**DDR HOLDINGS, LLC v. HOTELS.COM, L.P.**

United States Court of Appeals for the Federal Circuit

No. 2013–1505, Dec. 5, 2014

773 F.3d 1245

Before WALLACH, MAYER, and CHEN, Circuit Judges.[[1]](#footnote-1)\*

Opinion

CHEN, Circuit Judge.

[1] Defendants–Appellants National Leisure Group, Inc. and World Travel Holdings, Inc. (collectively, NLG) appeal from a final judgment of the United States District Court for the Eastern District of Texas entered in favor of Plaintiff–Appellee DDR Holdings, LLC (DDR). Following trial, a jury found that NLG infringes the asserted claims of U.S. Patent Nos. 6,993,572 (the ′572 patent) and 7,818,399 (the ‘399 patent). . . .

I. BACKGROUND

[2] DDR[, a non-practicing entity,] is the assignee of the ‘572 and ‘399 patents. . . . Each of these patents is directed to systems and methods of generating a composite web page that combines certain visual elements of a “host” website with content of a third-party merchant. For example, the generated composite web page may combine the logo, background color, and fonts of the host website with product information from the merchant.

[3] The common specification of the patents-in-suit explains that prior art systems allowed third-party merchants to “lure the [host website’s] visitor traffic away” from the host website because visitors would be taken to the third-party merchant’s website when they clicked on the merchant’s advertisement on the host site. The patents-in-suit disclose a system that provides a solution to this problem (for the host) by creating a new web page that permits a website visitor, in a sense, to be in two places at the same time. On activation of a hyperlink on a host website—such as an advertisement for a third-party merchant—instead of taking the visitor to the merchant’s website, the system generates and directs the visitor to a composite web page that displays product information from the third-party merchant, but retains the host website’s “look and feel.” Thus, the host website can display a third-party merchant’s products, but retain its visitor traffic by displaying this product information from within a generated web page that “gives the viewer of the page the impression that she is viewing pages served by the host” website.

[4] Representative claim 13 of the ‘572 patent recites:

13. An e-commerce outsourcing system comprising:

a) a data store including a look and feel description associated with a host web page having a link correlated with a commerce object; and

b) a computer processor coupled to the data store and in communication through the Internet with the host web page and programmed, upon receiving an indication that the link has been activated by a visitor computer in Internet communication with the host web page, to serve a composite web page to the visitor computer wit[h] a look and feel based on the look and feel description in the data store and with content based on the commerce object associated wit[h] the link.

[5] System claim 13 requires that the recited system provide the host website with a “link” that “correlate[s]” the host website with a “commerce object.” The “commerce object” is the product or product catalog of the merchant. ‘135 patent, 3:7–13. After recognizing that a website visitor has activated the link, the system retrieves data from a “data store” that describes the “look and feel” of the host web page, which can include visual elements such as logos, colors, fonts, and page frames. *Id.* at 12:46–50. The claimed system then constructs a composite web page comprising a “look and feel” based on the look and feel description in the data store along with content based on product information from the associated merchant’s product catalog.

[6] The ‘399 patent is directed to a similar system with a greater emphasis on a “scalable [computer] architecture” to serve “dynamically constructed [web] pages” associated with multiple host website and merchant pairs. ‘135 patent, 3:32–36. Representative claim 19 of the ‘399 patent recites:

19. A system useful in an outsource provider serving web pages offering commercial opportunities, the system comprising:

(a) a computer store containing data, for each of a plurality of first web pages, defining a plurality of visually perceptible elements, which visually perceptible elements correspond to the plurality of first web pages;

(i) wherein each of the first web pages belongs to one of a plurality of web page owners;

(ii) wherein each of the first web pages displays at least one active link associated with a commerce object associated with a buying opportunity of a selected one of a plurality of merchants; and

(iii) wherein the selected merchant, the out-source provider, and the owner of the first web page displaying the associated link are each third parties with respect to one other;

(b) a computer server at the outsource provider, which computer server is coupled to the computer store and programmed to:

(i) receive from the web browser of a computer user a signal indicating activation of one of the links displayed by one of the first web pages;

(ii) automatically identify as the source page the one of the first web pages on which the link has been activated;

(iii) in response to identification of the source page, automatically retrieve the stored data corresponding to the source page; and

(iv) using the data retrieved, automatically generate and transmit to the web browser a second web page that displays: (A) information associated with the commerce object associated with the link that has been activated, and (B) the plurality of visually perceptible elements visually corresponding to the source page.

