

Nos. 2019-1808; -1812; -1813; -1814

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

VOIP-PAL.COM, INC.,

Plaintiff-Appellant,

v.

TWITTER, INC.,

Defendant-Appellee.

(For Continuation of Caption See Inside Cover)

Appeal from the United States District Court for
the Northern District of California in Nos. 5:18-cv-04523-LHK, 5:18-cv-06054-
LHK, 5:18-cv-06177-LHK, and 5:18-cv-06217-LHK

**SECOND CORRECTED BRIEF OF *AMICI CURIAE* IN SUPPORT OF
PLAINTIFF-APPELLANT AND REVERSAL**

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VOIP-PAL.COM, INC.,

Plaintiff-Appellant,

v.

CELLCO PARTNERSHIP, dba Verizon Wireless Services LLC,

Defendant-Appellee.

VOIP-PAL.COM, INC.,

Plaintiff-Appellant,

v.

AT&T CORP.,

Defendant-Appellee.

VOIP-PAL.COM, INC.,

Plaintiff-Appellant,

v.

APPLE, INC.,

Defendant-Appellee.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
VOIP-PAL.COM, INC. v. TWITTER, INC.

Case No. 19-1808, -1812, -1813, -1814

CERTIFICATE OF INTEREST

Counsel for the:

(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

Raymond Mercado, Ph.D.; RPost Communications Limited, RMail Limited, and RPost Holdings, Incorporated
certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Raymond Mercado, Ph.D.	Raymond Mercado, Ph.D.	None
RPost Communications Limited	RPost Communications Limited	None
RPost Holdings, Incorporated	RPost Holdings, Incorporated	RPost Communications Limited
RMail Limited	RMail Limited	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

None

FORM 9. Certificate of Interest

**Form 9
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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

Unknown

8/23/2019

Date

/s/Lewis E. Hudnell, III

Signature of counsel

Lewis E. Hudnell, III

Printed name of counsel

Please Note: All questions must be answered

cc: _____

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amicus Curiae Raymond A. Mercado, Ph.D., is a political scientist and patent law scholar who has written on the law of patentable subject matter under 35 U.S.C. § 101 at issue in this case, and is interested in the wholesome development of the law. *See, e.g.*, Raymond A. Mercado, *Resolving Patent Eligibility and Indefiniteness in Proper Context, Applying Alice and Aristocrat*, 20 Va. J. L & Tech. 240 (2016).

Amici Curiae RPost Holdings Incorporated, RPost Communications Limited, and RMail Limited are a group of related operating companies and/or patent holders who have been subject to improper pleadings-stage eligibility challenges, such as the one in this case, and join this brief.

FED. R. APP. P. 29(a)(4)(D)-(E) STATEMENTS

Under Federal Rule of Appellate Procedure 29(a)(4)(D), *Amici Curiae* state that Plaintiff-Appellant has consented to the filing of this brief. Defendants-Appellees have not yet consented. Accordingly, *Amici Curiae* have concurrently filed a motion for leave to file this Amicus Brief.

Under Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici Curiae* affirm that no counsel for a party in this appeal authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than *Amici Curiae*—contributed money that was intended to fund preparing or submitting this brief. Counsel for *Amici Curiae* is counsel for Appellant on a matter unrelated to this appeal.

ARGUMENT

1. This Court Should Reverse, And Hold That a Patentee’s Plausible Factual Allegations That Claims Contain “Inventive Concepts” at Step Two of *Mayo/Alice* Cannot Be Refuted by a cursory Glance at the Claims, And That There is No “*Ipsissimis Verbis*” Test for Determining Patent Eligibility at the Pleadings Stage.

This Court’s watershed decisions in *Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. 2018) and *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.2d 1121 (Fed. Cir. 2018), have been critical to the development of § 101 jurisprudence since *Mayo/Alice*. However, these cases have yet to be fully understood by district courts. The application of “normal procedural standards for fact questions”¹ to eligibility cases has not yet taken hold. Many courts, like the court in this case, are still bypassing the critical factual inquiries this Court identified in *Berkheimer/Aatrix* and, instead, determining whether claims contain inventive concepts as a matter of improper judicial notice, without claim construction or a proper evidentiary record, and with no more than a cursory glance at the claims themselves.

The district court’s decision below is a case in point. Appellant’s specific factual allegations were not credited, and its identification of claim language containing inventive concepts was not considered according to the “normal procedural standards for fact questions” appropriate to the Rule 12 stage. In

¹ *Berkheimer v. HP Inc.*, 890 F.3d 1369, 1370 (Fed. Cir. May 31, 2018) (“*Berkheimer II*”) (Moore, Dyk, O’Malley, Taranto, & Stoll, JJ., concurring denial of reh’g en banc).

particular, the district court simply stated, without analysis, that the “claim language contains no mention” of the inventive concepts Appellant identified—“user specific calling” or “transparent routing”—apparently because the claims do not use those specific terms.

