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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
12/366,951	02/06/2009	Viktors Berstis	AUS920030848US2	8890
87220	7590	03/13/2018	EXAMINER	
Walder Intellectual Property Law (END) C/O Walder Intellectual Property Law, P.C. 17304 Preston Road Suite 200 Dallas, TX 75252			HUANG, TSAN-YU J	
			ART UNIT	PAPER NUMBER
			3685	
			MAIL DATE	DELIVERY MODE
			03/13/2018	PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte VIKTORS BERSTIS

Appeal 2016-007050¹
Application 12/366,951
Technology Center 3600

Before ST. JOHN COURTENAY III, JOHN HAMANN, and
JOYCE CRAIG, *Administrative Patent Judges*.

COURTENAY, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134(a) from a final rejection of claims 16–18, 22–24, and 28–39, which are all the claims pending in this application. Claims 1–15, 19–21, and 25–27 are cancelled. We have jurisdiction over the pending claims under 35 U.S.C. § 6(b).

We reverse.

¹ The Appellant identifies International Business Machines Corporation as the real party in interest. App. Br. 2.

STATEMENT OF THE CASE

Introduction

Appellant's invention relates to:

horology and, in particular, to methods and devices for time measurement using an **electrical time base**. More particularly, the present invention relies on the operation of a device, which may be a solid-state device, with methods and systems pertaining thereto, for **measuring time without an oscillator, oscillating element, or oscillating circuit and without a continuous power source**. Still more particularly, the present invention is directed to accomplishing **commercial transactions** in manners that employ said device for its **unique horological characteristics**.

(Spec. 2, ll. 5–15) (emphasis added).

Exemplary Claim

16. A method for processing a commercial transaction using data processing devices, the method comprising:

determining a **state of a time cell that is associated with a commercial transaction** that has been at least partially performed on a first data processing device at a time prior to a current time;

generating, at a second data processing device, a **first time value** that represents when the time cell was programmed at the time prior to the current time, **based on the determined state of the time cell**; and

processing information about the commercial transaction using the first time value to represent when the commercial transaction occurred at the time prior to the current time,

wherein:

the time cell is an electrical device having an insulating medium and an electrostatic charge storage element that is programmed by giving the electrostatic charge storage element a desired electrical potential,

the time cell discharges electrostatic charge from the electrostatic charge storage element through the insulating medium at a predetermined rate of discharge, and

determining the state of the time cell comprises detecting a current electrostatic charge stored in the electrostatic charge storage element.

(Emphasis added in bold and italics).

Prosecution History Regarding Withdrawn Rejections

In the Final Office Action, the Examiner withdraws: (i) the 35 U.S.C. § 101 rejection of independent claim 22 and its dependent claims 23 and 24; (ii) previous rejections under 35 U.S.C. § 112, second paragraph, and (iii) the rejection under pre-AIA 35 U.S.C. § 103(a) of claims 16–18, 22–24, and 28–39.² Final Act. 4. The Examiner confuses the status of this § 103(a) rejection, however, by inexplicably including in the Final Action a detailed statement of rejection under § 103(a) for claims 16–18, 22–24, and 28–39. Final Act. 7–15.

Appellant (App. Br. 24) refers to a July 14, 2015 phone interview with the Examiner in which the Examiner clarifies that the rejection under 35 U.S.C. § 103(a) for claims 16–18, 22–24, and 28–39 was in fact withdrawn. However, a summary of this telephone interview was never made of record by the Examiner. Nevertheless, in the Answer (2), the

² See 37 C.F.R. § 41.39(a)(1):

An examiner's answer is deemed to incorporate all of the grounds of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory action and pre-appeal brief conference decision), *unless the examiner's answer expressly indicates that a ground of rejection has been withdrawn.* (emphasis added).

Examiner clarifies that the rejection under 35 U.S.C. § 103(a) for claims 16–18, 22–24, and 28–39 is **withdrawn**.

