

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

**THE RECEIVERSHIP ESTATE OF
AUDIENCESCIENCE INC., REVITALIZATION
PARTNERS, LLC, AS GENERAL RECEIVER FOR
THE RECEIVERSHIP ESTATE OF
AUDIENCESCIENCE INC.,**
Plaintiffs-Appellants

v.

GOOGLE LLC, YOUTUBE LLC,
Defendants-Appellees

2024-1825

Appeal from the United States District Court for the
Northern District of California in No. 5:22-cv-04756-EJD,
Judge Edward J. Davila.

Decided: September 25, 2026

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Before REYNA, TARANTO, and STARK, *Circuit Judges*.

REYNA, *Circuit Judge*.

The Receivership Estate of AudienceScience Inc. and Revitalization Partners, LLC appeal the United States District Court for the Northern District of California’s grant of Google LLC’s motion for judgment on the pleadings of patent ineligibility under 35 U.S.C. § 101 and associated determination that amendment would be futile. We affirm.

BACKGROUND

I.

Appellants The Receivership Estate of AudienceScience Inc. and Revitalization Partners, LLC (“AudienceScience”) own U.S. Patent Nos. 7,747,676 (“676 patent”), 7,882,175 (“175 patent”), and 8,082,298 (“298 patent”) (collectively, the “Asserted Patents”). The Asserted Patents are related, share a common specification, and all claim priority to December 2004.

The Asserted Patents relate to internet advertising. More specifically, the common specification discloses selecting advertisements to display to a particular user on a publisher’s website “based upon both user history and page

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context.” J.A. 30–31 at 2:65–3:1.¹ Regarding page context, each web page is associated with “keywords” representative of its content. J.A. 31 at 3:5–7; J.A. 32 at 5:3–5. The common specification provides the example of associating the web page <http://www.xyz.com/sports/tennis> with the keywords “racket” and “athlete.” J.A. 24 at Fig. 2. Regarding user history, the Asserted Patents disclose tracking which web pages a user visits and associating specific keywords with the user’s browsing history. J.A. 31 at 3:20–23.

The common specification discloses that when a user searches for a web page, a set of advertisements is collected where the advertisements have been associated with keywords matching the keywords associated with the requested page and the user’s browsing history. J.A. 31 at 3:14–27. By considering both page context and user history, the resulting advertisements are purportedly “likely to be the most interesting to the user, the most remunerative to the publisher, and/or the most effective for the advertiser.” J.A. 31 at 4:34–36.

An advertisement is then selected from the collected set of advertisements based on a weighted performance score. Specifically, each advertisement is assigned a “performance score” that reflects “the extent to which the advertising message has generated revenue when previously presented.” J.A. 31 at 3:10–13; *see* J.A. 34 at 9:48–53. Each advertisement is then weighted “in accordance with its performance score.” J.A. 31 at 3:27–30; *see* J.A. 34 at 9:48–53. The common specification discloses that the weight of the performance score can be the performance score itself or “a function of the performance score[.]” J.A. 31 at 3:14–46; *see* J.A. 32 at 6:55–67.

¹ As the Asserted Patents share a common specification, we cite to the ’676 patent herein.

In the proceedings below, AudienceScience argued that the Asserted Patents include claims “directed to two improvements over the conventional approaches to advertisement selection, *i.e.*, (1) using a performance score and (2) considering both current page context and individual user history.” J.A. 7. AudienceScience further argued that the asserted claims are directed to the “weighted selections” of advertisements, subjects, and keywords. *Id.* The district court determined that claims 1, 2, and 10 of the ’676 patent, claims 1, 12, and 33 of the ’175 patent, and claims 1 and 12 of the ’298 patent are representative of all those limitations. J.A. 8.

