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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* MURALI VADDAGIRI

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Appeal 2014-006066  
Application 12/644,060  
Technology Center 2100

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Before ST. JOHN COURTENAY III, KRISTEN L. DROESCH, and  
LINZY T. McCARTNEY *Administrative Patent Judges*.

COURTENAY, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

This is an appeal under 35 U.S.C. § 134(a) from the Examiner's Final Rejection of claims 1–11, 13, 14, and 17–20, which are all the claims pending in this application. Claims 12, 15, and 16 are canceled. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

*Invention*

The invention on appeal relates to a method and apparatus for operating systems where instructions “intercept messages requesting use of System Services, correlate parameters from the messages with [a] table, and

issue an error message signifying denial to a requesting entity if the parameters do not match an entry in the table.” (Abstract).

*Representative Claim*

1. A method performed in a computer for protecting system services, said method comprising:

providing a user space and a kernel space;

providing a kernel in said kernel space;

**[L1]** *providing a table in the kernel, said table including a first column in which system services are recorded and a second column adjoining said first column in which user defined policies associated with said system services are recorded;*

receiving, in said kernel, a message, from an entity, to access one of said system services;

**[L2]** *examining said message to determine predefined parameters;*

correlating the predefined parameters with entries in said table wherein an entry including one of the system services and a corresponding one of said polices; and

issuing to the entity a return message based on results of said correlation **[L3]** *wherein process steps including receiving, examining, and correlating used to generate said results for all messages requesting access to said system services are executed in the kernel.*

(Bracketed matter and emphasis added with respect to contested limitations L1–L3).

*Rejections*

A. Claims 1, 2, 4, 6–11, 13, and 17–19 are rejected as being obvious under 35 U.S.C. § 103(a) over the combined teachings and suggestions of Provos (Niels Provos, *Improving Host Security with System Call Policies*, in Proceedings of the 12th USENIX Security Symposium 257–71

(2003)), in view of *Ebata et al.* (US 2004/0064541 A1; pub Apr. 1, 2004) (“*Ebata*”).

B. Claims 3 and 20 are rejected as being obvious under 35 U.S.C. § 103(a) over the combined teachings and suggestions of *Provos, Ebata, and Moriki et al.* (US 2006/0064523 A1; pub Mar. 23, 2006) (“*Moriki*”).

C. Claims 5 and 14 are rejected as being obvious under 35 U.S.C. § 103(a) over the combined teachings and suggestions of *Provos, Ebata, and Appavoo et al.* (US 2007/0061372 A1; pub Mar. 15, 2007) (“*Appavoo*”).

### ANALYSIS

We have considered all of Appellant’s arguments and any evidence presented. We disagree with Appellant’s arguments, and we adopt as our own: (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken, and (2) the reasons and rebuttals set forth in the Answer in response to Appellant’s arguments. (Ans. 15–24). However, we highlight and address specific findings and arguments for emphasis in our analysis below.

#### *Combinability under 35 U.S.C. § 103(a)*

As a threshold matter, we decide the question of whether the Examiner erred by improperly combining the cited references under 35 U.S.C. § 103. Here, Appellant raises four principal arguments:

First, Appellant alleges the rejection of claim 1 “rel[ies] on ‘design choice’ as basis or ground for [the] obviousness rejection,” and contends “the Examiner did not provide any argument or line of reasoning why the table structured and populated as recited in Claim 1 is an obvious matter of design choice.” (App. Br. 20).

However, Appellant's contention fails to address the Examiner's reasoning to combine the references under § 103. (*See* Final Act. 5) (“[t]he combination allows for the efficient display and use of data in a tabular format”). Therefore, we do not find Appellant's first argument persuasive.

Second, Appellant contends the Provos reference “teaches away” from the “wherein” clause of limitation L3:

In discouraging a complete implementation at the kernel level, Provos wrote “On the other hand, an implementation completely at the kernel-level is likely to be fast but less portable and also causes a significant increase in the complexity of the operating system (see Provos, section 4 Design, page 259, and paragraph 2) . . . . Applicant contends that these disclosures are evidence of “teaching away” because they discourage complete implementation in the kernel.

(App. Br. 24).

