

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner,

v.

FASTVDO LLC,
Patent Owner.

Case IPR2016-01203
Patent 5,850,482

Before JEFFREY S. SMITH, PATRICK M. BOUCHER, and PETER P.
CHEN, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION
On Request for Rehearing
37 C.F.R. § 42.71

I. INTRODUCTION

Patent Owner FastVDO LLC, filed a Request for Rehearing (Paper 16, “Req. Reh’g”) of portions of our Decision to Institute *Inter Partes* Review (Paper 14, “Dec.”), dated December 16, 2016, and specifically those portions instituting *inter partes* review of claims 7–11 and 22–26 of U.S. Patent No. 5,850,482 (Ex. 1001, “the ’482 patent”).

In its Request, Patent Owner argues that the Decision to Institute misapprehended or overlooked the Petition’s failure to comply with 37 C.F.R. §§ 42.104(b)(3) and (4). Req. Reh’g 1. Patent Owner also argues the Decision to Institute misapprehended or overlooked the Petition’s failure to provide analysis of “error correction means” sufficient to justify institution of *inter partes* review of claims 7 and 22. Req. Reh’g. 4.

For the reasons set forth below, Patent Owner’s Request for Rehearing is denied.

II. STANDARD OF REVIEW

Under 37 C.F.R. § 42.71(c), “[w]hen rehearing a decision on petition, a panel will review the decision for an abuse of discretion.” An abuse of discretion may be determined 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. *See 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). The request must identify, with specificity, all matters that the moving party believes the Board misapprehended or overlooked. *See* 37 C.F.R.

§ 42.71(d). Section 42.71(d) further provides that the request must identify where each matter was previously addressed.

III. DISCUSSION

Claims 7 and 22 each recite “error protection means” with the function of “providing error protection to at least one of the first portions of the plurality of code words while maintaining any error protection provided to the respective second portion associated with the at least one first portion at a lower level than the error protection provided to the respective first portion.” The Petition argues that the ’482 patent discloses insufficient structure for unequal “error protection means.” Pet. 9–10. Nevertheless, the Petition recognizes the Specification’s assertion that methods and apparatus for performing “unequal error protection” were “known to those skilled in the art” “as described, for example, in R. G. Gallager, ‘Information Theory and Reliable Communication’, Wiley and Sons (1968).” *Id.* (citing Ex. 1001, 16:10–14). As noted in our Institution Decision, the Petition argues that this assertion is a bare statement of the mere title of a book that does not adequately disclose any structure for the unequal “error protection means” and that the term is indefinite. Dec. 11 (citing Pet. 10). In our Decision, notwithstanding Petitioner’s position, we found that the specification of the ’482 patent “discloses enough of an algorithm to allow a person of ordinary skill to discern the necessary structure for performing the claimed function of the ‘error protecting means.’” Dec. 12.

Despite this explicit analysis, Patent Owner contends that the Board misapprehended or overlooked Patent Owner’s argument that the Petition is deficient because the Petition fails to comply with 37 C.F.R. § 42.104(b)(3). Req. Reh’g 1. That regulation requires that the Petition explain “[h]ow the

challenged claim is to be construed,” and “[w]here the claim to be construed contains a means-plus-function ... limitation as permitted under 35 U.S.C. § 112(f), the construction of the claim must identify the specific portions of the specification that describe the structure, material, or acts corresponding to each claimed function.” In particular, Patent Owner contends that we misapprehended or overlooked Patent Owner’s argument that Petitioner’s “*sole theory* regarding the claimed ‘error protection means’ [is] indefiniteness,” but provided alternative theories for other means-plus-function limitations. Req. Reh’g. 1–3.

But in the Preliminary Response, Patent Owner did not specifically argue that Petitioner provided a “sole theory” for the claimed “error protection means” based on indefiniteness. Rather, Patent Owner argued generally that “Petitioner does not describe the structure, materials, or acts corresponding to the terms that Petitioner contends are in means-plus-function format.” Prelim. Resp. 11. Because Patent Owner did not present its “sole theory” argument in the Preliminary Response, the Board could not have misapprehended or overlooked this argument.

Even considering this argument, we are not persuaded. In our Decision, we disagreed with Petitioner’s indefiniteness arguments, but nonetheless found that the Petition identifies sufficient structure to support constructions of the means-plus-function limitations. Dec. 10–16. Rather than misapprehend or overlook Patent Owner’s arguments, we found that the Specification of the ’482 patent “discloses enough of an algorithm to allow a person of ordinary skill to discern the necessary structure for performing the claimed function of the ‘error protecting means.’” Dec. 12.

IPR2016-01203
Patent 5,850,482

Patent Owner contends that Petitioner’s claim chart, which maps the “error protection means” to Kato, results in irreconcilable inconsistencies. Req. Reh’g. 4–5. Patent Owner also contends that Petitioner’s claim chart fails to identify any structure that could be interpreted as corresponding to the structure of the “error protection means.” *Id.* at 5–7. But the Board could not have misapprehended or overlooked these arguments because Patent Owner did not present them in the Preliminary Response.

Because Patent Owner has not persuasively identified any matter that was misapprehended or overlooked in the Institution Decision, we deny the Request.

IV. ORDER

Accordingly, it is

ORDERED that the Request for Rehearing is denied.

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