

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ARISTA NETWORKS, INC.
Petitioner

v.

CISCO SYSTEMS, INC.
Patent Owner

Case IPR2016-00309
Patent 7,224,668 B1

**PATENT OWNER'S
MOTION TO STRIKE PETITIONER'S REPLY**

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I. INTRODUCTION

Pursuant to the Board's authorization on February 7, 2017 (Exhibit 1028), Patent Owner, Cisco Systems, Inc. ("Cisco"), files this Motion to Strike Petitioner, Arista Networks, Inc. ("Arista")'s Reply to Patent Owner's Response (Paper 34). Petitioner's Reply contains new arguments, exceeding the scope permitted by 37 C.F.R. § 42.23(b). Instead of simply rebutting the substantive arguments and evidence presented in the Patent Owner's Response (Paper 19), Petitioner elected to raise non-responsive new arguments at a point in the trial when Patent Owner does not have the opportunity to meaningfully respond. Not only is this action a violation of the Board's rules, it is also unfairly prejudicial to Patent Owner. Accordingly, Patent Owner asks the Board to strike the portions of Petitioner's Reply identified below.

II. ARGUMENT

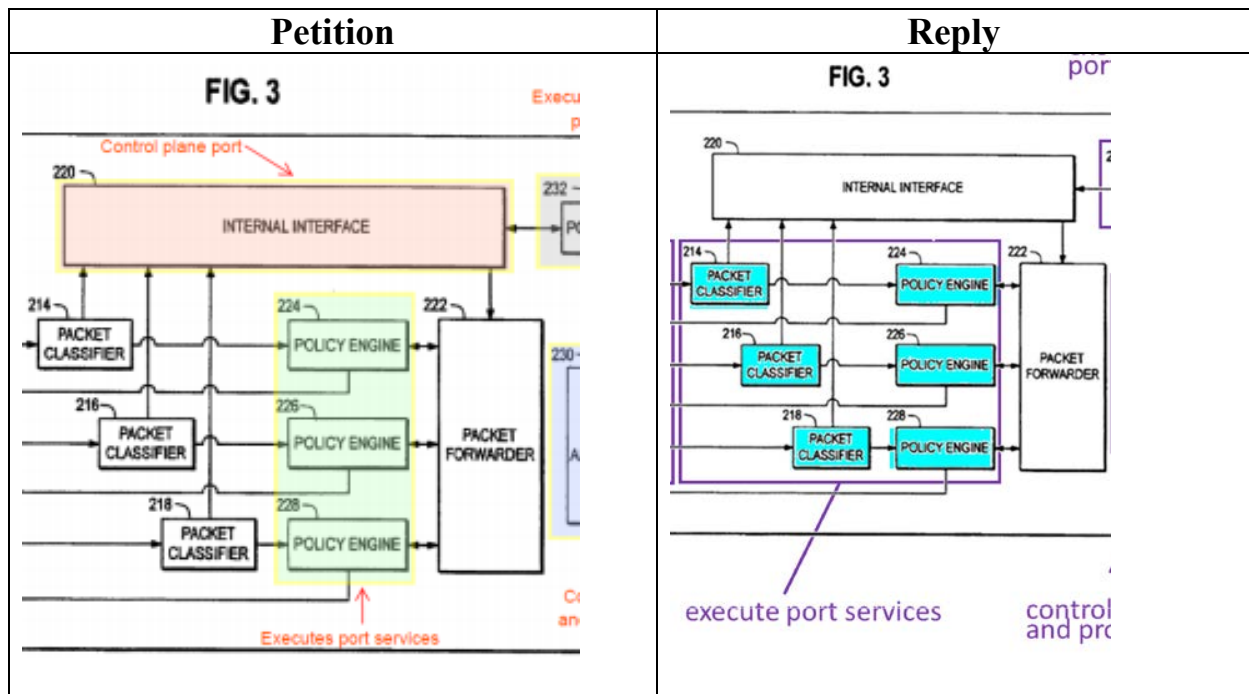
A "challenger [is] obliged to make an adequate case in its Petition and the Reply limited to a true rebuttal role." *Ariosa Diagnostics v. Verinata Health, Inc.*, 805 F.3d 1359, 1367 (Fed. Cir. 2015). In accordance with this directive, the Petition must identify specific evidence relied upon to support the proposed challenge and its relevance. 37 C.F.R. § 42.104(b)(5). Further, to achieve the underlying goal of efficiency and fairness of IPR trials, regulations limit a Reply submission "to matter responsive to the Patent Owner's Response." *Ariosa*, 805

