

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SERVICENOW, INC.,
Petitioner,

v.

HEWLETT-PACKARD CO.,
Patent Owner.

Case IPR2015-00707
Patent 7,925,981 B2

Before RAMA G. ELLURU, JAMES B. ARPIN, and
CHRISTOPHER L. CRUMBLEY, *Administrative Patent Judges*.

Opinion for the Board filed by ARPIN, *Administrative Patent Judge*.

Opinion concurring filed by CRUMBLEY, *Administrative Patent Judge*.

ARPIN, *Administrative Patent Judge*.

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

I. INTRODUCTION

ServiceNow, Inc. (“Petitioner”) filed a Petition (Paper 1, “Pet.”) to institute an *inter partes* review of claims 1, 22, and 23 (the “challenged claims”) of Patent No. US 7,925,981 B2 to Pourheidari *et al.* (Ex. 1001, “the ’981 patent”), pursuant to 35 U.S.C. §§ 311–319. Pet. 1. Petitioner challenged these claims of the ’981 patent on the following ground (Pet. 4, 21–60):

Claims	Grounds	References
1, 22, and 23	35 U.S.C. § 103(a)	Collaborate References and Fox

Hewlett-Packard Company (“Patent Owner”) filed a Preliminary Response (Paper 11, “Prelim. Resp.”).

For the reasons discussed in our Decision on Institution (Paper 12, “Dec.”), we denied institution of an *inter partes* review of any of the challenged claims. Pursuant to 37 C.F.R. § 42.71(d), Petitioner filed a Request for Rehearing (Paper 13, “Reh’g Req.”), seeking reconsideration of our Decision on Institution. For the reasons set forth below, Petitioner’s Request for Rehearing is *denied*.

II. DISCUSSION

1. *Standard for Reconsideration*

37 C.F.R. § 42.71(d) provides that:

A party dissatisfied with a decision may file a single request for rehearing, without prior authorization from the Board. The burden of showing a decision should be modified lies with the party challenging the decision. *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, or a reply.

(emphasis added). In addition, “[e]vidence not already of record at the time of the decision *will not be admitted* [with a request for rehearing] absent a showing of good cause.” Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,768 (Aug. 14, 2012) (emphasis added). When reconsidering a Decision on Institution, the Board reviews the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). Thus, a request for rehearing is not an opportunity merely to disagree with the Board’s assessment of the arguments or weighing of the evidence, or to present new arguments or evidence.

2. Overview

Petitioner asserts two bases for its Request for Rehearing. Reh’g Req. 1–4, 9–12. First, Petitioner argues that we misapplied the standard for determining public accessibility by failing to determine public accessibility based on “all of the facts and circumstances surrounding the disclosure.” Reh’g Req. 1 (quoting *In re Lister*, 583 F.3d 1307, 1313 (Fed. Cir. 2009)). In particular, Petitioner argues that “the Board appeared to have employed an analysis in which each individual piece of evidence was considered and rejected separately, eschewing the holistic approach required by Federal Circuit law.” *Id.* at 2. Further, Petitioner argues that we misstated the URL date of Exhibit 1014 (*id.* at 4–5), we improperly placed dispositive weight on the archiving dates of Exhibits 1004–1006 (*id.* at 5–7), and we improperly relied on the “Restricted Rights Legend” in Exhibits 1004–1006 (*id.* at 7–9). Second, Petitioner argues that we violated Petitioner’s rights by

sustaining Patent Owner’s evidentiary objections without affording Petitioner the opportunity to respond to those objections. *Id.* at 9–12.

