

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 13-01886-JVS (DFMx) Date February 11, 2015
 Title Essociate, Inc. V. Clickbooth.com, LLC

Present: The James V. Selna
 Honorable
Karla J. Tunis Not Present
Deputy Clerk Court Reporter

Attorneys Present for Plaintiffs: Not Present Attorneys Present for Defendants: Not Present

Proceedings: (IN CHAMBERS) Order GRANTING Defendant’s Motion Judgment on the Pleadings as to Patent Ineligibility (FLD 1-5-15)

In Case No. SACV 13-1886 JVS (DFMx), Plaintiff Essociate, Inc. (“Essociate”) asserts that Defendant Clickbooth.com, LLC (“Clickbooth”) is infringing Essociate’s U.S. Patent No. 6,804,660 (“’660 Patent”). (Compl., Docket (“Dkt.”) No. 1.) In a related co-pending, but unconsolidated, case—Case No. SACV 14-679 JVS (DFMx)—Essociate asserts that Defendant 4355768 Canada, Inc., dba CrakMedia (“CrakMedia”) is also infringing the ‘660 Patent. (Compl., Dkt. No. 1.)¹ In essentially identical motions, Clickbooth and CrakMedia (collectively, “Defendants”) concurrently move for judgment on the pleadings that the asserted claims of the ‘660 Patent are patent ineligible under 35 U.S.C. § 101. (Clickbooth’s Motion for Judgment on the Pleadings (“Clickbooth’s Mot.”), Case No. 13-1886, Dkt. No. 37; CrakMedia’s Motion for Judgment on the Pleadings (“CrakMedia’s Mot.”), Case No. 14-679, Dkt. No. 37.)² Essociate has filed an identical Opposition Brief to both Motions. (Opposition to Mot. (“Opp’n”), 1 n.1, Dkt. No. 41.) Clickbooth and CrakMedia have replied. (Reply, Dkt. No. 44.)

The Court rules on Defendants’ identical Motions in the co-pending cases in this

¹ For the remainder of this Order, Case No. SACV 13-1886 JVS (DFMx) will be cited and referred to as “Case No. 13-1886,” and Case No. SACV 14-679 JVS (DFMx) will be cited and referred to as “Case No. 14-679.”

² Because all the parties’ briefs in both cases are identical or nearly identical, for convenience of the parties and the Court, the remainder of the Order only cites to documents filed in the Clickbooth case, Case No. 13-1886, unless otherwise noted.

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single Order. For the following reasons, the Court **GRANTS** Defendants' Motions for Judgment on the Pleadings.

I. **Background**

Essociate filed suit against Clickbooth on December 3, 2013 (Compl., Dkt. No. 1), and against CrakMedia on April 30, 2014 (Compl., Case No. 14-679, Dkt. No. 1) for infringing its '660 Patent.

The '660 Patent "relates generally to e-commerce and, more particularly to . . . Internet based affiliate pooling." (Declaration of Darren M. Franklin ("Franklin Decl."), Ex. 1 ('660 Patent), 1:16–18, Dkt. No. 37-3.) E-commerce, or electronic commerce, is the exchange of information, goods, and services between buyers ("users") and sellers ("merchants"). (*Id.* at 1:38–43.) In order to reach users who are interested in what a merchant has to offer, a merchant must advertise its Uniform Resource Locator ("URL") because a user can only initiate a transaction with the merchant once it reaches the merchant's URL. (*Id.* at 1:36, 1:44–54.) Merchants advertise via links to their URLs that are placed at other URLs which are maintained by the content providers of the Internet—webmasters. (*Id.* at 2:10–16.) As the merchant advertises, the merchant relies on a tracking mechanism, or affiliate system, to chart a transaction from a user's clicking on a merchant's advertisement to the user's completed transaction. (*Id.* at 1:60–2:7.) The affiliate system allows a merchant to determine advertising compensation for webmasters based on the quantity or performance of traffic from the webmaster's URL to the merchant's URL. (*Id.* at 2:3–18.)

