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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte WAYNE D. WILLIAMS, MICHAEL L. SWINDELL, and JAMES B. PITTS[1]

Appeal 2018-001674
Application 13/289,969
Technology Center 3600

Before MICHAEL J. STRAUSS, JON M. JURGOVAN, and DAVID J. CUTITTA II, *Administrative Patent Judges*.

JURGOVAN, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant seeks review under 35 U.S.C. § 134(a) from the Examiner's Final Rejection of claims 1, 3–5, 8–12, 14–17, 19, and 20. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.[2]

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[1] We use the word "Appellant" to refer to "applicant(s)" as defined in 37 C.F.R. § 1.42. According to Appellant, the real party in interest is Embarcadero Technologies, Inc. Appeal Br. 2.

[2] Our Decision refers to the Specification ("Spec.") filed November 4, 2011, the Final Office Action ("Final Act.") mailed March 28, 2017, the Appeal Brief ("Appeal Br.") filed August 28, 2017, the Examiner's Answer ("Ans.") mailed October 6, 2017, and the Reply Brief ("Reply Br.") filed December 5, 2017.

CLAIMED SUBJECT MATTER

The claims relate to managing licenses for a product which may be a "software application, software module, or code for a client application designed to execute on a computer system or other device." Spec. Abstract, ¶ 42. Upon receiving a command from a user to execute a product, a computer system automatically accesses a license for the product from a database of licenses, and stores the license at the computer system for automatic activation upon execution of the product. *Id.*

Claim 1, reproduced below with argued limitations shown in emphasis, is representative of the claimed invention:

> 1. A computer-usable storage medium having instructions embodied therein that when executed cause a computer system to perform a method for managing a license for a product, said method comprising:
>
> *displaying a plurality of products at a product browser, wherein said product browser is searchable by a user responsive to user input at said product browser*;
>
> receiving a command at said product browser indicative of a selection of a product of the plurality of products from a user to execute said product via said product browser at said computer system, wherein said product is a software application comprising processor executable instructions stored at said computer system for execution within said product browser, wherein said product requires a license for execution, wherein said product is a self-contained file converted from an existing install file to be executed on an operating system to said self-contained file, wherein said product browser is capable of installing and executing said product, and wherein said self-contained file is managed, executed, and otherwise operated upon via said product browser;
>
> *responsive to receiving said command to execute said product, automatically accessing a database of licenses associated with an enterprise and storing said license via said product browser at said computer system for automatic license*

> *activation upon execution of said product, wherein said license is one of a limited number of licenses owned by said enterprise for said product*;
>
> *subsequent to said storing said license at said computer system, executing said product in said product browser at said computer system without requiring said product to be installed in said operating system*;
>
> tracking a real-time usage of said product during execution of said product for how often and how long said product is executed at said product browser, wherein said tracking occurs via said product browser; and
>
> generating a notification of an option to reclaim said license in response to information that said product is under-utilized by said computer system, wherein said information that said product is under-utilized is based at least in part on said tracking said real-time usage.

Appeal Br. 32–33 (Claims Appendix).

REJECTIONS

Claims 1, 3–5, and 8 stand rejected under 35 U.S.C. § 103(a) based on

Schmeidler (US 7,690,039 B2, issued March 30, 2010),

Read (US 2005/0049973 A1, published March 3, 2005),

Veditz (US 7,478,142 B1, issued January 13, 2009) and

Wood (US 2009/0172658 A1, published July 2, 2009). Final Act. 8–15.

Claims 9–12, 14–17, 19, and 20 stand rejected under 35 U.S.C. § 103(a) based on Schmeidler, Read, Wood, Veditz and Keith (US 2013/0204975 A1, published August 8, 2013). Final Act. 15–23.

ANALYSIS

Claim 1

The Examiner finds that Schmeidler discloses the limitations of "*displaying*," "*accessing*," and "*executing*" emphasized in claim 1 above. Final Act. 9–11; Schmeidler Fig. 4 [401], 2:32–43, 14:19–40, claim 1. Appellant argues that Schmeidler fails to disclose these claim limitations and that claim 1 thus is patentable. Appeal Br. 12–19.

The claimed "*displaying*" step shows products (i.e., software) available for selection by a computer, similar to a menu. Spec. Abstract, ¶ 42. The "*accessing*" step pertains to a database of licenses (e.g., a pool of seat licenses) for automatic activation upon execution of a product. Spec. Abstract, ¶ 55. The "*executing*" step pertains to executing the product in the product browser without requiring the product to be installed in the operating system. Spec. Abstract, ¶ 50. This technique is referred to as "sandboxing" and is used to prevent the product from undesirably impacting the computer. Spec. ¶¶ 50, 72.

