UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FITBIT, INC.,

Petitioner,

v.

PHILIPS NORTH AMERICA LLC,

Patent Owner.

Case IPR2020-00783[1]
Patent 7,088,233 B2

PATENT OWNER SUR-REPLY TO PETITIONER'S REPLY TO PATENT OWNER'S RESPONSE

[1] Garmin International, Inc., Garmin USA, Inc., and Garmin Ltd., who filed a petition in IPR2020-00910, has been joined as petitioner in this proceeding.

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I. INTRODUCTION

Petitioner's Reply ("Reply") ignores that the claimed invention requires "a security mechanism **governing information transmitted between the first personal device and the second device**," and not merely any generic "security mechanism". At base, Petitioner's arguments ignore the plain and ordinary meaning of most of the recited claim language and merely interpret the claim as applying any form of security. Petitioner's unreasonably broad interpretation is inconsistent with the intrinsic record and unsupported in the Petition itself, and should be rejected.

II. CLAIM CONSTRUCTION

1. "security mechanism governing information transmitted between the first personal device and the second device"

Petitioner purports to agree with the Board's institution decision declining construction of this term, yet repeatedly advocates for a meaning that ignores the fact that the claimed "security mechanism" must govern **information** transmitted between devices. Petitioner's Reply is replete with arguments as to how the use of encryption, as a concept, might constitute a "security mechanism," without acknowledging that the claims require significantly more. Ex. 1001, claim 1. Petitioner does not even attempt to justify this unreasonably broad construction and instead, as detailed further below, attempts to confuse the issue by citing Dr. Martin's testimony on how one might **implement** various "security mechanisms."

Despite Petitioner's focus on the construction for this term advanced in Patent Owner's Preliminary Response, neither Patent Owner's Response ("POR") nor Dr. Martin's declaration rely on that originally proposed construction to distinguish the prior art. *See* POR at 20, 28-29, 34-37; Ex. 2026 at 16-17; *see also* Ex. 1076, 91:5-17. Both the POR and Dr. Martin's declaration rely solely on the plain meaning of the words used in the claim, while pointing out that Petitioner's unreasonably broad construction renders much of the claim language superfluous. *See* POR at 21-23. Indeed, according to Petitioner's expert, the term should be construed so broadly that smashing a device with a hammer would constitute the requisite "security mechanism governing information transmitted between the first personal device and the second device"—even though in that situation there would be no information transmitted. *See* POR at 22-23 (citing Ex. 2026 at ¶74).

There is no credence to Petitioner's suggestion—made for the first time in reply—that the term might somehow require a subjective interpretation. *See* Reply at 2-3. To the contrary, the cases relied on by Petitioner are inapposite and actually support the application of the plain and ordinary meaning here. In *Homeland Housewares, LLC v. Whirlpool Corp.*, the Court found the term "predetermined settling speed" to be entitled to its plain and ordinary meaning of "determined beforehand", despite the fact that in practice any specific predetermined settling speed might be empirically determined through testing as suggested by the specification. *See Homeland Housewares, LLC v. Whirlpool Corp.*, 865 F.3d 1372, 1375-76 (Fed. Cir. 2017). Meanwhile in *Cochlear Bone Anchored Sols. AB v. Oticon Med. AB*, the Federal Circuit again endorsed the plain and ordinary meaning of the term, rejecting a construction of "adapted to" that would incorporate "accounting for the mechanics of the skull" into the claims. *See Cochlear Bone Anchored Sols. AB v. Oticon Med. AB*, 958 F.3d 1348, 1356 (Fed. Cir. 2020). In both *Homeland Housewares* and *Cochlear Bone*, the Federal Circuit endorsed a plain meaning despite the fact that the claim could be implemented in myriad different ways. These cases acknowledge that, under a plain and ordinary meaning, a variety of implementation may read on the claim, but that a range in implementation choices should not dictate the construction of the term—consistent with Dr. Martin's testimony.

Petitioner's attacks on Dr. Martin's testimony with respect to "security mechanisms" are without merit. Dr. Martin repeatedly pointed to the specific examples provided in the specification as a way of explaining that in a given implementation, a security mechanism governing information transmitted between devices could take different forms depending on the threats to be protected against. *See e.g.*, Ex. 1076, 97:16 ("Yes. I think the security mechanism depends. And, again, **it's in the specification**. As we talked about, there's the example of Figure 5, but there's also the example of transmitting information unencrypted but with

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