

# The Federal Circuit's Effective Business-Method Ban Continues!

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In yesterday's *Receivership Estate of AudienceScience Inc. v. Google* case, the Federal Circuit affirmed a district court's grant of judgment on the pleadings based on patent ineligibility under **35 U.S.C. § 101**. The case involves three patents directed to selecting advertisements to display to a user "based on both user history and page context." Given the subject matter, it was simply no surprise to see these patents struck down, thus continuing the Federal Circuit's long streak of finding all business-method patents ineligible post-*Alice*.

The representative claim follows:

1. A method performed by a computing system having a processor and a memory for selecting an advertising message for inclusion in a requested web page, comprising:
    - receiving a page request sent by a user identifying the requested page;
    - adding the requested page to a page request history listing pages recently requested by the user;
    - using a mapping from pages to keywords describing those pages to identify a set of keywords each mapped to from at least one of the pages listed in the page request history;
    - using a mapping from keywords to advertising messages described by those keywords to identify a set of advertising messages each mapped to from at least one of the identified set of keywords;
    - to each of the identified set of advertising messages, attributing a selection weighting reflecting the advertising message's relative performance, wherein the relative performance is determined by a performance score that indicates the extent to which the advertising message has generated revenue;
    - selecting one advertising message of the identified set of advertising messages in accordance with the selection weightings attributed to the advertising messages of the identified set of advertising messages; and
    - responding to the page request with a version of the requested page that includes an instruction to display the selected advertising message within the page, wherein code implementing the method is stored in the memory of the computing system for execution by the processor of the computing system.
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## Step One: Quick Analysis and the Chewy Analogy

At step one, the Federal Circuit agreed with the district court that the claims are directed to an abstract idea, but reached its conclusion without much analysis. In fact, in my prior posts, I've discussed how the Federal Circuit's usual § 101 analysis is to **Summarize** a claim, **Analogize** it to one of its prior cases, and then **Euthanize** it ("**SAE**"). Well, here, it seems that the court skipped the analogize step, certainly when determining whether the claim is directed to an abstract idea (at least initially).

Following is basically the entirety of the court's rationale before rendering its abstract-idea conclusion:

Here, claim 1 of the '676 patent recites a method of "selecting an advertising message for inclusion into a requested web page," where the method includes associating the requested page and the user's page request history with keywords which are used to "identify a set of advertising messages." J.A. 34 at 9:34–47. Each message within that "set of advertising messages" is given a "selection weighting" based on "the extent to which the advertising message has generated revenue," and one advertising message from the set is selected for display to the user in accordance with those weightings. J.A. 34 at 9:48–63. **Thus, we conclude that the claim language, as a whole, is directed to the abstract idea of targeting advertisements to internet users to maximize revenue generation.** (emphasis added)

To be fair, the court did go on to provide much more analysis (including addressing several of its prior cases) by responding to the appellant's arguments. For example, the appellant argued that the court's characterization of the claim was "at a high level of abstraction" that is "untethered to the claims." The court rejected this argument based on the title of the patents ("Selecting an Advertising Message for Presentation on a Page of a Publisher Web Site Based Upon Both User History and Page Contexts") and the specification's admission that the invention combines two conventional approaches.

The appellant also argued that the claims are directed to "highly specific improvements over prior-art technological processes for Internet advertising." The court rejected this argument for several reasons:

1. "The claims are not directed to a solution to overcome 'a problem specifically arising in the realm of computer networks'";
2. The claims lacked sufficient specificity, with the court analogizing the claims to those in *Chewy*; and
3. The claims are unlike those in *SRI International*, *Finjan*, and *McRO* because those cases involved recitation of specific solutions for solving technological problems, whereas here, nothing in the "claims or specification indicates any

specific technological improvements or solutions to an internet-centric problem in advertising.”

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## **Step Two: The Collapse**

At step two, the appellant argued that “[t]he use of both page context and user history is an inventive concept because it allows advertisement recommendations to account for both the subject matter that is currently on the user’s mind and subject matter that the user has previously demonstrated an interest in.” The court disagreed, noting that **both** methods are conventional and that their combination “**collapses into the abstract idea itself.**”

The appellant also argued that the claims were specific enough, relying on *Weisner*. But the court disagreed, stating that there was insufficient specificity because “the representative claim simply recites ‘attributing a selection weighting’ reflective of an advertisement’s ‘performance score’ that is indicative of the revenue that advertisement has generated.”

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## **Key Takeaways for Litigators and Drafters**

The Federal Circuit’s effective ban on business methods continues unabated. It has gotten to the point where I skip over many of the business-method-related cases in my webinar series. Practitioners should look at this case through two distinct strategic lenses:

- **For Litigators:** If you are defending against infringement allegations from a patent that is business-related, an early, pre-trial motion for lack of patentable subject matter remains your best chance for a quick and complete victory.
  - **For Patent Drafters:** You face an uphill battle (to say the least). Simply putting lots of specificity into your claims will probably not save you for this type of subject matter. To increase your chances of surviving Federal Circuit scrutiny, you absolutely need a detailed specification explaining the concrete *technological* differences over the prior art, and your claims must explicitly reflect those technological solutions.
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