

**THIS OPINION WAS NOT WRITTEN FOR PUBLICATION**

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 31

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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**Ex parte** MARTIN J. SIRKIN

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Appeal No. 96-3144  
Application 08/322,111<sup>1</sup>

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ON BRIEF

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Before, THOMAS, FLEMING and DIXON, **Administrative Patent Judges.**

DIXON, **Administrative Patent Judge.**

**DECISION ON APPEAL**

This is a decision on appeal from the examiner's final rejection of claims 1-9, which are all of the claims pending in this application.

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<sup>1</sup>Application for patent filed October 12, 1994. According to appellant, this application is a continuation of application 08/086,756, filed July 1, 1993, now abandoned, which is a continuation of application 07/705,425, filed May 24, 1991, now abandoned.

## **BACKGROUND**

The present invention relates to a method and system for estimating the time remaining to complete a task running on a multitasking workstation. The system and method periodically update the best estimate of the time remaining to complete a task as the multitasking workstation processor undergoes changes in the data processing workload. A succession of update estimates are derived and displayed to a user. Each of the successive estimates uses a task execution rate adjusted for the last increment of time. The iterations of the calculations improve the estimate accuracy.

Appellant has indicated that all the claims are grouped into a single group and stand or fall together. (See brief at page 6.)

Independent claim 1 is reproduced as follows:

1. Method for estimating and displaying a time to completion of a task executing on a multitasking workstation, comprising the steps of:

operating the workstation in a multitasking mode;

driving a display by the workstation;

generating through a first calculation in the workstation a first estimate of time to completion of a specified task based upon a size and a rate of execution of the specified task over an increment of time;

generating through a plurality of successive calculations revised estimates of time to completion based upon successively later

incremental measurements of the rate of execution, where the revised

estimates of time are responsive to the effects of changes in the composite multitask load of the multitasking workstation; and

driving the display to notify a user of the multitasking workstation of the revised estimates after their generation.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Yamaji et al. (Yamaji)	4,495,562	Jan. 22, 1985
Haynes et al. (Haynes)	4,457,772	Jul. 03, 1984

David Halliday et al., "FUNDAMENTALS OF PHYSICS", Third Edition, Extended, published 1988 by John Wiley & Sons (N. Y), pp. 12-23.

Claims 1-9 stand rejected under 35 U.S.C. § 103 as being unpatentable over Yamaji in view of Haynes, further in view of Halliday.

Rather than reiterate the conflicting viewpoints advanced by the Examiner and the appellant, we make reference to the brief<sup>2</sup> and answer<sup>3</sup> for the details thereto.

### **OPINION**

After a careful review of the evidence before us we disagree with the Examiner that claims 1-9 are properly rejected under 35 U.S.C. § 103 and we will not sustain the rejection of claims 1-9.

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<sup>2</sup> Appellant filed an appeal brief, November 16, 1995, (Paper No. 29). We will refer to this appeal brief as simply the brief.

<sup>3</sup> The Examiner responded to the brief with an Examiner's Answer mailed February 28, 1996, (Paper No. 30). We will refer to this examiner's answer as simply the answer.

As a consequence of our review, we make the determinations which follow.

Turning to the rejection of claims 1-9, assuming arguendo that the examiner has made a proper showing regarding the motivation to combine the teachings of Yamaji Haynes and Halliday, we do not find all the claimed steps which are recited in the claim 1.

The Examiner has not shown, in any teaching, the step of:

generating through a plurality of successive calculations revised estimates of time to completion based upon successively later incremental measurements of the rate of execution, where the revised estimates of time are responsive to the effects of changes in the composite multitask load of the multitasking workstation

(See claim 1; similar language is also found in claims 6 and 9.) The Examiner has pointed to Haynes at col. 11, lines 6-11, 24 and 43-44 to teach "successive calculations and "notifying a user." (See brief at page 4, paragraph 1.) The examiner has not pointed to any teaching in Yamaji, Haynes, or Halliday which clearly shows the successive calculations of estimates as set forth in the above quoted claim language nor a convincing line of reasoning why it would have been obvious to one of ordinary skill in the art at the time of the invention to perform the successive calculations of estimates where the estimates are "responsive to the effects of changes in the composite multitask load." We are unable to find in the art relied upon by the Examiner, any teaching prior to appellant's invention, that successive estimates could be used to

provide the desired periodically updated best estimate of the time remaining to complete a task as the multitasking workstation processor undergoes changes in the data processing workload being executed. (See brief at page 3, paragraph one.)

