

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

THE NIELSEN COMPANY (US), LLC,

Plaintiff,

v.

VIDEOAMP, INC.,

Defendant.

C.A. No. 24-123 (RGA)

**DEFENDANT VIDEOAMP, INC.'S OPENING BRIEF IN SUPPORT OF ITS
MOTION TO DISMISS COMPLAINT**

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Defendant VideoAmp, Inc. (“VideoAmp”) submits this brief in support of its motion to dismiss the Complaint filed by Plaintiff The Nielsen Company (US), Inc. (“Nielsen”). D.I. 1.

I. NATURE AND STAGE OF THE PROCEEDINGS

Nielsen filed suit against VideoAmp for infringement of United States Patent Nos. 11,871,058 (“the ’058 Patent”) and 11,856,250 (“the ’250 Patent”) (collectively, the “Asserted Patents”). D.I. 1. Because the allegations in its Complaint are predicated on patents that claim unpatentable subject matter, VideoAmp files this Motion.

II. SUMMARY OF ARGUMENT

1. The claims of the ’058 and ’250 Patents are directed to the abstract idea of compiling data from multiple source “environments” and performing statistical analysis on the available data to estimate “missing” data. Statistical analysis and estimations using mathematical calculations are abstract ideas. *SAP Am., Inc. v. InvestPic, LLC*, 898 F.3d 1161, 1165-66 (Fed. Cir. 2018). The processes of collecting and manipulating data are abstract ideas as well. *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat. Ass’n*, 776 F.3d 1343, 1347 (Fed. Cir. 2014) (“The concept of data collection, recognition, and storage is undisputedly well-known. Indeed, humans have always performed these functions.”); *PUREPREDICTIVE, Inc. v. H2O.AI, Inc.*, No. 17-CV-03049-WHO, 2017 WL 3721480, at *5 (N.D. Cal. Aug. 29, 2017), *aff’d sub nom. Purepredictive, Inc. v. H2O.ai, Inc.*, 741 F. App’x 802 (Fed. Cir. 2018) (“PPI’s claims are directed to a mental process and the abstract concept of using mathematical algorithms to perform predictive analytics”).

2. Limiting the analysis to a type of data does not save the patents from attempting to claim an abstract idea. *Affinity Labs of Texas, LLC v. DIRECTV, LLC*, 838 F.3d 1253, 1259 (Fed. Cir. 2016) (“The Supreme Court and this court have repeatedly made clear that merely limiting

the field of use of the abstract idea to a particular existing technological environment does not render the claims any less abstract.”) (citing cases).

3. The claims do not recite software innovations or improvements to the machine’s capabilities such that they would constitute inventive steps. *Finjan, Inc. v. Blue Coat System, Inc.*, 879 F.3d 1299, 1303 (Fed. Cir. 2018) (“In cases involving software innovations, this inquiry often turns on whether the claims focus on ‘the specific asserted improvement in computer capabilities . . . or, instead, on a process that qualifies as an ‘abstract idea’ for which computers are invoked merely as a tool.’” (quoting *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335-36 (Fed. Cir. 2016))).

4. Resolving this issue does not require discovery or claim construction. To avoid waste of judicial and party resources unnecessarily litigating invalid patents, VideoAmp therefore requests that the Court dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

III. STATEMENT OF FACTS

A. The Asserted Patents

Nielsen asserts two related patents that claim priority to provisional applications filed in 2015. The Asserted Patents are titled “Methods and Apparatus to Determine a Duration of Media Presentation Based on Tuning Session Duration.” *E.g.*, D.I. 1, Ex. A (the ’058 Patent). Both asserted patents claim priority to U.S. Patent Application No. 15/011,455, filed on January 29, 2016 (which is now U.S. Patent No. 9,986,272) and Provisional Application No. 62/239,126, filed on October 8, 2015. *See* D.I. 1, ¶¶ 18, 21. The ’058 Patent and the ’250 Patent also share a common specification (“the Common Specification”). *Id.*, ¶ 23.