In doing so, the district court improperly elevated form over substance, confining its inquiry to specific claim terms while ignoring the meaning of the claims themselves. But it is well-established under this Court’s precedent that “subject matter” need not employ “exactly the same terms as used in the claims” to be deemed disclosed in a prior application, a prior art reference, or in the claims themselves. *Eiselstein v. Frank*, 52 F.3d 1035, 1038 (Fed. Cir. 1995); *see also In re Gleave*, 560 F.3d 1331, 1334 (Fed. Cir. 2009) (holding that a prior art reference “need not satisfy an *ipsissimis verbis* test” to read on subject matter covered by the claims). This reasoning should hold true in the eligibility context as well, when a court is called upon to determine whether allegedly inventive concepts are contained in the claims, especially at the pleadings stage.

Step Two of the eligibility analysis should not require that claims disclose the alleged “inventive concepts” *in haec verba*; rather such an inquiry requires the perspective of the skilled artisan sensitive to changes in historical usage, who can determine whether the claim language would have been understood to disclose “inventive concepts” at the time of filing. Reversal is warranted in this case, which

is an excellent vehicle for providing additional clarity as to the meaning and application of *Berkheimer/Aatrix*. This Court should reverse, and hold that a patentee’s factual allegations “need not satisfy an *ipsissimis verbis* test” to survive a challenge to eligibility at the pleadings stage. Rather, this Court should hold that plausible factual allegations as to whether inventive concepts are contained within the claims, such as those made by the Appellant below, are sufficient to survive an eligibility challenge at the pleadings stage, and that district courts should not reject such allegations where they have no evidentiary basis for doing so.

Before *Berkheimer/Aatrix*, there were “deep conflicts in the case law about whether eligibility is a question of law, a question of fact, or a mix of both.”² District courts had expressed concern about resolving § 101 “at the Rule 12 stage,” which “can also tempt courts, sometimes improperly, to conclude that certain concepts are conventional or routine by way of judicial notice or treating this potentially factual question as a purely legal one.” *Intellectual Ventures II LLC v. FedEx Corporation*, 2017 WL 6002762, at *2 n. 1 (E.D. Tex. Dec. 1, 2017) (“Guidance from the Federal Circuit regarding the specific factual inquiries underlying a 101 determination is badly needed . . .”) (citation omitted). In the absence of a properly developed evidentiary record, another court noted, “the concern of hindsight bias has as much

² Paul R. Gugliuzza, *The Procedure of Patent Eligibility*, 97 Tex. L. Rev. 571, 601 (2018).

relevance to a § 101 challenge as it does to a § 103 challenge” and “[t]o ignore this concern would provide a ‘blank check’ to all those who challenge patents without sufficient legal or evidentiary basis.” *Ameritox Ltd. v. Millennium Health, LLC*, 88 F.Supp.3d 885, 914 (W.D. Wis. 2015).³ The PTAB, too, was uncertain whether “the question of patent-eligibility is a pure question of law” or “if the question of patent-eligibility is a question of law based on underlying facts...[which] have the potential of controlling the ultimate determination.” *IBG LLC v. Trading Techs. Int’l, Inc.*, 2017 WL 3394060, at *13 (PTAB Aug. 7, 2017). Thus, this Court’s clarification in *Berkheimer/Aatrix* that Section 101 involves factual inquiries—at least at Step Two

³ Commentators were also expressing concern throughout this period about the growing trend toward resolving 101 on the pleadings. *See, e.g.*, Timothy R. Holbrook & Mark D. Janis, *Patent-Eligible Processes: An Audience Perspective*, 17 Vand. J. Ent. & Tech. L. Rev. 349, 362, 382 (2015) (observing that courts are deciding eligibility with “virtually nothing to guide and focus the judicial imagination,” a “dynamic [that] becomes particularly salient when considering the procedural posture of these cases – motions to dismiss under Rule 12(b)(6) or 12(c)” and arguing against the courts’ “problematic” practice of “kick[ing] the hypothetical person of ordinary skill in the art to the curb in favor of a discretionary analysis [by the court] that need not be constrained to establish qualifying prior art evidence”); Raymond A Mercado, *Resolving Patent Eligibility and Indefiniteness in Proper Context: Applying Alice and Aristocrat*, 20 Va. J.L. & Tech. 240, 250, 257 (2016) (observing that “[s]ince *Alice*, the trend has been for eligibility to be resolved on the pleadings or via motions to dismiss” and arguing that “[c]ourts are improperly resolving these cases in a vacuum, substituting their own perspective for that of the skilled artisan and ignoring critical fact issues.”); Paul R. Gugliuzza, *Quick Decisions in Patent Cases*, 106 Georgetown L.J. ___, at *36, (forthcoming 2018) (“[t]he number of pleadings-stage dismissals on eligibility grounds has dramatically increased” in recent years), available at <https://ssrn.com/abstract=2987289>.

of *Mayo/Alice*—was a badly needed advance in the law, and has been welcomed by those concerned about the growing phenomenon of § 101 invalidations made at the Rule 12 stage.

