UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE OFFICE OF THE UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLE INC.,
Petitioner,

v.

CPC PATENT TECHNOLOGIES PTY, LTD.,
Patent Owner.

Case IPR2022-00602
U.S. Patent No. 9,665,705

PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW

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Pursuant to the Revised Interim Rules Governing the Director Review Process (Sept. 18, 2023), Patent Owner respectfully requests that the Commissioner review the Final Written Decision ("FWD") finding all claims of U.S. Patent No. 9,665,705 ("the '705 Patent") invalid. The issues warranting such review are:

1) After it adopted for institution purposes a construction of the limitation "accessibility attribute" previously urged by the Petitioner before the district court, the Panel changed that construction materially to capture the prior art without providing notice to the Patent Owner sufficient for due process under the Administrative Procedures Act ("APA"), thereby prejudicing Patent Owner. *See, e.g, Qualcomm Inc. v. Intel Corp.,* 6 F.4th 1256, 1265 (Fed. Cir. 2021).

2) The proposed modification of the Mathiassen reference with the non-biometric teachings of Anderson does not result in a series of received ***biometric*** signal entries that are mapped into an instruction used to populate the database as part of an enrollment process, as required by the challenged claims.

3) The Panel misapplied the law regarding the motivation to combine references in recognizing the combination of the Mathiassen reference, on the one hand, and the McKeeth and Anderson references, on the other hand, as valid combinations.

A. The Panel's Changed Construction of "Accessibility Attribute"

The challenged claims of the '705 Patent require, *inter alia,* "a transmitter sub-system controller configured to match the biometric signal against members of

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the database of biometric signatures to thereby output an ***accessibility attribute***." *See, e.g.,* Ex. 1001, claim 1 (emphasis added). The parties disputed the meaning of "accessibility attribute" in a co-pending district court proceeding, during which Petitioner vociferously argued that the term be construed as an "attribute that establishes whether ***and under which conditions*** access to the controlled item should be granted to a user." Ex. 2011 at 26 (emphasis added).

Petitioner argued that its proposed construction was "consistent with the description of the invention throughout the specification and the claims, which goes beyond mere matching—the binary decision of 'yes' or 'no'—and instead describes a system that provides for different types of access." *Id.* at 26. The Petitioner then described the "multi-tiered access" system taught in the '705 Patent, which "can only be facilitated by the different types of fingerprint (or other biometric) input - *i.e.*, the number of presses and duration—recited elsewhere in the claim" *See id.*

To drive the point home, Petitioner reiterated that "[b]inary matching—'match/no match'—is not what the inventor was trying to invent. Instead, he sought to provide a more sophisticated system with, inter alia, multiple types of access." *Id.* at 28. In contrast, according to Petitioner, CPC's proposed plain and ordinary meaning construction "would gut the clear definition given to it by the patentee, and improperly broaden the scope of the claims to encompass mere matching, a feature described as prior art." *Id.*

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As the Panel acknowledged in the FWD, it adopted, for purposes of institution Petitioner's construction "accessibility attribute," which includes both the "whether" and "under which conditions" components of that construction. *See* FWD at 19 & 21. In doing so, the Panel confirmed that adopted the construction excludes "a 'binary decision' to grant or not grant access to a locked structure or device." *Id.*

The principal reference relied upon by Petitioner is Mathiassen, which it represented teaches a "portable control processor . . . configured to match the user's biometric signal against the database of biometric signatures," and, ***[i]f there is a match, the processor will proceed to open (or lock) the car doors***." FWD at 44 (emphasis added) (internal citations omitted). This is clearly a ***binary*** operation, as there only two options – unlock the door if there is a match, or not if there is not. There is no third option. This was effectively confirmed by ***Petitioner's*** expert, who acknowledged that "Mathiassen is silent as to any incremental access that a car owner is granted, as opposed to any other user." PO Sur-Reply at 22, *citing* Ex. 2015 at 66:1-67:9. In other words, Mathiassen teaches precisely the type of "mere matching" that would "gut the clear definition" of "accessibility attribute" that Petitioner warned against. *See* Ex. 2011 at 28.

That Petitioner originally agreed with this proposition is evident from its Petition - "[a]pplying the [District] Court's construction, Mathiassen's 'open door' command ***as modified by McKeeth's teaching of duress and alert conditions***

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teaches or renders obvious outputting an accessibility attribute, as claimed." Petition at 17 (emphasis added). Put another way, Mathiassen needs McKeeth's teachings to satisfy the "accessibility attribute" under the construction proposed by it, and adopted by both the district court and the panel.

In dealing with Mathiassen in the FWD, the Panel inexplicably found that, "[b]ased on the language of the claims and specification, the 'accessibility attribute' may include only an 'access attribute,' which is 'unconditional,'" which is precisely the type of binary (yes/no – lock/unlock) decision that Petitioner adamantly opposed including in the very construction it successfully urged to the Panel for institution purposes. *See* FWD at 21. Nonetheless, the Panel stated that its original construction (again expressly excluding binary decisions) includes "unconditional access, if no conditions are imposed." FWD at 45-46. Notwithstanding this supposed inclusion, the Panel felt compelled to "modify" the construction of "accessibility attribute" to include the term "if any," *i.e.,* potentially none, such that the new construction reads "an attribute that establishes whether and under which conditions, ***if any***, access to the controlled item should be granted." FWD at 21 (emphasis added).

As a result of this obviously changed construction, the Panel went on to find that Mathiassen, which it found to teach at most a lock/unlock operation, "discloses or suggests" the "accessibility attribute" limitation. *See* FWD at 47. As such, Petitioner was allowed to benefit from one construction of that limitation before the

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