UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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VEEAM SOFTWARE CORPORATION
Petitioner

v.

SYMANTEC CORPORATION
Patent Owner

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Case IPR2013-00150
Patent 7,093,086

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Before THOMAS L. GIANNETTI, SCOTT E. KAMHOLZ, and
TRENTON A. WARD, *Administrative Patent Judges.*

WARD, *Administrative Patent Judge*.

DECISION
Institution of *Inter Partes* Review
37 C.F.R. § 42.108

I.   INTRODUCTION

   A. *Background*

Veeam Software Corporation filed a petition to institute an *inter partes* review of claims 1, 11, 12 and 22 of U.S. Patent 7,093,086 (the "'086 patent"). Paper 2 ("Pet."). Patent Owner Symantec Corporation filed a preliminary response. Paper 9 ("Prelim. Resp."). The standard for instituting an *inter partes* review is set forth in 35 U.S.C. § 314(a), which provides as follows:

> THRESHOLD -- The Director may not authorize an *inter partes* review to be instituted unless the Director determines that the information presented in the petition filed under section 311 and any response filed under section 313 shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.

Petitioner contends that the challenged claims are unpatentable under 35 U.S.C. §§ 102 and/or 103 on the following specific grounds (Pet. 10-58):[1]

Reference(s)	Basis	Claims challenged
Lim	§ 102	1, 11, 12, and 22
VMware ESX	§ 102	1, 11, 12, and 22
VMware GSG	§ 102	1, 11, 12, and 22

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[1] The references relied upon are: US 6,795,966 (Ex. 1004) ("Lim"), VMware ESX Server: User Manual (Ex. 1005) ("VMware ESX"), Getting Started Guide: VMware 2.0 for Linux (Ex. 1006) ("VMware GSG"), "Checkpoint for Network Transferable Computer" by Suzaki (Exs. 1007-1009) ("Suzaki"), and "Integrating Checkpointing with Transaction Processing" by Wang (Ex. 1010) ("Wang"); and US 6,917,963 (Ex. 1011) ("Hipp"). Additionally, Petitioner supports its challenge with a declaration by Dr. Prashant Shenoy (Ex. 1002) ("Shenoy Decl.").

Reference(s)	Basis	Claims challenged
Suzaki	§ 102	1 and 12
Suzaki and Wang	§ 103	11 and 22
Suzaki and Hipp	§ 103	11 and 22
Hipp	§ 102	1, 11, 12, and 22

For the reasons given below, we institute an *inter partes* review of claims 1, 11, 12, and 22.

B. Additional Proceedings

In addition to this petition, Petitioner has filed petitions challenging the patentability of certain claims of Patent Owner's U.S. Patents 6,931,558 (IPR2013-00141, IPR2013-00142), 7,254,682 (IPR2013-00144, IPR2013-00145), and 7,191,299 (IPR2013-00143, IPR2013-00151).

C. The Invention

The '086 patent is titled "Disaster Recovery and Backup Using Virtual Machines" and generally relates to computer systems and methods for backing up virtual machines. '086 patent, col. 2, ll. 1-2. The patent describes a computer system that executes one or more virtual machines, having multiple applications, and to create a backup; the computer system may capture a state of each virtual machine and backup the state. *Id.* at col. 2, ll. 53-56. The state may include the information in a virtual image created in response to a suspension of the virtual machine. *Id.* at col. 2, ll. 60-62. Figure 1 of '086 patent is reproduced below:
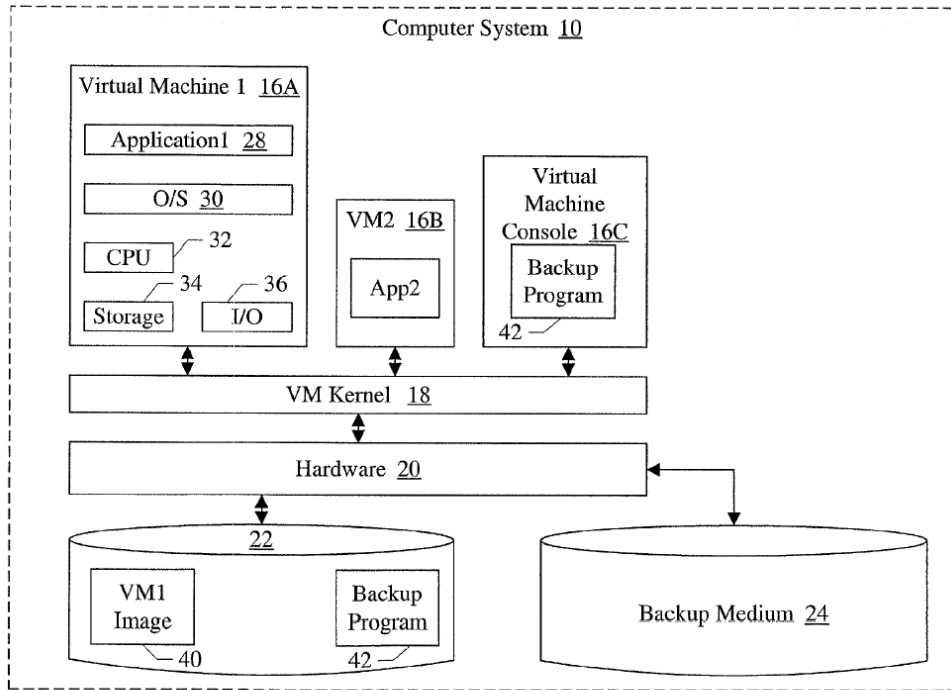
Fig. 1

'086 patent, Figure 1

As illustrated above in Figure 1, the '086 patent discloses that multiple virtual machines, 16A-C, can be controlled by Virtual Machine ("VM") Kernel 18, which comprise software and/or data structures executed on the underlying hardware 20 of the computer system 10. '086 patent, col. 3, ll. 30-37. Figure 1 further illustrates that the computer system 10 can include a storage device 22 and backup medium 24. '086 patent, col. 3, ll. 40-42. Claim 1 illustrates the claimed subject matter and is reproduced below:

> 1. A computer readable medium storing a plurality of instructions comprising instructions which, when executed:
> (i) capture a state of a first virtual machine executing on a first computer system, the state of the first virtual machine corresponding to a point in time in the execution of the first virtual machine, wherein the first

> > virtual machine comprises at least one virtual disk storing at least one file used by at least one application executing in the first virtual machine, and wherein the state of the first virtual machine comprises the at least one file; and
>
> > (ii) copy at least a portion of the state to a destination separate from a storage device to which the first virtual machine is suspendable, wherein suspending the first virtual machine is performed responsive to a suspend command.

D. Claim Construction

Consistent with the statute and the legislative history of the AIA, the Board will interpret claims of an unexpired patent using the broadest reasonable construction in light of the specification of the patent. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. 48756, 48766 (Aug. 14, 2012); 37 CFR § 42.100(b). There is a "heavy presumption" that a claim term carries its ordinary and customary meaning. *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002).

1. *"state of a virtual machine"*

Patent Owner alleges that the term "a state of [a] virtual machine" means "information regarding [the] virtual machine, including virtual disk(s), to permit the virtual machine to resume execution." Prelim. Resp. 14. The '086 patent states that "the virtual machine state includes all of the state used by the application (operating system and its configuration settings, the application and its configuration settings, etc.)." '086 patent, col. 3, ll. 22-25. In the related litigation involving the '086 patent in the District Court for the Northern District of California ("District Court"), the Court determined that the "the specification does not explicitly address what data a 'state' must contain, providing only examples, such as: 'all the state needed to restart the application on the second computer

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