

The opinion in support of the decision being entered today is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CAROL LYNDALL COLRAIN and DAVID BROWER

Appeal 2007-1476
Application 10/308,866
Technology Center 2100

Decided: July 24, 2007

Before ANITA PELLMAN GROSS, JAY P. LUCAS, and MARC S. HOFF,
Administrative Patent Judges.

GROSS, *Administrative Patent Judge*.

DECISION ON APPEAL
STATEMENT OF THE CASE

Colrain and Brower (Appellants) appeal under 35 U.S.C. § 134 from the Examiner's Final Rejection of claims 1 through 4, 6, 9 through 35, 37, and 40 through 48, which are all of the claims pending in this application.

Appellants' invention relates generally to resource management of networked systems. (See Specification 2.) Claim 1 is illustrative of the claimed invention, and it reads as follows:

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1. A method of detecting an event of interest, the method comprising the steps of:

in a framework in which a plurality of members are executing, establishing a monitor for at least a first member in the plurality of members to detect occurrence of the event of interest, the first member residing on a first node, wherein each of the plurality of members performs a service;

after the first member causes the event of interest to occur, the monitor communicating the event of interest to the framework; and

identifying at least an active second member to replace the first member in response to the monitor communicating the event of interest, the second member being configured to perform a service that is comparable to the service performed by the first member.

The prior art reference of record relied upon by the Examiner in rejecting the appealed claims is:

Dias US 5,805,785 Sep. 08, 1998

Claims 1 through 4, 6, 9 through 35, 37, and 40 through 48 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Dias.

Claim 18 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of co-pending Application 10/308,918.

We refer to the Examiner's Answer (mailed November 14, 2006) and to Appellants' Brief (filed July 21, 2006) and Reply Brief (filed January 19, 2007) for the respective arguments.

SUMMARY OF DECISION

As a consequence of our review, we will reverse the anticipation rejection of claims 1 through 4, 6, 9 through 35, 37, and 40 through 48. In addition we will affirm, *pro forma*, the provisional obviousness-type double patenting rejection of claim 18.

OPINION

The Examiner asserts (Answer 4 and 11) that Dias' executing a recovery program on a node other than where a failure has occurred satisfies the step of identifying an active second member to replace the first in response to an event (such as the failure of a member), as recited in claims 1 and 32. The Examiner further asserts (Answer 8) that the same execution of a recovery program satisfies the step of automatically causing the service to be provided by another member of the composite resource, as recited in claim 18.

Appellants contend (Br. 5) that Dias' calling a recovery program to execute commands needed to recover a failed subsystem differs from the claimed step of identifying an active second member to replace the first member in response to an event such as a failure. Similarly, Appellants contend (Br. 9) that Dias' calling a recovery program differs from the claimed step of automatically causing the service to be provided by another member of the composite resource. Accordingly, Appellants contend (Br. 6, 8, and 9) that Dias fails to anticipate independent claims 1, 18, and 32. Appellants further contend (Br. 7, 8, 10, and 11) that Dias, therefore, fails to anticipate dependent claims 2 through 4, 6, 9 through 17, 19 through 31, 33 through 35, 37, and 40 through 48. Thus, the issues are whether in the event

of a failure of a subsystem, Dias' recovery program anticipates 1) identifying an active second member to replace the first member and 2) causing the service to be provided by another member of the composite resource.

Dias discloses (col. 3, ll. 44-60, and Fig. 1) plural nodes 100-1 through 100-n, each with software subsystems 600-1 through 600-m. Dias states (col. 4, ll. 2-5) that a monitor can detect if a subsystem fails. Failure of a subsystem on one node "triggers recovery actions which are taken for the other instances of that subsystem and also for subsystem that interact with or depend on that subsystem" (Dias, col. 3, ll. 60-63). Dias discloses (col. 7, ll. 14-25) that an event manager, upon receiving notice of a subsystem failure that has not yet been recovered, looks to see if a rule exists for the "resource type." Thus, the subsystems correspond to Appellants' members, and failure of a subsystem corresponds to the claimed "event of interest" in independent claims 1 and 32 and to the claimed member failure in independent claim 18.