[7] Similar to claim 13 of the ‘572 patent, system claim 19 of the ‘399 patent requires that a “data store” hold “visually perceptible elements” (or “‘look and feel’ elements”) that “visually ... correspond” to a host web page. The host web page must include a link associated with a “buying opportunity” with a merchant. Once a visitor activates this link, the claimed system generates and transmits to the website visitor’s web browser a composite web page that includes product information of the merchant and the “look and feel” of the host website (i.e., “the plurality of visually perceptible elements visually corresponding to the [host web] page”).

[8] Claim 19 further requires that the data store must store “look and feel” descriptions for multiple hosts and that each link must be associated with a particular merchant’s product catalog. Claim 19 also requires that the merchant, system operator, and host website be “third parties with respect to one another.” When a website visitor activates a link associated with a merchant’s product catalog, the claimed system identifies the host web page and then transmits a composite web page using the proper “look and feel” elements of the host website in the data store and the product information from the associated merchant.

[9] The ‘572 patent issued on January 31, 2006. On the same day, DDR filed suit against NLG, Digital River, Inc. (Digital River), and nine other defendants, asserting infringement of various claims of the ‘135 and ‘572 patents. NLG is a travel agency that sells cruises in partnership with travel-oriented websites and major cruise lines through the Internet. DDR’s suit accused NLG of infringing the ‘135 and ‘572 patents by providing a system for cruise-oriented (host) websites that allows visitors to book cruises on major cruise lines (merchants). Joint Appendix (J.A.) 261. In particular, when a visitor on one of these cruise-oriented (host) websites clicks on an advertisement for a cruise, NLG’s system generates and directs the visitor to a composite web page that incorporates “look and feel” elements from the host website and product information from the cruise line (merchant).

[10] DDR’s suit was stayed during the pendency of an *ex parte* reexamination of the ‘135 and ‘572 patents requested by DDR that was based on prior art identified by the defendants. Shortly after the U.S. Patent and Trademark Office confirmed the validity of the ‘135 and ‘572 patents and the stay was lifted, the ‘399 patent issued on October 19, 2010. DDR subsequently amended its complaint to assert infringement of this patent by several of the defendants, including NLG.

[11] During *Markman* [claim-construction] proceedings, the parties stipulated to a construction of several terms, including “look and feel,” which appears in each of the asserted claims of the ‘572 patent, and “visually perceptible elements,” which appears in each of the asserted claims of the ‘399 patent. J.A. 542. For “look and feel,” the parties agreed to a construction of: “A set of elements related to visual appearance and user interface conveying an overall appearance identifying a website; such elements include logos, colors, page layout, navigation systems, frames, ‘mouse-over’ effects, or others [sic] elements consistent through some or all of the website.” *Id.* For “visually perceptible elements,” the parties agreed to a construction of: “look and feel elements that can be seen.” *Id.* The defendants, however, expressly reserved their rights to argue that both the “look and feel” and “visually perceptible elements” terms are indefinite, but offered the stipulated constructions “in the alternative.” *Id.*

[12] Between June 2012 and January 2013, DDR settled with all defendants except for NLG and Digital River. The case eventually proceeded to a jury trial in October 2012. At trial, DDR accused NLG and Digital River of direct and willful infringement of claims 13, 17, and 20 of the ‘572 patent, and accused NLG—but not Digital River—of direct and willful infringement of claims 1, 3, and 19 of the ‘399 patent. DDR also accused NLG and Digital River of inducing infringement of claim 17 of the ‘572 patent.

[13] The jury found that NLG and Digital River directly infringed the asserted claims of the ‘572 patent and that NLG directly infringed the asserted claims of the ‘399 patent, but that NLG and Digital River’s infringement was not willful. The jury found that NLG and Digital River did not induce infringement of claim 17 of the ‘572 patent. The jury also found that the asserted claims were not invalid. The jury determined DDR was entitled to $750,000 in damages from both NLG and Digital River for infringing DDR’s patents.

