409 U.S. at 69 (citing *Cochrane v. Deener*, 94 U.S. 780, 785 (1876))).

In *Diehr*, the claim at issue recited a mathematical formula, but the Supreme Court held that “[a] claim drawn to subject matter otherwise statutory does not become nonstatutory simply because it uses a

mathematical formula.” *Diehr*, 450 U.S. at 176; *see also id.* at 192 (“We view respondents’ claims as nothing more than a process for molding rubber products and not as an attempt to patent a mathematical formula.”). Having said that, the Supreme Court also indicated that a claim “seeking patent protection for that formula in the abstract . . . is not accorded the protection of our patent laws, . . . and this principle cannot be circumvented by attempting to limit the use of the formula to a particular technological environment.” *Id.* (citing *Benson and Flook*); *see, e.g., id.* at 187 (“It is now commonplace that an application of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection.”).

If the claim is “directed to” an abstract idea, we turn to the second step of the *Alice* and *Mayo* framework, where “we must examine the elements of the claim to determine whether it contains an ‘inventive concept’ sufficient to ‘transform’ the claimed abstract idea into a patent-eligible application.” *Alice*, 573 U.S. at 221 (quotation marks omitted). “A claim that recites an abstract idea must include ‘additional features’ to ensure ‘that the [claim] is more than a drafting effort designed to monopolize the [abstract idea].’” *Id.* (quoting *Mayo*, 566 U.S. at 77). “[M]erely requir[ing] generic computer implementation[] fail[s] to transform that abstract idea into a patent-eligible invention.” *Id.*

The PTO recently published revised guidance on the application of § 101. 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019) (“Memorandum”). Under that guidance, we first look to whether the claim recites:

(1) any judicial exceptions, including certain groupings of abstract ideas (i.e., mathematical concepts, certain methods of organizing human interactions such as a fundamental economic practice, or mental processes); and

(2) additional elements that integrate the judicial exception into a practical application (*see* MPEP § 2106.05(a)–(c), (e)–(h)).

See Memorandum, 84 Fed. Reg. at 52, 54–55.

Only if a claim (1) recites a judicial exception and (2) does not integrate that exception into a practical application, do we then look to whether the claim:

(3) adds a specific limitation beyond the judicial exception that is not “well-understood, routine, conventional” in the field (*see* MPEP § 2106.05(d)); or

(4) simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception.

See Memorandum, 84 Fed. Reg. at 56.

Here, the Examiner determines the claims are directed towards: the idea of commissions for referring a user that completes a purchase and reallocating resources based on those commissions (e.g. in order to increase revenue) [which] is a fundamental economic practice and hence the claims include [an] abstract idea.

Final Act. 12. The Examiner compares the concept recited by the claims with precedential cases in which courts determined similar concepts to be

abstract. *Id.* at 12–13 (citing *Ultramercial*,⁴ *Dealertrack*,⁵ and *buySAFE*^{6,7}). In connection with the second step of the *Alice/Mayo* analysis, the Examiner determines “[t]he claims do not include additional elements that are sufficient to amount to significantly more than the judicial exception.” *Id.* at 13. In particular, the Examiner determines the additional elements of implementing the otherwise abstract idea on a computer and limiting the use to a particular technical environment (i.e., online travel computers) is recited at a high level of generality “requiring no more than a generic computer for perform[ing] generic computer functions that are well-understood, routine, and conventional activities previously known to the industry.” *Id.* at 13–14.

Prima Facie Case of Subject Matter Ineligibility

- a. Argument: *The Examiner does not provide any reasoned rationale for why the claims are directed to a judicial exception*

Appellants contend the Examiner has failed to clearly articulate the reasons why the claimed invention is not patent eligible. Br. 23 (citing the “July 2015 Update: Subject Matter Eligibility” to 2014 Interim Guidance on

⁴ *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014) (claims merely reciting abstract idea of using advertising as currency as applied to particular technological environment of the Internet not patent eligible).

⁵ *Dealertrack, Inc. v. Huber*, 674 F.3d 1315, 1333 (Fed. Cir. 2012) (claims directed to abstract idea of processing loan information through a clearinghouse).

