UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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SOPHOS, INC.,
Petitioner,

v.

FINJAN, INC.,
Patent Owner.

_____

Case IPR2015-01022
Patent 8,677,494 B2

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Before JAMES B. ARPIN, ZHENYU YANG, and
CHARLES J. BOUDREAU, *Administrative Patent Judges*.

BOUDREAU, *Administrative Patent Judge*.

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

I. INTRODUCTION

Sophos, Inc. ("Petitioner") filed a Petition (Paper 1, "Pet.") requesting *inter partes* review of claims 1, 10, 14, and 18 of U.S. Patent No. 8,677,494 B2 (Ex. 1001, "the '494 patent"). Finjan, Inc. (Patent Owner") filed a Preliminary Response. Paper 6 ("Prelim. Resp."). Pursuant to 35 U.S.C. § 314, we denied institution of *inter partes* review. Paper 7 ("Dec."). Pursuant to 37 C.F.R. § 42.71(d), Petitioner filed a Request for Rehearing (Paper 8, "Reh'g Req."), seeking reconsideration of our Decision Denying Institution with respect to two of the four grounds asserted in the Petition. For the reasons set forth below, Petitioner's Request for Rehearing is *denied*.

II. BACKGROUND

Petitioner challenged the patentability of claims 1, 10, 14, and 18 of the '494 patent on the following four grounds:

#	References	Basis	Claim(s) Challenged
1	TBAV[1] and Ji[2]	§ 103(a)	1, 10, 18
2	TBAV, Ji, and Chen[3]	§ 103(a)	14
3	Arnold[4], Chen, and Ji	§ 103(a)	1, 10, 14, 18
4	Chen, Arnold, and Ji	§ 103(a)	1, 10, 14, 18

Pet. 4. In our Decision Denying Institution, we concluded that the Petition did not establish a reasonable likelihood that Petitioner would prevail in

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[1] ThunderBYTE Anti-Virus Utilities User Manual (Ex. 1006)
[2] U.S. Patent No. 5,623,600 (Ex. 1009)
[3] U.S. Patent No. 5,951,698 (Ex. 1010)
[4] U.S. Patent No. 5,440,723 (Ex. 1008)

challenging the patentability of any of the challenged claims on the asserted grounds, and we, accordingly, denied Petitioner's request to institute *inter partes* review. Dec. 11–25. In its Request for Rehearing, Petitioner seeks reconsideration of our Decision Denying Institution with respect to the first two of the asserted grounds set forth above, namely, obviousness of claims 1, 10, and 18 of the '494 patent over TBAV and Ji, and obviousness of claim 14 of the '494 patent over TBAV, Ji, and Chen. Req. Reh'g 1.

III. DISCUSSION

1. Standard for Reconsideration

Under 37 C.F.R. § 42.71(d),

> A party dissatisfied with a decision may file a 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). When reconsidering a decision on institution, the Board reviews the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion occurs when a "decision [i]s 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.*, 840 F.2d 1565, 1567 (Fed. Cir. 1988). A request for rehearing is not an opportunity merely to disagree with the panel's assessment of the arguments or weighing of the evidence, or to present new arguments or evidence. It is not an abuse of discretion to have performed an analysis or reached a conclusion with

which Petitioner disagrees, and mere disagreement with the Board's analysis or conclusion is not a proper basis for rehearing.

2. *Overview*

Petitioner asserts two bases for its Request for Rehearing. First, Petitioner argues, "the Board abused its discretion by finding that the Petition failed to establish that TBAV discloses deriving a 'list of suspicious computer operations' through its identification in TBAV of suspicious instructions that perform suspicious operations." Reh'g Req. 1. Second, Petitioner argues, the Board's "construction of 'database' . . . is legal error because it is not the broadest reasonable construction," and "[u]nder the correct broadest reasonable construction, TBAV discloses the storage of security profile data in a 'database.'" *Id.* at 1–2. For the reasons set forth below, we are not persuaded by Petitioner's arguments.

3. *"List of Suspicious Computer Operations"*

Each of claims 1 and 10, the two independent claims among the challenged claims, recites, *inter alia*, "deriving security profile data for [a] Downloadable, including a list of suspicious computer operations that may be attempted by the Downloadable." Ex. 1001, 21:21–23, 22:11–13. In our Decision Denying Institution, we determined that TBAV discloses "detecting suspicious instruction sequences within a file and applying heuristic flags to the file," and that heuristic flags could be termed "security profile data for [a] Downloadable." Dec. 13. We explained, however, that "a suspicious computer operation might result from the execution of instructions deemed to be potentially hostile," but that "instructions are not operations." *Id.* at 8 (emphasis omitted). Petitioner argues in the Request for Rehearing that "[t]his is a distinction without a difference, as no

operation can take place without execution of instructions, and the instructions dictate the operations that take place when the instructions are executed." Reh'g Req. 5. According to Petitioner, "the Board misapprehended or overlooked Petitioner's arguments that establish TBAV's heuristic flags indicate suspicious <u>operations</u> and that TBAV <u>lists</u> heuristic flags in a log file." *Id.* at 4–5.

Petitioner's arguments are not persuasive. Notwithstanding Petitioner's current assertions, Petition argued in the Petition that TBAV's heuristic flags are assigned to suspicious *instructions*. *See, e.g.*, Pet. 18–19 (stating that "[TBAV's] heuristic scanner . . . searches for suspicious *instruction sequences*" and that "[h]euristic flags are assigned to suspicious *instructions*, such as *instructions* that are common to viruses but uncommon to normal programs" (emphases added)). Notably missing from the Petition is any argument that TBAV's heuristic flags derive a list of suspicious *operations*. We cannot have misapprehended or overlooked an argument not raised. Although the Petition did use the word "operations" in several parenthetical statements paraphrasing TBAV's descriptions of certain heuristic flags, those references also are provided in the context of illustrating that the heuristic flags indicate suspicious *instructions*, and no argument is provided that the flags instead indicate *operations*:

> TBAV discloses that a heuristic flag is a character indicating a specific type of suspicious *instruction*. For example, the flags include "# - Decryptor code found" (indicating that the file contains *instructions* that perform self-decryption operations", "A – Suspicious Memory Allocation" ("indicating the program contains *instructions* that perform non-standard memory search and/or allocation operations), "B – Back to entry" (indicating the program contains *instructions* that perform endless loop operations), . . . among others.

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