[14] At the conclusion of trial, NLG and Digital River renewed motions for JMOL pursuant to Rule 50(b) of the Federal Rules of Civil Procedure (FRCP) on several grounds. NLG contended the asserted claims of the ‘572 and ‘399 patents are invalid under 35 U.S.C. § 101 because the claims are directed to patent-ineligible subject matter[, and made several other contentions regarding indefiniteness, evidence, damages, anticipation, obviousness. The district court denied these motions.] We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(1).

II. DISCUSSION

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B. Patent-eligible subject matter

[15] [Having concluded above that] the ‘572 patent is invalid as anticipated under 35 U.S.C. § 102(a), we focus on NLG’s § 101 challenge to claims 1, 3, and 19 of the ‘399 patent. We conclude, as did the district court, that the asserted claims of the ‘399 patent clear the § 101 hurdle.

[16] We review the district court’s determination of patent eligibility under 35 U.S.C. § 101 *de novo.* In *Mayo Collaborative Servs. v. Prometheus Labs., Inc.,* 132 S.Ct. 1289, 1294 (2012), the Supreme Court set forth an analytical framework under § 101 to distinguish patents that claim patent-ineligible laws of nature, natural phenomena, and abstract ideas—or add too little to such underlying ineligible subject matter—from those that claim patent-eligible applications of those concepts. First, given the nature of the invention in this case, we determine whether the claims at issue are directed to a patent-ineligible abstract idea. *Alice Corp. v. CLS Bank Int’l,* 134 S.Ct. 2347, 2355 (2014). If so, we then consider the elements of each claim—both individually and as an ordered combination—to determine whether the additional elements transform the nature of the claim into a patent-eligible application of that abstract idea. *Id.* This second step is the search for an “inventive concept,” or some element or combination of elements sufficient to ensure that the claim in practice amounts to “significantly more” than a patent on an ineligible concept. *Id.*

[17] Distinguishing between claims that recite a patent-eligible invention and claims that add too little to a patent-ineligible abstract concept can be difficult, as the line separating the two is not always clear. At one time, a computer-implemented invention was considered patent-eligible so long as it produced a “useful, concrete and tangible result.” *State St. Bank & Trust Co. v. Signature Fin. Grp., Inc.,* 149 F.3d 1368, 1373 (Fed.Cir.1998) (finding a machine that transformed data by a series of mathematical calculations to a final share price to be patent-eligible). This understanding rested, in large part, on the view that such inventions crossed the eligibility threshold by virtue of being in the technological realm, the historical arena for patented inventions.

[18] While the Supreme Court in *Bilski v. Kappos* noted that the machine-or-transformation test is a “useful and important clue” for determining patent eligibility, it is clear today that not all machine implementations are created equal. For example, in *Mayo,* the Supreme Court emphasized that satisfying the machine-or-transformation test, by itself, is not sufficient to render a claim patent-eligible, as not all transformations or machine implementations infuse an otherwise ineligible claim with an “inventive concept.” *See* 132 S.Ct. at 1301 (“[S]imply implementing a mathematical principle on a physical machine, namely a computer, [i]s not a patentable application of that principle.”). And after *Alice,* there can remain no doubt: recitation of generic computer limitations does not make an otherwise ineligible claim patent-eligible. 134 S.Ct. at 2358. The bare fact that a computer exists in the physical rather than purely conceptual realm “is beside the point.” *Id.*

[19] Although the Supreme Court did not “delimit the precise contours of the ‘abstract ideas’ category” in resolving *Alice,* 134 S.Ct. at 2356–57, over the course of several cases the Court has provided some important principles. We know that mathematical algorithms, including those executed on a generic computer, are abstract ideas. *See Benson,* 409 U.S. at 64. We know that some fundamental economic and conventional business practices are also abstract ideas. *See Bilski,* 130 S.Ct. at 3231 (finding the “fundamental economic practice” of hedging to be patent ineligible); *Alice,* 134 S.Ct. at 2356 (same for intermediated settlement).