⁶ *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1354–55 (Fed. Cir. 2014) (claims directed to creating a contractual relationship—a “transaction performance guaranty” deemed abstract).

⁷ Although the Examiner also cites to *SmartGene, Inc. v. Advanced Biological Laboratories, S.A.*, 555 Fed. App’x 950, 954–56 (Fed. Cir. 2014) (claims drawn to abstract idea of comparing new and stored information and using rules to identify options) (Final Act. 12), the reference to that decision is later removed (Ans. 16).

Subject Matter Eligibility (2014 IEG), 79 Fed. Reg. 74618 (Dec. 16, 2014) (hereinafter the “July 2015 Update” to the “Interim Guidance,” respectively)). Appellants assert the Examiner had not provided sufficient evidence on which to base a determination that the claims are directed to a judicial exception. *Id.* (citing *Ex parte Poisson*, Appeal 2012-011084 (PTAB Feb. 27, 2015) (non-precedential)). According to Appellants, the Examiner’s characterization of the claims is an improper oversimplification that ignores significant features and fails to consider the claims as a whole. *Id.* at 24. Appellants argue the Examiner fails to “explain how the . . . claimed features amount to the alleged abstract idea of ‘commissions for referring a user that completes a purchase and reallocating resources based on those commissions’ [or] fall under or are similar to the example of a ‘sale at home products where a referrer hosts a party at someone’s home and people buy products from a company.’” *Id.* at 25. Likewise, Appellants argue “the Examiner has failed to substantiate her position that the above claimed elements are properly comparable to the ‘home sale product example.’” *Id.* According to Appellants, “the Examiner does not provide any substantiated support for why the . . . claimed features are found to be a fundamental economic practice” and, lacking the allegedly missing “rationale or evidential support, the [Examiner’s characterization of the claims] is merely the Examiner’s opinion.” *Id.*

The Examiner responds, characterizing Appellants’ contention as “argu[ment] that the claims are not directed towards an abstract idea because the claims include elements beyond the abstract idea,” which “combin[es] steps [1 (determining whether the claims are directed to an abstract idea)] and [2 (determining whether the additional elements transform the nature of

the claim into a patent-eligible application)] into one step, rather than two steps.” Ans. 9. According to the Examiner, Appellants fail to identify a specific limitation that would distinguish the claims from an abstract idea. *Id.* at 11. The Examiner further disagrees there was a failure to present a prima facie case of ineligibility, and the Examiner states that the Final Action included “a reasoned rationale that identifies the judicial exception recited in the claim and why it is considered an exception” such that Appellants have “sufficient notice and [are] able to effectively respond.” *Id.* at 13.

Appellants’ contentions are unpersuasive. The Federal Circuit has repeatedly noted that “the prima facie case is merely a procedural device that enables an appropriate shift of the burden of production.” *Hyatt v. Dudas*, 492 F.3d 1365, 1369 (Fed. Cir. 2007) (citing *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992)). The court has, thus, held that the Office carries its procedural burden of establishing a prima facie case when its rejection satisfies the requirements of 35 U.S.C. § 132 by notifying the applicant of the reasons for rejection, “together with such information and references as may be useful in judging of the propriety of continuing the prosecution of [the] application.” *In re Jung*, 637 F.3d 1356, 1362 (Fed. Cir. 2011). All that is required of the Office is that it set forth the statutory basis of the rejection in a sufficiently articulate and informative manner as to meet the notice requirement of § 132. *Id.*; see also *Chester v. Miller*, 906 F.2d 1574, 1578 (Fed. Cir. 1990) (noting that § 132 “is violated when a rejection is so uninformative that it prevents the applicant from recognizing and seeking to counter the grounds for rejection”).

Here, in rejecting the pending claims under § 101, the Examiner analyzed the claims using the *Mayo/Alice* two-step framework, consistent with the then available guidance set forth in the USPTO’s Interim Guidance. Specifically, the Examiner notified Appellants that claims 1–17, 21, 23, and 24 are directed to “commissions for referring a user that completes a purchase and reallocating resources based on those commissions,” and that such commissions are “a fundamental economic practice and hence the claims include [an] abstract idea.” Final Act. 3, 6, 12; Ans. 3.

