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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DON BOWMAN and HARMEET SINGH BEDI

Appeal 2018-001034
Application 10/853,099
Technology Center 2400

BEFORE JASON V. MORGAN, TERRENCE W. McMILLIN, and
KENNETH G. SCHOPFER, *Administrative Patent Judges*.

McMILLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 63–65, 69, 93, 98, and 99. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.²

¹ We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Sandvine Incorporated ULC. Appeal Br. 3.

² We have considered and herein refer to the Specification of May 26, 2004 (“Spec.”); Final Office Action of Oct. 21, 2016 (“Final Act.”); Appeal Brief

CLAIMED SUBJECT MATTER

The claims are directed to a “method for detecting abnormal patterns of computer message traffic.” Spec. 1. Sole independent claim 63 is reproduced below (emphasis added):

63. A method for detecting a source or destination of abnormal message traffic on a network, said method comprising:

tracking messages between a plurality of sources and a plurality of destinations, wherein tracking messages comprises:

determining the source and destination of a message;

generating a source and destination pair counter for each source and destination pair;

incrementing the source and destination pair counter based on at least some of the messages and an amount of messages between said source and said destination;

determining a bandwidth variation of a rate of messages to a destination, wherein determining the bandwidth variation comprises:

generating a bandwidth counter for each destination;

updating the bandwidth counter based on the rate of messages to a destination; and

determining if a predetermined amount of time has passed; and

comparing values in the source and destination pair counter to a predetermined source and destination pair threshold and *comparing values in the bandwidth counter to a predetermined steady rate of messages* after the predetermined amount of time has passed to determine if there is abnormal message traffic related to a source or destination based on both comparisons.

of May 16, 2017 (“Appeal Br.”) and Examiner’s Answer of Sept. 5, 2017 (“Ans.”).

REJECTION

Claims 63–65, 69, 93, 98 and 99 stand rejected under 35 U.S.C. § 112, first paragraph, for failing to comply with the written description requirement.

OPINION

The claims are rejected for failing to comply with the written description requirement of Section 112, first paragraph. Final Act. 5. Specifically, the Examiner finds that the steps of “determining a bandwidth variation of a rate of messages to a destination” and of “comparing values in the bandwidth counter to a predetermined steady rate of messages”³ as set forth in claim 63 are not described in the Specification. *Id.*; *see also* Ans. 2–3.

Section 112 provides:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

35 U.S.C. § 112(a) (2012); pre-AIA 35 U.S.C. § 112, first paragraph, (2006). A description adequate to satisfy the written-description requirement must “reasonably convey[] to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.” *Ariad*

³ The Examiner incorrectly states this step in making the rejection. *See* Final Act. 5. However, this step is accurately set forth elsewhere in the Final Action (*see* Final Act. 3) and in the Examiner’s Answer (*see* Ans. 2, 6).

Pharms., Inc. v. Eli Lilly & Co., 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc) (citation omitted, alteration in original).

With regard to “determining a bandwidth variation of a rate of messages to a destination,”⁴ the Final Action states:

The specification describes a bandwidth variation detector determining whether a steady rate of messages is being provided *by a sender* and also describes calculating bandwidth variation based upon the destination of received messages. However, none of the proffered disclosure describes determining a bandwidth variation “of a rate of messages to a destination.”

Final Act. 5. The Applicant relies on Figure 5 and the related description in the Specification as describing this step. Appeal Br. 12. Figure 5 is reproduced below.

⁴ In addition, claim 63 recites that “determining the bandwidth variation comprises: generating a bandwidth counter for each destination, updating the bandwidth counter based on the rate of messages to a destination, and determining it a predetermined amount of time has passed . . . and comparing values in the bandwidth counter to a predetermined steady rate of messages.” These elements of claim 63 further define steps to “determin[e] a bandwidth variation of a rate of messages to a destination.”

