UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2007-1056
(Serial No. 09/947,801)

IN RE JED MARGOLIN

Appeal from the United States Patent and Trademark Office Board of Patent Appeals and Interferences.

APPELLANT'S BRIEF

Corrected

Dated: January 4, 2007

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CERTIFICATE OF INTEREST

The Appellant Jed Margolin, acting pro se, certifies the following:

1. That he is acting pro se in this appeal and has acted so during the prosecution of the patent application.
2. That he is the real party of interest in this case.
3. As an individual, he does not have subsidiaries or parent companies.
4. No Patent Agents or Attorneys have appeared or are expected to appear for me.

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Date: January 4, 2007

TABLE OF CONTENTS

page

CERTIFICATE OF INTEREST i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF RELATED CASES 1

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. What is a Home Network Server? 6

II. Home, Sweet Home 11

III. Who is a Subscriber? 13

IV. Does Ellis anticipate Margolin (and what is Ellis' Network Server)? 16

V. BPAI fails to add to the Examiner's case 24

VI. BPAI's understanding of key terms is different from the Examiner's 27

VII. BPAI cites Philips v. AWH Corp. but leaves something out 29

VIII. The Examiner and his supervisor show bad faith …………………….… 31

CONCLUSION …………………………………………………………….. 37

ADDENDUM - FINAL ORDER ISSUED BY THE BOARD OF PATENT APPEALS AND INTERFERENCES, APPEAL NO. 2006-2005, AUGUST 24, 2006 ……………………………………………………… 38

CERTIFICATE OF SERVICE …...…………………………………….…. 46

CERTIFICATE OF COMPLIANCE ……………………..……………….…. 47

TABLE OF AUTHORITIES

page

CASES

Cybor Corp. v. FAS Technologies, Inc., 138 F.3d 1448, 1456, 46 USPQ2d 1169, 1174 (Fed. Cir. 1998) (en banc) ………… 5

In Re Morris, 127 F.3d 1048, 1054-55, 44 USPQ2d 1023, …………. 7, 10
1027-28 (Fed. Cir. 1997)

Phillips v. AWH Corp., 415 F.3d 1303, 1323, 75 USPQ2d 1321, 1334 (Fed. Cir. 2005) (en banc). ………………………………. 29

STATUTES

35 U.S.C. §102 ……………………………………………………. 2, 5

RULES

MPEP Section 713.04 *Substance of Interview Must Be Made of Record* ……………………………………………………….... 32

MPEP Section 2144.03 *Reliance on Common Knowledge in the Art or "Well Known" Prior Art* ……………………………… 14

MPEP Section 2173.05(a)(II) *The Requirements For Clarity and Precision Must Be Balanced With the Limitations of the Language* ……………………………………….. 10

OTHER AUTHORITIES

Brief For The United States As Amicus Curiae in Appeal Nos. 03-1269,-1286 PHILIPS v. AWH CORP. ………… 29

STATEMENT OF RELATED CASES

This case has never been previously appealed in a judicial court and the Appellant does not know of any other appeal pending in this or any other court that will directly affect or be directly affected by this Court's decision in the pending appeal.

JURISDICTIONAL STATEMENT

The Court has jurisdiction pursuant to 28 U.S.C. §1295(a)(4)(A) as being an appeal under 35 U.S.C. §141 from the Final Order issued by the Board of Patent Appeals and Interferences mailed 8/24/2006. The Appellant, Margolin, filed a Notice of Appeal with the Patent and Trademark Office within 60 days from the date of the Final Order issued by the Board of Patent Appeals and Interferences and the Appellant also paid the required fee in a timely fashion.

STATEMENT OF THE ISSUES

The issue in the case is whether claims 1-5 are anticipated by U.S. Patent 6,167,428 issued December 26, 2000, to Ellis. Central to this issue is whether the Examiner's broad interpretation of the terms was reasonable and whether Margolin has the right to be his own lexicographer and, when he chooses not to be his own

lexicographer, whether he has the right to have the common meaning of words used in interpreting his claims.

STATEMENT OF THE CASE

This Appeal is in response to "Decision on Appeal", Appeal No. 2006-2005 (Application 09/947,801) mailed by the United States Patent and Trademark Office Board of Patent Appeals and Interferences ("BPAI") on 8/24/2006. The Appellant, Jed Margolin, ("Margolin") timely noticed this Appeal, which was docketed on November 17, 2006. The BPAI opinion, as authored by Administrative Judge Blankenship, ruled, "The rejection of claims 1-5 under 35 U.S.C. §102 is affirmed."

STATEMENT OF THE FACTS

The patent application at issue was filed September 6, 2001 claiming domestic priority of U.S. provisional application No. 60/249,830 filed November 17, 2000. After prosecution before the U.S. Patent and Trademark Office all claims were finally rejected. All claims (namely claims 1-5) were appealed to the Board of Patent Appeals and Interferences (BPAI). BPAI affirmed the rejection of all claims under 35 U.S.C. §102 as being anticipated by U.S. Patent 6,167,428 issued December 26, 2000, to Ellis. Appellant now appeals BPAI's affirmation of the rejection of all claims.

SUMMARY OF THE ARGUMENT

BPAI erred in finding the Examiner's broad interpretation of the terms used in claim 1 reasonable despite substantial evidence to the contrary.

Margolin's invention is for a distributed computing system using the computing resources of Home Network Servers connected through the Internet, where the owners of the Home Network Servers receive something of value in return for access to their Home Network Servers' otherwise unused computing resources. (Abstract.) The big questions are:

- What is a ***Home Network Server?***
- What is a ***Subscriber***?
- Does Ellis anticipate Margolin?

BPAI erred by:

- Refusing to allow Margolin to be his own lexicographer in defining the term "Home Network Server".
- Refusing to allow Margolin to use the common meaning of the word "home".
- Allowing, by default, the Examiner's bizarre definition of "subscriber" to stand.

It was only by these actions that BPAI was able to find the Examiner's broad interpretation of these terms "reasonable" and Margolin's invention to be anticipated by prior art.

As a result, BPAI erred in its statement that "Appellant could have amended the claim consistent with how appellant wants the claim to be interpreted." Because of the Examiner's definitions of ***subscriber, home,*** and ***home network server***, amending the claim would have been futile and produced only more rejections for Margolin and more unmerited counts for the Examiner. Although BPAI's comment speaks to the prosecution history of the case they were either unfamiliar with it or chose to ignore it.

Does Ellis anticipate Margolin?

No. Ellis' distributed computing takes place in his PCs. He does not use a home network server. The network servers he teaches are part of the ISP's equipment, not the subscriber's. Margolin's distributed computing takes place in the subscriber's home network server.

