

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ARISTA NETWORKS, INC.,
Petitioner,

v.

CISCO SYSTEMS, INC.,
Patent Owner.

Case IPR2015-01710
Patent 7,224,668 B1

**PETITIONER'S REQUEST FOR REHEARING
UNDER 37 C.F.R. § 42.71**

Arista Networks, Inc. (“Petitioner” or “Arista”) respectfully requests reconsideration based on the Board’s misapprehension and/or oversight of key facts and misapplication of law in deciding to deny institution under 35 U.S.C. § 325(d). This Request is timely as filed within 30 days of the Decision Denying Institution. *See* IPR2015-01710, Paper 7 (Feb. 16, 2016); 37 C.F.R. § 42.71(d)(2).

I. STATEMENT OF MATERIAL FACTS

Patent Owner accuses Petitioner of infringing the U.S. Patent No. 7,224,668 B1 (the “’668 patent”) in two co-pending litigations, namely *Cisco Systems, Inc. v. Arista Networks, Inc.*, No. 4:14-cv-05343-JSW (N.D. Cal.), filed December 5, 2014, and ITC Inv. No. 337-TA-945 (Network Devices, Related Software and Components Thereof (II)), filed December 19, 2014.

On April 1, 2015, Petitioner filed a petition requesting *inter partes* review of the claims 1–10, 12, 13, 15–28, 30, 31, 33–43, 45–49, 51–64, 66, 67, and 69–72 of the ’668 patent, namely IPR2015-00974 (“’974 IPR”). *See* ’974 IPR, Paper 2. Subsequent to this filing, and prior to the issuance of a decision on institution in the ’974 IPR, Petitioner became aware of another prior art reference material to the validity of the ’668 patent, namely U.S. Patent No. 6,246,680 B1 (Ex. 1104, “Frazier”). *See* IPR2015-01710, paper 2 at 60 (“’710 Petition”). On August 11, 2015, Petitioner filed another petition requesting *inter partes* review of the ’668 patent including the Frazier reference (Case IPR2015-01710 (“’710 IPR”). *See*

'710 IPR, Paper 2.

Several months later, on October 6, 2015 the Board denied institution on the '974 Petition. *See* '974 IPR, paper 7 (“'974 Decision”). More recently, on February 16, 2016, the Board also denied institution on the '710 Petition. *See* '710 IPR, paper 7 (“'710 Decision”). With respect to the '710 Petition, the Board denied institution under 35 U.S.C. § 325(d), reasoning that: (1) the '710 Petition “advances the same or substantially the same prior art or arguments that previously were presented to the Office in the '974 IPR”; and (2) “Petitioner does not contend that the newly-cited references were not known or available to it at the time it filed the '974 IPR.” *Id.* at 11.

II. LEGAL STANDARDS

37 C.F.R. § 42.71(c) allows a party to request a rehearing on a decision by the Board on whether to institute a trial. When considering a motion for rehearing a decision on institution, the Board reviews the decision for an abuse of discretion. *Id.* An abuse of discretion may be found if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors. *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *Arnold P'ship v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004); *In re Gartside*, 203 F.3d 1305, 1315–16 (Fed. Cir. 2000).

As is noted above, at issue in the present request for rehearing is the Board's reliance on 35 U.S.C. § 325(d) in denying institution. Section 325(d) provides:

In determining whether to institute or order a proceeding . . . the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office.

Notably, this provision does not itself prohibit filing subsequent petitions to challenge a given patent. Indeed, the PTAB routinely has instituted more than a single IPR proceeding for a patent based on serial petitions. For example, U.S. Patent Number 7,237,634 is the subject of thirteen instituted *inter partes* reviews based, at least in part, on a number of serial petitions filed by the Ford Motor Company ("Ford"). See IPR2014-00904, IPR2014-01416, IPR2015-00606, IPR2015-00722, IPR2015-00758, IPR2015-00784, IPR2015-00785, IPR2015-00787, IPR2015-00790, IPR2015-00791, IPR2015-00799, IPR2015-00800, IPR2015-00801. Similarly, U.S. Patent Number 7,104,347 is the subject of five instituted *inter partes* reviews based, at least in part, on serial petitions filed by Ford. See IPR2014-00571, IPR2014-00579, IPR2014-00884, IPR2015-00794, IPR2015-00795.

III. ARGUMENT

The '710 Decision demonstrates an abuse of discretion in denying institution

on the '710 Petition. In finding that the '710 Petition contains art and arguments that are “substantially the same” as those presented in the '974 Petition, it ignores that the two petitions feature different base references, and that markedly different arguments are presented regarding obviousness. Further, in finding that Petitioner failed to contend that the newly-cited Frazier reference was “not known or available to it” at the time it filed the '974 Petition, the '710 Petition applies a test found nowhere in statute or rule while ignoring an express representation to the contrary by Petitioner. Finally, the present case cannot credibly be cast as harassment warranting no consideration on the merits under Section 325(d).

A. Only Through Oversight or Misapprehension Could the '710 Decision Find that the '710 Petition Contains Art and Arguments That Are Substantially the Same as Those in the '974 Petition

Substantial evidence does not support the '710 Decision's finding that the art and arguments presented in the '710 Petition are substantially the same as those in the '974 Petition. To the contrary, they are materially different with respect to the primary references and the arguments made for the obviousness combinations.

1. The '710 Petition is based on a different primary reference

As an initial matter, the primary reference upon which the '974 Petition relies for the majority of the claim limitations, namely U.S. Patent No. 6,674,743 (“Amara”), is wholly absent from the '710 Petition. *Compare* '974 Petition at 3 *with* '710 Petition at 2-3. Amara is included, alone or in combination with other

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