

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 17

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte OWEN R. CLINE, CRAIG J. HUBBELL and  
VINODKUMAR M. JESSANI

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Appeal No. 2002-1282  
Application No. 08/778,459

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ON BRIEF

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Before THOMAS, KRASS and BARRETT, Administrative Patent Judges.  
KRASS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the final rejection of claims 28-33, 35, 38-46, 48, 49, 51-59 and 61-66.<sup>1</sup> Claims 34, 36, 37, 47, 50 and 60 have been indicated by the examiner as

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<sup>1</sup>We note that while the statement of rejection at page 3 of the answer refers to claims "28-63," it appears that the existing claims are "28-66." Moreover, since the examiner indicates some claims to be directed to allowable subject matter, the explicit statement of rejection appears to be in error.

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being directed to allowable subject matter and are no longer before us on appeal.

The invention is directed to automated failure recovery in a computer system. A monitor monitors a registered component of the computer system and performs failure recovery services when the registered component's failure is detected by a closing of a connection between the registered component and the system monitor.

Representative independent claim 28 is reproduced as follows:

28. An apparatus for failure recovery, comprising a system monitor, executed by a computer, for registering at least one component executed by a computer for failure recovery services performed by the system monitor, wherein the system monitor monitors the registered component via a connection between the registered component and the system monitor, and the system monitor performs the failure recovery services when the registered component's termination is detected by a closing of the connection.

The examiner relies on the following reference:

Fulton III et al. (Fulton)	5,715,386	Feb. 3, 1998 (filed May 1, 1996)
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Claims 28-33, 35, 38-46, 48, 49, 51-59 and 61-66 stand rejected under 35 U.S.C. § 103 as unpatentable over Fulton.

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Reference is made to the briefs and answer for the respective positions of appellants and the examiner.

OPINION

In rejecting claims under 35 U.S.C. § 103, it is incumbent upon the examiner to establish a factual basis to support the legal conclusion of obviousness. See In re Fine, 837 F.2d 1071, 1073, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). In so doing, the examiner is expected to make the factual determinations set forth in Graham v. John Deere Co., 383 U.S. 1, 17, 148 USPQ 459, 467 (1966), and to provide a reason why one having ordinary skill in the pertinent art would have been led to modify the prior art or to combine prior art references to arrive at the claimed invention. Such reason must stem from some teachings, suggestions or implications in the prior art as a whole or knowledge generally available to one having ordinary skill in the art. Uniroyal, Inc. v. Rudkin-Wiley Corp., 837 F.2d 1044, 1051, 5 USPQ2d 1434, 1438 (Fed. Cir.), cert. denied, 488 U.S. 825 (1988); Ashland Oil, Inc. v. Delta Resins & Refractories, Inc., 776 F.2d 281, 293, 227 USPO 657, 664 (Fed. Cir. 1985), cert. denied, 475 U.S. 1017 (1986); ACS Hosp. Sys., Inc. v. Montefiore

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Hosp., 732 F.2d 1572, 1577, 221 USPO 929, 933 (Fed. Cir. 1984).

These showings by the examiner are an essential part of complying with the burden of presenting a prima facie case of obviousness.

Note In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444

(Fed. Cir. 1992). If that burden is met, the burden then shifts

to the applicant to overcome the prima facie case with argument

and/or evidence. Obviousness is then determined on the basis of

the evidence as a whole and the relative persuasiveness of the

arguments. See Id.; In re Hedges, 783 F.2d 1038, 1040, 228 USPO

685, 687 (Fed. Cir. 1986); In re Piasecki, 745 F.2d 1468, 1472,

223 USPO 785, 788 (Fed. Cir. 1984); and In re Rinehart, 531 F.2d

1048, 1051, 189 USPO 143, 146-147 (CCPA 1976). Only those

arguments actually made by appellant have been considered in this

decision. Arguments which appellant could have made but chose

not to make in the brief have not been considered and are deemed

to be waived [see 37 CFR 1.192 (a)].

In the instant case, regarding independent claim 28, the

examiner cites the abstract and column 2, lines 11-53, of Fulton

for the teaching of a utility for failure recovery in a computer

wherein the steps of registering a process with a recovery

service, detecting the status of the registered process, and

restarting the registered process when the detected status

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indicates the registered process has terminated, are performed. The examiner indicates that Fulton does not explicitly disclose that the failure recovery is performed when the registered component's termination is detected by closing of a connection but the examiner finds that it would have been obvious

to realize that Fulton teaches the failure recovery when the registered component termination is detected since Fulton teaches (col. 2, lines 10-56) that watchd monitors the application and when detects [sic] that the process is dead or hung, watchd restarts the application on a new process, and furthermore the detection would include closing of connection since he teaches watchd daemon that detects a dead or hung application, thus would detect a closing of the connection related to a dead or hung application (answer-page 4).

For their part, appellants argue that the examiner has failed to take into account a specific claim limitation, viz., the monitoring of a registered component by means of a connection between the registered component and the system monitor, and performing the failure recovery services when the registered component's termination is detected by a closing of the connection. In contrast, urge appellants, Fulton's procedure is to monitor a process either actively by polling or passively by receiving a signal from the process (principal brief-page 3).

We agree with appellants.

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From our understanding of Fulton, an application is registered with watchd and watchd monitors the application (column 2, lines 31-33 of Fulton). Thus, we do have, in Fulton, a registered component (the application) and a monitor (watchd) for monitoring the registered component. Moreover, there is a failure recovery taught by Fulton as watchd restarts the application on a new process when it is detected that the monitored application is "dead or hung" (column 2, lines 33-35). As the examiner recognized, however, Fulton fails to disclose that the failure recovery is performed when the registered component's termination is detected by a closing of the connection between the registered component and the system monitor.

There is not even an indication in Fulton that there is a "connection" between watchd and the application but even if we agree that there is some type of "connection" between them, in the sense that watchd is monitoring the application, there is certainly no disclosure or suggestion by Fulton of performing the failure recovery services (in Fulton's case, a restarting of the application on a new process) when the application's termination is detected "by a closing of the connection," as required by the instant claims.

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The examiner counters that Fulton's detection "would include closing of connection since he teaches watchd daemon that detects a dead or hung application, thus would detect a closing of the connection related to a dead or hung application" (answer-page 6).

We disagree. First, Fulton is not clear that there is any "connection" between the application and the watchd monitor, and the examiner has not identified any specific connection in Fulton, but, to the extent there is some tenuous "connection," as that term is broadly interpreted, there is no evidence that detecting a dead or hung application is tantamount to detecting a "closing" of that "connection" between the application and the watchd monitor. There is absolutely no hint in Fulton that performing a failure recovery service is based, in any way, on detection of a closed connection between a registered component and a system monitor.

Moreover, the examiner has not indicated what is being considered as the "connection" in Fulton, nor has the examiner indicated what is considered to be a "closing" of that connection.

As such, we find no prima facie case of obviousness established by the examiner.

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Accordingly, the examiner's decision rejecting claims 28-33,  
35, 38-46, 48, 49, 51-59 and 61-66 under 35 U.S.C. § 103 is  
reversed.

REVERSED

JAMES D. THOMAS	)	
Administrative Patent Judge	)	
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	)	
	)	
	)	
ERROL A. KRASS	)	BOARD OF PATENT
Administrative Patent Judge	)	APPEALS AND
	)	INTERFERENCES
	)	
	)	
LEE E. BARRETT	)	
Administrative Patent Judge	)	

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