Two models of affiliate systems existed before the '660 Patent. (*Id.* at 2:24–27.) One was the stand-alone affiliate system for a single merchant and that merchant's network of affiliated webmasters. (*Id.* at 2:46–48.) Under this system, "any transactions initiated by the traffic are credited to the referring webmaster." (*Id.* at 2:42–43.) The other affiliate system model was an affiliate hub system. (*Id.* at 3:17–42.) This system included a master affiliate system (the "hub"), webmasters, and a network of individual merchant affiliate systems. (*Id.* at 3:18–20.) The webmasters sent the traffic of users to the hub, which in turn sent the users to appropriate individual merchant. (*Id.* at 23–26.) The affiliate hub system's back-end tracking mechanism tracked transactions and credited the appropriate webmaster for referrals to individual merchants. (*Id.* at 3:26–34.) This system benefitted webmasters with "simplified, coordinated access to" various

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merchants, but impaired merchants who risked losing business to other merchants in the hub because they “share[d] the same resources for traffic.” (*Id.* at 57–64.)

The ‘660 Patent outlines a third model of an affiliate system in which merchants receive user traffic from webmasters that do not join the merchant’s affiliate system. (*Id.* at 3:66–4:56.) Figure 3 of the ‘660 Patent provides an embodiment of this affiliate pooling system in connection with a stand-alone affiliate system. (*Id.* at 7:5–59.) The embodiment includes a merchant affiliate system with merchant affiliated webmasters, a separate affiliate pool of webmasters that is a “loose aggregation of Webmasters with a quantity of traffic,” and a virtual affiliate system that sends the user traffic of a subset of the webmasters in the affiliate pool to the merchant through the existing merchant affiliate system. (*Id.* at 7:5–13.) The subset of webmasters whose traffic is sent to the merchant through the virtual affiliate system are known as virtual affiliates. (*Id.* at 7:40–41.) These virtual affiliates “remain independent from the Merchant’s affiliate system” and “may remain anonymous to the Merchant’s affiliate system.” (*Id.* at 7:49–54.) Compensation for the traffic sent by the virtual affiliates is tracked by the assignment of a unique identifying code that is recognized by the merchant affiliate system. (*Id.* at 4:1–11, 7:35–39.)

Essociate alleges that Clickbooth is infringing Claims 1, 10, 15, 23, 28, and 36 of the ‘660 Patent. (Clickbooth’s Mot., 6:8–9.) Essociate alleges that CrakMedia is infringing claims 15, 23, 28, and 36 of the ‘660 Patent. (CrakMedia’s Mot., 6:10–11, Case No. 14-679.) Claim 1 is an independent method claim, from which Claim 10 depends. (‘660 Patent, 21:45–22:8, 22:44–46.) Claims 15 and 23 are “computer program” counterparts to method Claims 1 and 10, respectively. (*Id.* at 22:65–23:26, 23:61–64.) Claims 28 and 36 are “system” counterparts, or means-plus-function claims, for implementing method Claims 1 and 10, respectively. (*Id.* at 24:19–45; 25:10–12.) Defendants now move for a judgment on the pleadings that the asserted claims of the ‘660 Patent are patent ineligible under 35 U.S.C. § 101.

II. Legal Standard

Under Federal Rule of Civil Procedure 12(c), “[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.” A motion for judgment on the pleadings should be granted only if “taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law.”

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McSherry v. City of Long Beach, 423 F.3d 1015, 1021 (9th Cir. 2005). A Rule 12(c) motion asserting a failure to state a claim is governed by the same standard as a Rule 12(b)(6) motion to dismiss. United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054 n.4 (9th Cir. 2011); Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012).

In resolving a 12(b)(6) motion, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Nor must the Court “accept as true a legal conclusion couched as a factual allegation.” Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Second, assuming the veracity of well-pleaded factual allegations, the Court must “determine whether they plausibly give rise to an entitlement to relief.” Id. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.” Id.