IV. LEGAL STANDARD

A. Motion to Dismiss Under Rule 12(b)(6)

To survive a Rule 12(b)(6) motion, a complaint “must allege facts that ‘raise a right to relief above the speculative level on the assumption that the allegations in the complaint are true (even if doubtful in fact).’” *Victaulic Co. v. Tieman*, 499 F.3d 227, 234 (3rd Cir. 2007) (citation omitted). Although factual allegations are taken as true, legal conclusions are given no deference—those matters are left for the court to decide. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (noting tenet that allegations are taken as true on a motion to dismiss “is inapplicable to legal conclusions”). “[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief [as a matter of law], this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.” *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (internal citations and quotations omitted).

Patentability under 35 U.S.C. § 101 is a threshold legal issue. *Bilski v. Kappos*, 561 U.S. 593, 602 (2010). Accordingly, the § 101 inquiry is properly raised at the pleadings stage if it is apparent from the face of the patent that the asserted claims are not directed to eligible subject matter. *See Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 718-19 (Fed. Cir. 2014) (Mayer, J., concurring). In those situations, claim construction is not required to conduct a § 101 analysis. *Bancorp Servs. L.L.C. v. Sun Life Assur. Co.*, 687 F.3d 1266, 1273 (Fed. Cir. 2012) (“[W]e perceive no flaw in the notion that claim construction is not an inviolable prerequisite to a validity determination under § 101.”).

B. Analysis Under 35 U.S.C. § 101

Section 101 of the Patent Act sets forth the categories of patentable subject matter: “any new and useful process, machine, manufacture, or composition of matter.” 35 U.S.C. § 101. Within those categories, the law recognizes three exceptions to patent eligibility: “laws of nature,

physical phenomena, and abstract ideas.” *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980). Abstract ideas are ineligible for patent protection because a monopoly over these ideas would preempt their use in all fields. *See Bilski*, 561 U.S. at 611–12. In other words, “abstract intellectual concepts are not patentable, as they are the basic tools of scientific and technological work.” *Id.* at 653.

Courts analyze Section 101 patentability using the *Alice* two-step inquiry. *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 573 U.S. 208, 217–18 (2014). The claim elements are considered in combination at Step One, and then individually and in combination at Step Two. *Id.* First, the court determines “whether the claims at issue are directed to a patent-ineligible concept.” *Id.* at 218. Second, if the claim contains an abstract idea, the court evaluates whether there is “an ‘inventive concept’—*i.e.*, an element or combination of elements that is sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the ineligible concept itself.” *Id.*

V. ARGUMENT

A. Claim 1 of the ’058 Patent is representative.

The asserted patents both claim using a statistical model that is based on data collected from one source “environment” to estimate data that is missing when collected from another source “environment.” Starting with the ’058 patent, all independent claims include the same principal steps: (1) obtaining data from media presentation devices, including data referred to as “tuning session data,” which can be used to calculate “tuning session durations” (annotated in red), (2) obtaining a second type of data referred to as “presentation session data,” which can be used to calculate “presentation session durations” (annotated in blue), (3) generating a statistical model relating the “tuning sessions durations” to corresponding “presentation session durations” by performing one or more “operations” (annotated in green), (4) using the model to calculate an

“expected presentation duration” for the “second environment” where the data is not available (annotated in orange), and (5) presenting the calculated “presentation session duration” (annotated in purple):