[20] In some instances, patent-ineligible abstract ideas are plainly identifiable and divisible from the generic computer limitations recited by the remainder of the claim. For example, the Supreme Court in *Alice* determined that the claims at issue “simply instruct[ed] the practitioner to implement the abstract idea of intermediated settlement on a generic computer.” 134 S.Ct. at 2359. In *Ultramercial, Inc. v. Hulu, LLC,* 772 F.3d 709, 715–16 (Fed.Cir.2014), the claims merely recited the abstract idea of using advertising as a currency as applied to the particular technological environment of the Internet. In *buySAFE, Inc. v. Google, Inc.,* 765 F.3d 1350, 1355 (Fed.Cir.2014), the claims recited no more than using a computer to send and receive information over a network in order to implement the abstract idea of creating a “transaction performance guaranty.” In *Accenture Global Servs., GmbH v. Guidewire Software, Inc.,* 728 F.3d 1336, 1344–45 (Fed.Cir.2013), the claims merely recited “generalized software components arranged to implement an abstract concept [of generating insurance-policy-related tasks based on rules to be completed upon the occurrence of an event] on a computer.” And in *Bancorp Servs., L.L.C. v. Sun Life Assur. Co. of Canada (U.S.),* 687 F.3d 1266, 1278 (Fed.Cir.2012), the claims recited no more than the use of a computer “employed only for its most basic function, the performance of repetitive calculations,” to implement the abstract idea of managing a stable-value protected life insurance policy. Under Supreme Court precedent, the above claims were recited too broadly and generically to be considered sufficiently specific and meaningful applications of their underlying abstract ideas. Although many of the claims recited various computer hardware elements, these claims in substance were directed to nothing more than the performance of an abstract business practice on the Internet or using a conventional computer. Such claims are not patent-eligible.

[21] Against this background, we turn to the ‘399 patent’s asserted claims. We begin our § 101 analysis at *Mayo/Alice* step one: determining whether the computer-implemented claims at issue here are “directed to” a patent-ineligible abstract idea. Here, we note that the ‘399 patent’s asserted claims do not recite a mathematical algorithm. Nor do they recite a fundamental economic or longstanding commercial practice. Although the claims address a business challenge (retaining website visitors), it is a challenge particular to the Internet.

[22] Indeed, identifying the precise nature of the abstract idea is not as straightforward as in *Alice* or some of our other recent abstract idea cases. NLG’s own varying formulations of the underlying abstract idea illustrate this difficulty. NLG characterizes the allegedly abstract idea in numerous ways, including “making two web pages look the same,” “syndicated commerce on the computer using the Internet,” and “making two e-commerce web pages look alike by using licensed trademarks, logos, color schemes and layouts.” *See, e.g.,* Appellant’s Br. 18–20. The dissent characterizes DDR’s patents as describing the entrepreneurial goal “that an online merchant’s sales can be increased if two web pages have the same ‘look and feel.’” Dissenting Op. 1263. But as discussed below, under any of these characterizations of the abstract idea, the ‘399 patent’s claims satisfy *Mayo/Alice* step two.

[23] As an initial matter, it is true that the claims here are similar to the claims in the cases discussed above in the sense that the claims involve both a computer and the Internet. But these claims stand apart because they do not merely recite the performance of some business practice known from the pre-Internet world along with the requirement to perform it on the Internet. Instead, the claimed solution is necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks.

[24] In particular, the ‘399 patent’s claims 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. For example, asserted claim 19 recites a system that, among other things, 1) stores “visually perceptible elements” corresponding to numerous host websites in a database, with each of the host websites displaying at least one link associated with a product or service of a third-party merchant, 2) on activation of this link by a website visitor, automatically identifies the host, and 3) instructs an Internet web server of an “out-source provider” to construct and serve to the visitor a new, hybrid web page that merges content associated with the products of the third-party merchant with the stored “visually perceptible elements” from the identified host website. *See supra* 5.

[25] In more plain language, upon the click of an advertisement for a third-party product displayed on a host’s website, the visitor is no longer transported to the third party’s website. Instead, the patent claims call for an “outsource provider” having a web server which directs the visitor to an automatically-generated hybrid web page that combines visual “look and feel” elements from the host website and product information from the third-party merchant’s website related to the clicked advertisement.[[2]](#footnote-2)5 In this way, rather than instantly losing visitors to the third-party’s website, the host website can instead send its visitors to a web page on the outsource provider’s server that 1) incorporates “look and feel” elements from the host website, and 2) provides visitors with the opportunity to purchase products from the third-party merchant without actually entering that merchant’s website.

