

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)

*On 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*

CORRECTED REPLY BRIEF FOR PLAINTIFF-APPELLANT

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September 25, 2019

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.

CERTIFICATE OF INTEREST

Counsel for the Appellant, VoIP-Pal.com, Inc., certifies the following:

1. The full name of every party or amicus represented by me is:

VoIP-Pal.com, Inc.

2. The name of the real party in interest (if the party names in the caption is not the real party in interest) represented by me is:

None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

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 are:

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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.

Apple Inc. v. Voip-Pal.com, Inc., Appeal No. 18-1456, U.S. Court of Appeals for the Federal Circuit

/s/ Kevin N. Malek

Kevin N. Malek

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ARGUMENT

I. At Step One, The Claims Are To A Patent-Eligible Improvement to a Technological Communication Routing Process And System

Under *Alice*, a claim is not an unpatentable abstract idea if it “improve[s] an existing technological process.” *Alice Corp. Pty. v. CLS Bank Int’l*, 573 U.S. 208, 222 (2014). That precisely describes the inventions claimed in the Patents-in-Suit: The inventions allow a computer to establish a phone call, message or video communication to endpoints in two distinct networks, in a user-customized manner, without the need for the user’s decision-making and judgment. *See* Br.¹ 13-14.

A. The Claimed Invention Is Fundamentally Different from Prior-Art Methods of Routing Phone Calls

Defendants focus on the decision-making of an operator, in isolation, without any evidence of record that operators acted in the same manner as the claimed inventions. Nor did prior art PSTN nodes or PBX switches function in the manner of the asserted claims. VoIP-Pal explained those prior-art processes in its Opening Brief (Br. 5-7). Defendants do not challenge the accuracy of that description. But they urge that the patented methods merely automate prior-art practices. Def. Br.² 14. Not so. Like “most, if not all” inventions, the claimed invention utilizes certain

¹“Br” refers to VoIP-Pal’s Corrected Opening Brief.

²“Def. Br.” refers to Defendants’ Joint Responsive Brief For Defendants-Appellees.

prior-art “building blocks.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418-19 (2007). The claimed processes and systems expand the ability of communication systems and computers to provide customized, user-specific access to distinct communication networks thereby improving a technological process. APPX001315-001317; *see Alice*, 573 U.S. 208, 225.

B. Defendants’ Arguments Ignore and Misconstrue What Is Actually Claimed

Defendants correctly assert that it is the claims that matter to the Section 101 analysis. Def. Br. 18. But their arguments ignore or affirmatively misconstrue the text of the claims. Properly read, the claims are neither directed to, nor fail to add sufficiently concrete context to, an abstract idea.

1. The Claims Are Directed to Facilitating Phone Calls and Messaging, Not Mere Data Processing.

Invoking a now-commonplace attack on software patents, Defendants urge that the patents claim no more than information processing. Def. Br. 20-24. Defendants’ arguments, however, ignore virtually all of the claims’ steps and their specific requirements.

The asserted claims recite a highly technical process with defined technological structure. For example, the preamble of Claim 1 of the ‘815 Patent makes clear that the patents are not directed to “mere data transfer.” Claim 1 of the ‘815 Patent recites a “process for operating a call routing controller to facilitate

communication between callers and callees in a system comprising a plurality of nodes with which callers and callees are associated.” APPX0000167 (‘815 Patent) 36:14-39. It is not a mere process for transferring data as Defendants contend. Moreover, the process of Claim 1 must be in response to “initiation of a call.” APPX0000167 (‘815 Patent) 36:14-38. And the claim clearly requires that the claimed process will result in the programming of a call controller in a manner that identifies a physical gateway on the public network or a physical address on the private network that is associated with the “callee” and to which the call will be routed. Br. 16-17 (quoting ‘815 Patent). That is, the claims require a tangible output—an improved call routing controller, process, and technology providing customized, user-specific access to call routing integrated to the respective infrastructures of two distinct types of communication networks—a “public network” (e.g., PSTN) and a “private network” (e.g., VoIP). *Id.*

Defendants’ assertion (Def. Br. 21) that the patents merely “collect” “recognize” and “store” data reads those limitations out of the claims, focusing solely on the intermediate steps of locating a caller profile and classifying the call itself. But the Supreme Court has rejected that type of analysis: When determining patent-eligibility “under §101, the[] claims must be considered as a whole.” *Diamond v. Diehr*, 450 U.S.175, 188 (1981) (emphasis added); *see also Alice*, 134 S. Ct. at 2355. The question is not whether one step is “patentable in isolation.”

Diehr, 450 U.S. at 188. It is whether the entire claimed “process” is patent-eligible. *Id.* Defendants cannot ignore the claim limitations that contradict their position.

Indeed, Defendants argument that the claims are limited to mere information processing defies not only the preambles of the asserted claims, but also the body of the claims themselves. As noted in VoIP-Pal’s Opening Brief, the claims require the initiation of a call and the subsequent programming of a call routing controller in order to successfully route the call to a private or a public network. APPX000167 (‘815 Patent) 36:14-39. Disembodied “information” has no “call” to “classify” or “call controller” to program. Rather, the patents make clear that the claimed “classification” serves a higher end — the routing of the call to a physical destination on a public or a private network. APPX000167 (‘815 Patent) 36:14-39; *see also* Br. 48-50. Indeed, Defendants concede this point elsewhere in their brief. Def. Br. at 38-39; APPX000167 (‘815 Patent) 36:14-38; *see also* APPX000234 (‘005 Patent) 43:41-65 (claim 74).