Therefore, only claims 16–18 and 28–39 are before us on appeal, as rejected under 35 U.S.C. § 101 for being directed to patent-ineligible subject matter. Although claims 16–18, 22–24, and 28–39 are pending, **there is no rejection of claims 22–24 before us on appeal**, because it was withdrawn on page 4 of the Final Action, paragraph one. *See* n.2, *supra*.

Rejection

Claims 16–18 and 28–39 are rejected under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter.

Issue on Appeal

Did the Examiner err in rejecting claims 16–18 and 28–39 under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter?

ANALYSIS

We have considered all of Appellant’s arguments and any evidence presented. We highlight and address specific findings and arguments for emphasis in our analysis below.

Rejection of Claims 16–18 and 28–39 under 35 U.S.C. § 101

Under 35 U.S.C. § 101, a patent may be obtained for “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” The Supreme Court has “long held that this provision contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable.” *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2354 (2014) (quoting *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2116 (2013)). The Supreme Court in *Alice* reiterated the two-step framework previously set forth in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66, 82–84 (2012), “for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts.” *Alice*, 134 S. Ct. at 2355.

The **first step** in that analysis is to determine whether the claims at issue are directed to one of those patent-ineligible concepts, such as an **abstract idea**. Abstract ideas may include, but are not limited to, **fundamental economic practices, methods of organizing human activities, an idea of itself, and mathematical formulas or relationships**. *Id.* at 2355–57.

If the claims are **not directed** to a patent-ineligible concept, **the inquiry ends**. See *Visual Memory LLC v. NVIDIA Corp.*, 867 F.3d 1253, 1262 (Fed. Cir. 2017).

Otherwise, the inquiry proceeds to the **second step** where the elements of the claims are considered “individually and ‘as an ordered combination’ to determine whether the additional elements ‘transform the

nature of the claim’ into a patent-eligible application,” *Alice*, 134 S. Ct. at 2355 (quoting *Mayo*, 566 U.S. at 78–79), so as to ensure the claims amount to “significantly more” than the abstract idea. *Alice*, 134 S. Ct. at 2357.

We consider the question of whether the claims are directed to a **specific improvement** in the capabilities of the computing devices, or, instead, “a process that qualifies as an ‘abstract idea’ for which computers are invoked merely as a tool.” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1336 (Fed. Cir. 2016).

We, therefore, decide under **step two** whether the claims: (a) set forth an **inventive concept** that provides a specific means or method that **improves** the relevant technology, **or** (b) are directed to a result or effect that itself is the abstract idea, in which the claims merely invoke generic processes and machinery. *See Enfish*, 822 F.3d at 1336. (*See* TABLE 1 above, last two rows).

*The Examiner’s Rejection of Claims 16–18 and 28–39 under § 101*³

Regarding the **first prong** of the *Mayo/Alice* analysis, the Examiner concludes that claims 16–18 and 28–39 on appeal are:

directed to the **abstract idea** of processing information about a **commercial transaction based on the timing of the commercial transaction**. Analyzing a commercial transaction is a certain method of **organization human activity related to commercial activity**, an example of an **abstract idea** referenced in *Alice Corp.*

³ We give the contested claim limitations the broadest reasonable interpretation (BRI) consistent with the Specification. *See In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

(Final Act. 5.) (emphasis added).

Regarding the **second prong** of the *Mayo/Alice* analysis, the Examiner concludes:

The additional element(s) or combination of elements in the claim(s) other than the abstract idea per se amount(s) to no more than a mere instruction to **apply the abstract idea to a time cell that uses electrostatic physics**. Viewed as a whole, these additional claim element(s) do not provide meaningful limitation(s) to **transform the abstract idea into a patent eligible application of the abstract idea** such that the claim(s) amounts to significantly more than the abstract idea itself.

(Final Act. 5.) (emphasis added).

Thus, the Examiner concludes that all claims 16–18 and 28–39 on appeal are not patent-eligible under 35 U.S.C. § 101.

