UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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CLOUDFLARE, INC. and
SPLUNK INC.
Petitioner,
v.
SABLE NETWORKS, INC.,
Patent Owner.

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IPR2021-00909[1]
Patent 8,243,593 B2

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Before KRISTEN L. DROESCH, STACEY G. WHITE, and
GARTH D. BAER, *Administrative Patent Judges*.

WHITE, *Administrative Patent Judge*.

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

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[1] Splunk, Inc., which filed a petition in IPR2022-00228, has been joined as a petitioner in this proceeding.

I.   INTRODUCTION

Cloudflare, Inc. and Splunk Inc. ("Petitioner") filed a Request for Rehearing (Paper 44, "Request" or "Req. Reh'g") of our Final Written Decision (Paper 42, "Final Decision" or "Dec.") in which we determined that Petitioner did not demonstrate[2] that claims 17, 18, 37, and 38 of U.S. Patent No. 8,243,593 B2 (Ex. 1001, "the '593 patent") are unpatentable. For the reasons explained below, we deny Petitioner's Request for Rehearing.

II.   DISCUSSION

On request for rehearing, "[t]he burden of showing a decision should be modified lies with the party challenging the decision." 37 C.F.R. § 42.71(d). "The request 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, reply, or a sur-reply." *Id.* We have reviewed Petitioner's Request and carefully considered all of the arguments presented. We are not persuaded that we misapprehended or overlooked any arguments or evidence, and thus, we decline to modify the Decision.

In the Decision on Institution, we stated that the Petition alleged that dependent claims 17, 18, 37, and 38 would have been obvious over the Yung reference alone. Paper 16 ("Inst. Dec."), 38 (citing Paper 1 ("Petition" or "Pet.") 1 (table of grounds), 42–43 (addressing these dependent claims). We noted that claims 17 and 18 depend indirectly from independent claim 9 and

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[2] We also determined that Petitioner had demonstrated that claims 3, 9–13, 19–24, 29–33, and 39–44 of the '593 were unpatentable, but that portion of the Final Decision is not at issue here. *See* Dec. 47.

claims 37 and 38 depend indirectly from independent claim 29. *Id.* (citing
Ex. 1001, 12:9–16, 12:29–30, 12:33, 13:45–52, 14:9–10, 14:14). Thus, each
of these dependent claims includes the requirements of the respective
independent claims, including limitations requiring "computing . . . a
badness factor for the flow." Dec. 32 (citing Ex. 1001, 12:5–6, 13:41–42).
Claims 9 and 29 were alleged and found to be unpatentable over the
teachings of Yung and Copeland and the "computing . . . a badness factor"
recited in claims 9 and 29 was alleged to have been taught by Copeland. *See*
Inst. Dec. 38; *see also* Dec. 18–32. In the Institution Decision, we raised the
possibility that "the inclusion of claims 17, 18, 37, and 38 in the Yung-only
ground may be a typographical error." Inst. Dec. 39. We then invited the
parties to address whether we should consider whether claims 17, 18, 37,
and 38 would have been obvious over Yung and Copeland. *Id.*

The parties accepted our invitation and briefed the question as to
whether these dependent claims should be considered against the teachings
of Yung and Copeland. *See* Paper 30 ("PO Resp."), 13–16; Paper 33
("Reply"), 26–29; Paper 36 ("PO Sur-Reply"), 3–15. In addition, this issue
was discussed at the oral hearing. Paper 41, 21:17–24:7; 25:1–41:12. In the
Final Written Decision, we addressed this issue and "decline[d] to evaluate a
combination of references that was not advanced in the Petition, and so we
decline[d] to consider whether claims 17, 18, 37, and 38 would have been
obvious over Yung and Copeland." Dec. 38.

On Rehearing, Petitioner asserts that we erred in refusing to consider
whether claims 17, 18, 37, and 38 would have been obvious over Yung and
Copeland due to our alleged misapprehension of two Federal Circuit
decisions: *Koninklijke Philips N.V. v. Google LLC*, 948 F.3d 1330 (Fed. Cir.

2020) and *Apple Inc. v. MPH Technologies Oy*, 2022 WL 4103286 (Fed. Cir. Sept. 8, 2022) (non-precedential). Req. Reh'g 2. Petitioner asserts that

> [i]n both Federal Circuit decisions, the Board was asked to modify or create a new ground of unpatentability rather than applying the grounds as expressly recited. In contrast here, the Board is asked to correct a typographical error that was first raised in the institution decision and immediately acknowledged as such by Petitioners at the outset of the trial phase.

Id. at 2. We disagree with Petitioner's assertion of a typographical error.

In its Reply, Petitioner asserted that it had "inadvertently included the arguments addressing dependent claims 17, 18, 37, and 38 under Ground 1 (Yung alone) rather than Ground 2 (Yung and Copeland)." Reply 26. Petitioner maintains that assertion in its Rehearing Request, stating that we need only "resolve an obvious and admitted typographical error that placed two paragraphs in the wrong section of the petition." Req. Reh'g 4. In the Final Written Decision, however, we determined that

> [t]he Petition consistently contends that claims 17, 18, 37, and 38 would have been obvious in light of Yung alone. The summary table includes these claims in the Yung-only ground (Pet. 1); the organizational structure includes these claims in that ground (*id.* at ii–iii); and the substantive discussion of the claims refers to Yung and to other claims included in the Yung-only ground (*id.* at 42–43 (citing *id.* at 41–42)). Petitioner fails to identify (and we do not perceive) *any* portion of the Petition that can be read as affirmatively stating that these claims would have been obvious in light of Yung and Copeland. *See* Pet.; Pet. Reply 26–29. Consequently, we do not agree with Petitioner's contention that the omission of Copeland was a "typographical error." Pet. Reply 26–27. The problem is not an isolated typographical error (or two), but rather one that pervades the Petition.

Dec. 35–36. As such, we were not persuaded that the Petition contained a typographical error. We determined that the Petition repeatedly and expressly challenged claims 17, 18, 37, and 38 over Yung alone. Nothing in Petitioner's Request for Rehearing persuades us that that determination was in error.

In addition, we are not persuaded by Petitioner's arguments on rehearing regarding the cited case law. The *Apple* case is particularly instructive. In *Apple,* the petitioner asserted that claim 5 was unpatentable over Ishiyama, Murakawa, **and Ahonen**. *Apple*, 2022 WL 4103286, at *3 (emphasis added). Claims 6 and 7 depend from claim 5 and were alleged to have been obvious over Ishiyama and Murakawa. *Id.* The Federal Circuit held that the Board "properly declined to consider Ahonen" in its evaluation of claims 6 and 7, explaining that "[t]he Board did not err by declining to consider arguments that [the petitioner] did not make." *Id.* at *7.

On Rehearing, Petitioner asserts that the instant case is distinguishable because "[t]he parties in . . . *Apple* never did what Petitioner[] did in this case, i.e., request resolution of an obvious typographical error in a manner that makes sense as a matter of logic and patent law based on the contentions recited in the petition itself." Req. Reh'g 5. According to Petitioner, "[l]ogic dictates that because claim 17 includes every limitation of claim 12, then the portion of the petition showing how the prior art discloses claim 12 must also apply to claim 17." *Id.* at 6. Petitioner further argues that because claim 17 "begins by reciting '[t]he method of claim 12 . . . ,'" we should interpret that as "explicitly referring to the petition's argument addressing claim 12." *Id.* This argument fails because every dependent claim includes a reference to the claim it depends from, and by Petitioner's logic we should

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