UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FRIENDFINDER NETWORKS INC., STREAMRAY INC., WMM, LLC, WMM HOLDINGS, LLC, MULTI MEDIA, LLC, AND DUODECAD IT SERVICES LUXEMBOURG S.À.R.L.

Petitioners

v.

WAG ACQUISITION, LLC,
Patent Owner

CASE IPR2015-01037
Patent No. 8,122,141

PETITIONERS' REQUEST FOR REHEARING
PURSUANT TO 37 C.F.R. § 42.71(d)

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INTRODUCTION

Petitioners, by and through their undersigned counsel, hereby move pursuant to 37 C.F.R. § 42.71(d) for rehearing of the Board's October 19, 2015 Decision denying institution of *inter partes* review of U.S. Patent No. 8,122,141 ("the '141 Patent").[1] Respectfully, the Board erred in determining that Jun Su, "Continuous Media Support for Multimedia Databases" ("Su," Ex. 1003) is not a "printed publication" as required under 37 C.F.R. § 42.104(b)(2).[2] Indeed, the Board's determination regarding the public availability of Su rests on three fundamental errors – any one of which justifies the relief requested herein.

First, the Board failed to consider and give proper weight to the terms that would have been used by a person of ordinary skill in the art at the time of the invention to search for and locate references describing the subject matter of the '141

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[1] Petitioners also seek rehearing in IPR2015-01033 ("1033"). The Board relied on its 1033 Decision (with respect to Su) in denying institution here.

[2] *See, e.g., Oxford Nanopore v. Univ. of Wash.*, Case IPR2014-00512, Paper No. 12 at 12 (PTAB Sept. 15, 2014) (The Board uses the 'reasonable likelihood of prevailing' standard to determine whether a reference "constitute[s] prior art," and thus whether to institute *inter partes* review). This is a lower threshold than the preponderance of evidence standard applied at trial. 35 U.S.C. § 316(e).

Patent – including the Su reference. The Board specifically overlooked the importance of the term "continuous" – a term whose subject-matter-relevance is demonstrated not only by the Petition and unrebutted declaration of Dr. Polish – but by the '141 Patent itself. Ex. 1001 *passim*. To be clear, the inventor's goal was to achieve a continuous media broadcast without interruptions. Notwithstanding this fact, the Board found that the indexing of Su by author and the first word of the title (*i.e.*, "continuous") was "[in]sufficient to meet the applicable standard for public accessibility." 1033 Decision at 13. This finding is unsupported by law and fact, and refuted by the evidence of record.

Second, the Board erred in adopting Patent Owner's conclusory arguments and incorrect application of the legal standard for determining public accessibility. Specifically, the Board found that it was "persuaded by Patent Owner" with respect to its attorneys' characterization of Su's indexing. 1033 Decision at 13. The Board then adopted *verbatim* Patent Owner's claim that such indexing "would not provide a meaningful pathway to a researcher who was not previously aware of the existence of the thesis and was searching by subject matter." *Id*. However, in adopting this position, the Board omitted the requisite benchmark from its analysis: a person of ordinary skill in the art. Indeed, a reference is publicly accessible if it could be found by "persons interested *and* ordinarily skilled in the subject matter or art exercising reasonable diligence." *See, e.g.*, *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545

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