However, claim 1, considered as a whole, is not limited to a kernel-only approach. Rather, limitation L3 merely limits the “receiving, examining, and correlating” steps to being “executed in the kernel.” Although Provos may discourage a kernel-only approach, the reference ultimately utilizes “a hybrid approach to implement a small part of the system at the kernel-level,” while implementing other portions in user space. (Provos 259). Regarding the hybrid approach of Provos, the Examiner finds the “receiving, examining, and correlating” steps are implemented at the kernel level. (*See* Final Act. 4 relying on Provos 262–265, 258, 259). The Examiner further finds Provos, “page 259, section 4, paragraphs 1 and 2, discusses a system entirely kernel based.” (Final Act. 4).

Our reviewing court guides that the “mere disclosure of alternative designs does not teach away.” *In re Mouttet*, 686 F.3d 1322, 1334 (Fed. Cir. 2012) (citations omitted). This reasoning is applicable here. Because

Provos (259) expressly describes “us[ing] existing interception mechanisms to create an implementation completely in user space, implement the system entirely at the kernel-level, or choose a hybrid of both, we do not find Appellant’s “teaching away” argument persuasive.

Third, Appellant contends the combination “is improper because the subject matter and the problem of the references are different.” (App. Br. 25). “Provos relates to host security using system call interception and policy decision . . . . The structure of the policy database is not disclosed. In contrast, Ebata relates to routing messages in a network system.” (*Id.*)

The Examiner disagrees, explaining “Ebata was only provided to show that data may be structured in columns.” (Ans. 20).

To the extent Appellant is contending Provos and Ebata are non-analogous art, we note it is not sufficient to merely allege that the references are different. The question of whether a prior art reference is “analogous” turns on a two-prong test: “(1) whether the art is from the same field of endeavor, regardless of the problem addressed and, (2) if the reference is not within the field of the inventor’s endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved.” *In re Klein*, 647 F.3d 1343, 1348 (Fed. Cir. 2011).

Assuming *arguendo* that Provos and Ebata are not within the same field of endeavor, Appellant fails to provide sufficient argument or evidence explaining why structuring policy data into columns would not be a reasonably pertinent solution to the problem of storing system call policies.

Moreover, our reviewing court guides it is *irrelevant* that the prior art and the present invention may have *different purposes*. See *Nat’l Steel Car, Ltd. v. Canadian Pac. Ry., Ltd.*, 357 F.3d 1319, 1339 (Fed. Cir. 2004). It is

sufficient that references suggest doing what Appellant claims, although Appellant's particular purpose was different from that of the references. *In re Heck*, 699 F.2d 1331, 1333 (Fed. Cir. 1983) (citing *In re Gershon*, 372 F.2d 535, 539 (CCPA 1967)). "Obviousness is not to be determined on the basis of purpose alone." *In re Graf*, 343 F.2d 774 (CCPA 1965).

This reasoning is applicable here regarding Appellant's third argument, which we find unpersuasive. (*See* App. Br. 25).

Lastly, Appellant advances the following argument regarding secondary considerations (i.e., long-felt but unmet need):

[T]he process steps [of the claimed invention] are novel and the enhanced system security is a benefit to users. Therefore, the novel process steps and benefits are indicia of non obviousness . . . . There are no disclosures in Provos or Ebata on fixing this admitted problem (i.e., reduced security in out of kernel implementations). Applicant's solution is placing the system, covered in the appealed claims, in the kernel. *The solution to the problem is evidence of non obviousness. The problem of hacking computer systems is well known, documented, and troublesome. Therefore, any invention, such as the one claimed in this document, that improves security is worthy of protection.*

(App. Br. 26, 27). (Emphasis added).

Without evidence in support, we decline Appellant's invitation to speculate as to whether or not one of ordinary skill in the art would expect enhanced security as a result of an in-kernel implementation.<sup>1</sup> Moreover, as we explained above, although Provos teaches a hybrid in-kernel and out-of-

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<sup>1</sup> *See Tex. Instruments v. Int'l Trade Comm'n*, 988 F.2d 1165, 1178 (Fed. Cir. 1993) ("[L]ong-felt need is analyzed as of the date of an articulated identified problem and evidence of efforts to solve that problem."). *In re de Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984) ("It is well settled that unexpected results must be established by factual evidence. Mere argument or conclusory statements in the specification does not suffice.").

kernel system, the features Provos chooses to implement inside the kernel are the essentially the same features the claimed invention implements inside the kernel. It is not necessary under § 103 for the prior art to also suggest the combination achieves the *same advantage or result* discovered by Appellant. *See In re Kahn*, 441 F.3d 977, 987 (Fed. Cir. 2006).