ARGUMENT

BPAI erred in finding the Examiner's broad interpretation of the terms used in claim 1 reasonable despite substantial evidence to the contrary, resulting in a 35 U.S.C. §102 rejection of all of Margolin's claims. Since claim construction is a question of law the standard of review is *de novo*. [Cybor Corp. v. FAS Technologies, Inc., 138 F.3d 1448, 1456, 46 USPQ2d 1169, 1174 (Fed. Cir. 1998) (en banc)]

Margolin's invention is for a distributed computing system using the computing resources of Home Network Servers connected through the Internet, where the owners of the Home Network Servers receive something of value in return for access to their Home Network Servers' otherwise unused computing resources. (Abstract [1]) Claim 1 is reproduced below. [2]

> 1. A distributed computing system comprising:
>
> (a) a home network server in a subscriber's home;
>
> (b) one or more home network client devices;
>
> (c) an Internet connection;
>
> whereby the subscriber receives something of value in return for access to the resources of said home network server that would otherwise be unused.

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[1] Appendix page A18
[2] Appendix page A16

The big questions are:

- What is a ***Home Network Server?***
- What is a ***Subscriber***?
- Does Ellis anticipate Margolin?

BPAI erred by:

- Refusing to allow Margolin to be his own lexicographer in defining the term "Home Network Server".
- Refusing to allow Margolin to use the common meaning of the word "home".
- Allowing, by default, the Examiner's bizarre definition of "subscriber" to stand.

<u>What is a Home Network Server?</u>

BPAI looked at the term "Home Network Server" in the claims and decided they didn't know what it meant. Then they proclaimed that:

> Upon review of the entire disclosure, we conclude that the "Home Network Server" described embodiment does not convey a limiting definition for the term "server," nor that the invention is to be limited to the disclosed embodiment. [3]

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[3] Appendix page A4 second paragraph

Their next observation, "Moreover, the specification teaches (¶ 22) that the invention may be practiced without the specific details that are disclosed,"[4] is gratuitous. Margolin's Paragraph 22 states:

> In the following description, numerous specific details are set forth to provide a thorough understanding of the invention. However, it is understood that the invention may be practiced without these specific details. In other instances, well-known circuits, structures and techniques have not been shown in detail in order not to obscure the invention.[5]

BPAI used this so they didn't have to actually read the disclosure. If every patent application containing this traditional and revered boilerplate was treated the same way as Margolin's, there would be markedly fewer patents allowed and more work for this Court. Besides, divorcing the claims from the specification ended for the Patent Office with *In Re Morris* [127 F.3d 1048, 1054-55, 44 USPQ2d 1023, 1027-28 (Fed. Cir. 1997)]. This will be revisited shortly.

Margolin's specification describes what a Home Network Server is.

> [0014] A Home Network Server is used in a home to network various clients such as PCs, sensors, actuators, and other devices. It also provides the Internet connection to the various client devices in the Home Network. The Home Network Server also provides a firewall to prevent unauthorized access to the Home Network from the Internet. The use of a Home Network Server, as opposed to the use of peer-to-peer networking, allows a robust operating system to be used. It also allows the users on the Home Network to add additional applications to their PCs without fear of jeopardizing the proper functioning of their Internet security program (firewall) or the distributed

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[4] Appendix page A4 second paragraph

[5] Appendix bottom of page A13 to top of page A14

computing software. (Although a firewall is not strictly necessary, prudence dictates its use.) [6]

From Paragraph 23:

The general form of the Home Network System is shown in Figure 1. Home Network Server 101 is of conventional design and includes a CPU, memory, mass storage (typically a hard disk drive for operations and a CD-ROM or DVD-ROM Drive for software installation), video display capabilities, and a keyboard. **....**

In addition, Home Network Server 101 may provide sound capabilities for the purpose of providing audible warnings and alarms. [7]

From Paragraph 24

Home Network Server 101 uses Modem 103 to connect to the Internet. [8] **....**

From Paragraph 25:

Home Network Server 101 connects to Router, Switch, or Hub 102. [9] **...**

Paragraph 26:

Router, Switch, or Hub 102 connects to one or more clients such as PC_1 104 or Sensor/Actuator_1 106. More than one client PC may be used, such as PC_n 105, and more than one Sensor/Actuator may be used, such as Sensor/Actuator_n 107. Sensor/Actuators are used to control and/or monitor the home's systems such as HVAC and Security and appliances such as refrigerators, washers, and dryers. [10]

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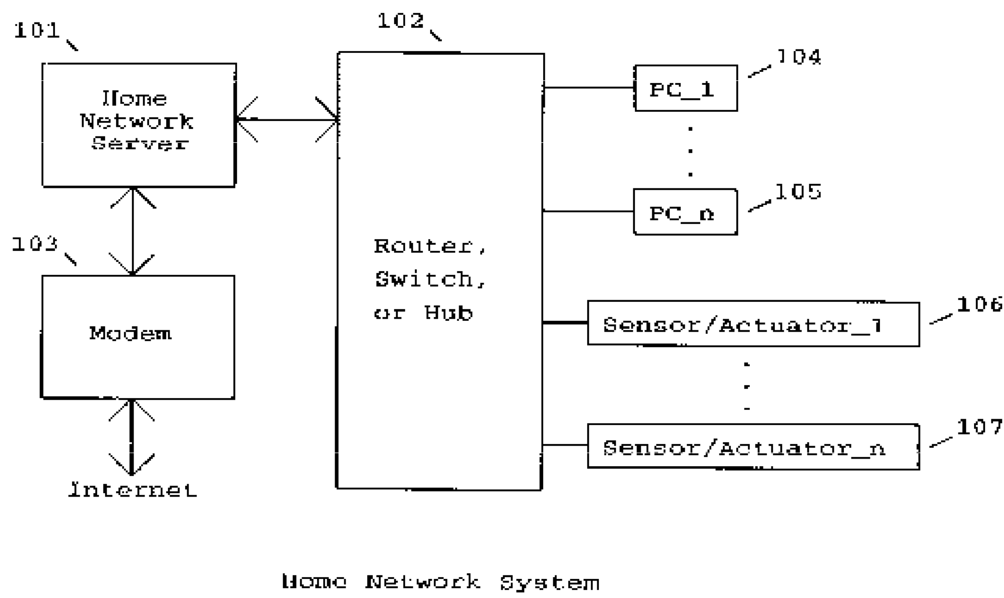
[6] Appendix page A12
[7] Appendix page A14
[8] Appendix page A14
[9] Appendix page A14
[10] Appendix page A14

From Paragraph 28:

> For reliability, Home Network Server 101 may use a robust operating system that can run for long periods of time without crashing. [11] ....

Margolin's Home Network Server is also shown as an element in his Figure 1, reproduced below. [12]



[11] Appendix page A15
[12] Appendix page A19

To boil it down, a Home Network Server is used in a home to network various clients such as PCs, sensors, actuators, and other devices which are used to control and/or monitor the home's systems such as HVAC and security as well as appliances such as refrigerators, washers, and dryers. The Home Network Server also provides the Internet connection to the various client devices in the Home Network. The use of a Home Network Server, as opposed to the use of peer-to-peer networking, allows a robust operating system to be used.

Therefore, BPAI erred by ignoring MPEP Section 2173.05(a)(II) [13] which allows the Applicant to be his own lexicographer.

