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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ARTUR BERGMAN

Appeal 2018-009181
Application 14/485,087
Technology Center 2400

Before MAHSHID D. SAADAT, JOHN P. PINKERTON, and
STEVEN M. AMUNDSON, *Administrative Patent Judges*.

PINKERTON, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant¹ appeals under 35 U.S.C. § 134(a) from the Examiner's Final Rejection of claims 1, 3–6, and 8–10, which are all of the claims pending in the application. Claims 2 and 7 are canceled. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies Fastly, Inc. as the real party in interest. Appeal Br. 2.

STATEMENT OF THE CASE

Introduction

Appellant generally describes the disclosed and claimed invention as follows:

Systems, methods, apparatuses, and software that select network addresses of a network content server are provided herein. In one example, a method of operating a control node to perform network address selection that selects between different communication service providers according to network characteristics is presented. The control node receives a domain name lookup request from an end user device to reach a network content server. The control node processes network characteristics and the domain name lookup request to select a network address that corresponds to one of the communication service providers. The end user device can use the selected network address to reach the network content server over the selected communication service provider.

Abstract.²

Claims 1 and 6 are independent. Claim 1 is illustrative of the subject matter on appeal and is reproduced below:

1. A control node for selecting a network address for an end user device to reach a network content server, wherein the network content server is addressable via a plurality of network addresses each associated with a unique communication service provider of a plurality of communication service providers, the control node comprising:

² Our Decision refers to the Final Office Action mailed Oct. 11, 2017 (“Final Act.”); the Appeal Brief filed Apr. 16, 2018 (“Appeal Br.”); the Reply Brief filed Sept. 24, 2018 (“Reply Br.”); the Examiner’s Answer mailed July 24, 2018 (“Ans.”); and the original Specification filed Sept. 12, 2014 (“Spec.”).

a communication interface configured to receive a domain name lookup request transferred by an end user device;

a processing system configured to identify network characteristics related to the end user device and the plurality of communication service providers associated with the network content server, wherein the network characteristics are derived at least from performance data of network communications between the network content server and a second end user device routed through at least one of the plurality of communication service providers, and process the network characteristics and the domain name lookup request to identify a selected network address from the plurality of network addresses for the network content server that corresponds to at least a domain name indicated by the domain name lookup request; and

the communication interface configured to transfer the selected network address for delivery to the end user device.

Appeal Br. 12 (Claims App.).

References

Name	Patent or Publication Number	Date
Moran et al. (“Moran”)	US 2002/0177448 A1	Nov. 28, 2002
Klinker	US 2004/0249971 A1	Dec. 9, 2004
Wong	US 2011/0066607 A1	Mar. 17, 2011
Zhang	US 2011/0173339 A1	July 14, 2011

Rejections on Appeal³

³ The Leahy-Smith America Invents Act (“AIA”) included revisions to 35 U.S.C. § 100 *et seq.* effective on March 16, 2013. Because the provisional application to which this application claims priority to was filed on Nov. 6, 2013 (*see* Spec. ¶ 1), the Examiner examined the claims under the AIA version of 35 U.S.C. § 103. Final Act. 2.

Claims 1 and 6 stand rejected under 35 U.S.C. § 103 as being unpatentable over Zhang and Klinker.⁴

Claims 3, 4, 8, and 9 stand rejected under 35 U.S.C. § 103 as being unpatentable over Zhang, Klinker, and Moran.

Claims 5 and 10 stand rejected under 35 U.S.C. § 103 as being unpatentable over Zhang, Klinker, and Wong.

ANALYSIS

The issue raised by the arguments in Appellant's briefs is whether the combination of Zhang and Klinker teaches or suggests the limitation:

identify network characteristics related to the end user device and the plurality of communication service providers associated with the network content server, wherein the network characteristics are derived at least from performance data of network communications between the network content server and a second end user device routed through at least one of the plurality of communication service providers,
as recited in claim 1, and as similarly recited in claim 6 (hereinafter, "the disputed limitation").⁵

The Examiner rejected claim 1 under 35 U.S.C. § 103 as being unpatentable over Zhang and Klinker. Final Act. 4–7. In the Final Action, the Examiner finds that Zhang discloses, among other things:

A control node (access gateway equipment, FIG. 3) for selecting a network address (IP address of the network services on ISP1

⁴ The Examiner also rejected claims 1, 3–6, and 8–10 under 35 U.S.C. § 112(a) for failing to comply with the enablement requirement, and under 35 U.S.C. § 112(b) as being indefinite. Final Act. 2–4. However, the Examiner has withdrawn those rejections. Ans. 10.

⁵ Appellant argues claims 1 and 6 together, focusing on claim 1, and states it refrains from discussing claims 3–5 and 8–10 "in view of their dependence upon otherwise allowable independent claims." Appeal Br. 8–10. Thus, we select claim 1 as representative. See 37 C.F.R. § 41.37(c)(1)(iv).

and ISP2; page 3, [0043]) for an end user device (user equipment; page 3, [0044]) to reach a network content server (service provider, FIG. 1), wherein the network content server is addressable via a plurality of network addresses (IP address of the network services on ISP1 and ISP2; page 3, [0043]) each associated with a unique communication service provider of a plurality of communication service providers (ISP1 and ISP2, FIG. 1 & page 3, [0043]),

* * *

a processing system (detection unit 351, FIG. 3) configured to process the network characteristics (page 4, [0052] & [0054]: detect the line state of the access link of each Internet service provider providing services) and the domain name lookup request (domain name resolution request) to identify a selected network address from the plurality of network addresses (page 4, [0049], lines 12–17: IP address of the network services on ISP1 and ISP2) for the network content server that corresponds to at least a domain name indicated by the domain name lookup request (page 4, [0050])

Id. at 4–5.

