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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/015,409	08/30/2013	Peter Shintani	201003708.02	8521
36738	7590	06/07/2019	EXAMINER	
ROGITZ & ASSOCIATES 4420 Hotel Circle Court SUITE 230 SAN DIEGO, CA 92108			WINTER, JOHN M	
			ART UNIT	PAPER NUMBER
			3685	
			NOTIFICATION DATE	DELIVERY MODE
			06/07/2019	ELECTRONIC

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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* PETER SHINTANI

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Appeal 2018-001724  
Application 14/015,409<sup>1</sup>  
Technology Center 3600

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Before BETH Z. SHAW, CARL L. SILVERMAN, and  
JASON M. REPKO, *Administrative Patent Judges*.

SILVERMAN, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134(a) from the Examiner's Non-Final Rejection of claims 16–22 and 24–27, which constitute all pending claims. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

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<sup>1</sup> The real party in interest is identified as Sony Corp. App. Br. 2.

## STATEMENT OF THE CASE

The invention relates to tracking activation of licensable components in audio video devices (“AVD”), such as TVs, using unique product identifications. Abstract; Spec. 1–2; Figs. 1–3, 9, 10. Claim 16, reproduced below, is exemplary of the subject matter on appeal (emphasis added):

16. *Audio video device (AVD) comprising:*

*a licensable component providing a licensable function related to presentation of audio video information on at least one display; and at least one computer memory that is not a transitory signal and that comprises instructions executable by at least one digital processor to configure the digital processor to:*

*determine whether the AVD [i]s in a retail demonstration mode;*

*present data on the AVD according to the licensable component without paying a license fee to exploit the licensable function responsive to a determination that the AVD is in the retail demonstration mode;*

*present data on the AVD according to the licensable component only pursuant to a license fee transaction for the licensable component post-vending of the AVD;*

*determine a number of times the retail demonstration mode has been selected; and*

*permanently disable the retail demonstration mode responsive to a determination that the AVD has been powered up and retail demonstration mode selected more than a threshold number of times.*

App. Br. 20 (Claims Appendix).

## THE REJECTIONS

Claims 16–22 and 24–27 are rejected under 35 U.S.C. § 101 because the claimed invention is directed to patent-ineligible subject matter. Non-Final Act. 7–8.

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Claims 16–22 and 24–27 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Houg et al (US 2011/0166968 A1; pub. July 7, 2011) (“Houg”), Hofricter (US 2009/0320062 A1; pub. December 24, 2009), Vadlamani et al. (US 2009/0254482 A1; pub. October 8, 2009) (“Vadlamani”), and Spit et al. (US 2009/0303075 A1; pub. December 10, 2009) (“Spit”). Non-Final Act. 8–12.

Claims 20–22 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Houg, Hofricter, Spit, and Iwata et al. (US 2010/0013841 A1; pub. January 21, 2010) (Iwata”). Non-Final Act. 12–14.

### *The § 101 Rejection*

#### PRINCIPLES OF LAW

Patent-eligible subject matter is defined in 35 U.S.C. § 101 of the Patent Act, which recites:

Whoever 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.

There are, however, three judicially created exceptions to the broad categories of patent-eligible subject matter in 35 U.S.C. § 101: “[l]aws of nature, natural phenomena, and abstract ideas.” *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 70 (2012) (brackets in original).

In determining whether a claim falls within an excluded category, we are guided by the Supreme Court’s two-step framework, described in *Mayo* and *Alice*. See *Alice*, 573 U.S. at 217–18 (citing *Mayo*, 566 U.S. at 75–77). In accordance with that framework, we first determine what concept the

claim is “directed to.” *See id.* at 219 (“On their face, the claims before us are drawn to the concept of intermediated settlement, *i.e.*, the use of a third party to mitigate settlement risk.”); *see also Bilski v. Kappos*, 561 U.S. 593, 611 (2010) (“Claims 1 and 4 in petitioners’ application explain the basic concept of hedging, or protecting against risk.”).

