



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.
12/685,928	01/12/2010	Wesley M. Felter	AUS920090080US1	8497
50170	7590	06/24/2015	EXAMINER	
IBM CORP. (WIP)			STOYNOV, STEFAN	
c/o WALDER INTELLECTUAL PROPERTY LAW, P.C.				
17304 PRESTON ROAD				
SUITE 200			ART UNIT	
DALLAS, TX 75252			PAPER NUMBER	
			2116	
			MAIL DATE	
			DELIVERY MODE	
			06/24/2015	
			PAPER	

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.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte WESLEY M. FELTER and JUAN C. RUBIO

Appeal 2013-005380
Application 12/685,928
Technology Center 2100

Before DEBRA K. STEPHENS, NORMAN H. BEAMER, and
KAMRAN JIVANI, *Administrative Patent Judges*.

BEAMER, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 14–33.¹ Claims 1–13 are cancelled. We have jurisdiction over the pending claims under 35 U.S.C. § 6(b).

We affirm.

¹ Appellants identify International Business Machines Corporation as the real party in interest. (App. Br. 2.)

THE INVENTION

Appellants' invention is directed to providing a customized power rating for computer equipment. (Abstract.)

Claim 14, reproduced below, is illustrative of the claimed subject matter:

14. A computer program product comprising a computer readable storage medium having a computer readable program stored therein, wherein the computer readable program, when executed on a processor, causes the processor to:

receive a default power limit for a computer device;

record actual case power consumption for the computer device based on an actual configuration and workload of the computer device; and

apply an actual case power limit to the computer device, wherein the actual case power limit is determined based on the recorded actual case power consumption.

The Examiner provisionally rejected claims 14–33 on the ground of nonstatutory obviousness-type double patenting. (Final Act. 2–4.)

The Examiner rejected claims 14–17, 22–25, 30, and 31 under 35 U.S.C. § 101 as directed to non-statutory subject matter. (Final Act. 5–6.)

The Examiner rejected claims 14–16 and 18–20 under 35 U.S.C. § 102(b) as being anticipated by Cartes et al. (US 2006/0206730 A1, pub. Sept. 14, 2006). (Final Act. 6–8.)

The Examiner rejected claims 22–24 and 26–28 under 35 U.S.C. § 103(a) as being unpatentable over Cartes and Bodas (US 6,804,616 B2, issued Oct. 12, 2004). (Final Act. 8–10.)

The Examiner rejected claims 25 and 29 under 35 U.S.C. § 103(a) as being unpatentable over Cartes, Bodas, and Gutnick (US 7,307,529 B2, issued Dec. 11, 2007). (Final Act. 10–11.)

The Examiner rejected claims 30 and 32 under 35 U.S.C. § 103(a) as being unpatentable over Cartes and Conwell et al. (US 7,095,324 B2, issued Aug. 22, 2006). (Final Act. 11–12.)

The Examiner rejected claims 31 and 33 under 35 U.S.C. § 103(a) as being unpatentable over Cartes, Bodas, and Conwell. (Final Act. 12–13.)

ISSUES ON APPEAL

As an initial matter, in response to the Examiner’s provisional rejection of claims 14–33 on the ground of nonstatutory obviousness-type double patenting, Appellants “hold response in abeyance.” (App. Br. 3.) Therefore, the provisional rejection is summarily affirmed, recognizing that the affirmance “might be obviated by future events.” *In re Wetterau*, 356 F.2d 556, 558 (CCPA 1966).

For the remaining rejections, Appellants’ arguments in the Appeal Brief present the following issues:²

First Issue: Whether the Examiner errs in concluding that claims 14–17, 22–25, and 30–31 are directed to non-statutory subject matter. (App. Br. 3–4.)

² Rather than reiterate the arguments of Appellants and the Examiner, we refer to the Appeal Brief (filed Dec. 4, 2012), Reply Brief (filed Mar. 6, 2013), Final Office Action (mailed Aug. 13, 2012), and the Answer (mailed Jan. 10, 2013) for the respective details.

Second Issue: Whether the Examiner errs in finding that Cartes discloses the independent claim 14 limitation, “a processor to . . . record actual case power consumption for the computer device based on an actual configuration and workload of the computer device,” and similar limitation of independent claim 18. (App. Br. 5–8.)

Third Issue: Whether the Examiner’s obviousness rejections are in error. (App. Br. 8–12.)

ANALYSIS

We have reviewed the Examiner’s rejections in light of Appellants’ arguments that the Examiner has erred. We disagree with Appellants’ arguments, and adopt as our own: (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken (Final Act. 2–13); and (2) the reasons set forth by the Examiner in the Examiner’s Answer in response to Appellants’ Appeal Brief (Ans. 14–20), and concur with the conclusions reached by the Examiner.

