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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* NHUT NGUYEN, KONG POSH BHAT, and  
MARK TRAYER

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Appeal 2015-006781  
Application 12/728,849  
Technology Center 2400

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Before BRUCE R. WINSOR, MICHAEL J. STRAUSS, and  
JON M. JURGOVAN, *Administrative Patent Judges*.

STRAUSS, *Administrative Patent Judge*.

DECISION ON APPEAL

### STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's Final Rejection of claims 1–20. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

### THE INVENTION

The claims are directed to preventing server overload for broadcast protocols by adaptively applying prescribed response behavior profiles. Spec., Title. Claim 1, reproduced below with a disputed limitation emphasized in *italics*, is illustrative of the claimed subject matter:

1. A server comprising:  
a controller configured to:

select a desired response profile for a plurality of broadcast client devices from a plurality of response profiles, *the controller configured to select the desired response profile based upon one or more current resource conditions of the server*; and

prepare a broadcast message for broadcasting to the client devices, the broadcast message comprising a response control field identifying the desired response profile, the desired response profile defining when the client devices will send response messages to the server in response to the broadcast message.

### REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Marolia (“Marolia 2”)	US 2006/0010437 A1	Jan. 12, 2006
Marolia et al. (“Marolia”)	US 2007/0027971 A1	Feb. 1, 2007
Holeman, Sr. (“Holeman”)	US 7,400,615 B2	July 15, 2008

## REJECTION

The Examiner rejected claims 1–20 under 35 U.S.C. § 103(a) over the combination of Marolia, Marolia 2, and Holeman. Final Act. 4–11.

## ISSUE ON APPEAL

Based on Appellants' arguments in the Appeal Brief (App. Br. 12–27) and Reply Brief (Reply Br. 2–11), the issue presented on appeal is whether Marolia's response option providing user selection of if and when to accept an update in combination with Marolia 2's update distribution during an off-peak hour teaches or suggests the disputed limitation of claim 1.

## ANALYSIS

We have reviewed the Examiner's rejections in light of Appellants' arguments the Examiner has erred in rejecting independent claims 1, 9, and 17 under 35 U.S.C. § 103(a) over the combination of Marolia, Marolia 2, and Holeman. We agree with Appellants' conclusions as to this rejection of the claims.

The Examiner finds Marolia teaches selecting a response profile based upon current resources, e.g., estimated download time. Final Act. 4–5. The Examiner relies on Marolia 2's listening parameters enabling a mobile device to determine if a package broadcast by the server is to be stored or consumed for teaching a current resource condition of the server. Final Act. 5. Therefore, the Examiner finds, the combination of Marolia and Marolia 2 teaches or suggests the disputed limitation of claim 1. Final Act. 5–6. Appellants contend Marolia only provides for user selection of if and when

to install firmware updates but “contains no teaching or suggestion that the website or any server selects the desired response profile.” App. Br. 16.

We agree with Appellants. Although the user can select a desired profile, claim 1 requires the response profile be selected for a plurality of broadcast client devices and, therefore, is not a desired profile selected by Marolia’s user. Thus, Marolia fails to teach or suggest a controller configured to select the desired response profile based upon one or more current resource conditions as required by claim 1. Furthermore, we agree with Appellants Marolia 2 does not teach basing a selection upon one or more current resource condition of the *server*. App. Br. 17. Although the Examiner directs attention to Marolia 2’s disclosure of sending responses “during an **off-peak hour when the server resource is minimally utilized in order to reduce congestion**” (Ans. 3 paraphrasing Marolia 2 ¶ 30), the referenced consideration is with respect to a distribution of updates packages *to users*, not responses *from users* back to the server. Therefore, we agree with Appellants the Examiner erred in rejecting claim 1.

Because we agree with at least one of the arguments advanced by Appellants, we need not reach the merits of Appellants’ other arguments. Therefore, for the reasons discussed *supra*, we do not sustain the rejection of independent claim 1 under 35 U.S.C. § 103(a) over the combination of Marolia, Marolia 2, and Holeman and, for the same reason, we do not sustain the rejection of independent claims 9 and 17 which include substantially the same limitation, or the rejection of dependent claims 2–8, 10–16, and 18–20.

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DECISION

We reverse the Examiner's decision to reject claims 1–20.

REVERSED