

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 20

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JESUS A. MARTINEZ and MANOJ B. AGNIHOTRI

Appeal No. 2004-1380
Application No. 09/513,425

ON BRIEF

Before HAIRSTON, JERRY SMITH, and RUGGIERO, Administrative Patent Judges.

JERRY SMITH, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on the appeal under 35 U.S.C. § 134 from the examiner's rejection of claims 1-19, which constitute all the claims in the application.

The disclosed invention pertains to server systems and, more particularly, to successful initialization of headless servers.

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Representative claims 1 and 5 are reproduced as follows:

1. A method, comprising:
monitoring a request for an activity of a
processor-based system using an activity driver;
retrieving an icon relating to the activity from a
memory;
sending the icon to a location of a display; and
sending the request to a predetermined program
from the activity driver.

5. A method, comprising:
executing a power-on routine;
identifying a portion of the power-on routine with
a state;
retrieving an icon from a memory to represent the
state; and
sending the icon to a location of a display
associated with a headless server system.

The examiner relies on the following references:

Kampe et al. (Kampe)	5,953,010	Sep. 14, 1999
Shearer, Jr. et al. (Shearer)	5,956,507	Sep. 21, 1999
Nouri et al. (Nouri)	6,122,746	Sep. 19, 2000
		(filed Oct. 01, 1997)

Tsai, Michael, "Review: Norton Utilities 3.5," About This
Particular Macintosh, vol. 3, no. 1(January 1997),
<http://www.atpm.com/3.11/pagell.shtml?print>.

Mecklermedia Corporation, "DU Meter," July 23, 1998,
<http://cwsapps.txcyber.com/32diag-dumeter.html> (Mecklermedia).

The following rejections are on appeal before us:

1. Claims 1, 2, 7, 8, 11, 12 and 16-19 stand rejected under
35 U.S.C. § 103(a) as being unpatentable over the teachings of
Kampe and Shearer.

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2. Claim 3 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over the teachings of Kampe and Shearer in view of Tsai.

3. Claims 4 and 15 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the teachings of Kampe and Shearer in view of Mecklermedia.

4. Claims 5, 6, 9, 10, 13 and 14 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the teachings of Kampe and Nouri.

Rather than repeat the arguments of appellants or the examiner, we make reference to the briefs and the answer for the respective details thereof.

OPINION

We have carefully considered the subject matter on appeal, the rejections advanced by the examiner and the evidence of obviousness relied upon by the examiner as support for the rejections. We have, likewise, reviewed and taken into consideration, in reaching our decision, the appellants' arguments set forth in the briefs along with the examiner's rationale in support of the rejections and arguments in rebuttal set forth in the examiner's answer.

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It is our view, after consideration of the record before us, that the evidence relied upon and the level of skill in the particular art would have suggested to one of ordinary skill in the art the obviousness of the invention as set forth in claims 5, 6, 9, 10, 13 and 14. We reach the opposite conclusion with respect to claims 1-4, 7, 8, 11, 12 and 15-19. Accordingly, we affirm-in-part.

In rejecting claims under 35 U.S.C. § 103, it is incumbent upon the examiner to establish a factual basis to support the legal conclusion of obviousness. See In re Fine, 837 F.2d 1071, 1073, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). In so doing, the examiner is expected to make the factual determinations set forth in Graham v. John Deere Co., 383 U.S. 1, 17, 148 USPQ 459, 467 (1966), and to provide a reason why one having ordinary skill in the pertinent art would have been led to modify the prior art or to combine prior art references to arrive at the claimed invention. Such reason must stem from some teaching, suggestion or implication in the prior art as a whole or knowledge generally available to one having ordinary skill in the art. Uniroyal, Inc. v. Rudkin-Wiley Corp., 837 F.2d 1044, 1051, 5 USPQ2d 1434, 1438 (Fed. Cir.), cert. denied, 488 U.S. 825 (1988); Ashland Oil, Inc. v. Delta Resins & Refractories, Inc., 776 F.2d 281, 293, 227

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USPQ 657, 664 (Fed. Cir. 1985), cert. denied, 475 U.S. 1017 (1986); ACS Hosp. Sys., Inc. v. Montefiore Hosp., 732 F.2d 1572, 1577, 221 USPQ 929, 933 (Fed. Cir. 1984). These showings by the examiner are an essential part of complying with the burden of presenting a prima facie case of obviousness. Note In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). If that burden is met, the burden then shifts to the applicant to overcome the prima facie case with argument and/or evidence. Obviousness is then determined on the basis of the evidence as a whole and the relative persuasiveness of the arguments. See Id.; In re Hedges, 783 F.2d 1038, 1039, 228 USPQ 685, 686 (Fed. Cir. 1986); In re Piasecki, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984); and In re Rinehart, 531 F.2d 1048, 1052, 189 USPQ 143, 147 (CCPA 1976). Only those arguments actually made by appellants have been considered in this decision. Arguments which appellants could have made but chose not to make in the brief have not been considered and are deemed to be waived [see 37 CFR § 41.37(c)(1)(vii)(2004)].