3. *Determining Public Accessibility*

With regard to its first basis, Petitioner argues that we misapplied the standard for determining public accessibility by considering each piece of evidence regarding public accessibility *separately*, rather than *as a whole*. *Id.* at 1–4. As our Decision on Institution makes clear, however, we considered the arguments and evidence presented by each party as a whole in determining whether Petitioner had met its burden of persuasion. *See* Dec. 8. In particular, we explained in our Decision on Institution that

Petitioner fails to make the critical link between the alleged identification of the Collaborate References on the “download page” and the exhibits relied upon in support of its asserted grounds. Despite Petitioner’s arguments and assertion that this “page” was publicly accessible “by no later than August 29, 2001,” Petitioner fails to demonstrate Exhibits 1004–1006, which Petitioner relies upon in support of each of the asserted grounds, were publicly accessible through the webpages included in Exhibit A to the Butler Affidavit more than one year prior to May 14, 2003. See Pet. 23; Ex. 1002 ¶ 144.

Id. at 14 (emphasis added). Similarly, we read the copyright notice and dates on Exhibits 1004–1006 together with “Restricted Rights Legend,” when accessing the parties’ arguments regarding the dates appearing on the exhibits. *Id.* at 15–17. As we explained,

We consider the references as a whole and read the download instructions, cited by Petitioner, in view of the restrictions on use and dissemination that also are set forth in the references. We are persuaded that, read together, the download instructions and the Restricted Rights Legends do not provide sufficient evidence that these references were publicly accessible.

Id. at 16–17 (emphases added).

We, thus, considered the arguments and evidence presented by the parties and determined that, based upon this record, Petitioner failed to satisfy its burden of showing a reasonable likelihood that asserted references Exhibits 1004–1006 were publically accessible, printed publications. *Id.* at 19–20; *see id.* at 22¹ (“I agree with the majority’s recitation of the facts, established by the present record. *I also agree with the majority’s evaluation that the evidence submitted by Patent Owner casts doubt on Petitioner’s assertion that the Collaborate References are prior art to the ’981 patent.* Where the majority and I part ways, however, is whether this record meets the ‘reasonable likelihood’ standard for institution of an *inter partes* review.” (emphasis added)).² Therefore, we did not misapply the standard for determining public accessibility by considering each piece of evidence regarding public accessibility separately, rather than as a whole.

Petitioner identifies certain instances in which we allegedly misunderstood or gave improper weight to particular pieces of evidence.

a. Misstated Date of Exhibit 1014

With respect to Exhibit 1014, Petitioner argues that we erroneously stated that Exhibit 1014 was archived by the Internet Archive on *November 1, 2002*. Reh’g Req. 4 (citing Dec. 11). Petitioner notes, however, that the

¹ This is the first page of Judge Crumbley’s dissent in the Decision on Institution. For clarity, we cite to the dissent consistent with Petitioner’s citations in the Request for Rehearing.

² In the Decision on Institution, the majority noted that “[t]he dissent differs from the majority on two basic issues: *the sufficiency of the evidence presented in the Petition, considered in light of the evidence presented in the Preliminary Response*, and the relevance of evidence presented at this stage of the proceeding to the decision to institute. With respect to the first issue, reasonable minds may differ as to the weight appropriately accorded to presented evidence.” Dec. 20 n.6 (emphasis added).

URL associated with Exhibit 1014 actually indicates an archive date of *January 11, 2002*. *Id.* Consequently, Petitioner argues that “all of the web pages attached to the Internet Archive affidavit, including the one identified by the Board, predated the filing date of the ’981 patent by more than one year.” *Id.* Petitioner is correct, and the date identified in our Decision on Institution is incorrect. Dec. 11.

Nevertheless, we discussed this date for two reasons in our Decision on Institution. First, we noted that, if the archive date of Exhibit 1014 were November 1, 2002, Exhibit 1014 would predate the filing date of the ’981 patent by less than one year, contrary to Petitioner’s assertion. Dec. 11 (citing Pet. 3, 22). In view of our error, however, there is no contradiction between Petitioner’s evidence and its asserted grounds. Second, we noted that Petitioner’s assertion of varying archive dates for Exhibits 1004–1006 is consistent with Patent Owner’s assertion of varying dates for these exhibits. *Id.* at 15 (“That the archived dates for Exhibits 1004–1006 vary is consistent with the varying archived dates noted above for the webpages identified in Exhibit A to the Butler Affidavit.”); *see* Prelim. Resp. 11; *see also* Ex. 2002, 1–3 (dates provided by the Wayback Machine service). It was this determination that contributed to our evaluation of the evidence. On this second point, we note that, after correcting our error, the archive dates of Exhibits 1004–1006 continue to vary. *See* Dec. 10–11.