FIG. 5

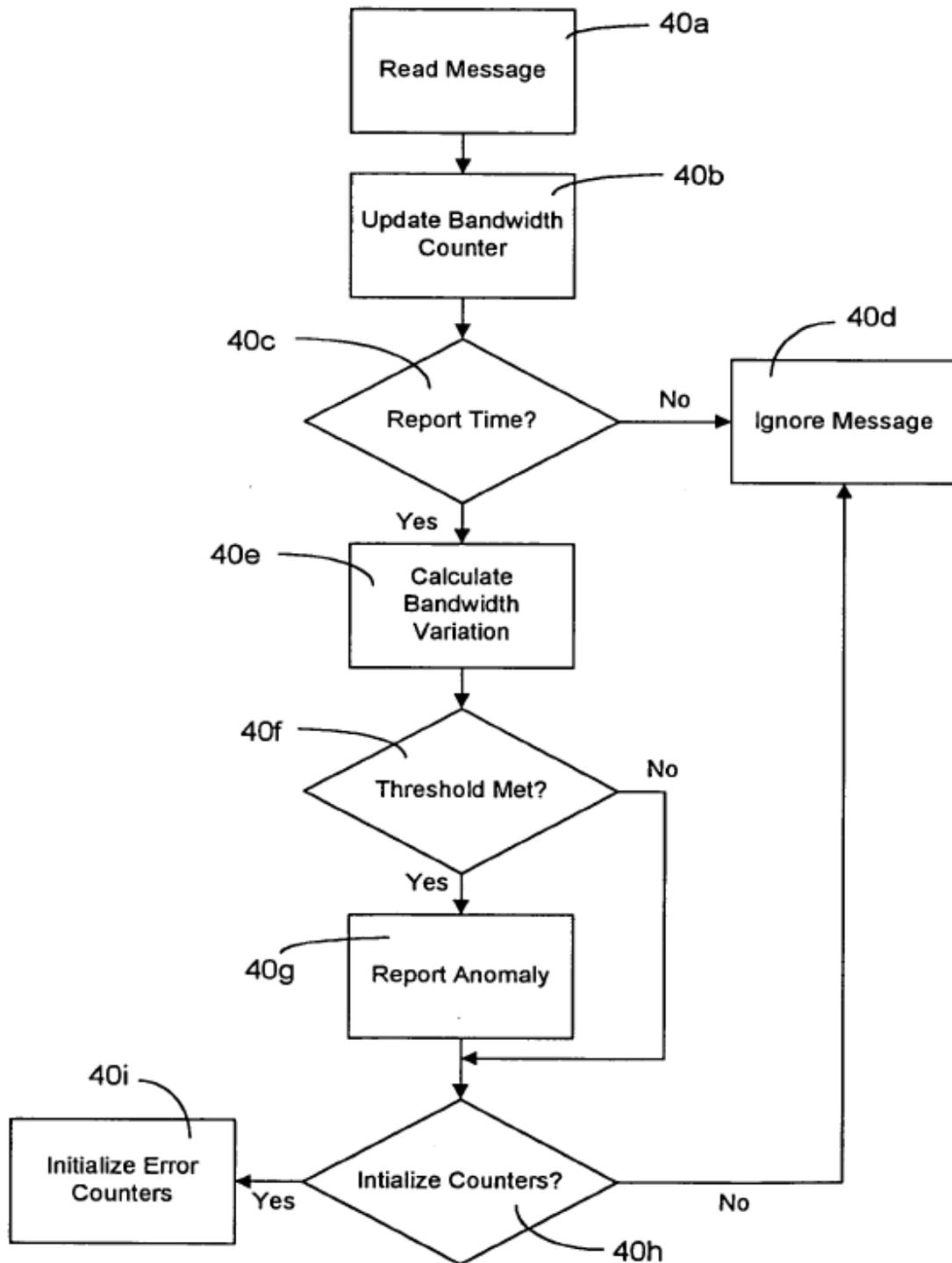


Figure 5 depicts, “a flowchart of the logical structure of the bandwidth variation detector.” Spec. 8:13–14. The detailed description of Figure 5 states, “[b]eginning at step 40a, a message is read to determine the *destination* address of the message” and “[a]t step 40b a counter corresponding to the *destination* address is updated.” *Id.* at 8:14–17 (emphases added). The next step in Figure 5, 40c, is labelled “Report Time?” and is described in the detailed description as “[a]t step 40c a test is made to determine if it is time to generate a report on bandwidth variation.” *Id.* at 8:17–18. We find a disclosure of determining how much the “counter corresponding to the destination address” has been updated in a period of time is a written description of determining the “rate of messages to a destination” as recited.

In Figure 5, step 40e is labelled “Calculate Bandwidth Variation” and step 40f is labelled “Threshold Met?” In addition, the detailed description of the “bandwidth variation detector” of Figure 5 provides “[a]ny number of schemes may be used to determine if an abnormality in bandwidth variation exists. The use of a moving average has been found to work well.” Spec. 8:22–24. And, a “test is then made at step 40f to determine if the desired threshold for bandwidth variation has been met.” *Id.* at 8:25–26. We find that using a moving average to determine if an “abnormality in bandwidth variation exists” and performing a “test . . . to determine if the desired threshold for bandwidth variation has been met” describe “determining a bandwidth variation” as recited. Based on the depiction of the “bandwidth variation detector” in Figure 5 and the cited passages from the detailed description of the “bandwidth variation detector” at page 8, lines 13–31, of the Specification, we find that the Specification provides a written

description of “determining a bandwidth variation of a rate of messages to a destination” as recited in claim 63.

With regard to the step of “comparing values in the bandwidth counter to a predetermined steady rate of messages” as set forth in claim 63, the Final Action states, “[t]he specification only mentions ‘bandwidth counters’ in the context of determining whether they should be initialized (p. 8, ll. 27–29) and does not describe comparing values in the ‘bandwidth counters’ to anything at all, much less to a ‘predetermined steady rate of messages.’” Final Act. 5–6. We find this statement is inaccurate. In Figure 5, step 40b is labelled “Update Bandwidth Counter.” The related passage in the detailed description of Figure 5 in the Specification states, “[a]t step 40b a counter corresponding to the destination address is updated.” Spec. 8:16–17. Thus, the Specification describes updating the “bandwidth counter” of the “bandwidth variation detector” as well as initializing it. And, we find that “comparing values in the bandwidth counter to a predetermined steady rate of messages” is supported by steps 40e (“Calculate Bandwidth Variation”) and 40f (“Threshold Met?”) of Figure 5 and the related description in the Specification of “[t]he use of a moving average” “to determine if the desired threshold for bandwidth variation has been met.” *See id.* at 8:24–26.

For the foregoing reasons, we find that the Specification provides a written description of both the steps of “determining a bandwidth variation of a rate of messages to a destination” and of “comparing values in the bandwidth counter to a predetermined steady rate of messages” as set forth in claim 63. Therefore, the rejection of independent claim 63 and dependent claims 64, 65, 69, 93, 98, and 99 on the basis that these limitations lack written description support cannot be sustained.

CONCLUSION

The Examiner's rejection of claims 63–65, 69, 93, 98, and 99 is reversed.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
63–65, 69, 93, 98, 99	112, first paragraph	Written Description		63–65, 69, 93, 98, 99

REVERSED