The Examiner’s characterization is fully consistent with Appellants’ Specification. For example, Appellants’ application is entitled “Self-Funded Commission Management System” (Spec., Title) wherein “[a] user-initiated transaction is received as a result of a referral from an affiliate” (Spec. ¶ 4), including a “self-funded commission system 100 [which] can reallocate resources across multiple advertising campaigns . . . based on performance variables” (Spec. ¶ 27). According to the Specification, the system reallocates surplus funds from one advertising campaign to an advertising campaign performing outside of desired metrics. *Id.*

The Examiner characterizes the claims as directed to fundamental economic practices such as creating a contractual relationship as in *buySAFE* (Final Act. 13; Ans. 3), i.e., certain methods of organizing human activity, and the claims further include aspects directed to other methods of organizing human activity, including activities relating to commercial or legal interactions, e.g., advertising, marketing, and sales activities or behaviors as in *Ultramerical* (*id.*), as cited by the Examiner. In contrast, Appellants provide insufficient evidence or argument to persuade us the Examiner’s characterization of the claims is inconsistent with Appellants’

disclosure and, therefore, that the Examiner erred in determining the claims are directed to a judicial exception.

Having determined the claims are directed to an abstract idea under prong 1 of the Memorandum, we consider whether the abstract idea has been integrated into a practical application under prong 2. For the reasons discussed by the Examiner (Final Act. 13–14), the abstract idea has not been integrated into a practical application. In particular, the additional elements of a system computing device and data network merely require use of a computer and data transmission facilities as tools to perform the abstract idea identified by the Examiner, i.e., providing commissions for referring a user that completes a purchase and reallocating resources based on those commissions. Other than automating implementation of the abstract idea, the claims fail to reflect an improvement in the functioning of a computer or to other technology or technical field, integrate a particular machine into the claims, or otherwise require additional elements integrating the judicial exception into a practical application.

We are also not persuaded the Examiner’s characterization of the claims is an oversimplification. Br. 25. In articulating the subject matter to which the claims are directed, we note “[a]n abstract idea can generally be described at different levels of abstraction.” *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1240–41 (Fed. Cir. 2016). There is no definitive rule to determine what constitutes an “abstract idea.” Rather, our reviewing court has explained that “both [the Federal Circuit] and the Supreme Court have found it sufficient to compare claims at issue to those claims already found to be directed to an abstract idea in previous cases.” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1334 (Fed. Cir. 2016). In that regard, we

agree with the Examiner that claim 1, when viewed as a whole, is similar to the ideas identified as abstract in *Ultramerical*, *Dealertrack*, and *buySAFE* (Final Act. 12–13; Ans. 3), and to other cases directed to sales activities such as targeted advertising based on demographic information provided by the user as in *Affinity Labs of Texas, LLC v. Amazon.com Inc.*, 838 F.3d 1266, 1271 (Fed. Cir. 2016).

b. Argument: *The Examiner does not properly rely on any legal precedent*

Appellants contend the cases cited by the Examiner in determining Appellants' claims recite concepts similar to those found by the courts to be abstract fail to provide support for a similar finding in the instant appeal. First Appellants argue the Examiner's reliance on *SmartGene* is improper because the case is not precedential. As "the Examiner has removed the reference to *SmartGene* in the 101 rejection" (Ans. 16), the issue is rendered moot.

Appellants further argue "the Examiner does not properly compare the claimed concepts to any prior court decision." Br. 27 (citing the Interim Guidance). According to Appellants, the Examiner "does not explain how the claimed features are comparable to the claims or concepts at issue in these court decisions." *Id.* The Examiner responds, noting that a comparison was provided at pages 12–13 of the Final Action. Ans. 16–17.

