2016-2604

United States Court of Appeals for the Federal Circuit

FRONT ROW TECHNOLOGIES LLC,

Plaintiff-Appellant,

v.

MLB ADVANCED MEDIA, L.P., NBA MEDIA VENTURES, MERCURY RADIO ARTS, INC., dba The Glenn Beck Program, Inc., GBTV, LLC, PREMIERE RADIO NETWORKS INC., TURNER SPORTS INTERACTIVE, INC., TURNER DIGITAL BASKETBALL SERVICES, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the District of New Mexico, Consolidated Case No. 1:10-cv-00433-JB-SCY, Hon. John O. Browning, Judge

OPENING BRIEF FOR DEFENDANTS-APPELLEES

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(For Continuation of Appearances See Inside Cover)

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Front Row Technologies LLC **v.** MLB Advanced Media, L.P., et al.

Case No. 16-2604

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☒ (appellee) ☐ (amicus) ☐ (name of party)

NBA Media Ventures, LLC; Turner Sports Interactive, Inc.; and Turner Digital Basketball Services, Inc.

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10 % or more of stock in the party
NBA Media Ventures, LLC	None	None
Turner Sports Interactive, Inc.	None	See Attachment A.
Turner Digital Basketball Services, Inc.	None	See Attachment A.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

VINSON & ELKINS LLP: Andrew J. Allen, Stephen M. Hash, Temilola Sobowale

2/23/2017
Date

/s/ David B. Weaver
Signature of counsel

Please Note: All questions must be answered

David B. Weaver
Printed name of counsel

cc: All Counsel of Record

ATTACHMENT A

3. Parent corporations and publicly held companies that own 10% or more of stock in the party.

Turner Sports Interactive, Inc. is a wholly owned subsidiary of Turner Sports, Inc. Turner Sports, Inc. is a wholly owned subsidiary of Turner Broadcasting System, Inc. Turner Broadcasting System, Inc. is wholly owned by Historic TW Inc. Turner Broadcasting System, Inc. is ultimately and wholly owned by Time Warner Inc., a publicly traded Delaware company. No publicly traded entity or person has a 10 percent or greater stock ownership in Time Warner Inc.'s issued outstanding common stock.

Turner Digital Basketball Services, Inc. is a wholly owned subsidiary of Turner Broadcasting System, Inc. Turner Broadcasting System, Inc. is wholly owned by Historic TW Inc. Turner Broadcasting System, Inc. is ultimately and wholly owned by Time Warner Inc., a publicly traded Delaware company. No publicly traded entity or person has a 10 percent or great stock ownership in Time Warner Inc.'s issued outstanding common stock.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Front Row Technologies LLC **v.** MLB Advanced Media, L.P.

Case No. 16-2604

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☒ (appellee) ☐ (amicus) ☐ (name of party)

MLB Advanced Media, L.P.

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10 % or more of stock in the party
MLB Advanced Media, L.P.	None	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Foley & Lardner LLP: Cynthia J. Rigsby (Franecki), Jason J. Keener, Kevin J. Malaney, Matthew B. Lowrie

Feb 23, 2017
Date

/s/ Alan E. Littmann
Signature of counsel

Please Note: All questions must be answered

Alan E. Littmann
Printed name of counsel

cc: All Counsel of Record

FORM 9. Certificate of Interest **Form 9 Rev. 03/16**

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Front Row Technologies LLC **v.** MLB Advanced Media, L.P., et al.

Case No. 16-2604

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☒ (appellee) ☐ (amicus) ☐ (name of party)

GBTV, LLC; Mercury Radio Arts, Inc.; and Premiere Radio Networks Inc.

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10 % or more of stock in the party
GBTV, LLC	None	See Attachment A
Mercury Radio Arts, Inc.	None	See Attachment A
Premiere Radio Networks Inc.	None	See Attachment A

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Cowan, DeBaets, Abrahams & Sheppard LLP: Scott J. Sholder, Brittany L. Kaplan

2/23/2017
Date

/s/ Eleanor M. Lackman
Signature of counsel

Please Note: All questions must be answered

Eleanor M. Lackman
Printed name of counsel

cc: All Counsel of Record

Attachment A

3. Parent corporations and publicly held companies that own 10% or more of stock in the party.

GBTV LLC is a dissolved entity that has been merged into TheBlaze Inc. TheBlaze Inc. is a majority-owned subsidiary of Mercury Radio Arts, Inc. No publicly held corporation owns 10% or more of TheBlaze Inc.'s stock.

Mercury Radio Arts, Inc. is solely owned by Mr. Glenn Beck. No publicly held corporation owns 10% or more of its stock.

Premiere Radio Networks, Inc. is a wholly owned subsidiary of Clear Channel Communications, Inc., which is wholly owned by CC Media Holdings, Inc., which is a publicly held corporation. No publicly held corporation owns 10% or more of CC Media Holdings, Inc.'s stock.

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STATEMENT OF RELATED CASES

Counsel for Defendants-Appellees are unaware of any other appeal taken in the underlying civil actions or of any other cases in this or another court that will directly affect or be directly affected by the Court's decision in this appeal.

I. ISSUE PRESENTED

Whether the District Court correctly held that all claims of the patents-in-suit were invalid under 35 U.S.C. § 101, where:

(1) the claims are directed to the abstract ideas of

(a) sending video of an event to handheld devices over wireless networks or

(b) authorizing the sending of video based on the user's location, and

(2) the claims contain no inventive concept sufficient to transform the abstract ideas into patentable inventions because they recite purely functional language using conventional technology admittedly known in the art.

II. STATEMENT OF CASE

A. Preliminary Statement

This Court's recent precedent in at least three closely analogous actions strongly supports affirmance of the District Court's dismissal in this case: *Affinity Labs of Texas, LLC v. DIRECTV, LLC* ("*Affinity/DIRECTV*"), 838 F.3d 1253 (Fed. Cir. 2016); *Affinity Labs of Texas, LLC v. Amazon.com Inc.* ("*Affinity/Amazon*"), 838 F.3d 1266 (Fed. Cir. 2016); and *Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363 (Fed. Cir. 2015). Four of the five patents on appeal—U.S. Patent Nos. 7,812,856 ("the '856 Patent"); 8,086,184 ("the '184 Patent"); 8,270,895 ("the '895 Patent"); and 8,401,460 ("the '460 Patent") (collectively, "the Video Patents")—claim nothing more than the abstract idea of sending video of an event to handheld devices over wireless networks, using conventional technology and purely functional language. In the two *Affinity Labs* decisions, this Court invalidated claims drawn to generically implemented abstract ideas for streaming media to cellular phones remarkably similar to the Video Patents here. *See Affinity/DIRECTV*, 838 F.3d at 1258; *Affinity/Amazon*, 838 F.3d at 1269. The fifth patent on appeal, U.S. Patent No. 8,583,027 ("the '027 Patent"), also should be affirmed as invalid because it claims the

abstract idea of authorizing handheld devices to receive video based on a user's location. Appx116. This Court in *Intellectual Ventures* invalidated claims directed to a very similar abstract idea, implemented at a similarly high level of generality. *See* 792 F.3d at 1369.

Under this Court's precedent, Front Row's patent claims at issue here are directed to ineligible subject matter under 35 U.S.C. § 101 and, therefore, invalid. The claims merely take abstract ideas and instruct others to implement them on already existing generic hardware, using solely functional language. Indeed, on appeal, Front Row admits that "the technology described in the Front Row patents existed when Front Row filed the parent patents from which most of the patents-in-suit derived." Front Row Technologies, LLC's Corrected Brief of Appellant ("Br.") at 33 n.31.

The Video Patents thus do no more than take the fundamental concepts of capturing, transmitting, and displaying video data, and say "apply it with a handheld device like a cell phone or PDA." Although this idea is stated as the basic invention of the Video Patents, the patents never describe *how* it is to be done—a deficiency this Court has previously criticized in *Internet Patents Corp. v. Active Network, Inc.*

See 790 F.3d 1343, 1348 (Fed. Cir. 2015) ("The mechanism for maintaining the state is not described, although this is stated to be the essential innovation.").

The '027 Patent similarly recites only "what" the invention is supposed to do—determine user location and authorize access based on it—but none of the "how" needed to accomplish it. *See, e.g.*, *Affinity/Amazon*, 838 F.3d at 1271 ("The features set forth in the claims are described and claimed generically rather than with the specificity necessary to show how those components provide a concrete solution to the problem addressed by the patent.").

Front Row's patent specifications likewise are "devoid of technical explanation as to how to implement the invention." *In re TLI Commc'ns Patent Litig.*, 823 F.3d 607, 615 (Fed. Cir. 2016). As the court below correctly observed, the "claims do not merely *involve* a patent-ineligible concept . . . . They describe two patent-ineligible concepts and not much else." Appx118 (citations omitted).

In its brief, Front Row makes little effort to distinguish its patents from the controlling precedent of *Affinity/DIRECTV*, *Affinity/Amazon*, and *Intellectual Ventures*. Instead, Front Row asks the Court to rely

almost exclusively on dictionaries and on Front Row's interpretation of selected district court opinions, which are irreconcilable with governing precedent from the Supreme Court and this Court.

Because Front Row's patents claim patent-ineligible subject matter under 35 U.S.C. § 101, the Court should affirm the judgment of the District Court.

B. Front Row and the Present Litigation

Notwithstanding unsubstantiated claims of its "years of work" and "hundreds of thousands of dollars in development costs," *see* Br. at 1, Plaintiff-Appellant Front Row remains a non-practicing entity whose principals—also the named inventors on the patents at issue—are themselves patent attorneys. Appx3607, Appx3613. Front Row has never built, developed, or sold a new handheld device, any improved networking technology, faster streaming video techniques, or anything else. Any objectionable "costs" are almost entirely litigation-related—driven in large part by Front Row's wasteful litigation tactics—and have been borne by both sides.

