Attorney Docket No. 077580-0089

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In the Reexamination of:	)	
Edmand Munger, et al.	)	
	)	
U.S. Patent No.: 6,502,135	)	
Filed: February 15, 2000	)	**Examiner:**
Issued: December 31, 2002	)	**Andrew L. Nalven**
	)	
For: AGILE NETWORK PROTOCOL FOR SECURE COMMUNICATIONS WITH ASSURED SYSTEM AVAILABILITY	)	**Group Art Unit: 3992**
	)	
Reexamination Proceeding	)	
Control No.: 95/001,269	)	
Filed: December 8, 2009	)	

RESPONSE TO OFFICE ACTION IN REEXAMINATION

Mail Stop *INTER PARTES* REEXAM
Central Reexamination Unit
Office of Patent Legal Administration
United States Patent & Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

The Patent Owner hereby responds to the Office Action dated January 15, 2010 ("the Office Action") in the above-identified Reexamination of U.S. Patent Number 6,502,135 ("the '135 Patent") having a period of response set to expire on April 15, 2010, in view of the extension of time granted on February 25, 2010.

Remarks being on page 2 of this response; and

Listing of the claims appears in Appendix A.

REMARKS

Claims 1-10, 12, and 18 are under reexamination, with claims 1, 10, and 18 being independent. Claims 1, 3, 4, 6-10, and 12 stand rejected. Claims 2 and 5 were found not to be anticipated by the documents cited in the Replacement Request for *Inter Partes* Reexamination of Patent ("Request"). Therefore, Patent Owner respectfully requests confirmation of claims 2 and 5 at this time.

Claim 18 has been added. Support for claim 18 may be found, for example, in the originally issued claims of the '135 Patent at column 47, lines 20-35 and column 47, lines 47-52. Specifically, claim 18 corresponds to the combination of claims 2 and 5. No new matter has been introduced.

Because claim 9 depends from claim 5, which was found not to be anticipated or otherwise rejected by the cited documents in the Request, it is not understood how claim 9 stands rejected. Nevertheless, the Patent Owner addresses the rejection as provided below.

I. Patent Owner's Response to the Rejection

A. Applicable Standard for Rejection Under 35 U.S.C. § 102(a)

Claims 1, 3, 4, 6-10, and 12 of the '135 Patent stand rejected under 35 U.S.C. § 102(a) as being anticipated by Aventail Connect v3.1/v2.6 Administrator's Guide ("Aventail"). That statutory provision provides that "[a] person shall be entitled to a patent unless - (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent . . . ."

With respect to a rejection under 35 U.S.C. § 102, the MPEP states that "[a] claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *See* MPEP § 2131, citing *Verdegaal Bros. v. Union Oil Col. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). The above-stated rejection, however, fails to meet this standard for the following reasons.

B. Aventail has not been shown to be prior art under § 102(a)

The Office Action and the Request both fail to demonstrate the actual publication date of Aventail necessary to establish a *prima facie* showing that Aventail is prior art. Both the Office

Action and the Request assert that Aventail was published between 1996 and 1999 without any stated support. Request at 5; Office Action at 2. The Patent Owner can only presume that this assertion arises from the copyright date range printed on the face of the reference. *See* Aventail at *i*. This copyright date range is not, however, the publication date of Aventail.

The distinction between a publication date and a copyright date is critical. To establish a date of publication, the reference must be shown to have "been disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art, exercising reasonable diligence, can locate it." *In re Wyre*, 655 F.2d 221 (C.C.P.A. 1981). Aventail, on its face, provides "© 1996-1999 Aventail Corporation." The copyright date does not meet this standard. Unlike a publication date, a copyright date merely establishes "the date that the document was created or printed." *Hilgraeve, Inc. v. Symantec Corp.*, 271 F. Supp. 2d 964, 975 (E.D. Mich. 2003).

Presuming the author of the document accurately represented the date the document was created, this creation date is not evidence of any sort of publication or dissemination. Without more, this bald assertion of the creation of the document does not meet the "publication" standard required for a document to be relied upon as prior art.

Further exacerbating matters is the filing date of the '135 Patent: February 15, 2000. Suppose the relied upon sections of the Aventail reference were created on December 31, 1999, and the copyright date range accordingly amended to read "1996-1999." Under these circumstances, it is possible that the document, although created, was not made publicly available until after the filing date of the '135 Patent, six weeks after creation. Under these circumstances, Aventail clearly would not be eligible to be relied upon as prior art to the '135 Patent.

The party asserting the prior art bears the burden of establishing a date of publication. See *Carella v. Starlight Archery*, 804 F.2d 135 (Fed. Cir. 1986) (finding that a mailer did not qualify as prior art because there was no evidence as to when the mailer was received by any of the addresses). Yet, neither the Office Action nor the Request even attempt to show that Aventail was disseminated or made publicly available.