[26] The dissent suggests that the “store within a store” concept, such as a warehouse store that contains a kiosk for selling a third-party partner’s cruise vacation packages, is the pre-Internet analog of the ‘399 patent’s asserted claims. Dissenting Op. 1264. While that concept may have been well-known by the relevant timeframe, that practice did not have to account for the ephemeral nature of an Internet “location” or the near-instantaneous transport between these locations made possible by standard Internet communication protocols, which introduces a problem that does not arise in the “brick and mortar” context. In particular, once a customer enters a physical warehouse store, that customer may encounter a kiosk selling third-party cruise vacation packages. There is, however, no possibility that by walking up to this kiosk, the customer will be suddenly and completely transported outside the warehouse store and relocated to a separate physical venue associated with the third-party—the analog of what ordinarily occurs in “cyberspace” after the simple click of a hyperlink—where that customer could purchase a cruise package without any indication that they were previously browsing the aisles of the warehouse store, and without any need to “return” to the aisles of the store after completing the purchase. It is this challenge of retaining control over the attention of the customer in the context of the Internet that the ‘399 patent’s claims address.

[27] We caution, however, that not all claims purporting to address Internet-centric challenges are eligible for patent. For example, in our recently-decided *Ultramercial* opinion, the patentee argued that its claims were “directed to a specific method of advertising and content distribution that was previously unknown and never employed on the Internet before.” 772 F.3d at 714. But this alone could not render its claims patent-eligible. In particular, we found the claims to merely recite the abstract idea of “offering media content in exchange for viewing an advertisement,” along with “routine additional steps such as updating an activity log, requiring a request from the consumer to view the ad, restrictions on public access, and use of the Internet.” *Id.* at 715-16.

[28] The ‘399 patent’s claims are different enough in substance from those in *Ultramercial* because they do not broadly and generically claim “use of the Internet” to perform an abstract business practice (with insignificant added activity). Unlike the claims in *Ultramercial,* the claims at issue here specify how interactions with the Internet are manipulated to yield a desired result—a result that overrides the routine and conventional sequence of events ordinarily triggered by the click of a hyperlink. Instead of the computer network operating in its normal, expected manner by sending the website visitor to the third-party website that appears to be connected with the clicked advertisement, the claimed system generates and directs the visitor to the above-described hybrid web page that presents product information from the third-party and visual “look and feel” elements from the host website. When the limitations of the ‘399 patent’s asserted claims are taken together as an ordered combination, the claims recite an invention that is not merely the routine or conventional use of the Internet.

[29] It is also clear that the claims at issue do not attempt to preempt every application of the idea of increasing sales by making two web pages look the same, or of any other variant suggested by NLG. Rather, they recite a specific way to automate the creation of a composite web page by an “outsource provider” that incorporates elements from multiple sources in order to solve a problem faced by websites on the Internet. As a result, the ‘399 patent’s claims include “additional features” that ensure the claims are “more than a drafting effort designed to monopolize the [abstract idea].” *Alice,* 134 S.Ct. at 2357. In short, the claimed solution amounts to an inventive concept for resolving this particular Internet-centric problem, rendering the claims patent-eligible.

[30] In sum, the ‘399 patent’s claims are unlike the claims in *Alice,* *Ultramercial, buySAFE, Accenture,* and *Bancorp* that were found to be “directed to” little more than an abstract concept. To be sure, the ‘399 patent’s claims do not recite an invention as technologically complex as an improved, particularized method of digital data compression. But nor do they recite a commonplace business method aimed at processing business information, applying a known business process to the particular technological environment of the Internet, or creating or altering contractual relations using generic computer functions and conventional network operations, such as the claims in *Alice, Ultramercial, buySAFE, Accenture*, and *Bancorp.* The claimed system, though used by businesses, is patent-eligible under § 101.[[3]](#footnote-3)6 The district court did not err in denying NLG’s motion for JMOL of invalidity under 35 U.S.C. § 101 as to these claims.

. . . .

III. CONCLUSION

[31] [In the remaining parts of the opinion, the Court held that the ‘399 patent was not invalid for lack of definiteness under Section 112 ¶ 2; and that substantial evidence supported the jury’s finding that NLG infringed the ‘399 patent. The court held, however, that the $750,000 damages award and the award of prejudgment interested had to be recalculated to exclude damages for the ‘572 patent, which was invalid and unprotectable.]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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MAYER, Circuit Judge, dissenting.