On May 5, 2010, Front Row filed its initial complaint against Major League Baseball Properties, Inc. and Defendant-Appellee MLB

Advanced Media, L.P. ("MLBAM") in the United States District Court for the District of New Mexico, asserting three patents related to those on appeal here. Appx146-159. Front Row subsequently amended its complaint to add another patent along with infringement allegations against Defendant-Appellee NBA Media Ventures, LLC ("NBAMV"). Appx320-340, Appx448-471. Upon joint motion of all parties, the District Court stayed the case pending *inter partes* reexamination proceedings for the four then-asserted patents. Appx3244.

While the agreed-upon stay was still in effect, Front Row filed a new suit in a new venue—the United States District Court for the Northern District of Texas—to assert a fifth, related patent against MLBAM, and also Defendants-Appellees Mercury Radio Arts, Inc.; GBTV, LLC; and Premiere Radio Networks, Inc. (collectively, "the Beck Defendants"). Appx3132-3139. Upon motion from MLBAM and the Beck Defendants, opposed by Front Row, the Texas court transferred the new action to New Mexico for consolidation with the original action. Appx3275-3285. The New Mexico court consolidated the cases, over Front Row's baseless objections, and observed that Defendants'

arguments of forum-shopping "may very well have merit." Appx3334 n.1.

Front Row then tried to circumvent the stay by amending its complaint to drop three of the four originally asserted patents, which had fared poorly in reexamination, and add eight new, related patents. Appx649-682. Front Row also dismissed all allegations connected to the patent originally asserted in the Texas action, leaving nine asserted patents. Appx2120 n.1.

Additionally, Front Row filed a separate lawsuit against Turner Sports Interactive, Inc. and Turner Digital Basketball Services, Inc. (collectively, "Turner"), alleging infringement of several of the same patents by several of the same products at issue in the original action. Appx3457-3464. Front Row then filed yet another lawsuit against NBAMV and Turner, asserting the '027 Patent. Appx3466-3470. This action brought the number of asserted patents to ten and the number of separate lawsuits to four. These actions were also consolidated with the original action, again over Front Row's opposition. Appx3576-3591, Appx3592-3593.

Defendants-Appellees filed their motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) against the ten patents then at issue, arguing that the Front Row patents were invalid under 35 U.S.C. § 101. Appx1057-1090. Shortly after the hearing on this motion (in which Front Row defended all ten patents), Front Row abruptly dropped five of the asserted patents. Appx2120, Appx2161, Appx1490, Appx1521-1523.[1]

In total, Front Row filed four separate actions to assert related patents, all of which were consolidated despite Front Row's repeated objections. Front Row also asserted fourteen different patents, nine of which it has since dropped without any litigation on the merits of those patents. The five remaining patents are now on appeal.

C. The Front Row Patents.

Front Row claims that "[i]nspiration" for the patents-in-suit struck at a concert when co-inventor and Front Row co-principal Luis Ortiz was forced to move due to his pregnant wife's discomfort. Br. at 4.

[1] The parties then stipulated to the dismissal of the five dropped patents. Appx2152-2159. Following the stipulation, Front Row filed a Fifth Amended Complaint to assert its five remaining patents. Appx2128-2151.

Unable to see the concert anymore, Mr. Ortiz thought, "What if I could stream live video of the band onto my PDA?" Appx3596, Appx3611. Front Row thus tells that "the basic concept behind all the ideas now embodied in Front Row's patent portfolio was born." Appx3596. Front Row's own story precisely captures the abstract nature of the claimed invention—that is, seeking to claim the abstract idea itself of sending video to a handheld device, without providing an inventive concept necessary to transform the idea into a patentable invention. Front Row never developed this "basic concept" beyond its abstract infancy.

The Video Patents. The District Court identified two claims as representative of all claims of the four Video Patents. Appx100-112. The claims, which the District Court described as "superficially complex," are directed to the abstract idea of sending video to handheld devices over wireless networks. Appx98. These claims are reproduced below, with highlighting to indicate their "basic character":

Claim 1 of the '895 Patent:

> At least one server, comprising:
>
> memory capable of storing entertainment venue-based data comprising video captured of live entertainment occurring in front of a live audience from more than one camera located in at least one entertainment venue;

at least one processor capable of authenticating via a security code at least one remote hand held device to provide at least one user of said at least one remote hand held device wireless access to said entertainment venue-based data;

at least one processor processing the venue-based data including video captured from the more than one camera into a format suitable for streaming over wireless data networks as streamed data that is capable of further processing for viewing by said at least one remote hand held device;

and at least one port capable of streaming said venue-based data as streamed data from said at least one server so that said entertainment venue-based data may be wirelessly received as said streamed data by at least one remote hand held device authorized to receive said entertainment venue-based data through at least one wireless data communications network, in order to permit said entertainment venue-based data to be accessible wirelessly as said streamed data via said at least one remote hand held device by said at least one user of said at least one remote hand held device at locations within or remote from said at least one venue for viewing via said at least one remote hand held device, said video captured from said more than one camera located at said at least one entertainment venue.

Claim 15 of the '856 Patent:

A method for displaying a particular perspective of a venue-based activity at least one authorized hand held device having a display screen, said method comprising the steps of:

simultaneously capturing a plurality of video perspectives of a venue-based activity utilizing more than one camera located at a sports and entertainment venue;

processing said plurality of video perspectives at a server into encrypted video data packet for display on a touch-

> sensitive display screen associated with said at least one authorized hand held device provided in the form of at least a smart phone or personal digital assistance, said at least one hand held device further comprising at least one 802.11 wireless module for access to a wireless local area network and a cellular communications module for communication with a wireless cellular communications network;
>
> wirelessly transmitting said encrypted video packet over an 802.11 wireless local area network to said at least one authorized hand held device said plurality of video perspectives of a venue-based activity from said server;
>
> processing said plurality of video perspectives at said at least one authorized hand held device into decrypted video data packet for display on said touch-sensitive display screen associated with said at least one authorized hand held device; and
>
> displaying a particular video perspective on said touch-sensitive display screen, in response to a user selection of said particular video perspective from among said plurality of video perspectives.

The claims recite a series of generic functions without any description as to *how* they are to be performed. For example, claim 1 of the '895 Patent recites that data is "process[ed] . . . into a format suitable for streaming over wireless data networks" and then "stream[ed] . . . so that said [] data may be wirelessly received . . . for viewing." Nowhere do the claims state how the data is to be processed or streamed. Instead, only the results are claimed: video is captured so

it can be processed, processed so it can be streamed, and streamed so it can be displayed.

Nor does the specification provide relevant detail as to how the claimed functions are performed. The totality of the "capturing," "processing," and "transmitting" functions are described at an extremely high level of generality:

> A captured image of football player 82 can be transferred from one or more video cameras . . . and transmitted via wired and/or wireless communications to server 100. The server 100 then processes the video data received from one or more of the digital transmitters and formats the video data for transmission via wireless means to wireless data transmitter/receiver 100, which may be integrated with hand held device 100.

Appx786 at 11:29-38. The specification also admits that the claimed functions are drawn to conventional and routine activity. For example, capturing video with multiple cameras is described as commonplace: "Most modern stadiums and live entertainment facilities . . . typically employ . . . a plurality of television cameras positioned to capture video images at diverse locations within the stadium." Appx781 at 1:61-67.

The representative claims thus are drawn to an abstract idea—sending video over wireless networks to handheld devices—that is both common and longstanding. Fans of sports, music, and other

entertainment have watched televised broadcasts of events taking place in other locations for many years. Front Row's patent specification acknowledges that prior to its patents, "handheld television[s] [were] available for receiving public television broadcasts." Appx784 at 7:22-23.[2] The specification also acknowledges that certain venues had already used individual, interactive touch screen systems to offer fans enhanced viewing options. Br. at 6; Appx782 at 3:32-35. The claims of the Video Patents reflect no more than a generic wish: what was already available for viewing on portable televisions or in venue seat-backs should now be available for viewing on portable computing devices, such as PDAs.

The '027 Patent. The '027 Patent also claims an abstract idea: authorizing handheld devices to receive video based on the user's location. The District Court held that claim 1 of the '027 Patent, below, is representative. Appx113-114. As above, the yellow highlighting illustrates the claim's "basic character":

---

[2] The patents at issue purport to claim priority to the same provisional application and share substantially similar specifications. Unless otherwise noted, language quoted from the patents' specification appears in all five patents.

> A method for authorizing access by a user of at least one service associated with an event at a venue based on a location of said user as determined by information derived from communication between a computing device in the form of a wireless handheld device carried and utilized by said user and assets of a data communications network, said method comprising:
>
> determining a location of at least one user based on communications of at least one computing device comprised of a wireless handheld device utilized by said at least one user with said data communications network supporting data communications of said at least one computing device;
>
> authorizing said at least one computing device to receive said at least one service based on said location as determined by said data communications network, wherein said at least one service includes streaming video accessed from a server wherein streaming video captured by at least one video camera operating within at least one entertainment venue is processed for delivery to subscribers of the at least one service and wherein said authorizing said at least one computing device further comprising preventing said at least one computing device from receiving said at least one service beyond or within a particular geographic area based on said location determination by said data communication network.

Stripped of its repetitive language, representative claim 1 of the '027 Patent recites only two functions: (1) determining a user's location, and (2) authorizing access (or not) based on that location. Determining access to content based on location is a longstanding business practice. For example, it has long been employed by the newspaper industry to

select different advertisements or content based on a customer's location. The claim purports to limit this business practice to the field of streaming video to handheld devices, but contains no description at all as to how the recited functions are performed. Determining location of a device is simply "based on communications" between a device and a data network, while authorizing access is in turn merely "based on said location." Appx3693 at 26:16-35.

