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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* ERIK J. BURCKART, JAMES PATRICK GALVIN JR, and  
BRIAN L. PULITO

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Appeal 2015-007667  
Application 10/733,658  
Technology Center 2100

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Before CARL W. WHITEHEAD JR., ERIC S. FRAHM, and  
KAMRAN JIVANI, *Administrative Patent Judges*.

FRAHM, *Administrative Patent Judge*.

DECISION ON APPEAL

## STATEMENT OF THE CASE

### *Introduction*

Appellants appeal under 35 U.S.C. § 134(a) from a final rejection of claims 1, 3, 7, 9, 13, and 18. Claims 2, 4–6, 8, 10–12, and 14–17 have been canceled. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm-in-part.

### *Exemplary Claims*

Exemplary claims 1 and 7 under appeal, with emphases added, read as follows:

1. A method for policy driven, online meeting updates during a course of an electronic meeting, comprising:  
providing a meeting event to different groups of participants in the electronic meeting *in a sequence ordered by a relative priority assigned for each group upon a determination that a priority policy is available as a meeting policy, otherwise providing the meeting event to randomly selected different groups of participants in a staggered fashion.*

7. A machine readable storage device having stored thereon a computer program for conducting electronic meetings, said computer program comprising a routine set of instructions which when executed by a machine cause the machine to perform a method for policy driven, online meeting updates during a course of an electronic meeting, comprising:  
providing a meeting event to different groups of participants in the electronic meeting in a sequence ordered by a relative priority assigned for each group upon a determination that a priority policy is available as a meeting policy, otherwise providing the meeting event to randomly selected different groups of participants in a staggered fashion.

### *Examiner's Rejections*

(1) The Examiner rejected claims 7 and 9 under 35 U.S.C. § 101 as being directed to non-statutory subject matter. Final Act. 2; Ans. 2–3.

(2) The Examiner rejected claims 1, 3, 7, 9, 13, and 18 as being unpatentable under 35 U.S.C. § 103(a) over the combination of Viertl (US 2002/0080172 A1; published June 27, 2002) and Tarbotton (US 7,013,330 B1; issued Mar. 14, 2006 and filed Oct. 3, 2000). Final Act. 3–4; Ans. 3–4.

*Issues on Appeal*

Based on Appellants' arguments in the Appeal Brief (App. Br. 4–7) and the Reply Brief (Reply Br. 2–8), the following two issues are presented on appeal:

(1) Did the Examiner err in rejecting claims 7 and 9 under 35 U.S.C. § 101 as being directed to non-statutory subject matter because a computer readable storage medium cannot be a transitory signal?

(2) Did the Examiner err in rejecting claims 1, 3, 7, 9, 13, and 18 as being obvious because the combination of Viertl and Tarbotton fails to teach or suggest:

*providing a meeting event to different groups of participants in the electronic meeting in a sequence ordered by a relative priority assigned for each group upon a determination that a priority policy is available as a meeting policy, otherwise providing the meeting event to randomly selected different groups of participants in a staggered fashion*

(emphasis added), as recited in representative independent claim 1, and as similarly recited in independent claims 7 and 13?

ANALYSIS

We have reviewed the Examiner's rejections (Final Act. 2–4) in light of Appellants' contentions in the Appeal Brief (App. Br. 4–7) and Reply Brief (Reply Br. 2–8) that the Examiner has erred, and have considered the Examiner's response to Appellants' arguments in the Appeal Brief (Ans. 4–

7). We disagree with Appellants' conclusions as to claims 1, 7, and 13 and provide the following for emphasis.

*Rejection under 35 U.S.C. § 101*

We disagree with Appellants' conclusions that claims 7 and 9 are directed to statutory subject matter. We adopt as our own (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken (Final Act. 2; Ans. 2–3), and (2) the reasons set forth by the Examiner in the Examiner's Answer in response to the Appellants' Appeal Brief (Ans. 4–6).

Appellants contend (App. Br. 4; Reply Br. 2–4) claims 7 and 9 are statutory, because (i) “the claim term ‘device’ necessarily excludes signals” (App. Br. 4); and (ii) the dictionary definition of “device” includes “an object, machine, or piece of equipment that has been made for some special purpose” (*Id.* (see *Device Definition*, Meriam-Webster.com, <http://www.merriam-webster.com/dictionary/device> (last visited Jan. 26, 2015))), and cannot be a signal or other propagation medium. Appellants' contentions are not persuasive, because we agree with the Examiner that “[g]iven its broadest reasonable interpretation, machine readable storage encompasses both non-transitory and transitory (signals) embodiments” (Ans. 2). In addition, we emphasize the following.

First, Appellants' Appeal Brief points to Figures 1 and 2 for support of the machine readable storage recited in claim 7 (see App. Br. 2–3 (Summary of Claimed Subject Matter)). Notably, Appellants disclose Figure 2 is a process flowchart for a software program (note at Appeal Brief, page 3, Appellants state “the computer program performs,” indicating that claim 7 is directed solely to a computer program) for performing the method

recited in claim 7 (*see* Spec. ¶ 14). And, Figure 1 is a “conceptual illustration” of a system (*see* Spec. ¶ 13), and fails to show any “machine readable storage device.” By way of differentiation, Appellants do NOT refer to e-meeting server 101, shown in Figure 1, for support of the claimed “machine readable storage device” in claim 7, but DO refer to e-meeting server 101 for support of the server recited in claim 13 (*see* App. Br. 3).

Second, although the Specification describes statutory embodiments of software (*see* Spec. ¶ 25), a computer program product, computer program, or application (*see Id.* ¶¶ 26 and 27), we find that the Specification fails to define a *machine readable storage device*. Thus, the Specification does not limit machine readable storage device to only statutory embodiments, and claims 7 and 9 must be interpreted to cover both statutory and non-statutory types of media.