Indeed, not only does BPAI's ruling that they could find no limiting definition for the term "server" defy reason it also defies this Court's decision in *In Re Morris* [127 F.3d 1048, 1054-55, 44 USPQ2d 1023, 1027-28 (Fed. Cir. 1997)] which ruled:

> The Solicitor is correct, and we reject appellants' invitation to construe either of the cases cited by appellants so as to overrule, sub silentio, decades old case law. Some cases state the standard as "the broadest reasonable interpretation," see, e.g., In re Van Geuns, 988 F.2d 1181, 1184, 26 USPQ2d 1057, 1059 (Fed. Cir. 1993), others include the qualifier "consistent with the specification" or similar language, see, e.g., In re Bond, 910 F.2d 831, 833, 15 USPQ2d 1566, 1567 (Fed. Cir. 1990). Since it would be unreasonable for the PTO to ignore any interpretive guidance afforded by the applicant's written

[13] Appendix page A178

> description, either phrasing connotes the same notion: as an initial matter, the PTO applies to the verbiage of the proposed claims the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant's specification.

Since BPAI was unable to discern the plain meaning of "home network server" in the claims they were supposed to look at the specification for enlightenment. They erred by refusing to do so. (Failure to make a good faith effort to look is the same as not looking.)

Home, Sweet Home.

The definition of "home" was hotly contested during the prosecution of the case including Margolin's response to the Examiner's answer to Margolin's BPAI Appeal Brief (Appellant's Response to Examiner's Answer filed 1/24/2006 to Appellant's Appeal Brief). [14] Although BPAI failed to address this issue, by the act of stating that "Appellant could have amended the claim consistent with how appellant wants the claim to be interpreted" a discussion of the prosecution history is only fair.

[14] Appendix page A175

The Examiner (and his Supervisor) took the position that since the term "home" has so many common meanings (which they fail to list or even cite their reference) and Margolin failed to explicitly define the term, the word "home" has no meaning at all. From Examiner's Answer, Page 11 second paragraph [15] :

> **Response to C)** The examiner and the supervisor has read and interpreted "home" in light of the specifications that 'home" can be very broadly defined and can be interpreted in many different contexts. A thorough review of the disclosure did not disclose any specific definition of "home".

It is true that Margolin did not explicitly define the meaning of "home." It never occurred to him that someone might not know what a home is, especially when he referred to the article in Scientific American [16] :

> **[0008]** The other article in the November 2000 issue of Scientific American (*As We May Live* by W. Wayt Gibbs) describes the home of the future where the home's major systems (as well as a variety of sensors) are networked together and to the Internet. Even at the present time, more and more homes are networking their existing computers together.

Margolin requests that the Court take judicial notice that the most common definition of home is: a residence, it's where a person lives, it's the place protected by the Fourth Amendment to the United States Constitution.

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[15] Appendix page A163

[16] Appendix page A11, the article starts at Appendix page A22

By denying Margolin the use of the word "home," a "home network server" became, simply, a "network server." The Examiners and BPAI set up a straw man and then bravely knocked him down. Or, maybe not. The definition of "network server" will be discussed shortly.

Who is a Subscriber?

Instead of saying he didn't know what a "subscriber" was and then pretending that the term didn't exist (as he did with "home"), Examiner Patel came up with his own bizarre definition.

From the second office action, end of the first paragraph [17] :

> *As far as the subscriber's home, the Home network server receives the service from the PC. (Col 7 lines 46 - 47) When a device receives a service, is interpreted by the examiner to mean "subscribing" to a service.*

Since the Home network server receives the service from the PC then the Home network server is subscribing to the service which means the Home network server is the subscriber. Note that the words "subscribe" or "subscriber" are found nowhere in Ellis.

In a subsequent telephone interview (Telephone Interview with SPE Rupal Dharia, Examiner Chirag R. Patel, and Primary Examiner Frantz Jean Thursday

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[17] Appendix page A103

8/25/2005) [18] SPE Dharia insisted that a "subscriber" can be a device such as a computer, and asserted that his computer regularly "subscribes" to different newsletters. Margolin asked if his computer did this on its own or if he had instructed it to do this but did not get an answer.

Although the phrase "Official Notice" was not used, this is what the Examiners did. And they did not provide any documentation for their definition.

In doing so they violated MPEP 2144.03 (A) *Reliance on Common Knowledge in the Art or "Well Known" Prior Art* which states [19] :

> Official notice without documentary evidence to support an examiner's conclusion is permissible only in some circumstances.

Margolin does not believe "Official Notice" was permissible in this circumstance.

Margolin did not spend much time defining "subscriber" because, again, he felt it was obvious. From the Specification [20] :

> [0016] In exchange for the use of the otherwise unused capacity of the Home Network Server for distributed computing, the contracting company provides the subscriber (nominally the owner of the Home Network) something of value such as reduced cost of Internet service, free Internet service, or a net payment.

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[18] Appendix page A130
[19] Appendix page A180
[20] Appendix page A12

Margolin's invention is not a complex network protocol requiring the services of a software engineer with a PhD. It's not even rocket science. In Margolin's invention the person having ordinary skill in the art is a person who installs and maintains home network systems. Many homeowners do this themselves. They know what a home is because they live in one. If they have Internet service they know what a subscriber is because they are one.

It was only by the actions described above that BPAI was able to find the Examiner's broad interpretation of these terms "reasonable" and Margolin's invention to be anticipated by prior art.

As a result, BPAI erred by stating that "Appellant could have amended the claim consistent with how appellant wants the claim to be interpreted." Because of the Examiner's definitions of ***subscriber, home,*** and ***home network server***, amending the claim would have been futile and produced only more rejections for Margolin and more unmerited counts for the Examiner. Although BPAI's comment speaks to the prosecution history of the case they were either unfamiliar with it or chose to ignore it. Otherwise they would have sanctioned Examiner Chirag Patel and his supervisor SPE Rupal Dharia for disrespecting the English language.

Does Ellis anticipate Margolin (and what is Ellis' Network Server)?

Ellis' Network Server is not a Home Network Server.

Margolin has discussed Ellis' definition of "Network Server" extensively during the prosecution of this case in his Response to the First Office Action [21], his Informal After Final Response [22], the telephone interview of 8/5/2005 [23], the telephone interview of 8/9/2005 [24], the telephone interview of 8/25/2005 [25], the Pre-Brief Conference Request [26], and in his BPAI Appeal Brief [27]. Except for the telephone interview of 8/5/2005, every time Margolin has patiently explained how Ellis' Network Server is part of the ISP's equipment and, therefore, not a home network server, the Examiner has said (effectively), "Yes, it is," and failed to respond to the evidence.

The Network Server NS2 shown by Ellis in numerous figures is part of the ISP's equipment.

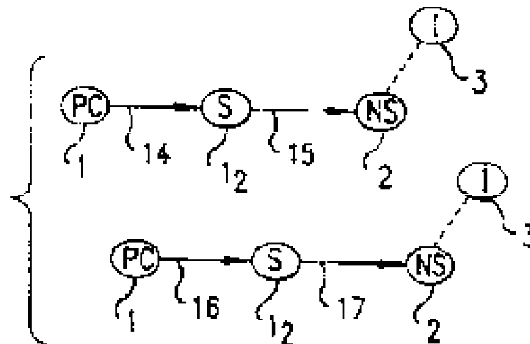
Ellis uses the terms *Server* and *Network Server* to mean the same thing.