The specification is equally devoid of any meaningful description. Only two paragraphs in the specification of the '027 Patent relate to the use of location to determine access to streaming video. Appx3682-3683 at 4:39-5:8; Appx3693 at 25:30-61.[3] These paragraphs merely parrot the very same generic, functional language as recited in the claims:

> A location of at least one user can be determined based on communications of at least one computing device utilized by the at least one user with the data communications network supporting data communications of the at least one computing device. The at least one computing device can be authorized to receive the at least one service based on the location as determined by the data communications network.

[3] The '027 Patent claims priority to 2000 as a "continuation" of the '895 Patent. The only two paragraphs, however, that relate to the use of location to determine access to video do not appear in the '895 Patent. *See* Appx759-794. These paragraphs first appeared in the specification when the '027 Patent was filed in February 2012.

Appx3682 at 4:50-57; Appx3693 at 25:36-43. The '027 Patent is thus directed to an abstract idea itself, implemented with conventional hardware performing generic functions.

D. The District Court Appropriately Analyzed and Granted Defendants' Motion for Judgment on the Pleadings.

In a thorough 138-page decision, the District Court granted Defendants' motion for judgment on the pleadings, holding that the remaining five patents asserted by Front Row are invalid for claiming unpatentable subject matter under 35 U.S.C. § 101. Appx1-140. The decision carefully analyzed Section 101 precedent from the Supreme Court, this Circuit, and district courts, to address every issue raised by the parties.

First, the District Court concluded that "the clear-and-convincing evidence standard of proof applies to the [Section 101] Motion."[4] *See* Appx67-76. The court then held that claim construction was not necessary prior to deciding the motion because "[e]ven accepting Front

[4] The District Court's nearly ten-page discussion of the applicability of the clear-and-convincing standard, Appx67-76, reveals that the statement at the outset of the decision that the "clear-and-convincing evidence standard does *not* apply" (emphasis added) was a mere scrivener's error, Appx2. Front Row's attempt to allege legal error on this basis is not tenable. *See* Br. at 8.

Row's preferred claim constructions, . . . the claims would not satisfy § 101's requirements," and "[o]n a more general level, the [c]ourt [did] not see how a decision on any of Front Row's constructions would affect its patents' subject-matter eligibility, because the distinctions between the parties' constructions are insignificant for § 101 purposes."[5] Appx85-86. The District Court further rejected Front Row's arguments that there remained unresolved factual disputes, stating that "the relevant findings either are defined in the patents themselves or are the type of findings that courts routinely make when deciding legal questions." Appx87.

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[5] Although Front Row has objected generally to the fact that the District Court addressed subject-matter eligibility prior to claim construction, *see, e.g.*, Br. at 1, 18, Front Row has not presented any arguments concerning any specific error or how claim construction would have changed the Section 101 analysis. Without that showing, this loose objection should be rejected. *See Genetic Techs. Ltd. v. Merial L.L.C.*, 818 F.3d 1369, 1374 (Fed. Cir. 2016) ("'[C]laim construction is not an inviolable prerequisite to a validity determination under § 101.' Here, there is no claim construction dispute relevant to the eligibility issue." (quoting *Bancorp Servs., L.L.C. v. Sun Life Assurance Co. of Can. (U.S.)*, 687 F.3d 1266, 1273 (Fed. Cir. 2012))); *Cyberfone Sys., LLC v. CNN Interactive Grp., Inc.*, 558 F. App'x 988, 991 n.1 (Fed. Cir. 2014) ("Cyberfone argues that claim construction must precede the § 101 analysis, but does not explain which terms require construction or how the analysis would change. . . . There is no requirement that the district court engage in claim construction before deciding § 101 eligibility.").

The District Court reviewed the asserted claims to select three representative claims: claim 15 of the '856 Patent as representative of the Video Patents' method claims, claim 1 of the '895 Patent as representative of the Video Patents' system claims, and claim 1 of the '027 Patent as representative of the claims of that patent. Appx93-116. Indeed, that the court meticulously considered each claim is evidenced by the fact that the court rejected one of Defendants' proposed representative claims in favor of another and created detailed tables comparing each asserted independent claim.[6] *See* Appx98 (selecting the "superficially complex" claim 15 of the '856 Patent over claim 1 of the '184 Patent), Appx101-114 (comparing each independent claim). The District Court further considered and rejected Front Row's arguments concerning the dependent claims, holding that they were fairly represented by the three representative claims because they "introduce only slight variations" and "none of them are materially distinct from the representative independent claims." Appx115-116.

[6] Contrary to Front Row's statement that the District Court failed to analyze claim 20 of the '184 Patent, Br. at 12, that claim appears at the end of the District Court's table spanning Appx111-112.

Finally, applying the two-step test set forth by the Supreme Court in *Alice Corp. v. CLS Bank International*, 134 S. Ct. 2347 (2014), the District Court held that the Video Patents—represented by claim 15 of the '856 Patent and claim 1 of the '895 Patent—are directed to the abstract idea of "sending video of an event to handheld devices over wireless networks." Appx116. The court also concluded that the Video Patents do not contain an inventive concept because they "add[] only generic and conventional elements to the abstract idea," and furthermore that the claims add nothing when considered "as an ordered combination." Appx126, Appx128; *see also* Appx133-135.

As for the '027 Patent, the District Court held that those claims are directed to the abstract idea of "authorizing handheld devices to receive streaming video based on a user's location," Appx116, and that the claims have no inventive concept because they "recite[] generic features" and "fail[] to explain how the elements will accomplish their intended result," Appx136-137. The court therefore granted Defendants' motion for judgment on the pleadings.

III. SUMMARY OF ARGUMENT

The District Court properly granted judgment on the pleadings after holding that the five patents asserted by Front Row are invalid for claiming patent ineligible subject matter under 35 U.S.C. § 101. This Court's recent decisions in *Affinity Labs of Texas, LLC v. DIRECTV, LLC*, 838 F.3d 1253 (Fed. Cir. 2016); *Affinity Labs of Texas, LLC v. Amazon.com Inc.*, 838 F.3d 1266 (Fed. Cir. 2016); and *Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363 (Fed. Cir. 2015), involve remarkably similar claims and concepts to the patents at issue here, and provide relevant guidance for affirmance of the District Court's judgment. The *Affinity Labs* decisions—which Front Row all but ignores in its brief—both affirmed the Section 101 invalidity of claims involving the delivery of streaming media to cellular phones. And *Intellectual Ventures* held claims similar to the '027 Patent invalid as directed to customizing information based on location.

The District Court correctly held that the Video Patents—the '856, '895, '184, and '460 Patents—are invalid under Section 101 because they are directed to the abstract idea of sending video of an event to handheld devices over wireless networks. The claims do nothing more

than extend the longstanding commercial practice of capturing video in one location and transmitting it wirelessly for display on a device at another location. The claims consist of high-level, functional, result-focused steps and elements—such as processing video data, authorizing a user, transmitting the video data, and displaying the video data—that do no more than recite the conceptual elements of the abstract idea. The claims of the Video Patents thus are not directed to an improvement to computer technology, but rather to the abstract idea itself.

Front Row's argument concerning this first step of the *Alice* test lacks merit because Front Row, without citing any authority, adopts a dictionary definition as its standard for abstractness. The resulting argument that including "specific" elements—such as, for example, video formats, transmission types, and limits to the handheld devices—is sufficient to salvage the claims from abstractness is irreconcilable with established Section 101 jurisprudence. In particular, Front Row overlooks the rule that narrowing claims to a particular technological environment does not render the claims patentable. *Bilski v. Kappos*, 561 U.S. 593, 610 (2010). Front Row also ignores the step 1 test of

looking to the character of the claim as a whole, while saving specific narrowing elements for step 2 of the *Alice* test. *See BASCOM Global Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1349 (Fed. Cir. 2016).

Turning to the second step of the *Alice* test, the District Court correctly held that the claims of the Video Patents do not contain any inventive concept sufficient to make the abstract claims patentable. The claims rely on technology, such as handheld devices and networks, which the patents' specifications admit was all well-known at the time of the claimed invention. The claims also rely on result-focused, functional claim language, with no description of how any of the functions are to be performed. Furthermore, the ordered combination of claim elements does not provide an inventive concept because the combination adds nothing that was not already present with the individual elements.

Front Row's arguments as to step 2 are similarly without merit. First, Front Row complains about general historical observations by the District Court, but courts frequently make such observations and Front Row does not even allege that the observations are wrong. Second,

Front Row asserts that the patents are not broadly preemptive because they are limited to "venue attendees." But this narrowing element does not actually exist in the claims. Regardless, it is well-established law that preempting less than an entire field does not make an abstract claim patentable. *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015) ("[T]he absence of complete preemption does not demonstrate patent eligibility.").

With respect to the '027 Patent, the District Court correctly held that this patent claims the abstract idea of authorizing handheld devices to receive streaming video based on a user's location. The two steps of the representative claim involve simply determining a user's location and then authorizing or denying access to streaming video based on the location. The '027 Patent relies on the same generic, known computer technology and conventional functionality—without any description as to how the functions are performed.

Front Row argues, incorrectly, that the '027 Patent is patent eligible because the location-determination functionality is equivalent to the GPS receiver that allowed claims to survive in *SiRF Technology, Inc. v. International Trade Commission*, 601 F.3d 1319, 1333 (Fed. Cir.

2010). But in *SiRF*, the GPS receiver was a specific device, while the '027 Patent engages in pure functional, result-focused claiming, which Section 101 jurisprudence rejects.

Finally, this Court should reject Front Row's remaining arguments on appeal concerning the District Court's handling of the case. Namely, Front Row's argument that the Federal Circuit should adopt a series of questions prepared by a single district court judge as a new and exclusive five-factor test under Section 101 is incorrect and would supplant this Court's well-established jurisprudence. Furthermore, Front Row fails to identify a single claim that it believes is not fairly and adequately represented in the District Court's ruling. The District Court's Section 101 analysis was conducted with appropriate representative claims, and its grant of judgment on the pleadings, therefore, should be affirmed.