Dias further discloses (col. 7, l. 57-col. 8, l. 5) that a recovery program begins executing commands by determining for each command the node on which the command is to be executed. When a command is to be executed on another node, the recovery driver transmits the command to the specified node. Dias discloses (col. 9, l. 66-col. 10, l. 19) that a recovery command includes five specifications – 1) the set of nodes upon which the command should execute, 2) the command itself, 3) the expected resulting status for the command to be executed successfully, 4) an information file used to expand the recovery node specification, and 5) the maximum number of times the command will be executed if the first try is not successful.

Notwithstanding the Examiner's statement (Answer 14) that Dias discloses replacing a first failed node with a designated spare node¹ and therefore discloses the step of identifying a second member in claims 1 and 32, we find nothing in Dias to teach or suggest when a first subsystem (or member) fails on one node, identifying a second subsystem (or member) on a second node to replace the first subsystem, where the two subsystems perform comparable services. Similarly, we find no teaching or suggestion in Dias of causing the service provided by the first member to be provided by the second member, as recited in claim 18. If anything, we find suggestions to the contrary. For example, that "[r]ecoverable failure of any instance of any subsystem triggers recovery actions which are taken for the other instances of that subsystem and also for subsystems that interact with or depend on that subsystem" (see Dias, col. 3, ll. 60-63) suggests that recovery actions are applied to all comparable subsystems, not that one subsystem is substituted for the failed one. Similarly, by specifying (col. 10, ll. 1-2) the "set of nodes on which the command should execute," Dias suggests that recovery commands are applied to multiple nodes, not a command to a single second member to replace the failed member. Also, by specifying (col. 10, ll. 18-19) "the maximum number of times that the command will be executed if the command does not execute successfully," Dias suggests randomly trying other members rather than identifying the one that will replace the failed member.

¹ We note that the Examiner's reference to replacing one node with another (Answer 14) suggests that the Examiner has taken Dias' nodes as the claimed members. However, as indicated by Appellants (Reply Br. 2) a member is a resource on a node, like Dias' subsystem, not the node itself.

"It is axiomatic that anticipation of a claim under § 102 can be found only if the prior art reference discloses every element of the claim." *In re King*, 801 F.2d 1324, 1326, 231 USPQ 136, 138 (Fed. Cir. 1986). *See also Lindemann Maschinenfabrik GMBH v. American Hoist and Derrick Co.*, 730 F.2d 1452, 1458, 221 USPQ 481, 485 (Fed. Cir. 1984). Since Dias fails to disclose the claimed steps of "identifying at least an active second member to replace the first member" in claims 1 and 32 or of "automatically causing the service to be provided ... by another member" in claim 18, Dias does not anticipate the claims. Accordingly, we will not sustain the anticipation rejection of claims 1 through 4, 6, 9 through 35, 37, and 40 through 48.²

Regarding the provisional obviousness-type double patenting rejection of claim 18, Appellants state (Br. 9) that they intend to file a Terminal Disclaimer upon allowance of either claim 18 or claim 1 of co-pending Application 10/308,918. Appellants provide no arguments against the rejection. Accordingly, we will sustain the rejection, *pro forma*.

ORDER

The decision of the Examiner rejecting claims 1 through 4, 6, 9 through 35, 37, and 40 through 48 under 35 U.S.C. § 102(b) is reversed. Also, the decision of the Examiner provisionally rejecting claim 18 under the judicially created doctrine of obviousness-type double patenting is affirmed.

² The Examiner should note that our reversal of the art rejection does not mean that we believe the claims to be patentable, merely that the art of record was insufficient to support an anticipation rejection.

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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). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART

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HICKMAN PALERMO TRUONG & BECKER, LLP
2055 GATEWAY PLACE
SUITE 550
SAN JOSE, CA 95110