[21] Appendix page A59
[22] Appendix page A118
[23] Appendix page A110
[24] Appendix page A123
[25] Appendix page A130
[26] Appendix page A138
[27] Appendix page A146

In Column 12 lines 26-33 [28], Ellis refers to Reference Number 2 as ***server 2.***

> Such shared processing can continue until the device 12 detects the an application being opened 16 in the first PC (or at first use of keyboard, for quicker response, in a multitasking environment), when the device 12 would signal 17 the network computer such as a server 2 that the PC is no longer available to the network, as shown in FIG. 5B, so the network would then terminate its use of the first PC.

Here is Figure 5. Although it is not labeled, the lower one is presumably Figure 5B.



In Column 17 lines 32-41 [29] , Ellis refers to Reference Number 2 as ***network 2***.

> Preferably, wireless connections 100 would be extensively used in home or business network systems, including use of a master remote controller 31 without (or with) microprocessing capability, with preferably broad bandwidth connections such as fiber optic cable connecting directly to at least one component such as a PC 1, shown in a slave configuration, of the home or business personal network system; that preferred connection would link the home system to the network 2 such as the Internet 3, as shown in FIG. 10I.

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[28] Appendix page A46
[29] Appendix page A49

Here is Figure 10I:

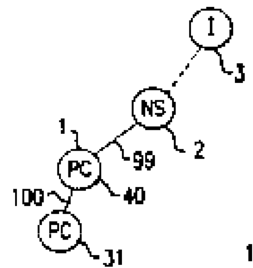

FIG.10I

Moreover, in the Abstract [30], Ellis refers to ***network servers (2)*** in a list of items that are being referred to by the reference numbers used in the drawings.

> This invention relates to computer networks having computers like personal computers (1) or network servers (2) with microprocessors linked (5) by transmission means (4, 14) and having hardware, and other means such that at least one parallel processing operation occurs that involve at least two computers in the network. This invention also relates to large networks composed of smaller networks, like the Internet (3), wherein more than one separate parallel processing operation involving more than one set of computers occurs simultaneously and wherein ongoing processing linkages can be established between microprocessors of separate computers connected to the network. This invention further relates to business arrangements enabling the shared used of network microprocessors for parallel and other processing wherein personal computer owners provide microprocessor processing power to a network, in exchange for linkage to other computers including linkage to other microprocessors; the basis of the exchange between owners and providers being whatever terms to which the parties agree.

From Ellis Column 6 BRIEF DESCRIPTION OF THE DRAWINGS [31] :

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[30] Appendix page A33
[31] Appendix page A43

FIG. 1 is a simplified diagram of a section of a computer network, such as the Internet, showing an embodiment of a meter means which measures flow of computing during a shared operation such as parallel processing between a typical PC user and a network provider.

FIG. 2 is a simplified diagram of a section of a computer network, such as the Internet, showing an embodiment of another meter means which measures the flow of network resources, including shared processing, being provided to a typical PC user and a network provider.

Ellis Figures 1 and 2 are reproduced below. [32]

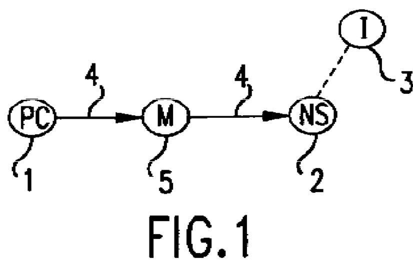

FIG.1

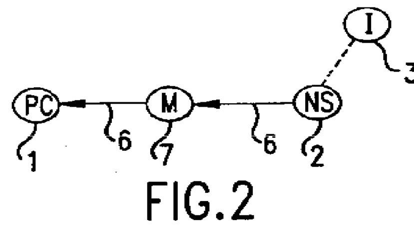

FIG.2

In Figure 1 and Figure 2, PC1 is the typical PC user. In Figure 1, M5 is the meter. In Figure 2, M7 is the meter. That leaves NS2 to be the network provider that provides access to the Internet (3).

Therefore, element NS 2 is referred to, interchangeably, as: server 2, network 2, network servers 2, and network provider.

Indeed, Ellis' choice of labels used in the drawings showing Reference Number 2 is **NS**, which would be an entirely reasonable abbreviation for ***Network Server***.

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[32] Appendix page A35

Ellis' description of Figure 1 and Figure 2 places a meter (M5 or M7) between the PC user and the network provider (server/network/network server/network provider).

BPAI agrees that it is the resources of Ellis' PC that are used for distributed computing. From BPAI Opinion page 3, second paragraph [33]:

> There can be no substantive dispute that Ellis discloses that a PC user (i.e., a subscriber to a service that provides Internet access) may receive something of value in return for access to the resources of the PC that would otherwise be unused.

Therefore, Network Server NS2 is part of the ISP's equipment and is not a Home Network Server 101 as taught by Margolin. If Ellis' Network Server NS2 were the same as Margolin's Home Network Server 101, then Ellis' financial arrangement would be with himself. This interpretation would render Ellis' patent invalid for lack of usefulness. Since issued patents are presumed valid such an interpretation is impermissible. Fortunately, Ellis intends his financial arrangement to be with a separate party. From Column 10 lines 1-6 [34] :

> The financial basis of the shared use between owners/leasers and providers would be whatever terms to which the parties agree, subject to governing laws, regulations, or rules, including payment from either party to the other based on periodic measurement of net use or provision of processing power.

[33] Appendix page A3
[34] Appendix page A45

Also, since Ellis' Network Server NS2 is part of the ISP's equipment, if the resources of NS2 were used for distributed computing then Ellis' ISP would be paying him for using their own equipment.

Ellis further distinguished his PC from a server in his response to the First Office Action for his application 09/320,660 where he stated the importance of being able to run applications on his ***PC 1*** which were not available to the operating systems typically used by servers. (The First Office Action was mailed October 14, 1999; Ellis' Response is dated April 14, 2000, and the application was eventually issued as U.S. Patent 6,167,428 .)

From Ellis' Response, Page 24 Second Paragraph [35] :

> The Examiner appears to have rejected claims 27-41 because of a belief that UNIX and NT servers can be run on personal computers and can be made to function temporarily as a master personal computer or as a slave personal computer, as similarly recited in claims 27-41. However, a UNIX or an NT server functions as a server, not as a master personal computer or as a slave personal computer, which require applications not found in UNIX or NT operating systems. Therefore, Applicant submits that neither Seti@home nor a UNIX or an NT server running on personal computers discloses, teaches or suggests:
> ……………

Ellis then discusses how this relates to his claims. Ellis uses PCs for distributed computing. His PCs do not run the specialized software used in servers. At the time Ellis' invention was made, UNIX and NT were the most popular operating

[35] Appendix page A96

systems used in servers. They did not run the standard PC applications that Ellis felt it was essential to use on his PCs.