IV. ARGUMENT

In reviewing a grant of judgment on the pleadings under Federal Rule of Civil Procedure 12(c), this Court follows the procedural law of the regional circuit. *Imation Corp. v. Koninklijke Philips Elecs. N.V.*, 586 F.3d 980, 984 (Fed. Cir. 2009). In the Tenth Circuit, a grant of judgment on the pleadings is reviewed *de novo*. *BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co.*, 830 F.3d 1195, 1200 (10th Cir. 2016). "Patent eligibility under 35 U.S.C. § 101 is an issue of law reviewed de novo." *OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1362 (Fed. Cir. 2015).

A claim of infringement based on a patent drawn to ineligible subject matter under Section 101 may be properly dismissed on the pleadings, as this Court has repeatedly affirmed. *See Affinity/Amazon*, 838 F.3d at 1268, 1272; *Affinity/DIRECTV*, 838 F.3d at 1256, 1265; *Shortridge v. Found. Constr. Payroll Serv., LLC*, 655 F. App'x 848, 851, 854 (Fed. Cir. 2016); *TLI*, 823 F.3d at 609-10; *OIP*, 788 F.3d at 1360-62 (Fed. Cir. 2015); *Content Extraction & Transmission LLC v. Wells Fargo Bank, N.A.*, 776 F.3d 1343, 1345 (Fed. Cir. 2014); *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 711-12 (Fed. Cir. 2014); *buySAFE, Inc. v.*

Google, Inc., 765 F.3d 1350, 1351-52 (Fed. Cir. 2014). Front Row's suggestion—based on the earlier, vacated *Ultramercial* decision—that such dismissals are "rare," *see* Br. at 14-15, does not reflect the current state of the law.

The Supreme Court has defined a two-part test to determine whether a patent is invalid under 35 U.S.C. § 101 for claiming ineligible subject matter. First, a court must "determine whether the claims at issue are directed to a patent-ineligible concept," such as an abstract idea. *Alice*, 134 S. Ct. at 2355. To determine whether a patent claims an abstract idea, courts "start by ascertaining the basic character of the subject matter." *Internet Patents*, 790 F.3d at 1348. This "first-stage inquiry . . . look[s] at the 'focus' of the claims, their 'character as a whole.'" *Elec. Power Grp. v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016). This inquiry also seeks to "determine whether the claims 'focus on a specific means or method that improves the relevant technology' or are 'directed to a result or effect that itself is the abstract idea and merely invoke generic processes and machinery.'" *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1241 (Fed. Cir. 2016) (quoting *McRO,*

Inc. v. Bandi Namco Games Am., Inc., 837 F.3d 1299, 1314 (Fed. Cir. 2016)).

Second, if the claims are directed to an abstract idea, a court must then determine whether the claims contain "an 'inventive concept' sufficient to 'transform' the claimed abstract idea into a patent-eligible application." *Alice*, 134 S. Ct. at 2357 (quoting *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1294, 1298 (2012)). It is insufficient simply to "[s]tat[e] an abstract idea while adding the words 'apply it with a computer.'" *Id.* at 2358. Similarly, this "inventive concept" must be more than "simply instruct[ing] the practitioner to implement the abstract idea with routine, conventional activity." *Ultramercial*, 772 F.3d at 715. That is because "mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention." *Alice*, 134 S. Ct. at 2358. Thus, "[a]n inventive concept that transforms the abstract idea into a patent-eligible invention *must be significantly more than the abstract idea itself*, and cannot simply be an instruction to implement or apply the abstract idea on a computer." *BASCOM*, 827 F.3d at 1349 (emphasis added). High-level, result-oriented, "functional descriptions

devoid of technical explanation as to how to implement the invention" are insufficient. *TLI*, 823 F.3d at 615; *see Affinity/DIRECTV*, 838 F.3d at 1265; *Elec. Power Grp.*, 830 F.3d at 1356.

A. The District Court Correctly Held that the Video Patents Claim Ineligible Subject Matter.

1. The Video Patents Are Directed to the Abstract Idea of Sending Video of an Event to Handheld Devices over Wireless Networks.

The claims of the Video Patents fail the first step of the *Alice* analysis because they are directed to an abstract idea. The claims of the Video Patents, taken as a whole, are focused on sending video of an event to handheld devices over wireless networks. This is a longstanding business practice that is virtually identical to the abstract idea this Court held to be patent ineligible in the *Affinity Labs* cases. *See Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1334 (Fed. Cir. 2016) ("[B]oth this court and the Supreme Court have found it sufficient to compare claims at issue to those claims already found to be directed to an abstract idea in previous cases.").

Moreover, the claims as a whole are not directed to any "improvements to computer-related technology" that could satisfy step one of the *Alice* test. *Id.* at 1335. Front Row concedes as much in its

brief when it distinguishes this Court's *Enfish* opinion: "[Our] patents are not software or computer-operation patents." Br. at 29. As the District Court found, and as the claims and specification confirm, "Front Row did not invent streaming video, digital video, a new wireless protocol, or even an improvement to any component." Appx119.

On appeal, Front Row wholly disregards the proper analysis under step one of the *Alice* inquiry. Front Row makes no effort to ascertain the character as a whole of its claims to determine whether they are "directed to" an abstract idea, as required by *Alice* and this Court's precedent. Instead, Front Row relies on a dictionary definition of "abstract" to argue that its claims contain limitations that are too "specific" and "tangible" to be abstract. Br. at 21-28. Front Row's arguments are contrary to governing law on Section 101 and should be rejected.

a. Sending Video to Wireless Handheld Devices Is an Abstract Idea.

The claims of the Video Patents, taken as a whole, are directed to an abstract idea: sending video to handheld devices over wireless networks. The claims recite some or all of the five basic steps of (1) acquiring/capturing/storing video, (2) authorizing a device, (3)

processing the video data, (4) transmitting the video data, and (5) displaying the video data. *See* Appx101-112 (District Court's tables comparing each independent claim); *see also, e.g.*, *Content Extraction*, 776 F.3d at 1347 (reducing claim elements to their fundamental abstract ideas). These basic steps are functional processes that simply state what it means to send video from one location to another (*i.e.*, capturing, processing, transmitting the video) so a handheld device that is authorized to access it can display it. Thus, the claims as a whole do not simply involve an abstract idea, they are squarely directed to one. The abstract character of the claims is confirmed by the longstanding practice of this basic idea, admissions from the specification, and this Court's recent precedent from the two *Affinity Labs* cases.

Since the dawn of television, broadcasters have captured video data in one location and transmitted it wirelessly for display in another location. The District Court agreed, concluding as an initial matter "that broadcasters have captured and transmitted video 'for some time,' and that the concepts were 'well-known' at the time of Front Row's claimed invention." Appx92. It then also concluded that it "is similarly not open to reasonable dispute" "[t]hat the television industry has

recorded video and transmitted it in 'a format that can be received by different devices, including portable televisions.'" *Id.* The television industry has thus employed these basic concepts of video transmission "for some time" and these concepts were "undisputedly well-known" at the time of Front Row's claimed invention. *See Content Extraction*, 776 F.3d at 1347.

Indeed, the specification admits that abstract idea was well known and the fundamental practice of capturing video at a venue for display to viewers is "typically employed" at most venues. *See, e.g.*, Appx781 at 1:61-67. The patents further acknowledge that "hand held television[s] [were] available for receiving public television broadcasts" at the time of the claimed invention. *See, e.g.*, Appx784 at 7:22-23.

Based on similar historical observations, this Court recently found analogous claims drawn to the same abstract idea as the claims of the Video Patents. In *Affinity/DIRECTV*, the claims were "directed to a broadcast system in which a cellular telephone located outside the range of a regional broadcaster (1) requests and receives network-based content from the broadcaster via a streaming signal, (2) is configured to wirelessly download an application for performing those functions, and

(3) contains a display that allows the user to select particular content."[7] 838 F.3d at 1256.

This Court explained that "[w]hile independent claim 1 refers to general components such as a cellular telephone, a graphical user

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[7] The representative claim considered by the Court in *Affinity/DIRECTV* recited:

> 1. A broadcast system, comprising:
>
> a network based resource maintaining information associated with a network available representation of a regional broadcasting channel that can be selected by a user of a wireless cellular telephone device; and
>
> a non-transitory storage medium including an application configured for execution by the wireless cellular telephone device that when executed, enables the wireless cellular telephone device:
>
> to present a graphical user interface comprising at least a partial listing of available media sources on a display associated with the wireless cellular telephone device, wherein the listing includes a selectable item that enables user selection of the regional broadcasting channel;
>
> to transmit a request for the regional broadcasting channel from the wireless cellular telephone device; and
>
> to receive a streaming media signal in the wireless cellular telephone device corresponding to the regional broadcasting channel, wherein the wireless cellular telephone device is outside of a broadcast region of the regional broadcasting channel, wherein the wireless cellular telephone device is configured to receive the application via an over the air download.

838 F.3d at 1255-56.

interface, and a downloadable application, the claimed invention is entirely functional in nature. . . . There is nothing in claim 1 that is directed to *how* to implement out-of-region broadcasting on a cellular telephone." *Id.* at 1258. The Court examined the specification, but found that beyond several general references to Internet radio, the patent "contains no further discussion of how the invention implements the delivery of ordinary broadcast radio signals to cellphones." *Id.* at 1260. Thus, the Court determined that "the claim is drawn to the idea itself" of "providing out-of-region access to regional broadcast content," and the concept was abstract because "[t]he practice of conveying regional content to out-of-region recipients has been employed by nearly every form of media that has a local distribution." *Id.* at 1258 (providing examples such as mailing a local newspaper out-of-state or using satellite broadcasts).

