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Paper 23
Entered: October 29, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE, INC., SAMSUNG ELECTRONICS AMERICA, INC.,
HTC CORP., HTC AMERICA, INC., and LG ELECTRONICS, INC.,
Petitioner,

v.

UNILOC 2017 LLC,
Patent Owner.

Case IPR2018-00424[1]
Patent 7,881,902 B1

Before SALLY C. MEDLEY, JOHN F. HORVATH, and
SEAN P. O'HANLON, *Administrative Patent Judges*.

HORVATH, *Administrative Patent Judge*.

DECISION
Denying Patent Owner's Request on Rehearing of Final Written Decision
37 C.F.R. § 42.71(d)

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[1] HTC Corp., HTC America, Inc., and LG Electronics, Inc., who collectively filed a petition in IPR2018-01631, and Samsung Electronics America, Inc., who filed a petition in IPR2018-01653, have been joined to this proceeding.

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I. INTRODUCTION

Apple, Inc. ("Petitioner")[2] filed a Petition (Paper 2, "Pet.") requesting *inter partes* review of claims 1–6, 9, and 10 ("the challenged claims") of U.S. Patent No. 7,881,902 B1 (Ex. 1001, "the '902 patent"). Uniloc 2017 LLC ("Patent Owner") filed a Response (Paper 11, "PO Resp."), Petitioner filed a Reply (Paper 12, "Pet. Reply"), and Patent Owner filed a Sur-Reply (Paper (15, "PO Sur-Reply").

On July 16, 2019, we entered a Final Written Decision determining that Petitioner had shown, by a preponderance of evidence, that claims 1–6 and 10 of the '902 patent are unpatentable, but had failed to show that claim 9 is unpatentable. Paper 21 ("Final Dec."). On August 15, 2019, Patent Owner filed a Request for Rehearing, asking us to reconsider our finding that Petitioner had shown claims 5, 6, and 10 are unpatentable over the combination of Fabio and Pasolini. Paper 22 ("Reh'g Req."). For the reasons discussed below, Patent Owner's Request for Rehearing is *denied*.

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."

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[2] As noted above, HTC Corp., HTC America, Inc., LG Electronics, Inc., and Samsung Electronics America, Inc. have been joined as Petitioners to this proceeding.

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37 C.F.R. § 42.71(d). The burden of showing a decision should be modified on a request for rehearing lies with the party challenging the decision. *Id.*

Patent Owner argues "[t]he Board appears to have misunderstood argument and evidence presented during trial why Petitioner failed . . . to prove Fabio's validation interval TV maps onto the 'cadence window' term," and why "Fabio's validation interval TV is not 'a window of time *since* a last step was counted,' as required by Petitioner's construction for the 'cadence window' term." Reh'g Req. 1. Specifically, Patent Owner argues that the Board misunderstood the teachings of Fabio by repeating—for the third time—an argument first presented in Patent Owner's Response and repeated in Patent Owner's Sur-Reply that "Fabio's validation scheme is *retrospective* in that it is used to validate only the last step." *Id.* at 2; see also PO Resp. 13–15, PO Sur-Reply 1–5.

We discussed Patent Owner's "retrospective argument" at length in the Final Written Decision, as well as the reasons we did not find it persuasive. *See* Final Dec. 46–49. Although Patent Owner disagrees with that analysis, Patent Owner fails to explain how we misunderstood or misinterpreted its "retrospective" argument or how we erred in interpreting the teachings of Fabio. Instead, Patent Owner presents a *new* argument, asserting for the first time that we misinterpreted Fabio because under Petitioner's interpretation, with which we agreed, "the first and second steps (shown in Figure 6 as $T_R(1)$ and $T_R(2)$, respectively) would necessarily be excluded from the total count of valid steps." Reh'g Req. 3–4. This would occur, Patent Owner argues, because the validation interval TV needed to

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validate the step recognized at $T_R(1)$ would require the timing interval between two non-existent previous steps, and the validation interval TV needed to validate the step recognized at $T_R(2)$ would require the timing interval between the step recognized at $T_R(1)$ and a non-existent previous step. *Id*. This exclusion of the first two steps would not happen under Patent Owner's interpretation of Fabio, Patent Owner argues, because "the second step $T_R(2)$ can be *retrospectively* validated . . . when the third step is recognized within its respective TV." *Id*. at 4–5.

We are not persuaded by Patent Owner's argument for two reasons. First, this is a new argument that was not previously presented in Patent Owner's Response or Sur-Reply as evidenced by Patent Owner's failure to identify where this "matter was previously addressed in a motion, an opposition, or a reply." 37 C.F.R. § 42.71(d). It is, of course, axiomatic that we cannot have misapprehended or overlooked an argument that Patent Owner had not previously made.

Second, we would not be persuaded by this argument even if we were to consider it on its merits. Fabio discloses two counting procedures—first counting procedure 110 and second counting procedure 130. Ex. 1006, Fig. 3. First counting procedure 110 includes step validation test (230), and second counting procedure 130 includes step validation test (320) that is "altogether similar to the first validation test carried out in block 230 of Fig. [4]." *Id*. at 3:58–4:27, 6:12–34, Figs. 4, 7. Petitioner does not rely on Fabio's validation interval TV to validate the first few steps (e.g., the steps recognized at $T_R(1)$ and $T_R(2)$) during first counting procedure 110. *See* Pet.

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53–54. Instead, Petitioner relies on a modified validation interval TV having a default value that "establish[es] a default cadence window based on the user's physical attributes [in order to] increase the likelihood that the first few steps are recognized as being compatible," or that "increase[s] compatibility with the user's previous step as the user is beginning a new activity such as walking or running." *Id.*

In our Final Written Decision we "agree[d] with Petitioner's reasoning that a person skilled in the art would have been motivated to modify Fabio's validation interval TV [in first counting procedure 110] to have a default width in order to determine the compatibility of the first few steps of user activity." Final Dec. 46. In particular, we agreed that it would have been obvious to modify TV to have a default width because "Fabio teaches the importance of using TV to determine the compatibility of timing between steps, and the timing compatibility of the first few steps *can only be determined with a default time interval* rather than the time interval of (non-existing) previous steps." *Id.* (citing Ex. 1006, 4:28–55). Patent Owner does not argue that this finding was erroneous. *See* Reh'g Req. 1–6. Thus, using modified validation interval TV having a default width would allow the step recognized at $T_R(2)$ to be validated by the step recognized at $T_R(1)$, assuming the step recognized at $T_R(1)$ to be a valid step.

Moreover, after counting a threshold number N_{T2} (e.g., 8) of control steps that pass step validation test (230), first counting procedure 110 calls second counting procedure 130. Ex. 1006, 5:10–39, Figs. 3, 4, 7. Thus, the first step recognized (315) in second counting procedure 130 (e.g., step 9)

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