

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte THOMAS EDWIN TURICCHI, JR., SHINOBU TOGASAKI, and
STEVEN R. LANDHERR

Appeal 2007-2653
Application 09/896,794
Technology Center 2100

Decided: January 28, 2008

Before JAMES D. THOMAS, ALLEN R. MACDONALD,
and THU A. DANG, *Administrative Patent Judges*.

DANG, *Administrative Patent Judge*.

DECISION ON APPEAL

I. STATEMENT OF CASE

Appellants appeal the Examiner's final rejection of claims 1-23 under 35 U.S.C. § 134(2002). We have jurisdiction under 35 U.S.C. § 6(b)(2002).

A. INVENTION

According to Appellants, they invented an apparatus and method for providing user-requested content through an alternate network service when the preferred network service is unavailable. The apparatus is preferably embodied in computer readable program code. The invention may include the steps of assessing the availability of the user-requested content from the preferred network service; selecting an alternate network service providing substantially similar content to the user-requested content when the user-requested content is unavailable from the preferred network service; and linking to the alternate network service when the user-requested content is unavailable from the preferred network service (Spec., Abstract).

B. ILLUSTRATIVE CLAIM

Claim 1 is exemplary and is reproduced below:

1. A method for providing user-requested content over a network, comprising:

assessing the availability of a preferred network service providing said user-requested content;

selecting an alternate network service providing substantially the same content as said user-requested content when said preferred network service is unavailable; and

Appeal 2007-2653
Application 09/896,794

linking to said selected alternate network service to provide substantially the same content as said user-requested content when said preferred network service is unavailable.

C. REJECTIONS

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

Choquier US 5,774,668 Jun. 30, 1998

Claims 1-23 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Choquier.

We affirm.

II. ISSUES

The issues are whether Appellants have shown that the Examiner erred in finding that claims 1-23 are anticipated by Choquier.

III. FINDINGS OF FACT

The following Findings of Fact (FF) are shown by a preponderance of the evidence.

Appellants' Invention

1. In embodiments of Appellants' invention, a user may access a preferred network service that is experiencing demand that exceeds

the capacity of the resource allocated thereto, instead of allowing the user to access the preferred network service, and thus degrade the performance of the preferred network service, or instead of refusing service to the user altogether, the user is provided with the same content, or substantially similar content, through an alternate network service (Spec. 3, ll. 2-9).

Choquier

2. Choquier teaches a dynamic load balancing feature, wherein, when a user sends a request to open a service, the Gateway microcomputer that receives the request initially identifies the application servers that are within the relevant service group. The Gateway microcomputer then determines the current load of each application server in the service group, and applies a load balancing method to select an application server that is relatively lightly loaded. The service request is then passed to the selected application server for processing (col. 2, ll. 43-52).
3. Servers 120 within a service group are replicated, meaning that they all run the same service application (or set of service applications) that implements the server portion of a particular service (or set of related services) (col. 9, ll. 3-7).
4. All servers run like service applications and provide access to like service data, the service appears the same to all users, even though

different user service sessions may be assigned (by the Gateways 126) to different servers 120 of the service group (col. 9, ll. 11-16).

PRINCIPLES OF LAW

Appellants have the burden on appeal to the Board to demonstrate error in the Examiner's position. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006).

Anticipation is established when a single prior art reference discloses expressly or under the principles of inherency each and every limitation of the claimed invention. *Atlas Powder Co. v. IRECO Inc.*, 190 F.3d 1342, 1347 (Fed. Cir. 1999); *In re Paulsen*, 30 F.3d 1475, 1478-79 (Fed. Cir. 1994).

"Moreover, limitations are not to be read into the claims from the specification." *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993) (citing *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989)). Our reviewing court has repeatedly warned against confining the claims to specific embodiments described in the specification. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1323 (Fed. Cir. 2005) (en banc). During prosecution before the USPTO, claims are to be given their broadest reasonable interpretation, and the scope of a claim cannot be narrowed by reading disclosed limitations into the claim. *See In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997); *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989); *In re Prater*, 415 F.2d 1393, 1404-05 (CCPA 1969).