AudienceScience contends that claim 1 of the ’676 patent alone is representative for purposes of appeal. It argues that none of the differences between claim 1 of the ’676 patent and the other claims the district court determined were representative “ultimately mattered to its § 101 analysis.” Reply Br. 3. We agree that the differences between claim 1 of the ’676 patent and the other claims are immaterial for purposes of this appeal. For example, although claim 1 of the ’676 patent recites weighting advertisements, our analysis would not change if the claim instead recited weighting subjects or keywords. Thus, for purposes of this appeal, we treat claim 1 of the ’676 patent as representative, which recites as follows:

1. A method performed by a computing system having a processor and a memory for selecting an advertising message for inclusion in a requested web page, comprising:

receiving a page request sent by a user identifying the requested page;

adding the requested page to a page request history listing pages recently requested by the user;

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using a mapping from pages to keywords describing those pages to identify a set of keywords each mapped to from at least one of the pages listed in the page request history;

using a mapping from keywords to advertising messages described by those keywords to identify a set of advertising messages each mapped to from at least one of the identified set of keywords;

to each of the identified set of advertising messages, attributing a selection weighting reflecting the advertising message's relative performance, wherein the relative performance is determined by a performance score that indicates the extent to which the advertising message has generated revenue;

selecting one advertising message of the identified set of advertising messages in accordance with the selection weightings attributed to the advertising messages of the identified set of advertising messages; and

responding to the page request with a version of the requested page that includes an instruction to display the selected advertising message within the page, wherein code implementing the method is stored in the memory of the computing system for execution by the processor of the computing system.

J.A. 34 at 9:34–63.

II.

In 2021, AudienceScience sued Google LLC and YouTube LLC (collectively, “Google”) in the United States District Court for the Western District of Texas for infringing various claims of the Asserted Patents. The case was

later transferred to the United States District Court for the Northern District of California.

Google moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) on the basis that the asserted claims are patent ineligible under 35 U.S.C. § 101. The district court granted Google's motion.

At step one of the eligibility analysis, the district court determined that the asserted claims are directed to an abstract idea. The district court found that the claims "all involve the identification or use of keywords or subjects related to the requested web page or previously viewed electronic content in order to . . . select[] an advertisement to display." J.A. 13. It further found that each claim "teaches a weighting of either advertising messages, keywords, or subjects by scoring based on revenue generation." *Id.* Thus, the district court determined that the asserted claims, as a whole, are directed to the abstract idea of "targeting advertisements to internet users to maximize revenue generation." *Id.* at 13–16.

At step two, the district court determined that the asserted claims failed to recite an inventive concept. The district court rejected AudienceScience's argument that using performance scores to select advertisements is an "inventive improvement" that the claims "explain exactly how" to do. J.A. 17. It found that, although AudienceScience "argue[d] that the weighting of advertisements or their keyword and subject descriptors by revenue was an advancement over prior art, neither the Complaint nor the [Asserted Patents] contain any allegations or statements to this effect." J.A. 18. It further found that the Asserted Patents "do not describe a precise method of weighting beyond stating that the relevant category to be weighted . . . is to be rated by revenue generated." J.A. 18–19 (citing J.A. 31 at 3:10–13). Thus, the district court determined that, even if AudienceScience had alleged that the performance score

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limitation was an inventive concept, that concept is directed to nothing other than the abstract idea itself.

Further, at step two, the district court rejected AudienceScience’s argument that the combination of two “conventional” advertising methods, “i.e., the use of user history or page context to target an internet advertisement to a user,” constitutes an inventive concept. J.A. 18 (citing J.A. 30 at 1:47–2:20). The district court found that “the combination of these conventional approaches involves generic steps such as adding a page request to a user’s page request history and mapping descriptions . . . of the current page and prior pages to advertisements.” *Id.*

Finally, the district court determined *sua sponte* that, “because the Court’s findings in each step of the *Alice* analysis [are] based on the language of the [Asserted Patents], it finds that amendment of the Complaint would be futile.” J.A. 19. It therefore dismissed the complaint without leave to amend.

AudienceScience timely appeals the district court’s grant of Google’s Rule 12(c) motion and associated dismissal with prejudice. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(1).

STANDARD OF REVIEW

We review a district court’s grant or denial of judgment on the pleadings under Federal Rule of Civil Procedure 12(c) under the law of the regional circuit. *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1311 (Fed. Cir. 2016). The Ninth Circuit reviews the grant or denial of judgment on the pleadings de novo. *Id.* (citing *Kotrous v. Goss–Jewett Co.*, 523 F.3d 924, 929 (9th Cir. 2008)). Judgment on the pleadings “is properly granted when there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law.” *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009) (citations omitted). In evaluating a Rule 12(c) motion, courts

must “accept all factual allegations in the complaint as true and construe them in the light most favorable to the non-moving party.” *Id.* (citations omitted).

