

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
TWITTER, INC., AND YELP INC.,
Petitioners

v.

EVOLUTIONARY INTELLIGENCE LLC
Patent Owner.

Inter Partes Review No. IPR2014-00086
Inter Partes Review No. IPR2014-00812¹

Petitioners' Request for Rehearing

¹ Per the Board's Order (Paper 16 at 4), Petitioner Apple identifies this as a consolidated filing.

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I. Introduction

Petitioners respectfully request rehearing of the Board's final written decision, Paper 42 ("Dec."). The Board found claims 2-12, 14, and 16 of U.S. Patent No. 7,010,536 ("the '536 patent") not anticipated by U.S. Patent No. 5,836,529 to Gibbs (Ex. 1006). Dec. at 29. The Board's decision overlooks and misapprehends evidence and arguments showing both the anticipatory nature of Gibbs and the proper construction of the claims. Petitioners respectfully ask the Board to reconsider its decision and find claims 2-12, 14, and 16 anticipated.

II. Standard of Review

"When rehearing a decision on petition, a panel will review the decision for an abuse of discretion." 37 C.F.R. § 42.71(c); *see, e.g.*, IPR2013-00194, Paper 69 at 13. An abuse of discretion exists "when [the] decision is based on clearly erroneous findings of fact, is based on erroneous interpretations of the law, or is clearly unreasonable, arbitrary or fanciful." *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1460 (Fed. Cir. 1998) (*en banc*). The party challenging the decision "must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply." 37 C.F.R. § 42.71(d).

III. Argument

A. The Board's Final Written Decision Misapprehends the Evidence Establishing that Gibbs Discloses the Claimed "Containers"

The Board’s final written decision misapprehends and overlooks evidence showing that Gibbs describes the claimed “containers.” ***First***, despite finding the term “container” to be “a logically defined data enclosure which encapsulates any element or digital segment ... or set of digital elements,” (Dec. at 8), the Board found Gibbs to not disclose such a “container.” Specifically, the Board found that Gibbs does not disclose any single, logically defined enclosure comprising the instantiated transport, map, and report objects. Dec. at 23. This conclusion overlooks the extensive evidence presented by Petitioners showing that the train management software in Gibbs creates an object-oriented programming structure, i.e. a ***logical data structure*** that comprises instantiated transport, map, and report objects. *See* § III.A.1 below. If it did not, Gibbs’ software would simply not work.

Second, the Board found that, based on its reading of one paragraph (¶ 110) of Dr. Houh’s Declaration, “Petitioner’s evidence is inconsistent, and does not specify where the container element is found in Gibbs.” Dec. at 23. This overlooks Petitioners’ unambiguous identification of Gibbs’ object-oriented programming structure as the claimed “container,” and misapprehends the context of the remaining paragraphs of Dr. Houh’s Declaration. *See* § III.A.2 below.

1. Gibbs Discloses a Logical Data Structure Comprising Objects, and Is Thus a “Container”

As described in the Petition and Dr. Houh’s Original Declaration (Ex. 1003), Gibbs discloses a logical data structure created by the train management software

which comprises a collection of instantiated objects that work together to implement the Gibbs train management system. Pet. at 12-13; Ex. 1003 at ¶¶ 69-75; Ex. 1006 at Fig. 2-3, 8a, 9b, 5:52-6:43, 22:23-55. Gibbs' various objects exist in the memory of a computer as a *logical data structure* when the train management software is executing on a workstation. Ex. 1009 at ¶ 37; Reply at 4-5; Ex. 1003 at ¶¶ 78, 89; Pet. at 14; Ex. 1006 at 8:44-53, 9:27-31. As Dr. Houh explained, in Gibbs' object-oriented system "each object is instantiated as part of a *logical data structure* in the system as it is operating." Ex. 1009 at ¶ 37. Even Dr. Green agreed – he testified that Gibbs discloses "a *highly structured* railroad system information *database*" within "an object-oriented programming *structure* as conventionally known in the art." Ex. 2006 at ¶¶ 78, 94; Ex. 1006 at 3:65-4:10, 7:20-27. Thus, the evidence before the Panel established that the Gibbs TMS workstations, in operation, create a data structure (a "highly structured . . . information database") comprised of the different objects to implement the object oriented design of the Gibbs train management software.

This data structure created by the Gibbs software clearly meets the Board's definition of a "container": "a logically defined data enclosure which encapsulates any element . . . or set of digital elements." See Dec. at 8. Critically, as Dr. Green testified, a person of ordinary skill in the art would understand "logically defined" to include data elements related by a *software mechanism* (e.g., the Gibbs

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