1. A method comprising:

obtaining respective tuning session data from a plurality of media presentation devices, corresponding ones of the media presentation devices in respective ones of media presentation environments, the respective ones of the media presentation environments including at least one media output device to present media from a corresponding one of the media presentation devices, the respective tuning session data from respective ones of the media presentation devices indicative of a tuning session having a tuning session duration, the tuning session duration indicative of an amount of time between interactions with a corresponding one of the media presentation devices, wherein presentation session data is available for a first subset of the media presentation environments, and wherein presentation session data is not available for a second subset of the media presentation environments;

obtaining, for ones of the first subset of the media presentation environments, respective presentation session data indicative of a presentation session duration during which media corresponding to a respective tuning session was presented on the respective at least one media output device by the media presentation device within a respective tuning session duration;

generating, by performing one or more operations with processor circuitry, a model relating the respective tuning session durations to corresponding presentation session durations from the ones of the first subset of the media presentation environments;

based on the model, determining, by performing one or more operations with the processor circuitry, for a given one of the media presentation environments in the second subset of the media presentation environments, an expected presentation session duration for a given tuning session having a given tuning session duration; and

causing, by performing one or more operations with the processor circuitry, presentation of the expected presentation session duration for the given tuning session from the given one of the media presentation environments.

'058 Patent, claim 1. Independent claim 15 (as well as dependent claims 12 and 13) differ only in the *type* of data considered in the claimed statistical analysis—the known (second) data obtained is “on/off duration” data as opposed to tuning session duration data. *Id.* at claims 12, 13, and 15.

Claims that depend from these independent claims are substantively similar. Dependent claims 2 and 3 add the step of obtaining additional data for the model used in the statistical analysis. *Id.* at claims. 2-3. Dependent claims 4, 5 and 9 recite generic considerations of the statistical model, such as: (1) whether data from multiple of the inputs (“tuning session durations and corresponding ones of the presentation session durations”) have a “threshold” level of similarity (*id.* at claim 4); (2) whether that level of similarity is “a threshold of time similarity” (*id.* at claim 5).; and (3) whether the number of tuning session durations considered meets a threshold. *Id.* at claim 9. Dependent claim 14 adds only the ability to identify the source “environments” from which data was collected. And dependent claims 16-19 and 22 of the '058 patent share substantially the same limitations as the dependent claims to claim 1, but for independent claim 15. The asserted claims of the '250 Patent (claims 1–5, 9, 11, 14–19, 22) are not substantially different from the '058 Patent. Specifically, the '250 Patent claims a “computing system” comprising of machine-readable instructions and processor circuitry to carry out substantially the same method claimed in the '058 Patent. *Compare* '058 Patent, claim 1 *with* '250 Patent, claim 1.

Claim 1 of the '058 Patent is thus representative for the § 101 analysis. *See IPA Techs., Inc. v. Amazon.com, Inc.*, 352 F. Supp. 3d 335, 344 (D. Del. 2019) (“Plaintiff has failed to identify any claims that are not represented by the asserted claims of the patents [and] Defendants have made a sufficient showing that the claims of each patent are substantially similar and linked to the same abstract idea. Therefore, the Court will treat the asserted claims as representative of all the

claims of their respective patents.”); *Wireless Discovery LLC v. Coffee Meets Bagel, Inc.*, 654 F. Supp. 3d 347, 355 (D. Del. 2023) (similar).

B. *Alice* Step 1: Claim 1 of the ’058 Patent is directed to an abstract idea of compiling data from media devices in an “environment” to create a statistical model, and using that model to estimate missing data.

At *Alice* Step One, a court evaluates whether the claims as a whole, considered in light of the specification, are “directed to” patent-ineligible subject matter, such as an abstract idea. *Alice*, 573 U.S. at 217; *Enfish*, 822 F.3d at 1335. In asking this threshold question, courts must focus on the specific claimed solution rather than high-level simplifications. *Alice*, 573 U.S. at 217 (quotation marks omitted). Courts “must look to the claims as an ordered combination, without ignoring the requirements of the individual steps.” *McRO, Inc. v. Bandai Namco Games Am., Inc.*, 837 F.3d 1299, 1313 (Fed. Cir. 2016); accord *Visual Memory LLC v. NVIDIA Corp.*, 867 F.3d 1253, 1258 (Fed. Cir. 2017).