[T]hose of ordinary skill in the art would understand the claim term “machine-readable storage medium” would include signals *per se*. Further, where, as here, the broadest reasonable interpretations of all the claims each covers a signal *per se*, the claims must be rejected under 35 U.S.C. § 101 as covering non-statutory subject matter.

*See Ex Parte Mewherter*, 107 USPQ2d 1857, 1862 (BPAI 2013)  
(precedential in relevant part).

Third, we note that Appellants are not precluded from amending these claims to overcome this rejection. Nor are Appellants precluded from amending the Specification to specifically define “machine readable storage device” to include only statutory storage media. Guidance on this point is provided in U.S. Patent & Trademark Office, *Subject Matter Eligibility of Computer Readable Media*, 1351 Off. Gaz. Pat. Office 212 (Feb. 23, 2010) (“A claim drawn to such a computer readable medium that covers both

transitory and non-transitory embodiments may be amended to narrow the claim to cover only statutory embodiments to avoid a rejection under 35 U.S.C. § 101 by adding the limitation ‘non-transitory’ to the claim.”). *See also* U.S. Patent & Trademark Office, *Evaluating Subject Matter Eligibility Under 35 USC § 101* (August 2012 Update) (pages 11–14), available at [http://www.uspto.gov/patents/law/exam/101\\_training\\_aug2012.pdf](http://www.uspto.gov/patents/law/exam/101_training_aug2012.pdf) (noting that while the recitation “non-transitory” is a viable option for overcoming the presumption that those media encompass signals or carrier waves, merely indicating that such media are “physical” or tangible” will not overcome such presumption).

Fourth, and finally, we do not find the term “device” to be effectively narrower than the term “medium,” as far as limiting the claimed subject matter to a non-transitory element. For example, Google defines “device” as “a plan, scheme, or trick with a particular aim.”<sup>1</sup> Dictionary.com defines “device” as “a plan or scheme for effecting a purpose” or “an invention or contrivance.”<sup>2</sup> Further, a plan or invention serving a particular aim/purpose can be a computer program or software – just as Appellants define the invention of claims 7 and 9 in their own Specification as outline above.

Consequently, we find the Examiner did not err in rejecting independent claim 7, as well as claim 9 which depends therefrom, under 35 U.S.C. § 101, as being directed to non-statutory subject matter.<sup>3</sup>

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<sup>1</sup> [https://www.google.com/?gws\\_rd=ssl#q=device+definition](https://www.google.com/?gws_rd=ssl#q=device+definition), last accessed Dec. 10, 2016.

<sup>2</sup> <http://www.dictionary.com/browse/device>, last accessed Dec. 10, 2016.

<sup>3</sup> We do not look beyond the issue raised in the Appeal Brief that the Examiner improperly rejected claims 7 and 9 as failing to fall within a statutory category as non-transitory storage media/devices. However, upon

*Rejection under 35 U.S.C. § 103(a)*

The Examiner relies upon Tarbotton (col. 6, l. 52–col. 7, l. 2; *see* Ans. 4) as disclosing the limitation at issue in claims 1, 7, and 13, of (i) determining a priority policy is available as a policy; (ii) providing an update to different groups of participants in a sequence ordered by a relative priority assigned for each group; and (iii) if not priority policy is available, then providing the update to randomly selected different groups of participants in a staggered fashion.

However, Tarbotton merely discloses that if a priority is detected as being at a low level, then no download (i.e., update) is performed (col. 6, ll. 52–56); and if a priority is found to be equal to or higher to a set amount, then random selection is used to issue the download (i.e., update) (col. 6, ll. 56–58). In other words, a priority policy is always available, and therefore Tarbotton never discloses doing something (such as providing an event in random order as claimed) in response to a determination that NO priority policy exists.

In view of the foregoing, Appellants' arguments (App. Br. 7) that Tarbotton, and thus the combination of Viertl and Tarbotton, fails to teach or suggest, (i) selectively providing an event either in priority order or in a staggered order dependent upon a determination that a priority policy exists or does not exist; and/or (ii) providing a meeting event to different targets

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further prosecution, and in light of our discussion above, the Examiner may want to consider whether, despite nominally falling within a statutory category, all of the claims on appeal are nevertheless drawn to a patent-ineligible abstract idea, in view of the Supreme Court's decision in *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014).



based upon the priority policy; but if the priority policy does not exist, providing the event in a random order, are persuasive.

Accordingly, we do not sustain the Examiner's obviousness rejection of claims 1, 3, 7, 9, 13, and 18.

### CONCLUSIONS

(1) The Examiner did not err in rejecting claims 7 and 9 under 35 U.S.C. § 101 as being directed to non-statutory subject matter because a computer readable storage medium as broadly construed could include non-statutory matter.

(2) The Examiner erred in rejecting claims 1, 3, 7, 9, 13, and 18 as being obvious because Tarbotton, and thus the combination of Viertel and Tarbotton, fails to teach or suggest "providing a meeting event to different groups of participants in the electronic meeting *in a sequence ordered by a relative priority assigned for each group upon a determination that a priority policy is available as a meeting policy, otherwise providing the meeting event to randomly selected different groups of participants in a staggered fashion,*" (emphasis added) as recited in each of independent claims 1, 7, and 13.

### DECISION

(1) The Examiner's rejection of claims 7 and 9 under 35 U.S.C. § 101 as being directed to non-statutory subject matter is affirmed.

(2) The Examiner's obviousness rejection of claims 1, 3, 7, 9, 13, and 18 under 35 U.S.C. § 103(a) is reversed.

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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