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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JOSEPH E. HACKETT
and
LEONARD S. HAND

Appeal 2016-006366
Application 13/760,396
Technology Center 2100

Before CARLA M. KRIVAK, JEREMY J. CURCURI, and MICHAEL M. BARRY, *Administrative Patent Judges*.

KRIVAK, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellants request rehearing of the Decision on Appeal of November 2, 2017 ("Dec."). Appellants' Rehearing Request (Reh'g Req.) contends the Board, in its Decision, misapprehended and/or overlooked certain arguments presented by Appellants (Reh'g Req. 1).

The Decision has been reconsidered in light of Appellants' arguments in the Rehearing Request and no errors have been found. Therefore, the Decision is not modified for the reasons discussed below.

ANALYSIS

Appellants contend the Board's Decision "overlooks and/or misapprehends Appellants' previously presented arguments that '[m]erely presenting these two different pieces of data at the same time within the same display does not establish that one piece of data (i.e., the recommendation) is based upon the other piece of data (i.e., the trend of the score)'" (Reh'g Req. 3; Reply Br. 7). Specifically, Appellants assert, "[i]t is the relationship between the recommendation and the criteria . . . that is missing from the combination of Shu and Ostermeyer" (Reh'g Req. 3) ("[E]ven if both Ostermeyer and Shu taught the limitations at issue, the combination of Ostermeyer and Shu would still fail to teach the claimed limitation, as a whole.").

We did not overlook or misapprehend Appellants' argument. As stated in our Decision, "Ostermeyer also suggests a trend of *a score for an alternative device* by determining the impact of migration, which reflects projected performance of the migrated virtual machine, target host server, or other virtual machine running on the target host server (*see* col. 11, ll. 52–61; *see also* Ans. 9–10)" (Dec. 4) (emphasis added). Appellants have not addressed the Examiner's finding that Ostermeyer teaches or suggests a trend of a score for an alternative device, contrary to their assertions (Reh'g Req. 3–4) (*see* Ans. 9 (citing, *inter alia*, Ostermeyer col. 13, ll. 53-55 ("At Block 525, the migration modeler 244 of the monitoring system 200 determines the impact of migrating the virtual machine to the destination host server")). As the Examiner explains, and we agreed in our Decision (*see* Dec. 4)—

> In col. 13, ll. 53-55, the "destination host server" corresponds to the claimed "alternative device." **Additional disclosures in the Ostermeyer reference make it clear that the 'trend of a score" (the projected impact of performing a VM migration) is regarding the "alternative device" (the target host server).** See col. 3, ll. 18-22, "generate impact data indicative of a projected impact on resources of at least the target physical platform based on the anticipated migration of the virtual machine to the target physical platform and the correlated metric data"; and col. 11, ll. 57-61, "determine the impact of the migration. In certain embodiments, **this impact can reflect the projected performance of the migrated virtual machine, the target host server and/or other virtual machines running on the target host server".**

Ans. 9–10 (emphases added). Thus, Ostermeyer teaches or suggests "the recommendation depends, at least in part, upon a trend of a score for the alternative device," as claimed.

Our Decision also agrees with the Examiner that Shu's paragraph 18 teaches or suggests "the DRS module *makes recommendations* that a user or administrator who can review and carry out the changes manually" (Dec. 5) (citing Ans. 4, 10–11) (emphasis in original). The Decision concludes "it would have been obvious to a person having ordinary skill in the art to combine the recommendation to migrate to another VM as taught by Shu with the display of a forecasted impact of migrating a VM to a destination host server (alternative device), as taught by Ostermeyer" (*id.*). Thus, the Decision properly relies on a motivation to combine the two teachings that specifically articulates how the relationship between the teachings of Shu and Ostermeyer results in a teaching or suggestion of the disputed requirement, and does not rely on mere presentation of two different pieces of data, as Appellants contend. Accordingly, Appellants have not persuaded us we misapprehended or overlooked any argument.

DECISION

Appellants' Request for Rehearing is granted to the extent that the Decision was reconsidered, but is denied with respect to making any changes thereto.

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).

REQUEST FOR REHEARING DENIED