

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

Before BRYAN F. MOORE, MATTHEW R. CLEMENTS, and
PETER P. CHEN, *Administrative Patent Judges*.

MOORE, *Administrative Patent Judge*.

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

INTRODUCTION

Petitioner, Arista Networks, Inc., filed a Request for Rehearing (Paper 8, “Req. Reh’g”) of the Decision Denying Institution of *Inter Partes* Review (Paper 7, “Dec. on Inst.”) (“Decision”) of claims 1–10, 12, 13, 15–28, 30, 31, 33–43, 45–49, 51–64, 66, 67, and 69–72 of U.S. Patent No. 7,224,668 B1 (Ex. 1101, “the ’668 patent”). In the Request for Rehearing, Petitioner argues that the Decision Denying Institution overlooked certain matters in denying the Petition (“the ’710 Petition”). For the reasons set forth below, the Request for Rehearing is *denied*.

ANALYSIS

When considering a request for rehearing, we review the Decision for an abuse of discretion. 37 C.F.R. § 42.71(c). The party requesting rehearing bears the burden of showing that the Decision should be modified, and “[t]he request must specifically identify all matters the party believes [we] misapprehended or overlooked.” 37 C.F.R. § 42.71(d).

Petitioner argues that we abused our discretion under 35 U.S.C. § 325(d) in denying institution in this case. Petitioner argues that it “presented significantly different arguments in the ’710 Petition than in the ’974 Petition¹.” Req. Reh’g. 8. Petitioner argues that the petitions use a different primary reference for obviousness and that the “overlap” of the petitions is minimal. *Id.* at 4–5. Nonetheless, Petitioner does not address the fact that the first petition was denied because we rejected the overlapping argument. Thus, the overlap, as small as it allegedly is, was crucial to the ’974 Petition. Accordingly, we are not persuaded by this argument.

¹ IPR2015-00974.

Petitioner suggests that because of the limited overlap, “[t]he ’710 Decision’s finding, therefore, effectively bars the use of secondary references cited in prior filed petitions in subsequent petitions despite the PTAB’s established track record allowing use of such references.” *Id.* at 6 (citing several Board decisions). Petitioner fails to acknowledge that the Decision is not precedential to other Board decisions, nor are the Board decisions cited by Petitioner precedential to this case. Thus, we are not persuaded by this argument.

Petitioner argues that because we criticized the ’974 Petition for ambiguity in the ground based on the combination of Amara and Habraken, Petitioner should be allowed to present a more specific combination in the ’710 Petition. Req. Reh’g. 6–8. A petitioner is not entitled to unlimited challenges against a patent:

In determining whether to institute or order a proceeding under . . . chapter 31, 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.

35 U.S.C. § 325(d). Petitioner does not address the Decision’s discussion of the anticipation ground presented in the ’974 Petition. The Decision found that the anticipation ground presented the same arguments regarding Habraken as were presented regarding Habraken in the ’974 Petition. Dec. 9–10.

Petitioner faults the Decision for relying on “inapposite precedent,” i.e., *Biodelivery Sciences International, Inc. v. RB Pharmaceuticals Limited*, Case IPR2014-00998, Paper 12 (“*Biodelivery Sciences*”). *Id.* at 8. The Decision does not cite to *Biodelivery Sciences* as precedent, nor is

Biodelivery Sciences designated by the Board as precedential. Nevertheless, Petitioner asserts that, unlike the present case, the allegedly new references in *Biodelivery Sciences* were either discussed in the prior petition or related to references discussed in the prior petition. *Id.*

We cited *Biodelivery Sciences* only because, similar to Habraken (which was not formally included in the anticipation ground in the '974 Petition), the EMEA Study Report in *Biodelivery Sciences* was not formally included in the ground from the previous petition. Dec. 10. Despite that fact, the panel in *Biodelivery Sciences* used the EMEA Study Report as a basis for finding the arguments in the two petitions were the same. *Id.* In any event, *Biodelivery Sciences* was cited only as an example; it is not necessary to the finding in the Decision. Thus, we are not persuaded by this argument.

Petitioner further asserts that “the '710 Decision also relies on the Petitioner’s alleged failure to ‘contend specifically that the newly-cited references were not known or available to it at the time it filed the '974 IPR.’” Req. Reh’g. 9. This is improper, according to Petitioner, because “nothing in Section 325(d) or any other applicable rule or statute, requires Petitioner to show that the newly-cited Frazier reference was unknown or unavailable to it at the time of filing the '710 Petition.” *Id.* at 9. Petitioner argues that by considering this information, the Board would effectively estop a petitioner from using newly-cited references because they “could have been raised” before without meeting the final decision requirement of 35 U.S.C. § 315(e)(1). *Id.* at 9–10. We recognize the potential issues between the provisions of Sections 325(d) and 315(e). As an initial matter, Petitioner’s possible awareness of Frazier was not treated as dispositive; it

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was merely an “additional fact” (Dec. on Inst. 11) that “further guided” (*id.*) our exercise of discretion. Nevertheless, because the exercise of our discretion rested upon other grounds, we need not decide whether availability of the reference to Petitioner is a proper consideration under Section 325(d). To avoid any confusion, we clarify that we do not consider whether Petitioner knew of the Frazier reference at the time it filed the ’974 Petition as a basis for exercising our discretion to deny the ’710 Petition under Section 325(d).

Finally, Petitioner argues that Patent Owner could not be harassed in a situation in which the first petition was denied. Req. Reh’g. 14. The Board however, has previously denied institution under Section 325(d) in a case where the previous petition was denied. *Netapp Inc. v. Crossroads Systems, Inc.*, IPR2015-00776, slip op. at 5 (PTAB Sept. 8, 2015) (Paper 12). Additionally, harassment of Patent Owner is not the only basis for denying institution under 325(d). Our discretion under § 325(d) is guided by a balancing of the interests of the parties, the public, and the Board. *See id.*; *Samsung Elec. Co. v. Rembrandt Wireless Techs., LP*, Case IPR2015-00114, slip op. at 6 (PTAB Jan. 28, 2015) (Paper 14) (“[I]t is more efficient for the parties and the Board to address a matter once rather than twice.”). Thus, in construing our authority to institute *inter partes* review under 37 C.F.R. § 42.108, we are mindful of the guidance provided in § 42.1(b): “[37 C.F.R. § 42] shall be construed to secure the just, speedy, and inexpensive resolution of every proceeding.” *Id.*; *see also ZTE Corp. v. ContentGuard Holdings, Inc.*, Case IPR2013-00454, slip op. at 5-6 (PTAB Sept. 25, 2013) (Paper 12) (“The Board is concerned about encouraging, unnecessarily, the

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