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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte LAURENCE R. LIPSTONE, WILLIAM CROWDER, ANDREW SWART, CHRISTOPHER NEWTON, and LEWIS ROBERT VARNEY

Appeal 2018-000424
Application 13/715,466
Technology Center 2400

Before CARL W. WHITEHEAD JR., IRVIN E. BRANCH, and MICHAEL M. BARRY, *Administrative Patent Judges.*

BRANCH, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE[1]

Pursuant to 35 U.S.C. § 134(a), Appellant[2] appeals from the Examiner's decision to reject claims 1–40. *See* Final Act. 1. An oral hearing was held on July 3, 2019. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM IN PART.

CLAIMED SUBJECT MATTER

The claims are directed to devices and methods supporting content delivery with adaptation services with feedback from health service. Claim 1, reproduced below with disputed limitations emphasized in *italics*, is illustrative of the claimed subject matter:

> 1. A device, operable in a system comprising a plurality of computers, each computer comprising hardware including memory and at least one processor, each computer configured to run at least two content delivery (CD) services of a plurality of CD services, wherein said CD services include: adaptation services, collector services, and control services, and wherein at least some of said plurality of computers run control services, and at least some of said computers run collector services,
>
> said device comprising hardware including memory and at least one processor and:
>
> (a) *a first CD service*, said first CD service being configured:
>
> (a)(l) to monitor aspects of the device; and

[1] We refer to the Specification, filed December 14, 2012 ("Spec."); Final Office Action, mailed January 5, 2017 ("Final Act."); Appeal Brief, filed July 5, 2017 ("Appeal Br."); and Examiner's Answer, mailed August 18, 2018 ("Ans.").

[2] We use the word Appellant to refer to "applicant" as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Level 3 Communications, LLC. Appeal Br. 2.

(a)(2) to generate first information relating to monitored aspects of the device; and

(a)(3) to provide at least some of said first information to at least one other CD service; and

(b) *a second CD service*, said second CD service being configured to control CD services on said device in response to service configuration information obtained by said second CD service at said device from said control services, wherein said second CD service controls said CD services on said device based on service configuration information obtained by said second CD service, wherein said service configuration information is based on said first information provided by said first CD service in (a)(3) relating to monitored aspects of the device.

RELATED APPEALS

Appellant states: "Appeals have been filed or are being filed in the following Applications that share a priority Application (Provisional Application 61/737,072, filed December 13, 2012) with the present Application: 13/715,590; 13/715,747; 13/802,093; 13/802,143; 13/802,335; 14/088,356; 14/088,358; 14/088,367; 14/088,542; 14/307,380; 14/307,389; and 14/578,402." Appeal Br. 2.

REFERENCE AND REJECTION

Claims 1–40 stand rejected under 35 U.S.C. § 102(b) as anticipated by Weller (US 7,840,667 B2; Nov. 23, 2010). Final Act. 2–5.

ANALYSIS

We have reviewed the Examiner's rejections in light of Appellant's arguments. We have considered in this Decision only those arguments Appellant actually raised in the Briefs. Any other arguments Appellant could have made but chose not to make in the Briefs are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).

To the extent consistent with our analysis herein, we adopt as our own the findings and reasons set forth by the Examiner in (1) the action from which this appeal is taken (Final Act. 2–5) and (2) the Examiner's Answer in response to Appellant's Appeal Brief (Ans. 3–8) and concur with the conclusions reached by the Examiner. We highlight the following for emphasis.

35 U.S.C. § 102

Claims 1, 2, 6–8, 11–14, 18–27, 30– 33, and 37–40

Appellant argues claims 1, 20, and 38 on a similar basis, namely that Weller fails to describe first and second CD services on a common "device," (claim 1) or "particular computer" (claims 20 and 38). Appeal Br. 9–14; *see id.* at 12–13 ("Weller does not teach or suggest that his overflow controller process is on the same device as his monitoring agents. . . . Since Weller does not teach or in any way suggest a device having ('comprising') both the claimed first and second CD services, Weller does not and cannot anticipate claim I or its dependents.").