In contrast, Margolin uses a Home Network Server for distributed computing. The value of Margolin's ***Home Network Server 101*** is precisely its ability to use a stable, reliable Operating System without requiring the Subscriber to replace his PC software. At the time Ellis' invention was made, as well as the time Margolin's invention was made, the vast majority of PCs used some version of the Microsoft Windows Operating System and most PC Applications were available only for such systems. Thus, one advantage of Margolin's use of ***Home Network Server 101*** is that the Subscriber can continue to use Microsoft Windows on his PCs without jeopardizing the safety of his home's systems.

An example of how the Examiner ignored the above evidence can be found in Examiner's Answer to Margolin's Appeal Brief to BPAI January 24, 2006, page 10 [36] where he said:

> B) Applicant argues "*The Examiner erroneously defines the term "subscriber" in a way that is not consistent with Applicant's use of the term, denying Applicant the right to act as his own lexicographer even if it is to use the ordinary meaning of the term.*
>
> Response to B) When a device receives a service, it is mean "subscribing" to a service". The examiner interpreted the term "device" in light of the cited passage Ellis (US 6,167,428) Col 7 line 65 - Col 8 line 14 which listed below

[36] Appendix page A162

> was cited to mean an entity can be defined as an individual. This was interpreted by the examiner in light of applicant's disclosure per [0016] pages 4-5 which describe the "subscriber (nominally the owner of the Home Network)" and examiner referred it as in individual per Ellis (Col 7 line 65 — Col 8 line 14) Per (Col 7 line 65 — Col 8 line 14) Ellis states "For this new network and its structural relationships, a network provider is defined in the broadest possible way as any entity (corporation or other business, government, not-for-profit, cooperative, consortium, committee, association, community, or other organization or individual) that provides personal computer users (very broadly defined below) with initial and continuing connection hardware and/or software and/or firmware and/or other components and/or services to any network, such as the Internet and Internet II or WWW or their present or future equivalents, coexistors or successors, like the Metalnternet, including any of the current types of Internet access providers (ISP's) including telecommunication companies, television cable or broadcast companies, electrical power companies, satellite communications companies, or their present or future equivalents, coexistors or successors."

The Examiner argued that, since Ellis' network provider (the owner of Ellis' network server 2) could be an individual, it was the same individual who owned Margolin's Home Network Server 101. (The argument assumes that since Margolin's Home Network Server acts as a proxy server for the Home Network clients it is an Internet Service Provider, which is wrong and simply shows the Examiner's intransigence.) He ignored Margolin's argument, stated above, that if this were the case then Ellis' financial arrangement would be with himself and would have no value. If Ellis' network server 2 is owned by an individual it must be a different individual than the one owning Ellis' PC 1.

BPAI fails to add to the Examiner's case.

In BPAI's opinion on page 6 second full paragraph they said [37] :

> Ellis teaches that the PCs that provide processing power may reside on home network systems (e.g., col. 17,ll. 22-40). Given the examiner's broad but reasonable interpretation of instant claim 1, Ellis provides support for the examiner's finding of anticipation.

The section of Ellis cited by BPAI teaches about master microprocessor 30.[38]

> And the master microprocessor 30 might also control the use of several or all other processors 60 owned or leased by the PC user, such as home entertainment digital signal processors 70, especially if the design standards of such microprocessors in the future conforms to the requirements of network parallel processing as described above. In this general approach, the PC master processor would use the slave microprocessors or, if idle (or working on low priority, deferable processing), make them available to the network provider or others to use. Preferably, wireless connections 100 would be extensively used in home or business network systems, including use of a master remote controller 31 without (or with) microprocessing capability, with preferably broad bandwidth connections such as fiber optic cable connecting directly to at least one component such as a PC 1, shown in a slave configuration, of the home or business personal network system; that preferred connection would link the home system to the network 2 such as the Internet 3, as shown in FIG. 10I.

Master microprocessor 30 is not Margolin's Home Network Server. Earlier, when master microprocessor 30 is introduced, starting at col. 16, line 33, it turns out that master microprocessor 30 is the one microprocessor in Ellis' network that is not used for distributed computing. It performs only operational and security functions.

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[37] Appendix page A6
[38] Appendix page A49

From Ellis col 16 lines 33 – 42 [39] :

> As shown in FIGS. 10A-10F, to deal with operational and security issues, it may be optimal for individual users to have one microprocessor or equivalent device that is designated, permanently or temporarily, to be a master 30 controlling device (comprised of hardware and/or software and/of firmware and/or other component) that remains unaccessible (preferably using a hardware and/or software and/or firmware and/or other component firewall 50) directly by the network but which controls the functions of the other, slave microprocessors 40 when the network is not utilizing them.

Margolin teaches the exact opposite. Margolin's Home Network Server is the only machine in the Home Network used for the distributed computing system.

The Ellis paragraph cited by BPAI also discusses master controller 31. This is the only reference in Ellis to a master controller 31. (Ellis Figure 10I shows a PC 31, which sheds no light on it.) All we know is that master controller 31 does not need microprocessing capability [40] (Column 17 lines 32 - 35), which makes it a poor candidate for Margolin's home network server.

> Preferably, wireless connections 100 would be extensively used in home or business network systems, including use of a master remote controller 31 without (or with) microprocessing capability, …

As a result, there is nothing to suggest that Ellis' home or business networks contain the Home Network Server taught by Margolin.

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[39] Appendix page A48
[40] Appendix page A49

BPAI has carelessly read Ellis which explains why they were able to support the Examiner's broad (and wrong) finding of anticipation.

Further, BPAI observed (BPAI Opinion page 6 second full paragraph) [41] :

> Moreover, Ellis at column 8, line 59 through column 9, line 20 describes the types of computers that may be considered PCs in the context of the disclosure. The personal computers are described as including "network computers," which would seem to include both of conventional server and client computers on the home network systems described elsewhere in Ellis. In this regard, we note that appellant's disclosed Home Network Server 101 is "of conventional design." (Spec. ¶ 23.)

Ellis defines "network computer" in at least two mutually exclusive ways. In Col 7, line 29 – 31 under the heading DETAILED DESCRIPTION OF THE PREFERRED EMBODIMENTS he says [42] :

> The new network computer will utilize PC's as providers of computing power to the network, not just users of network services.

Since Ellis' system uses PCs for distributed computing the "network computer" is the entire distributed computing system. It is not a Home Network Server as taught by Margolin.

In Col 12, lines 17 – 26 the network computer is equated to Ellis' server 2 [43] :

> Or, more simply, as shown in FIG. 5A, whenever the state that all user applications are closed and the PC 1 is available to the network 14 (perhaps after a time delay set by the user, like that conventionally used on screensaver software) is detected by a software controller device 12 installed in the PC,

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[41] Appendix page A6
[42] Appendix page A44
[43] Appendix page A46

> the device 12 would signal 15 the network computer such as a server 2 that the PC available to the network, which could then control the PC 1 for parallel processing or multitasking by another PC.