Mayo/Alice Analysis — Step 1

Regarding *Alice* Step 1, Appellant contends, *inter alia*:

Thus, while Appellant acknowledges that the claims include the concept of processing information about a commercial transaction, the claims are not "directed to" only this concept and instead recite a specific mechanism for processing information about the commercial transaction that amounts to significantly more than just an abstract idea, contrary to the allegations made by the Examiner.

(App. Br. 11).

We note Appellant's independent claim 16 is directed, *inter alia*, to a method of performing the recited steps or acts of *determining, generating, and processing*, followed by a "wherein" clause in which a structural element ("a **time cell**") is defined in the claim as an "electrostatic storage

element” that is given a “desired electrical potential” (i.e., is charged), and then, over time, it discharges “through the insulating medium at a predetermined rate of discharge,” whereupon the “state of the time cell” is determined to indicate the passage of a (predetermined) interval of time.⁴

Thus, claim 16 is directed to a “method for processing a **commercial transaction** using [generic] data processing devices.” However, for the reasons discussed below, we conclude method claim 16 also recites the use of a particular type of machine (“a time cell”) that has its state transformed by “giving the electrostatic charge storage element a desired electrical potential.” *See* n.3 *supra*.

Our reviewing court guides that fundamental economic and conventional business practices are often found to be abstract ideas, even if performed on a **computer**. *See, e.g., OIP Techs. Inc. v. Amazon.com, Inc.*,

⁴ In the event of further prosecution, we leave it to the Examiner to consider whether method claim 16 is a hybrid claim because the claim recites steps in a method that use a “time cell” **and** an apparatus (time cell) that independently performs a recited **function** of discharging an electrostatic charge. “A single claim which claims both an apparatus and the method steps of using the apparatus is indefinite under 35 U.S.C. § 112, second paragraph.” MPEP § 2173.05(p)(II) (citing *In re Katz Interactive Call Processing Patent Litigation*, 639 F.3d 1303, 1318 (Fed. Cir. 2011) (citing *IPXL Holdings v. Amazon.com, Inc.*, 430 F.3d 1377, 1384 (Fed. Cir. 2005)). *See IPXL Holdings*, 430 F.3d at 1384 (holding invalid a claim covering both a system and a method as a “hybrid” claim). In both *Katz* and *IPXL Holdings*, the Federal Circuit held claims indefinite for combining two classes of invention. We leave it to the Examiner to consider a rejection under § 112, second paragraph, of independent claim 16 and its associated dependent claims. Although the Board is authorized to reject claims under 37 C.F.R. § 41.50(b), no inference should be drawn when the Board elects not to do so. *See* Manual of Patent Examining Procedure (MPEP) § 1213.02.

788 F.3d 1359, 1362–63 (Fed. Cir. 2015). In particular, “[t]he abstract idea exception prevents patenting a **result** where ‘it matters not by what process or **machinery** the result is accomplished.’” *McRO, Inc. v. Bandai Namco Games America Inc.*, 837 F.3d 1299, 1312 (2016) (emphasis added) (quoting *O’Reilly v. Morse*, 56 U.S. 62, 113 (1854)).

Here, Appellant emphasizes that the “time cell” of independent claim 16 is directed to an improvement in the technology:

recites that *the time cell is an electrical device having an insulating medium and an electrostatic charge storage element that is programmed by giving the electrostatic charge storage element a desired electrical potential*. The claim further states that *the time cell discharges electrostatic charge from the electrostatic charge storage element through the insulating medium at a predetermined rate of discharge*. Moreover, and as further definition of the way in which the operation for determining the state of the time cell is performed, the claim recites that *determining the state of the time cell comprises detecting a current electrostatic charge stored in the electrostatic charge storage element*. The other independent claims recite similar features. **This is clearly directed to an improvement to technology** and is clearly not attempting to “tie up” or preempt the alleged abstract idea of “processing information about a commercial transaction based on the timing of the commercial transaction” but rather a specific mechanism for processing information about a commercial transaction that involves the programming of a time cell at the time the commercial transaction was at least partially performed, and detecting the state of the time cell at a second data processing device to thereby process information about the commercial transaction.