The claims require much more than information processing, or the mere act of “processing” information. As the District Court found:

*In general, the asserted claims of the Patents relate to the process of routing calls (either voice or video) between a caller and a callee, in which calls are classified as either public network calls or private network calls.*¹ ‘815 Patent at 1:50-54. More specifically, *the process of routing the call involves a computer “super node” routing a call based on “identifiers” associated with both the caller and the callee.*

APPX000008-000010 (District Court Order) (internal citations omitted).

Defendants continue their oversimplification that the claims merely “involve routing communications based on information about the participants.” *See* Def. Br. 19. Based on this mischaracterization of the claims, Defendants contend that the claims are ineligible at Step One because “routing data is an abstract idea,” relying on this Court’s decision in *Intellectual Ventures I LLC*. *Id.* (citing *Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1318 (Fed. Cir. 2016)).

Foremost, Defendants reliance on *Intellectual Ventures I LLC* is misplaced and only serves to highlight the flaw in Defendants’ reasoning. The claims that this Court found ineligible in *Intellectual Ventures I LLC* are entirely devoid of any technological structure and relate to no more than mere characterization of data files. For example, in *Intellectual Ventures I LLC*, this Court examined claim 9 of the ‘050 Patent there, which was directed to “[a] method for identifying characteristics of data files, comprising” receiving, determining and outputting information, without anything more. *See Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1313 (Fed. Cir. 2016) (citing ‘050 patent, col. 8, ll. 13–26) (emphasis added). Accordingly, claim 9 of the ‘050 Patent was expressly directed to nothing more than a “method for identifying characteristics of data files.” *Id.* at 1313-1317.

Moreover, this Court has held that claims covering organizing or analyzing information can be eligible when directed to something more. *See, e.g., McRO, Inc. v. Bandai Namco Games America Inc.*, 837 F.3d 1299, 1313 – 1314, 1316 (Fed. Cir.

2016); *see also Core Wireless Licensing S.A.R.L. v. LG Elecs., Inc.*, 880 F.3d 1356, 1362-63 (Fed. Cir. 2018) (finding claims eligible under § 101 notwithstanding that the claims included the generic “idea of summarizing information”). Indeed, the cases that Defendants rely upon are entirely distinguishable because the claims (in those cases) were limited to the collection, processing and display of information ***without anything more*** and without anything inventive. *See Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1354 (Fed. Cir. 2016) (finding claims to information gathering to be abstract because the claims did not use “any particular assertedly inventive technology for performing those functions”); *see also West View Research, LLC v. Audi AG*, 685 F App’x 923, 926 (Fed. Cir. 2017) (unpublished) (holding that claims to collecting, analyzing, retrieving and processing information were ineligible where they did not go beyond “the abstract idea of collecting and analyzing information”); *see also FairWarning IP, LLC v. Iatric Systems, Inc.*, 839 F.3d 1089, 1093 (Fed. Cir. 2016) (agreeing that the invention was “drawn to the concept of *analyzing records* [and data] of human activity to detect suspicious behavior” without anything more (emphasis added)); *SAP Am., Inc. v. InvestPic, LLC*, 898 F.3d 1161, 1167-68 (Fed. Cir. 2018); *In re TLI Commc’ns LLC Patent Litig.*, 823 F.3d 607, 611 (Fed. Cir. 2016) (claims directed to nothing more than “the abstract idea of *classifying and storing digital images* in an organized manner” (emphasis added)). In other words, the cases that Defendants cite relate ***solely*** to the

steps of processing and displaying information. See also, e.g., Content Extraction & Transmission LLC v. Wells Fargo Bank, 792 F.3d 1343 at 1369-70 (Fed. Cir. 2014) (requiring no more than collecting information about a user for display on a website); *Intellectual Ventures I LLC v. Capital One Fin. Corp.*, 850 F.3d 1332, 1340 (Fed. Cir. 2017) (requiring no more than collecting, displaying, and manipulating data in response to inputs); *BSG Tech LLC v. Buyseasons, Inc.*, 899 F.3d 1281, 1286 (Fed. Cir. 2018) (requiring no more than collecting input from the user and displaying information); *Univ. of Fla. Research Found., Inc. v. Gen. Elec. Co.*, 916 F.3d 1363, 1368 (Fed. Cir. 2019) (requiring no more than collecting, analyzing, manipulating and displaying data). Moreover, the fact that a claim may contain generic computer components is not dispositive of eligibility. *See e.g. Amdocs (Israel) Ltd. v. Openet Telecom, Inc.*, 841 F.3d 1288, 1306 (Fed. Cir. 2016); *Trading Techs. Int'l, Inc.*, 675 F. App'x 1001, 1004 (Fed. Cir. 2017) (affirming eligibility where claims recited more than setting, displaying, and selecting data using conventional computers and the internet); *see also Bascom Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1350 (Fed. Cir. 2016); *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1314–15 (Fed. Cir. 2016); *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1336 (Fed. Cir. 2016).

In contrast, the asserted claims here are directed to much more: a “process for operating a call routing controller to facilitate communication between callers and

callees in a system comprising a plurality of nodes with which callers and callees are associated.” See APPX000010 (District Court Order) (quoting preamble of claim 1 of the ‘815 Patent). Moreover, Claim 1 of the ‘815 Patent requires providing an improved call routing controller, in communication with a call controller, that enables a private communication network (e.g., a VoIP system) to better interoperate with a traditional public communications network (e.g., the public switched telephone network or “PSTN”), to reach an intended destination in either the private or public network. APPX000167 (‘815 Patent) 36:14-39.

