

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 24

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte CHARLES JOHNSON, LARRY W. EMLICH, PAUL KOMOSINSKI,  
and ROBERT W. LENNIE

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Appeal No. 1999-1583  
Application No. 08/377,390

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ON BRIEF

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Before KRASS, BARRETT, and FLEMING, Administrative Patent Judges.

KRASS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the final rejection of claim 3, the only claim pending.

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The invention is directed to a fault tolerant monitoring and control system in a distributed processing network. The network includes a plurality of computer systems executing a plurality of service processes that cooperatively perform a function. Monitored processes and exporter processes exchange messages.

An exporter process sends messages to a monitored process about the state of one or more service processes. The exporter process receives messages from the monitored process and transfers information to one or more controlled service processes. A new export process is instantiated if a message is received that one or more of the service processes being monitored has failed.

Claim 3 is reproduced as follows:

3. A fault tolerant monitoring and control system in a distributed processing network, wherein the distributed processing network includes a plurality of computer systems for executing a plurality of service processes which cooperatively perform a function across the plurality of service processes, comprising:

a plurality of export processes, wherein at least one export process is associated with each one of the plurality of computer systems;

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a monitor process associated with the function being performed across the plurality of service processes which service processes run independently of the monitor process, the monitor process being coupled to receive messages from the plurality of export processes including messages from an export process about the state of one or more service processes performing the function, the monitor process also being coupled to send messages to the export process to control the plurality of service processes; and

a control means for instantiating a new export process if a message is received that one or more of the service processes being monitored has failed.<sup>1</sup>

The examiner relies on the following references:

Freund	5,095,421	Mar. 10, 1992
Fuchs et al. [Fuchs]	5,440,726	Aug. 08, 1995
		(filed June 22, 1994)

Claim 3 stands rejected under 35 U.S.C. 112, first and second paragraphs.

Claim 3 stands further rejected under 35 U.S.C. 102(e) as anticipated by Fuchs.

Claim 3 stands still further rejected under 35 U.S.C. 103 as unpatentable over Fuchs in view of Freund.

Reference is made to the brief and answer for the

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<sup>1</sup> While the amendment to claim 3, filed May 2, 1997, has not been physically entered into the record, it is clear, from the Advisory Action of May 13, 1997 and from paragraph 8 of page 2 of the Examiner's answer, that the amendment is intended to be entered and that this is a correct copy of the claim being appealed.

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respective positions of appellants and the examiner.

OPINION

We turn first to the rejections under 35 U.S.C. 112. The final rejection contended that there was insufficient disclosure in the specification to support the claimed feature of "...a monitor process...independently of monitor process..." That is, the examiner was contending that there was an inadequate written description to support that which was now claimed because the specification recited a local and a global monitor and "there is no mention of these processes being independent of each other or of the service process." With regard to the second paragraph rejection, the examiner contended that "it is not clear what exactly is being claimed; the recitation suggest [sic] that the monitor is independent of itself, or even the other processes, as such it is vague and indefinite" Final rejection, Paper No. 9-page 2].

Appellants apparently are convinced that the rejection of claim 3 under 35 U.S.C. 112 has been overcome by an amendment of April 29, 1997 [see page 2 of the brief]. However, the

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examiner repeats the rejection of claim 3 under 35 U.S.C. 112, first and second paragraphs, in the answer, referring to the final rejection, Paper No. 9 [answer-page 3] and indicates nowhere in the answer that the rejection has been overcome by an amendment or that the rejection has been withdrawn.

Appellants file no reply brief even in the face of a clear indication in the answer that there still exists a rejection of claim 3 under 35 U.S.C. 112, first and second paragraphs.

We will not sustain the rejection of claim 3 under 35 U.S.C. 112, first and second paragraphs. We understand that there may have been no argument in the brief because appellants assumed that the rejections under 35 U.S.C. 112, first and second paragraphs, had been overcome by a previously filed amendment. We do find it strange, however, that appellants filed no reply brief to contest the rejections under 35 U.S.C. 112 once it became clear in the answer that the examiner had not withdrawn these rejections. In any event, we will not sustain the rejection of claim 3 under 35 U.S.C. 112, first and second paragraphs because the examiner simply had no basis for making the rejection.

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It is clear that the examiner is repeating the rejection that was made in the final rejection prior to the amendment of May 2, 1997. That amendment made it clear that a monitor process was not run independently of the monitor process itself but, rather, that "a monitor process associated with the function being performed across the plurality of service processes *which service processes* run independently of the monitor process,..." [emphasis ours]. Thus, it is the service processes which are run independently of the monitor process. There is no allegation by the examiner that this is not supported by the original disclosure. Further, when read in light of the amended language, it is also clear that there is no indefiniteness with regard to claim 1.