(App. Br. 12–13).

Turning to the Specification (20–21) for *context*, we find a description of exemplary embodiments of the recited “time cell:”

An insulated, charge storage element, e.g., as discussed above with respect in **FIG. 2A**, can be implemented in many different forms. One implementation of an insulated, charge storage element is a modified non-volatile memory cell, which is termed a “time cell”; more specifically, a particular embodiment of a time cell comprises a modified non-volatile memory cell that contains a charge storage element. In contrast to a typical non-volatile memory cell in which one attempts to hold a programmed charge as long as possible to accurately represent a programmed memory state, a time cell can be configured or constructed by modifying or configuring the structures of a non-volatile memory cell such that its programmed charge storage element loses, discharges, emits, or leaks its electrostatic charge through its insulating medium in a known, controllable, measurable, manner. The phrase “to program a time cell” is used in the same manner as the phrase “to program a non-volatile memory cell”; in other words, the phrase “to program a time cell” is used to describe the process by which an insulated charge storage element within a time cell receives its charge.

A time cell can be configured or constructed to lose, discharge, emit, or leak a programmed electrostatic charge at a known, controllable, measurable, rate; different time cells can be configured or constructed to lose, discharge, emit, or leak electrostatic charge at different but known, controllable, measurable, rates. A read operation can be performed on a time cell in order to obtain a measurement of the remaining charge within the time cell’s charge storage element; in other words, the read operation provides an indirect observation of the electric potential of the charge storage element in the time cell that is caused its retained electrostatic charge. The time cell’s structure determines the amount of time that should elapse before the charge storage element loses enough charge to reach a particular electric potential; in other words, by knowing the amount of time that should elapse before the time cell’s charge storage element reaches a particular voltage, the read operation can determine whether or not a predetermined time

period has elapsed. A predetermined time period that a time cell is configured to measure may be termed the time cell's time period or the time cell's **expiration period**; a time cell that has reached its **expiration period** may be termed an **expired time cell**.

(emphasis added in italics and bold).

Given the aforementioned *context* from the Specification (*id.*), we conclude the recited “time cell” of claim 16 performs a quantitative measurement of time that cannot reasonably be performed as a **mental process**, or by a person with the aid of pen and paper. Moreover, we find using a non-volatile memory cell (as described above) which does not require a battery to measure time is an **inventive concept** that provides a specific means or method that **improves** the relevant technology. (See further discussion under *Mayo/Alice* step two, *infra*).

See also Specification page 4, lines 15–26:

In contrast to typical horological technology, a time cell provides electronic time measurement without a continuous energy source, such as a battery or an AC or DC power supply, particularly without use of chemical reactions or radioactive materials. Moreover, a time cell provides electronic time measurement without an oscillator, an oscillating circuit, a beat or pulse counter, or any other type of electric time base oscillator. Hence, a time cell is a small timekeeping device that is hermetically sealed and essentially impervious to external physical effects except extreme temperatures and extreme radiation. As such, a time cell has a small size, a simple fabrication, and a low unit cost.

Thus, in considering Appellant's claims as a whole in light of the Specification, the principal issue before us under § 101 is whether it matters what machinery by which the result is accomplished, because the “time cell”

of claim 16 is arguably not a generic machine, such as a generic computer which can be programmed to perform many different functions.

Accordingly, even if we assume *arguendo* under **step one** of the *Mayo/Alice* analysis that claim 16 is directed to an **abstract idea** of “processing a **commercial transaction**” using (generic) “data processing devices,” we must further consider under **step two** whether the positively recited “**time cell**” renders the claimed process patent-eligible, because the recited “time cell” is arguably a **particular machine**, which is only capable of performing a **single dedicated function**, unlike a **generic computer**, which is capable of performing many different functions when appropriately programmed. (*See* independent method claim 16).

