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| EXAMINER | |
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| ZELASKIEWICZ, CHRYSTINA E | |

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JOHN POULO, JAMES HOOVER,
NICK IKONOMAKIS, and GORAN OBRADOVIC

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Appeal 2014-009362
Application 13/525,187
Technology Center 3600

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Before MURRIEL E. CRAWFORD, JOSEPH A. FISCHETTI, and NINA L. MEDLOCK, *Administrative Patent Judges*.

CRAWFORD, *Administrative Patent Judge*.

## DECISION ON APPEAL

## STATEMENT OF THE CASE

Appellants seek our review under 35 U.S.C. § 134 of the Examiner's final decision rejecting claims 27–46. We have jurisdiction over the appeal under 35 U.S.C. § 6(b). Appellants appeared for oral hearing on December 13, 2016.

We REVERSE.

Claim 27 is illustrative:

> 27. A method for determining votes recorded on a voter-marked paper ballot, comprising:
>
> receiving, at a ballot processing computer, optical image data comprising an optical image of a voter-marked paper ballot, the voter-marked paper ballot including voter selection areas;
>
> performing a pixel determination of one or more voter selection areas, the pixel determination identifying pixels in the optical image that contain a voter marking;
>
> determining that a first subset of the one or more voter selection areas have been selected based on the pixel determination when a pixel count of one or more voter selection areas exceed a predefined first threshold value for determining a specific voter selection area has been selected;
>
> determining that a second subset of the one or more voter selection areas have not been selected when a pixel count of one or more voter selection areas fall below a predefined second threshold value for determining a specific voter selection area has not been selected;
>
> determining that a third subset of the one or more voter selection areas includes at least one ambiguous mark when a pixel count of one or more voter selection areas fall between the predefined first threshold value and second threshold value; and
>
> outputting an indication that one or more voter selection areas are ambiguous when it is determined that the voter-marked paper ballot includes at least one ambiguous mark.

Appellants appeal the following rejections:

1. Claims 27–40 are rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter.
2. Claims 27, 28, and 32–46 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Chung et al. (US 2007/0170253, pub. July 26, 2007) in

view of Kakarala et al. (US 2003/0052981, pub. Mar. 20, 2003).

## ISSUE

Did the Examiner err in rejecting claims 27–40 under 35 U.S.C. § 101 because the Examiner has not established that the claims are directed to an abstract idea?

Did the Examiner err in rejecting claims 27–46 under 35 U.S.C. §103(a) because Kakarala does not disclose determining that one or more voter selection areas include at least one ambiguous mark?

## ANALYSIS

*Rejection under 35 U.S.C. §101*

The Examiner rejects claims 27–40 under 35 U.S.C. § 101 as directed to non-statutory subject matter. In the rejection, the Examiner refers to the [the USPTO's] . . . Interim Guidance for Determining Subject Matter Eligibility for Process Claims in View of Bilski v. Kappos" (75 Fed. Reg. 43,922 (July 27, 2010)). (Final Act. 3).

Although the Examiner mentions whether the claimed invention is directed to an abstract idea (Answer 2), the Examiner's analysis appears to be largely based on the machine-or-transformation test, which was displaced by the Court's decision in *Bilski v.Kappos*, 561 U.S. 593 (2010) which held that the machine-or-transformation is not dispositive of the issue of whether claims are directed to an abstract idea. As such, it is not clear that the Examiner's reasoning is consistent with the Interim Guidance for Determining Subject Matter Eligibility for Process Claims in View of Bilski

v. Kappos. In any event, we proceed to analyze the claims pursuant to the two-part test for determining whether claims are directed to patentable subject matter under the framework of the Court in *Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014) which followed the two-part test set forth in *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1293 (2012).

First, as to whether the claim is directed to an abstract idea, law of nature, or natural phenomenon, *see Alice*, 134 S. Ct. at 2355, the Examiner discusses whether the claimed method is directed to an abstract idea in the Final Action. The Examiner, in the Answer, in response to the Appellants arguing that the claims are not directed to an abstract idea, expresses disagreement with the Appellants on whether the claims are directed to an abstract idea. However, the Examiner does not establish that the method, which involves a ballot processing computer that performs a pixel count of voter-marked ballots on optical ballot images and determines whether the pixel count is above a first threshold, below a second threshold, or falls between the first and second thresholds, covers an abstract idea. There is no articulation of an abstract idea. The Examiner states only that the claims fail the machine-or-transformation test. We conclude that the Examiner fails to demonstrate sufficiently that the claims are directed to an abstract idea.

Because we resolve this issue after consideration of the first step of the *Alice* test, we need not reach the second step of the *Alice* test, e.g., as to whether there are further claim limitations that contain an "inventive concept" sufficient to "transform" an abstract idea into a patent-eligible application. *See Alice*, 134 S. Ct. at 2357; USPTO 2014 Interim Guidance on Patent Subject Matter Eligibility, 79 Fed. Reg. 74,618, 74,621 (Dec. 16,

2014). For this reason, we do not sustain the Examiner's rejection under 35 U.S.C. § 101 of claims 27–40.

*Obviousness*

We will not sustain the Examiner's rejection under 35 U.S.C. § 103(a) of claims 27, 28, and 32–46 as being unpatentable over Chung in view of Kakarala, because we agree with the Appellants that Kakarala does not disclose determining whether the voter selection areas include at least one ambiguous mark.

The Examiner relies on paragraphs 75 and 76 of Kakarala for teaching this subject matter.

We find that Kakarala discloses a demosaicing process for interpolating colors of a digital image obtained from an image sensor to obtain all three primary colors at a single pixel location. The process uses a vote logic to demosaic the image in which three votes are assigned for each pixel. This vote logic does not relate to voter selection areas but rather to a demosaicing process. As such, the disclosure in paragraphs 75 and 76 regarding votes relates to pixel votes in a demosaicing process not determining whether voter selection areas include at least one ambiguous mark.

In view of the foregoing, we will not sustain the Examiner's rejection of claim 27 and claims and 32–40 dependent therefrom. We will also not sustain the rejection of claim 41 and claims 42–46 dependent therefrom because claim 41 also requires determining whether voter selection areas include at least one ambiguous mark.

We will also not sustain the rejection of claims 29–31 as being unpatentable over Chung in view of Kakarala and Munyer because the

Examiner relies on Kakarala for teaching determining whether voter selection areas include at least one ambiguous mark.

## DECISION

The decision of the Examiner is reversed.

REVERSED