Concepts determined to be abstract ideas, and thus patent ineligible, include certain methods of organizing human activity, such as fundamental economic practices (*Alice*, 573 U.S. at 219–20; *Bilski*, 561 U.S. at 611); mathematical formulas (*Parker v. Flook*, 437 U.S. 584, 594–95 (1978)); and mental processes (*Gottschalk v. Benson*, 409 U.S. 63, 69 (1972)). Concepts determined to be patent eligible include physical and chemical processes, such as “molding rubber products” (*Diamond v. Diehr*, 450 U.S. 175, 191 (1981)); “tanning, dyeing, making water-proof cloth, vulcanizing India rubber, smelting ores” (*id.* at 183 n.7 (quoting *Corning v. Burden*, 56 U.S. 252, 267–68 (1853))); and manufacturing flour (*Benson*, 409 U.S. at 69 (citing *Cochrane v. Deener*, 94 U.S. 780, 785 (1876))).

In *Diehr*, the claim at issue recited a mathematical formula, but the Supreme Court held that “[a] claim drawn to subject matter otherwise statutory does not become nonstatutory simply because it uses a mathematical formula.” *Diehr*, 450 U.S. at 176; *see also id.* at 191–92 (“We view respondents’ claims as nothing more than a process for molding rubber products and not as an attempt to patent a mathematical formula.”). Having said that, the Supreme Court also indicated that a claim “seeking patent protection for that formula in the abstract . . . is not accorded the protection of our patent laws, . . . and this principle cannot be circumvented by attempting to limit the use of the formula to a particular technological

environment.” *Id.* (citing *Benson and Flook*); *see, e.g., id.* at 187 (“It is now commonplace that an *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection.”).

If the claim is “directed to” an abstract idea, we turn to the second step of the *Alice* and *Mayo* framework, where “we must examine the elements of the claim to determine whether it contains an ‘inventive concept’ sufficient to ‘transform’ the claimed abstract idea into a patent-eligible application.” *Alice*, 573 U.S. at 221 (quotation marks omitted). “A claim that recites an abstract idea must include ‘additional features’ to ensure ‘that the [claim] is more than a drafting effort designed to monopolize the [abstract idea].’” *Id.* (quoting *Mayo*, 566 U.S. at 77, (alteration in original)). “[M]erely requir[ing] generic computer implementation[] fail[s] to transform that abstract idea into a patent-eligible invention.” *Id.*

The United States Patent and Trademark Office (“USPTO”) recently published revised guidance on the application of § 101. USPTO, *2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (Jan. 7, 2019) (“Memorandum”). Under that guidance, we first determine whether the claim recites:

- (1) any judicial exceptions, including certain groupings of abstract ideas (i.e., mathematical concepts, certain methods of organizing human activity such as a fundamental economic practice, or mental processes); and
- (2) additional elements that integrate the judicial exception into a practical application (*see* MPEP § 2106.05(a)–(c), (e)–(h)).

Only if a claim (1) recites a judicial exception and (2) does not integrate that exception into a practical application, do we then look to whether the claim:

(3) adds a specific limitation beyond the judicial exception that is not “well-understood, routine, conventional” in the field (*see* MPEP § 2106.05(d)); or

(4) simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception.

*See* Memorandum.

### ANALYSIS

The Examiner rejected claims 16–22 and 24–27 as being directed to the abstract idea of “a licensable component providing a licensable function related to presentation of audio video information on a display.” Non-Final Action. 7. The Examiner determines “[t]he claim(s) do not include additional elements that are sufficient to amount to significantly more than the judicial exception because the additional computer elements, which are recited at a high level of generality, provide conventional computer functions that do not add meaningful limits to practicing the abstract idea.”