Mayo/Alice Analysis — Step 2

Under step two of the *Mayo/Alice* analysis, we analyze the claims to determine if there are **additional limitations** that individually, or as an ordered combination, ensure the claims amount to “significantly more” than the abstract idea. *Alice*, 134 S. Ct. at 2357.

The “Machine-or-Transformation” (MoT) Test

As recognized by the Federal Circuit in *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715–16 (Fed. Cir. 2014), the “machine-or-transformation” (MoT) test, as outlined in *In re Bilski*, 545 F.3d 943, 954 (Fed. Cir. 2008), can provide a “**useful clue**” in the second step of the *Alice* framework.

Under *Bilski's* MoT test, a claimed process can be patent-eligible under § 101 if:

- (1) **it is tied to a particular machine or apparatus;** or
- (2) **the process transforms a particular article into a different state or thing.** *Bilski*, 545 F.3d at 954 (citing *Gottschalk v. Benson*, 409 U.S. 63, 70 (1972)).

Applying the *machine-or-transformation* test here, and for essentially the same reasons argued by Appellant in the Appeal Brief (12–13), we conclude that Appellant's claim 16 (and associated dependent claims 17, 18, and 31) are *sufficiently tied* to a **particular** machine or apparatus: i.e., “**a time cell.**” We conclude the “time cell” recited in Appellant's independent claim 16 is **not a generic machine**, because, unlike a **generic computer**, which can perform **many different functions** when programmed, the recited “time cell” can only be used for **a single, dedicated purpose** (measuring a predetermined passage of time as a function of the decay over time of an electrical charge). Thus, we conclude the claimed “time cell” is a **particular machine** under *Bilski's* MoT test.⁵

Further, under the second prong of the *Bilski* MoT test, we conclude the process of claim 16 **transforms** a particular article (“**time cell**”) into a **different state**, because we find the state of the time cell is **changed (transformed) to a different state** when it is given an electrostatic charge of a desired electrical potential, so as to discharge at “a predetermined rate

⁵ We need not reach and do not decide the issue of whether a dedicated special-purpose programmed computer is, or is not, a “particular machine” under the *Bilski* machine-or-transformation test.

of discharge” to effect a measurement that a predetermined time period has elapsed. (Claim 16).

Therefore, *Bilski’s* MoT test provides a **useful clue** that the claimed process of claim 16 is patent-eligible under § 101, because we find **prongs one and two** of the MoT test are **satisfied**.

Moreover, we conclude a person cannot reasonably and accurately measure longer intervals of time (e.g., an expiration time) as a **mental step**.⁶ Nor are the generic “data processing devices” of claim 16 used to perform the recited timing function that is positively recited as being performed by the “time cell.”⁷

For the aforementioned reasons, we conclude the additional “**time cell**” element recited in method claims 16–18 and 31 individually provides a sufficient inventive concept, so as to ensure the claims amount to “significantly more” than the abstract idea. *Alice*, 134 S. Ct. at 2357 (emphasis added).⁸

⁶ See *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1375 (Fed. Cir. 2011) (“That purely mental processes can be unpatentable, even when performed by a computer, was precisely the holding of the Supreme Court in *Gottschalk v. Benson*”).

⁷ As held by the Supreme Court, “although the machine-or-transformation test **is reliable in most cases**, it is not the exclusive test . . . rather it is a **critical clue**.” *Bilski v. Kappos*, 561 U.S. 593, 613–14 (2010) (Justices Stevens, Ginsburg, Breyer, and Sotomayor concurring).