First Issue

Appellants argue that the Examiner errs in concluding that claims 14–17, 22–25, and 30–31 are directed to non-statutory subject matter. (App. Br. 3–4.) Independent claim 14 is directed to “A computer program product comprising a computer readable storage medium having a computer readable program stored therein.” Claims 15–17, 22–25, and 30–31 depend from claim 14. Appellants argue that a “storage medium” is by definition non-transitory, and therefore is a “manufacture” qualifying as patentable subject matter under 35 U.S.C. § 101. (App. Br. 3.)

This argument is unpersuasive. As the Examiner correctly concludes, a claim to “computer readable storage medium” is insufficient to limit the claim to non-transitory media. (Ans. 14–16). *See Ex parte Mewherter*, 107 USPQ2d 1857, 1862 (PTAB 2013) (precedential) (holding recited machine-readable storage medium ineligible under Section 101 because it encompassed transitory media). Therefore we sustain the rejection of claims 14–17, 22–25, and 30–31 pursuant to 35 U.S.C. § 101.

Second Issue

Appellants argue that the Examiner errs in finding that Cartes discloses, “a processor to . . . record actual case power consumption for the computer device based on an actual configuration and workload of the computer device.” (App. Br. 5–8.) In particular, Appellants argue that Cartes does not base any determination of actual power consumption on the “workload” of the computer device, but rather uses maximum power ratings of the components of the device. (App. Br. 6–7; Reply Br. 5.) Appellants further argue that “[t]he sum of the theoretical maximum power consumptions of the components of a server is not the same as the **recorded actual case** power consumption of the server.” (App. Br. 8).

The Examiner responds that:

Cartes discloses determining the maximum power rating of the host processor 112 (i.e. one of the actual hardware components installed in the server, please see Table 1, page 2) in correspondence of the server executing an application that is maximally intensive for the host processor 112 (i.e. with consideration to the server's workload - paragraph 0019, lines 17-21).

(Ans. 18.)

The portion of Cartes, on which the Examiner relies, states:

[T]he maximum power rating of the host processor 112 should be approximately equal to the power consumed by the host processor 112 when the server 102 is executing an application that is maximally intensive for the host processor 112.

(Cartes ¶ 19.)

Appellants do not persuade us that the Examiner’s findings are erroneous. Under the broadest reasonable interpretation of “workload” in the context of the claim, the maximum power rating disclosed in Cartes is based on measuring actual power consumption on the workload of the computer device. That Cartes uses “the power consumed by the host processor . . . when the server . . . is executing an application that is maximally intensive for the host processor” is consistent with the use of the term “workload” in the claims. For example, the Specification states, “A power monitor determines actual power consumption by computer equipment in a facility. *After equipment has been stressed*, an operator sends the actual power consumption information to the manufacturer.”

(Spec. ¶ 60) (emphasis added).

Therefore, we sustain the anticipation rejection of independent claims 14 and 18.

Third Issue

Appellants argue that the Examiner’s obviousness rejections, based on various combinations of Cartes, Bodas, Gutnick, and Conwell, are in error. (App. Br. 8–12.) All of the claims rejected for obviousness are dependent from independent claims 14 and 18. In arguing that the obviousness rejections are in error, Appellants repeat the argument discussed above, that Cartes does not base any determination of actual power consumption on the

“workload” of the computer device. (App. Br. 8–12.) This argument is unpersuasive, for the reasons discussed above.

Appellants also argue that the obviousness rejection of claims 22 and 26 over Cartes and Bodas is in error because “Bodas teaches **calculating** a maximum power rating of actual components, but does not teach recording actual case power consumption.” (App. Br. 9; Reply Br. 8). However, the Examiner relies on Cartes as teaching or suggesting “recording of actual power consumption.” (Ans. 19.) Therefore, Appellants do not persuade that the Examiner’s obviousness conclusions are in error.

In sum, we sustain the Examiner’s obviousness rejections.

CONCLUSION

As discussed above, the Examiner’s provisional rejection of claims 14–33 on the ground of nonstatutory obviousness-type double patenting, is summarily affirmed.

For the reasons set forth above, we sustain the Examiner’s rejection of claims 14–17, 22–25, 30, and 31 as directed to non-statutory subject matter, the anticipation rejection of independent claims 14 and 18, and the obviousness rejections of claims 22–24 and 26–28 as being unpatentable over Cartes and Bodas; of claims 25 and 29 as being unpatentable over Cartes, Bodas, and Gutnick; of claims 30 and 32 as being unpatentable over Cartes and Conwell; and of claims 31 and 33 as being unpatentable over Cartes, Bodas, and Conwell. We also sustain the rejection of claims 15, 16, 19, and 20 as being anticipated by Cartes, which rejection is not argued separately with particularity. (App. Br. 8.)

Appeal 2013-005380
Application 12/685,928

DECISION

The Examiner's rejection of claims 14–33 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)(2012).

AFFIRMED

ELD