*Id.* The Examiner states:

Claim 16 recites, in part, providing a licensable function, presenting data in demonstration mode, presenting data post vending and disabling demonstration mode. These steps describe the concept of comparing new and stored info and using rules to identify options, which corresponds to concepts identified as abstract ideas by the courts, such as *SmartGene, Inc. v. Advanced Biological Labs.*, 555 Fed. Appx. 950 (Fed. Cir. 2014) as well as *Alice Corp. Pty. Ltd. V. CLS Bank Int’l* 573 U.S., 134 S. Ct. 2347 (2014). The concept described in claim 16 is not meaningfully different than those concepts found by the courts to be abstract ideas. As such, the description in claim 16 of a licensable component providing a licensable function related to presentation of audio video information on a display is an abstract idea.

The claim does not include additional elements that are sufficient to amount to significantly more than the judicial exception because the additional elements when considered both individually and as and as an ordered combination do not amount to significantly more than the abstract idea. The claim recites the additional limitations of a [] computer memory, an AVD. These additional limitations are recited at a high level of generality and are recited as performing generic computer functions routinely used in computer applications. Generic computer components recited as performing generic computer functions that are well-understood, routine and conventional activities amount to no more than implementing the abstract idea with a computerized system. Thus, taken alone, the additional elements do not amount to significantly more than the above-identified judicial exception (the abstract idea). Looking at the limitations as an ordered combination adds nothing that is not already present when looking at the elements taken individually. There is no indication that the combination of elements improves the functioning of a computer or improves any other technology. Their collective functions merely provide conventional computer implementation. Therefore, the claim(s) are rejected under 35 U.S.C. 101 as being directed to non-statutory subject matter.

*Id.* at 7–8.

Appellant argues, *inter alia*, the Examiner errs in not properly identifying the recited abstract idea and not explaining how the specific claim limitations set forth in the abstract idea corresponds to a concept that the courts have identified as an abstract idea. App. Br. 5–6. Appellant argues the claims do not recite “determining a license mode.” *Id.* at 6. Appellant argues the claim does not recite “comparing” nor “identifying options.” *Id.* at 8. Appellant further argues that no court case, to Appellant’s knowledge, has held that “determining a license mode” is an abstract idea. *Id.* Appellant argues the Examiner’s approach does not follow the guidance of *Enfish* and *Diehr*. *Id.* at 8–9 (citing *Enfish, LLC v.*

*Microsoft Corp.*, 822 F.3d 1327, 1337 (Fed. Cir. 2016); “‘describing the claims at such a high level of abstraction and untethered from the language of the claims all but ensures that the exceptions to § 101 swallow the rule,’ *Diamond v. Diehr*, 450 U.S. 175, 189 n.12 (cautioning that overgeneralizing claims, ‘if carried to its extreme, make[s] all inventions unpatentable because all inventions can be reduced to underlying principles of nature which, once known, make their implementation obvious’”).

In the Answer, the Examiner finds that “determine whether the AVD is in a retail demonstration mode” and the subsequent decision to display data based upon the comparing is construed as comparing new and stored info and using rules to identify options.” Ans. 3. Regarding whether a court case has ever held that “determining a license mode” is abstract, the Examiner states:

abstract ideas are not limited to ideas that may be characterized as economic principles; nor are abstract ideas limited to the examples set forth in *Alice*, i.e., fundamental economic practices, certain methods of organizing human activities, an idea of itself, and mathematical relationships or formulae. *See Alice*, 134 S. Ct. at 2350, 2356.

*Id.*

In the Reply Brief, Appellant argues *SmartGene* is not a precedential case and the present case is not similar to the intermediate financial settlement in *Alice*. Reply Br. 1–2. Appellant argues that the alleged abstract idea of “providing a licensable function, presenting data in demonstration mode, presenting data post vending and disabling demonstration mode” is not supported by case law.

As discussed below, we are persuaded by Appellant’ arguments.

Applying the current Guidelines (Memorandum), we conclude that claim 16 does not recite an abstract idea. Memorandum, 84 Fed. Reg. at

I(a), III. In particular, none of the limitations in claim 16 recites (A) mathematical concepts, (B) certain methods of organizing human activity such as a fundamental economic practice, commercial or legal interactions, managing personal behavior or relationships or interactions between people, or (C) mental processes.