III. Discussion

A. Defendants’ Request for Judicial Notice

Before the Court engages in the patent-eligibility analysis, the Court must address Defendants’ request for judicial notice of six exhibits. (Request for Judicial Notice, Dkt. No. 38; Franklin Decl., Ex. 2–7.) Because factual challenges have no bearing under Rule 12(b)(6), generally, the Court may not consider material beyond the pleadings in ruling on a motion to dismiss, or in this case a motion for judgment on the pleadings. Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001), overruled on other grounds, Galbraith v. Cnty. of Santa Clara, 307 F. 3d 1119, 1125 (9th Cir. 2002). There are, however, three exceptions to this rule that do not demand converting the motion into one for summary judgment. Lee, 250 F.3d at 688. First, pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of matters of public record if the facts are not subject to reasonable dispute. Id. at 688-89; see Fed. R. Evid. 201(b). Second, the Court also may take judicial notice of documents attached to or “properly submitted as part of the complaint.” Lee, 250 F.3d at 688. Third, if the documents are “not physically attached to the complaint,” they may still be considered if the documents’

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“authenticity . . . is not contested” and the documents are necessarily relied upon by the complaint. Id.; United States v. Corinthian Colleges, 655 F.3d 984, 998–99 (9th Cir. 2011). The Court concludes that the six exhibits do not fall into any of these exceptions and thus denies the request for judicial notice of all six exhibits.

B. Overview of the Patent-Eligibility Analysis

“It is well established that whether the asserted claims . . . are invalid for failure to claim statutory subject matter under 35 U.S.C. § 101, is a question of law.” In re Comiskey, 554 F.3d 967, 975 (Fed. Cir. 2009) (internal quotation marks and citation omitted). Courts may address whether a patent is ineligible under § 101 through a motion for judgment on the pleadings or a motion to dismiss. See, e.g., buySAFE, Inc. v. Google, Inc., 765 F. 3d 1350, 1352 (Fed. Cir. 2014) (affirming district court’s grant of a motion for judgment on the pleadings based on a § 101 analysis); Content Extraction & Transmission LLC v. Wells Fargo Bank, N.A., 2014 U.S. App. LEXIS 24258 at *4 (Fed. Cir. Dec. 23, 2014) (affirming district court’s grant of a motion to dismiss based on a § 101 analysis).

Under § 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, § 101 has a longstanding, “important implicit exception: [l]aws of nature, natural phenomena, and abstract ideas are not patentable.” Alice Corp. Pty. Ltd. v. CLS Bank Int’l, 134 S. Ct. 2347, 2354 (2014) (quoting Assoc. for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2116 (2013)). “[A]n invention is not rendered ineligible for patent simply because it involves an abstract concept,” but only applications of an abstract concept “to a new and useful end” remains eligible for patent protection. Alice, 134 S. Ct. at 2354 (internal quotation marks omitted) (citing Diamond v. Diehr, 450 U.S. 175, 187 (1981); Gottschalk v. Benson, 409 U.S. 63, 67 (1972)).

The U.S. Supreme Court has set forth a two-step “framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent eligible applications of those concepts.” Alice, 134 S. Ct. at 2355 (citing Mayo Collaborative Servs. v. Prometheus Labs., Inc., 132 S. Ct. 1289 (2012)). First, the Court must “determine whether the claims at issue are directed to one of those patent-ineligible concepts.” Alice, 134 S. Ct. at 2355 (citing Mayo, 132 S. Ct. at 1296–97). If so, then the second step requires the Court to search for an “inventive concept” by considering the elements of each claim—both individually and as an ordered

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combination—“to determine whether the additional elements ‘transform the nature of the claim’ into a patent-eligible application.” Alice, 134 S. Ct. at 2355 (citing Mayo, 132 S. Ct. at 1297–98). If the claims at issue are directed to a patent-ineligible concept and the elements of each claim do not transform it into a patent-eligible application, then the claims are patent-ineligible under 35 U.S.C. § 101. See Alice, 134 S. Ct. at 2355, 2360.³

C. Application of the Patent-Eligibility Analysis⁴

Essociate alleges that Clickbooth and CrakMedia are infringing multiple claims of the ‘660 Patent, but the parties agree that analysis of Claim 1 is representative of the analysis of the other claims. (See Clickbooth’s Mot., 6:9–10; Opp’n, 4:3–4; CrakMedia’s Mot., 6:12–14, Case No. 14-679.) Claim 1 of the ‘660 Patent is a method claim and reads as follows:

A method for providing Virtual Affiliates to an existing target affiliate system, the method comprising the operations of:

configuring an existing target affiliate system to receive referrals from a first plurality of Webmasters in an affiliate pool of source Webmasters such that the target Merchant affiliate system recognizes a transaction as originating from a source Webmaster in an affiliate pooling system, including the step of:
 assigning a source Webmaster unique identifier for each of said first plurality of Webmasters each operating at least one web site;

³ For the remainder of this Order, this two-step analysis will be referred to as the “patent-eligibility analysis” or the “§ 101 analysis.”