As discussed above, representative claim 1 recites steps related to determining “presentation session durations” using a statistical “model” created from data subsets including “presentation session data” and “tuning session duration data.” Each of these steps refer to mental processes such obtaining data, organizing it, and manipulating it using mathematics:

Claim Language	Claimed Idea
1. A method comprising:	
obtaining respective tuning session data from a plurality of media presentation devices,	receiving data from multiple sources
corresponding ones of the media presentation devices in respective ones of media presentation environments,	receiving data
the respective ones of the media presentation environments including at least one media output device to present media from a corresponding one of the media presentation devices,	receiving data
the respective tuning session data from respective ones of the media presentation devices indicative of a tuning session having a tuning session duration, the tuning session duration indicative of an amount of time between interactions with a corresponding one of the media presentation devices,	receiving data

wherein presentation session data is available for a first subset of the media presentation environments, and wherein presentation session data is not available for a second subset of the media presentation environments;	organizing data
obtaining, for ones of the first subset of the media presentation environments, respective presentation session data indicative of a presentation session duration during which media corresponding to a respective tuning session was presented on the respective at least one media output device by the media presentation device within a respective tuning session duration;	receiving data from multiple sources
generating, by performing one or more operations with processor circuitry, a model relating the respective tuning session durations to corresponding presentation session durations from the ones of the first subset of the media presentation environments;	create a statistical model based on math
based on the model, determining, by performing one or more operations with the processor circuitry, for a given one of the media presentation environments in the second subset of the media presentation environments, an expected presentation session duration for a given tuning session having a given tuning session duration; and	presenting result of mathematical calculation
causing, by performing one or more operations with the processor circuitry, presentation of the expected presentation session duration for the given tuning session from the given one of the media presentation environments.	presenting organized data

Obtaining, organizing, and manipulating data using mathematical forecasting tools constitutes abstract ideas. *Gottschalk v. Benson*, 409 U.S. 63, 71–72, 93 (1972) (“Abstract ideas include mathematical formulas and calculations”); *PUREPREDICTIVE, Inc.*, 2017 WL 3721480, at *4 (finding that the asserted claims “[were] mathematical processes that not only could be performed by humans but also go to the general abstract concept of predictive analytics rather than any specific application.”). And taken together, the claim limitations describe only the abstract concept of obtaining data (from multiple sources), organizing that data, using mathematical “operations” to create a statistical model, and estimating data using that statistical model. See D.I. 1, ¶ 40; ’058 Patent, Abstract.

These claimed concepts are abstract ideas under the guidance from the Federal Circuit. In *SAP Am., Inc.*, the Federal Circuit found a claim directed towards “performing a statistical

analysis” as concerning patent ineligible subject matter. 898 F.3d at 1165-66. Like the claim here, the claims in *SAP* recited obtaining data and organizing it, using a mathematical operation (specifically, generating a “distribution function”) to perform a statistical analysis, and presenting the results of that statistical analysis:

22. A system for providing statistical analysis of investment information over an information network comprising:
 a financial data database for storing investment data;
 a client database;
 a plurality of processors collectively arranged to perform a parallel processing computation, wherein the plurality of processors is adapted to:
 receive a statistical analysis request corresponding to a selected investment;
 based upon investment data pertaining to the selected investment, perform a resampled statistical analysis to generate a resampled distribution;
 and,
 provide a report of the resampled distribution.

Id. The Federal Circuit reasoned that the claimed steps of “selecting certain information, analyzing it using mathematical techniques, and reporting or displaying the results of the analysis” were “all abstract”:

The claims in this case are directed to abstract ideas. The focus of the claims, as reflected in what is quoted above, is on selecting certain information, analyzing it using mathematical techniques, and reporting or displaying the results of the analysis. That is all abstract.

Id. at 1167.