The Court then found similarities between the Affinity claims and those from earlier Section 101 cases:

> Although the technology at issue in this case differs from that involved in *TLI* and *Ultramercial*, the analysis of the "abstract idea" step in those cases is instructive here. As in those cases, *the patent in this case involves the conveyance and manipulation of information using wireless communication and computer technology*. While the

> inventions in those cases involved tangible components, *the components were conventional and were used in conventional ways. The same is true in this case, as the claimed cellular telephone is used to receive wireless signals*, the claimed graphical user interface is used to display a menu of options to the user, and the claimed broadcasting system is used as the source of streaming content.

Id. at 1261 (emphases added).

Likewise, in the related *Affinity/Amazon* decision, this Court addressed another set of claims "directed to a network-based media system with a customized user interface, in which the system delivers streaming content from a network-based resource upon demand to a handheld wireless electronic device having a graphical user interface." 838 F.3d at 1268. Affinity contended that its patent "embodied a concrete technological innovation because, as of its priority date (March 28, 2000), wireless streaming of media was not 'routine, conventional, or well-known.'" *Id.* at 1269. The Court rejected this argument.

This Court held that the Affinity patent "does not disclose any particular mechanism for wirelessly streaming content to a handheld device. The specification describes the function of streaming content to a wireless device, but not a specific means for performing that function." *Id.* This Court found that

> [a]t that level of generality, the claims do no more than describe a desired function or outcome, without providing any limiting detail that confines the claim to a particular solution to an identified problem. The purely functional nature of the claim confirms that it is directed to an abstract idea, not to a concrete embodiment of that idea.

Id. The Court, accordingly, held that the claims were directed to the abstract "concept of delivering user-selected media content to portable devices," *id.*, and that this idea was abstract and long standing because "[i]t is not debatable . . . that the delivery of media content to electronic devices was well known long before the priority date of [Affinity's] patent," *id.* at 1270.

Here, Front Row's Video Patents similarly "involve[] the conveyance and manipulation of information using wireless communication and computer technology." *Affinity/DIRECTV*, 838 F.3d at 1261. The claims involve the same basic functionality and goal of delivering media to wireless handheld devices as the claims in *Affinity/DIRECTV* and *Affinity/Amazon*. Just as the claims directed to the "concept of delivering user-selected media content to portable devices" in *Affinity/Amazon* are abstract, 838 F.3d at 1269, the claims of the Video Patents directed to "sending video of an event to handheld devices over wireless networks" also are abstract.

On appeal, Front Row challenges the District Court's historical observations as either improper fact-finding or irrelevant to the *Alice* analysis. Br. at 46-48, 54. Neither of Front Row's criticisms has merit. This Court repeatedly has upheld general historical observations by district courts. *See buySAFE*, 765 F.3d at 1355 (concluding that a particular form of contractual relationship is "beyond question of ancient lineage"); *Content Extraction*, 776 F.3d at 1347 ("[B]anks have, for some time, reviewed checks, recognized relevant data such as the amount, account number, and identity of account holder, and stored that information in their records."). Further, as shown above, the District Court's historical observations about the longstanding practice of broadcasting sporting events and of wirelessly transmitting video to portable devices are substantially similar to observations this Court made in the *Affinity Labs* cases. *See, e.g.*, *Affinity/DIRECTV*, 838 F.3d at 1258. Front Row does not even allege that these observations are inaccurate, nor could it—as this Court has previously held, "[i]t is not debatable . . . that the delivery of media content to electronic devices

was well known long before the priority date of [Affinity's] patent." *Affinity/Amazon*, 838 F.3d at 1270.[8]

Front Row's comment that these observations are "irrelevant" also falls flat. The observations are directly relevant to helping establish that the claims are directed to a "longstanding commercial practice," and such practices are generally held to fall into the abstract category. *See DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257 (Fed. Cir. 2014); *see also Affinity/Amazon*, 838 F.3d at 1270. The District Court's historical observations are proper under the law, factually correct, and provide further support of the District Court's decision regarding the abstract nature of Front Row's claims.

b. The Video Patents Are Not Directed to an Improvement in Computer Functionality.

The basic character of the Video Patents is not directed to "improvements to computer-related technology," or to improving any other technology for that matter. Appx119 (quoting *Enfish*, 822 F.3d at 1335). Front Row even admits that its patents "are *not* software or computer-operation patents," conceding that its claims are

[8] Affinity's patent claimed priority to March 2000, preceding Front Row's earliest possible priority claim by several months.

distinguishable from the computer-improvement claims of *Enfish*. Br. at 29 (emphasis added). Front Row does not claim to have invented streaming video, digital video, a new authentication technique, a new wireless protocol, a new camera, a new type of handheld device, or even an improvement to any of these components. Nor can it, as Front Row admits that "the technology described in the Front Row patents existed [as of its purported priority date]." Br. at 33 n.31.

Front Row's specification makes clear that the patents rely solely on components of technology that already existed and employ them without reciting or describing any improvement to their functionality. *See, e.g.*, Appx784 at 7:33-37 (listing a variety of handheld devices "well known in the art"); Appx788 at 15:2-11 (reciting a "variety of wireless protocols, including cellular, Bluetooth, and RF or direct IR communications"). For example, the "server" used for processing and transmitting video data is "well known in the art" and is employed without modification or improvement. Appx786-787 at 12:67-13:3. Although Front Row's brief repeatedly touts the alleged benefits of digital technology, *see, e.g.*, Br. at 1, 13, 22, 23, 25, 26, 45, 48, 55, 58, Front Row admits that the patents merely *use* that existing technology,

Br. at 55. The specification also confirms that Front Row's intended solution was simply to use the conventional technology that already existed, not to improve its functions in any particular way. *See, e.g.*, Appx781 at 2:39-43 ("[S]uch problems in venue environments can be solved through the use of hand held devices, such as PDAs . . . ."); Appx782 at 3:57-58 ("The present inventors thus realize that a solution to these problems lies in the use of wireless hand held devices.").

Just as in *Affinity/DIRECTV*, the Video Patents are not directed to the solution of a technological problem or an improvement in computer or network functionality. *See* 838 F.3d at 1262. Instead, the claims are directed to the idea itself of sending video to wireless handheld devices "through the use of conventional devices, without offering any technological means of effecting that concept." *Id.* "In this case, the claims are directed not to an improvement in cellular telephones but simply to the use of cellular telephones as tools in the aid of a process focused on an abstract idea." *Id.*

As such, "the recited physical components merely provide a generic environment in which to carry out the abstract idea" of sending video to wireless handheld devices. *TLI*, 823 F.3d at 611. In sum, the

claims here are "not directed to an improvement in computer functionality, but [are] directed to 'the use of conventional or generic technology in a nascent but well-known environment.'" *Amazon/DIRECTV*, 838 F.3d at 1260-61 (quoting *TLI*, 823 F.3d at 612). The claims thus are "directed to a result or effect that itself is the abstract idea." *McRO*, 837 F.3d at 1314.

c. Front Row Defies Governing Law on Section 101

In its brief, Front Row never attempts to analyze the claims of the Video Patents as a whole, as required by step one of the *Alice* test. Front Row fails to articulate an alternative to the formulation of the abstract idea identified by District Court—sending video of an event to a handheld device using wireless networks—and that formulation, therefore, is unchallenged on appeal. Instead, Front Row asserts that its claims are not directed to an abstract idea because they have "tangible" elements used in a "specific" field or with "specific" types of data. These arguments are directly contrary to Supreme Court precedent governing 35 U.S.C. § 101 and should be rejected.

First, Front Row argues that its patents are not drawn to an abstract idea because they recite "tangible" elements such as a "hand

held device." Br. at 30-33. The Supreme Court directly rejected this idea in *Alice* because "[s]uch a result would make the determination of patent eligibility depend simply on the draftsman's art," 134 S. Ct. at 2359 (quotation marks omitted), whereby a clever patentee could simply append any physical device to an abstract idea and avoid ineligibility. The fact that claim elements such as a "hand held device" or a "server" or a "camera" are "tangible" is irrelevant to the Section 101 analysis.

Second, Front Row, relying solely on a dictionary definition of "abstract," argues in the same vein that its patents cannot be directed to an abstract idea because they contain "specific" elements. Br. at 21-22. Front Row's reliance on a dictionary is misplaced and contrary to governing precedent on step 1 of the *Alice* test because this Court has repeatedly found claims to be directed to an abstract idea despite containing "specific" elements. *See, e.g., Affinity/DIRECTV*, 838 F.3d at 1262 (claiming "specific" elements such as a cellular phone); *Intellectual Ventures*, 792 F.3d at 1370 (claiming a display and interactive interface); *Content Extraction*, 776 F.3d at 1348 (claiming a scanner and computer). Furthermore, under step 1 of the *Alice* test, courts generally do not address the types of limitations that Front Row

raises, instead "defer[ring] . . . consideration of the specific claim limitations' narrowing effect for step two." *See BASCOM*, 827 F.3d at 1349. Under step 1, courts "start by ascertaining the basic character of the subject matter." *Internet Patents*, 790 F.3d at 1348. This "first-stage inquiry . . . look[s] at the 'focus' of the claims, their 'character as a whole.'" *Elec. Power Grp.*, 830 F.3d at 1353. No matter how many times Front Row repeats the word "specific," the focus of its claims as a whole remains the same: sending video of an event to a handheld device over wireless networks. This focus "is not directed to the solution of a 'technological problem,' nor is it directed to an improvement in computer or network functionality." *Affinity/DIRECTV*, 838 F.3d 1262 (citations omitted).

Finally, the type of limiting Front Row suggests amounts to an impermissible "attempt[] to limit the use of the [abstract idea] to a particular technological environment.'" *Bilski,* 561 U.S. at 610 (quoting *Diamond v. Diehr*, 450 U.S. 175, 191 (1981)). Front Row incorrectly argues that, so long as its claims refer to a particular type of event or media format or type of receiver, they are not drawn to an abstract idea. Br. at 22.