2. Defendants’ Arguments That The Claims Are Abstract At Step One Because They Include Functional Elements Is Incorrect.

Defendants persistently argue that the asserted claims are abstract because they use generic or functional language. This is clearly misguided. It is wholly appropriate to use functional language to limit claims. In fact, in other contexts, this Court, as well as others, have held that both apparatus and method/process claims can be written using functional language. See, e.g., *Microprocessor Enhancement Corp. v. Tex. Instruments Inc.*, 520 F.3d 1367, 1375 (Fed. Cir. 2008) (“[A]pparatus claims are not necessarily indefinite for using functional language.”); see also *Cox Commc'ns, Inc. v. Sprint Commc'n Co. LP*, 838 F.3d 1224, 1232 (Fed. Cir. 2016) (“here, functional language promotes definiteness....All of the asserted claims are method claims, so it makes sense to define the inventive method as a series of

functions.”); *see also Mastermine Software, Inc. v. Microsoft Corp.*, 874 F.3d 1307, 1313 (Fed. Cir. 2017).

In arguing that that the claims are ineligible because they are generic or functional, Defendants improperly conflate other issues that are not relevant to the 35 U.S.C. § 101 question. “[W]hether a patent specification teaches an ordinarily skilled artisan how to implement the claimed invention presents an enablement issue under 35 U.S.C. § 112, not an eligibility issue under § 101.” *Visual Memory LLC v. NVIDIA Corp.*, 867 F.3d 1253, 1261 (Fed. Cir. 2017); *see also Free Stream Media Corp. v. Alphonso Inc.*, No. 17-cv-02107-RS, 2018 WL 7348855 at *4 (N.D. Cal., Jan. 12, 2018) (“To the extent ... that the patent does not adequately explain how the barriers are overcome when the described system and methods are employed, such issues do not support a finding of patent ineligibility under Section 101.”). Accordingly, Defendants’ arguments that the claims must be ineligible because they are generic or functional fails.

C. Case Law Also Demonstrates That the Claims Are Not Abstract At Step One.

Once the claims and prior art are properly understood, Defendants’ arguments under the two-step *Alice/Mayo* framework and *Alice*’s “technological improvement” standard collapse. *See* Br. 19-36. The claims are “directed to” a specific and concrete technological process, not an abstract idea. *Alice*, 573 U.S. 208, 217; *see* Br. 36-42. And the claim limitations clearly add *enough* to qualify as patent-eligible processes

and systems. *Mayo Collaborative Services v. Prometheus Labs, Inc.*, 566 U.S. 66, 77 (2012); *see* Br. 24-25. The patents do not monopolize “basic tools of scientific and technological work,” *Alice*, 573 U.S. 208, 216. There are myriad non-infringing ways to perform computer-based communication and methods to route the same. *See* Br. 24-25.

These are not claims about “business methods”—ideas about “fundamental economic practice[s]” and “organizing human activity”—which the Supreme Court and this Court have deemed abstract ideas under §101. *Alice*, 573 U.S. 208, 218-19; *see* Br. 35-41. There is a huge difference between the “financial solutions” in those cases and the “communication and routing solution” at issue here. Def. Br. 19-25. *See Alice*, 573 U.S. 208, 218-19; *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257 (Fed. Cir. 2014). The novel communication method here, by contrast, is technological, not entrepreneurial.

1. Defendants Contention That Generic Computer Elements Cannot Save a Claim is Incorrect.

Defendants’ own application of *Alice* to the facts is entirely incorrect. For example, in arguing that the claims are abstract *at Step One*, Defendants assert that “[c]laims that ‘merely require generic computer implementation, fail to transform [an] abstract idea into a patent-eligible invention.’” *See* Def. Br. (in their *Alice* Step One section) at 24 (citing *Alice*, 573 U.S. at 221). But whether the implementation of the abstract idea on a computer is enough to “*transform the abstract idea*” into a

patent-eligible invention is not a proper inquiry at Step One. In fact, the passage from *Alice* upon which Defendants rely for this faulty proposition is clearly part of the Supreme Court's Step Two inquiry in *Alice*. Indeed, the complete excerpt from *Alice*, relied upon the Defendants makes this point clear:

Turning to the second step of Mayo's framework: The method claims, which merely require generic computer implementation, fail to transform that abstract idea into a patent-eligible invention.

Alice, 573 U.S. at 211 (emphasis added). In a likely attempt to further confuse the issue, Defendants compound the problem they created by citing additional Step Two precedent from this Court for the same illogical Step One proposition. *See* Def. Br. 24 (citing *buySafe, Inc. v. Google, Inc.*, 765 F.3d 1350, 1355 (Fed. Cir. 2014); *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1355 (Fed. Cir. 2016)). However, Defendants' reliance on *buySafe* and *Elec. Power Grp.* are inapposite because the cited passages are clearly directed at Step Two's inquiry. *See, e.g., buySafe, Inc. v. Google, Inc.*, 765 F.3d 1350, 1355 (Fed. Cir. 2014); *Elec. Power Grp.*, 830 F.3d at 1355. In *Elec. Power Grp.*, this Court explained that the issue Defendants' raise in their Step One challenge is actually a part of the Step Two challenge. *Id.*

Despite what Defendants' argue, the question of whether implementation on a computer is *sufficient to transform an abstract idea into a patent-eligible invention* is clearly a Step Two question. *See Alice*, 573 U.S. 208, at 222; *Mayo*, 566

U.S. 66, at 71; *Bilski v. Kappos*, 561 U.S. 593, 610–11 (2010); *Diehr*, 450 U.S. 175, at 191 (1981); *buySAFE, Inc.*, 765 F.3d 1350, at 1355.