At the outset, we note that merely underlining claim language and asserting it is different from the prior art references is insufficient to constitute an argument. *See* 37 C.F.R. § 41.37(c)(1)(iv) (2013) ("The arguments shall explain *why* the examiner erred as to each ground of rejection contested by appellant." (Emphasis added)). Furthermore, "[i]t is not the function of [the Board] to examine the claims in greater detail than argued by an appellant, looking for [patentable] distinctions over the prior art." *In re Baxter Travenol Labs*., 952 F.2d 388, 391 (Fed. Cir. 1991). Accordingly, in the following, we address only Appellant's contentions that are articulated with sufficient particularity and supported by sufficient

explanation as to constitute cognizable allegations of specific reversible Examiner error and thereby amount to actual arguments. Arguments that Appellant did not make in the Briefs are waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Appellant argues for patentability as follows:

> Appellants understand Schmeidler to disclose a system utilizing a [Secure Content Delivery Platform (SCDP)] client installed on a PC and a separate HTML browser installed on the PC for delivering content to a PC. Appellants understand that a user first interacts with an HTML browser installed on their PC to select a title from the virtual storefront. Still using the HTML browser, the user negotiations for purchase of the selected title. Upon completion of the purchase negotiation, a launcher module of the SCDP client launches the title. *Appellants respectfully submit that the SCDP client and the HTML browser are separate components of the system taught in Schmeidler*.

Appeal Br. 13 (emphasis added); Reply Br. 3. Appellant further argues that Schmeidler teaches away from the claimed embodiments for this reason.[3] Appeal Br. 14.

We do not agree with Appellant's argument, which is premised on the incorrect assertion that Schmeidler's SCDP client and HTML browser are separate components. Schmeidler's Figure 3A is shown below with red highlighting to indicate the SCDP client and HTML browser.

[3] "[B]y specifically teaching that in addition to an SCDP client a separate HTML browser is used to select and purchase a title, Appellant's respectfully submit that Schmeidler teaches away from the claimed embodiments." Appeal Br. 14.

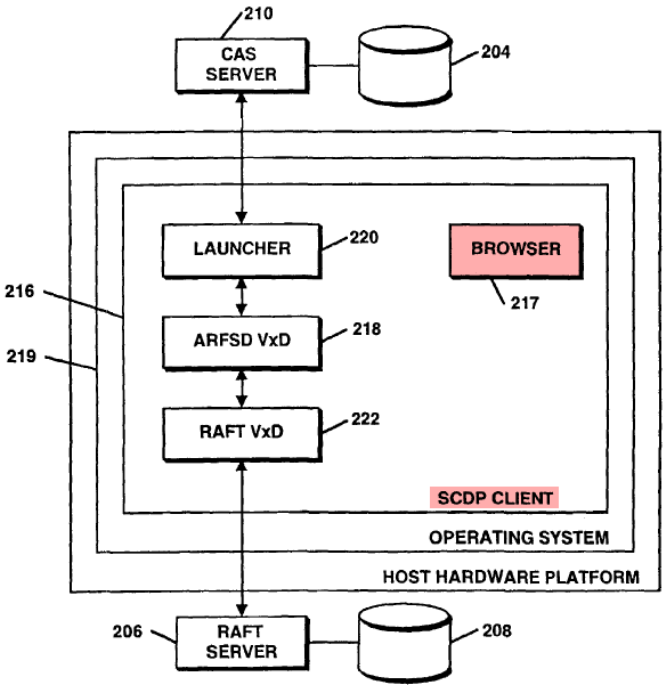

Figure 3A

As can be seen in Figure 3A above, Schmeidler's HTML browser 217 is a component within the SCDP client 216. *See also* Schmeidler 10:2–18. Accordingly, Schmeidler's HTML browser and SCDP client are not separate components, as Appellant argues.

Furthermore, Appellant's "teaching away" argument requires a showing that the reference "criticizes, discredits or otherwise discourages" including the HTML browser in the SCDP client. *See In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004). The situation here is quite the opposite, however, as Schmeidler expressly teaches including the HTML browser in the SCDP client so that they are not separate. Appellant's argument thus fails to show Examiner error.

Appellant next argues that Schmeidler does not disclose the limitation of claim 1 reciting "*wherein said license is one of a limited number of licenses owned by an enterprise for the product*." Appeal Br. 15. To the

contrary, the Examiner finds, and we agree, that this limitation is disclosed in Schmeidler. Final Act. 11. Specifically, the Examiner cites to Schmeidler for the following statement:

> Examples of possible purchase types may include 1) a time-limited demo of the title, 2) a single payment for a single ["]use" of a title, 3) a single payment which allows unlimited "uses" of a title over some specified time period e.g., week, month, etc.