Appellants' argument is unpersuasive of Examiner error. We determine that the Examiner's mapping of the claims to the features determined to constitute abstract ideas provides the disputed explanation of why Appellants' claims likewise constitute abstract ideas. Final Act. 12–13. In particular, we disagree the Examiner has failed to properly compare the

claimed concepts to any prior court decision. Br. 27–28. As explained above, the Examiner compares Appellants’ claims to the ideas identified as abstract in *Ultramercial*, *Dealertrack*, and *buySAFE* (Final Act. 12–13; Ans. 3, 16–17). We also disagree it is improper to “reject[] a claim over a combination of multiple abstract ideas where the abstract ideas are selectively applied to the limitations of the claim.” Br. 28. Merely combining several abstract ideas does not render the combination any less abstract. *RecogniCorp, LLC v. Nintendo Co.*, 855 F.3d 1322, 1327 (Fed. Cir. 2017) (“Adding one abstract idea (math) to another abstract idea . . . does not render the claim non-abstract.”); *see also FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1093–94 (Fed. Cir. 2016) (determining the pending claims were directed to a combination of abstract ideas).

Step 1 (Prong 1)

- a. *Argument: The claims are not directed to an abstract idea because they improve a computer-related technology*

Appellants argue the claims address a computer-related problem by repurposing an existing system using a particular affiliate identifier to track affiliates’ commissions. Br. 32. According to Appellants, the subject claims are analogous to those found to be patent-eligible in *McRO*,⁸ *BASCOM*,⁹ and *Enfish*. *Id.* at 30. The Examiner responds, distinguishing the present claims over those held to encompass “computer-related technology by allowing computer performance of a function not previously performable by a computer.” Rather than addressing a computer-related problem as argued by Appellants, the Examiner determines the claims are “directed towards the

⁸ *McRO, Inc. v. Bandai Namco Am. Inc.*, 837 F.3d 1299 (Fed. Cir. 2016).

⁹ *BASCOM Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016).

abstract idea of commissions for referring a user that completes a purchase and reallocating resources based on those commissions (e.g. in order to increase revenue).” Ans. 21. According to the Examiner, the claims include tracking referrals based on identifying referrals using information (e.g., a name) that is formatted based on a separate system. *Id.* The Examiner notes that repurposing information such as a name is not a problem particular to computers but, instead, is a technique existing “long before being involved in the referral system.” *Id.* at 22.

Appellants’ contention is unpersuasive. We agree with the Examiner that use of information formatted based on a separate system, absent some underlying technical reason, is not a technological problem, and Appellants have failed to provide sufficient evidence or argument to persuade us otherwise. In particular, Appellants’ Specification discloses the pseudo-IATA schema as an example of a standardized format for an affiliate identifier that is patterned after the International Air Transport Association number or IATA. Spec. 20. Thus, the claimed “format” requirement is merely one system adopting an identifier provided by another system. As explained by the Examiner, this is no more than using a previously given name by another system for the purpose of identification of some entity such as the claimed affiliate. Designations such as names have long been assigned to people, animals, and other items and objects, and these designations including names were subsequently adopted by others for purposes of identifying the person or item in various situations and contexts. Thus, Appellants fail to persuade us reuse of a name is a technological problem unique or special to computers as opposed to a feature of the underlying abstract idea.

We are also unpersuaded by Appellants' citations to prior decisions determining claims to be directed to patent-eligible subject matter because the cited decisions address subject matter distinguishable over the Appellants' invention. In particular, the claims in *McRO* recited a "specific . . . improvement in computer animation" using "unconventional rules that relate[d] sub-sequences of phonemes, timings, and morph weight sets." *McRO*, 837 F.3d at 1302–03, 1307–08, 1314–15. Moreover, it was not the mere presence of unconventional rules in *McRO* that led to patent eligibility; rather, it was that the rules were used "in a process specifically designed to achieve an improved technological result." *Id.* at 1316. Here, Appellants have not shown how "the claimed solution involv[ing] using a particular identifiers, central fund, parameters for allocating a payment, and automated reallocation of surplus funds for online advertising campaigns" (Br. 32–33) achieves an improved technological result.