Defendants also argue throughout their brief that the specific and tangible elements of the claimed inventions, such as the “call routing controller” cannot save the invention at Step One because the “recited ‘controllers’ [are not] a specific device particularized in any way to the claimed method.” *See* Def. Br. p. 25 (citing APPX000156 (‘815 Patent) 13:10-24). Significantly, Defendants do not, because they cannot, seriously dispute that the claims are directed to tangible computer components. Instead, Defendants argue, improperly, that these tangible computer components do not save the claims at Step One *because they are generic*:

[t]he controllers have generic computer components, such as processors, memory, and input/output ports – components that all computers have.

See Def. Br. p. 25. Fatally, as discussed herein, that is not the proper inquiry at Step One. In fact, the presence of these admittedly tangible components can be the basis for finding claims not abstract, because such tangible and concrete limitations are technological and can be said to add more to the claims – as the Supreme Court made clear in *Alice*. *See* APPX000156 (‘815 Patent) 13:10-14; APPX000158 (‘815 Patent) 17:16-37; APPX000122 (‘815 Patent) Fig. 7; APPX000157 (‘815 Patent) 15:16-16:5; APPX000120 (‘815 Patent) Fig. 4). Defendants have conceded this point in their argument. They instead argue, wrongly, that the presence of generic computer

elements *necessarily renders* the claims abstract at Step One. That is not true. Processors, memory chips and input/output ports are tangible elements. The fact that they exist in every computer does not necessarily mean that a claim using those elements must be abstract. At Step One, the question is whether these tangible computer elements *add more to the abstract idea covered by the claims*. Here they do. These elements not only add more, but they are actually required for the invention. The inventions cannot function without them. That must be contrasted with the issue the Supreme Court faced in *Alice*, where the patentee held claim over an invention that did not require the tangible computer elements to function, but rather claimed an abstract idea that was completely operable without the computer elements. *See Alice*, 573 U.S. 208, 225. Here, the computer elements are actually necessary for the invention to work.

2. Defendants’ Contentions Regarding Analogous Long-Standing Practices Are Unsupported and Unsupportable.

Defendants also contend that the claims are analogous to long-standing practices of switchboard operators – their so-called operator analogy. Def. Br. 26-28. Defendants’ sole support for this proposition is speculation drawn from the District Court’s decision and a series of unsupported attorney arguments. Defendants offer no explanation for how the citations support their position—and with reason. Defendants start off by mischaracterizing the District Court’s decision suggesting that “the district court correctly recognized, routing a call **using information about**

the caller and callee is analogous to the function of a switchboard operator.” Def. Br. 27 (citing APPX000031) (emphasis added). Nowhere in the record does the District Court conclude that switchboard operators routed calls using “**information about the caller.**” At most, the District Court found that:

telephone operators might have used a caller’s identity to properly ***attribute toll charges, or to record the caller’s number for a call back*** in case the connection was lost.

APPX000031 (emphasis added). Attributing toll charges or recording a number for call back purposes is not routing. Accordingly, Defendants suggestion that the asserted claims are embodied in long-standing operator switch-boarding should be rejected because it is just untrue. That is also evident in the fact that Defendants do not cite to a single source for the propositions espoused in their Brief in support of this so-called operator analogy. *Compare* Def. Br. p. 27.

Significantly, as VoIP-Pal pointed out in its Opening Brief, the District Court did not even analogize the asserted claims to any long-standing practice of record. Instead, the District Court analogized the asserted claims to a “long-standing practice” found in an entirely separate judicial decision on an entirely different invention. Br. 21-23; *see also* APPX000031. Defendants say nothing in response.

To be sure, switchboard operators existed. But Defendants have not produced any evidence of any analogous process or system. That is because none exists.

Defendants' reliance on citations without evidence should itself be fatal. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006).

II. The Asserted Claims Are Eligible Under *Alice/Mayo Step Two*

Under step two of *Alice*, the asserted claims are patentable because the “ordered combination” of claimed elements contains a patent-eligible application (i.e., “inventive concept”) satisfying § 101. Br. 45. In particular, the claims provide an improved call routing controller, process, and technology providing customized, user-specific access to call routing integrated to the respective infrastructures of two distinct types of communication networks—a “public network” (e.g., PSTN) and a “private network” (e.g., VoIP). APPX001335-000040 (Third Amended Complaint) at ¶¶ 7-15.

Neither the District Court, nor the Defendants, have properly analyzed whether the *additional* features of the claims (i.e., those going beyond the alleged “abstract idea” in step one) are integrated so as to add “something more” to the claims “as a whole” as is required by *Alice*. Instead, the District Court and Defendants stripped out claim elements that are allegedly “generic” or old to recharacterize the “ordered combination.” The District Court relied on a technically invalid analogy to patent claims for a *different* technology, found ineligible in another case, to find the recharacterized “ordered combination” conventional based

on a *single* consideration: “ordering of steps”. Br. 50. This ignores the inventive concept captured by the asserted claims as well as VoIP-Pal’s explanation of how *all* the recited claim elements are integrated into the claim “as a whole.” APPX001340 (Third Amended Complaint) at ¶ 16. Separately, the District Court drew erroneous conclusions about individual claim elements, yet declined to perform the claim constructions necessary to understanding the basic character of the claims. APPX000034-000036.