As has been previously shown, Ellis' server 2 (also referred to as server NS2) is not a Home Network Server as taught by Margolin.

As far as both Ellis and Margolin having used the word "conventional" in their applications is concerned, two devices may both be of conventional design and yet be totally different devices even if what makes them different is only software. In a computer mouse of conventional design the mouse ball turns two small wheels, but having two wheels doesn't make it a bicycle.

BPAI's understanding of key terms is different from the Examiner's.

There is a puzzling aspect of BPAI's decision. While they found the Examiner's broad interpretation reasonable their own interpretation of the key terms "subscriber" and "home" are different from his.

Margolin argued that the subscriber is a person, nominally the owner of the Home Network. The Examiner asserted that the subscriber is a device such as a computer.

From page 3 of the BPAI decision second paragraph [44] :

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[44] Appendix page A3

> There can be no substantive dispute that Ellis discloses that a PC user (i.e., a subscriber to a service that provides Internet access) may receive something of value in return for access to the resources of the PC that would otherwise be unused.

BPAI understands that the PC user is a subscriber to a service that provides Internet access. Therefore, assuming the PC user is a person, the subscriber is a person and not a device.

The Examiner decided that the word "home" has so many meanings and he was completely unable to discern what Margolin meant by a "home." But from the BPAI decision page 5 last paragraph [45] :

> Instant claim 1 does not recite the functions of the home network server, but only its location (i.e., in a subscriber's home).

BPAI agrees that a home is a location. It's a subscriber's home. Since BPAI agrees that a subscriber is a person, it's a person's home.

They have disagreed with the Examiner's definition of "subscriber" and "home" yet they affirmed the Examiner's rejection as being reasonable.

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[45] Appendix page A5

BPAI cites Philips v. AWH Corp. but leaves something out.

In BPAI's opinion on page 5, second paragraph, they said [46] :

> Our reviewing court has repeatedly warned against confining the claims to specific embodiments described in the specification. Phillips v. AWH Corp., 415 F.3d 1303, 1323, 75 USPQ2d 1321, 1334 (Fed. Cir. 2005) (en banc).

BPAI makes this statement as though it is an absolute commandment. It isn't.

Philips v. AWH is a great case. It contains all of the hot topics in claim interpretation, many of which are relevant to the current case, such as the use of dictionaries.

As a measure of the importance of Philips v. AWH there are 36 *amicus curiae* parties listed. One of these [47] is the USPTO Office of the Solicitor representing the USPTO, the Department of Justice, and the Federal Trade Commission.

In the Solicitor's Brief Section III *The Tension Between Proper Use of the Specification and Improper Reading in of Limitations* (page 20) [48]

> A merely exemplary feature, because of its *exemplary* status, should not be read into claims whose words do not include that feature. By way of illustration, where the specification describes a feature, not found in the words of the claims, only to fulfill the statutory best mode requirement, the feature

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[46] Appendix page A5

[47] Brief For The United States As Amicus Curiae in Appeal Nos. 03-1269,-1286 PHILIPS v. AWH CORP.

[48] Appendix page A194

> should be considered exemplary, and the patentee should not be unfairly penalized by the importation of that feature into the claims. A person of ordinary skill may also consider a feature merely exemplary where nothing in the written description indicates that the invention is exclusively directed toward the feature or suggests that embodiments without it are outside the scope of the invention. Sunrace Roots Enter. Co. v. SRAM Corp., 336 F.3d 1297, 1305 (Fed. Cir. 2003). However, if the specification as a whole suggests that the very character of the invention requires the limitation be a part of every embodiment, then defining a claim term in accordance with that limitation would be appropriate. Alloc., 342 F.3d at 1370.

The first part of the paragraph does not apply to the current case because the term "home network server" appears in both the claims and the specification where Margolin defined it.

The second part, "if the specification as a whole suggests that the very character of the invention requires the limitation be a part of every embodiment, then defining a claim term in accordance with that limitation would be appropriate" does apply, since Margolin's Home Network Server is essential to "the very character of the invention."

BPAI left the second part out. By leaving it out BPAI misrepresented (by omission) the position of its own agency as presented by the Solicitor's Brief. BPAI is supposed to be an impartial administrative review court. Instead, it has acted as the Examiner's advocate.

The Examiner and his supervisor show bad faith.

There is another troubling aspect to this case.

Margolin had a telephone interview with Examiner Patel on August 5, 2005 [49] during which Margolin explained in simpler terms what his invention was and how it was different from Ellis. Examiner Patel asked questions that suggested he understood Margolin's invention and in particular, that Margolin's Home Network Server was distinctly different from Ellis' Network Server NS2. Examiner Patel thanked Margolin for clarifying his invention and distinguishing it from Ellis, and agreed to talk to his supervisor (SPE Rupal Dharia) who had the authority to negotiate the disposition of the application. Examiner Patel also stated he would do an additional search to see if there was other Prior Art relevant to the invention. Further, he proposed that a conference telephone interview be held to include SPE Rupal Dharia. Margolin agreed and the conference telephone was set up for the following week on August 9, 2005.

On August 9 a conference telephone interview was held [50] but SPE Dharia was not present. Instead, a Primary Examiner from another group (Examiner Frantz Jean) was pressed into service. Examiner Frantz Jean was not familiar with the case and

[49] Appendix page A108
[50] Appendix page A122

was therefore not in a position to negotiate anything. In addition, Examiner Patel denied that the case had been advanced during the August 5 telephone interview.

MPEP Rule 713.04 *Substance of Interview Must Be Made of Record* states:

> Examiners must complete an Interview Summary form PTOL-413 for each interview where a matter of substance has been discussed during the interview by checking the appropriate boxes and filling in the blanks. If applicant initiated the interview, a copy of the completed "Applicant Initiated Interview Request" form, PTOL-413A (if available), should be attached to the Interview Summary form, PTOL-413 and a copy be given to the applicant (or applicant's attorney or agent), upon completion of the interview. [51]

The telephone interview of August 5, 2005 was a material part of the prosecution history of this case. Margolin filed an Applicant's Summary of this telephone interview which the Examiner did not contest. It is shown in the Image File Wrapper as "8/12/2005 Applicant summary of interview with examiner" [52] This Applicant's Summary also contains Margolin's Informal After Final Response to the Second Office Action [53] which Examiner Patel had refused to enter into the record.

The Examiner's Interview Summary for the August 5, 2005 telephone interview was filed [54] but there are some problems with it.

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[51] Appendix page A185
[52] Appendix page A108
[53] Appendix page A114
[54] Appendix page A188

1. The Examiner's Summary was dated and mailed on October 12, 2006, more than 14 months after the telephone interview. This was after BPAI issued its ruling and after Margolin filed his Notice of Appeal.
2. The Examiner's Summary was signed only by SPE Rupal Dharia. Since his is the only signature on the Summary it must be assumed that he wrote it. However, Dharia was not present during the telephone interview.
3. The Summary contains errors ranging from distortions to outright fabrications.