We consider first the rejection of claims 1, 2, 7, 8, 11, 12 and 16-19 based on Kampe and Shearer. These claims stand or fall together as a single group [brief, page 6], and we will consider independent claim 1 as the representative claim for this group.

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The examiner essentially finds that Kampe teaches the method of claim 1 except that Kampe does not explain the intricacies of the system program or how the loader and main module interact with the kernel to generate text status messages. The examiner cites Shearer as teaching one example of interacting with a kernel to allow for additional processing before a specific activity is implemented. The example disclosed by Shearer is the use of a pseudo-device driver to intercept system calls and then to forward the call onto the targeted kernel function. The examiner finds that the pseudo-device driver of Shearer is the same as the claimed activity driver. The examiner also finds that it would have been obvious to the artisan to use a pseudo-driver as taught by Shearer to monitor requests for activity and generate messages in Kampe [answer, pages 3-4].

Appellants argue that the pseudo-driver of Shearer is used with system calls and does not disclose monitoring a request for an activity using an activity driver. Specifically, appellants argue that the system calls of Shearer are not requests for an activity. Appellants also assert that Shearer fails to teach or suggest the use of its pseudo-drivers in connection with a system for retrieving icons related to an activity. Finally, appellants argue that the examiner has not provided a convincing rationale

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for combining the teachings of Kampe and Shearer [brief, pages 6-7].

The examiner responds that a system call as taught by Shearer is a request for an activity within the meaning of claim 1 and the pseudo-driver of Shearer meets the claimed activity driver. The examiner notes that the motivation for combining the teachings is that the direct accessibility to the kernel as taught by Shearer would have been desirable to the artisan [answer, pages 8-10].

Appellants respond that the examiner has improperly relied on extrinsic evidence to support the rejection. Appellants also argue again that a system call in Shearer is not a request for monitoring an activity using an activity driver [reply brief, pages 1-3].

We will not sustain the examiner's rejection of claims 1, 2, 7, 8, 11, 12 and 16-19 for essentially the reasons argued by appellants in the briefs. We primarily agree with appellants that the artisan having the teachings of Kampe and Shearer before him would not have been motivated to make the modification proposed by the examiner. We are of the view that the modification proposed by the examiner could only come from an improper attempt to reconstruct the claimed invention in

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hindsight. We also agree with appellants that the pseudo-drivers taught by Shearer do not teach the claimed activity driver nor the steps performed by the activity driver.

We now consider the rejection of claim 3 based on Kampe, Shearer and Tsai and the rejection of claims 4 and 15 based on Kampe, Shearer and Mecklermedia. Since the rejection of these claims relies on the same improper combination of Kampe and Shearer discussed above, we do not sustain the rejection of claims 3 and 4 for the reasons discussed above.

We now consider the rejection of claims 5, 6, 9, 10, 13 and 14 based on Kampe and Nouri. These claims stand or fall together as a single group [brief, page 6], and we will consider claim 5 as the representative claim for the group. With respect to representative claim 5, the examiner finds that Kampe teaches the claimed invention except for the step of sending the icons to a display associated with a headless server system. The examiner cites Nouri as teaching the remote monitoring of headless server systems and, therefore, the association of remote displays with headless server systems. The examiner finds that it would have been obvious to the artisan to display Kampe's icons on a remote display as taught by Nouri [answer, pages 7-8].

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Appellants argue that neither Kampe nor Nouri teaches or suggests sending an icon to a display associated with a headless server system. Appellants argue that the display of Nouri is associated with a client computer rather than a headless server system [brief, page 10].

The examiner responds that the claimed association only requires that some relationship exist that reasonably links the display to the headless server system. The examiner asserts that the displays of Nouri are "associated" with the headless server system as broadly interpreted [answer, pages 12-13].

Appellants respond that Nouri clearly discloses that the screen displays of Figures 15-19 are seen at a client's computer, not a server system [reply brief, pages 3-4].

We will sustain the examiner's rejection of claims 5, 6, 9, 10, 13 and 14 for essentially the reasons argued by the examiner in the answer. We agree with the examiner that appellants' argument that the displays of Nouri are seen at the client computer does not overcome the rejection. As noted by the examiner, claim 5 only recites that the display is associated with a headless server system. There is no requirement in the claim regarding the physical location of the display. The examiner is correct that even though the displays of Nouri are

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physically located at the client's computer, they are still associated with a headless server system as the displays display information with respect to the headless server system.

Therefore, we agree with the examiner that the collective teachings of Kampe and Nouri render the invention of these claims obvious within the meaning of 35 U.S.C. § 103.

In summary, we have sustained the examiner's rejections with respect to claims 1-4, 7, 8, 11, 12 and 15-19, but we have not sustained the rejection with respect to claims 5, 6, 9, 10, 13 and 14. Therefore, the decision of the examiner rejecting claims 1-19 is affirmed-in-part.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART

KENNETH HAIRSTON)	
Administrative Patent Judge)	
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JERRY SMITH)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS
)	AND
)	INTERFERENCES
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JS/sld

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