[D-1] I respectfully dissent. The claims asserted by DDR Holdings, LLC (“DDR”) fall outside 35 U.S.C. § 101 because they simply describe an abstract concept—that an online merchant’s sales can be increased if two web pages have the same “look and feel”—and apply that concept using a generic computer. 

I.

[D-2] The common specification of DDR’s patents notes that an online merchant will often lose customers when those customers click on an advertisement from a third-party vendor that has been displayed on the original merchant’s web page. The specification explains, however, that the original merchant could potentially avoid “the loss of hard-won visitor traffic,” if he were able to dupe customers into believing that they were still on the merchant’s web page even when they were actually viewing goods from a third-party vendor. Notably, though, DDR’s patents are very vague as to how this duping is to occur, indicating only that the web page of the original merchant and that of the third-party vendor should be made to look alike using “visually perceptible elements.” *See* U.S. Patent No. 7,818,399 (the “‘399 patent”) col.28 ll.31–32 (requiring the use of a “plurality of visually perceptible elements visually corresponding to the [original merchant’s web] page”). DDR’s patents fail to meet the demands of section 101 because they describe a goal—confusing consumers by making two web pages look alike—but disclose no new technology, or “inventive concept,” *Mayo*, 132 S.Ct. at 1294, for achieving that goal. *See O’Reilly v. Morse,* 56 U.S. (15 How.) 62, 120, 14 L.Ed. 601 (1854) (rejecting a claim which covered “an effect produced by the use of electro-magnetism distinct from the process or machinery necessary to produce it”) . . . .

[D-3] DDR’s patents are long on obfuscation but short on substance. Indeed, much of what they disclose is so rudimentary that it borders on the comical. For example, the patents explain that two web pages are likely to look alike if they are the same color, have the same page layout, and display the same logos. The recited computer limitations, moreover, are merely generic. The claims describe use of a “data store,” a “web page having a link,” and a “computer processor,” all conventional elements long-used in e-commerce. Because DDR’s claims, like those at issue in *Alice Corporation v. CLS Bank International,* “simply instruct the practitioner to implement [an] abstract idea ... on a generic computer,” they do not meet section 101. 134 S.Ct. at 2359; *see id.* at 2360 (rejecting claims requiring a “data processing system’ “with a “communications controller” and a “data storage unit” as “purely functional and generic” (citations and internal quotation marks omitted)).

II.

[D-4] The court concludes that the asserted claims of DDR’s ‘399 patent fall within section 101 because “they do not merely recite the performance of some business practice known from the pre-Internet world along with the requirement to perform it on the Internet.” This is incorrect. DDR’s claims do, in fact, simply take a well-known and widely-applied business practice and apply it using a generic computer and the Internet. The idea of having a “store within a store” was in widespread use well before the dawn of e-commerce. For example, National Leisure Group, Inc. (“NLG”), one of the defendants here, previously “sold vacations at ... BJ’s Wholesale Clubs through point of purchase displays in the 45 BJ’s Clubs along the Eastern Seaboard.” Br. of Defendants–Appellants National Leisure Group, Inc. and World Travel Holdings, Inc. at 4. DDR’s patents are directed to the same concept. Just as visitors to BJ’s Wholesale Clubs could purchase travel products from NLG without leaving the BJ’s warehouse, the claimed system permits a person to purchase goods from a third-party vendor, but still have the visual “impression that she is viewing pages served by the [original host merchant].” ‘399 patent col.3 ll.23–24; *see ante* at 1264 (explaining that DDR’s claimed system “permits a website visitor, in a sense, to be in two places at the same time”). Indeed, any doubt as to whether the claimed system is merely an Internet iteration of an established business practice is laid to rest by the fact that one of the named inventors acknowledged that the innovative aspect of his claimed invention was “[t]aking something that worked in the real world and doing it on the Internet.” J.A. 03208.