Schmeidler 2:39–43. The Examiner appears to view this excerpt from Schmeidler as teaching an enterprise may own these three types of licenses, thus disclosing a "*limited number of licenses owned by the enterprise for the product*." Final Act. 11.

Appellant further argues Schmeidler discloses titles available for purchase are "potentially subject to expiration after a length of time has elapsed, [and] are not subject to any availability limitations." Appeal Br. 24. Appellant appears to view "availability" as meaning whether there is a license in a pool of licenses, for example, that can be used to authorize execution of a product, as opposed to time restrictions that may exist for any particular license. This argument is ineffective to distinguish the claim over the reference, however, because, as explained, the Examiner shows that Schmeidler discloses that the license for a title may be one of three types owned by an enterprise, and thus "*one of a limited number of licenses owned by the enterprise for the product*" as claimed. Accordingly, the Examiner shows Schmeidler discloses the argued claim limitation.

Appellant next argues Schmeidler teaches that, in response to a user selecting a digital offer, a negotiation to purchase that offer commences. Appeal Br. 15. According to Appellant, Schmeidler requires the negotiation to be completed before receipt of any authorization token permitting

execution of the title. *Id.* Appellant appears to argue that the negotiation interrupts the flow from purchase to execution of a title so that the execution cannot be responsive to the purchase, thus teaching away from the claimed limitation. *Id.*

There is no language in claim 1, however, that precludes a negotiation from taking place in the performance of the claimed method. Appellant appears to be arguing a limitation that does not appear in the claim, and that thus cannot be relied upon for patentability. *In re Self*, 671 F.2d 1344, 1348 (CCPA 1982). As such, Appellant's argument, as best understood, is unpersuasive because it is not commensurate in scope with the claim. In addition, Appellant presents no reason why Schmeidler's negotiation precludes the title execution from being responsive to the title purchase. Indeed, Schmeidler discloses that it is. For example, in the flowcharts of Figure 5A and 5B, negotiation occurs before Schmeidler's launcher requests purchase of a title (Step 512) and, through a series of intermediate steps, ultimately causes launcher module to run the title executable (Step 526). Schmeidler 13:57–60; 14:19–42. Consequently, in Schmeidler, selection of a title for purchase ultimately leads to execution of the title. As to Appellant's "teaching away" argument, Appellant has not identified a teaching in the reference that "criticizes, discredits or otherwise discourages" title execution in response to title selection or purchase. *See* Decision 6.

Appellant further argues that the selection of a digital offer in Schmeidler is not an "*execution command*" or a "*command to execute said product*" as claimed. Appeal Br. 24. As explained, in Schmeidler's flowcharts of Figures 5A and 5B, the launcher requests purchase of a title

(Step 512) and ultimately causes launcher module to run the title executable (Step 526). Schmeidler 14:19–42. Because the purchase of a title ultimately causes execution of the purchased title, it effectively includes and therefore discloses an execution command or command to execute the product.

Appellant's remaining arguments for claim 1 concern Read, Veditz, Wood, and Keith. Appeal Br. 15–19. As the Examiner did not rely on any of these references, but on Schmeidler, to teach the argued limitations of claim 1, we do not address these arguments.

No separate arguments are presented for the dependent claims, which fall for the reasons stated with respect to claim 1.

Claims 9 and 17

Appellant presents the same arguments for independent claims 9 and 17 as presented for claim 1. Appeal Br. 20–24. For similar reasons as explained above with respect to claim 1, we find these arguments unpersuasive to show Examiner error.

Appellant's remaining arguments for claims 9 and 17 concern Read, Veditz, Wood, and Keith. Appeal Br. 20–30. The Examiner did not rely on any of these references to teach the argued limitations of claims 9 and 17. Accordingly, we do not address these arguments.

Remaining Claims

Appellant presents no separate arguments for the remaining dependent claims, which fall for the reasons stated for their respective independent claims. 37 C.F.R. § 41.37(c)(1)(iv).

DECISION

We affirm the Examiner's rejection of claims 1, 3–5, 8–12, 14–17, 19, and 20 under 35 U.S.C. § 103(a).

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).

In summary:

Claims Rejected	**35 U.S.C. §**	**Reference(s)/Basis**	**Affirmed**	**Reversed**
1, 3–5, 8	103(a)	Schmeidler, Read, Veditz, Wood	1, 3–5, 8	
9–12, 14–17, 19, 20	103(a)	Schmeidler, Read, Wood, Veditz, Keith	9–12, 14–17, 19, 20	
Overall Outcome			1, 3–5, 8–12, 14–17, 19, 20	

AFFIRMED