Although we misapprehended Petitioner’s evidence on this point, the incorrect date did not contribute to our evaluation of the parties’ arguments and evidence. The correction of this error does not alter our overall evaluation of the sufficiency of the evidence presented in the Petition, considered in light of the evidence presented in the Preliminary Response.

b. Dispositive Weight on Exhibits 1004–1006

Petitioner argues that we improperly placed dispositive weight on the archiving dates of Exhibits 1004–1006. Reh’g Req. 5. Moreover, Petitioner argues that “[t]he Board *appears* to have based its decision in part on speculation that Exhibits 1004–1006 were somehow different from the documents available for download through the August 29, 2001 BEA e-docs download page.” *Id.* (emphasis added).

Both arguments misunderstand our determination. First, Petitioner does not indicate where we stated in our Decision on Institution that we gave *dispositive* weight to the archiving dates of Exhibits 1004–1006. Instead, Petitioner seems to assume that we gave such weight to Patent Owner’s evidence of the archiving dates of Exhibits 1004–1006. As we explained above, however, we did not rely solely on any single piece of evidence in determining that Petitioner has failed to satisfy its burden of showing a reasonable likelihood that asserted references Exhibits 1004–1006 were publically accessible, printed publications. *See* Dec. 16–17, 19–20. Second, Petitioner notes that, “as Judge Crumbley observed in his dissenting opinion, [Patent Owner’s evidence] does not convincingly establish that the documents were not publicly accessible before the filing date.” Reh’g Req. 5 (citing Dec. 23). The issue before us, however, was whether Petitioner had demonstrated a reasonable likelihood of showing that Exhibits 1004–1006 are publically accessible, printed publications upon which its challenges might prevail. Despite the dissent, the panel members agreed that the evidence submitted by Patent Owner “*casts doubt* on Petitioner’s assertion that the Collaborate References are prior art to the ’981 patent.” *See* Dec. 22 (emphasis added). As Judge Crumbley correctly observes, the disagreement

among the panel members was on “whether this record meets the ‘reasonable likelihood’ standard for institution of an *inter partes* review.” *Id.* That issue has been determined in this initial proceeding, and a Request for Rehearing is not the opportunity for Petitioner merely to express its disagreement with our assessment of the arguments or weighing of the evidence.

Because we did not give dispositive weight to Patent Owner’s evidence of the archiving dates of Exhibits 1004–1006, and Petitioner has not pointed to evidence in the record to the contrary, Petitioner fails to demonstrate that we misapprehended or overlooked arguments or that we abused our discretion in our assessment of the arguments or weighing the evidence presented by the parties regarding Exhibits 1004–1006.

c. Reliance on the “Restricted Rights Legend”

Petitioner argues that, “[t]o the extent the Board used the ‘Restricted Rights Legend’ to support its finding of a lack of public accessibility, it clearly erred.” Reh’g Req. 7. In particular, Petitioner argues that such Restricted Rights Legends are found commonly in publications and that the “Restricted Rights Legend” in Exhibits 1004–1006 “has little or no bearing on the public availability of Exhibits 1004–1006, and thus provided no support for a finding that those documents were not publicly accessible.” *Id.* at 7–8.

