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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte GARY D. CUDAK, CHRISTOPHER J. HARDEE, RANDALL C. HUMES, and ADAM ROBERTS

Appeal 2015-004116
Application 13/596,022[1]
Technology Center 3700

Before NINA L. MEDLOCK, BRUCE T. WIEDER, and KENNETH G. SCHOPFER, *Administrative Patent Judges*.

SCHOPFER, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 from the rejection of claims 1–21. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

BACKGROUND

According to Appellants, "[t]he present invention relates to multiplayer gaming and more particularly to resource consumption in multiplayer gaming." Spec. ¶ 2.

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[1] According to Appellants, the real party in interest is International Business Machines Corporation. Appeal Br. 2.

CLAIMS

Claims 1–21 are on appeal. Claim 1 is illustrative of the appealed claims and recites:

> 1. A computer-implemented method for dynamic quality of service (QoS) management for multi-player computer gaming, the method comprising:
>
> monitoring a multi-player computer game hos[t]ed by a game server;
>
> detecting a game moment for a game player in the multi-player game;
>
> determining a degree of sensitivity for the game moment; and,
>
> enhancing access of the game player to a computing resource in response to determining the game moment to be highly sensitive.

Appeal Br. 13.

REJECTIONS

1. The Examiner rejects claims 15–21 under 35 U.S.C. § 101 as directed to non-statutory subject matter.
2. The Examiner rejects claims 1–21 under 35 U.S.C. § 102(b) as anticipated by Anschutz.[2]
3. The Examiner rejects claims 3, 4, 10, 11, 17, and 18 under 35 U.S.C. § 103(a) as unpatentable over Anschutz.

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[2] Anschutz et al., US 2004/0230695 A1, pub. Nov. 18, 2004.

DISCUSSION

Rejection under 35 U.S.C. § 101

The Examiner rejects claims 15–21 because "a computer program product is non-statutory subject matter. Computer program products must be positively clamed [sic] to reside on a non-transitory computer readable medium." Final Act. 2.

Appellants argue that the Specification definitively states that a computer readable storage medium, as claimed, is distinct from a computer readable signal medium such that computer readable storage medium does not include signals *per se*. Appeal Br. 4–9. However, we agree with the Examiner that the exemplary nature of the descriptions in the Specification does not provide a sufficiently clear exclusion of transitory media from the scope of the term "computer readable storage medium." *See* Ans. 2–3; *see also Ex parte Mewherter,* 107 USPQ2d 1857, 1862, 2013 WL 4477509 at *3 (PTAB 2013) (precedential). In this matter, we are also guided by our reviewing court which has stated "during patent prosecution when claims can be amended, ambiguities should be recognized, scope and breadth of language explored, and clarification imposed. . . . [T]his way . . . uncertainties of claim scope [can] be removed, as much as possible, during the administrative process." *In re Zletz*, 893 F.2d 319, 321-22 (Fed. Cir. 1989). Thus, if Appellants wish to limit the claims to more clearly exclude transitory media, the more appropriate procedure for doing so while prosecution is open is through an amendment to the claims.

For these reasons, we sustain the rejection of claims 15–21 under 35 U.S.C. § 101.

Art Rejections

With respect to each of the independent claims, the Examiner finds that Anschutz discloses each limitation of the claims. Final Act. 2–3. Appellants argue that the Examiner has not adequately shown how Anschutz discloses the limitation "enhancing access of the game player to a computing resource in response to determining the game moment to be highly sensitive." Appeal Br. 9–12.

We are persuaded by Appellants' arguments. In the rejection, the Examiner finds that Anschutz discloses detecting a degree of sensitivity for a game moment by determining higher priority game events (Anschutz ¶¶ 581–582) and enhancing access as claimed by giving higher priority events a lower reconciliation time. Final Act. 3. However, although Anschutz does disclose establishing the priority for a game event (¶ 582), Anschutz only discloses that reconciliation time is adjusted based on server capacity and load (¶ 579). *See* Appeal Br. 10. Thus, the Examiner's finding is not supported on the record before us.

In the Answer, the Examiner further explains that "enhancing access to a computer resource" is equivalent to Anschutz's teaching of using and setting multiple diffserve code-points related to treating higher priority events. Ans. 3–4. However, we find that the Examiner has not adequately explained how this meets the claim language at issue, particularly because, as noted by Appellants, Anschutz's use of multiple diffserve code-points relates to "the application" as a whole and not necessarily the access for a particular game player, as required by the claim. *See* Reply Br. 6–8.

For these reasons, we do not sustain the rejection of independent claims 1, 8, and 15 as anticipated by Anschutz. For the same reasons, we do not sustain the rejections of any of dependent claims 2–7, 9–14, and 16–21.

CONCLUSION

For the reasons set forth above, we AFFIRM the rejection of claims 15–21 as directed to non-statutory subject matter, and we REVERSE the rejections of claims 1–21 as anticipated or obvious.

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).

AFFIRMED-IN-PART