UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner,

v.

REALTIME DATA LLC,
Patent Owner.

Case IPR2016-01737
Patent 8,880,862

PETITIONER'S REQUEST FOR REHEARING

I. INTRODUCTION AND STATEMENT OF RELIEF REQUESTED

Petitioner hereby requests rehearing under 37 CFR § 42.71(d), in response to the Final Written Decision ("Decision") in proceeding IPR2016-01737. The Decision indicates that "Petitioner fails to establish that proposed substitute claims 118-173 are obvious" over prior art and combinations of prior art set forth in Petitioner's Papers 24, 37, and 43. Pap. 57, 46. Petitioner requests reconsideration of the Decision finding these claims patentable because the Decision misapprehended or overlooked Petitioner's arguments explaining how Settsu preloads during the same boot sequence in which a boot device controller receives a command to load.

Specifically, the Decision states that "***we do not agree with Petitioner's reading of Settsu to include preloading during the same boot sequence*** in which a boot device controller receives a command over a computer bus to load … ***[r]ather, we understand Settsu to load after a command has been received over a computer bus***."[1] Pap. 57, 53. Here, the claimed "preloading … during the same boot sequence" is tacitly construed to cover something other than "load[ing] … after a command has been received over a computer bus." *Id.* This result cannot be reached without misapprehension or oversight of:

(a) the plain language of the substitute claims themselves, which recite that

[1] Throughout this paper, unless indicated, emphases in quotations is added.

"***preloading occurs during the same boot sequence in which a boot device controller receives a command over a computer bus*** to load" (Pap. 19, iii-v (presenting substitute independent claims 118, 122, and 124));

(b) intrinsic evidence related to specification description relevant to preloading during the same boot sequence, in particular, a portion of the '862 Patent specification noting that "***the preloading process may be … continued after the boot process begins*** (in which case ***booting and preloading are performed simultaneously***)" ('862 Patent, 21:48-52; *see also* Pap. 19, 6-7); and

(c) deposition testimony of Patent Owner's expert Dr. Back who, when asked whether a POSITA would have understood that the '862 Patent receives requests for preloaded boot data while it is preloading other boot data, testified on cross-examination that: "[y]es, that is correct," adding that "***it is possible for the data storage controller to … engage in the preloading process while already servicing requests*** for preloaded data during that second phase where booting and preloading may be performed simultaneously" (Ex. 1046, 120:13-121:11; *see also* Pap. 47, 5-6).

Indeed, as demonstrated in this request and the arguments advanced throughout this proceeding, no claim language or record evidence justifies a narrowed construction of "preloading … during the same boot sequence" that

excludes "load[ing] … after a command has been received over a computer bus." Rather, this construction is reached only through oversight or misapprehension of the intrinsic record, which, as indicated above, demonstrates the opposite by establishing that preloading encompasses processes performed before or "after a command has been received over a computer bus," as disclosed by Settsu. Pap. 24, 10-19; Pap. 31, 7-8.

As the Decision notes, "[i]n an *inter partes* review, claim terms in an unexpired patent are interpreted according to their broadest reasonable construction in light of the specification of the patent in which they appear." Pap. 57, 6 (citing 37 C.F.R. § 42.100(b); *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144–46 (2016)). As such, and absent any special definitions, claim terms are given "their ordinary and customary meaning, as would be understood by one of ordinary skill in the art at the time of the invention." Pap. 57, 6 (citing *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007)).

Under this standard, proper consideration of the full record compels a conclusion that Settsu describes "preloading … during the same boot sequence in which a boot device controller receives a command over a computer bus to load the portion of boot data," as recited in the substitute claims. Accordingly, Petitioner requests that the Board reconsider its Decision with respect to the substitute claims based upon the full record, and respectfully submits that the

Board should find that substitute claims 118-173 are obvious over Settsu, as set forth in Petitioner's Papers 24, 37, and 43.

II. LEGAL STANDARDS

A request for rehearing "must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply." 37 CFR § 42.71(d). "When rehearing a decision on petition, a panel will review the decision for an abuse of discretion." 37 CFR § 42.71(c). "An abuse of discretion is found if the decision: (1) is clearly unreasonable, arbitrary, or fanciful; (2) is based on an erroneous conclusion of law; (3) rests on clearly erroneous fact finding; or (4) involves a record that contains no evidence on which the Board could rationally base its decision." *Intelligent Bio-Systems, Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1367 (Fed. Cir. 2016); *Koninklijke Philips Electronics N.V. v. Cardiac Science Operating Co.*, 590 F.3d 1326, 1334 (Fed. Cir. 2010).

III. BASIS FOR RELIEF REQUESTED

The Decision erred in interpreting "preloading … during the same boot sequence" to cover something other than the preloading performed by Settsu. As set forth in Papers 24, 37, and 43, Petitioner explained how Settsu meets (1) the plain language of the substitute claims, (2) Settsu aligns with disclosed examples in the '862 Patent's specification, and (3) Settsu aligns with the explanation of the

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