Appellant's reliance on *BASCOM*, 827 F.3d at 1350, is also unpersuasive. App. Br. 30. In *BASCOM*, the court determined that "an inventive concept can be found in the non-conventional and non-generic arrangement of known, conventional pieces." *BASCOM*, 827 F.3d at 1350. In that case, the installation of a filtering tool at a specific location, remote from the end users, with customizable filtering features specific to each end user, provided an inventive concept in that it gave the filtering tool both the benefits of a filter on a local computer and the benefits of a filter on the ISP server. *Id.* We find no analogous achievement of a technical improvement here. Instead, the claims recite results-focused limitations of assigning an affiliate identifier using a format of another system, associating the identifier with an online advertisement, receiving a transaction and confirmation the

transaction was completed (i.e., “consumed”), receiving a commission related to the transaction, associating the transaction with the affiliate, forming an aggregated commission for the merchant for each of its affiliates, determining and sending a payment due the affiliate, determining a surplus fund remaining after the payment is completed, and reallocating the surplus fund across online advertising campaigns of the affiliates based on performance variable of the online advertising campaigns. None of these steps have been shown to address a technological problem much less a problem specific to a computing device or online transactions and advertising. Accordingly, Appellants’ reliance on *BASCOM* is inapposite and, therefore, unpersuasive of Examiner error.

- b. Argument: *The claims are not directed to abstract ideas because they recite a particular solution to a problem or a particular way to achieve a desired outcome*

Appellants argue, “[l]ike *McRO*, [the claim] limitations (as opposed to the mere recitation of a computer) resolve the problem in a particular way and achieve the desired outcome.” Br. 34. According to Appellants, these limitations “allow the efficient and timely management of online advertising campaigns by automating the process of allocating payments and surplus funds across the online advertising campaigns.” *Id.* The Examiner responds, distinguishing Appellants’ claims over those held patent-eligible in *McRO* because “the present application does not discuss an improvement in computer-related technology by allowing computer performance of a function not previously performable by a computer, as in *McRO*.” Ans. 24.

We are not persuaded of Examiner error. The argued limitations merely limit the use of the abstract idea to a particular technological environment, which the Court made clear in *Alice* is insufficient to transform

an otherwise patent-ineligible abstract idea into patent-eligible subject matter. *See Alice*, 573 U.S. at 223.

- c. Argument: The claims do not preempt other means for practicing the alleged abstract idea

Appellants contend “[i]n *McRO*, the court found the claims to be subject matter eligible because they recite a specific means or method and do not preempt other approaches for the desired result.” Br. 34. According to Appellants “[b]ecause the claimed solution does not preempt other implementations of the alleged abstract idea, the 35 U.S.C. § 101 [rejection] should be withdrawn.” *Id.* The Examiner responds, citing to Robert W. Bahr, Memorandum--Recent Subject Matter Eligibility Decisions (*McRO, Inc. dba Planet Blue v. Bandai Namco Games America Inc., BASCOM Global Internet Services v. AT&T Mobility LLC, and Amdocs (Israel) Ltd. v. Openet Telecom, Inc.*), United States Patent and Trademark Office (November 2, 2016) as providing guidance explaining the lack of pre-emption is not dispositive of patent eligibility. Ans. 25.

Appellants’ pre-emption argument is unpersuasive. As indicated by the Examiner (Ans. 25), although preemption “‘might tend to impede innovation more than it would tend to promote it,’ thereby thwarting the primary object of the patent laws” (*Alice*, 573 U.S. at 216 (quoting *Mayo*, 566 U.S. at 71)), “the absence of complete preemption does not demonstrate patent eligibility” (*Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015)). *See also OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1362–63 (Fed. Cir. 2015) (“[T]hat the claims do not preempt all price optimization or may be limited to price optimization in the e-commerce setting do not make them any less abstract.”).