Defendants do not dispute VoIP-Pal’s application of the *Alice/Mayo* Step Two framework. Nevertheless, Defendants propagate the same misunderstandings reached by the District Court by reductionistic recharacterization contrary to Supreme Court precedent. Separately, Defendants absurdly maintain that “collecting,” “analyzing” and “utilizing” (“storing” or “sending”) data limitations do not *ipso facto* contain an “inventive concept”—which would categorically ban all computer-based (software) inventions. Finally, Defendants assert—in the absence of any claim construction by the District Court—that user-specific call-handling and routing transparency is “not embodied by [the] claims in any way,” ignoring Voip-Pal’s arguments and evidence to the contrary, while mischaracterizing the concepts themselves. None of this is appropriate at the Rule 12(b)(6) stage where VoIP-Pal deserves all inferences in its favor. *Cedars-Sinai Med. Ctr. v. Nat’l League of Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir. 2007).

A. The Claims Are Eligible At Step Two Because They Claim an Patentable “Ordered Combination” That Is Inventive

Step Two requires consideration of the “additional elements” of a claim (i.e., those that are go beyond the “abstract idea” identified in step one) to determine whether they integrate the abstract idea into a patent-eligible application. Br. at 46-48. Such analysis requires consideration of the claim “as a whole”. *Id.* (citing *Alice*, *Mayo* and *Diehr*). Indeed, this Court has warned against oversimplifying the claims or ignoring claim elements which, in isolation, appear abstract, during §101 analysis. Br. at 49 (citing *Enfish* and *McRO*). Any claim elements that “could be omitted while leaving intact” the ineligible abstract idea from “step one”, are precisely the “additional elements” that the Supreme Court mandated should be considered under “step two”. See *Ameranth, Inc. v. Genesis Gaming Solutions, Inc.*, No. 11-00189-AG, 2014 U.S. Dist. LEXIS 175600, *18 (C.D. Cal. Nov. 12, 2014).³

Yet the District Court’s analysis of the “ordered combination” was cursory at best and did not follow the above precedents. APPX000037 (District Court Order). Rather, the district court postulated the *functional equivalence* of paraphrased fragments of Voip-Pal’s claims to unrelated claim language drawn to a *completely*

³ Defendants assert that Voip-Pal provides no argument regarding preemption. Def. Br. 54-55. But applying *Ameranth* here, “one could implement many different [methods of “routing a call based on characteristics of the caller/callee”] that do not infringe the claims”. *Ameranth* at *17; compare Br. 48-51. In prosecution, the Patents-In-Suit distinguished over numerous references. And Voip-Pal has prevailed in *eight inter partes* reviews. APPX001305, Br. 2. Clearly, *many* routing methods do not practice the asserted claims, thereby mooting *Alice*’s preemption concerns.

different technology, namely, the steps of “processing”, “routing” and “controlling” in claims held ineligible in *Two-Way Media. Ltd. v. Comcast Cable Communications, LLC*, 874 F.3d 1329 (Fed. Cir. 2017). Consequently, numerous “additional elements”—i.e., limitations not necessitated by the court’s “abstract idea” in step one—were stripped out. Br. 49-50. Unsurprisingly, the District Court did not analyze whether these “additional elements” integrated the “abstract idea” of Step One into a patent-eligible application in the process “as a whole,” as required by the precedents.

Defendants justify the cursory or non-existent “ordered combination” analysis by arguing that “Step Two” requires a District Court to “cut through the verbiage” of a “large number of words” to determine “basic operations”. Def. Br. 53. But Defendants do not cite any authority for that departure from *Alice*, *Mayo* and *Diehr* or any post-*Alice* precedent. Defendants say “there is nothing wrong with an approach that characterizes the ordered combination... by looking [only] at its operative terms”. *Id.* at 54. No case law is cited differentiating “operative” from “inoperative” terms. In claim 1, Defendants identify only *five* words as “operative” without explaining why the rest could not conceivably contribute to an “inventive concept”. And Defendants fail to rebut Voip-Pal’s specific examples of “operative” “additional elements” eliminated from the District Court’s step two analysis. Br. 49-51.

Defendants also argue that VoIP-Pal’s challenge to the “ordered combination” analysis is unwarranted because VoIP-Pal “did not raise this challenge in opposition to the motion to dismiss”. Def. Br. 53. This argument fails for multiple reasons. *First*, the District Court did not follow the Supreme Court framework for a proper Step Two ordered combination analysis. Br. 46-48. That is a legal error *independent* of any error stemming from reliance on *Two-Way Media*. *Second*, the erroneous ordered combination analysis adopted by the District Court was not advocated in Defendants’ Motion to Dismiss. Defendants cited *Two-Way Media* as an example that an “ordering of steps” may be found “conventional,” but never attempted to *equate* specific steps from *Two-Way Media* to corresponding steps in VoIP-Pal’s claims. Compare APPX000942 (Motion to Dismiss) at 23; APPX000037 (District Court Order) 33 (“First, data is *processed* by ‘locating a caller dialing profile’... Then, data is *routed* by classifying the call...[etc.]” [emphasis in original]). Thus, VoIP had no opportunity to challenge an error made—for the first time—in the District Court’s decision.

Defendants now assert (1) the District Court analyzed the ordered combination “exactly” like this Court in *Two-Way Media*; and (2) that “the two ordered combinations were indistinguishable”. Def. Br. 54. Both contentions are false.

