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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ANA C. BIAZETTI, THOMAS LUMPP, and
JUERGEN SCHNEIDER

Appeal 2012-009768
Application 12/347,108
Technology Center 2100

Before JEAN R. HOMERE, JEFFREY S. SMITH, and
JEFFREY A. STEPHENS, *Administrative Patent Judges*.

STEPHENS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants seek our review under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1–12. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

Claimed Subject Matter

The invention generally relates to dynamic creation of policies that provide for high availability computing. *See Spec.* 1–3. Claim 1, reproduced below, is illustrative:

1. A method for dynamically creating a high availability policy based upon entries in a configuration management database (CMDB) and a best practices template, the method comprising:

directing resource discovery in a CMDB for a selected application to discover components and dependencies of the selected application;

mapping the components and dependencies discovered for the selected application in the CMDB to a best practices template specifying a parameterized high availability topology for the selected application; and,

storing the best practices template with mapped components and dependencies as a high availability policy for the selected application.

Rejections

Claims 8–12 stand rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter.¹

¹ The Examiner appears to have withdrawn the rejection of method claims 1–7 under 35 U.S.C. § 101. Should there be further prosecution of this application (including any review for allowance), the Examiner may wish to review all of the claims for compliance under 35 U.S.C. § 101 in light of the recently issued preliminary examination instructions on patent eligible subject matter. *See* “Preliminary Examination Instructions in view of the Supreme Court Decision in *Alice Corporation Pty. Ltd. v. CLS Bank International, et al.*,” Memorandum to the Examining Corps, June 25, 2014; *see also CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366 (Fed. Cir. 2011) (holding method claim reciting steps of obtaining information, constructing a map, and utilizing the map invalid under § 101

Claims 1–12 stand rejected under 35 U.S.C. § 102(b) as anticipated by O’Brien (US 7,228,453 B2, issued June 5, 2007).

ISSUES

The issues raised by Appellants’ contentions are as follows:

1. Whether the “computer usable storage medium” recited in claim 8 includes transitory media and is therefore directed to patent ineligible subject matter.
2. Whether O’Brien discloses “mapping the components and dependencies discovered for the selected application in the CMDB to a best practices template specifying a parameterized high availability topology for the selected application” (hereinafter, the “mapping step”), as recited in claim 1.

ANALYSIS

Section 101 – Claims 8–12

The Examiner determined that the limitation “computer usable storage medium” in claim 8 appears to cover transitory and non-transitory embodiments and thus encompasses non-statutory subject matter such as transitory propagating signals. Ans. 5–6. The Examiner suggested Appellants amend claim 8 to recite a “non-transitory computer usable medium,” Final Act. 4 (mailed Oct. 12, 2011), but Appellants did not do so.

Appellants do not present persuasive evidence or argument that the Specification explicitly defines “computer usable storage medium” to

as being “drawn to an unpatentable mental process—a subcategory of unpatentable abstract ideas,” along with related computer readable media claim).

exclude non-transitory embodiments, or that any other limitations in claim 8 restrict the claim to non-transitory embodiments. Appellants argue that a storage medium is not a transitory medium like a signal. Appeal Br. 11.

Since the filing of Appellants' Brief, the Board held in *Ex parte Mewherter*, 107 USPQ2d 1857, 1862 (PTAB 2013) (precedential in relevant part), that in the relevant timeframe "those of ordinary skill in the art would understand the claim term 'machine-readable storage medium' would include signals *per se*." Appellants' arguments to the contrary and citation of prior non-precedential Board opinions are therefore unavailing.

"[W]here, as here, the broadest reasonable interpretations of all the claims each covers a signal *per se*, the claims must be rejected under 35 U.S.C. § 101 as covering non-statutory subject matter." *Id.* (citing, *inter alia*, *In re Nuijten*, 500 F.3d 1346, 1356-57 (Fed. Cir. 2007) (transitory embodiments are not directed to statutory subject matter) and U.S. Patent & Trademark Office, *Subject Matter Eligibility of Computer-Readable Media*, 1351 Off. Gaz. Pat. Office 212 (Feb. 23, 2010)). Although Appellants remark that the "Examiner appears to believe the findings of the Federal Circuit and the Supreme Court are not binding upon the Examiner as an agent of the United States Patent and Trademark Office," Appeal Br. 10, Appellants do not argue that any specific Federal Circuit or Supreme Court authority compels us not to follow the Board's *Mewherter* decision.