The Examiner finds as follows:

> the present claims defines "the device" to be part of [a] system comprising a plurality of computers, each computer running two or more content delivery services. In other words, "the device" won't be limited to a single computer or single computer component configured to provide one or more CD services. In Weller, "a device" is a regional or private CDN server that comprises <u>one</u> or more content or edge servers and is configured to operate a suite of software services including at least a first CD service (agent 109) for monitoring aspects of the device, e.g., network and server loads, and a second CD service (overflow controller) that uses data (e.g., network/server loads) generated by first CD service to generate configuration information for use to spill traffic to another region (col 8, lines 19–52). It's worth

> noting that CD services are part of software suite (fig. 4) which cannot operate on their own and must be implemented within a server such as content server. Since the claimed "device" won't be read as single server, both NCDN and the overflow controller/server would still be seen as part of the claimed "device". Thus, the examiner submits that Weller teachings meet the alleged claim limitations.

Ans. 3–4.

We do not find a persuasive rebuttal to the Examiner's construction of the claimed device (claim 1) that "'the device' won't be limited to a single computer or single computer component configured to provide one or more CD services," and the Examiner's determination that "[i]n Weller, 'a device' is a regional or private CDN server that comprises one or more content or edge servers and is configured to operate a suite of software services." Ans. 3; *see generally* Appeal Br. 9–14. Because Appellant does not persuasively rebut these determinations, we are unpersuaded of error in the Examiner's rejection of claim 1.

Regarding claims 20 and 38, which recite "a particular computer," rather than "a device," we note the Examiner's finding that Weller describes that its content delivery network (CDN) region can be implemented on a single server. Ans. 5 (citing Weller, col. 4, ll. 1–2 (a content delivery network (CDN) region "typically comprises a set of one or more content servers that share a common backend")). We understand the Examiner to find that Weller describes an entire CDN region hosted on a single content server, which includes all described services.

Appellant argues that Weller's "CDN region" "is a set of 'surrogate origin servers,' but does not include the overflow controller or the monitoring agents." Appeal Br. 12 (citing Weller, col. 3, ll. 65–67 ("A CDN

service provider (CDNSP) may organize sets of surrogate origin servers as a 'region.'"). We do not find this to be a persuasive rebuttal to the Examiner's finding that Weller describes a CDN region to include, on a single computer, a content server and "and is configured to operate a suite of software services including" the claimed first and second CD services. Ans. 3.

Thus, we are unpersuaded of error in the Examiner's rejection of claims 1, 20, and 38. Because Appellant argues claims 6 and 7 based on claim 1 (Appeal Br. 16–17), we also sustain the rejection of these claims. Appellant does not argue the remaining claims in this group with particularity.

Claims 3 and 4

Claim 3 depends from claim 1 and recites "the second CD service is an adaptation service." Claim 4 depends from claim 3.

Appellant argues claim 3 on the basis that the portion of Weller cited by the Examiner (Final Act. 4 (citing Weller, column 11, lines 46–59)) "has no teaching or suggestion of the claimed adaptation service." Appeal Br. 14.

The Examiner responds that Weller teaches "provisioning adaption service for sharing bandwidth across different networks." Ans. 5–6 (again citing Weller, col. 11, ll. 46–59).

We have reviewed the portion of Weller cited by the Examiner and find the Examiner has not adequately explained how the subject matter of claim 3 is described here. Accordingly, we cannot sustain the rejection of claims 3 and 4 on this record.