From Dharia's Summary:

> Upon review of the history of this application, it became apparent that an interview summary was inadvertently not prepared.

The implication is that Dharia reviewed the history of the application on his own initiative.

In September, 2006, Margolin contacted the Office of the USPTO Solicitor to inform them that he intended to appeal BPAI's decision to the CAFC and that a material document (the Examiner's Summary of the 8/5/2005 telephone interview) had never been filed. Their response was that there was nothing they could do about it. Margolin was then directed around to a number of other USPTO offices. Then Dharia's Summary appeared. Either this was an amazing coincidence or it was the result of Margolin's actions, not Dharia's initiative.

And, if the Examiner's failure to prepare an Examiner's Summary to the Telephone Interview of 8/5/2005 was "inadvertent", then he must have also inadvertently failed to read Applicant's Summary of that interview [55]. He certainly did not contest it at the time. He also must have inadvertently failed to read (or contest) Margolin's Applicant's Summary of the 8/9/2005 Telephone Interview where Margolin noted that the Examiner had not yet filed an Examiner's Summary of the August 5 interview. [56] If an Examiner's Summary was produced in a timely fashion and was inadvertently not filed, then the original document should be produced.

Dharia states:

> Applicant argued the examiner improperly made the second office action final and introduced a new grounds of rejection. Applicant requested the examiner to withdraw the rejection. Examiner responded to all of the arguments and used the same prior art, Ellis (US 6,167,428), thus making a proper final rejection.

Margolin asked Examiner Patel to withdraw making the Second Office Action final in one or more telephone conversations preceding the 8/5/2005 telephone interview. The purpose of these telephone conversations was to ask Patel to have a telephone interview to discuss (and, hopefully, resolve) the case. (Patel had

[55] Appendix page A108
[56] Appendix page A122

initially refused to conduct a telephone interview.) This was not a part of the telephone interview of 8/5/2005 where the Examiner was receptive to Margolin's arguments. He did not reject them in this interview.

SPE Dharia further states:

> A summary is provided below to make the record complete for the August 5th interview to the best of the examiner's recollection.

Dharia has no recollection of the interview. He wasn't there. [57] If he is referring to Examiner Patel's recollection of the meeting then his summary is second-hand and brings up the question, "Why didn't Examiner Patel write the Summary?"

Dharia states:

> Applicant proposed changing the claims only if the examiner was willing to allow the application. Examiner explained that any amendment would require further search and consideration by the examiner. Examiner repeatedly asked applicant to send a formal response in writing. Applicant repeatedly refused as applicant did not wish to pay the extra fees of $395.

Dharia has distorted the facts. From Margolin's Applicant's Summary for the telephone interview of 8/5/2005 [58]:

> **7.** I proposed to amend the phrase in Claim 1, Claim 3, and Claim 5 "***something of value***" to "***something of value from a contracting company***" if it would result in the application being allowed. He seemed receptive to my offer to amend the claims but said he did not have the authority to negotiate the deposition of the application.

[57] Appendix page A189
[58] Appendix page A112

Margolin's unwillingness to file an AF Amendment or an RCE was expressed in other conversations and interviews with the Examiner, but not this one. Margolin's position was that the purpose of a telephone interview was to engage in a dialogue and, if possible, come to an agreement. With the exception of the 8/5/2005 telephone interview the Examiner's position was always, "File an AF Amendment or RCE and then I'll think about it." Margolin saw no reason to throw money away so the Examiner could get more unmerited counts.

Dharia states:

> Applicant was extremely insistent and wished to speak to someone with negotiation authority. Out of courtesy by the examiner, another interview was scheduled for August 9 with someone of negotiation authority.

Margolin was not "extremely insistent." It was Patel's idea to talk to someone with negotiation authority. And it wasn't just anyone with negotiation authority, it was to be with Dharia. As noted previously, Dharia was a no-show. As far as "courtesy" is concerned, if Dharia had wanted to be courteous he could have started by showing up for the scheduled telephone interview on August 9.

SPE Dharia was not present at the 8/5/2005 interview and has no standing to file this Examiner's Summary. His Examiner's Summary is a clumsy attempt to mislead this court as to the prosecution history of this case. Shame on the USPTO for permitting this.

CONCLUSION

BPAI erred by refusing to allow Margolin to be his own lexicographer in defining the term "Home Network Server," refusing to allow Margolin to use the common meaning of the word "home," and allowing, by default, the Examiner's bizarre definition of "subscriber" to stand. It was only by these actions that BPAI was able to find the Examiner's broad interpretation of these terms "reasonable" and Margolin's invention to be anticipated by Ellis. Ellis does not anticipate Margolin.

Margolin's specification describes his invention in enough detail to allow it to be built by a person having ordinary skill in the art of home network systems without undue experimentation. Margolin's claims are properly drawn and distinctly point out his invention.

Therefore, Margolin respectfully requests this Court reverse BPAI's finding of anticipation and order the Director of the Patent and Trademark Office to issue a Notice of Allowance for the Margolin Application as filed.

Jed Margolin

January 4, 2007

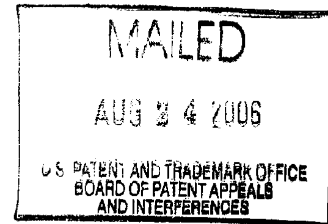
ADDENDUM

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

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JED MARGOLIN



Appeal No. 2006-2005
Application No. 09/947,801

ON BRIEF

Before THOMAS, HAIRSTON, and BLANKENSHIP, Administrative Patent Judges.

BLANKENSHIP, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 1-5, which are all the claims in the application.

We affirm.

BACKGROUND

The disclosed invention relates to a distributed computing system using the computing resources of Home Network Servers connected through the Internet, where the owners of the Home Network Servers receive something of value in return for access to the Home Network Servers' otherwise unused computing resources. (Abstract.) Claim 1 is reproduced below.

1. A distributed computing system comprising:

   (a) a home network server in a subscriber's home;

   (b) one or more home network client devices;

   (c) an Internet connection;

   whereby the subscriber receives something of value in return for access to the resources of said home network server that would otherwise be unused.

The examiner relies on the following reference:

Ellis	6,167,428	Dec. 26, 2000 (filed May 27, 1999)

Claims 1-5 stand rejected under 35 U.S.C. § 102 as being anticipated by Ellis.

We refer to the Final Rejection (mailed Jun. 15, 2005) and the Examiner's Answer (mailed Jan. 24, 2006) for a statement of the examiner's position and to the Brief (filed Nov. 17, 2005) and the Reply Brief (filed Mar. 16, 2006) for appellant's position with respect to the claims which stand rejected.

OPINION

Based on appellant's remarks in the Brief, we select claim 1 as representative in this appeal. We will decide the appeal on the basis of claim 1. See 37 CFR § 41.37(c)(1)(vii).

Ellis describes networked computers whereby PC (personal computer) users' connections to the Internet may be obtained at no cost, in exchange for making the PCs available for shared processing when otherwise idle. See, e.g., Ellis at col. 11, l. 55 - col. 12, l. 4. There can be no substantive dispute that Ellis discloses that a PC user (i.e., a subscriber to a service that provides Internet access) may receive something of value in return for access to the resources of the PC that would otherwise be unused.

