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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/586,512	12/30/2014	Charles I. Cook	1404-US-U1	3168

83809 7590 12/27/2019

CenturyLink Intellectual Property LLC
Patent Docketing
1025 Eldorado Blvd.
Broomfield, CO 80021

EXAMINER	
AGUIAR, JOHNNY B	

ART UNIT	PAPER NUMBER
2447	

NOTIFICATION DATE	DELIVERY MODE
12/27/2019	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CHARLES I. COOK

Appeal 2019-001374
Application 14/586,512
Technology Center 2400

Before ELENI MANTIS MERCADER, NORMAN H. BEAMER, and GARTH D. BAER, *Administrative Patent Judges*.

MANTIS MERCADER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant[1] appeals under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 1–9 and 11–18, which are all the pending claims. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

THE INVENTION

Appellant's claimed invention is directed to "tracking website performance and providing a user with website performance data" (Abstract).

Independent claim 1, reproduced below, is representative of the subject matter on appeal:

> 1. A method of providing website performance data comprising:
>
> identifying, at a server, a first website being accessed by a user device;
>
> replicating the first website on a browser emulator associated with the server;
>
> obtaining, with the server, a first set of website performance metrics for the first website;
>
> executing selected performance tests on the replicated website to determine a first set of determined performance results;

[1] We use the word "Appellant" to refer to "applicant" as defined in 37 C.F.R. § 1.42. Appellant identifies Century Link Intellectual Property LLC as the real party in interest (Appeal Br. 3).

including the first set of determined performance results in the first set of website performance metrics;

obtaining, with the server, a second set of website performance metrics for a second website having similar content to the first website;

forwarding the first set of website performance metrics and the second set of website performance metrics to a performance information generator associated with the server;

determining, with the server, the second set of website performance metrics demonstrates better performance than the first set of website performance metrics;

generating a performance information message containing website performance information for the first website and the second website, based upon the first set of website performance metrics and the second set of website performance metrics;

transmitting the performance information message to the user device;

determining a user device performance information; and

simultaneously displaying the performance information message, the user device performance information, and a display recommending the second website as an alternative website having better performance than the first website on the user device, substantially in real-time as the user device accesses the first website.

Appeal Br. 37 (Claims Appendix).

REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is the following:

Hoyer	US 6,381,635 B1	Apr. 30, 2002
Donker	US 2004/0107296 A1	June 3, 2004
Santos	US 2004/0176992 A1	Sept. 9, 2004
Salle	US 2004/0177138 A1	Sept. 9, 2004
Vasudeva	US 2004/0267691 A1	Dec. 30, 2004
Lachwani	US 9,274,935 B1	Mar. 1, 2016

REJECTIONS

The Examiner made the following rejections[2]:

Claims 1–9 and 11–18 stand rejected under 35 U.S.C. § 112(b) as being indefinite. Final Act. 6.

Claims 1–3, 7, and 11–13 stand rejected under 35 U.S.C. § 103 as being unpatentable over Santos, Donker, and Lachwani. Final Act. 9.

Claims 4, 5, 14, and 15 stand rejected under 35 U.S.C. § 103 as being unpatentable over Santos, Donker, Lachwani, and Salle. Final Act. 13.

Claims 6 and 16 stand rejected under 35 U.S.C. § 103 as being unpatentable over Santos, Donker, Lachwani, and Vasudeva. Final Act. 14.

Claims 8, 9, and 17 stand rejected under 35 U.S.C. § 103 as being unpatentable over Santos, Donker, Lachwani, and Hoyer. Final Act. 16.

ISSUES

The issues are whether the Examiner erred in finding:

[2] The rejection of claims 1–9 and 11–18 under 35 U.S.C. § 101 was withdrawn in the Answer. *See* Final Act. 6, Ans. 17.