We review a district court’s denial of leave to amend or determination of futility of amendment under the law of the regional circuit. *Sanderling Mgmt. Ltd. v. Snap Inc.*, 65 F.4th 698, 702 (Fed. Cir. 2023). The Ninth Circuit reviews the denial of leave to amend for abuse of discretion and the question of futility of amendment de novo. *Id.* Whether to grant leave to amend “turns on whether amendment would be futile,” or whether “it is clear . . . that the complaint could not be saved by any amendment.” *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011).

DISCUSSION

AudienceScience raises two issues on appeal. First, AudienceScience argues the district court erred by determining that Google is entitled to judgment as a matter of law that the asserted claims of the Asserted Patents are directed to patent ineligible subject matter under 35 U.S.C. § 101. Second, AudienceScience argues the district court improperly foreclosed amendment of its Complaint by determining that amendment would be futile. We address each in turn below.

Eligibility Under § 101

Patent eligibility is governed by 35 U.S.C. § 101, which provides that “[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.” Excepted from eligibility under § 101 are “[l]aws of nature, natural phenomena, and abstract ideas.” *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014). This appeal involves the abstract idea exception.

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To determine whether a claim is patent eligible, we turn to the Supreme Court’s two-step “*Alice*” framework. Under step one, we consider whether the claim is “directed to,” in this case, an abstract idea. *See id.* at 217. If not, the inquiry ends and the claim is patent eligible. *Id.* If so, at step two, we consider whether the claim includes an “inventive concept” by “consider[ing] the elements of each claim both individually and as an ordered combination to determine whether the additional elements transform the nature of the claim into a patent-eligible application.” *Id.* Thus, at step two, we ask whether the claims recite something “significantly more” than the abstract idea itself. *Id.* at 217–18.

We review de novo whether a claim is directed to patent eligible subject matter under 35 U.S.C. § 101. *Berkheimer v. HP, Inc.*, 881 F.3d 1360, 1365 (Fed. Cir. 2018). We have determined that “[t]he patent eligibility inquiry may contain underlying issues of fact.” *Id.* At step two, “whether a claim element or combination of elements is well-understood, routine and conventional to a skilled artisan in the relevant field is a question of fact.” *Id.* at 1368. If a genuine dispute exists for this inquiry, step two “cannot be answered adversely to the patentee based on the sources properly considered on a motion to dismiss.” *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1128 (Fed. Cir. 2018). But “not every § 101 determination contains genuine disputes over the underlying facts material to the § 101 inquiry.” *Berkheimer*, 881 F.3d at 1368.

Step One

The step one inquiry asks whether claims are “directed to” an abstract idea. *Alice*, 573 U.S. at 217. That inquiry “applies a stage-one filter to claims, considered in light of the specification, based on whether their character as a whole is directed to excluded subject matter.” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016)

(citation modified). We conclude at step one that AudienceScience’s asserted claims are directed to an abstract idea.

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

AudienceScience argues that this characterization violates the fundamental principle that courts must avoid “describing the claims . . . at a high level of abstraction” that is “untethered from the claims.” Appellant Br. 36 (quoting *Enfish*, 822 F.3d at 1337). This is without merit. As discussed, the claims explicitly recite selecting and displaying advertisements based on information collected about a user and advertisement performance, and so this abstract idea is not untethered from the claims.

The common specification also supports this conclusion. The Asserted Patents are titled “Selecting an Advertising Message for Presentation on a Page of a Publisher Web Site Based Upon Both User History and Page Context.” J.A. 22; J.A. 36; J.A. 50. The field of the invention is described as “electronic advertising.” J.A. 30 at 1:15–16. The common specification also discloses two “conventional approaches” to targeted advertising on a computer, i.e., approaches based on either page context or user history, and explains that the invention combines these approaches.

