

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SERVICENOW, INC.,
Petitioner,

v.

HEWLETT-PACKARD CO.,
Patent Owner.

Case IPR2015-00707
Patent 7,925,981 B2

Before RAMA G. ELLURU, JAMES B. ARPIN, and
CHRISTOPHER L. CRUMBLEY, *Administrative Patent Judges*.

Opinion for the Board filed by ARPIN, *Administrative Patent Judge*.

Opinion concurring filed by CRUMBLEY, *Administrative Patent Judge*.

ARPIN, *Administrative Patent Judge*.

DECISION
Denying Request for Rehearing
37 C.F.R. § 42.71(d)

I. INTRODUCTION

ServiceNow, Inc. (“Petitioner”) filed a Petition (Paper 1, “Pet.”) to institute an *inter partes* review of claims 1, 22, and 23 (the “challenged claims”) of Patent No. US 7,925,981 B2 to Pourheidari *et al.* (Ex. 1001, “the ’981 patent”), pursuant to 35 U.S.C. §§ 311–319. Pet. 1. Petitioner challenged these claims of the ’981 patent on the following ground (Pet. 4, 21–60):

Claims	Grounds	References
1, 22, and 23	35 U.S.C. § 103(a)	Collaborate References and Fox

Hewlett-Packard Company (“Patent Owner”) filed a Preliminary Response (Paper 11, “Prelim. Resp.”).

For the reasons discussed in our Decision on Institution (Paper 12, “Dec.”), we denied institution of an *inter partes* review of any of the challenged claims. Pursuant to 37 C.F.R. § 42.71(d), Petitioner filed a Request for Rehearing (Paper 13, “Reh’g Req.”), seeking reconsideration of our Decision on Institution. For the reasons set forth below, Petitioner’s Request for Rehearing is *denied*.

II. DISCUSSION

1. *Standard for Reconsideration*

37 C.F.R. § 42.71(d) provides that:

A party dissatisfied with a decision may file a single request for rehearing, without prior authorization from the Board. The burden of showing a decision should be modified lies with the party challenging the decision. *The request 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.

(emphasis added). In addition, “[e]vidence not already of record at the time of the decision *will not be admitted* [with a request for rehearing] absent a showing of good cause.” Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,768 (Aug. 14, 2012) (emphasis added). When reconsidering a Decision on Institution, the Board reviews the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). Thus, a request for rehearing is not an opportunity merely to disagree with the Board’s assessment of the arguments or weighing of the evidence, or to present new arguments or evidence.

2. Overview

Petitioner asserts two bases for its Request for Rehearing. Reh’g Req. 1–4, 9–12. First, Petitioner argues that we misapplied the standard for determining public accessibility by failing to determine public accessibility based on “all of the facts and circumstances surrounding the disclosure.” Reh’g Req. 1 (quoting *In re Lister*, 583 F.3d 1307, 1313 (Fed. Cir. 2009)). In particular, Petitioner argues that “the Board appeared to have employed an analysis in which each individual piece of evidence was considered and rejected separately, eschewing the holistic approach required by Federal Circuit law.” *Id.* at 2. Further, Petitioner argues that we misstated the URL date of Exhibit 1014 (*id.* at 4–5), we improperly placed dispositive weight on the archiving dates of Exhibits 1004–1006 (*id.* at 5–7), and we improperly relied on the “Restricted Rights Legend” in Exhibits 1004–1006 (*id.* at 7–9). Second, Petitioner argues that we violated Petitioner’s rights by

sustaining Patent Owner's evidentiary objections without affording Petitioner the opportunity to respond to those objections. *Id.* at 9–12.

3. *Determining Public Accessibility*

With regard to its first basis, Petitioner argues that we misapplied the standard for determining public accessibility by considering each piece of evidence regarding public accessibility *separately*, rather than *as a whole*. *Id.* at 1–4. As our Decision on Institution makes clear, however, we considered the arguments and evidence presented by each party as a whole in determining whether Petitioner had met its burden of persuasion. *See* Dec. 8. In particular, we explained in our Decision on Institution that

Petitioner fails to make the critical link between the alleged identification of the Collaborate References on the “download page” and the exhibits relied upon in support of its asserted grounds. Despite Petitioner’s arguments and assertion that this “page” was publicly accessible “by no later than August 29, 2001,” Petitioner fails to demonstrate Exhibits 1004–1006, which Petitioner relies upon in support of each of the asserted grounds, were publicly accessible through the webpages included in Exhibit A to the Butler Affidavit more than one year prior to May 14, 2003. See Pet. 23; Ex. 1002 ¶ 144.

Id. at 14 (emphasis added). Similarly, we read the copyright notice and dates on Exhibits 1004–1006 together with “Restricted Rights Legend,” when accessing the parties’ arguments regarding the dates appearing on the exhibits. *Id.* at 15–17. As we explained,

We consider the references *as a whole* and read the download instructions, cited by Petitioner, in view of the restrictions on use and dissemination that also are set forth in the references. We are persuaded that, *read together*, the download instructions and the Restricted Rights Legends do not provide sufficient evidence that these references were publicly accessible.

Id. at 16–17 (emphases added).

We, thus, considered the arguments and evidence presented by the parties and determined that, based upon this record, Petitioner failed to satisfy its burden of showing a reasonable likelihood that asserted references Exhibits 1004–1006 were publically accessible, printed publications. *Id.* at 19–20; *see id.* at 22¹ (“I agree with the majority’s recitation of the facts, established by the present record. *I also agree with the majority’s evaluation that the evidence submitted by Patent Owner casts doubt on Petitioner’s assertion that the Collaborate References are prior art to the ’981 patent.* Where the majority and I part ways, however, is whether this record meets the ‘reasonable likelihood’ standard for institution of an *inter partes* review.” (emphasis added)).² Therefore, we did not misapply the standard for determining public accessibility by considering each piece of evidence regarding public accessibility separately, rather than as a whole.

Petitioner identifies certain instances in which we allegedly misunderstood or gave improper weight to particular pieces of evidence.

a. Misstated Date of Exhibit 1014

With respect to Exhibit 1014, Petitioner argues that we erroneously stated that Exhibit 1014 was archived by the Internet Archive on *November 1, 2002*. Reh’g Req. 4 (citing Dec. 11). Petitioner notes, however, that the

¹ This is the first page of Judge Crumbley’s dissent in the Decision on Institution. For clarity, we cite to the dissent consistent with Petitioner’s citations in the Request for Rehearing.

² In the Decision on Institution, the majority noted that “[t]he dissent differs from the majority on two basic issues: *the sufficiency of the evidence presented in the Petition, considered in light of the evidence presented in the Preliminary Response*, and the relevance of evidence presented at this stage of the proceeding to the decision to institute. With respect to the first issue, reasonable minds may differ as to the weight appropriately accorded to presented evidence.” Dec. 20 n.6 (emphasis added).

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