The *Two-Way Media* Court never relied on an element-by-element comparison with claims taken from a technologically-unrelated patent. Rather, the *Two-Way*

Media Court analyzed specific claim terms *after* claim construction had been completed, unlike here. *Two-Way Media Ltd. v. Comcast Cable Communications, LLC*, 874 F.3d 1329, 1335, 1338 (Fed. Cir. 2017). Furthermore, the District Court’s analogy to *Two-Way Media* is also ***technically invalid and dangerously facile***. The District Court unwittingly ***redefines*** the terms “processing”, “routing” and “controlling” from their original meaning in *Two-Way Media*. APPX000037 (District Court Decision). In *Two-Way Media*, “processing” appears to mean converting audio/visual information into streams of digital packets. *See Two-Way Media* 874 F.3d 1329 at 1334-1335 (*compare* “processing” step in claim 29 of the ‘622 patent with equivalent “converting” step in claim 1 of the ‘187 patent). But converting audio/visual information into packets is ***completely different and non-analogous to*** “locating a caller dialing profile” and matching profile attributes with a callee identifier in the ‘815 Patent. *See* APPX000037 (District Court Decision). Moreover, “routing” in *Two-Way Media* refers to sending the aforesaid audio/visual packet stream to users. *See Two-Way Media* at 1334-1335. This act is completely different from a classifying step performed by a “routing controller” as in Claim 1 of the ‘815 Patent to setup a call *before* any packet stream is established between a caller and callee. The Court’s conclusion that Claim 1 “discloses a similar structure to the *Two-Way Media* claim” (APPX000037 and APPX000046 (District Court Decision))

commits technical error and departs from *Alice*'s "Step Two" mandate, unconstrained by claim construction or expert evidence.⁴

Moreover, the District Court's finding "elsewhere" that "no individual step was transformative" (Def. Br. 54) is unavailing because (1) analysis of the "ordered combination" "as a whole" is supposed to be a distinct, meaningful enquiry for which review of *dissected* individual steps cannot substitute (since inventive concepts also arise from the *cooperation* of claim elements); and (2) moreover, the Court's analysis of individual elements is incomplete and deficient. Br. 55-57.

Defendants also present an alternate theory for why the "ordered combination" lacks an inventive concept, namely, that data is "collected", "analyzed" and then "utilized" (i.e., "stored or sent"). *See* Def. Br. 15, 35-36, 36. This theory is no less reductionistic or inaccurate than the District Court's distillation of the "ordered combination" into three words. Again, this turns step two into a farce, rather than a meaningful inquiry. If claims which involve collecting, analyzing and utilizing (storing or sending) data, *ipso facto* contain no "inventive concepts"—Step Two is a foregone conclusion or even a categorical ban on computer-implemented (software) routing inventions. But this violates statute (§101 does not exclude routing

⁴ The same District Court invalidated another patent—for a *completely different* communication technology—by relying on the *same* analogy. *See Uniloc USA Inc. v. LG Electronics*, Case No. 18-CV-06738-LHK, Dkt. No. 86 (N.D. Cal. April 9, 2019) (Bluetooth claims held ineligible because they allegedly involved "processing", "routing" and "controlling" as in *Two-Way Media*).

inventions). Under Defendants’ theory, almost any computerized method arguably lacks an “inventive concept”, e.g., *BASCOM*’s patent-eligible server “collected”, “analyzed” and “utilized” data. *BASCOM Global Internet Servs. V. AT&T Mobility*, 827 F.3d 1341, 1345 (Fed. Cir. 2016).

And contrary to Defendants, the district court’s analysis of the individual claim limitations was also incomplete and unsupported. Def. Br. 51-53.

(1) Defendants argue that the district court did not misunderstand the claims or specification by alleging the dialing profile comprises “identificatory attributes” “left undefined in the claim and specification,” and accuses Voip-Pal of failing to identify the relevant figures in the patent. *Id.* Actually, Voip-Pal’s opposition referred to figures explaining the attributes (APPX001309); they were also referenced in the Third Amended Complaint at ¶8. APPX001335-001336. More to the point, the district court purports to interpret what the specification discloses—but incorrectly states that attributes are left “undefined... in the *specification*,” which suggests a misunderstanding. APPX000035 (District Court Decision). Separately, Defendants’ defense of the district court confusing a caller identifier with a caller profile (Br. 56, citing APPX000009 (District Court Decision)) is unavailing. Def. Br. 52. The District Court itself cited the ‘815 Patent at 2:8-25 as the basis for its conclusion, which discloses comparing the callee identifier to various attributes “associated with the caller dialing profile” (e.g., IDD, NDD, area code, length)—

none of which is a phone number, as alleged by Defendants. The District Court’s confusion about the caller dialing profile is undeniable, which likely caused its misunderstanding of the claims. Likewise, the District Court mischaracterizes the *patent specification* as “fail[ing] to disclose user-specific calling”. See Def. Br. 12 (citing APPX000047 (District Court Decision)); compare APPX001308-001309 (VoIP-Pal’s Opposition Brief); APPX001030 (Third Amended Complaint) at ¶¶ 8, 14).

(2) Defendants assert that the district court’s analysis of matching was correct. Def. Br. 52. But the District Court had no sound basis for determining the “matching” process was not “inventive.” APPX000035-000036 (District Court Decision); compare Br. 57 (citing *DDR*). The matching step is based on *profile attributes* from a preceding step and also forms the basis for the subsequent “classifying” step. The Court cites no evidence that *this* manner of matching could not be inventive.