Petitioner, however, fails to indicate where it raised these arguments in its Petition³ (see 37 C.F.R. § 42.71(d)) and now attempts to introduce new evidence (Reh’g Req. Appendix A) in support of its arguments. We could

³ Although Petitioner cites to pages 23 and 24 of its Petition (Reh’g Req. 8), Petitioner did not discuss the Restricted Rights Legends in Exhibits 1004–1006 on the cited pages.

not misapprehend or overlook arguments that Petitioner did not make or evidence that Petitioner did not present with its Petition. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,768. Moreover, as we explained in our Decision on Institution, “[w]e consider[ed] the references as a whole and read the download instructions, cited by Petitioner, in view of the restrictions on use and dissemination that also are set forth in the references.” Dec. 16.

4. Evidentiary Objections

Petitioner argues that “[r]ehearing should also be granted because the Board sustained evidentiary objections raised by the patent owner in its Preliminary Response, without affording any opportunity for response or comment by the Petitioner.” Reh’g Req. 9. Petitioner suggests that, in Federal court practice, “[w]hen a party objects to the introduction [of] evidence, the party offering the evidence is permitted to explain why the evidence is admissible. And if there is no objection, of course, the evidence is admissible even if it qualifies as hearsay.” *Id.* at 10 (citing cases where no objection was raised to the hearsay evidence).

Petitioner, however, misunderstands the treatment of Petitioner’s evidence of the copyright notices on Exhibits 1004–1006 in our Decision on Institution. We did not “sustain” Patent Owner’s evidentiary objection; Petitioner’s evidence was neither excluded from the record nor denied our consideration. *Cf.* 37 C.F.R. § 42.64. In fact, as our Decision on Institution makes clear, the evidence of the copyright notices was considered fully, along with the other evidence presented by the parties, in reaching our determination on the public accessibility of Exhibits 1004–1006. *See* Dec. 15–17. Specifically, on this record, we were not persuaded that the

copyright notices are entitled to any greater weight than that afforded to hearsay in determining public accessibility. *Id.* at 17.

As is apparent from our Decision on Institution, we determined the evidence of the copyright notices was hearsay. However, it was not excluded. Rather, we considered it, and found it insufficient, in the context of this record, to demonstrate a reasonable likelihood of public accessibility. *See* Dec. 15–17.

Thus, we are not persuaded that our identification of the copyright notices as hearsay and our weighing them as such in the context of the arguments and evidence presented by the parties, misapprehended or overlooked Petitioner’s arguments or evidence or abused our discretion. Further to the extent that Petitioner now attempts to present new evidence (Reh’g Req. Appendix B) and arguments related to that new evidence (Reh’g Req. 11–12), we could not misapprehend or overlook arguments that Petitioner did not make or evidence that Petitioner did not present with its Petition. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,768.

III. ORDER

For the reasons given, it is

ORDERED that Petitioner’s Request for Rehearing is *denied*;

FURTHER ORDERED that, pursuant to 37 C.F.R. § 42.7(a), Paper 13 is *expunged*; and

FURTHER ORDERED that, pursuant to 37 C.F.R. § 42.5(a) and Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,768, Petitioner shall refile its Request for Rehearing, omitting Appendices A and B and any citations thereto.

CRUMBLEY, *Administrative Patent Judge*, concurring in the denial of rehearing.

While I continue to disagree with the majority's evaluation of Petitioner's likelihood of success, and the majority's determination regarding the hearsay status of some of Petitioner's evidence, I do not consider the issues identified by Petitioner in its Request for Rehearing to require grant of rehearing. Our Rules state that the standard for rehearing a decision on petition is abuse of discretion (37 C.F.R. § 42.71(c)), and is limited to matters the Board misapprehended or overlooked (37 C.F.R. § 42.71(d)). With one inconsequential exception,⁴ the issues identified by Petitioner are either not abuses of discretion, or are not issues the majority misapprehended or overlooked in the Decision Denying Institution.

For these reasons, I concur in the denial of rehearing.

⁴ I refer to the panel majority's mistake regarding the archive date of Exhibit 1014. Because the majority states that—even correcting for this mistake—it does not consider the evidence to establish a reasonable likelihood of Petitioner prevailing, the error in the Decision Denying Institution is harmless.

IPR2015-00707
Patent 7,925,981 B2

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