⁴ Essociate suggests that the Court should not engage in a § 101 analysis before claim construction, (Opp’n, 11:13–16), but the Court disagrees. “Although the determination of patent eligibility requires a full understanding of the basic character of the claimed subject matter, claim construction is not an inviolable prerequisite to a validity determination under § 101.” Content Extraction & Transmission LLC v. Wells Fargo Bank, N.A., 2014 U.S. App. LEXIS 24258 at *12 (Fed. Cir. Dec. 23, 2014).

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receiving a user request for a target Merchant affiliate system URL from a web site operated by a particular referring Webmaster of the first plurality of Webmasters, wherein the user request includes the source Webmaster unique identifier for the particular referring Webmaster, and wherein the target Merchant affiliate system includes a unique identification system for its own affiliated Webmasters;

correlating the received source Webmaster unique identifier to a target Webmaster unique identifier corresponding to the unique identification system of the requested merchant affiliate system; and

generating a URL for the requested Merchant affiliate system, wherein the URL includes the correlated target Webmaster Merchant unique identifier, whereby the URL can be utilized to access the requested Merchant affiliate system, and further provide identification of the source Webmaster for requisite tracking.

(‘660 Patent, 21:45–22:8.) Defendants argue that Claim 1, as well as the other claims Essociate alleges they are infringing, fails both steps of the patent-eligibility analysis. Essociate responds that the asserted claims pass step one and thus a step two analysis is unnecessary, but in the alternative argues that the asserted claims also pass step two. After engaging in the two-step analysis below, the Court concludes that it agrees with Defendants.

1. Step One

Defendants contend that the asserted ‘660 Patent claims are directed to an abstract idea. (Clickbooth’s Mot., 11:13–14:13.) More specifically, Defendants assert that the claims are directed to the abstract idea of “receiving and tracking referrals from referral sources.” (*Id.* at 12:3–4.) In response, Essociate tries to narrow what constitutes an abstract idea in an effort to argue that its claims are not directed to a patent-ineligible concept. (Opp’n, 6:13–10:20.)

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Essociate contends that an abstract idea is only a “fundamental truth; an original cause; a motive.” (*Id.* at 6:17–18.) The U.S. Supreme Court did not “delimit the precise contours of the ‘abstract ideas’ category” in *Alice*, but it made clear that the “abstract-ideas category” is not limited to “preexisting, fundamental truths.” *Alice*, 134 S. Ct. at 2356 (internal quotation marks and citation omitted). The Supreme Court also recognized some important principles that have since been applied by the Federal Circuit. *Alice*, 134 S. Ct. at 2357. For example, “mathematical algorithms, including those executed on a generic computer, are abstract ideas.” *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1256 (Fed. Cir. Dec. 5, 2014) (citing *Benson*, 409 U.S. at 64). Moreover, “some fundamental economic and conventional business practices are also abstract ideas.” *DDR Holdings*, 773 F.3d at 1256 (citing *Bilski v. Kappos*, 130 S. Ct. 3218, 3231 (2010) (concept of risk hedging is an abstract idea)). In *Alice*, the Supreme Court explained that even though the concept of risk hedging in *Bilski* was not a fundamental truth, it was still an abstract idea because it was a fundamental economic practice and a method of organizing human activity. *Alice*, 134 S. Ct. at 2356–57 (citing *Bilski*, 130 S. Ct. at 3231). The Supreme Court concluded in *Alice* that the concept of intermediated settlement was also a fundamental economic practice that thereby placed the concept within the same “realm of abstract ideas” as the concept in *Bilski*. *Alice*, 134 S. Ct. at 2356–57 (internal quotation marks omitted).