To the extent Appellant additionally advances an argument alleging reliance by the Examiner on impermissible hindsight (*see* App. Br. 26 ¶2), Appellant has not provided any objective evidence of secondary considerations, which our reviewing court guides “operates as a beneficial check on hindsight.” *Cheese Systems, Inc. v. Tetra Pak Cheese and Powder Systems, Inc.*, 725 F.3d 1341, 1352 (Fed. Cir. 2013). Nor has Appellant provided any evidence demonstrating the Examiner’s proffered combination would have been “uniquely challenging or difficult for one of ordinary skill in the art,” *Leapfrog Enters., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1162 (Fed. Cir. 2007).

Accordingly, for at least the aforementioned reasons, and by a preponderance of the evidence, we are not persuaded the Examiner erred by improperly combining the references under § 103.

*Rejection A of Independent Claim 1 under § 103*

*Contested Limitation L1 of Claim 1*

**Issue**: Did the Examiner err in finding the combination of Provos and Ebata teaches or suggests contested L1 limitation: “providing a table in the kernel, said table including a first column in which system services are recorded and a second column adjoining said first column in which user

defined policies associated with said system services are recorded,” within the meaning of claim 1? <sup>2</sup>

In rejecting claim 1 over Provos and Ebata, the Examiner concluded it would have been obvious to store Provos’s system services and associated user defined policies in a multi-column table, such as the table disclosed in Ebata. (Final Act. 5).

Appellant urges, repeatedly, that it was improper for the Examiner “to partition[] or break[] up the recitation [of the table], for purposes of examination.” (App. Br. 18); (*see also id.* at 19, 32, 35, 37, 40, 43, and 45–49).<sup>3</sup> Appellant does not provide any authority in support of this contention. Nevertheless, Appellant maintains “[b]reaking-up the recitation, as the Examiner did, destroys the functionality of the element within the claim.” (*Id.* at 18).

The Examiner notes “Provos discloses a policy table containing specific data,” (Ans. 15 (citing Provos 262 and 267)), and finds “providing a specific recitation of multiple columns in [a] table (as seen in Ebata) would [not] destroy the table as seen in Provos,” because “Ebata provides a structured way (in columns) of storing the data described in the table of Provos.” (*Id.* at 16).

On this record, we are not persuaded the Examiner erred. We find an artisan possessing common sense would have known that tables have rows

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<sup>2</sup> We interpret the contested claim limitations according to the broadest reasonable interpretation consistent with the Specification. *See In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

<sup>3</sup> While many of these pages are directed to different claims, Appellant’s argument is similar for each claim (i.e., the Examiner cannot separate data from the “table” and “columns” in which it is stored).

and columns, and Ebata explicitly teaches a table of two or more columns used for security policies. (Ebata ¶ 75, Fig. 16, depicting host policy table).

Therefore, we find Appellant’s arguments unavailing regarding contested limitation L1, for essentially the same reasons articulated by the Examiner in the Answer, and for the reasons discussed above. Accordingly, Appellant has not persuaded us the Examiner erred in finding the combination of Provos and Ebata teaches or suggests contested limitation L1.

*Contested Limitation L2 of Claim 1*

**Issue:** Did the Examiner err in finding the combination of Provos and Ebata teaches or suggests contested limitation L2: “examining said message to determine predefined parameters,” within the meaning of claim 1?

In finding Provos teaches limitation L2, the Examiner mapped the claimed “message” to an application’s request for a policy decision, as shown in Figure 3 of Provos. (Final Act. 4). The Examiner then found the message is “examined” when “the kernel consults a policy database to check if the system call should be denied or permitted.” (*Id.*) (citing Provos 262).

Appellant points to the next sentence in Provos, which describes, “[a]t this point policy decisions are made without inspecting any of the system call arguments.” (App. Br. 21) (citing Provos 262). “Stated another way, Provos does not examine system calls (i.e. messages) to detect *system call augment* for decision [*sic.*] made in the kernel.” (App. Br. 22). (Emphasis added).