The same is true here. Using claim 1 of the ’058 patent as a representative sample, the claim concerns collecting data, analyzing it using a statistical model, and presenting the results to the user. The specifics of the underlying statistical model are not claimed, and regardless, would not be enough to save the asserted patents. *In re Bd. of Trustees of Leland Stanford Junior Univ.*, 991 F.3d 1245, 1249-51 (Fed. Cir. 2021) (“Courts have long held that mathematical algorithms for performing calculations, without more, are patent ineligible,” and therefore “claims [that] are

directed to the use of mathematical calculations and statistical modeling” are unpatentable). And other than the use of the statistical model, the claims refer only to the manipulation of data, which is also an abstract idea. *Mgmt. Sci. Assocs., Inc. v. Datavant, Inc.*, 510 F. Supp. 3d 238, 247-48 (D. Del. 2020) (granting a motion to dismiss on 101 grounds, finding that the “the [asserted] patent is directed to the abstract idea of collecting, labelling, and manipulating data”).

Using a particular type of data in a model (for example, a second source of data) is still an abstract idea. *Electric Power Group, LLC v. Alston, S.A.*, 830 F.3d 1350, 1354 (Fed. Cir. 2016) (finding that, as part of the *Alice* step one analysis, claims directed to “collecting information, including when limited to a particular content” are drawn to abstract ideas. *Id.* at 1354 (citing cases)). Specifically, the analysis of information “by steps people go through in their minds, or by mathematical algorithms, without more” are “mental processes within the abstract-idea category.” *Id.* (citing cases). And the output of these “abstract processes of collecting and analyzing information, without more . . . is abstract as an ancillary part of such collection and analysis.” *Id.*

Nothing in the claims or the Common Specification suggests that the claimed invention improves the function of the machine itself. In *Enfish*, the claims improved upon the standard relational model with a new type of self-referential database, which constituted more than “recited use of an abstract mathematical formula on any general purpose computer.” 822 F.3d at 1338. Such is not the case here—the “innovation” referenced repeatedly is creating models based on available data and using the models to calculate missing data using generic computer components. *In re Downing*, 754 F. App’x 988, 994 (Fed. Cir. 2018) (citing cases) (“The case law has consistently held that generic computer components are not sufficient to transform abstract claims into patent-eligible subject matter.”).

Thus, the claims here are directed to the abstract process of inputting known data into a computer to predict or estimate missing data, which is at its core, mathematics. Following the cases from the Federal Circuit such as *SAP* and *Electric Power*, those concepts are an abstract idea under Step 1 of the *Alice* analysis.

C. *Alice* Step 2: The asserted patents do not claim an inventive concept.

Because the claims of the '058 and '250 Patents are directed to an abstract idea, the Court must next determine whether the patent contains an “inventive concept sufficient to transform the claimed abstract idea into a patent-eligible application.” *Alice*, 573 U.S. at 220 (internal quotations omitted). A claim directed towards an abstract idea must include “‘additional features’ to ensure ‘that the [claim] is more than a drafting effort designed to monopolize the [abstract idea].’” *Alice*, 573 U.S. at 221 (alterations in original) (quoting *Mayo*, 566 U.S. at 77).

For this inquiry, the Federal Circuit has explained that this Court should inquire whether any limitations establish an inventive concept that transforms the abstract idea into patent eligible subject matter. *In re Bd. of Trustees of Leland Stanford Junior Univ.*, 991 F.3d at 1251; *see also Secured Mail Sols. LLC v. Universal Wilde, Inc.*, 873 F.3d 905, 911 (Fed. Cir. 2017) (“To save a patent at step two, an inventive concept must be evident in the claims.”)