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J.A. 30 at 1:47–2:20, 2:65–3:1. The common specification explains the selected advertisements are “likely to be relevant to the user, . . . the most remunerative to the publisher, and/or the most effective for the advertiser.” J.A. 31 at 4:33–36.

AudienceScience argues that the representative claim survives at step one because it is directed to “highly specific improvements over prior-art technological processes for Internet advertising” as opposed to a process that simply uses a computer as a tool for carrying out a process. Appellant Br. 30–31. In support of this contention, AudienceScience advances three primary arguments.

First, AudienceScience argues that, “[t]o the extent ‘the claims address a business challenge . . . , it is a challenge particular to the Internet.’” Appellant Br. 31 (citing *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257 (Fed. Cir. 2014)). Specifically, AudienceScience argues that using information “collected about [the] user from the current webpage and the user’s browsing activity, and further utilizing information known about the prior ‘performance’ of the advertisements” was “not possible before the Internet.” Appellant Br. 32. It argues this means that the claimed invention is an improvement to a technological process because it “*only* exists in the context of computing.” Appellant Br. 31. We are not persuaded.

Contrary to AudienceScience’s assertions, the claims are not directed to a solution to overcome “a problem specifically arising in the realm of computer networks.” See *DDR Holdings*, 773 F.3d at 1257. In *DDR Holdings*, we held that claims reciting methods for retaining website users on a host website when the users click on an internet advertisement for a third-party website were non-abstract. We reasoned that “the ephemeral nature of an Internet ‘location’ or the near-instantaneous transport between these locations made possible by standard Internet communication protocols, [] introduce[d] a problem that does not arise

in the ‘brick and mortar’ context.” *Id.* at 1258. That is not the case here.

As the district court noted, the asserted claims here are directed to “selecting the most effective ad[vertisement],” which is fundamentally a “non-internet centric problem.” The claims here address internet advertisements that are analogous to advertisements conventionally run in print or on television, where publishers target specific demographics based on how successful an advertisement has performed in the past. Nothing in the claims is directed to anything more than choosing advertisements based on information collected about the user and/or the advertisement, albeit on the internet. *See DDR Holdings*, 773 F.3d at 1259 (discussing that application of a “known business process to the particular technological environment of the Internet” does not confer eligibility).

Second, AudienceScience argues that the claims are not abstract because they do not merely recite “a desirable result or function,” but instead a “specific solution.” Appellant Br. 32 (citation modified). AudienceScience references the limitations of “adding the requested page,” identifying “a set of keywords,” and identifying “a set of advertising messages,” among others. Appellant Br. 32–33. It argues this “highly granular” set of steps “describes a concrete methodology, not a mere abstraction.” Appellant Br. 34. We disagree.

The representative claim here is similar to the claims we held abstract in *Chewy, Inc. v. International Business Machines Corp.* 94 F.4th 1354 (Fed. Cir. 2024). In *Chewy*, the claims at issue “broadly recite[d]” the steps of “identifying [a] search result item” from a user’s internet search, “searching for” and “identifying an associated advertisement” from an “information repository” that “matches the search result item,” “correlating the search result item and associated advertisement,” and “searching, retrieving, and displaying” the “associated advertisement” to a user.

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Chewy, 94 F.4th at 1365. We concluded in *Chewy* that “[c]orrelating advertisements with search results is a type of targeted advertising and is thus abstract.” *Id.*

We further concluded in *Chewy* that the claims were not “directed to any challenges unique to computer networks, or specific improvements to the functionality of the computer itself,” and instead “merely recite . . . identifying advertisements based on search results, without any specificity as to how this is accomplished.” *Id.* at 1366. Here, too, the claims recite gathering information (keywords) from a user’s search, searching for matching advertisements using those keywords, and displaying the advertisement without providing any specificity as to how those steps are achieved. The only discernable difference in the claim here is that an advertisement is selected from a set of matching advertisements based on a “performance score.” But even this concept relates to collecting data to better tailor advertisements to maximize revenue. And even if this step adds a degree of particularity, what it adds is not enough to offset the abstract concept embodied by the claims. *See Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014) (“Although certain additional limitations, such as consulting an activity log, add a degree of particularity, the concept embodied by the majority of the limitations describes only the abstract idea of showing an advertisement before delivering free content.”).