In response, the Examiner interprets the claim term “predefined parameters” as not being limited to the arguments of a system call: “[t]he system call is not exclusively arguments, for instance the system call would

specify to what service the system call is directed” and the identity of the user running the code that made the system call. (Ans. 18).

The Examiner’s broad but reasonable construction of the claim term “predefined parameters” is consistent with Appellant’s Specification. (*See, e.g.,* Spec. ¶ 7 (“the System Call Handler intercepts, and *examines* the credentials to determine *the identity of the process* or application program which invoked the System Service”) (Emphasis added); *id.* at ¶ 30 (“[t]he decision can be implemented by comparing *the identity (id) of the requested System Service* extracted from the request message with entries in the database”) (Emphasis added)). Therefore, we are not persuaded the Examiner’s interpretation of limitation L2 is overly broad or unreasonable, in light of Appellant’s Specification (¶ 7). *See* n.8, *infra*.

In the Reply Brief (5), Appellant further urges: “if the examining recitation is construed to exclude examination of the attributes and/or the system call augments, Claim 1 could be construed as useless,”<sup>4</sup> because the “correlating” and “issuing” steps “could not be executed if examination of system call augments was not included in the examining recitation.”

Appellant’s argument is not persuasive. The Examiner finds Provos teaches “correlating” the identity of the system call with an in-kernel database “to check if the system call should be denied or permitted; [Provos] page 264, column 1, paragraph 3,” and then returns the result of the correlation back to the application. (*See* Final Act. 4). *See* Provos, 264, ¶ 3: *e.g.*, regarding policies for system calls, Provos describes: “It is possible to

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<sup>4</sup> The Examiner’s broad but reasonable construction does not *exclude* the system call arguments, but rather, *includes* things other than the system call arguments as being within the scope of the claim.

make policies more flexible by using predicates. Policy statements are only evaluated if their predicate matches,” for example, “execution of a shell could be predicated so that it applies only to non-root users.”

The Examiner’s findings regarding limitation L2 are supported by a preponderance of the evidence. Accordingly, we are not persuaded the Examiner erred in finding Provos teaches or suggests contested limitation L2.

*Contested Limitation L3 of Claim 1*

**Issue:** Under § 103, did the Examiner err in finding the combination of Provos and Ebata teaches or suggests contested limitation L3: “wherein process steps including receiving, examining, and correlating used to generate said results for all messages requesting access to said system services are executed in the kernel,” within the meaning of claim 1?

Appellant contends:

[T]he alleged disclosure of a system entirely kernel base (on which the Examiner relied) is too nebulous and unclear to meet the recitation of the wherein limitation clause. Stated another way, the mere mention of an entirely kernel base system is not sufficient to meet the recitation of the wherein limitation recitation of Claim 1 because the implementation may not include or require all of the steps recited in Claim 1.

(App. Br. 22).

However, the Examiner did not rely on the “mere mention” of an entirely kernel based system. As the Examiner explains:

[T]he citation of page 262, section 5, paragraph 3[] specifically states the kernel consults the in-kernel policy table to decide whether or not to allow the system call. This section was relied on for the examining and correlating steps and shows the kernel specifically performing these steps. Also of note is that as seen in the rejection of the receiving step (page 263, figure 3) that the kernel receives an indication of system call. Therefore the steps of receiving, examining, and correlating are indeed executed in the kernel as seen in Provos.

(Ans. 19).

Given the Examiner's clear mapping, we find Appellant's allegation of Provos being "too nebulous and unclear to meet the recitation of the wherein limitation clause" is without merit. (App. Br. 22). Therefore, we find Provos teaches or at least suggests contested limitation L3.

For at least the aforementioned reasons, on this record, we find a preponderance of the evidence supports the Examiner's underlying factual findings and ultimate legal conclusion of obviousness regarding independent claim 1. Because Appellant has not persuaded us the Examiner erred, we sustain Rejection A of claim 1.

*Rejection A of Dependent Claim 2 under § 103*

Claim 2 recites: "The method of Claim 1 including logging in memory information associated with said message and said results of said correlation."

Appellant contends the claimed logging step "is performed for *all* messages," and alleges, "Provos only records information for a system call that *matches* [the] selected policy statement." (App. Br. 27–28) (Emphasis added).

