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**Datasheet for the decision
of 14 November 2013**

Case Number: T 0816/09 - 3.5.01

Application Number: 05005267.9

Publication Number: 1574979

IPC: G06F17/60

Language of the proceedings: EN

Title of invention:

Enhancing virally-marketed facilities

Applicant:

Tagged, Inc.

Headword:

Viral marketing/TAGGED

Relevant legal provisions:

EPC 1973 Art. 56

Keyword:

Inventive step - no (obvious implementation of non-technical requirement)

Decisions cited:

T 0003/90, T 0641/00, T 1784/06

Catchword:



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Boards of Appeal
Chambres de recours**

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Case Number: T 0816/09 - 3.5.01

D E C I S I O N
of Technical Board of Appeal 3.5.01
of 14 November 2013

Appellant: Tagged, Inc.
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Representative: Dendorfer, Claus
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 3 December 2008
refusing European patent application No.
05005267.9 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman: S. Wibergh
Members: K. Bumés
P. Schmitz

Summary of Facts and Submissions

I. The appeal is against the decision of the examining division to refuse European patent application No. 05005267.9, entitled "Enhancing virally-marketed facilities", for lack of inventive step (Article 56 EPC 1973).

II. The examining division considered that the problem addressed was of a business nature, namely how to enhance the profit of a virally marketed business facility. The solution proposed was to measure the effectiveness of the viral marketing campaign by tracking the results (number of invitations, number of registrations) and to pursue only business options that increased the virality and profitability of the campaign.

No technical problem other than the implementation of the business model on a computer system appeared from the application. The implementation did not go beyond notorious technical functions associated with any business/administrative task on a computer system. Due to the paucity of technical definition, the examining division did not find it necessary to refer to any particular prior art document in support of this view.

III. The appellant filed an appeal and requested that the decision under appeal be set aside and a patent be granted based on a set of claims 1 to 15 filed on 21 May 2008, i.e. the set of claims underlying the examining division's decision.

(a) System claim 1 reads:

"1. A system for operating a virally marketed facility, comprising:
a processor;
a memory coupled to the processor;
a user interface coupled to the processor;
wherein the processor is to:
- measure virality of the facility based on a conversion rate and a propagation rate;
- determine potential options for increasing virality;
and
- execute potential options for increasing virality."

(b) Dependent system claim 2 reads:

"2. The system of claim 1, wherein:
the options for increasing virality include:
additional ideas related to the facility; and/or
using additional avenues of communication; and/or
providing additional commercial aspects of the facility; and/or providing rewards for customers enlisting additional customers."

(c) Independent apparatus claim 7 reads:

"7. An apparatus for operating a virally marketed facility, comprising:
- a facility manager coupled to the facility;
- a metric measurement module coupled to the facility manager and to the facility, wherein the metric measurement module measures a propagation rate and/or a conversion rate of the facility;
- a variation tester coupled to the metric measurement module and the facility manager; and
- a variation generator coupled to the facility manager and to the variation tester."

IV. The appellant's arguments can be summarised as follows.

(a) *Arguments in support of a technical problem*

The application strives to operate a virally marketed facility in such a manner that its virality increases with time. In order to achieve this goal, the system defined by claim 1 solves the technical problem of measuring the virality. It is submitted that measurement of any property is an inherently technical task. By using the conversion rate and the propagation rate as indicators of virality in the facility, the application formulates an application-specific technical solution to the technical problem of defining and accurately describing virality in the context of a virally marketed facility (e.g. a website).

A further technical problem presented in the application is using the measured (growth or decay) information to determine potential options for increasing virality.

(b) *Arguments in support of inventive step*

As a technical measurement problem is solved, inventive elements reside not only in the implementation but also in the concept of operating a virally marketed facility such as to increase virality.

Basing the virality measurement on a propagation rate and a conversion rate inherently involves selecting a growth model which most suitably characterises virality. The selection is said to require non-obvious considerations as it is not known that conventional growth models may be used for accurately measuring the virality of a facility. Therefore, the claimed features

describe a technical innovation beyond a generic computer implementation.