Unfortunately, some district courts—like the court in this case—have seemed to misunderstand or play down the significance of *Berkheimer/Aatrix*. For example, in *Evolutionary Intelligence, LLC v. Sprint Nextel Corporation*, 2019 WL 2059661, at *3 (N.D. Cal. May 9, 2019), the court stated that “*Berkheimer/Aatrix* no more ‘require’ district courts to undertake a § 101 factual inquiry, than any other Federal Circuit panel decision makes that same inquiry ‘optional.’” But, this statement reflects a fundamental misunderstanding of this Court’s case law. Contrary to the reading of *Berkheimer/Aatrix* articulated in *Evolutionary Intelligence*, a “factual inquiry” relevant to Step Two of the § 101 analysis is *always* required.

In *Berkheimer*, this Court specifically noted that whereas in prior cases “[w]e have previously stated that the § 101 inquiry *may* contain underlying factual issues,” the Court was now specifically identifying the question, at Step Two of *Mayo/Alice*, of “whether something is well-understood, routine, and conventional to a skilled artisan at the time of the patent” as “a factual determination” per se. *Id.* at 1368-69 (quotation omitted). In other words, after *Berkheimer*, Step Two of *Mayo/Alice* necessarily involves a factual determination. It may be true that not every case presents a genuine dispute of material fact (at the summary judgment stage), or that

a patentee's own concessions in the specification might defeat factual allegations for purposes of eligibility at the pleadings stage. But, *Berkheimer* has made clear that Step Two of the eligibility inquiry involves a determination that is quintessentially factual. As the Court recently stated in *Cellspin Soft, Inc. v. Fitbit, Inc.*, 2019 WL 2588278, at *8 (Fed. Cir. Jun. 25, 2019), “the principle, implicit in *Berkheimer* and explicit in *Aatrix*, that factual disputes about whether an aspect of the claims is inventive” is one that “may preclude dismissal at the pleadings stage under § 101.” Thus, the question a court faces at the pleadings stage is whether a patentee has made “plausible and specific factual allegations that aspects of the claims are inventive,” or merely conclusory allegations, “wholly divorced from the claims.” *Id.*

Here, the district court improperly circumvented the relevant Step Two factual inquiry altogether with a glance at the claims more appropriate to Step One of *Mayo/Alice*. See APPX47 (“the '815 Patent's claim language contains no mention of these alleged benefits of user-specific calling, such as supporting local public switched telephone network telephone number styles or unconventional styles of calling regardless of where a caller is located. After all, Alice's *step one* inquiry must focus on the claim language.”) (emphasis added). The district court's confusion of Steps One and Two is reversible error in its own right.

More importantly, however, in rejecting Appellant's allegations that the asserted claims contained the inventive concepts of “user-specific calling” and

“transparent routing,” the court provided no analysis beyond stating that the claims do not contain the alleged inventive concepts, apparently because the claims do not use the specific language by which Appellant has labeled its inventive concepts. This rationale is contrary to *Aatrix*, *Cellspin Soft*, and much of this Court’s precedent.

For example, it is well-known in patent law that a reference may read on a claim for purposes of anticipation under § 102 but “need not satisfy an *ipsissimis verbis* test.” *In re Gleave*, 560 F.3d 1331, 1334 (Fed. Cir. 2009). Similarly, it is well-established that the specification need not “recite the claimed invention *in haec verba*” in order to satisfy the written description requirement. *Ariad Pharmaceuticals, Inc. v. Eli Lilly and Co.*, 598 F.3d 1336 (Fed. Cir. 2010) (en banc). The principle is surely the same in the eligibility context: a patentee need not label or elaborate upon the inventive concepts contained in his or her claims exclusively by using the exact claim language, although of course he or she must plausibly show where the alleged inventive concepts are captured in the claims.

Indeed, there are good reasons for not doing so. In any technical field, it is quite common for the discourse to shift and for earlier articulations of technology to be supplanted. This progression is one reason why the perspective of the skilled artisan, sensitive to these shifts in terminology and to historical usages, has long been recognized as critical in patent law. *See, e.g., Teva Pharmaceuticals USA, Inc.*

v. Sandoz, Inc., 135 S. Ct. 831, 841 (2015) (observing that “[e]xperts may be examined to explain terms of art, and the state of the art, at any given time” and referring to the question whether “a certain term of art had a particular meaning to a person of ordinary skill in the art at the time of the invention” as a “factual finding”); *Berkheimer II*, 890 F.3d at 1371 n.3 (Step Two of *Mayo/Alice* involves “a question of historical fact”); *see also* Mercado, *supra* note 3, at 327 (arguing that “extrinsic evidence as to the state of the prior art and expert testimony regarding the conventionality or unconventionality of the claims should be required prior to a determination on eligibility”).