- d. Argument: The claims do not meet the requirements for the fundamental economic practice judicial exception

Appellants contend the Examiner errs in determining the claims are directed to a fundamental economic practice because “[t]he claims involve using specific operations performed via a computing system to automate the collection of commissions and the disbursement of payments and surplus funds across online advertising campaigns.” Br. 35. Appellants argue “[n]one of [the] claimed elements is a fundamental economic practice because neither the claimed elements themselves nor the combination of these elements relate to agreements between people in the form of contracts, legal obligations, and business relations.” *Id.* at 36. The Examiner responds, finding Appellants’ contention unpersuasive because it is based on the false premise “that the claims are not directed towards an abstract idea of a fundamental economic practice because the claims include elements beyond the abstract idea of a fundamental economic practice.” Ans. 28. As explained by the Examiner, such argument emphasizing the technical implementation of the idea conflates “steps 2A and step 2B of subject matter eligibility tests for products and processes.” *Id.*

We agree with the Examiner. As explained above, Appellants’ claims are directed to a self-funded commission management system (Spec., Title) and, in particular, “commissions for referring a user that completes a purchase and reallocating resources based on those commissions (e.g. in order to increase revenue).” Final Act. 12. Given the claims and specification here and the Examiner’s rational explanation of the intrinsic evidence, Appellants provide insufficient evidence or argument to persuade us that reallocating advertising resources is not a fundamental economic

practice and/or other method of organizing human activity including commercial or legal interactions. Accordingly, we agree with the Examiner's determination that the claims are directed to an abstract idea.

Step 1 (Prong 2)

Under prong 2 we determine whether an additional element (or combination of elements) may have integrated the exception into a practical application. Memorandum, 84 Fed. Reg. at 54–55. Although, as part of the guidance provided by the recently issued Memorandum, this prong was not explicitly discussed as a separate consideration during the prior prosecution of Appellants' application, the relevant facts and considerations have been addressed and discussed. That is, for the reasons discussed above, the claims do not recite an additional element that reflects an improvement in the functioning of a computer, or an improvement to other technology or technical field. *See DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1258–59 (Fed. Cir. 2014). Instead, certain claim limitations (e.g., receiving transaction information and reallocating surplus funds) only recite additional elements that add insignificant extra-solution activity to the judicial exception. *See CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1375 (Fed. Cir. 2011). As discussed further below, the remaining claim elements only recite generic computer components that are well-understood, routine, and conventional. *See Alice*, 573 U.S. at 225

Step 2

Argument: The claimed solution is necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks

Appellants contend:

[I]n the instant application, the claimed solution is necessarily rooted in computer technology (e.g., using affiliate identifiers having particular formats to track commissions and automatically reallocate surplus funds across multiple online advertising campaigns) in order to overcome a problem specifically arising in the realm of computer networks (e.g., the efficiency and timeliness involved with managing the online advertising campaigns). In particular, the claims do not simply take an abstract business method from the pre-Internet world and implement it on a computer.

Br. 39. Appellants argue, as in *BASCOM*, the instant claims include a non-conventional and non-generic arrangement of known, conventional pieces that are significantly more than the underlying abstract idea. *Id.* According to Appellants “the Examiner does not consider the claimed elements in combination such that the claims are analyzed as a whole. A proper analysis under step 2B demonstrates that the claims recite[] elements that are significantly more than the alleged abstract idea.” *Id.*

The Examiner responds, finding “the idea of commissions for referring a user that completes a purchase and reallocating resources based on those commissions (e.g. in order to increase revenue) is [an] idea that existed before and still exists outside the realm of computer technology.”

Ans. 32. The Examiner dismisses Appellants’ argument that the claimed automatic reallocation of surplus funds across multiple online advertising campaigns is a feature rooted in computer technology, finding such automatic reallocation is a “well-understood, routine, and conventional activit[y] previously known to the industry, specified at a high level of generality” that is insufficient to transform the nature of the claim into a patent-eligible application. *Id.* at 33–34.