Hence, the appellant submits that the system according to claim 1 and the apparatus according to claim 7 have technical character, are novel, and are based on an inventive step.

- V. The Board summoned the appellant to attend oral proceedings, as requested on an auxiliary basis. In an annex, the Board voiced doubts about the technical character of the problems put forward by the appellant and about the presence of an inventive step in the implementing solution.
- VI. By a fax letter received on 27 October 2013, the Board was informed that neither the representative nor the appellant would attend the oral proceedings scheduled for 29 November 2013. The Board then cancelled the oral proceedings.

Reasons for the Decision

1. The appellant initially requested, as an auxiliary measure, oral proceedings before the Board. After a hearing had been appointed, the appellant informed the Board that it would not attend. This statement is regarded as a withdrawal of the request for oral proceedings (T 3/90, OJ EPO 1992, 737).
2. According to the application, which was published as A1: EP-A1-1 574 979 (14 September 2005), viral marketing can be utilised to enhance usage of a facility, such as a website, by advertising the facility through social contacts (A1, paragraphs 0001/0002). Detecting or predicting the sustainability

of a virally marketed facility and determining a profitable change to the facility may be helpful but measuring the impact of viral marketing can be difficult (A1, paragraphs 0003 to 0005).

In its most general aspect, the application proposes to measure the virality of a facility and to try out variations (options) of the facility with a view to increasing its virality (A1, original independent claim 8). The virally marketed facility may be a website (original claim 1). The virality of a facility may be measured based on a conversion rate and a propagation rate (original claim 14):

- The conversion rate indicates how many invitations sent in a day by registered users of a website result in registrations of new users (A1, paragraph 0049).
- The propagation rate indicates how many invitations are sent by people who registered on a given day (A1, paragraph 0050).

Original claims 9 to 13 deal with general options and iterations for increasing the virality of a facility. For example, original claim 12 requires options to be continued which produce increased virality and requires options to be discontinued which do not produce increased virality.

Article 56 EPC 1973 - Inventive step

3. In the light of Article 52(1)(2)(3) EPC, Article 56 EPC 1973 requires a non-obvious technical contribution (see e.g. T 641/00-*Two identities/COMVIK*, Headnote 1, OJ EPO 2003, 352; T 1784/06-*Classification method/COMPTEL*).
4. The Board does not consider the problems put forward by the appellant to have a technical character.

Viral marketing utilises human social behaviour to (self-)propagate information which effectively advertises a facility (such as a website). It is a marketing person's choice to consider high propagation and conversion rates of an advertisement as indicators of success of a marketing campaign and to call those rates the virality of the marketed facility.

It is the marketing person that seeks to increase the marketing success as judged by his/her definition of virality.

5. The Board does not consider that any "measurement of any property is an inherently technical task" (grounds of appeal, top of page 3). It will crucially depend on what is "measured", and whether or not the measurement involves technical means. For example, the description mentions (paragraph 0004) that the ultimate "measure" of success is revenue, which is a financial concept. At paragraph 0047, the virality of a website is measured by evaluating public discussion, which could simply be achieved by interviews (mental acts).

6. Thus, the technically skilled person comes into play only at the implementation level. However, counting click rates to measure the popularity or virality of a website does not require an inventive step. This finding is implicitly acknowledged by the application which leaves technical implementation details to the skilled reader.

Trying out whether a variation of a website increases or decreases its popularity does not imply any non-obvious technical consideration, either.

7. The virality of a website (or other facility) might conceivably be increased by providing it with innovative technical features.

However, claim 1 does not define the nature of the "options" to be executed. Hence, no technical contribution can be derived from the "options for increasing virality". This view is confirmed by the options defined in claim 2, such as providing additional commercial aspects of the facility (see point III.b above).

8. Therefore, the Board judges that the system for operating a virally marketed facility according to claim 1 and the corresponding apparatus according to claim 7 do not involve an inventive step.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



T. Buschek

S. Wibergh

Decision electronically authenticated