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Paper No. 21
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SYMANTEC CORP.,
Petitioner,

v.

FINJAN, INC.,
Patent Owner.

Case IPR2015-01892
Patent 8,677,494 B2

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

BOUDREAU, *Administrative Patent Judge.*

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

I. INTRODUCTION

Finjan, Inc. ("Patent Owner") filed a Partial Request for Rehearing Pursuant to 37 C.F.R. §§ 42.71(c) and 42.71(d) (Paper 13, "Req. Reh'g" or "Request for Rehearing"), requesting rehearing of our determination to institute an *inter partes* review of claims 1, 2, 5, 6, 10, 11, 14, and 15 of U.S. Patent No. 8,677,494 B2 ("the '494 patent," Ex. 1001). For the reasons that follow, Patent Owner's Request for Rehearing is *denied*.

II. BACKGROUND

Symantec Corp. ("Petitioner") filed a Petition (Paper 1, "Pet.") challenging the patentability of claims 1, 2, 5, 6, 10, 11, 14, and 15 of the '494 patent ("the challenged claims") on the following grounds:

Reference(s)	Basis	Claims Challenged
Swimmer[1]	35 U.S.C. § 102(b)	1, 2, 6, 10, 11, and 15
Swimmer	35 U.S.C. § 103(a)	5 and 14
Swimmer	35 U.S.C. § 103(a)	1, 2, 5, 6, 10, 11, 14, and 15
Cline[2] and Ji[3]	35 U.S.C. § 103(a)	1, 2, 5, 6, 10, 11, 14, and 15
Forrest[4] and Ji	35 U.S.C. § 103(a)	1, 2, 5, 6, 10, 11, 14, and 15

Pet. 5. In the Institution Decision entered on March 18, 2016, we concluded, following consideration of Petitioner's explanations and supporting evidence

[1] Morton Swimmer et al., *Dynamic Detection and Classification of Computer Viruses Using General Behaviour Patterns*, VIRUS BULL. CONF. 75 (Sept. 1995) (Ex. 1005)
[2] U.S. Patent No. 5,313,616 to David C. Cline et al. (Ex. 1003)
[3] U.S. Patent No. 5,623,600 to Shuang Ji et al. (Ex. 1012)
[4] Stephanie Forrest et al., *A Sense of Self for Unix Processes*, PROC. 1996 IEEE SYMPOSIUM ON SEC. & PRIVACY 120 (1996) (Ex. 1004)

in view of Patent Owner's Preliminary Response (Paper 7, "Prelim. Resp."), that Petitioner had demonstrated in its Petition a reasonable likelihood of prevailing in showing the unpatentability of each of the challenged claims under 35 U.S.C. § 103(a) over Swimmer. Paper 9 ("Dec. on Inst."), 12–23. Accordingly, we instituted an *inter partes* review on that ground. *Id.* at 34. We also concluded, however, that Petitioner had not established a reasonable likelihood that it would prevail on any of the other grounds asserted, and we declined to institute an *inter partes* review on any other ground. *Id.* at 23–34.

Patent Owner now contends that we "misapprehended or overlooked" arguments presented in its Preliminary Response, and that the matters misapprehended or overlooked "amount to an abuse of discretion resulting in a decision that is based on an erroneous interpretation of law." Req. Reh'g 1.

III. DISCUSSION

1. Standard for Rehearing

When considering a request for rehearing, we review 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). "The burden of showing a decision should be modified lies with the party challenging the decision." 37 C.F.R. § 42.71(d); Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,768 (Aug. 14, 2012). 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 Patent Owner disagrees, and mere disagreement with our analysis or conclusion is not a proper basis for rehearing.

2. Overview

Patent Owner raises four principal arguments in its Request for Rehearing. First, Patent Owner argues, "the Board overlooked Petitioner's inappropriate conflation of claim terms and Patent Owner's argument that Petitioner improperly conflated the claim limitations of 'deriving security profile data for the Downloadable…' with 'storing the Downloadable security profile data in a database.'" Req. Reh'g 2 (citing Prelim. Resp. 20–21). Second, Patent Owner contends that "the Board overlooked Patent Owner's argument that Swimmer does not teach 'storing the Downloadable security profile data in a database' because Swimmer does not teach 'storing' its audit records anywhere, let alone storing them in a database." *Id.* at 2–3 (citing Prelim. Resp. 21). Third, Patent Owner contends that "the Board's determination that Swimmer's 'audit record is a database' is inconsistent with the Board's previous determinations as to the proper construction for the claimed 'database.'" *Id.* at 3. Fourth, Patent Owner argues, "the Board misapprehended the significance of Patent Owner's arguments with respect to objective indicia of nonobviousness." *Id.* We address Patent Owner's arguments in turn. For the reasons set forth below, we are not persuaded by Patent Owner's arguments.

3. Alleged Conflation of Claim Terms

Each of independent claims 1 and 10 recites, *inter alia*, "deriving security profile data for the Downloadable" and "storing the Downloadable

security profile data in a database." Ex. 1001, 21:21, 21:24–25, 22:11, 22:15–16. Patent Owner contends that "Petitioner took the position that both 'security profile data' and 'database' should be redundantly the same, by mapping both to Swimmer's audit records," and that "[i]n instituting trial, the Board overlooked Petitioner's legally deficient position. In fact, the Institution Decision states that Swimmer's 'audit record is a database' despite acknowledging that Petitioner already relies on these 'audit records' to be the claimed 'security profile data.'" Req. Reh'g 5 (citing Pet. 18, 19; Dec. on Inst. 16, 23). According to Patent Owner, "the Institution Decision overlooks Patent Owner's argument that interpreting Swimmer's audit records to be both the claimed 'security profile data' and the claimed 'database' is contrary to the law by giving no effect to the 'storing . . . in a database' language recited in the claims." *Id.* at 6 (citing Prelim. Resp. 20–21).

Patent Owner's contentions are not persuasive. As Petitioner argued in the Petition, Swimmer's VIDES uses an emulator to monitor application programs and code, which Petitioner identified as the recited Downloadables, and to generate a stream of system activity data. Pet. 16 (citing Ex. 1005, 7 ("The prerequisite for using an Intrusion Detection (ID) system like ASAX is an audit system which securely collects system activity data.")). Petitioner explains, "To generate th[ese] system activity data, the emulator, 'accepts the entire instruction set of a processor as input, and interprets the binary code as the original processor would.'" *Id.* (citing Ex. 1005, 8–9 ("audit record attributes of records as collected by the PC emulator have the following meaning . . . [t]he final format for an MS-DOS audit record is as follows: <*code segment, RecType[,] StartTime, EndTime,*

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