F.3d at 1368. A Petitioner’s Reply that “crosses the line from the responsive to the new” evades these procedural safeguards and risks expunction. *Id.*

A. Petitioner’s new argument that claimed “port services” are executed by Amara’s “packet classifiers” is improper.

In its Reply, Petitioner raised for the first time an argument that Amara’s “packet classifiers 214-216” execute the claimed “port services.” (Reply, p. 8-10.)

This argument represents a significant shift in Petitioner’s obviousness theory made in the Petition, which argued Amara’s “policy engines 224-228” executed the claimed “port services.” (Petition, at 26-27.) Viewing Petitioner’s annotated Figure 3 from the Petition against the same annotated Figure from its Reply highlights Petitioner’s shifting arguments.



(Compare Petition, p.16 with Reply, p. 9.)

Patent Owner first learned of Petitioner's new theory during the deposition of Petitioner's expert, Dr. Lin. At deposition, Dr. Lin repeatedly provided non-responsive answers in an attempt to interject the new "packet classifier" theory into the trial. (*See e.g.*, Exhibit 2005, 94:20-95:8; 89:16-90:24; 22:15-21, 86:7-9; 93:2-94:1.) Indeed, Dr. Lin admitted that the new theory was missing entirely from his Declaration. (Ex 2005, 114:21-25 ("I agree that in my Declaration I did not talk to packet classification as being part of port services.").)

Although Patent Owner did not fully understand the contours of Petitioner's new theory at the time it filed its Response, Patent Owner nonetheless attempted to address this new theory in its Response based on Dr. Lin's brief testimony. (POR, p. 25.) Petitioner seized on Dr. Lin's reference to the new theory at deposition and developed it into a three-page argument, citing new evidence not included in its Petition. However, the limited nature of Dr. Lin's testimony did not provide the Patent Owner with all of the facts and law associated with Petitioner's fully-developed "packet classifier" argument presented in its Reply.

Petitioner's backdoor attempt to introduce a new argument into trial through the deposition of its expert violates the notice provisions of the Administrative Procedure Act, requiring that a Patent Owner be timely informed of "the matters of facts and law asserted." *In re Nuvasive*, 2015-1672, -1673, slip op, at p. 8 (Fed Cir. Nov. 9, 2016) (quoting from 5 U.S.C. § 554(b)(3)). This notice provision requires

that Petitioner's arguments be presented and supported in its Petition: "The challenger [is] obliged to make an adequate case in its Petition and the Reply limited to a true rebuttal role." *Ariosa Diagnostics v. Verinata Health, Inc.*, 805 F.3d 1359, 1367 (Fed. Cir. 2015). A calculated reference to a new theory at deposition should not be the key to unlock a new argument in Petitioner's Reply.

The Board should also disregard Petitioner's attempts to justify its new argument by characterizing the argument as a response to a claim construction by Patent Owner. Patent Owner did not construe this element. Instead, Patent Owner discussed this claim element in accordance with its plain and ordinary meaning—a meaning that should be well known to Petitioner after filing three IPR proceedings and litigating these claims at the ITC. Specifically, on July 9, 2015—nearly five months prior to the filing of the Petition in the present proceeding—Patent Owner filed a POPR in IPR2015-00974, which argued that Amara did not perform "port services" on its external packets. *See* Paper 6, IPR2015-00974, at pp. 25-27 (July 9, 2015). From at least this prior proceeding, Petitioner understood the plain and ordinary meaning of this claim term and Patent Owner's position, yet made a deliberate decision not to address it in the Petition in the present proceeding. The fact that Petitioner was aware of Patent Owner's argument is supported by the fact that Petitioner's expert deliberately introduced the argument at his deposition, before Patent Owner even filed its Response. Petitioner made a strategic decision

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