This Court's recent decision in *Electric Power Group, LLC v. Alstom S.A.*, demonstrates how a claim may include any number of "specific" claim elements, but nevertheless be directed to an abstract idea. 830 F.3d 1350 (Fed. Cir. 2016). The claims there referred to a particular environment (electric power grids), particular types of power system data sources (power plant locations, etc.), particular types of measurements (voltages, power flows, etc.), and particular types of analysis (limits, rates of change, etc.). *Id.* at 1351-52. This Court nevertheless determined that the claims were directed to the abstract idea of "collecting information, analyzing it, and displaying certain results of the collection and analysis." *Id.* at 1353.

Similarly, Front Row's patents are not saved by the fact that the representative claims refer to a particular type of handheld device (such as a "smartphone"), a particular type of event (such as a live event in front of a live audience), a particular type of media (video data), or a particular type of network (wireless using the 802.11 standard). This type of superficial "specificity" does not alter the fundamental character

of the claims as a whole and cannot remove the representative claims from the realm of abstraction.[9]

2. The Video Patents Lack an Inventive Concept that Could Transform the Abstract Claims into Patentable Subject Matter.

The Video Patents are directed to the abstract idea of sending video to handheld devices over wireless networks. Accordingly, to satisfy 35 U.S.C. § 101, the Video Patents must contain "an 'inventive concept' sufficient to 'transform' the claimed abstract idea into a patent-eligible application." *Alice*, 134 S. Ct. at 2357 (quoting *Mayo*, 132 S. Ct. at 1294, 1298 (quotation marks omitted)). They do not contain any such concept, and thus fail step two of the *Alice* test.

First, the claims use "only generic and conventional elements" to implement the abstract idea. Appx126. Front Row itself admits that

[9] Rather than follow binding precedent on Section 101, Front Row seeks refuge in a single district court case that is currently on appeal to this Court, *ContentGuard Holdings, Inc. v. Amazon.com, Inc.*, 142 F. Supp. 3d 510 (E.D. Tex. 2015). The claims at issue in that non-binding decision are directed to substantially different subject matter than those here (digital rights management as opposed to sending video to a handheld device over wireless networks). The claims here are far more analogous to this Court's decisions in the two *Affinity Labs* cases and *Intellectual Ventures*. The Court need not delve into the merits of the *ContentGuard* decision to decide this case because its own precedent is far more applicable and fully disposes of the issues presented here.

all of the technology recited in the claims already existed. Br. at 33 n.31. Similarly, the specification confirms that all of the individual components and processes were "well known" in the art at the time of the claimed invention. *Second*, the "ordered combination" of the claim elements adds nothing that was not already present when considering the conventional elements individually. Using purely functional language, the claims state only what the combination of elements is, but fail to identify any non-generic or non-conventional way in which the elements are used. *Third*, the field of use limitations and token post-solution components recited in the claims are similarly insufficient to provide an inventive concept. Appx128. The Court should affirm the District Court's holding that the Video Patents fail to provide an inventive concept.[10]

a. Each Element of the Video Patents Is Admittedly Well-Known and Conventional.

The Video Patents rely on "well-understood, routine, and conventional activities commonly used in the industry," which are not

[10] The District Court also held that the claims do not pass the machine-or-transformation test. Appx129, Appx136. Front Row does not argue on appeal that any of the patents satisfy the machine-or-transformation test.

inventive. *Content Extraction*, 776 F.3d at 1348. "The Court in *Alice* made clear that a claim directed to an abstract idea does not move into section 101 eligibility territory by 'merely requir[ing] generic computer implementation.'" *buySAFE*, 765 F.3d at 1354 (quoting *Alice*, 134 S. Ct. at 2357). Like the "scanner" and "computer" in *Content Extraction*, 776 F.3d at 1348, the "display" and "interactive interface" in *Intellectual Ventures*, 792 F.3d at 1370, or the "cellular phone" in *Affinity/ DIRECTV*, 838 F.3d at 1262, each of Front Row's claimed components are generic terms for widely understood elements. The steps of the method claims likewise rely on generic computer functionality, such as processing and transmitting.

On appeal, Front Row admits that "the technology described in the Front Row patents existed when Front Row filed the parent patents from which most of the patents-in-suit derived." Br. at 33 n.31. Front Row does not identify any particular element that it claims embodies an inventive concept, and thus Front Row effectively concedes that the individual elements and functionality were conventional.

The Specifications Demonstrate that the Hardware and Processing Claimed Is Conventional. On appeal, Front Row argues that

Defendants-Appellees failed to provide evidence to support the conclusion that the patents' use of conventional, well-known technology was not inventive. Br. at 44-45. To the contrary, Defendants-Appellees supplied evidence in the form of the specification of the Front Row patents themselves. *See* Appx1075-1078; *see also, e.g.*, *TLI*, 823 F.3d at 609, 613-14 ("[H]ere we need to only look to the specification, which describes the telephone unit and server as either performing basic computer functions such as sending and receiving data, or performing functions 'known' in the art."); *Internet Patents*, 790 F.3d at 1348 (looking to specification for what was "well-known" and "common"). The specifications are evidence of the "state of the art" at the time the Video Patents were filed, including what was well-known. The shared specification of the Video Patents admits:

- The handheld device "can be implemented as a specific type of a hand held device, such as a Personal Digital Assistant (PDA), paging device, WAP-enabled mobile phone, and other associated hand held computing devices *well known in the art*." Appx784 at 7:32-37 (emphasis added); *see also* App781 at 2:62-65 (referring to

"data- and video-enabled wireless communication devices currently available in the marketplace").

- Stadiums and venues used "a plurality of television cameras positioned to capture video images at diverse locations." Appx781 at 1:61-67.
- "Access points for wireless LAN networks and associated wired and wireless hardware," including "servers," were "well known in the art." Appx786-787 at 12:67-13:3. Furthermore, a variety of existing "wireless transmission systems" or "data networks," such as wireless LAN networks, Bluetooth, and multiple types of cellular systems, are described in the specification as "well known in the networking arts." *See* Appx787 at 14:62 to Appx789 at 17:29.
- "Transmitters are well known in the art . . . ." Appx785 at 10:3-4.
- "[T]ouch screen displays" were similarly "well known in the art." Appx785 at 10:27-29.

Likewise, the generic computer functionality employed by the Video Patents—"transmitting," "capturing," "acquiring," "authenticating," "receiving," "processing," "accessing," "displaying"—

are not inventive because they are basic computing functions "specified at a high level of generality." *Alice*, 134 S. Ct. at 2357. This Court repeatedly has rejected the notion that such basic computer functions can qualify as "inventive concepts." *See, e.g.*, *Affinity/DIRECTV*, 838 F.3d at 1262, 1263 (identifying use of "routine functions, such as transmitting and receiving signals" and "functions generic to cellular telephones"); *Intellectual Ventures*, 792 F.3d at 1370-71 ("Steps that do nothing more than spell out what it means to 'apply it on a computer' cannot confer patent-eligibility."); *OIP*, 788 F.3d at 1363 (holding various computer functions, such as sending messages and storing data, to be well-understood, conventional activities).

Front Row's Effort to Claim Ends Sought Rather than Means to Achieve Those Ends Must Fail. In addressing the second step of the *Alice* test, this Court also has recognized that there is "an important common-sense distinction between ends sought and particular means of achieving them, between desired results (functions) and particular ways of achieving (performing) them." *Elec. Power Grp.*, 830 F.3d at 1356; *see Affinity/Amazon*, 838 F.3d at 1271 ("The features set forth in the claims are described and claimed generically rather than with the specificity

necessary to show how those components provide a concrete solution to the problem addressed by the patent."). To the extent the hardware components for the claimed methods and systems are described, they are only discussed in a high-level, functional manner in which the results, not the particular ways of achieving them, are described.

For example, claim 15 of the '856 Patent recites a step for "processing said plurality of video perspectives at a server into encrypted video data packet for display on a touch-sensitive display screen associated with said at least one authorized hand held device . . . ." Appx829 at 26:52-55. But nothing explains how the "processing" is performed on the video data to convert it into an "encrypted video data packet" or how the processing allows the video to be displayed on the handheld device. Similarly, there is no explanation for how to perform the step of "wirelessly transmitting." *Id.* at 26:62. The claims just state that these steps are to be done, not how they are done,[11] and thus fails the Section 101 test under this Court's precedent. *See, e.g.*, *Affinity/DIRECTV*, 838 F.3d at 1258 ("There is nothing in claim 1 that

[11] The specification is also of no help, as it is similarly generic and hollow. *See* Appx786 at 11:29-38 (describing in a broadly generic fashion the processing and transmitting steps).

is directed to *how* to implement out-of-region broadcasting on a cellular telephone. Rather, the claim is drawn to the idea itself.").

Similarly, Front Row appears to place much emphasis in its brief on the authentication elements, but nowhere do the claims state how the authentication occurs or describe how they are anything but generic functions. Reciting authentication "with a security code" or using "encrypted" data does not make the functions any less generic. "Security codes" appear only twice in the specification, first as part of a laundry list of ways to limit a broadcast, and second as a generic, conventional method of securing data. Appx784 at 7:25-26 (listing "proper authentication, filters, security codes, or the like" as examples of controlling broadcasts), 7:45-48 (stating that the handheld device can "process proper security codes to thereby ensure that data transferred to and from hand held device may be secure and/or permitted"). Encryption is described only once and in very brief, generic terms: "For example, [transmission] equipment can rely on the encryption of signals. These signals, if encrypted, can be decrypted by authorized hand held receivers." Appx820 at 8:63-67. As used in the Video Patents, authentication and encryption are claimed wholly as generic

goals, not as a specific means of achieving them. Thus, for each claim, the "sequence of steps d[oes] not 'do significantly more than simply describe [the] abstract method.'" *Affinity/DIRECTV*, 838 F.3d at 1263 (quoting *Ultramercial*, 772 F.3d at 715). That is insufficient to provide an inventive concept.

b. The Ordered Combination of Elements Does Not Provide an Inventive Concept.