Nielsen asserts that the Asserted Patents solve specific problems.¹ First, Nielsen asserts that the advertising industry was unable to “determin[e] the times during which [a] television was on and displaying media from the reported content source,” thereby making it difficult to determine media viewership. D.I. 1, ¶ 25 (citing D.I. 1, Ex. C (“Lee Decl.”), ¶ 9)). The Asserted Patents purportedly solve this problem “by disclosing and claiming innovative ways of determining the

¹ In addition to the conclusory statements in its Complaint, Nielsen relies on an expert declaration attached to its Complaint. However, this Court should not consider the Lee Declaration because it is not a written instrument. VideoAmp’s argument is expressed more fully *infra* § II.D.

likely presentation session data missing from subsets of the tuning session data.” *Id.*, ¶ 26. Nielsen asserts that the “innovation” is using a “second source of data” to make viewership estimations (for example, through a statistical analysis model). *Id.* (“[T]he Patents describe developing a model using data from the first subset of households that allows determining likely presentation session data for the second subset of households, thereby solving the problem of inaccurate tuning data.”); *see also id.*, ¶ 30. However, the Asserted Patents acknowledge that statistical analysis based on a limited set of data to perform audience measurement was known in the art (albeit, purportedly costly):

To collect these demographics, an audience measurement entity enlists a plurality of media consumers (often called panelists) to cooperate in an audience measurement study (often called a panel) for a predefined length of time. The media consumption habits and demographic data associated with these enlisted media consumers are collected and used to statistically determine the size and demographics of the entire audience of the media presentation. . . . The process of enlisting and retaining participants for purposes of audience measurement is often a difficult and costly aspect of the audience measurement process.

’058 Pat. at 1:40-54. Nielsen’s pled “innovat[ion],” which contradicts the Asserted Patents recognition of prior art statistical analysis techniques—is not sufficient. *Secured Mail Sols.*, 873 F.3d at 907, 913 (Fed. Cir. 2017) (affirming grant of 12(b)(6) motion to dismiss seven patents under § 101, because “a court need not accept as true allegations that contradict matters properly subject to judicial notice or by exhibit, such as the claims and the patent specification”) (internal quotation marks and citation omitted). Indeed, Nielsen’s attempt to claim a monopoly over any statistical analysis (including that which the asserted patents allege is prior art) undermines its ability to argue that the claims concern patentable subject matter. *See Bilski*, 561 U.S. at 611-12.

Second, Nielsen asserts that “[t]he Patents claim specific improvements to a process for creating accurate models of media viewing.” D.I. 1, ¶ 32; *see also id.*, ¶ 33. However, it is not an inventive concept to take correlated data (such as the claimed tuning session and presentation data)

and use that data to make predictions; it is algebra—solving for X in $X+Y=Z$ when you know Y and Z. And the Federal Circuit has already held that the use of math and statistical models is *not* inventive. *Stanford*, 991 F.3d at 1252 (“The application of those elements results in the mathematical analysis itself, and therefore the claimed method subsists in ‘the basic tools of scientific and technological work.’”); *id.* at 1251 (“[T]he improvement in computational accuracy alleged here does not qualify as an improvement to a technological process; rather, it is merely an enhancement to the abstract mathematical calculation of haplotype phase itself.”).

This case is distinguishable from *Berkheimer* and the line of cases where factual issues have been found to exist in *Alice* Step 2. In *Berkheimer*, the Federal Circuit noted that the specification explicitly “describe[d] an inventive feature that store[d] parsed data in a purportedly unconventional manner.” *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1369 (Fed. Cir. 2018). The court added that “[t]he improvements in the specification, to the extent they are captured in the claims, create a factual dispute regarding whether the invention describes well-understood, routine, and conventional activities . . . so we must analyze *the asserted claims* and determine whether they capture these improvements.” *Id.* (emphasis added). Thus, only *after* finding that some claims “contain limitations directed to the arguably unconventional inventive concept described in the specification,” the court held that there was a question of fact as to whether those claims perform “well-understood, routine, and conventional activities.” *Id.* at 1370. *Berkheimer* and its progeny “do not stand for the proposition that a plaintiff can avoid dismissal simply by reciting in the complaint that the invention at issue is novel and that the inventive concept resides in the abstract idea itself.” *First-Class Monitoring, LLC v. Ups of Am., Inc.*, 389 F. Supp. 3d 456, 471 (E.D. Tex. 2019) (emphasis added). Furthermore, “[a]ny allegation about inventiveness, wholly divorced from the claims or the specification, does not defeat a motion to dismiss; only plausible and

specific factual allegations that aspects of the claims are inventive are sufficient.” *Dropbox, Inc. v. Synchronoss Techs., Inc.*, 815 F. App’x 529, 538 (Fed. Cir. 2020) (internal quotations omitted).