Third, AudienceScience argues this court has held similar software claims to be non-abstract in *SRI International*, *Finjan*, and *McRO*. Appellant Br. 34–36 (citing *SRI Int’l, Inc. v. Cisco Sys., Inc.*, 930 F.3d 1295 (Fed. Cir. 2019); *Finjan, Inc. v. Blue Coat Sys., Inc.*, 879 F.3d 1299 (Fed. Cir. 2018); *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299 (Fed. Cir. 2016)). But the claims in those cases were different. In *SRI International*, we held claims non-abstract that were directed to a “specific technique” for “using a plurality of network monitors that each analyze specific types of data on the network and integrating

reports from the monitors” to solve the “technological problem” of “identifying hackers or potential intruders into the network.” 930 F.3d at 1303. In *Finjan*, we held that, although scanning for computer viruses by itself is an abstract idea, the claims were nonetheless non-abstract because they included limitations corresponding to a “behavior-based” approach to virus scanning which “constitutes an improvement in computer functionality.” 879 F.3d at 1304. And in *McRO*, we held claims focused on an improvement in computer animation non-abstract for setting forth specific rules for, e.g., “evaluat[ing] sub-sequences, generat[ing] transition parameters or apply[ing] transition parameters to create a final morph weight set.” 837 F.3d at 1314. Ultimately, our determinations in those cases rested on the recitation of specific solutions for solving technological problems in the respective claims.

We cannot say the same is true here. As the district court determined, nothing in the claims or specification indicates any specific technological improvements or solutions to an internet-centric problem in advertising. Instead, the Asserted Patents are directed to combining two methods of conventional targeted internet advertising, i.e., using either page context or user browsing history to select advertisements. J.A. 30 at 1:47–49. And the performance score concept is directed to the non-technological problem of selecting the highest revenue generating advertisement.

Thus, we hold that the asserted claims of the Asserted Patents are directed to targeting advertisements to internet users to maximize revenue generation, an abstract idea not eligible for patenting. Having concluded that the Asserted Patents are directed to an abstract idea, we move to step two of the *Alice* inquiry.

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Step Two

AudienceScience argues the asserted claims include two inventive concepts that transform the claims into more than an abstract idea. We disagree.

First, AudienceScience argues that “[t]he use of both page context and user history is an inventive concept because it allows advertisement recommendations to account for *both* the subject matter that is currently on the user’s mind and subject matter that the user has previously demonstrated an interest in.” Appellant Br. 45 (emphasis in original). We disagree. As we note above, the Asserted Patents describe that each of these targeted advertising methods are conventional. J.A. 30 at 1:47–2:20. And AudienceScience itself argues that the combination of these two methods relates to “provid[ing] far more personalized results,” Appellant Br. 45, which collapses into the abstract idea itself. Thus, the use of these two methods in combination “cannot supply the inventive concept.” *BSG Tech. LLC v. BuySeasons, Inc.*, 899 F.3d 1281, 1290 (Fed. Cir. 2018) (“[A] claimed invention’s use of the ineligible concept to which it is directed cannot supply the inventive concept that renders the invention ‘significantly more’ than the ineligible concept.”). Further, as the district court noted, the recitation of these methods in the asserted claims involves only generic steps like updating a user’s page request history and correlating keywords associated with web pages to keywords associated with advertisements.

Second, AudienceScience argues that the recitation of assigning advertisements “performance scores” and assigning “weights” “in accordance with [those] performance score[s]” constitutes an inventive concept. Appellant Br. 46–47. AudienceScience argues this concept solves a problem unique to the internet and is adaptive because it uses “probabilistic selection” when selecting advertisements. Appellant Br. 47. AudienceScience argues our opinion in *Weisner v. Google LLC*, 51 F.4th 1073 (Fed. Cir.

2022) is instructive. In *Weisner*, we concluded that patent owner sufficiently alleged for two of four asserted patents that claims directed to “creating and using travel histories to improve computerized search results” recited a “specific implementation of the abstract idea that purports to solve a problem unique to the Internet.” *Weisner*, 51 F.4th at 1084–85. Specifically, we concluded that “the claims’ specificity as to the mechanism through which they achieve improved search results . . . [was] sufficient.” *Id.* at 1085.