The Court agrees with Defendants that the ‘660 Patent claims are directed to a concept similar to those in *Alice* and *Bilski*. Thus, like the claims in those two cases, the claims at issue here are also directed to an abstract idea. Without purporting to construe the claims, the Court holds that the ‘660 Patent describes steps for how a merchant can gain access to customers from a referring entity without having to compete with other merchants for those same customers. This process allows a merchant to avoid, or at least reduce, competition while also allowing it to still track which and how many customers the referring entity directs to the merchant. The Court agrees with Defendants’ characterization that these steps simply embody the concept of receiving and tracking referrals from referral sources. Like in *Alice* and *Bilski*, receiving and tracking referrals is a concept that involves the “mere formation and manipulation of economic relations.” *Content Extraction & Transmission LLC v. Wells Fargo Bank, N.A.*, 2014 U.S. App. LEXIS 24258 at *6 (Fed. Cir. Dec. 23, 2014) (citing *Alice* and *Bilski*). Regardless of whether a merchant is seeking customers on or off the Internet, it is a fundamental economic practice to (1) keep track of who is directing customers to one’s business, and (2) compensate or provide incentives to that referring source to ensure the continuing

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flow of customers from that source. The fact that the two affiliate systems that existed prior to the ‘660 Patent—the standalone system and the affiliate hub system—also received and tracked referrals further demonstrates how this concept is a fundamental economic practice. (‘660 Patent, 2:24–27.) Any claim limitations that may add a degree of particularity do not disturb the fact that the concept embodied by the majority of the claim limitations describes only the abstract idea of receiving and tracking referrals. See Ultramercial, Inc. v. Hulu, LLC, 772 F.3d 709, 715 (Fed. Cir. 2014) (“Although certain additional limitations, such as consulting an activity log, add a degree of particularity, the concept embodied by the majority of the limitations describes only the abstract idea of showing an advertisement before delivering free content.”).

The Court disagrees with Essociate that the claims are similar to those in DDR Holdings, in which the court held that the asserted claims were not directed to an abstract idea. DDR Holdings, 773 F.3d at 1259. The claims in DDR Holdings “address the problem of retaining website visitors that, if adhering to the routine, conventional functioning of Internet hyperlink protocol, would be instantly transported away from a host’s website after ‘clicking’ on an advertisement and activating a hyperlink.” Id. at 1257. The court held that the claims are “necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks.” Id. But the court also cautioned that “not all claims purporting to address Internet-centric challenges are eligible for patent.” Id. at 1258. Unlike the claims in DDR Holdings, the ‘660 Patent claims “merely recite the performance of some business practice known from the pre-Internet world along with the requirement to perform it on the Internet.” Id. at 1257. Said another way, the ‘660 Patent does not overcome a problem “necessarily rooted in computer technology.” Id.

Essociate’s other arguments fail as well. Essociate asserts that the ‘660 Patent’s claims are novel, but “any novelty in implementation of the idea is a factor to be considered only in the second step of the [§ 101] analysis.” Ultramercial, 772 F.3d at 715. Essociate also notes that affiliate tracking is “one concept underlying the ‘660 Patent, it is not the claimed invention.” (Opp’n, 9:22–23.) But this is irrelevant. The first step asks whether the claims are directed to an abstract idea, not whether the claimed invention is an abstract idea. See, e.g., Alice, 134 S. Ct. at 2356–57 (holding that the concept of intermediated settlement is an abstract idea and not analyzing whether the claimed invention is an abstract idea).

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Therefore, the ‘660 Patent claims are directed to the abstract idea of receiving and tracking referrals from referral sources. The Court must continue to step two to determine if the claims are still patent eligible.

2. Step Two

Because the claims are directed to an abstract idea, the second step of the § 101 analysis requires the Court to analyze if the claims—both individually and as an ordered combination—contain an “inventive concept” to “transform” the claimed abstract idea into patent-eligible subject matter. Alice, 134 S. Ct. at 2357 (quoting Mayo, 132 S. Ct. at 1294, 1298). The transformation requires “more than simply stating the abstract idea while adding the words ‘apply it.’” Alice, 134 S. Ct. at 2357 (quoting Mayo, 132 S. Ct. at 1294) (internal brackets omitted). Instead, the claims “must include additional features to ensure that the claim[s] [are] more than a drafting effort designed to monopolize the abstract idea.” Alice, 134 S. Ct. at 2357 (quoting Mayo, 132 S. Ct. at 1297) (internal quotation marks and brackets omitted).