However, claim 1 is silent regarding a logging step that "is performed for *all* messages." (*Id.*). The antecedent basis for "said message" (claim 2)

is “receiving in said kernel, *a message*,” as recited in claim 1. Therefore, claim 1 (from which claim 2 depends) merely requires *one* (or more) messages.<sup>5</sup> Appellant does not argue a definition in the Specification or provide rebuttal evidence in the record that would preclude the Examiner’s reading of claim 2. However, even if Appellant’s construction was applied, Appellant’s assertion regarding Provos is incorrect. The Examiner finds Provos does not merely log the *matched* system calls, rather at “page 262, column 1, paragraph 2, [Provos] discloses logging the attempt when a system call is denied.” (*See* Ans. 20). *See* Provos at 262 “the system call is denied and an error code returned to the application. The errant attempt is *logged* by the operating system.” (Emphasis added).

Therefore, on this record, we find a preponderance of the evidence supports the Examiner’s underlying factual findings and ultimate legal conclusion of obviousness regarding claim 2. Because Appellant has not persuaded us the Examiner erred, we sustain Rejection A of dependent claim 2.

*Rejection A of Dependent Claim 6 under § 103*

Claim 6 recites: “The method of Claim 1 wherein examination of said message includes extracting indicia that identify said system service for which access is requested; and *extracting attributes associated with said*

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<sup>5</sup> *See, e.g., Free Motion Fitness, Inc. v. Cybex Int’l, Inc.*, 423 F.3d 1343, 1350 (Fed. Cir. 2005) (A singular indefinite article “a” or “an” with a claim feature may support an interpretation of “one or more” of those claim features); *SanDisk Corp. v. Kingston Technology Co., Inc.*, 695 F.3d 1348, 1360 (Fed. Cir. 2012).

*extracted indicia.*” (Emphasis added with respect to the contested limitation).

The Final Office Action cites Provos as teaching the contested limitation, by disclosing “the system call and its arguments are translated.” (Final Act. 6, quoting Provos 260). Appellant contends the Examiner’s finding is erroneous because “translating and extracting are different acts or steps and one does not suggest the other.” (App. Br. 29). However, according to the Examiner, the process of “translating” necessarily “include[es] extracting since data has to be gleaned from the system call in order to translate the system call as well as the arguments associated with the system call.” (Ans. 21).

In the Reply Brief (7), Appellant contends the Examiner “interpret[s] the reference to include that which is gleaned from Appellant’s disclosure [which] appears to be improper.”

We have addressed Appellant’s allegation of hindsight, *supra*. Appellant’s argument appears to refer to the Examiner’s statement that “[t]he process of translating was *interpreted* as including extracting.” (Ans. 21) (Emphasis added).

However, we find the Examiner merely used the word “interpreted” to clarify her finding of extraction being *inherent to* the process of translating, and therefore the translation of system calls in Provos (260) at least suggests the claimed extracting. Regarding inherency under § 103, the evidence cited by the Examiner (Final Act. 6, Ans. 21) is sufficient to show “the natural result flowing from the operation as taught would result in the performance of the questioned function.” *PAR Pharm., Inc. v TWI Pharms., Inc.*, 773 F.3d 1186, 1194–95 (Fed. Cir. 2014)(internal citation omitted).

For at least these reasons, Appellant has not persuaded us the Examiner erred. Therefore, we sustain the Examiner's Rejection A of claim 6.

*Rejection A of Independent Claim 11 under § 103*<sup>6</sup>

Appellant contests an additional temporal limitation recited in claim 11 that was not recited in claim 1.

Claim 11 recites an [a]pparatus . . . wherein said first table is provided *when a product is available.*" (Emphasis added). According to Appellant, the foregoing limitation "should be interpreted as 'when a product is *first* available,'" because "Figure 2, applicant's specification, shows the main kernel and first table," and because pages 10–11 of the specification provides: "[t]he Kernel Extension 1 and associated system services 508 could be added after the main kernel 504 and system services 506 are provided in a product." (App. Br. 34) (Emphasis added).

We decline to read the argued but unclaimed term "first" into claim 11.<sup>7</sup> The specification (10–11) merely suggests "associated system services 508 *could be added* after the main kernel 504." (Emphasis added). Appellant could have amended claim 11 to narrow the claim scope to be

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<sup>6</sup> To the extent Appellant raises the same arguments for independent claim 11 as were previously advanced regarding the rejection of independent claim 1 (App. Br. 31–34), we do not find these arguments persuasive for the same reasons as discussed above regarding rejection A of claim 1.