Rather than identify any individual element, Front Row attempts to rely on the "ordered combination" of elements in the Video Patents in search of an inventive concept. Br. at 55-59. But the ordered combination of elements in the Video Patents lacks an inventive concept because "the computer components [of the Front Row claims] 'ad[d] nothing . . . that is not already present when the steps are considered separately.'" *Alice*, 134 S. Ct. at 2359 (quoting *Mayo*, 132 S. Ct. at 1298). The claims use well-known, generic computer and network functionality related to sending data—such as processing data, authenticating a user, transmitting data, and so on—in order to provide the same type of result in connection with sending video to wireless handheld devices.

The Video Patents place the claim elements in the same conventional order as was longstanding practice in the television industry. Claim 15 of the '856 Patent, for example, puts its individual generic functions in the conventional order for video transmission: (1) capturing, (2) processing, (3) transmitting, and (4) displaying. Likewise, requiring that the receiving device be "authorized" before it can receive or display data is the conventional, if not axiomatic, means of securing data. Instead of claiming a "non-conventional and non-generic arrangement of known, conventional pieces," *BASCOM*, 827 F.3d at 1350, the Video Patents claim conventional elements in their conventional and generic order.

Nor can Front Row claim that the "combination" of admittedly conventional elements provides something more than the elements considered separately. The Video Patents combine a server with a handheld device, with each component doing exactly what is generic and conventional in that combination: the server processes and transmits, while the handheld device receives and displays. The specification itself admits that handheld devices are already designed to request, receive, process, and display data, including video data,

received wirelessly from other sources. Appx781 at 2:39-50, 2:62-3:2.[12] Servers and wireless networks are similarly "well known" for transmitting data wirelessly to devices. Appx786 at 12:67-13:3. By the patents' own admission, the "ordered combination" of servers and hand held devices for the wireless transmission and display of data is not an inventive concept.

Citing its combination of elements, Front Row argues that its claims are inventive because "[c]oncepts for streaming live event videos barely existed in 2000." Br. at 49. This very argument was rejected by the Federal Circuit in *Affinity/Amazon*. There, "Affinity contend[ed] that [its] patent embodied a concrete technological innovation because, as of its priority date (March 28, 2000), wireless streaming of media was

[12] In attempting to identify an inventive concept, Front Row asserts that "handheld devices had not received and displayed video as of 2000." Br. at 58. This is directly contrary to the facts of record, as stated in the specification. *E.g.* Appx817 at 2:28:30 ("The most advanced data- and video-enabled wireless communication devices currently available in the marketplace take the form of a PDA."); *id.* at 2:4-18 (referring to "data/video-enabled cellular telephones[] and other hand held wireless video-enabled devices" that were in "increasingly widespread use").

not 'routine, conventional, or well-known.'"[13] *Affinity/Amazon*, 838 F.3d at 1269. The Court rejected that argument, stating that "[t]he patent . . . does not disclose any particular mechanism for wirelessly streaming content to a handheld device. The specification describes the function of streaming content to a wireless device, but not a specific means for performing that function." *Id.*

Just as in *Affinity/Amazon*, the Video Patents here fail to disclose the mechanism or means for sending video to wireless handheld devices. Front Row repeatedly argues that its inventive concept lies in the combination of streaming user-selected content to handheld devices and basic security features. Br. at 55-57. But this Court held that a very similar combination in *Affinity/Amazon*—"streaming user-selected content to a portable device" and "basic user customization features"—lacked an inventive concept because it failed to recite "the specificity necessary to show how those components provide a concrete solution to the problem addressed by the patent." 838 F.3d at 1271-72. The Video Patents are equally generic and recite purely functional language that

[13] The claimed priority date for the Front Row patents—October 26, 2000—is even later than the March 28, 2000 date in the *Affinity Labs* cases. *See, e.g.*, Appx759 (claiming priority to provisional application).

fails to provide "a specific, discrete implementation of the abstract idea." *BASCOM*, 827 F.3d at 1350. For example, nothing in the claims or specification provides a concrete way to employ an "authorized handheld device" (recited in claim 15 of the '856 Patent), just as "neither the claim nor the specification reveals any concrete way of employing" the "customized user interface" that was claimed in *Affinity/Amazon*. 838 F.3d at 1271-72.

Front Row also touts the "ordered combination" of elements regarding the processing, transmission, and display of "encrypted video data packets" as an inventive concept. Br. at 59. But this cannot be the "essence of the invention" that supplies the inventive concept because nowhere in the claims or the specification is there any discussion as to how these steps are to be done.[14] *See Internet Patents*, 790 F.3d at 1348. In arguing that there is a "unique combination of limitations," Br. at 41, Front Row simply repeats the individual elements while failing to describe how anything about their combination or their order is

[14] Similarly, Front Row repeatedly mischaracterizes its claims as drawn to specific functions regarding "compress[ing] information." *See, e.g.*, Br. at 55. Nowhere in the claims or the specification of the Video Patents does the word "compression" or any variant thereof appear.

inventive. The ordered combination of elements in the Video Patents adds nothing more than is present when viewing each generic and conventional element individually.

c. Field of Use Limitations and Token Post-Solution Activity Do Not Provide an Inventive Concept.

Front Row argues on appeal that the patents should be patentable because they do not raise preemption concerns. Br. at 60-62. The District Court referred to Front Row's so-called "specific" elements as "'token' components," and correctly held that the Video Patents "preempt a significant set of possible inventions." Appx131. In any event, this Court previously has held that "[w]here a patent's claims are deemed only to disclose patent ineligible subject matter under the *Mayo* framework . . . preemption concerns are fully addressed and made moot." *Ariosa*, 788 F.3d at 1379.

Front Row first argues that "venue attendee" limits the scope of the claims to avoid broad preemption. Br. at 61. Neither of the representative claims, however, is limited to "venue attendees." *See, e.g.*, Appx793 at 25:64-26:2 ("at locations within *or remote* from said at least one venue" (emphasis added)); Appx829-830 (lacking any clear location limitation in claim 15 of the '856 Patent).

Even if the claims could be so construed, restricting the invention to people inside a venue does not make the claims any less abstract. *Bilski*, 561 U.S. at 612 ("[L]imiting an abstract idea to one field of use . . . d[oes] not make the concept patentable."). Reducing the preemptive scope of the representative claims to "venue attendees" would not matter here because "the absence of complete preemption does not demonstrate patent eligibility." *Ariosa*, 788 F.3d at 1379.

Front Row also argues that the District Court ignored various narrowing elements such as the authentication elements, the use of particular wireless protocols, touchscreens, smartphones, and tablets. Br. at 61. These elements once again merely serve to limit the abstract idea to a "particular technological environment." *Bilski*, 561 U.S. at 610. They do not change the fact that the claims are directed to an abstract idea and do not contain any inventive concept. Even within an environment narrowed by Front Row's asserted elements, the claims would still be abstract.

B. The District Court Correctly Held that the '027 Patent Also Claims Ineligible Subject Matter.

The '027 Patent is directed to a different abstract idea: authorizing handheld devices to receive streaming video based on a

user's location. Appx116. The District Court properly analogized the claims of the '027 Patent to the information tailoring at issue in *Intellectual Ventures*, concluding that the '027 Patent uses the same basic concept of "restricting content based on a user's location." Appx125; 792 F.3d at 1369. The court then held that the '027 Patent does not contain an inventive concept because the claims "barely recite any limitations beyond the abstract concept." Appx136. The District Court determined that the claims recite only generic features, that the claims "fail[] to explain how the elements will accomplish their intended result," and that the claims do not satisfy the machine or transformation test. Appx136-138.

On appeal, Front Row incorrectly argues that the '027 Patent's location-determination element is equivalent to the GPS receiver element held patentable in *SiRF Technology, Inc. v. International Trade Commission*, 601 F.3d 1319, 1333 (Fed. Cir. 2010). Br. at 62-64. The functionally claimed location determination is not limited to a GPS receiver, but rather encompasses all means for achieving that result, such that it claims the abstract idea, rather than a specific means for applying it.

1. The '027 Patent Is Directed to the Abstract Idea of Authorizing Handheld Devices to Receive Streaming Video Based on a User's Location.

Representative claim 1 of the '027 Patent is reproduced in the Statement of the Case above and contains just two steps: (1) determining user location and (2) allowing access to data based on that location. The claim's preamble recites the "basic character" of the claim: "authorizing access by a user of at least one service associated with an event at a venue based on a location of said user." *See* Appx3693 at 26:8-10.

In *Intellectual Ventures*, this Court rejected another patent that similarly used location to determine content presented to a user. 792 F.3d at 1369. There, one aspect of the patent was directed to displaying Internet content "as a function of the user's personal characteristics." *Id.* The patent owner admitted that "tailoring content based on the viewer's location or address would satisfy" this limitation. *Id.* The Federal Circuit held that "[t]his sort of information tailoring is 'a fundamental . . . practice long prevalent in our system.'" *Id.* (quoting *Alice*, 134 S. Ct. at 2356). The Court analogized this to tailoring newspaper inserts or advertisements "based on the customer's location"

and held that "[p]roviding this minimal tailoring . . . is an abstract idea." *Id.*

Likewise, allowing access to data, or not, based on location—as claimed in the '027 Patent—is an abstract idea that has long been practiced by businesses. Applying this Court's newspaper analogy from *Intellectual Ventures*, local newspapers are typically available only within a limited delivery area, and whether a person can receive the newspaper or not is based on the person's location. Blackouts of sports television broadcasts have long made home games unavailable on local television in order to encourage fans to attend the games in person.[15] These practices apply the same abstract idea of allowing access based on location claimed by the '027 Patent, which simply extends the idea to streaming video to a wireless handheld device.

2. The '027 Patent Does Not Contain an Inventive Concept.

The '027 Patent relies on the same generic computer hardware and software, and "well-understood, routine, conventional activity" employed with the Video Patents discussed above. *Mayo*, 132 S. Ct. at

[15] As discussed above in Section IV.A.1.a, this and other courts frequently make such historical observations.