These restrictions “cannot be circumvented by attempting to limit the use of the [abstract] idea to a particular technological environment.” Alice, 134 S. Ct. at 2358 (quoting Bilski, 561 U.S. at 610–11) (internal brackets omitted). Thus, the claims’ simple invocation of computer implementation or the Internet cannot alone add an inventive concept. Alice, 134 S. Ct. at 2357 (“[M]ere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.”); Ultramercial, 772 F.3d at 716 (“[T]he use of the Internet is not sufficient to save otherwise abstract claims from ineligibility under § 101.”). Instead, to be an inventive concept, the claims’ invocation of computer implementation or the Internet must involve more than the performance of “well-understood, routine, conventional activities previously known to the industry.” Alice, 134 S. Ct. at 2359 (quoting Mayo, 132 S. Ct. at 1294) (internal quotation marks and brackets omitted).

Defendants argue that the ‘660 Patent’s claims do nothing more than seek to limit the use of the abstract idea of receiving and tracking referrals from referral sources to the technological environment of an existing target affiliate system. (Clickbooth’s Mot., 15:9–12.) They further assert that the four individual steps in Claim 1, viewed both individually and as an ordered combination, “do[] no more than require a generic computer to perform generic computer functions.” (Id. at 15–21.) Essociate responds

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that the claims individually and collectively contain inventive concepts, but it seems to only repeat variations of a single allegedly inventive concept: that an existing merchant affiliate system can accept user traffic from webmasters in another affiliate system while those webmasters remain independent of the existing merchant affiliate system. (Opp’n, 12–16.) The Court agrees with Defendants. In light of Alice and Ultramercial, these claims cannot be viewed as adding an inventive concept.

In Alice, the representative method claim recited steps for a practitioner, more specifically an intermediary, to create “shadow” bank accounts that mirrored the balances of two parties’ real-world accounts. Alice, 134 S. Ct. at 2352, 2359. The claims further instructed how the shadow accounts would be updated in real time as permitted transactions were entered and at the end of the day would issue instructions to the relevant banks to actually carry out those transactions. Id. The Supreme Court held that these claims did not include an inventive concept because “using a computer to create and maintain ‘shadow’ accounts amounts to electronic recordkeeping—one of the most basic functions of a computer.” Id. at 2359 (citing Benson, 409 U.S. at 65.). Similarly, in Ultramercial, the Federal Circuit held that the claims at issue, which involved “[t]he process of receiving copyrighted media, selecting an ad, offering the media in exchange for watching the selected ad, displaying the ad, allowing the consumer access to the media, and receiving payment from the sponsor of the ad,” lacked an inventive concept. Ultramercial, 772 F.3d at 715–16. The court concluded that the “claimed sequence of these steps comprises only conventional steps, specified at a high level of generality,” and that invoking the Internet to implement these steps also added no inventive concept. Id. at 716 (internal quotation marks and citations omitted).

Similar to the claims at issue in Alice and Ultramercial, the ‘660 Patent claims, viewed individually and as an ordered combination, only instruct the practitioner to implement the abstract idea with routine, conventional activity on a generic computer. The claims list steps to configure an existing affiliate system to receive referrals from a new source, assign unique identification codes to webmasters in this new source, receive requests for access to merchant URLs, correlate the identification codes of the affiliate system and the webmaster using a tool like a lookup table, and then generate a URL for the merchant. (‘660 Patent, 11:1–67, 21:45–22:8.) These claimed steps do not improve the functioning of the computer or the Internet, but only “amount[] to electronic bookkeeping.” The assigning of unique identification codes, providing access to URLs, and generating URLs describe routine, conventional activity of how computers

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communicate with each other via the Internet. Although more elaborate, this is akin to issuing customers at a butcher shop unique numbers which are then called, or tallied, to service the customer uniquely and independently of other customers. Even if some of the steps in the claims “were not previously employed in this art it is not enough—standing alone—to confer patent eligibility upon the claims at issue.” Ultramercial, 772 F.3d at 716. The claims fail to do anything more than instruct the practitioner to implement the abstract idea of receiving and tracking referrals from referral sources on a generic computer. See Alice, 134 S. Ct. at 2359. Invocation of the Internet, a “ubiquitous information-transmitting medium,” to implement these method claims is insufficient to transform the abstract idea into patent-eligible subject matter. Ultramercial, 772 F.3d at 716.

