

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

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JENNIFER J. THAYER,
JEFFREY D. SCHWARTZ, and NEAL A. KRAWETZ

Appeal 2007-0210
Application 10/167,359¹
Technology Center 2100

Decided: May 24, 2007

Before JAMES D. THOMAS, JOSEPH F. RUGGIERO,
and JAY P. LUCAS, *Administrative Patent Judges*.

LUCAS, *Administrative Patent Judge*.

DECISION ON APPEAL
STATEMENT OF CASE

Appellants appeal from a final rejection of claims 1-20 and 26-49 under authority of 35 U.S.C. § 134 (2002). The Board of Patent Appeals and Interferences (BPAI) has jurisdiction under 35 U.S.C. § 6(b) (2002).

¹ Application filed June 11, 2002. The real party in interest is Hewlett Packard Company.

Appellants' invention relates to a system and method for sending and receiving software updates and other forms of data over a network between a server and client. In the words of the Appellant:

In accordance with one embodiment of the present invention, a data management system comprises a processor adapted to receive a transfer of an update. The system also comprises an update manager accessible by the processor and adapted to obtain a listing identifying each of a plurality of data packets corresponding to the update. The update manager is further adapted to access the listing to determine a transfer status of each of the data packets in the response to a partial transfer of the update.

Claim 1 is exemplary:

1. A data management system, comprising:
 - a processor adapted to receive a transfer of an update; and
 - an update manager accessible by the processor and adapted to obtain a listing identifying each of a plurality of data packets corresponding to the update prior to a transfer of the update.

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

Doshi	5,222,061	Jun. 22, 1993
Dougall	2003/0093485 A1	May 15, 2003 (filed May 15, 2002)

The Examiner rejected claims 1- 20 and 26-49 under 35 U.S.C. 103(a) for being obvious over Dougall in view of Doshi.

Appellants contend that the claimed subject matter is not rendered obvious over Dougall in view of Doshi, for reasons to be discussed more

fully below. The Examiner contends that each of the claims is properly rejected.

Rather than repeat the arguments of Appellants or the Examiner, we make reference to the Briefs and the Answer for their respective details. 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 Briefs have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(vii) (2004).²

We reverse the rejections.

ISSUE

The issue is whether Appellants have shown that the Examiner erred in rejecting the claims under 35 U.S.C. § 103(a) (2004). The issue turns on whether the references Dougall or Doshi, alone or in combination, render obvious the claimed limitation “an update manager accessible by the processor and adapted to obtain a listing identifying each of a plurality of data packets corresponding to the update prior to a transfer of the update.”

² Appellants have not presented any substantive arguments directed separately to the patentability of the dependent claims except as will be noted in this opinion. In the absence of a separate argument with respect to those claims, they stand or fall with the representative independent claim. *See In re Young*, 927 F.2d 588, 590, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991). *See also* 37 C.F.R. § 41.37(c)(1)(vii).

FINDINGS OF FACT

Findings with respect to the rejection of claims 1-20 and 26-49 under 35 U.S.C. § 103 (a).

1. Appellants have invented a system and method for transferring a software update from a server (Appellants' 14) to one or more clients (Appellants' 12) over a network, for example the Internet (Appellants' 16). In the terms of the Specification, "update" is read broadly to include many types of electronic data: programs, data files, instructions. (Specification, ¶ 0014).
2. A careful reading of the claims in view of the issues raised in the Brief, Reply Brief and Answer indicates the key limitation to be "...an update manager accessible by the processor and adapted to obtain a listing identifying each of a plurality of data packets corresponding to the update prior to a transfer of the update." The Specification (Specification, ¶ 0018) and common understanding of "update" indicate the meaning of the word is the full update, as the Specification refers to parts of the update in terms of individual data packets.
3. Examiner's rejection relies upon Dougall to teach as part of the prior art a server sending an update to a processor adapted to receive the transfer, but relies upon Doshi to "teach the limitation of obtaining a list identifying each of data packet prior to a transfer." (Answer 3). It is noted that in Doshi the

Transmit Controller 120 (read as the claimed Update Manager) references a list of packets to be transferred, transmit list 130 (the claimed “listing”). (Answer 4). We find, however, that this list is not obtained by an update manager accessible by the processor on the receiving side of the system. The list remains on the sending side of the system, contrary to the claimed limitation.

4. When the objection to the rejection noted in paragraph three above was raised by the Appellants, Examiner adjusted the rationale of the rejection. Examiner notes, in the Answer page 8, that “Doshi teaches in col. 4, line 33-62, fig. 1, element 205 stores the packet in receiver buffer 210, see col. 4, l. 4-14, and periodically receiver 200 sends to transmitter 100 and 120 (element 100 corresponding to a processor adapted to receive update and element 120 corresponding to update manager) a status control message (corresponding to listing of a plurality of update) indicating the list of sequence numbers that receiver received correctly.” (Quote adjusted for clarity). This message, says the Examiner, is sent prior to sending a later section of the full update.
5. We have carefully reviewed this new rationale for the rejection, but find that it still fails to meet the claimed limitations. The clear meaning of the limitation is that the manager is adapted to obtain a listing of each of the data packets of the update prior to

a transfer of the update. Giving as broad a reasonable interpretation of the claims as is consistent with the specification and plain meaning of the terms of the claim, we find that the listing of data packets must be able to be obtained before the transmission. That is simply not taught by the Doshi reference.

PRINCIPLES OF LAW

On appeal, Appellants bear the burden of showing that the Examiner has not established a legally sufficient basis for the rejection of the claims.

“In reviewing the [E]xaminer’s decision on appeal, the Board must necessarily weigh all of the evidence and argument.” *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992).

In sustaining a multiple reference rejection under 35 U.S.C. § 103(a), the Board may rely on one reference alone without designating it as a new ground of rejection. *In re Bush*, 296 F.2d 491, 496, 131 USPQ 263, 266-67 (CCPA 1961); *In re Boyer*, 363 F.2d 455, 458 n.2, 150 USPQ 441, 444 n.2 (CCPA 1966).

Our reviewing court states in *In re Zletz*, 893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989) that “claims must be interpreted as broadly as their terms reasonably allow.” Our reviewing court further states, “[t]he terms used in the claims bear a ‘heavy presumption’ that they mean what they say and have the ordinary meaning that would be attributed to those words by persons skilled in the relevant art.” *Texas Digital Sys. Inc v.*

Telegenix Inc., 308 F.3d 1193, 1202, 64 USPQ2d 1812, 1817 (Fed. Cir. 2002), *cert. denied*, 538 U.S. 1058 (2003).

ANALYSIS

Appellants have contend that Examiner erred in rejecting claims 1-20 and 26-49 under 35 U.S.C. 103(a). Reviewing the findings of facts cited above, we find an essential limitation of the claim was not disclosed in the cited prior art. The claim requires an update manager, accessible by a processor, adapted to receive a transfer of a update, and adapted to receive a listing identifying all the data packets of the update prior to the transfer. (Finding of Fact #2). Examiner has cited art, notably Doshi, which contains the packet list, but on the sending side. Examiner has also noted that the reference teaches that a second list of received packets is accumulated on the receiving side and sent back to the transmitting side, but that operation does not take place prior to the sending of the update, in accordance with the common meaning of the terms.

As this issue establishes the error of the rejection, the other issues raised by Appellants need not be addressed.

CONCLUSION OF LAW

Based on the findings of facts and analysis above, we conclude that the Examiner erred in rejecting claims 1- 20 and 26-49 over the cited art. The rejection of those claims is reversed

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DECISION

The Examiner's rejection of claims 1-20 and 26-49 is Reversed.

REVERSED

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