Accordingly, we agree with the Examiner that claim 8 encompasses non-statutory subject matter. Appellants do not present separate arguments for dependent claims 9–12, and we sustain the rejection of these claims under 35 U.S.C. § 101 for the same reasons.

Section 102 – Claims 1–12

Appellants argue that O’Brien does not disclose the mapping step of claim 1. Appeal Br. 15. Specifically, Appellants argue that the Examiner failed to rebut Appellants’ previous arguments that mapping is not disclosed in O’Brien, that the Examiner misconstrued the term “best practices template,” and that the Examiner has not established a proper claim construction of the claim term “parameterized high availability topology.” Appeal Br. 18.

Regarding construction of the term “best practices template,” Appellants quote from a previous office action response arguing the “Examiner has set forth an express claim construction of the term ‘best practices template’ as a ‘desired configuration.’” *Id.* at 15. Appellants argue that the Examiner ignored these arguments regarding “misconstruction of the ‘best practices template.’” *Id.* at 16. Appellants appear to assert that describing the “best practices template” as a desired configuration does not incorporate claim 1’s further limitation that the best practices template “specif[y] a parameterized high availability topology.” We will, therefore, address Appellants’ arguments in the context of the term “parameterized high availability topology,” as recited in claim 1.

Appellants argue that the broadest reasonable interpretation of “parameterized high availability topology” is “a high availability topology that has been parameterized.” Appeal Br. 17. According to Appellants, the Examiner “impermissibly interpreted ‘parameterized high availability topology’ to more broadly mean ‘structured markup language document’ that describes a ‘managed object class.’” *Id.* at 17–18. Appellants elsewhere argue, however, that the Examiner interpreted “parameterized

high availability topology” to mean a structured markup language document formatted with different entries specifying a known topology. *Id.* at 15–16 (citing Final Act. 16–17).

Appellants further assert that the Examiner’s findings relating to high availability best practices designs, templates, fault management, topologies, and mapping as disclosed by O’Brien, *see* Ans. 19–21 (citing O’Brien Fig 2; col. 2, ll. 37–62; col. 4, ll. 8–33; col. 3, ll. 61–63; col. 5, ll. 17–28; col. 6, ll. 23–39; col. 3, ll. 13–24; col. 3, ll. 37–41; col. 6, ll. 52–67; col. 7, ll. 1–3; col. 9, ll. 16–26), show that O’Brien has “words of varying relevance to Appellants’ claim language.” Appellants submit, however, the cited textual portions do not show that O’Brien discloses “a best practices template specifying a parameterized high availability topology for the selected application,” Reply Br. 7. In particular, Appellants argue that a “managed object class” acts as a template for the construction of an object, and that the Examiner has not shown the managed object classes disclosed in O’Brien define or specify a parameterized high availability topology. *Id.*

We are not persuaded that the Examiner interprets “parameterized high availability topology for the selected application” to mean a structured markup language document that describes a managed object class, or even a structured markup language document formatted with different entries specifying a known topology. The Examiner’s findings indicate that the term “parameterized” encompasses a structured markup document, and that a managed object class is a “template.” *See generally* Ans. 19–21. We agree with these findings. We do not, however, understand the Examiner’s interpretation of “parameterized high availability topology” to be limited to these examples.

We agree with the Examiner that the term “parameterized topology” and related terms are described in the Specification open-endedly. *See* Final Act. 16 (citing Spec. ¶¶ 31–33). For example, the Specification states that “the best practices template can be a structured markup language document such as an extensible markup language (XML) formatted document with different entries specifying a known topology for rendering an application highly available.” Spec. ¶ 31. In addition, “the best practices template can include parameterized entries that can be completed by mapping the discovered components and dependencies of a selected application to different ones of the parameterized entries in order to create an application specific high availability policy 280.” *Id.* ¶ 32. “For instance, the parameterized entries of the best practices template can enumerate different hosts” *Id.* One statement about what the best practices template “is” states that it “is a best practice model of how an application or component can be made highly available.” *Id.* ¶ 31. Accordingly, we find the Examiner’s interpretation of “parameterized topology” to be reasonably supported by the Specification.