(3) Voip-Pal criticized the court’s conclusion that the steps of “classifying” and “producing a routing message” lacked an inventive concept based *solely* based on the court’s inference that these steps are “performed on a generic computer”. See Br. 55; APPX000036 (District Court Decision). Notably, Defendants provide no defense of this *non sequitur*, which incorrectly assumes that software modules are incapable of an inventive concept. See Def. Br. 51-53. *Genband US LLC v. Metaswitch Networks Corp.*, No. 2:14-cv-33-JRG-RSP, 2016 U.S. Dist. LEXIS

37946, *28 (E.D. Tex. Jan. 6, 2016) (whether components are implemented as “hardware and/or software” does not change the *Alice* analysis); *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335, 1339 (Fed. Cir. 2016).

B. The Asserted Claims Contain Unconventional Inventive Concepts

The claims contain inventive concepts, e.g., a non-generic arrangement of elements providing user-customized access to call routing integrated to the infrastructures of two distinct types of communication networks—e.g., a “public network” (e.g., PSTN) and a “private network” (e.g., VoIP). See APPX001030-001031 (Third Amended Complaint) at ¶¶7-16 (explaining unconventionality). Voip-Pal’s victory in *eight* IPR Petitions also suggests this arrangement is unconventional. Br. 2.

Defendants deny that the claims embody user-specific handling or routing transparency though no claim construction has been performed. Def. Br. 48-51. Further, Defendants’ description of these concepts is confused. *Id.*

Voip-Pal’s complaint explains at ¶12 that the caller dialing profile used to process a call is “user-specific.” APPX001030-001032 (Third Amended Complaint). The complaint gives an example of a call between users having different “profiles,” each having user-specific “attributes” that customize that user’s calling experience. *Id.* For example, two users could have two different, user-specific IDD attributes. APPX001309 (VoIP-Pal’s Opposition) at FN6-7. When these attributes are matched

to a callee identifier, the system will determine whether a given call is international *differently* for the two users. See APPX000124 ('815 Patent) at Figure 8B (blocks 257-259). Defendants never deny that a “profile” is specific to a caller. But using caller-specific profile “attributes” in call processing renders such processing caller-specific. For example, in claim 1 of the '815 Patent, because the profile “attributes” are necessarily user-specific, the “callee identifier” is “match[ed]” one or more times in a user-specific way, thus subsequent classifying/routing steps are necessarily performed in a user-specific way.⁵ Defendants bizarrely mischaracterize user-specific handling as obviating the need to dial country codes when placing an international call. Def. Br. 48 (likewise at pp. 5, 14, 27, 48). No such feature exists, nor did Voip-Pal say it did.⁶ Even from the example in footnote 6 (APPX001309), it is apparent that the benefit is *not* “obviating” dialing a country code, but rather, that the two callers can dial international calls in user-specific ways. (Other profile attributes customize other aspects of the calling experience for each user.)

Defendants deny that user-customized processing is a patent-eligible benefit. Def. Br. 50. However, *Bascom* found claims for Internet filtering at “with customizable filtering features specific to each end user”—in lieu of a “one-size-fits-

⁵ See also APPX001313 (VoIP-Pal’s Opposition to Motion to Dismiss), APPX001322 and APPX001324 (explanations of user-specific processing).

⁶ Defendants’ fundamental misunderstanding is astounding and would be dispelled by studying Fig. 8B of the patent. Block 263 expects a E.164 compatible number, which includes a country code, thus a user dials a country code for international calls. See, e.g., APPX000159-000160 ('815 Patent) 19:15-18, 19:63-67, 22:34-48.

all filter”’—unconventional and patent-eligible. *Bascom Global Internet Servs., Inc. v. AT&T Mobility, LLC*, 827 F.3d 1341, 1350 (Fed. Cir. 2016). Likewise, the challenged claims implement user-customized calling “versatile enough [to] be adapted to many different users’ preferences” in a network-based routing controller. Unlike prior art PSTN or PBX nodes, the invention was not limited to a “one-size-fits-all” manner of processing calls, but applied configurable, caller-specific profile settings to process calls. See APPX001335-000038 (Third Amended Complaint) at ¶¶ 8, 12. Defendants fail to explain why such improved communication controllers cannot involve an “inventive concept”.

Notably, the *BASCOM* claims did not recite, *ipsissimis verbis*, the inventive concept of “customizable filtering features specific to each end user [on an ISP server].” *BASCOM* at 1350 (emphasis added). Rather, the corresponding claim language which *gave rise* to this inventive concept was, *e.g.*: “associating each said network account to at least one filtering scheme...” See *BASCOM* at 1345 (‘606 patent). The *BASCOM* claim did not specify the exact filtering rules. *That* was not the inventive concept; it was rather the *customizability* of the filtering, based on *associating each* account *with* custom filtering schemes. This is similar to VoIP-Pal’s claims, which associate *each* user profile with a user-specific set of calling attributes.

Defendants also distort the concept of routing transparently. Def. Br. 49. It is not the automation of a manual step or a dialing convention. Rather, whether a

destination is routed using public or private networks is purposefully *invisible* to the caller. From the caller's point of view, public and private destinations are addressed identically. The caller has no way to know or specify how a call is routed. This reflects a difference in architecture and processing from prior systems, not whether a step is manual or automated. *See* APPX001338-000039 (Third Amended Complaint) at ¶14 (caller not aware that London destination is on the private network). *See* APPX000167 ('815 Patent) claim 1 ("callee identifier" is resolved by the claimed method to either a "private network routing message" or "public network routing message" based on caller attributes and network routing criteria). Defendants' argument that "the representative claims do not even require a call to be routed" ignores that the recited "call controller" receives the routing message as a request to *establish* a call. *See, e.g.,* Def. Br. at 49; *compare* APPX000162-000163 (26:46-27:43). Defendants also conveniently ignore that claim 1 recites "facilitating communication", claim 54 recites "to establish a call" and claim 49 explicitly states the "call controller" "effect[s] routing of the call". Br. 50, FN8.