Thus, the Patent Owner respectfully submits that the Office Action has failed to establish that Aventail is prior art to the rejected claims. Accordingly, the Patent Owner respectfully

requests that the § 102(a) rejection over Aventail be withdrawn, and the rejected claims 1 and 10, as well as claims 3, 4, 6-9 and 12 depending thereupon, be confirmed.

C. The Rejection of Claims 1, 3, 4, 6-10, and 12 Under 35 U.S.C. § 102(a)

Claims 1, 3, 4, 6-10, and 12 of the '135 Patent stand rejected under 35 U.S.C. § 102(a) as being anticipated by Aventail. The rejection was based on the reasons given by the Request on pages 11-17 and Exhibit A and based on additional reasons presented in the Office Action on pages 4-9. Assuming Aventail qualifies as prior art, the Patent Owner respectfully traverses this rejection for the following reasons.

1. Aventail has not been shown to teach a virtual private network ("VPN")

a) Claim 1

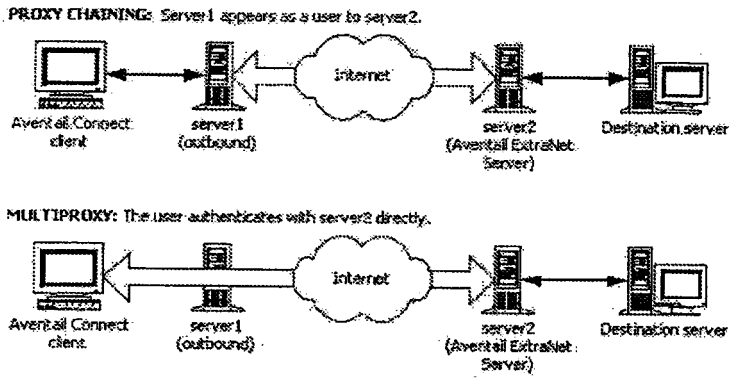
Claim 1 recites a method of transparently creating a VPN between a client computer and a target computer. As described below, Aventail fails to teach, either explicitly or inherently, at least this feature of the claimed invention. The Patent Owner's statements below are supported by an expert Declaration of Jason Nieh, Ph.D. pursuant to 37 C.F.R. § 1.1.32 ("Nieh Decl.") submitted herewith.

Aventail discloses a system and architecture for transmitting data between two computers using the SOCKS protocol. Nieh Decl. at ¶ 11. The system routes certain, predefined network traffic from a WinSock (Windows sockets) application to an extranet (SOCKS) server, possibly through successive servers. Aventail at 7; Nieh Decl. at ¶ 11. Upon receipt of the network traffic, the SOCKS server then transmits the network traffic to the Internet or external network. Aventail at 7; Nieh Decl. at ¶ 11. Aventail's disclosure is limited to connections created at the socket layer of the network architecture. Nieh Decl. at ¶ 11.

In operation, a component of the Aventail Connect software described in the reference resides between WinSock and the underlying TCP/IP stack. *See* Aventail at 9; Nieh Decl. at ¶ 12. The Aventail Connect software intercepts all connection requests from the user, and determines whether each request matches local, preset criteria for redirection to a SOCKS server. *See* Aventail at 10; Nieh Decl. at ¶ 12. If redirection is appropriate, then Aventail Connect creates a false DNS entry to return to the requesting application. *See* Aventail at 12; Nieh Decl. at ¶ 13. Aventail discloses that Aventail Connect then forwards the destination hostname to the

extranet SOCK server over a SOCKS connection. *See* Aventail at 12; Nieh Decl. at ¶ 13. The SOCKS server performs the hostname resolution. Aventail at 12; Nieh Decl. at ¶ 14. Once the hostname is resolved, the user can transmit data over a SOCKS connection to the SOCKS server. Nieh Decl. at ¶ 14. The SOCKS server, then, separately relays that transmitted data to the target. Nieh Decl. at ¶ 14.

The Request also cites to a "Proxy Chaining" and a "MultiProxy" mode disclosed in Aventail. Request at 12; Aventail at 68-73. In the "Proxy Chaining" mode, Aventail indicates that a user can communicate with a target via a number of proxies such that each proxy server acts as a client to the next downstream proxy server. Aventail at 68; Nieh Decl. at ¶ 16. As shown below, in this mode, the user does not communicate directly with the proxy servers other than the one immediately downstream from it. Aventail at 68, 72; Nieh Decl. at ¶ 16.



Aventail at 72. In the "MultiProxy" mode, Aventail indicates that the user, via Aventail Connect, authenticates with each successive proxy server directly. Aventail at 68; Nieh Decl. at ¶ 17. Regardless of the number of servers or proxies between the client and target, at least one is required and the operation of Aventail Connect does not materially differ between the methods. Nieh Decl. at ¶ 18.

Aventail has not been shown to disclose the VPN claimed in Claim 1 of the '135 Patent for at least three reasons. Nieh Decl. at ¶ 19. First, Aventail has not been shown to demonstrate that computers connected via the Aventail system are able to communicate with each other as though they were on the same network. *Id.* at ¶ 20. Aventail discloses establishing point-to-

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