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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte STEPHEN GOLD

Appeal 2010-007863
Application 11/412,485
Technology Center 2100

Before: JASON V. MORGAN, ERIC B. CHEN, and
MICHAEL J. STRAUSS, *Administrative Patent Judges*.

STRAUSS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF CASE

Appellant appeals under 35 U.S.C. § 134 from a rejection of claims 1, 4-19 and 21-22. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

INVENTION

The claims are directed to a synchronization of a virtual storage system and an actual storage system. Abstract.

Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A virtual storage system comprising:
 - a storage subsystem having virtual storage devices to emulate physical storage devices of an actual storage system;
 - and
 - a controller to:
 - detect a status change of a particular physical storage device in the actual storage system, the status change comprising at least one of loading of the particular physical storage device and ejecting of the particular physical storage device; and
 - in response to detecting the status change of the particular physical storage device, perform synchronization between the virtual storage system and the actual storage system by updating a state of a corresponding virtual storage device in the virtual storage system,
 - wherein the controller is configured to update the state of the corresponding virtual storage device by:
 - in response to the particular physical storage device being loaded in the actual storage system, checking whether the corresponding virtual storage device exists in the virtual storage system; and
 - in response to determining that the corresponding virtual storage device does not exist in the virtual storage system, creating the corresponding virtual storage device.

ANALYSIS

Appellant contends Trimmer fails to disclose, “in response to the particular physical storage device being loaded in the actual storage system . . . **creating** the corresponding virtual storage device.” App. Br. 8 and Reply Br. 2. The Examiner responds that Trimmer discloses a physical tape library with a tape reader that, upon loading of a physical tape, confirms that it has a barcode matching that of a virtual tape that is to be backed-up to the physical tape. Ans. 5. The Examiner acknowledges that Trimmer does not disclose that the virtual tape is created in response to loading the physical storage device. *Id.* However, the Examiner argues that:

. . . since the virtual tape is created from a virtual barcode that is identical to the physical barcode that is read from the physical tape that is loaded into the tape library the examiner is taking official notice to the fact that it would have been obvious to one of ordinary skill in the art at the time of the invention to create the virtual storage device from the physical device in response to the loading of the physical device because the barcodes used to create the virtual devices are read by the built in barcode reader of the physical library when the physical tapes are loaded into the library, therefore making, creating the virtual tape from the virtual barcode at the time of the loading of the tape and reading of the physical barcode, the most straight forward, convenient, efficient and user friendly time to create the virtual tape in the system of Trimmer et al.

FOA 11-12, Ans. 5.

Appellant argues that Trimmer discloses the virtual library as the primary backup system for data restoration with the ability to export virtual storage to create a physical storage device for a preexisting virtual storage device. App. Br. 7. Appellant argues that in exporting a virtual storage device to a physical storage device, the corresponding virtual storage device already exists in the virtual library system of Trimmer thereby obviating any

need to create a virtual storage device. *See id.* While the Examiner argues it would be obvious to create a missing virtual storage device upon detecting its absence in response to insertion of a physical device, we find no corresponding disclosure in Trimmer. Trimmer is concerned with use of a virtual library system as a primary backup with physical storage available as a further backup. However Trimmer does not disclose details about reloading the physical tapes to restore the original protected data.

To the extent that the Examiner relies on “official notice,” we find the Examiner’s explanation conclusory and therefore inadequate to support a finding of obviousness. The Examiner has not provided persuasive argument or evidence that the facts asserted to be well known are capable of instant and unquestionable demonstration as being well-known.⁴ In particular, the Examiner’s reasoning for “creating the virtual tape from the virtual barcode at the time of the loading of the tape and reading of the physical barcode” (Ans. 6) is that it is “the most straight forward, convenient, efficient and user friendly time to create the virtual tape in the system of Trimmer et al.” (*id.*). However, we find that the Examiner’s reasoning is speculative and conclusory. “[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006), cited with approval in *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 417-18 (2007).

⁴ *See* MPEP §2144.03, Reliance on Common Knowledge in the Art or “Well Known” Prior Art.

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Accordingly, we will not sustain the rejection of claim 1 and, for the same reason, the rejection of claims 16 and 22 or of dependent claims 4-15 and 17-21.

CONCLUSION

Appellant has persuaded us of error in the Examiner's decision to reject independent claim 1 and, for the same reasons, 16 and 22. Thus, we will not sustain the Examiner's rejection of claims 1, 4-19 and 21-22 under 35 U.S.C. § 103(a).

DECISION

The decision of the Examiner to reject claims 1, 4-19 and 21-22 is reversed.

REVERSED

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