UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
12/032,351	02/15/2008	Gennaro A. Cuomo	RSW920080082US1 (384)	4188

46320 7590 03/24/2015

CRGO LAW
STEVEN M. GREENBERG
7900 Glades Road
SUITE 520
BOCA RATON, FL 33434

EXAMINER
HUISMAN, DAVID J

ART UNIT	PAPER NUMBER
2183	

NOTIFICATION DATE	DELIVERY MODE
03/24/2015	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

docketing@crgolaw.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte GENNARO A. CUOMO, MATT R. HOGSTROM,
SAI G. RATHNAM, MATTHEW J. SHEARD,
and BRIAN L. WHITE EAGLE

Appeal 2013-001024
Application 12/032,351
Technology Center 2100

Before JEFFREY S. SMITH, DANIEL N. FISHMAN, and
DANIEL J. GALLIGAN, *Administrative Patent Judges*.

GALLIGAN, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants[1] seek our review under 35 U.S.C. § 134(a) of the Examiner's final rejection of claims 1–14. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.[2]

---

[1] The Appeal Brief identifies International Business Machines Corp. as the real party in interest. Br. 2.

[2] Our Decision refers to Appellants' Appeal Brief filed May 21, 2012 ("Br."); Examiner's Answer mailed July 18, 2012 ("Ans."); and original Specification filed February 15, 2008 ("Spec.").

STATEMENT OF THE CASE

Claims on Appeal

Claims 1, 9, and 12 are independent claims. Claim 1 is reproduced below:

> 1. A virtualization data processing system comprising:
>
> a hypervisor configured for execution in a host computing platform in at [sic] a computer system of at least one computer with memory and at least one processor;
>
> a virtual machine (VM) image managed by the hypervisor;
>
> a configuration applied to the VM image, the configuration specifying a set of resources in the host computing platform accessible by applications executing in the VM image; and
>
> re-tasking logic coupled to the hypervisor, the logic comprising program code enabled to select a new role for the VM image, to determine a new configuration for the new role, and to apply the new configuration to the VM Image.

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

Knauerhase et al. (hereinafter "Knauerhase")	US 2005/0132362 A1	June 16, 2005

Examiner's Rejections

Claims 1–8 and 12–14 stand rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter. Ans. 2–3.

Claims 1–9 and 12 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Knauerhase. Ans. 3–6.

Claims 10, 11, 13, and 14 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Knauerhase in view of Official Notice. Ans. 6–8.

ANALYSIS

We adopt the findings of fact made by the Examiner in the Examiner's Answer as our own, and we agree with the conclusions reached by the Examiner for the reasons given in the Answer. *See* Ans. 2–13. We have considered Appellants' arguments, but we are not persuaded of Examiner error. We highlight the following for emphasis.

Rejection of Claims 1–8 under 35 U.S.C. § 101

The Examiner concluded the subject matter of claims 1–8 are not directed to one of the four statutory categories of invention and, therefore, rejected these claims under 35 U.S.C. § 101. Ans. 2–3. Appellants argue independent claim 1 is directed to a machine. Br. 5–6. As support, Appellants note claim 1 requires "a hypervisor configured for execution in a host computing platform in a computer system of at least one computer with memory and at least one processor" and further note "Appellants' specification indicates that a typical combination of hardware and software could be a general purpose computer system with a computer program that, when being loaded and executed, controls the computer system such that it carries out the methods described herein." Br. 5.

We are not persuaded of Examiner error. As the Examiner found, although claims 1–8 can be interpreted as a machine, they are not limited to a machine but, instead could be only software or data. Ans. 8. As support, the Examiner cited Appellants' Specification, which explains that "[*e*]*mbodiments of the invention can take the form of an entirely hardware embodiment, an entirely software embodiment or an embodiment containing both hardware and software elements*." Ans. 8 (quoting Spec. ¶ 28). The Examiner further explained that claim 1's recitation of "a hypervisor

configured for execution in a host computing platform in at [sic] a computer system of at least one computer with memory and at least one processor" is "an intended hardware environment for the hypervisor, but the hardware is not claimed as part of the virtualization data processing system." Ans. 8–9.

We agree with the Examiner and, therefore, we sustain the rejection of claim 1 and dependent claims 2–8, which are not separately argued, under 35 U.S.C. § 101.

