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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

L'ORÉAL USA, INC.,
Petitioner,

v.

UNIVERSITY OF MASSACHUSETTS,
Patent Owner.

Case IPR2018-00779
Patent 6,645,513 B2

Before CHRISTOPHER G. PAULRAJ, ROBERT A. POLLOCK, and DAVID COTTA, *Administrative Patent Judges*.

COTTA, *Administrative Patent Judge*.

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

I. INTRODUCTION

L'Oréal USA, Inc. ("Petitioner" or "L'Oréal") filed a petition requesting an *inter partes* review of claims 1–7 and 9 of U.S. Patent No. 6,645,513 B2 (Ex. 1002, "the '513 patent"). Paper 2 ("Pet."). The University of Massachusetts ("Patent Owner" or "UMass") filed a Preliminary Response to the Petition. Paper 8 ("Prelim. Resp."). On

September 7, 2018, after consideration of the Petition and Preliminary Response, we entered a Decision denying institution of *inter partes* review Paper 10 ("Dec."). On October 11, 2018, Petitioner filed a Corrected Request for Rehearing (Paper 12, "Req. Reh'g") seeking reconsideration of the Decision.[1]

For the reasons stated below, Petitioner's Request for Rehearing is denied.

II. ANALYSIS

Standard of Review

When reconsidering a decision on institution, we review the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion may be found 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. *Star Fruits S.N.C. v. U.S.*, 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 party requesting rehearing has the burden of showing the decision should be modified, which includes specifically identifying all matters the party believes we misapprehended or overlooked. 37 C.F.R. § 42.71(d).

[1] Petitioner filed a Request for Rehearing on October 9, 2018. Paper 11. Because the request was incorrectly captioned, with the permission of the Board (Ex. 3002), Petitioner refiled a request for rehearing correcting this clerical error. Paper 12. All citations herein are to the Corrected Request for Rehearing.

Background

Petitioner challenged claims 1–7 and 9 of the '513 patent on three related grounds: that claims 1–7, and 9 are anticipated by JP '153[2]; that claim 4 is obvious over JP '153; and that claims 1–7 and 9 would have been obvious over the combination of JP '153 and DE '107[3]. Pet. 6–7. We declined to institute *inter partes* review. Dec.

Petitioner's Request for Rehearing focuses on our construction of the limitation in claim 1 requiring that "the adenosine concentration applied to the dermal cells is 10^{-3} M to 10^{-7} M." In the Petition, Petitioner argued that this limitation should be construed to mean "a concentration of adenosine ***in the composition*** that is topically applied to an unbroken, epidermal layer of a region of the skin containing the dermal cells to be from 10^{-3} M to 10^{-7} M (*i.e.*, 0.0265 to 0.00000265 wt %)." Pet. 15. In the Decision denying institution, we rejected Petitioner's proposed construction and construed this limitation to mean "mean what it says – that the recited concentration is the concentration that is applied to the dermal cells." Dec. 14.

Legal Principles

For the reasons discussed in connection with our institution decision, we applied a district court-type claim construction like that provided in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc). Dec. 6.

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[2] Murayama, JP H9-157153 A, published June 17, 1997 ("JP '153"). JP '153 was originally published in Japanese. Ex, 1005. All citations herein are to Exhibit 1006, the English translation of JP '153 provided by the Petitioner.

[3] Schönrock et al., DE 195 45 107 A1, published June 5, 1997 ("DE '107"). DE '107 was originally published in German. Ex. 1003. All citations herein are to Exhibit 1004, the English translation of DE '107 provided by the Petitioner.

Under this standard, we gave claim terms their ordinary and customary meaning, as would be understood by a person of ordinary skill in the art, at the time of the invention, in light of the language of the claims, the specification, and the prosecution history of record. *Phillips*, 415 F.3d at 1313. We also considered the extrinsic evidence presented by Petitioner. *Id.* at 1317. Petitioner does not challenge our decision to apply the *Phillips* claim construction standard. Req. Reh'g 2.

Analysis

Claim 1 of the '513 patent, the only independent claim, requires "topically applying to the skin a composition comprising a concentration of adenosine." In the Decision, we construed this limitation to require that "a composition be applied directly to the outer, epidermal layer of the skin that is intact . . . such that the inner, dermal layer of the skin is not exposed." Dec. 6–7. Petitioner agrees that this is the correct construction. Req. Reh'g 4.

Claim 1 also requires that "the adenosine concentration applied to the dermal cells is 10^{-3} M to 10^{-7} M." In the Decision, we construed this limitation to require that the recited concentration is "the concentration that is applied to the dermal cells." Dec. 14.

Petitioner argues that we "incorrectly applied *Phillips* by interpreting only two words of the claim, *i.e.* 'dermal cells,' in isolation, overlooking the remaining language of the claims and therefore failing to accord sufficient weight to the specification and file history or Petitioner's evidence." Req. Reh'g 2. We are not persuaded.

Any construction of the phrase "concentration applied to the dermal cells" must ascribe some meaning to the term "dermal cells." As discussed

in the Decision, there is no dispute that the skin is comprised of multiple layers, including the epidermis, the dermis, and subcutaneous fat. Dec. 8. Our construction gives the term "dermal cells" is ordinary meaning by construing it to refer to "dermal cells" — i.e., the dermis or dermal layer. We do not find in the record, and Petitioner does not suggest, another way to interpret the limitation "concentration applied to the dermal cells" consistent with the ordinary meaning of the words "dermal cells."

Petitioner proposes that we construe the limitation "concentration applied to the dermal cells" to mean "a concentration . . . applied to an unbroken, epidermal layer of a region of the skin containing the dermal cells." Pet. 15. However, as noted in the Decision, there is no meaningful difference between the "epidermal layer of a region of the skin containing the dermal cells" recited in Petitioner's proposed claim construction, and the epidermis. Dec. 8 n.3. Petitioner's proposed construction is, thus, contrary to the language of the claim, because it changes the meaning of "dermal cells" to "epidermal cells."

Petitioner argues, in effect, that the ordinary meaning of the term "dermal cells" changes when it is considered "within the context of the immediately-preceding words '***applied to***,' and the ***single recited application step***." Req. Reh'g 3. According to Petitioner, there is only one step in claim 1 in which adenosine is "applied" and that step requires application to the skin (which we interpreted to mean the epidermal layer of the skin). Petitioner contends the claim term "applied" in the limitation "applied to the dermal cells" must be understood to refer back to this step of applying adenosine to the epidermal layer of the skin because, otherwise,

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