<sup>7</sup> Our reviewing court guides: "it is important not to import into a claim limitations that are not part of the claim. For example, a particular embodiment appearing in the written description may not be read into a claim when the claim language is broader than the embodiment." *Superguide Corp. v. DirecTV Enterprises, Inc.*, 358 F.3d 870, 875 (Fed. Cir. 2004).

commensurate with the argued meaning. (App. Br. 34). Instead, we broadly but reasonably interpret the temporal limitation “when” recited in the “wherein clause” of *apparatus* claim 11 as not being limited to providing “said first table” when a product is *first* available, as urged by Appellant. (App. Br. 34).<sup>8 9</sup>

With this construction in mind, we turn to the rejection. The Examiner cites to page 263 of Provos, explaining “Systrace is a kernel extension added to an already available computer system.” (Final Act. 8).

A preponderance of the evidence (*id.*) supports the Examiner’s finding that Provos teaches, or at least suggests, the contested limitation of claim 11. Because Appellant has not persuaded us the Examiner erred, we sustain Rejection A of claim 11.

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<sup>8</sup> Because “applicants may amend claims to narrow their scope, a broad construction during prosecution creates no unfairness to the applicant or patentee.” *In re ICON Health and Fitness, Inc.*, 496 F.3d 1374, 1379 (Fed. Cir. 2007) (citation omitted).

<sup>9</sup> As a further matter of claim construction of the contested *temporal* “wherein clause” limitation, MPEP §2111.04 guides:

Claim scope is not limited by claim language that suggests or makes optional but does not require steps to be performed, *or by claim language that does not limit a claim to a particular structure*. However, examples of claim language, although not exhaustive, that may raise a question as to the limiting effect of the language in a claim are:

- (A) "adapted to" or "adapted for" clauses;
- (B) "wherein" clauses; and
- (C) "whereby" clauses.

MPEP § 2111.04, 9th Ed., Nov. 2015 (emphasis added).

*Rejection A of Independent Claim 18 under § 103*

Appellant does not advance separate, substantive arguments and supporting evidence demonstrating error regarding the Examiner's Rejection A of independent claim 18. Instead, Appellant merely restates the purported deficiencies in the references regarding the database comprising a table with columns, as previously raised regarding Rejection A of independent claims 1 and 11. However, for the reasons discussed above, we find no deficiencies regarding the contested aspects of Rejection A for claims 1 and 11. Therefore, we sustain the Examiner's rejection A of independent claim 18 for the same reasons discussed above regarding independent claims 1 and 11.

*Rejection A of Dependent Claims 4, 7–10, 13, 17, and 19 under § 103*

Appellant does not advance separate, substantive arguments and/or supporting evidence demonstrating error regarding the Examiner's rejection A of claims 4, 7, 9, 10, and 13. Instead, Appellant merely restates the purported deficiencies in the references regarding the database comprising a table with columns, as previously raised regarding the rejection of independent claims 1 and 11. However, for the reasons discussed above, we find no deficiencies regarding obviousness Rejection A, and we adopt the Examiner's findings.

Regarding claim 17, Appellant merely recites the claim language, restates the Examiner's findings, and concludes “[n]one of the disclosures appears relevant to the recitation of Claim 17.” (App. Br. 39). However,

mere attorney argument and conclusory statements do not demonstrate error in the Examiner's rejection.<sup>10</sup>

Appellant does not advance separate substantive arguments and/or supporting evidence demonstrating error regarding the Examiner's rejection A of claims 8, 10, and 19 which depend from respective claims 7, 1, and 18. Arguments not made are considered waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).

For these reasons, we sustain the Examiner's Rejection A of dependent claims 4, 7–10, 13, 17, and 19.

*Rejection B of Claims 3 and 20 under § 103*

Claim 3 recites: “The method of Claim 2 further including *notifying an administrator* if a return message denies access to said requested system service.” (Emphasis added).

