

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

HUGHES NETWORK SYSTEMS, LLC and
HUGHES COMMUNICATIONS, INC.,
Petitioners,

v.

CALIFORNIA INSTITUTE OF TECHNOLOGY,
Patent Owner.

Case IPR2015-00067
Patent 7,116,710 B1

Before KALYAN K. DESHPANDE, GLENN J. PERRY, and
TREVOR M. JEFFERSON, *Administrative Patent Judges*.

JEFFERSON, *Administrative Patent Judge*.

DECISION
Denying Patent Owner's Request for Rehearing
37 C.F.R. § 42.71

I. INTRODUCTION

Hughes Network Systems, LLC and Hughes Communications, Inc. (collectively, “Hughes”) filed a Request for Rehearing of the Board’s Decision (Paper 18, “Dec.”), dated April 27, 2015, which denied institution of claims 1, 3– 6, 15, 16, and 20–22 of U.S. Patent No. 7,116,710 B1 (Ex. 1001, “the ’710 patent”) as challenged in Hughes’s Petition (Paper 4, “Pet.”). Paper 19 (“Req. Reh’g”). In general, Hughes contends that the Board overlooked evidence establishing Frey¹ as a printed publication reference. Req. Reh’g 1. For the reasons stated below, Hughes’s request for rehearing is *denied*.

II. STANDARD OF REVIEW

Under 37 C.F.R. § 42.71(c), “[w]hen rehearing a decision on petition, a panel will review the decision for an abuse of discretion.” An abuse of discretion occurs when a “decision was based on an erroneous conclusion of law or clearly erroneous factual findings, or . . . a clear error of judgment.” *PPG Indus. Inc. v. Celanese Polymer Specialties Co. Inc.*, 840 F.2d 1565, 1567 (Fed. Cir. 1988) (citations omitted). The request must identify specifically all matters that the dissatisfied party believes that the Board misapprehended or overlooked. 37 C.F.R. § 42.71(d).

¹ Brendan J. Frey and David J.C. MacKay, *Irregular Turbocodes*, PROCEEDINGS OF THE 37TH ALLERTON CONFERENCE ON COMMUNICATION, CONTROL, AND COMPUTING (1999) at 1–7 (Ex.1012, “Frey”).

III. DISCUSSION

A. *Frey Evidence*

Hughes contends “that the Board overlooked or misapprehended important points and evidence in the Petition concerning why Frey is a publication available for challenging the ’710 patent.” Req. Reh’g 1. Hughes relies on the testimony of Dr. MacKay (Ex. 1060), specifically paragraph 44, to support that that its contention that Frey was published on Dr. MacKay’s website. Hughes quotes MacKay’s testimony as follows:

44. I published the article “Irregular Turbocodes” on my website no later than October 8, 1999. This is based on my recollection and information indicating the website paper was last modified on the MacKay Canadian and Cambridge Websites on this same date as shown in Exhibit 1040. The file name for the irregular turbocodes paper was “itc-al.ps.Z” which stands for Irregular Turbo Codes Allerton; “ps” stands for the document format “postscript” and “Z” stands for a UNIX compression file format. A copy of the “Irregular Turbocodes” paper as published on October 9, 1999 is filed herewith as Exhibit 1012.

Ex. 1060 ¶ 44; Req. Reh’g 4. Hughes points out the Board overlooked or misapprehended the Petition evidence, which cited paragraph 44 of Dr. MacKay’s testimony and states: “Exhibit 1012 - ‘Irregular Turbocodes’ by B.J. Frey and D.J.C. MacKay (“*Frey*”), published at least by October 8, 1999 and available as prior art under 35 U.S.C. § 102(a); *see also* Ex. 1060 at ¶¶ 40-49.” Req. Reh’g at 4 (quoting Pet. 2). Hughes also provides argument and citations to evidence that the MacKay website was publicly available to persons of ordinary skill in the art. Req. Reh’g 5–11 (citing Ex. 1060 ¶¶ 17, 18–20).

We first note that the Petition itself states only that Frey was published at least by October 8, 1999. Hughes made no argument as to why this date was supported by the evidence. Instead, the Petition includes only an unexplained cite to multiple paragraphs of the MacKay testimony. Pet. 2 (citing Ex. 1060 ¶¶ 40–49). Thus, the Petition itself does not discuss that Frey was published on Dr. MacKay’s website and explain any of the facts and circumstances related to that publication.

We also find that paragraph 44 of Dr. MacKay’s testimony, relied upon by Hughes, neither cites nor discusses the extensive testimony regarding the public accessibility of the MacKay website that Hughes argues for the first time in the rehearing. Req. Reh’g 5–6 (citing Ex. 1060 ¶¶ 10–23). Neither the Petition nor the MacKay testimony cited in support of the publication of Frey provides any guidance, argument, or evidence to support the publication date of Frey or the public accessibility of the MacKay websites. Instead, Hughes left it to the Board to read Dr. MacKay’s testimony, without guidance or direction, and fashion a presentation in support of Frey that it did not make itself in the Petition. Indeed, Hughes’s extensive argument presented in support of the MacKay website is entirely absent from the Petition. *See* Req. Reh’g 8–11.

We also are not persuaded by Hughes’s citation to new evidence that is allegedly known to Patent Owner and that corroborates that Frey was published and available. Req. Reh’g 11–13. New evidence could not have been overlooked or misapprehended by the Board, as that evidence that was not presented in the Petition. With respect to the Petition, we found that “Petitioner’s sole reference to the MacKay declaration (Pet. 2, citing Ex. 1060 ¶¶ 40–49) does not provide sufficient support for the contention that

Frey was published to the interested public [and that] the Petition provides insufficient testimony, evidence or argument with respect to the public accessibility of the MacKay website.” Dec. 10.

Based on the foregoing, we find that Hughes fails to demonstrate that we misapprehended or overlooked Hughes’ arguments regarding the challenges to the patentability of claims 1, 3– 6, 15, 16, and 20–22 of the ’710 patent based in part on Frey because Hughes did not present this information in the Petition.

IV. ORDER

Accordingly, it is

ORDERED that Petitioner’s request for rehearing is *denied*.

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