We now turn to the rejection of claim 3 under 35 U.S.C. 102(e). It is the examiner's contention that Fuchs comprises a fault tolerant monitoring and control distributed processing network having a plurality of processes, identifying Figures 1, 4a, 4b, 5a and 5b of Fuchs. The examiner contends that Fuchs discloses a monitor process means at column 2, lines 42 et seq., column 7, lines 32 et seq. and column 13, lines 31 et seq. Finally, the examiner contends that Fuchs teaches a

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control means in Figures 4a, 4b and column 11, lines 35 et seq.

We find that the examiner's rationale fails to establish a prima facie case of anticipation. Claim 3 calls for a plurality of export processes, a monitor process associated with the function being performed across the plurality of service processes which service processes run *independently* of the monitor process, and a control means for instantiating a new export process if a message received by the monitor process from the export processes indicates that one or more of the service processes being monitored has failed.

The examiner has not particularly pointed out where each of these claimed elements and their interconnection, resulting in the claimed functions, is found in Fuchs. A mere general reference to various figures and to various columns and lines "et seq.", without specifically pointing out the correspondence between the claimed elements and those disclosed by Fuchs is not sufficient to establish anticipation.

The claim calls for service processes which run independently of the monitor process and appellants argue this

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limitation, pointing out, reasonably, in our view, that at column 7, lines 32-60, of Fuchs, it is disclosed that error detection monitor process 20 runs on the same node as the processes being monitored. Accordingly, a monitor process being run on the same node as a monitored process is subject to the same faults as the processes being monitored and cannot be considered to be "independent," as claimed [brief-page 3].

In response, first the examiner argues that the claim language is not clear and that the examiner does not understand the language, "a monitor process associated with the function being performed across the plurality of service processes which...run independently of the monitor process" [answer-page 4]. Initially, we point out that the language quoted by the examiner omits the language, "service processes" between "which" and "run" which appears to be the cause of the examiner's problems with regard to 35 U.S.C. 112. In any event, we point out that if the examiner could not understand the claim, the proper rejection would be under 35 U.S.C. 112, second paragraph, which the examiner applied, and not under 35 U.S.C. 102 or 103. Prior art cannot be applied against a claim that is not understood since such an application of

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prior art to an indefinite claim must rely on mere speculation.

Even assuming the examiner understood the claim language enough to apply the cited reference(s), the examiner indicates that the evidence of the "independent" nature of the processes, as claimed, lies in "columns two-three" [answer-page 4]. In particular, the examiner cites

the fault tolerant computing system will detect faults in an application process which cause the application processes to crash or hang... The fault tolerant computing system will include at least one watchdog for monitoring application process, In addition...will include a restart subsystem for executing recovery algorithms which will attempt to bypass detected faults...appropriate functions from a fault tolerant library, into the code for the application process...checkpointing function, ...fault tolerant writes and reads...logging of messages received... [answer-page 4].

The examiner then concludes that "[a]ll of these functions monitor services processes and are not dependent upon the origination of the processes" [answer-page 4].

At page 5 of the answer, the examiner further explains that

Figures 4a-4b, show clearly that the

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monitoring activity of a process P are multiply distributed. In that, it has both single and multiple nodes executing a single and multiple processes, which in turn have plural backup nodes. Thus, the monitoring is independent of the processes... The fact that each monitor means may be utilized to monitor multiple events at different nodes as well as different process, clearly demonstrate that the monitors are independent of the processes they monitor.

We have carefully reviewed the examiner's comments but we do not find them to be persuasive of anticipation in view of column 7, lines 32-60, of Fuchs, where it is disclosed that error detection monitor process 20 runs on the same node as the processes being monitored. It would appear to us that a monitor process being run on the same node as a monitored process is subject to the same faults as the processes being monitored and cannot be considered to be "independent," as claimed.

Further, we agree with appellants that Fuchs simply does not teach the claimed control means for instantiating a new export process if a message is received that one or more of the service processes being monitored has failed and the examiner has not explained where, in Fuchs, this limitation is

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found. The examiner responds, at page 7 of the answer, that  
Fuchs

monitors "...each monitored application process to determine its condition by periodically sending a message to the process using the inter process communication...and evaluating the return value to determine weather[sic]that process is still active.", (col. 7, lines 45 et seq.).

However, we still do not understand what, exactly, in Fuchs, the examiner considers to be the claimed "export processes." As such, the examiner has failed to establish a prima facie case of anticipation and we will not sustain the rejection of claim 3 under 35 U.S.C. 102(e).

Since Freund does not provide for the deficiencies of Fuchs, we also will not sustain the rejection of claim 3 under 35 U.S.C. 103.

#### CONCLUSION

We have not sustained the rejection of claim 3 under 35 U.S.C. 112, first and second paragraphs, and we have not sustained the prior art rejections of claim 3 under 35 U.S.C. 102(e) and 103.

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Accordingly, the examiner's decision is reversed.

REVERSED

ERROL A. KRASS	)	
Administrative Patent Judge	)	
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LEE E. BARRETT	)	BOARD OF PATENT
Administrative Patent Judge	)	APPEALS AND
	)	INTERFERENCES
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	)	
	)	
MICHAEL R. FLEMING	)	
Administrative Patent Judge	)	

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