III. The District Court's Decision Was Premature

Alternatively, the District Court's conclusions were premature because the following issues are disputed: (1) what was "well-understood, routine and conventional"; (2) claim construction; and even (3) what the patent specification discloses.

A. What Was “Well-Understood, Routine and Conventional” Is In Dispute.

The District Court could not address Voip-Pal’s assertion that its inventive concept was not “well-understood, routine or conventional”. See APPX001335-000040 (Third Amended Complaint) at ¶¶7-16 and APPX001321-000022 (VoIP-Pal’s Opposition). Instead, the District Court fettered its analysis solely to evaluating “ordering of steps” based on a technically invalid analogy. APPX000037 (District Court Decision). The District Court declined to consider VoIP-Pal’s proffered evidence of unconventionality from IPR proceedings. APPX001322, APPX001325-001326 (VoIP-Pal’s Opposition Brief) at 21 n.16, 24-25 including Exhibit 4 (Dr. Mangione-Smith Declaration). The District Court also concluded, without requiring clear and convincing evidence, that the specification “admitted” that all claim elements were conventional, which Voip-Pal *strongly disputes*. Br. 55-57. *Natural Alternatives International, Inc. v. Creative Compounds, LLC*, 918 F.3d 1338, 1347 (Fed. Cir. 2019).

B. There Are Unresolved Factual Disputes Affecting Claim Construction.

There remain unresolved factual disputes about claim construction. Defendants’ blanket assertion that user-specific call handling is “not embodied by

VoIP-Pal’s claims in any way” (Def. Br. 50) does not engage VoIP-Pal’s arguments to the contrary. *MyMail, Ltd. v. ooVoo, LLC*, No. 18-1758, 2019 WL 3850614 (Fed. Cir. Aug. 16, 2019) (holding that a district court must resolve claim construction disputes prior to §101 analysis at the Rule 12(c) or 12(b)(6) stage).

Additionally, the District Court declined to construe VoIP-Pal’s means-plus-function claims (e.g., claim 28) as required by 35 U.S.C. §112. Br. 57-58. Defendants justify the District Court’s inaction as based on its view that the routing controller used “generic computer components”. Def. Br. 59-60 (citing APPX000033 (District Court Decision), ignoring that the specification discloses a detailed algorithm transforming the computer into a “special purpose computer programmed to perform the disclosed algorithm.” *Aristocrat Technologies Australia Pty Ltd. v. Int’l Game Tech.*, 521 F.3d 1328, 1333 (Fed. Cir. 2008). Defendants falsely assert that “VoIP-Pal did not identify the specific algorithm within the figures,” ignoring Voip-Pal’s detailed identification of specific blocks in Figs. 8A-8D provided in its opposition at footnote 13.⁷ APPX001010-000011. Similarly, the District Court’s statement that the ‘815 Patent *specification* fails to provide “any details” of how the

⁷ Defendants’ accusation that VoIP-Pal did not say *why* claim 28 is non-abstract is an attempt to impose a reverse onus on Voip-Pal. Def. Br. 59. Defendants carry the burden of proving invalidity, yet failed to construe the means-plus-function claims. Their *de minimis* comments about “generic computer components” (See Motion to Dismiss at 10) fails to account for the non-generic programming these claims imply, rendering defendants’ other §101 arguments inapplicable (e.g., telephone operators never performed Figs. 8A-8D; the algorithm is indisputably user-specific; etc.)

invention achieves its results is incorrect (indeed, inexplicable) given VoIP-Pal's detailed explanations. *See* APPX000037 (District Court Decision), APPX000026; *compare* APPX001315-001316 (VoIP-Pal's Opposition Brief). It appears that neither the District Court nor the Defendants reviewed the algorithmic steps identified in footnote 13. Thus, the District Court falsely concluded that "the patent specification fails to disclose user-specific calling," and Defendants make manifestly false assertions about how Voip-Pal's system operated, *e.g.*, the "user no longer needed to dial a country code to make an international call" (Def. Br. 5, 14, 48, 60).

These errors highlight the need to construe all the claims prior to §101 analysis.

CONCLUSION

For all of the foregoing reasons, VoIP-Pal respectfully requests that this Court vacate the District Court's judgment in favor of Defendants and reverse the District Court's March 25, 2019 order dismissing these actions as to all Defendants.

Dated: September 25, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

VoIP-Pal.com, Inc. v. Twitter, Inc., AT&T Corp., Cellco Partnership and Apple, Inc.
Nos. 2019-1808, - 1812, -1813, -1814.

I, Kevin N. Malek, being duly sworn according to law and being over the age of 18, upon my oath depose and say that: On September 25, 2019, I electronically filed the Brief for Appellant with the Clerk of Court using the CM/ECF System, which did send notice of such filing to the following registered CM/ECF users:

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Upon acceptance by the Court of the e-filed document, six paper copies will be filed with the Court, via Federal Express, within the time provided in the Court's rules.

/s/ Kevin N. Malek

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

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