The Examiner recognizes appellant's argument concerning the lack of a teaching concerning successive estimates, but does not directly address the argument in the answer. (See answer at page 8, paragraphs 2-3.) The answer discusses dynamic control and multitasking, but does not address "successive estimates." It is not clear if the discussion was intended to assert that dynamic control and multitasking imply successive estimates and subsequent communication thereof to a user, and we cannot speculate as to the Examiner's findings beyond the written record. Our reviewing court has repeatedly stated that

Obviousness is a legal conclusion which we are required to draw from facts appearing in the record or of which judicial notice may be taken. Thus before we can conclude that any disclosed invention is "obvious" under the conditions specified in 35 U.S.C. § 103, we must evaluate facts from which to determine 1) what was shown in the prior art at the time the invention was made, and 2) the knowledge which a person of ordinary skill in the art possessed at the time the invention was made.

Here, neither the record nor the facts of which we are able to take judicial notice supplies the factual data necessary to support the legal conclusion of obviousness of the invention at the time it was made. We are unwilling to substitute speculation and hindsight appraisal of the prior art for such factual data. For this reason we think there is a doubt as to the factual basis supporting the conclusion of the board of appeals that the invention would have been obvious to one of ordinary skill in the art of metal spinning. Under these circumstances, the doubt should be resolved in favor of the applicant. (citations omitted)

**In re Sprock** 301, F.2d 686, 690-691, 133 USPQ 360, 364 (CCPA 1962).

The Examiner has set forth in the answer on page 7, line 20 - page 8, paragraph one, a discussion of the combination of the three teachings and concludes that the "good prediction of completion times would be desirable in the system of Yamaji et al. for such things as load planning to maximize the average utilization of the processors and to provide good real time response, Haynes et al. provides a[n] overview of a[n] algorithm that results in a good prediction under variable load conditions." This combination for load planning would not provide the skilled artisan with the motivation to notify the user since the processor modification is the focus of the estimate.

Moreover, the estimates of Haynes merely estimate the time of completion of the job without mention of any concern or adjustment for the effect of changes in the composite multitask workload of the glass factory. Haynes does not disclose a multitasking environment, but a substantially linear singular task of glass production rather than a multitasking environment.

We find that the examiner has not met the burden of setting forth a *prima facie* case of obviousness in rejecting claims 1-9. Our reviewing court has stated that obviousness is tested by "what the combined teachings of the references would have suggested to those of ordinary skill in the art." **In re Keller**, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981).

Instead, it appears to us that the examiner relied on hindsight in reaching the obviousness determination. However, our reviewing court has said, "[t]o imbue one of ordinary skill in the art with knowledge of the invention in suit, when no prior art reference or references of record convey or suggest that knowledge, is to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher." **W. L. Gore & Assoc. v. Garlock, Inc.**, 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983).

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. Upon evaluation of all the evidence before us, it is our conclusion that the evidence adduced by the examiner is not sufficient to establish a **prima facie** case of obviousness with respect to claim 1. Accordingly, we will not sustain the examiner's rejection of claims 1, 6 and 9 under 35 U.S.C. § 103.

Since all the limitations of independent claims 1, 6 and 9 are not suggested by the applied prior art, we cannot sustain the examiner's rejection of appealed claims 2-5, 7 and 8 which depends therefrom, under 35 U.S.C. § 103.

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**CONCLUSION**

To summarize, the decision of the examiner rejecting claims 1 through 9 under 35 U.S.C. § 103 is reversed. The decision of the examiner is reversed.

**REVERSED**

JAMES D. THOMAS	)	
Administrative Patent Judge	)	
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MICHAEL R. FLEMING	)	BOARD OF PATENT
Administrative Patent Judge	)	APPEALS AND
	)	INTERFERENCES
	)	
	)	
	)	
JOSEPH L. DIXON	)	
Administrative Patent Judge	)	

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