⁸ We emphasize that even if time measurement devices are notoriously well known in the art, this has no bearing upon our analysis under § 101. The Supreme Court guides: “[t]he ‘novelty’ of any element or steps in a process, or even of the process itself, is of **no relevance** in determining whether the subject matter of a claim falls within the § 101 categories of possibly patentable subject matter.” *Diamond v. Diehr*, 450 U.S. 175, 188–89 (1981)

Therefore, on this record, we are persuaded of error regarding the Examiner’s legal conclusion that method claims 16–18 and 31 on appeal are directed to patent-ineligible subject matter.⁹

Independent System Claim 28

Independent claim 28 is directed to a “system” (i.e., apparatus) and not to a method. The *Biliski* MoT test is inapplicable to system (apparatus) claim 28. However, the recited “article of manufacture” of claim 28 comprises additional limitations, including, *inter alia*:

a time cell state detector that determines a state of **a time cell** that is associated with a commercial transaction that has been at least partially performed on a data processing device different from the apparatus at a time prior to a current time; and

a time converter that generates a first time value that represents when the **time cell** was programmed, at the time prior to the current time, based on the determined state of the time cell; and

...

(emphasis added). Our reviewing court further emphasizes: “[e]ligibility and novelty are **separate inquiries**.” *Two-Way Media Ltd. v. Comcast Cable Commc’ns, LLC*, 874 F.3d 1329, 1340 (Fed. Cir. 2017) (emphasis added).

⁹ “Patent eligibility under § 101 presents an issue of law.” *Accenture Glob. Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1340 (Fed. Cir. 2013). The patent eligibility inquiry may contain underlying issues of fact. *Mortg. Grader, Inc. v. First Choice Loan Servs. Inc.*, 811 F.3d 1314, 1325 (Fed. Cir. 2016). In particular, “[t]he question of 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.” *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1368 (Fed. Cir. 2018).

wherein:

the time cell is an electrical device having an insulating medium and an electrostatic charge storage element that is programmed by giving the electrostatic charge storage element a desired electrical potential,

the time cell discharges electrostatic charge from the electrostatic charge storage element through the insulating medium at a predetermined rate of discharge, and

determining the state of **the time cell** comprises detecting a current electrostatic charge stored in the electrostatic charge storage element.

(Independent Claim 28) (emphasis added).

Thus, we consider claim 28 as a whole and emphasize that the recited “**system** for supporting a **commercial transaction** that is processed using **data processing devices** comprising: **an article of manufacture comprising . . .**” includes the recited “**time cell**” (machine) as an essential part of the claimed “system” under the transitional term “comprising.” *See Genentech, Inc. v. Chiron Corp.*, 112 F.3d 495, 501 (Fed. Cir. 1997) (“‘Comprising’ is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim.”).

Similar to our discussion above regarding method claim 16, we conclude the system of claim 28 **transforms** the recited “**time cell**” to a **different state**. We find the state of the time cell is **changed (transformed) to a different state** when it is given an electrostatic charge of a desired electrical potential, so as to discharge at “a predetermined rate of discharge” to effect a measurement that a (predetermined) time period has elapsed.

Thus, it is our view that the additional individual element of the recited “time cell” is sufficient to transform the nature of the claim into a patent-eligible application.

Therefore, we conclude at least the **additional limitation** of the recited “**time cell**” as an essential part of the claimed “system” ensures that independent claim 28 amounts to **significantly more** than the abstract idea of merely using generic data processing devices to perform the recited “commercial transaction.” *See Alice*, 134 S. Ct. at 2357. We therefore conclude the claimed “time cell” feature provides an **inventive concept** as an **improvement** sufficient to ensure that the invention in practice amounts to **significantly more** than a patent upon the abstract idea of a commercial transaction.

Remaining system claims 29–30 and 32–39 depend directly or indirectly from independent system claim 28.

Remaining Claims 22–24

We note again that the Examiner withdrew the rejection under 35 U.S.C. § 101 for remaining computer program product claims 22–24, including independent claim 22. *See* Final Action 4. Therefore, there is no rejection before us on appeal for claims 22–24. *See* 37 C.F.R. § 41.39(a)(1).

CONCLUSION

The Examiner erred in rejecting claims 16–18 and 28–39 under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter.

Appeal 2016-007050
Application 12/366,951

DECISION

We reverse the Examiner's decision rejecting claims 16–18 and 28–39 under 35 U.S.C. § 101.

REVERSED