

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NETFLIX, INC.,
Petitioner,

v.

OPENTV, INC.,
Patent Owner.

Case IPR2014-00252
Patent 8,107,786

Before SALLY C. MEDLEY, JAMES T. MOORE, and
JUSTIN BUSCH, *Administrative Patent Judges*.

BUSCH, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING
37 C.F.R. § 42.71

Introduction

On July 8, 2014, OpenTV, Inc. (“Patent Owner”) filed a request for rehearing (Paper 14, “Req. Reh’g”) of the Board’s decision instituting an inter partes review, entered June 24, 2014 (Paper 13, “Dec.”). According to Patent Owner, the Decision misapprehended the law governing when institution is permitted. The request is *denied*.

Discussion

A party requesting rehearing has the burden of showing a decision should be modified by specifically identifying all matters the party believes the Board misapprehended or overlooked. 37 C.F.R. § 42.71(d). When rehearing a decision on a petition, a panel will review the decision for an abuse of discretion. 37 C.F.R. § 42.71(c).

Patent Owner asserts the Board provided its own analysis and filled in evidentiary gaps, thus overstepping its role as an adjudicator. Req. Reh’g 5. However, the Petition is not to be read in a vacuum. Section 312 provides that a Petition shall identify each claim challenged and the grounds therefor. Notably, 35 U.S.C. § 312 (a)(3) also permits the submission of evidence such as copies of patents and printed publications, along with affidavits, declarations, and expert opinions. While the Patent Owner is correct that the Petition must explain, adequately and with particularity, the nature of the prior art and its application to the challenged claims, the question is whether the information presented in the petition shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least one of the claims challenged in the petition.

Petitioner’s challenges identified portions of Plotnick as allegedly disclosing each of the limitations in the claims challenged under 35 U.S.C. §

102. While it is not the Board's role to cure evidentiary flaws in a petition, the Board considers all of the evidence presented. Citations in the Decision to paragraphs of Plotnick not particularly called out in the petition are not a result of the Board "filling in evidentiary gaps of the Petition and taking it upon itself to establish that a reasonable likelihood of prevailing existed," as asserted by Patent Owner. Req. Reh'g 4.

Rather, those citations provide clarity regarding the reasons the Board was persuaded that, on the evidence presented, there was a reasonable likelihood that the petitioner would prevail with respect to at least one of the claims challenged in the petition. While it is not the Board's role to cure deficiencies in a petition, the Board does not read the petition without considering the underlying evidence submitted. Likewise, the Board does not look to citations to a reference without considering the relevant context. Moreover, those citations alleged to be beyond the scope of the petition are merely citations to portions of a prior art reference (Plotnick) that was submitted as part of the petition. In fact, Petitioner cited to various paragraphs within the range of paragraphs cited by the Board that are alleged to be beyond the scope of the petition. We disagree that the Decision misapprehended the law and, accordingly, deny the request for rehearing.

ORDER

It is ORDERED that Patent Owner's request for rehearing is *denied*.

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