Appellants' contentions are unpersuasive of Examiner error. Other than conclusory statements alleging the additional elements constitute significantly more than the underlying abstract idea, Appellants provide insufficient evidence or argument to identify any such elements or persuade us the claims otherwise include eligible subject matter. Although the claims require a system computing device and the provision of an online advertising campaign over a data network, the system computing device is disclosed only as "any special purpose or general purpose processor capable of executing instructions within software stored on the memory element 114." Spec. ¶ 14. Likewise, the data network is described at a high level of generality as "a local area network, wide area network, wireless network, the Internet, or some other suitable media." *Id.* ¶ 15. These generic recitations of a computer system, processor, memory and communication network performing basic, generic computer and data communication functions do not amount to significantly more than the judicial exception, and Appellants fail to direct attention to evidence that these elements are other than generic components. Instead, we agree with the Examiner that the recited computer and network elements are well-understood, routine, or conventional as found in prior relevant court decisions. *See Bancorp Servs., L.L.C. v. Sun Life Assurance Co. of Can. (U.S.)*, 687 F.3d 1266, 1278 (Fed. Cir. 2012) (a computer "employed only for its most basic function . . . does not impose meaningful limits on the scope of those claims"); *LendingTree, LLC v. Zillow, Inc.*, 656 F. App'x 991, 997 (Fed. Cir. 2016) (holding ineligible claims to a computerized method of speeding up a loan-application process); *Alice*, 573 U.S. at 223 ("[T]he mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention");

OIP Techs., 788 F.3d at 1363 (“[R]elying on a computer to perform routine tasks more quickly or more accurately is insufficient to render a claim patent eligible.”); *buySAFE*, 765 F.3d at 1355 (“That a computer receives and sends the information over a network—with no further specification—is not even arguably inventive.”); *Ultramercial*, 772 F.3d at 715–16 (claims merely reciting abstract idea of using advertising as currency as applied to particular technological environment of the Internet not patent eligible). Accordingly, we agree with the Examiner in determining the additional claim elements fail to transform the abstract idea into patent-eligible subject matter, and we sustain the rejection of claims 1–17, 21, 23 and 24 under 35 U.S.C. § 101 as directed to a judicial exception without significantly more.

§ 112, first paragraph

The Examiner finds the Specification fails to provide written description support for the limitation “wherein the automatic reallocation self-funds the online advertising campaign of the affiliate based on the performance variables and the affiliate identifier and without input of the administrator or the affiliate.” Final Act. 15. According to the Examiner, the Specification discloses that performance variables are set by the merchant or administrator and, because the disputed automatic reallocation is based on these performance variables, the reallocation is also *dependent on* input by the merchant or administrator, i.e., the reallocation step is not *without* administrator or affiliate input. Final Act. 15–16. Appellants contend the disclosed merchant or administrator input is received during system set-up but does not “relate[] to the automated reallocation once the

aggregated commission has been formed and surplus fund has been determined.” Br. 22.

Appellants’ contention is unpersuasive of Examiner error. To satisfy the written description requirement under 35 U.S.C. § 112(a), “the disclosure of the application relied upon [must] reasonably convey[] to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.” *Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc) (citations omitted); *see also Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1563–64 (Fed. Cir. 1991) (“[T]he applicant must . . . convey with reasonable clarity to those skilled in the art that, as of the filing date sought, he or she was in possession of the invention.”).

Claim 1 is directed to “[a] method for generating self-funded commission management for affiliates providing online advertising campaigns targeted to users for products or services offered by merchants associated with a travel industry.” The method includes multiple steps including a step of reallocating surplus funds across advertising campaigns including automatically reallocating a portion of the surplus fund based on various factors “wherein the automatic reallocation self-funds the online advertising campaign of the affiliate based on the performance variables and the affiliate identifier and without input of the administrator or the affiliate for funding the online advertising campaign.” It is not clear if the “without” language is limited to only the reallocation step so as to permit administrator or affiliate input in establishing the performance variables which control the reallocation step, or if the claim excludes the use of performance variables that had such input even if the automatic reallocation itself does not. However, in either case, because a failure to disclose administrator or

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affiliate input as part of the automatic reallocation step is not equivalent to an affirmative disclosure of excluding such input, we agree there is inadequate written description support for the disputed limitation explicitly excluding such input. Accordingly, we sustain the rejection of claims 1–17, 21, 23 and 24 under 35 U.S.C. § 112, first paragraph.

DECISION

We affirm the Examiner’s decision to reject claims 1–17, 21, 23 and 24 under 35 U.S.C. § 101.

We affirm the Examiner’s decision to reject claims 1–17, 21, 23 and 24 under 35 U.S.C. § 112, first paragraph.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv). *See* 37 C.F.R. § 41.50(f).

AFFIRMED