The Examiner finds that Zhang does not teach the disputed limitation of claim 1. *Id.* at 6. However, the Examiner finds that Klinker does so because paragraph 23 of Klinker discloses:

measuring inbound traffic performance from each of the identified sources to the destination address space through each of the plurality of network service providers, determining an optimal path associated with each of the sources to access the destination address space via one of the network service providers; and directing each of the identified source[s] to access the destination address space via one of the network service providers in accordance with the optimal path associated with the source.

Id. at 6–7 (citing Klinker ¶ 23).

Appellant makes two arguments. First, Appellant argues that Klinker fails to teach or suggest the disputed limitation because, “while Klinker teaches identifying performance data from sources, Klinker fails to teach that the performance data is identified for communications with a particular content server. Instead, Klinker teaches identifying performance data associated with a range of destination network addresses.” Appeal Br. 9 (citing Klinker ¶ 23); Reply Br. 2. Second, Appellant argues that Klinker fails to teach or suggest the disputed limitation because Klinker does not “teach that the performance data from a first source (end user device) may be used in identifying an internet service provider (or address) for a second source (end user device).” Appeal Br. 9.

In response to Appellant’s first argument, the Examiner finds that Klinker’s teaching of “measuring inbound traffic performance from each of the identified sources to the destination address space through each of the plurality of network service providers’ corresponds to the claimed limitation ‘identify network characteristics related to the end user device and the plurality of communication service providers associated with the network content server.’” Ans. 11. In the Reply Brief, Appellant disputes the Examiner’s finding and argues that “[o]ne destination address space is not equivalent to multiple addresses for a single server.” Reply Br. 2. In this regard, we agree with the Examiner for two reasons. First, the Examiner relies on Zhang as teaching “a network content server . . . [that] is addressable via a plurality of network addresses,” and Appellant’s argument is directed at Klinker individually, rather than the Examiner’s combination of Zhang and Klinker. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986) (“Non-obviousness cannot be established by attacking references

individually where the rejection is based upon the teachings of a combination of references.”). Second, Klinker teaches that its “destination address space” can be “an online content or web site or application.” *See* Klinker ¶¶ 22 (“invention . . . for controlling the inbound path to an online content or web site or application”), 55 (“access, e.g., application 250”). Thus, Klinker teaches or at least suggests that the “destination address space” could be an online content such as a “network content server,” which as discussed above, the Examiner also finds is taught by Zhang. *See* Final Act. 4.

In regard to Appellant’s second argument, the Examiner finds that Klinker teaches deriving network characteristics related to the end user device “derived at least from performance data of network communications between the network content server and a second end user device” because Klinker discloses (1) “measuring inbound traffic performance from each of the identified sources to the destination address space through each of the plurality of network service providers” (Ans. 12 (citing Klinker ¶ 23, lines 8–11)), and (2) “source corresponds as ‘second end user device’” (*id.* (citing Klinker ¶ 19, lines 12–15) (stating “a source (i.e., a user”)). The Examiner also finds that Appellant’s second argument is not supported by claim 1 because claim 1 recites “identify network characteristics . . . to identify a selected network address . . . for the *network content server*,” rather than “identifying an *internet service provider* (or address) for a second source (end user device),” as Appellant argues. Ans. 13 (emphasis added).

Once again, we are not persuaded that the Examiner has erred. Initially, we disagree with the Examiner that Appellant’s second argument is not commensurate with the scope of claim 1 because, when fairly considered

in context, Appellant’s second argument is that Klinker fails to teach the network characteristics are “derived at least from performance data of network communications between the network content server and a second end user device routed through at least one of the plurality of communication service providers . . . to identify a selected network address . . . for the network content server,” as recited in claim 1. *See* Appeal Br. 8–9; Reply Br. 2–3. However, we agree with the Examiner that Klinker’s disclosure of “measuring inbound traffic performance from *each of the identified sources* to the destination address space through each of the plurality of network service providers” and “determining an optimal path associated with each of the sources to access the destination address space” teaches or suggests that network characteristics are derived at least from performance data of network communications between the network content server⁶ and a second end user device (i.e., the source user device). Ans. 12–13 (citing Klinker, ¶ 23, lines 8–11; ¶ 19, lines 12–15). Because Klinker teaches measuring inbound traffic performance from multiple sources or end user devices, and then determining an optimal path associated with each source, we find Klinker teaches or suggests network characteristics derived at least from “a second end user device.”

⁶ As discussed *supra*, the Examiner relies on Zhang as teaching a network content server addressable by a plurality of addresses. To the extent Appellant’s second argument is based on Klinker failing to teach a network content server, we again find that Appellant’s attack on Klinker individually is not persuasive because the Examiner relies on the combination of Zhang and Klinker. *See Merck*, 800 F.2d at 1097.

For these reasons, we sustain the Examiner's rejection of claim 1 under 35 U.S.C. § 103. For the same reasons, we sustain the Examiner's rejection of claims 3–6 and 8–10, which are not argued separately substantively.

DECISION

We affirm the Examiner's rejection of claims 1, 3–6, and 8–10 under 35 U.S.C. § 103.

SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 6	103	Zhang, Klinker	1, 6	
3, 4, 8, 9	103	Zhang, Klinker, Moran	3, 4, 8, 9	
5, 10	103	Zhang, Klinker, Wong	5, 10	
Overall Outcome			1, 3–6, 8–10	

AFFIRMED