Regarding the tertiary Moriki reference, Appellant acknowledges that “faults in I/O devices are logged and the log is *reported to an administrator [sic.]*,” but contends “[w]hat is reported is different from the recitation in Claim 3 relating to notifying for denying access to requested system service.” (App. Br. 46) (Emphasis added).<sup>11</sup>

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<sup>10</sup> *See In re Lovin*, 652 F.3d 1349, 1357 (Fed. Cir. 2011) (“[W]e hold that the Board reasonably interpreted Rule 41.37 to require more substantive arguments in an appeal brief than a mere recitation of the claim elements and a naked assertion that the corresponding elements were not found in the prior art.”).

<sup>11</sup> To the extent claim 3 is directed to conveying a message or meaning to a human reader (e.g., “notifying an administrator”), the MPEP guides: “where the claim as a whole is directed [to] conveying a message or meaning to a human reader independent of the intended computer system, and/or the computer-readable medium merely serves as a support for information or

This argument is not persuasive. One cannot show nonobviousness by attacking references individually when the rejection is based on a combination of references. *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). As the Examiner explains, “Provos was provided as disclosing notifying an entity if access is denied for a system call,” whereas “Moriki was provided as disclosing notifying an administrator.” (Ans. 24).

Appellant does not advance separate, substantive arguments and/or supporting evidence demonstrating error regarding the Examiner’s rejection B of claim 20. Instead, Appellant merely restates the purported deficiencies in the references regarding the contents of the administrator’s notification, (App. Br. 46–47), as previously raised regarding the rejection of claim 3. However, for the reasons discussed above, we find no deficiencies regarding the rejection of claim 3. Because Appellant has not persuaded us the Examiner erred, we sustain Rejection B of claims 3 and 20.

*Rejection C of Claims 5 and 14 under § 103*

Appellant does not advance separate, substantive arguments and/or supporting evidence demonstrating error regarding the Examiner’s Rejection C of claims 5 and 14. Instead, Appellant merely restates the purported deficiencies in the references regarding the database comprising a table with columns, as previously raised regarding Rejection A of independent claims 1 and 11. Arguments not made are considered waived. *See* 37 C.F.R. § 41.37(c)(1)(iv). Therefore, we also sustain the Examiner’s Rejection C of

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data, no functional relationship exists.” MPEP § 2111.05 (III.) (9th Ed., Nov. 2015).

claims 5 and 14, for the same reasons discussed above regarding Rejection A of independent claims 1 and 11.

### *Reply Brief*

To the extent Appellant advances new arguments in the Reply Brief not in response to a shift in the Examiner's position in the Answer, we note arguments raised in a Reply Brief that were not raised in the Appeal Brief or are not responsive to arguments raised in the Examiner's Answer will not be considered except for good cause. *See* 37 C.F.R. § 41.41(b)(2).

### *Conclusion*<sup>12</sup>

For at least these reasons, on this record, we are not persuaded the Examiner erred. We find a preponderance of the evidence supports the

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<sup>12</sup> Independent claim 18 is directed to: "A program product for use in a computer comprising: a *tangible* computer readable medium; . . . ." Appellant's Specification (¶ 19) describes: "A computer readable *signal* medium *may include a propagated data signal* with computer readable program code embodied therein, for example, in baseband or as part of a *carrier wave*. Such a *propagated signal* may take any of a variety of forms, including, *but not limited to, electro-magnetic, optical, or any suitable combination thereof.*" (Emphasis added).

However, "*tangible*" (claim 18) does not have the same limiting scope as "non-transitory," so as to exclude non-statutory propagating signals.

In the event of further prosecution, we direct the Examiner's attention to a precedential Board decision to ensure the "tangible computer readable medium" recited in independent claim 18 (and associated dependent claims) is directed to statutory subject matter under 35 U.S.C. § 101. *See Ex parte Mewherter*, 107 USPQ2d 1857 (PTAB 2013) (precedential) (holding recited machine-readable storage medium ineligible under § 101 since it encompasses transitory media); *see also* David J. Kappos, *Subject Matter Eligibility of Computer Readable Media*, 1351 Off. Gaz. Pat. Office 212 (Feb. 23, 2010).

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Examiner's underlying factual findings and ultimate legal conclusion of obviousness for all claims on appeal.

#### DECISION

We affirm the Examiner's decision rejecting claims 1–11, 13, 14, and 17–20 under § 103.

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

AFFIRMED

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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.