We note, however, that neither Appellant nor the Examiner direct our attention to a construction of "adaptation service." We have reviewed Appellant's Specification and note that the Specification does not appear to

describe "adaptation service" beyond mentioning it in the title. *See generally* Spec. Accordingly, should further prosecution ensue, the Examiner might consider whether the subject matter of claim 3 has adequate specification support. To whatever extent Appellant might argue that "adaptation service" was well-known at the time of the invention (*see, e.g.*, Spec. ¶ 147 ("Those of ordinary skill in the art will realize and understand, upon reading this description, that different and/or other categorizations of these services may be applied.")), then the Examiner might consider whether claim 3 is obvious over Weller in combination with that which was well-known at the time of Appellant's invention.

Claim 5

Claim 5 depends from claim 1 and recites "wherein the service configuration information obtained from the control services is generated by said control services."

The Examiner again cites Weller, column 11, lines 46–59. Final Act. 4. In response to Appellant's argument that the subject matter of claim 5 is not taught at this location, the Examiner finds "Weller teaches generating configuration information by the control services." Ans. 6 (citing Weller, col. 4, ll. 17–20).

Appellant's arguments do not include a rebuttal to this finding. *See generally* Appeal Br. 16. Accordingly, we are unpersuaded of error in the Examiner's rejection of claim 5.

Claims 9, 10, 28, and 29

Appellant argues claims 9, 28, and 29 on the basis that "[i]f the Examiner relies on the 'single server in an NCDN' argument against claim

1, he cannot then assert that there are multiple servers when rejecting claim 9 (which depends from claim 1)." Appeal Br. 17. This argument is not persuasive of error. Weller's example of a single server (column 4, lines 1–2) describes claim 1's first and second CD services on a common "device." The Examiner's reliance on this disclosure does not, however, constrain the Examiner to Weller's single-server embodiments.

Accordingly, we sustain the Examiner's rejection of claims 9, 28, and 29.

Claims 15, 16, 34, and 35

Claim 15 depends from claim 11, which depends from claim 1, and recites "wherein the second CD service is configured to instruct a CD service on said device to be in a specific operating state." Claim 34 includes a similar recitation.

To the extent that the Examiner relies on the second CD service corresponding to Weller's 'overflow controller' . . . , the Examiner has not shown . . . that '*the second CD service* [the overflow controller] *is configured to instruct a CD service on said device to be in a specific operating state.*'" Appeal Br. 19 (referring to the Examiner's rejection of claim 1).

The Examiner finds that "Weller teaches monitoring health information (e.g., network conditions) by first CD service and using the monitored information by second CD service to configure/provision other CD services, i.e., generating mapping rules to direct user request to optimal region/server." Ans. 7 (citing Weller col 9, ll. 18–36 and col 12, ll. 62–67).

We have reviewed the Examiner's finding with respect to claim 15. We do not find that the Examiner has adequately explained how the cited

portions of Weller describe the limitation of claim 15. Accordingly, on this record, we cannot sustain the rejection. We also cannot sustain the rejection of claim 16, which depends therefrom, and we cannot sustain the rejections of claims 34 and 35, argued on the same basis. Whether the subject matter of these claims would have been obvious is not before us.

Claims 17 and 36

The Examiner rejects claims 17 and 36 on the basis that the subject matter "would have been obvious to one skilled in the art." Final Act. 5. We cannot sustain the rejection because these claims are rejected as anticipated under 35 U.S.C. § 102(b) and not obviousness under 35 U.S.C. § 103(a).

CONCLUSION

The Examiner's decision to reject claims 1, 2, 5–14, 18–33, and 37–40 is affirmed and the Examiner's decision to reject claims 3, 4, 15–17, and 34–36 is reversed.

DECISION SUMMARY

Claims Rejected	**35 U.S.C. §**	**Reference**	**Affirmed**	**Reversed**
1, 2, 5–14, 18–33, 37–40	102(b)	Weller	1, 2, 5–14, 18–33, 37–40	
3, 4, 15–17, 34–36	102(b)	Weller		3, 4, 15–17, 34–36
Overall Outcome:			1, 2, 5–14, 18–33, 37–40	3, 4, 15–17, 34–36

TIME PERIOD FOR RESPONSE

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

AFFIRMED IN PART