1. the limitation "substantially in real-time as the user device accesses the first website" as indefinite, as recited in claim 1, and similarly recited in independent claim 11; and

2. the combination of Santos, Donker, and Lachwani teaches or suggests the limitations of:

> replicating the first website on a browser emulator associated with the server;

and

> executing selected performance tests on the replicated website to determine a first set of determined performance results,

as recited in independent claim 1, and similarly recited in independent claim 11.

ANALYSIS

Indefiniteness Rejection

The Examiner finds the limitation "substantially in real-time as the user device accesses the first website" is indefinite because

> it is unclear whether the phrase "substantially in real-time" refers to nanoseconds, microseconds, milliseconds, seconds, minutes or even hours. Therefore, the metes and bounds of the claimed subject matter cannot be established

(Ans. 16).

Appellant argues that

> [t]he Examiner approaches use of "substantially" in a vacuum. The Examiner does not evaluate the usage of "substantially in real-time" in light of the disclosure, and importantly in light of the interpretation that would be given to the term by one of ordinary skill in the art

(Reply Br. 4).

We agree with Appellant. While the disclosure does not appear to use the word "substantially," the disclosure states that "the performance information message is displayed to the user in real time as the user accesses the website" (Spec. ¶ 34) and further states that

> [i]n certain embodiments, the pop-up message or other performance information message will be relatively simple, and preferably ***small and innocuous*** to facilitate display of the message ***while*** the user is accessing a website

(Spec. ¶ 55, emphasis added). One skilled in the art would understand that the information arrives while the user device is accessing the first website, because the information is formatted in a manner so as not to interfere with the user's website access. One skilled in the art would consider the information receipt as being "substantially in real-time."

Accordingly, we reverse the Examiner's indefiniteness rejection of independent claims 1 and 11, and dependent claims 2–9 and 12–18.

Obviousness Rejection

The Examiner finds that Santos teaches that

> an agent 20 simulates an example session between a website customer 34 and the website 30, which covers the claimed limitation "replicating (simulating) the first website (website 30) on a browser emulator associated with the server (agent 20)"

(Ans. 17, citing Santos ¶¶ 16, 20, Fig. 1), and that "agent 20 interacts with the website 30 according to behavior model 56" (Ans. 17, citing Santos ¶¶ 18, 21, Fig. 1).

Appellant argues that

> the Examiner continues to ignore the distinction of replicating a website in a browser emulator — as claimed — and the simulation of an example session between a customer and the actual website — as taught in Santos

(Reply Br. 4). Appellant contends that "the Examiner does not refute that the agent interacts with the actual website itself" (Reply Br. 5).

We agree with Appellant. The claimed invention emulates a website in a browser emulator, as opposed to accessing the website as part of a simulation. The Examiner neither acknowledges the difference, nor explains how the combination of references teaches or suggests "replicating the first website on a browser emulator." None of the remaining references cures the deficiency of Santos.

Accordingly, we are constrained by the record to reverse the Examiner's obviousness rejection of independent claim 1 and independent claim 11 commensurate in scope, as well as dependent claims 2–9 and 12–18.

CONCLUSION

The Examiner erred in finding:

1. the limitation "substantially in real-time as the user device accesses the first website" as indefinite, as recited in claim 1, and similarly recited in independent claim 11; and
2. the combination of Santos, Donker, and Lachwani teaches or suggests the limitations of:

> replicating the first website on a browser emulator associated with the server;

and

> executing selected performance tests on the replicated website to determine a first set of determined performance results,

as recited in independent claim 1, and similarly recited in independent claim 11.

DECISION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–9, 11–18	112(b)	Indefiniteness		1–9, 11–18
1–3, 7, 11–13	103	Santos, Donker, Lachwani		1–3, 7, 11–13
4, 5, 14, 15	103	Santos, Donker, Lachwani, Salle		4, 5, 14, 15
6, 16	103	Santos, Donker, Lachwani, Vasudeva		6, 16
8, 9, 17		Santos, Donker, Lachwani, Hoyer		8, 9, 17
Overall Outcome				1–9, 11–18

REVERSED