ANALYSIS

35 U.S.C. § 102(b)

As to claim 1, the Appellants argue “Choquier emphasizes that a transfer is made to the ‘same service’, but one that is replicated on a different application server” (App. Br. 11; Reply Br. 2). Appellants reference Fig. 1 in Appellants’ Specification for the depiction of Appellants’ preferred network service 120 as separate from Appellants’ alternate network service 140, and assert that they are not Choquier’s ‘replicated servers,’ in that they are not associated with the same host data center 104 (Reply Br. 2). Appellants further assert that “[b]y erroneously focusing on the problems solved by the two inventions, rather than on the different solutions to those problems, the examiner loses sight of the plain meaning of the term ‘alternate network service’ as it appears in the pending claims” (Reply Br. 3).

We disagree. The term “alternate network service” cannot be confined to a specific exemplary embodiment in Appellants’ Specification. Appellants’ claims simply do not place any limitation on what the “alternate network service” is to be, to represent, or to mean, other than that the alternate network service provides substantially the same content and is selected when the preferred network service is unavailable. Appellants’ arguments that the alternate network service differs from Choquier’s service because Choquier’s service is performed by a replicated server on the same

host data center and that Choquier provides a different solution are not commensurate with the invention that is claimed.

We construe the term “alternate network service” by giving the term its customary and ordinary meaning. The customary and ordinary meaning of to “alternate” is “serving or used in place of another; substitute.” *The American Heritage Dictionary of the English Language* (4th ed. 2000), found at www.bartelby.com.

Accordingly, we construe “alternate network service” as a network service used in place of another when the other is unavailable. Appellants’ own disclosure sets forth that the alternate network service provides the same content as well as substantially same content (FF 1).

Choquier discloses servers of a service group running like service applications and providing access to like service data, wherein the service appears the same to all users (FF 3-4). When a first application server is heavily loaded, a second application server that is relatively lightly loaded is selected (FF 2). We find that the selection of the service performed by the second application server to be the selection of an alternate network service providing same content or substantially the same content as the service of the first application server, when the service of the first application server is unavailable.

As to the other recited elements of claim 1, Appellants provide no argument to dispute that the Examiner has correctly shown where all these claimed elements appear in the prior art. Accordingly, we find that the

Appeal 2007-2653
Application 09/896,794

Appellants have not shown that the Examiner erred in rejecting claim 1 as anticipated by Choquier.

Appellants do not provide a separate argument for claims 9 and 19, and thus, claims 9 and 19 fall with claim 1.

Claims 2-8 and 20 depend from claim 1, claims 10 and 12-18 depend from claim 9, and claim 20 depends from claim 19. Accordingly, claims 2-10 and 12-20 respectively include the same limitations as claims 1, 9, and 19, and thus, fall with claims 1, 9, and 19.

As to claims 11 and 21, Appellants repeat the argument that Choquier “fails to disclose ‘selecting an alternate network service providing substantially the same content as said user-requested content when said preferred network service is unavailable’” (App. Br. 15). As discussed above with respect to claim 1, we find that Choquier’s selection of service performed by an application server to be the selection of an alternate network service providing same content or substantially the same content as the service of the first application server, when the service of the first Choquier. Accordingly, we find that the Appellants have not shown that the Examiner erred in rejecting claims 11 and 21 as anticipated by Choquier.

As to claims 22 and 23, the Examiner rejects the claims over the teachings of Choquier by finding “The first server comprises ‘a first back-end server hosting a preferred network service and the alternate server comprises a second back-end server hosting an alternate network service’ in order to allow users to receive the same content when the preferred server is

Appeal 2007-2653
Application 09/896,794

unavailable (col. 8, line 65 through col. 9, line 16)” (Ans. 10). Appellants provide no argument to dispute that the Examiner has correctly shown where all the claimed elements appear in the prior art. Accordingly, we find that the Appellants have not shown that the Examiner erred in rejecting claims 22 and 23 as anticipated by Choquier.

For at least the above reasons, we conclude that Appellants have not shown that the Examiner erred in rejecting claims 1-23 under 35 U.S.C. § 102(b).

CONCLUSION OF LAW

- (1) Appellants have not shown that the Examiner erred in finding that claims 1-23 are unpatentable over the teachings of Choquier.
- (2) Claims 1-23 are not patentable.

DECISION

The Examiner's rejection of claims 1-23 under 35 U.S.C. § 102(b) is affirmed.

Appeal 2007-2653
Application 09/896,794

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

AFFIRMED

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