

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

STARBUCKS CORPORATION,
Petitioner,

v.

AMERANTH, INC.
Patent Owner.

Case No. CBM2015-00099
U.S. Patent No. 6,781,325

Submitted Electronically via the Patent Review Processing System

PATENT OWNER'S REQUEST FOR REHEARING
OF INSTITUTION DECISION

I. INTRODUCTION.

Patent Owner Ameranth, Inc., pursuant to 37 CFR §42.71, respectfully requests rehearing of the Board's Institution Decision in CBM2015-00099 (Paper 9), in which the Board instituted a (CBM) review as to claims 11-13 and 15 of U.S. Patent No. 6,781,325 (the '325 Patent), on grounds of 35 U.S.C. §103.

II. STATEMENT OF PRECISE RELIEF REQUESTED.

Patent Owner respectfully requests that the Board rehear and reconsider its Institution Decision and modify the Decision to hold that trial shall not be instituted on claims 11-13 and 15 of the '325 Patent.

III. THE RELIEF REQUESTED SHOULD BE GRANTED.

The Board's Institution Decision in CBM2015-00099 should be modified because the Board relied on an incomplete Petitioner exhibit (Exhibit 1035, comprising portions of the "Dittmer" reference), the incompleteness of which contributed to the Board misapprehending and overlooking key evidence (contradictory to Petitioner's assertions) found in the complete Dittmer book.

As set forth and discussed below, Dittmer clearly confirms that "hospitality applications" do not include "car rentals" or other travel/transportation functions, and further confirms that the "ordering" in the `325 patent is "**food** ordering." Because all of Petitioner's and the Board's §103 grounds rely on the Brandt "car rental" reference as purportedly disclosing "hospitality applications" in relation to

the “central database” limitation,¹ and no references teach “food ordering” (pursuant to the correct construction for the “orders” limitation of claim 11, as discussed below), all §103 grounds fail.

The complete Dittmer reference,² recently obtained by Patent Owner³ on September 19, 2015⁴ subsequent to the Institution Decision,⁵ clearly contradicts

¹ All §103 grounds (Pet. at 48-49; Inst. Dec. at 32) rely on Brandt’s “**car rental**” reference for the “hospitality applications” limitation as regards the “central database” limitation (which is pivotal to the claim as a whole—synchronization clearly involves the “central database”). All grounds thus fail because, as explained herein, the Brandt’s “**car rental**” is not a “hospitality application.”

² Clearly, the **complete book** (including the actual “**Glossary**” of terms), was long in the possession of Petitioner, yet Petitioner excluded this **Glossary** from its incomplete production, along with excluding the Table of Contents (which showed the Glossary’s existence).

³ See Exhibit 2040, yet this is not new evidence, rather merely the complete version of Petitioner Exhibit 1035.

⁴ Patent Owner was only able to first see the complete Dittmer book when it located and ordered a copy (which is long out of print) and received it on September 19, 2015, via Express Mail.

⁵ Relying on the prohibitions against “incorporation by reference” and that all relied-on evidence must be cited to in the Petition itself, Patent Owner understandably anticipated that the Board would rely on the Petitioner-cited pages, pp. 11-14, 404 in Dittmer (Pet. at 48-49), which are for the broader and unclaimed term “travel and tourism” and not “hospitality.” Once apprised, in the Institution

Petitioner's purported Dittmer-based definitions of the critical terms as adopted by the Board, and confirms that the portions of Dittmer omitted by Petitioner are material to the outcome of the Institution Decision. If Petitioner had simply produced the full Dittmer book as an exhibit, including the Glossary, which actually defines all the disputed terms, it would have been clear to the Board that institution of trial was not warranted, because Dittmer precisely defined each disputed term to be consistent with Patent Owner's definitions of "hospitality" and "orders" and in direct contradiction to Petitioner's asserted definitions.

A. Relevant applicable statutes and regulations.

A request for rehearing must identify specifically all matters the party believes were misapprehended or overlooked, and the place where each matter was addressed previously in a motion, an opposition, or a reply. 37 C.F.R. §42.71(d).

B. Trial should not be instituted on claims 11-13 and 15 on the instituted grounds—all relying on "Brandt" to teach the "hospitality application" – "central database" limitation of all claims, because the Board inadvertently overlooked and misapprehended critical evidence from the parsed "Dittmer" reference.

The Board's constructions of "hospitality" and "orders"⁶ were founded on an

Decision, of the Board's expansive consideration of the excerpts of Dittmer as it related to the broader "travel and tourism" industry, Ameranth was then compelled to seek to obtain the complete book.

⁶ Black letter law requires claims to be construed **consistently** within a patent and **as a whole**. Thus the "orders" term in claim 11 must be construed consistent with

inadvertent misapprehension of the evidence, exacerbated by Petitioner's selective production of the Dittmer reference. Because these erroneous findings are dispositive to all instituted grounds, trial should not be instituted.

The Board held that "[o]n this record, we are persuaded that the ordinary and customary meaning of hospitality is broad enough **to encompass car rental activities,**" and "[o]ur construction of hospitality includes businesses **such as car rental agencies,** that provides services to travelers." (Inst. Dec. at 13; emphasis added.). This construction of "hospitality" is contrary to the plain meaning of the claims, disclosure and prosecution history, and relied on a materially incomplete exhibit, *i.e.*, less than 25% of the complete Dittmer reference.

1. The Board relied on Petitioner's parsed production of the Dittmer reference, believing it to be representative.

The "record" that the Board relied on to reach its conclusions was based on a parsed and incomplete exhibit, with material portions excluded from Petitioner's selective and incomplete production. The Board reached the erroneous conclusion that the excerpted portions produced by Petitioner were the actual definitions of the critical hospitality terms as adopted by the authors of Dittmer:

the proper construction of "hospitality." Both terms properly considered **together** with the actual Dittmer Glossary definitions, discussed below, compel the construction of "ordering" and "orders" in the `325 patent to be "**food** ordering" and not "car rental" or generic "goods and services" ordering, as the Board incorrectly concluded on page 32 of its Institution Decision.

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