The ‘660 Patent claims also fail the preemption test that Essociate urges the Court to apply. (Opp’n, 8:3–8.) Preemption occurs when the patent claims the “building blocks of human ingenuity” and “would risk disproportionately tying up the use of the underlying ideas.” Alice, 134 S. Ct. at 2354 (internal quotation marks and brackets omitted). There is no comparable risk of preemption when the patent claims “integrate the building blocks [of human ingenuity] into something more.” Id. Essociate contends that the asserted claims are similar to the customized web page patent in Intellectual Ventures I LLC v. Mfrs. & Traders Trust Co., 2014 WL 7215193 at *9 (D. Del. Dec. 18, 2014), in which the court held that the “claims do not preempt all applications of providing customized web pages, as they recite a specific method of customizing web pages based on user data.” However, the court in Intellectual Ventures only reached their preemption decision after first concluding that the patent-at-issue contained claims that did more than “recite a commonplace business method aimed at processing business information [or] apply[] a known business process to the particular technological environment of the Internet.” Id. (quoting DDR Holdings, 773 F.3d at 1259). This is not the case here. Instead, the ‘660 Patent claims “creat[e] or alter[] contractual relations using generic computer functions and conventional network operations.” DDR Holdings, 773 F.3d at 1259. Thus, these claims “risk disproportionately tying up” innovation regarding the idea of receiving and tracking referrals from referral sources in the Internet context. Alice, 134 S. Ct. at 2354.

The asserted claims additionally fail the machine-or-transformation test, which is not the sole test governing the § 101 analysis, but is a “useful and important clue” in the second step of the analysis. Ultramercial, 772 F.3d at 716 (quoting Bilski, 561 U.S. at

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604). Under this test, a claimed process can be patent-eligible under § 101 if: “(1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing.” Ultramercial, 772 F.3d at 716 (internal quotation marks and citations omitted). Essociate’s argument that an affiliate system is a machine, (Opp’n, 17:12–14), fails because an affiliate system is “not tied to any particular novel machine or apparatus, only a general purpose computer.” Ultramercial, 772 F.3d at 716 (“[T]he Internet is not sufficient to save [a] patent under the machine prong of the machine-or-transformation test.”). The asserted claims also fail the transformation prong because “[a]ny transformation from the use of computers or the transfer of content between computers is merely what computers do and does not change the analysis.” Id. at 717; see also In re Bilski, 545 F.3d 943, 954 (Fed. Cir. 2008) (en banc), aff’d on other grounds, Bilski, 561 U.S. at 593 (“Purported transformations or manipulations simply of public or private legal obligations or relationships, business risks, or other such abstractions cannot meet the test because they are not physical objects or substances, and they are not representative of physical objects or substances.”).

For the same reasons regarding Claim 1, its dependent Claim 10 also lacks an inventive concept. Claim 10 recites:

A method as recited in claim 1, wherein at least one of the plurality of Webmasters operates a website having a banner ad for a related Merchant affiliate system.

(‘660 Patent, 22:44–46.) The ‘660 Patent admits that using a banner ad is a routine, conventional activity on the Internet. (Id. at 2:10–13 (“Webmasters . . . maintain URLs in order to disperse information and links to other URLs. These links are often in the form of a Merchant’s advertisement, such as a banner ad.”))

Therefore, Claim 1 and Claim 10 are not patent-eligible under § 101. The Court sees no distinction between these claims and their computer program counterparts in Claims 15 and 23. Claims 28 and 36 are the system counterparts of Claims 1 and 10 and also “add nothing of substance to the underlying abstract idea.” Alice, 134 S. Ct. at 2360.

IV. Conclusion