The claim 16 preamble recites an “[a]udio video device (AVD)” described in the Specification as a TV. Spec, Field of the Invention, Figs. 1–3. The limitation “a licensable component providing a licensable function related to presentation of audio video information on at least one display” is described in the Specification, for example, as “if the user wishes to automatically scan the broadcast spectrum to detect channels, in which case it may be inferred that the ATSC decoder/demodulator 58 and MPEG decoder 62 will be required and, hence, that licenses to use those components will be needed” and does not recite (A), (B), or (C). Spec. 7. Likewise, the limitation “at least one computer memory that is not a transitory signal and that comprises instructions executable by at least one digital processor to configure the digital processor to” perform identified functions does not recite (A), (B), or (C).

We note that none of the claim 16 limitations discussed below recites (A) or (C).

The limitations “determine whether the AVD [is] in a retail demonstration mode” and “present data on the AVD according to the licensable component without paying a license fee to exploit the licensable function responsive to a determination that the AVD is in the retail demonstration mode” may be economic in nature, but there is no basis to support a conclusion that it recites a *fundamental* economic practice, a

commercial interaction, interaction between people, or other principle set forth in (B). Similarly, the limitation “present data on the AVD according to the licensable component only pursuant to a license fee transaction for the licensable component post-vending of the AVD” does not recite a fundamental economic practice, a commercial interaction, interaction between people, or other principle of (B).

For the same reason, the limitations “determine a number of times the retail demonstration mode has been selected” and “permanently disable the retail demonstration mode responsive to a determination that the AVD has been powered up and retail demonstration mode selected more than a threshold number of times” do not recite a fundamental economic practice, a commercial interaction, interaction between people, or other principle of (B).

Regarding “commercial or legal interactions, managing personal behavior or relationships or interactions between people” set forth in (B), claim 16 recites specific steps to determine whether an AVD is in a retail demonstration mode and, if so, present data on the AVD according to a licensable component without paying a license fee; present such data only pursuant to a license fee post-vending of the AVD; determine a number of times the retail demonstration mode has been selected; and permanently disable the retail demonstration mode responsive to a determination that the retail demonstration mode has been powered up and retail demonstration mode selected more than a threshold number of times. The claim is unlike the claims of *Ultramerical* in which the court held a claim describing “only the abstract idea of showing an advertisement before delivering free content”

is patent ineligible. *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed Cir. 2014); 84 Fed. Reg. 52 (Jan. 7, 2019) n.13.

We note “all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas.” *Mayo*, 566 U.S. at 71. As discussed *supra*, abstract ideas may include, but are not limited to, fundamental economic practices, methods of organizing human activities, and mathematical formulas or relationships. *Alice*, 573 U.S. at 217–221. Under this guidance, we must therefore ensure at step one that we articulate what the claims are directed to with enough specificity to ensure the step one inquiry is meaningful. *Id.* at 217 (“[W]e tread carefully in construing this exclusionary principle lest it swallow all of patent law.”). Here, the Examiner’s rejection is based on an unreasonably broad claim interpretation without sufficient consideration of the specific limitations.

As discussed above, because claim 16 does not recite an abstract idea (a judicial exception), there is no need to consider whether the claim includes additional elements that integrate the judicial exception into a practical application. Likewise, we need not proceed to analyze the claim under *Alice*, step 2.

In view of the above, we do not sustain the rejection of claim 16, and dependent claims 17–22.

Independent claims 24–27 are similar to claim 16, discussed *supra*, to the extent that none of these claims’ limitations recites a fundamental economic practice, a commercial interaction, interaction between people, or other principle in (B). For example, claim 24 recites (emphasis added):

24. A device comprising:

at least one computer memory that is not a transitory signal and that comprises instructions executable by at least one processor to:

*actuate licensable component in an audio video device (AVD) to provide a presentation on a video display in accordance with a licensable feature without implementing a license fee payment therefor at least in part responsive to a determination that audio received by the AVD indicates that multiple sources of audio are playing the same audio as each other;*

*subsequently disable the licensable component at least in part responsive to a determination that the AVD has been vended.*

Here, similar to our claim 16 analysis, *supra*, there is no basis to conclude any of these limitations recites a *fundamental* economic practice or principle. Likewise, these limitations do not recite “commercial or legal interactions, managing personal behavior or relationships or interactions between people”

Therefore, we do not sustain the rejection of claims 24–27.