Instant claim 1 recites, however, that the subscriber receives something of value in return for access to the resources of "said home network server" that would otherwise be unused. Claim 1 further recites, inter alia, "a home network server in a subscriber's home. . . ." Appellant argues that the terms in view of their most common meanings in the art, or at least how the terms are to be interpreted in light of the instant specification, distinguish over Ellis.

The examiner contends that the instant specification does not set forth any particular definition for "server" or "home network server." The examiner submits (Answer at 6-7), with reference to a technical dictionary definition, that "server" is understood by the artisan to include a computer or program, on the Internet or another network, that responds to commands from a client. For example, a "file server" may

contain an archive of data or program files such that when a client submits a request for a file, the server transfers a copy of the file to the client. As such, the examiner finds that the artisan would have appreciated that the PCs described by Ellis function as clients with respect to the servers on the Internet, but function as servers when providing resources to other entities on the Internet.

Appellant responds (Reply Brief at 6) that the term "server" is defined differently in the specification, which describes a "Home Network Server" (e.g., spec. ¶ 14). We find that the specification at paragraph 2 sets forth certain definitions, but not for the terms in dispute. Upon review of the entire disclosure, we conclude that the "Home Network Server" described embodiment does not convey a limiting definition for the term "server," nor that the invention is to be limited to the disclosed embodiment. Moreover, the specification teaches (¶ 22) that the invention may be practiced without the specific details that are disclosed.

With respect to the examiner's proffered definition of "server," appellant notes that the examiner relied on the second listed definition, rather than the first. Appellant submits, without citation to any authority, that dictionaries list the definitions of words in the order in which they are most commonly used. The first listed definition for "server" is, according to appellant (Reply Brief at 5): "1. On a local area network (LAN), a computer running administrative software that controls access to the network and its resources, such as printers and disk drives, and provides resources to computers functioning as workstations on the network."

First, we note that appellant's definition of "server" appears to be limited to local area networks and how a server may be implemented on that particular network type. Ellis provides evidence, however, that the artisan did not consider the term "server" to be limited to local area networks. See, e.g., Ellis at col. 22, ll. 30-37 (servers operated by Internet Service Providers).

Second, and more important, the present inquiry relates to the broadest reasonable interpretation of "server" consistent with the specification, rather than how the term might be more commonly used in the art. Both the broader definition offered by the examiner and the narrower definition offered by appellant appear to be consistent with appellant's specification. We cannot discard the broader meaning in favor of the narrower. Claims are to be given their broadest reasonable interpretation during prosecution, and the scope of a claim cannot be narrowed by reading disclosed limitations into the claim. See In re Morris, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997); In re Zletz, 893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989); In re Prater, 415 F.2d 1393, 1404, 162 USPQ 541, 550 (CCPA 1969). Our reviewing court has repeatedly warned against confining the claims to specific embodiments described in the specification. Phillips v. AWH Corp., 415 F.3d 1303, 1323, 75 USPQ2d 1321, 1334 (Fed. Cir. 2005) (en banc).

Instant claim 1 does not recite the functions of the home network server, but only its location (i.e., in a subscriber's home). The claim is thus broad enough to cover either of a server for a home network and a server on a home network. Appellant could

have amended the claim consistent with how appellant wants the claim to be interpreted. "An essential purpose of patent examination is to fashion claims that are precise, clear, correct, and unambiguous. Only in this way can uncertainties of claim scope be removed, as much as possible, during the administrative process." In re Zletz, F.2d 893 at 322, 13 USPQ2d at 1322.

Ellis teaches that the PCs that provide processing power may reside on home network systems (e.g., col. 17, ll. 22-40). Given the examiner's broad but reasonable interpretation of instant claim 1, Ellis provides support for the examiner's finding of anticipation.

Moreover, Ellis at column 8, line 59 through column 9, line 20 describes the types of computers that may be considered PCs in the context of the disclosure. The personal computers are described as including "network computers," which would seem to include both of conventional server and client computers on the home network systems described elsewhere in Ellis. In this regard, we note that appellant's disclosed Home Network Server 101 is "of conventional design." (Spec. ¶ 23.)

While Ellis is not purported to teach providing the processing services of PC servers for home network systems to the exclusion of PC clients on the systems, we observe that instant claim 1 does not preclude access to the resources of client PCs on a home network.

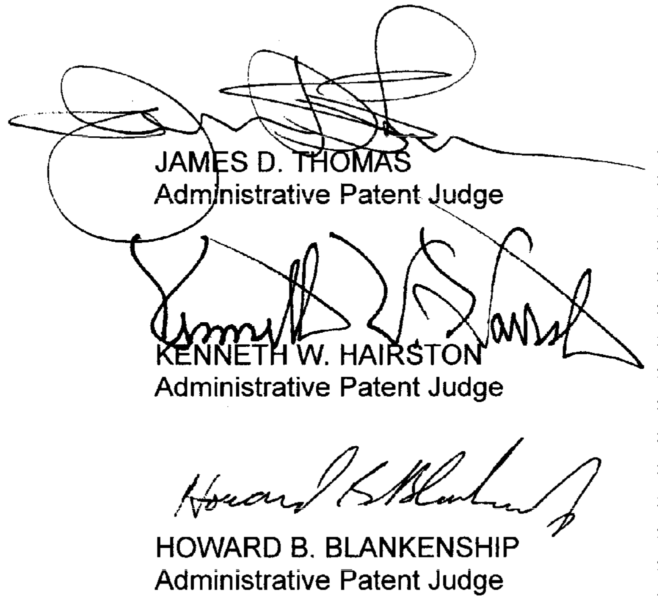
We have considered all of appellant's arguments in the briefs, but are not persuaded that instant claim 1 has been rejected in error. We thus sustain the rejection of claims 1-5 under 35 U.S.C. § 102 as being anticipated by Ellis.

CONCLUSION

The rejection of claims 1-5 under 35 U.S.C. § 102 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a). See 37 CFR § 1.136(a)(1)(iv).

AFFIRMED



JAMES D. THOMAS
Administrative Patent Judge

KENNETH W. HAIRSTON
Administrative Patent Judge

HOWARD B. BLANKENSHIP
Administrative Patent Judge

BOARD OF PATENT APPEALS AND INTERFERENCES

Appeal No. 2006-2005
Application No. 09/947,801

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above foregoing and Attachments has been served on the Office of the Solicitor for the United States Patent and Trademark Office by United States Postal Service Express Mail Service to the address shown below:

Dated: January 4, 2007

Jed Margolin

Jed Margolin

Office of the Solicitor
Post Office Box 15667
Arlington, VA 22215

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and (C) and Federal Circuit Rule 32(a). It is proportionally spaced, has a typeface of 14 points or more, and contains 8,165 words as calculated by the Microsoft Word program used to prepare the brief.

Dated: Reno, NV

January 4, 2007

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