Trials@uspto.gov
571-272-7822

Paper No. 61
Entered: August 21, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE, INC.,
Petitioner,

v.

REALTIME DATA LLC,
Petitioner.

Case IPR2016-01738
Patent 8,880,862 B2

Before DEBRA K. STEPHENS, GEORGIANNA W. BRADEN, and JASON J. CHUNG, *Administrative Patent Judges*.

BRADEN, *Administrative Patent Judge.*

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

I. INTRODUCTION

Apple, Inc. ("Petitioner") timely filed a Request for Rehearing under 37 C.F.R. § 42.71(d) on April 16, 2018. Paper 60 ("Req. Reh'g"). Petitioner's Request for Rehearing seeks reconsideration of our Final Written Decision (Paper 59, "Decision") entered on March 15, 2018. Petitioner disagrees with the Decision due to alleged errors in claim construction that resulted in the Board's misapprehension of the asserted prior art reference Settsu as reading on Patent Owner's proposed substitute claims, specifically the limitation of "preloading during the same boot sequence." Reh'g Req. 1–4 (emphasis omitted).

For the reasons provided below, we *deny* Petitioner's request with respect to making any change thereto.

II. ANALYSIS

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 C.F.R. § 42.71(d). The party challenging a decision bears the burden of showing the decision should be modified. *Id.*

Petitioner requests rehearing of our construction of the limitation "preloading . . . during the same boot sequence" as incorrect, arguing we erred by overlooking (1) the plain language of the substitute claims by too narrowly construing "preloading" as occurring before receipt of any command (Req. Reh'g 1–2) (emphasis omitted), (2) cited intrinsic evidence regarding the timing requirements for "preloading" (*id.* at 2) (emphasis omitted), (3) cited deposition testimony of Patent Owner's expert Dr. Back

regarding the understanding of a person of ordinary skill in the art (*id.* at 2 (citing Ex. 1046, 120:13–121:11)).

Petitioner contends that construing "preloading" as occurring "during the same boot sequence" is "defied by the very embodiment cited by Patent Owner when offering that language in its Motion to Amend." *Id.* at 8 (citing Paper 20, 6 (citing Ex. 2017, 41:7–9, 42:17–20, 43:13–14, Fig. 7B), 9–10, 12. According to Petitioner, the cited embodiment fails to suggest that preloading is limited temporally with respect to when a command is received over a computer bus. *Id.* at 9–10. Petitioner argues that the specification explicitly contemplates both before ("***prior to*** commencement of the boot process") and after ("***continued after*** the boot process begins"). *Id.* at 10 (citing Ex. 1001, 21:48–52; Paper 37, 8).

Petitioner further contends that Patent Owner's expert's testimony does not support a broad construction of "preloading." *Id.* at 11. Specifically, Petitioner argues that Dr. Back admitted under cross-examination that the data storage controller may engage in the preloading process while already servicing requests for preloaded data (i.e., after a command to load). *Id.* (citing Ex. 1046, 120:13–121:11). According to Petitioner, "by confirming that preloading in the '862 Patent occurs after a command has been received, Dr. Back endorsed an understanding of 'preloading' that is broader than the implicit construction required by the Decision." *Id.*

First, as explained in the Decision, when construing the claims at issue (1) we looked at the language of the claims themselves, (2) we consulted the patent's specification to help clarify the meaning of claim terms, because the claims "must be read in view of the specification, of

which they are a part," *Trading Techs. Int'l, v. eSpeed, Inc.*, 595 F.3d 1340, 1352 (Fed. Cir. 2010) (quoting *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (en banc), *aff'd*, 517 U.S. 370 (1996)), and (3) we reviewed "the patent's prosecution history in proceedings in which the patent has been brought back to the [US Patent and Trademark Office] for a second review" (*Microsoft Corp. v. Proxyconn, Inc.*, 789 F.3d 1292, 1298 (Fed. Cir. 2015)). *See* Decision, 6–7.

Second, contrary to Petitioner's arguments, we considered Petitioner's argument (and the cited supporting evidence) with respect to preloading in regards to the proposed substitute claims and in regards to each piece of prior art (or combination of prior art teachings). Decision, 56–64. Specifically, we found that Petitioner had failed to demonstrate that the cited art disclosed "preloading" boot data *into a "volatile" memory* — the proposed substitute claims require both elements. *Id.* Additionally, we found that the prior art cited fails to disclose or teach "preloading" as required by the proposed substitute claims. *Id.* As noted in the Decision, we determined that Settsu does not disclose preloading control information "during the same boot sequence in which a boot device controller receives a command over the computer bus to load the boot data," as recited in the substitute claims. *Id.* at 64. We further stated that we "understand Settsu to load after a command has been received over a computer bus (i.e., in a different boot sequence)." *Id.* We also stated "Settsu teaches loading boot data when it is accessed or requested by the system (although not before it is requested). Ex. 1006, Claim 3 ('said OS loading processing module loads each of said plurality of functional modules into said memory *and then*

generates and starts execution of a thread for said OS initialization module every time it loads of each said plurality of functional modules')." *Id.*

Furthermore, we are not persuaded by Petitioner's argument that the "***preloading in the substitute claims***" would have been understood by an ordinarily skilled artisan as "***broad enough to include transfer of data from disk into memory based on a command to load*** " (Req. for Reh'g 6). The claim language does not recite, nor does the Specification disclose, "transfer of data from disk into memory *based on* a command to load"; rather, the claim recites preloading occurs during the same boot sequence.

Petitioner's argument regarding Dr. Back's testimony is similarly unpersuasive (*id.* at 9). Whether requests for "preloaded boot data" may be received "while it is preloading other boot data" does not address the claims' recitation in light of the Specification, as discussed in our Decision.

We note that merely disagreeing with our analysis or conclusions does not serve as a proper basis for a rehearing, because it does not show an overlooked or misapprehended matter.

For the forgoing reasons, Petitioner has not shown that the Board misapprehended or overlooked arguments or evidence in interpreting "preloading . . . .during the same boot sequence . . . ." as recited in the proposed substitute claims. For the same reasons as discussed in the Decision, Petitioner's Request for Rehearing similarly is not persuasive as to Petitioner's position on the construction of this claim element or its application to the cited prior art. Petitioner's arguments regarding this limitation fail to identify what we misapprehended or overlooked as required by 37 C.F.R. § 42.71(d). Thus, Petitioner has not carried its burden of

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.