#### *The § 103 Rejections*

Appellant argues, *inter alia*, that the Examiner errs in finding that the combination of cited references (Houng, Hofrichter, Vadlamani, and Spit) teaches the claim 16 limitation “present data on the AVD *according to the licensable component without paying a license fee to exploit the licensable function responsive to a determination that the AVD is in the retail demonstration mode.*” App. Br. 11–15; Reply Br. 4–5. According to Appellant, Houng teaches obtaining an activation code for a tuner, but does not teach a license fee transaction. App. Br. 12 (citing Houng ¶¶ 97, 98, 101). Appellant argues that Hofrichter teaches presenting features according to a script in a retail mode such that the user sees features the manufacturer wants the user to see, but does not teach this is done without paying a license

fee. *Id.* at 14. Appellant argues the Examiner errs in considering “without paying a license fee” is a negative limitation that need not be expressly shown.

In the Answer, the Examiner states “that a broadest reasonable interpretation of the claimed feature of ‘present data on the AVD according to the licensable component only pursuant to a license fee transaction for the licensable component post-vending of the AVD’ merely requires the presentation of some type of data in conjunction with a licensing transaction being processed.” Ans. 3. The Examiner finds these features are disclosed by Houg as the activation code of Houg is analogous to a license code, and Houg presents an interface allowing the code to be activated. *Id.* at 3–4 (citing Houg, Figs. 19, 20). The Examiner finds Hofrichter teaches the limitation “presenting data on an AVD according to the licensable component without paying a license fee when in a retail demonstration mode” and notes that “without paying a license fee” is a negative limitation and is anticipated by any reference that does not expressly disclose paying a license fee. *Id.* at 4 (citing Hofrichter, Fig. 3).

In the Reply Brief, Appellant reiterates arguments presented in the Appeal Brief and argues that the Examiner’s “broadest reasonable interpretation” is unreasonable as it erases terms (“according to the licensable component”). Reply Br. 4. Regarding “without paying a license fee,” Appellant argues that “[t]he failure to disclose something does not translate into a teaching of its opposite.” *Id.* at 4–5 (citing *Santarus, Inc. v. Par Phann., Inc.*, 694 F.3d 1344, (Fed. Cir. 2012)).

We are persuaded by Appellant’s arguments that the Examiner’s claim interpretation is unreasonably broad. In particular, the Examiner’s

interpretation does not properly apply the recited claim terms “according to the licensable component” and “without paying a license fee.” Rather, the Examiner’s interpretation of these elements renders them meaningless. Claim terms in a patent application are given the broadest reasonable interpretation consistent with the Specification, as understood by one of ordinary skill in the art. *In re Crish*, 393 F.3d 1253, 1256 (Fed. Cir. 2004). We agree with Appellants that in this case, the limitation “without paying a license fee” narrows the claim and must be taught by the references. *See Santarus, Inc. v. Par Pharm., Inc.*, 694 F.3d 1344, (Fed. Cir. 2012) (limitation “restricted the claims to this preferred use ... [t]his exclusion narrowed the claims, as the patentee is entitled to do.”). The Examiner’s claim interpretation (Ans. 3-4) effectively ignores the limitation “without paying the license fee,” which is an unreasonably broad interpretation in light of the claims and Specification.

In view of the above, we do not sustain the rejection of claim 16 and dependent claims 17–22.