[D-5] *Alice* articulated a technological arts test for patent eligibility. 134 S.Ct. at 2359 (explaining that the claimed method fell outside section 101 because it did not “improve the functioning of the computer itself” or “effect an improvement in any other technology or technical field”). Here, the court correctly recognizes *Alice’s* technological arts standard, but applies it in a deficient manner. According to the court, DDR’s claims fall within section 101 because the “solution” they offer “is *necessarily rooted* in *computer technology* in order to overcome a problem specifically arising in the realm of computer networks” (emphasis added). The solution offered by DDR’s claims, however, is not rooted in any new computer technology. Its patents address the problem of preventing online merchants from losing “hard-won visitor traffic,” and the solution they offer is an entrepreneurial, rather than a technological, one. DDR has admitted that it did not invent any of the generic computer elements disclosed in its claims. There is no dispute, moreover, that at the time of the claimed invention the use of hyperlinks to divert consumers to particular web pages was a well-understood and widely-used technique. While DDR’s patents describe the potential advantages of making two web pages look alike, they do not disclose any non-conventional technology for capturing the “look and feel” of a host website or for giving two web pages a similar appearance. *See Alice,* 134 S.Ct. at 2360 (“[W]hat petitioner characterizes as specific hardware ... is purely functional and generic.”). DDR’s patents fall outside section 101 because they simply “tak[e] existing information”—the visual appearance of a host merchant’s website—and use conventional technology to “organiz[e] this information into a new form.” *Digitech Image Techs., LLC v. Elecs. for Imaging, Inc.,* 758 F.3d 1344, 1351 (Fed.Cir.2014); *see Mayo,* 132 S.Ct. at 1298 (emphasizing that reciting “well-understood, routine, [or] conventional activity” does not impart patent eligibility).

[D-6] In concluding that DDR’s claims meet the demands of section 101, the court focuses on the fact that “they recite a *specific* way to automate the creation of a composite web page....” *Ante* at 1259 (emphasis added). The Supreme Court, however, has emphatically rejected the idea that claims become patent eligible simply because they disclose a specific solution to a particular problem. Indeed, although the claims at issue in *Alice* described a very specific method for conducting intermediated settlement, the Court nonetheless unanimously concluded that they fell outside section 101.

[D-7] Nor is the fact that the claims address an “Internetcentric problem,” sufficient to render them patent eligible. The Supreme Court has repeatedly made clear that “limiting the use of an abstract idea to a particular technological environment” is insufficient to confer patent eligibility. *Alice,* 134 S.Ct. at 2360 (citations and internal quotation marks omitted). Accordingly, the fact that DDR’s system operates “in the context of the Internet,” does not bring it within patentable subject matter.

[D-8] The potential scope of DDR’s patents is staggering, arguably covering vast swaths of Internet commerce. DDR has already brought infringement actions against ten defendants, including Digital River, Inc., Expedia, Inc., Travelocity.com, L.P., and Orbitz Worldwide, LLC. DDR’s claims are patent ineligible because their broad and sweeping reach is vastly disproportionate to their minimal technological disclosure. *See Mayo,* 132 S.Ct. at 1303 (In assessing patent eligibility, “the underlying functional concern ... is a *relative* one: how much future innovation is foreclosed relative to the contribution of the inventor.”).

[D-9] *Alice* made clear that claims untethered to any advance in science or technology do not pass muster under section 101. 134 S.Ct. at 2359. Viewed as a whole, DDR’s claims contain no more than an abstract idea for increasing sales implemented via “some unspecified, generic computer,” *id.* at 2360. The inventive concept, if any, embedded in DDR’s claims is an idea for “retaining control over the attention of the customer,” *ante* at 1258. Because this purported inventive concept is an entrepreneurial rather than a technological one, DDR’s claims are not patentable.

1. \* Professor’s note: major edits are indicated with ellipses or brackets. Other omissions, such as omission of citations (with or without parentheticals), are not noted for purposes of readability. Paragraph numbering has been added to aid with pinpoint citation in class discussion. [↑](#footnote-ref-1)
2. 5 On a fundamental level, the creation of new compositions and products based on combining elements from different sources has long been a basis for patentable inventions. See, e.g., *Parks v. Booth*, 102 U.S. 96, 102, ––– S.Ct. ––––, 26 L.Ed. 54 (1880) (“Modern inventions very often consist merely of a new combination of old elements or devices, where nothing is or can be claimed except the new combination.”); *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418–19, 127 S.Ct. 1727, 167 L.Ed.2d 705 (2007) (“[I]nventions in most, if not all, instances rely upon building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what, in some sense, is already known.”). [↑](#footnote-ref-2)
3. 6 Of course, patent-eligible does not mean patentable under, *e.g.*, 35 U.S.C. §§ 102 and 103. [T]he patent*ability* of the ′399 patent’s asserted claims [under sections 102 or 103] is not before us. [↑](#footnote-ref-3)