Rejection of Claims 12–14 under 35 U.S.C. § 101

Independent claim 12 is directed to a "computer program product comprising a computer usable storage medium storing computer usable program code for VM re-tasking." The Examiner determined "computer usable storage medium" in independent claim 12 covers transitory propagating signals and, therefore, rejected claims 12–14 under 35 U.S.C. § 101 as directed to non-statutory subject matter.

Appellants argue claim 12 is directed to statutory subject matter because it recites "a computer usable storage medium," rather than just "a computer usable medium." Br. 8. Appellants argue:

> Appellants' specification distinguishes a 'storage medium' from a mere 'medium' in that the specification indicates that one type of medium is a medium that stores a computer program. The specification continues that such a storage medium includes an electronic, magnetic, optical, electromagnetic, infrared or semiconductor system as compared to a propagation medium.

Br. 8.

Appellants' Specification states:

> For the purposes of this description, a computer-usable or computer readable medium can be any apparatus that can contain, store, communicate, propagate, or transport the

> program for use by or in connection with the instruction execution system, apparatus, or device. The medium can be an electronic, magnetic, optical, electromagnetic, infrared, or semiconductor system (or apparatus or device) or a propagation medium.

Spec. ¶ 29. The Examiner found that each of these examples of media qualify as a "computer usable storage medium," and explained that "[a] propagation medium (signal), in particular, is a transitory computer usable storage medium" that "stores data (e.g. program code) during transmission from a transmitter to a receiver." Ans. 10. The Examiner further explained that Appellants' Specification does not distinguish computer usable storage media from propagation media. Ans. 11.

We agree with the Examiner. Appellants' Specification does not limit a "storage medium" to a non-transitory embodiment. *See Ex parte Mewherter*, 107 USPQ2d 1857 (PTAB 2013) (precedential-in-part) (computer-readable media encompass transitory embodiments unless explicitly excluded). As such, we are not persuaded of Examiner error and we sustain the rejection of claim 12 and dependent claims 13 and 14, which are not separately argued, under 35 U.S.C. § 101.

Rejection of Claims 1–14 under 35 U.S.C. §§ 102 and 103

Appellants contend the Examiner erred in finding Knauerhase discloses the limitation of claim 1 reciting "re-tasking logic coupled to the hypervisor, the logic comprising program code enabled to select a new role for the VM image, to determine a new configuration for the new role, and to apply the new configuration to the VM Image" because "activity" disclosed in Knauerhase is distinct from "role," as recited in claim 1. Br. 10–13. Appellants argue that the activity of Knauerhase is "behavior of a VM that

can be monitored, for example processor usage, network usage, disk usage, or whether the VM is performing a time-critical task." Br. 11 (quoting Appellants' Office Action Response filed Nov. 1, 2011). Appellants argue "a role is clear as claimed as being 'for a VM image' rather an experience 'by a VM image'" and therefore, the Examiner's reliance on experiences of a VM, such as higher processing usage, as disclosing a "role" is erroneous. Br. 13.

In rejecting claim 1, the Examiner found Knauerhase discloses "for different tasks (activity levels), different resource configurations are applied to each VM image." Ans. 4 (citing Knauerhase ¶¶ 12, 15, Fig. 1). The Examiner explained that a role for a virtual machine (VM) could be a word-processing role and that it could change to a time-critical role later. Ans. 12–13.

Knauerhase discloses examples of activities of a virtual machine include calculating data or sorting lists. Knauerhase ¶ 15 (emphasis added) ("Block **140** illustrates that it may be determined whether or not the *activity* of the VM triggers a change in the allocation of the resources used by the virtual machine. In one illustrative embodiment, a VM may be primarily using processor resources. For example the *VM may be calculating data, or sorting lists*."); *see also* Knauerhase ¶ 12 (emphasis added) ("In one embodiment, activity such as, for example, processor usage, network usage, disk usage, or *whether the VM is performing a time-critical task*."). Such activities or tasks are encompassed by the definition of "role" cited by Appellants: "the function assumed or part played by a person or thing in a particular situation." Br. 12 (quoting Appellants' Office Action Response filed Nov. 1, 2011). As such, we are not persuaded of error in the

Examiner's findings regarding claim 1 or claims 9 and 12 argued together with claim 1 (Br. 10, 14).

Based on the foregoing, we sustain the rejection of claim 1, as well as claims 2–9 and 12, which are not separately argued (Br. 13–14), under 35 U.S.C. § 102(b). We likewise sustain the rejection of claims 10, 11, 13, and 14, which are not separately argued (Br. 14), under 35 U.S.C. § 103(a).

DECISION

We affirm the Examiner's rejection of claims 1–14.

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

kis