Claims 20–22 depend from claim 16 and are separately rejected over the cited references Houg, Hofricter, Spit, and additionally Iwata (Vadlamani is not cited in this rejection). Non-Final Act. 12–14. The Examiner finds Iwata teaches enabling a viewer to establish whether the audio video device is in the retail demonstration mode and presenting an option to select the retail demonstration mode. *Id.* at 13 (citing Iwata, Figs. 4, 6, ¶ 91). However, the Examiner presents no persuasive evidence that Iwata teaches the disputed limitations of claim 16, discussed *supra*. In particular, there is no showing that Iwata teaches “according to the

licensable component without paying a license fee.” Therefore, we do not sustain the rejection of claims 20–22 over Houg, Hofricter, Spit, and Iwata.

In the rejection of independent claims 24–27, the Examiner finds Houg discloses wherein the indication that the AVD has not been vended is established at least in part by determining that a user input retail mode key signal has been received indicating the retail demonstration mode responsive to a prompt presented on the display. Non-Final Act. 10 (citing Houg, Figs. 6, 7, ¶ 107). The Examiner additionally finds:

the claimed feature of “wherein the indication that the AVD has not been vended is established at least in part by determining that audio received by the AVD indicates that multiple sources of audio are playing the same audio as each other [referring to claim 24] or wherein the indication that the AVD has not been vended is established at least in part by determining that other CE devices similar to the AVD are in an immediate network vicinity to the AVD [referring to claim 25] or wherein the indication that the AVD has not been vended is established at least in part by determining that a wireless signal associated with a retail outlet is detected [referring to claim 26] “ is old and well known in the field of art and thus is no more than the simple substitution of one known element for another or the mere application of a known technique to a piece of prior art ready for improvement. Ex parte Smith, 83 USPQ2d 1509 (Bd. Pat. App. & Int).

Examiner further notes that a wherein clause that merely states the result of the limitations in the claim adds nothing to the patentability or substance of the claim. (Texas Instruments Inc. v. International Trade Commission 26, USPQ2d 1010 (Fed. Cir. 1993); Griffin v. Bertina, 62 USPQ2d 1431 (Fed. Cir. 2002); Amazon.com Inc. v. Barnesandnoble.com Inc., 57 USPQ2d 1747 (CAFC 2001).

*Id.* at 10.

Appellant argues the Examiner’s findings that the identified features of claims 24–27 are “old and well known” carries no weight as it is an

allegation lacking any evidentiary support. App. Br. 16. Appellant argues the wherein clause in these claims “is not a mere statement of the results of limitations, but an amplification of how those limitations are effected.” *Id.* According to Appellant, “[t]he examiner for the first time now clarifies he is relying on an (unstated) theory of official notice. Suspecting this may have been the case previously, Applicant has twice previously requested a prior art showing of the allegedly well known facts under MPEP §2144.03, without response, implying concession that the allegedly well known facts in fact cannot be officially noticed away.” *Id.* at 17. Appellant argues that the Examiner does not address claim 27. *Id.* at 19.

In the Answer, the Examiner reiterates arguments presented in the Non-Final Action and that “[c]laim 27 has been rejected in parallel with claim 16.” Ans. 4–5. In the Reply Brief, Appellant reiterates arguments presented in the Appeal Brief, including that claim 27 is not addressed by the Examiner. Reply Br. 6.

We are persuaded by Appellant’s arguments because, on the record before us, the Examiner presents insufficient evidence that Houg, and the other cited references teach the limitations of claims 24–27. In particular, there is no basis for the Examiner’s reliance on “old and well known” and the “wherein” limitations should be considered. Moreover, regarding claim 27, we find insufficient basis to support the Examiner’s assertion that this claim “has been rejected in parallel with claim 16,” and, as discussed *supra*, we do not sustain the rejection of claim 16

In view of the above, we do not sustain the rejection of claims 24–27.

#### DECISION

Appeal 2018-001724  
Application 14/015,409

We reverse the Examiner's decision rejecting claims 16–22 and 24–27 under 35 U.S.C. § 101.

We reverse the Examiner's decision rejecting claims 16–22 and 24–27 under 35 U.S.C. § 103(a).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv). *See* 37 C.F.R. § 41.50(f).

REVERSED