Thus, neither of Nielsen’s supposed “innovations” are sufficient, and the Asserted Patents do not pass Step 2 of the *Alice* test.

D. There are no claim construction or factual disputes preventing a ruling on this issue at the Rule 12 stage.

Nielsen’s bare allegation in the Complaint that the Asserted Patents “disclos[e] and claim[] *innovative* ways of determining the likely presentation sessions data missing from subsets of the tuning session data” cannot defeat this motion—otherwise, Rule 12 would be rendered toothless against plaintiffs who plead “magic words.” D.I. 1, ¶ 26 (emphasis added); *see also Appistry, Inc. v. Amazon.com, Inc.*, 195 F. Supp. 3d 1176, 1183, n.6 (W.D. Wash., 2016) *aff’d sub nom. Appistry, LLC v. Amazon.com, Inc.*, 676 F. App’x 1008 (Fed. Cir. 2017) (“Plaintiff’s position is absurd. Requiring the Court to accept such facts or legal conclusions (even in the form of an early expert declaration) would permit any plaintiff to circumvent the § 101 inquiry on an early motion to dismiss or motion for judgment on the pleadings simply by including a few lines attesting to the novelty of the invention.”). The Court’s ineligibility analysis should therefore disregard Nielsen’s bare legal conclusion about the novel aspects of its asserted patents. *Simio, LLC v. FlexSim Software Products, Inc.*, 983 F.3d 1353, 1366 (Fed. Cir. 2020) (“We disregard conclusory statements when evaluating a complaint under Rule 12(b)(6).”).

Recognizing the weakness in its patents, Nielsen attaches an expert declaration from Ms. Virginia Lee in an attempt to survive a 12(b)(6) motion. But Ms. Lee’s Declaration should not be considered by this Court in determining this motion. Rule 10 sets forth the form of a complaint, and notes that the pleading may be accompanied by a “written instrument.” A written instrument within the meaning of Rule 10(c) “is a document evidencing legal rights or duties or giving formal

expression to a legal act or agreement, such as a deed, will, bond, lease, insurance policy or security agreement.” *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F.Supp. 1108, 1115 (W.D.N.Y. 1996) (citing Black’s Law Dictionary 801, 1612 (6th ed.1990)). An expert declaration attached to a complaint is *not* a written instrument. *See, e.g., DeMarco v. DepoTech Corp.*, 149 F. Supp. 2d 1212, 1221 (S.D. Cal. 2001) (“In sum, considering an expert affidavit would so complicate the procedural posture of a motion to dismiss that it would become virtually indistinguishable from a motion for summary judgment.”). And even if Ms. Lee’s Declaration were considered, the *Alice* analysis would be the same. Ms. Lee’s declaration is a series of quotations from the Common Specification followed by conclusory statements. *See, e.g., D.I. 1, Ex. C, ¶ 16* (“The Patents claim specific improvements to a process for creating accurate models of media viewing”); *id.* (“The Patents’ innovation, reflected in all the claims, is to use a second source of data”). Those conclusory statements should be given no weight when they contradict the patent teachings—such as Column 1, lines 40 to 55 of the ’058 Patent, which plainly contemplates the use of statistical analysis with panel data to perform audience measurement.

Accordingly, VideoAmp’s motion is ripe, and it should be granted.

VI. CONCLUSION

For these reasons, VideoAmp respectfully requests that the Court dismiss, in their entirety, Nielsen’s claims of infringement for failure to plead actionable knowledge of the patent and the alleged infringement. Because Nielsen sought infringement with patents claiming unpatentable subject matter, the Court’s dismissal of those claims should be with prejudice.

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