We concluded that the claims in *Weisner* were specific enough to survive a Rule 12(c) motion. But here, the representative claim simply recites “attributing a selection weighting” reflective of an advertisement’s “performance score” that is indicative of the revenue that advertisement has generated. J.A. at 9:48–53. The claims do not explain in any greater specificity how this performance score concept is carried out. In *Weisner*, we also relied on “allegations in the [Second Amended Complaint] as well as portions of the specification, which we must accept as true at the pleadings stage.” 51 F.4th at 1088. Here, AudienceScience indisputably failed to include allegations in its Complaint regarding an inventive concept. It also points to nothing in the specification suggesting that the weighted performance score limitation constitutes an inventive concept.

Therefore, we affirm the district court’s determination that, on the motion for judgment on the pleadings record, the asserted claims lack an inventive concept.

A. Futility of Amendment

AudienceScience argues that the district court’s determination that amendment of its Complaint would be futile improperly foreclosed it from amending and therefore requires vacatur and remand. We conclude that because AudienceScience took no steps whatsoever to indicate to the district court that it wished to amend, it forfeited that argument on appeal.

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AudienceScience points to our opinion in *Aatrix Software*, where we concluded that a district court erred by denying amendment of a complaint after determining claims to be patent ineligible at the motion to dismiss stage. 882 F.3d at 1124–26. There, patent owner moved for reconsideration of the district court’s ineligibility determination and, alternatively, for leave to amend its complaint, both of which the district court denied. *Id.* We concluded that the district court abused its discretion in refusing leave to amend because patent owner appended a second amended complaint to its motion for reconsideration setting forth “allegations that, taken as true, would directly affect the district court’s patent eligibility analysis.” *Id.* at 1125–26.

In the proceedings below, AudienceScience never sought leave to amend its Complaint, which contained no allegations as to any purported inventive concept included in its claims. See Appellant Br. 62 (“AudienceScience did not provide extensive allegations about the patents’ inventiveness in its complaint because the patents themselves proved the point.”). AudienceScience also did not append a proposed amended complaint to its opposition to Google’s Rule 12(c) motion. Nor did it even hint in its briefing on Google’s motion that it could and would amend its Complaint to correct any *Alice* step two deficiencies the district court might find with its original Complaint. And it did not, as the Ninth Circuit expressly allows, move for reconsideration and vacatur of the district court’s judgment after the court granted Google’s Rule 12(c) motion.

Even now, AudienceScience does not indicate with any specificity what it would allege if given the opportunity to amend. Appellant Br. 63 (arguing vaguely that it “could have added allegations putting the patent language in context and explaining more clearly to the court why the invention’s specific use of page-context and user-history approaches, as well as the use of weighted performance scores, were inventive concepts”). Under these

circumstances, AudienceScience’s request to remand with instructions that it be permitted to amend is forfeited, and we see no reason to excuse its forfeiture. *Alaska v. United States*, 201 F.3d 1154, 1163–64 (9th Cir. 2000) (“Where a party does not ask the district court for leave to amend, the request on appeal to remand with instructions to permit amendment comes too late.” (citation modified)); *see also Benson v. JP Morgan Chase Bank, N.A.*, 673 F.3d 1207, 1218 (9th Cir. 2012) (“Where a party never asked for permission, its argument that the ‘district court should have permitted’ is without force.” (citation omitted)). We therefore do not reach the merits of the district court’s futility determination.²

CONCLUSION

We have considered AudienceScience’s remaining arguments and find them unpersuasive. For the reasons provided, we affirm.

AFFIRMED

² This case does not call on us to set out the bare minimum a patentee can do (in connection with a Rule 12 motion based on § 101) without forfeiting its right to ask us to give it a chance to amend. And we acknowledge that the Ninth Circuit has “a line of cases stretching back nearly 50 years” holding that district courts granting Rule 12(b)(6) motions “should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). Here, as AudienceScience did absolutely nothing to even suggest it wished to amend, and continues to refrain from specifying what it would do with leave if granted, we hold that forfeiture has occurred in this case.