The Examiner finds that O’Brien defines a topology that includes the availability manager. Ans. 19. Specifically, O’Brien discloses that the availability manager runs on the same node as the cluster manager, and that the standby availability manager runs on the cluster standby node and executes as a hot standby. *See* O’Brien col. 25, ll. 42–60. The described topology is depicted in Figure 1 of O’Brien, reproduced below.

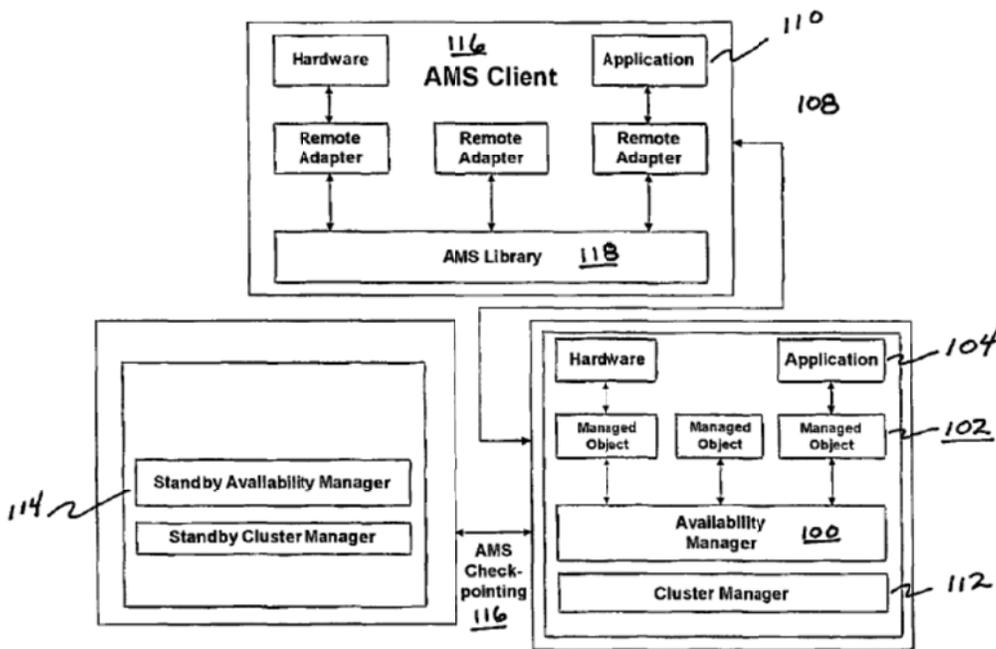


Figure 1

Figure 1 shows the general topology of the availability manager disclosed in O'Brien.

The Examiner finds that “the ‘best practices template,’ when applied to a failed primary availability manager itself in a failover condition, specifies a one-to-one ‘high availability topology’ by applying a standby availability manager.” Ans. 21. The availability manager topology relied on by the Examiner and described at column 25 of O'Brien is “parameterized” under the broadest reasonable interpretation of the term consistent with the Specification because it uses general references to components rather than assign specific objects representing specific network resources. Specific objects are assigned by virtue of the “mapping” of the system model to managed objects. *See* Ans. 20–21 (citing O'Brien col. 9, ll. 16–26); *see also*

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Ans. 20 (finding that a managed object includes the availability manager itself).

In light of the foregoing reasons, we are unpersuaded of error in the Examiner's findings. We sustain the rejection of claim 1 under 35 U.S.C. § 102(b) as anticipated by O'Brien. Appellants do not present separate arguments for independent claim 8 or dependent claims 2-7 and 9-12. We sustain the rejection of these claims for the same reasons.

DECISION

The Examiner's decision to reject claims 1-12 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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