Here, the court failed to credit Appellant’s allegations and evidence showing that it was “considered conventional” in the prior art to use a “specific callee identifier format or by following certain dialing conventions,” and that Appellant’s inventions improved upon the prior art with at least two inventive concepts (“user specific calling” and “transparent routing”). APPX1335-40 at ¶¶ 11, 13 (emphasis original). In spite of the fact that Appellant specifically argued that Claim 1 of the ’815 Patent contains the inventive concept of “user specific calling” and thus describes using caller-specific “attributes” (“calling attributes associated with the caller”) to evaluate a “callee identifier” in order to identify an intended destination (“callee”)—plausibly pointing to specific claim language as containing the alleged inventive concept—nevertheless the district court rejected Appellant’s plausible

allegations apparently on the basis that Appellant’s label for its inventive concept—“user-specific calling”—was absent from the claim language. The court provided the same rationale for its rejection of Appellant’s plausible allegation that, “in contrast” to the failures of the prior art, Appellant’s invention provides “routing transparency.” APPX1335-40 at ¶ 16. Again, the district court improperly rejected Appellant’s argument that “[t]ransparent routing is embodied in all the asserted claims” and identification of specific language from Claim 1 of the ’815 patent containing the alleged inventive concept (“determining a match when at least one of said calling attributes matches at least a portion of said callee identifier,” and “classifying the call as a [private or public] network call when said match meets [private or public] network classification criteria”). APPX1296-1328.

Yet, as pointed out *supra*, there is no rigid requirement for the claims to recite the inventive concepts *in haec verba*. As this Court recently held “[w]hile a factfinder may ultimately determine that [a claim] limitation was well-understood, routine, and conventional, absent a clear statement to that effect in the specification, complaint, or other material properly before the court, when disputed such a determination may not be made on a motion for judgment on the pleadings.” *Natural Alternatives International, Inc. v. Creative Compounds, LLC*, 918 F.3d 1338, 1347 (Fed. Cir. Mar. 15, 2019) Here, Appellant specifically argued and plausibly alleged that Claim 1 of the ’815 patent, as well as the other asserted claims, contained

inventive concepts. Under *Aatrix*, *Cellspin Soft*, and *Natural Alternatives*, the district court's failure to credit these allegations was improper, particularly at the Rule 12 stage.

Moreover, the district court concluded that the claims do not recite an inventive concept without undertaking any effort to determine what the language of the claims actually means. Indeed, the district court rejected Appellant's allegations without even construing the claims or explaining why the claim language cited by Appellant did not plausibly contain the inventive concepts Appellant alleged. Although the district court noted that this Court has stated that "claim construction is not an inviolable prerequisite to a validity determination under § 101," the district court ignored that immediately after that statement, this Court specifically noted "that it will ordinarily be desirable—and often necessary—to resolve claim construction disputes prior to a § 101 analysis, for the determination of patent eligibility requires a full understanding of the basic character of the claimed subject matter." *Bancorp Servs., L.L.C. v. Sun Life Assur. Co. of Canada*, 687 F.3d 1266, 1273-1274 (Fed. Cir. 2012). What is more, the district court's and other courts continued reliance on *Bancorp*, which was decided two years before *Alice*, for the notion that Rule 12 patent eligibility challenges can be resolved without claim construction is becoming an outdated proposition. *Natural Alternatives Int'l, Inc.*, 918 F.3d at 1354 ("This case, and the general development of the law concerning §

101 analysis at the pleading stage, causes me to ask whether the time has come for this court to reconsider whether a Rule 12(c) motion based on § 101 should be decided before claim construction.”) (Reyna, J., concurring-in-part, dissenting-in-part). At bottom, the district court unfairly held Appellant to an improper standard that it could not meet—requiring that the claims specifically recite the inventive concept yet refusing to construe the claims to determine if they do. Here, as in *Aatrix*, Appellant’s allegations and briefing “demonstrate a need for claim construction” before any decision on patent eligibility. *Aatrix*, 882 F.3d at 1129. Accordingly, this Court should reverse, or at a minimum vacate the district court’s decision and remand the case for claim construction.

CONCLUSION

For the foregoing reasons, the district court’s decision should be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on August 23, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Under Federal Rules of Appellate Procedure 29(a)(4) and 32(a)(7), the undersigned certifies that this brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(A).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f) and Federal Circuit Rule 32(b), this brief includes 2,965 words.

2. This brief has been prepared in proportional space typeface using Microsoft Word 2013 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count of this word processing system in preparing this certificate.

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