1298. Claim 1 of the '027 Patent uses the same generic elements: a "wireless handheld device," a "data communications network," a "server," and a "video camera." *See* Section IV.A.2.a *supra*. Furthermore, the functional, result-focused claim language recites basic computing functions "specified at a high level of generality." *Alice*, 134 S. Ct. at 2357.

As the District Court noted, the '027 Patent "fails to explain how the elements will accomplish their intended result." Appx137; *see TLI*, 823 F.3d at 615 ("[T]he specification limits its discussion of these components to abstract functional descriptions devoid of technical explanation as to how to implement the invention."). For example, the claim states that location of the user is "based on communications" between the "wireless handheld device" and a "data communications network." Appx3693 at 26:16-21. The patent is silent concerning any specifics for how that is done. Thus, the "sequence of steps d[oes] not 'do significantly more than simply describe [the] abstract method.'" *Affinity/DIRECTV*, 838 F.3d at 1263 (quoting *Ultramercial*, 772 F.3d at 715).

Front Row incorrectly argues, as it did to no avail at the District Court, *see* Appx138, that this Court's decision in *SiRF* somehow salvages the '027 Patent because the location-determination of the '027 Patent is "functionally equivalent" to the GPS receiver in the *SiRF* patent. Br. at 62-64. In *SiRF*, the Federal Circuit held that claims reciting "a GPS receiver" and "a satellite signal receiver" were patent eligible because "they *explicitly* require the use of a particular machine (a GPS receiver) and *could not be performed without the use of such a receiver*." 601 F.3d at 1331, 1333 (emphases added). The claims of the '027 Patent, on the other hand, fail to recite a GPS receiver or any other "particular machine or apparatus." *See id.* at 1332. Front Row does not assert that the '027 Patent requires a GPS receiver. Instead, Front Row argues that the '027 Patent's claimed location-determination is "functionally equivalent" to a GPS receiver. Br. at 63.

In fact, they cannot be equivalent in any way because the '027 Patent's claims cover potentially every way of determining location, with or without a GPS receiver. Furthermore, claiming a functional result as the claims do here is exactly what the law seeks to avoid. Claims that "focus on a specific means or method" are patent eligible,

while those "directed to a result or effect that itself is the abstract idea," as is the case here, are invalid. *See McRO*, 837 F.3d at 1314.

C. The Additional Arguments to Which Front Row Resorts on Appeal Must Be Rejected.

1. The Court Should Reject Front Row's Invitation to Replace Governing Law on Inventive Concept with a Novel Five-Factor Test.

Rather than apply the governing law on *Alice* step 2, Front Row asks this Court to replace that precedent with what Front Row calls a "five factor" test. Br. at 34-37. Front Row created its test based on a series of questions posed by a judge of the Southern District of New York in *Iron Gate Security, Inc. v. Lowe's Companies, Inc.*, No. 15-cv-8814 (KBF), 2016 WL 4146140 (S.D.N.Y. Aug. 3, 2016). Front Row misreads *Iron Gate* and offers no reason to discard governing law on Section 101.

In *Iron Gate*, the district court identified a series of "non-exhaustive questions" that it considered "relevant to the step two analysis": "(1) Is there an improvement recited? (2) Is there a benefit recited? (3) Is something new recited? (4) Does the patent have one or more particular applications? (5) What are the steps and limits to be followed in applying the invention?" *Iron Gate*, 2016 WL 4146140, at

*10. But the *Iron Gate* court never proposed, as Front Row now does, to transform these questions into a "five factor" test that would supplant this Court's guidance on whether a patent recites an inventive concept. Br. at 34-38.

Front Row's attempt to elevate these questions into an exclusive "five factor" test contravenes *Alice* and this Court's precedent. Br. at 37. For example, existing precedent has made clear that the directive "apply it with a computer" does not provide an inventive concept. *See, e.g.*, *Alice*, 134 S. Ct. at 2358. Yet this simple directive on its own could satisfy at least two of Front Row's "factors" because using a computer to implement an abstract idea could provide an "improvement" or "benefit" over not using a computer in terms of speed and accuracy—a result explicitly rejected by this Court. *OIP*, 788 F.3d at 1363 (explaining there can be no inventive concept from "relying on a computer to perform routine tasks more quickly or more accurately"). Front Row's casual suggestion that this Court should contravene *Alice* and its own well-established precedent in favor of a new five-factor test inconsistent with that precedent should be rejected.

2. The District Court Properly Relied on Representative Claims that Are Substantially Similar and Directed to the Same Abstract Idea as the Other Patents.

Front Row appears to object to the District Court's use of representative claims as part of the court's analysis and ultimate invalidation of the five patents-in-suit. Br. at 3, 9-13. That objection is groundless. The District Court conducted a thorough analysis of the claims in the five patents at issue in order to select these three representative claims. The court's discussion on whether it had the authority and could select representative claims, and then its analysis of the claims themselves, spanned more than 23 pages. Appx93-116. A further sign of the care with which the District Court considered the claims is its rejection of a representative claim proposed by Defendants (claim 1 of the '184 Patent), in favor of a representative claim selected by the court (claim 15 of the '856 Patent). *See* Appx98-99 (noting that claim 15 of the '856 Patent had an additional step and was "superficially complex . . . to ensure that the Court does not overlook any important elements").

Front Row wrongly suggests that the District Court failed to find that the representative claims were representative of all asserted

independent claims. In particular, Front Row seizes on the word "most" in two subheadings of the District Court's decision to suggest that the court somehow left claims out of its analysis. Br. at 9. Front Row misreads the District Court's opinion. The District Court clearly included all of the independent claims in the tables that illustrate its analysis of representative claims. *See* Appx101-114. The District Court simply used the word "most" to indicate that claim 15 of the '856 Patent and claim 1 of the '895 Patent adequately represented all of the independent claims except those of the '027 Patent. The '027 Patent was, of course, represented by its own claim 1. Front Row's argument is thus baseless.

Front Row also expresses dissatisfaction at not having any representative claims from the '184 and '460 Patents, Br. at 9, and the mistaken belief that the District Court's tables overlooked claim 20 of the '184 Patent, Br. at 12; *but see* Appx111-112. But critically, Front Row does not actually argue that the claims selected by the District Court are not representative, and does not identify any specific independent or dependent claims that should have been addressed separately.

It is well-established, and Front Row does not deny, that courts may rely on representative claims as part of a Section 101 analysis where claims are "substantially similar and linked to the same abstract idea." *Content Extraction*, 776 F.3d at 1348. This is particularly true when, as is the case here, the asserted patents belong to the same patent family, involve the same technology, and share similar or identical patent specifications. For example, in *Alice*, the Supreme Court invalidated claims from four patents based on one representative claim. 134 S. Ct. at 2352 & nn.1-2. There, the Court also extended the Section 101 analysis conducted on method claims to the system and media claims because they were "no different . . . in substance." *Id.* at 2360.

If Front Row believed that the selected claims were not representative, it was incumbent upon it "to present 'any meaningful argument for the distinctive significance of any claim limitations' other than those included in [the representative claims]." *Affinity/Amazon*, 838 F.3d at 1268 n.2 (quoting *Elec. Power Grp.*, 830 F.3d at 1352). Front Row did not present any argument at all on this point. To the contrary, Front Row itself relies on "the specific limitations in the

representative claims" as a basis to assert the patentability of all of its patents. *See, e.g.*, Br. at 39. The Section 101 analysis is thus properly predicated on the representative claims. *See Affinity/DIRECTV*, 838 F.3d at 1256 n.1; *Affinity/Amazon*, 838 F.3d at 1268 n.2.

Front Row also contends that the District Court did not explain the subject-matter eligibility analysis for the dependent claims, other than to say that the claims were not "materially distinct" from the representative claims. Br. at 12-13. But Front Row was required to identify any dependent claims it believes were not fairly represented, and it failed to do so. *See Affinity/DIRECTV*, 838 F.3d at 1264 n.4 ("In any event, as noted above, Affinity has not separately argued the patent eligibility of the dependent claims and thus has waived any argument that those claims should be analyzed separately from claim 1."). Here, the dependent claims parallel those in *Content Extraction* and *Affinity/DIRECTV*: "the dependent claims . . . all recite functions that are not inventive but simply constitute particular choices from within the range of existing content or hardware." *Affinity/DIRECTV*, 838 F.3d at 1264. The District Court agreed, holding that "the additional claims here introduce only slight variations to the representative

independent claims. District courts have dismissed similar differences as immaterial." Appx115. The District Court thus considered each of the claims and held that they were fairly and adequately represented by the selected representative claims.

V. CONCLUSION

This is a straightforward Section 101 case with claims remarkably similar to those this Court previously held invalid in *Affinity Labs of Texas, LLC v. DIRECTV, LLC*, 838 F.3d 1253 (Fed. Cir. 2016); *Affinity Labs of Texas, LLC v. Amazon.com Inc.*, 838 F.3d 1266 (Fed. Cir. 2016); and *Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363 (Fed. Cir. 2015). The District Court, in a detailed 138-page decision, first correctly determined that the Video Patents claim nothing more than the abstract idea of sending video of an event to handheld devices over wireless networks, and that the '027 Patent claims the abstract idea of authorizing handheld devices to receive video based on the user's location. The District Court then properly recognized that the patent claims do not contain any inventive concept and instead recite purely functional language using conventional technology admittedly known in the art. In every respect, the District

Court strictly followed the precedent of the Supreme Court and this Court. Defendants-Appellees, therefore, respectfully request that this Court affirm the District Court's judgment and hold that the asserted patents are invalid for claiming unpatentable subject matter under 35 U.S.C. § 101.

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United States Court of Appeals
for the Federal Circuit

Front Row Technologies LLC v. MLB Advanced Media, L.P., 2016-2604

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