

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DUODECAD IT SERVICES LUXEMBOURG S.À.R.L.,
FRIENDFINDER NETWORKS INC., AND STREAMRAY, INC.,
Petitioner,

v.

WAG ACQUISITION, LLC,
Patent Owner.

Case IPR2015-01035
Patent No. 8,185,611 B2

Before GLENN J. PERRY, TREVOR M. JEFFERSON,
BRIAN J. McNAMARA *Administrative Patent Judges*.

JEFFERSON, *Administrative Patent Judge*.

DECISION
Petitioner's Request for Rehearing
37 C.F.R. § 42.71

I. INTRODUCTION

Duodecad IT Services Luxembourg S.À.R.L, Friendfinder Networks Inc., and Streamray Inc. (collectively “Petitioner”) filed a request for rehearing (Paper 9, “Req. Reh’g”) of the Board’s decision (Paper 8, “Dec.”) dated Oct. 23, 2015, which denied institution of *inter partes* review of claims 1–18 of U.S. Patent No. 8,185,611 B2 (Ex. 1001, “the ’611 patent”). Petitioner contends that “the Board overlooked or misapprehended important points regarding claim construction of “playback rate” and “about the playback rate” as recited in the challenged claims. Req. Reh’g 2–7. In addition, Petitioner argues that the board misapprehended Petitioner’s use of Chen,¹ Chen FH,² Carmel,³ and ISO-11172⁴ as recited in Petitioner’s Ground 3. *Id.* at 7–15.

II. STANDARD OF REVIEW

Under 37 C.F.R. § 42.71(c), “[w]hen rehearing a decision on petition, a panel will review the decision for an abuse of discretion.” An abuse of discretion occurs when a “decision was based on an erroneous conclusion of law or clearly erroneous factual findings, or . . . a clear error of judgment.” *PPG Indus., Inc. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1567 (Fed. Cir. 1988). The request must identify, specifically, all matters the party believes the Board misapprehended or overlooked. 37 C.F.R. § 42.71(d).

¹ U.S. Patent No. 5,822,524, issued Oct. 13, 1998 (Ex. 1004, “Chen”).

² File History of U.S. Application No. 08/505,488 which issued as U.S. Patent No. 5,822,524 (Ex. 1005, “Chen FH”).

³ U.S. Patent No. 6,389,473 B1, issued May 14, 2002 (Ex. 1006, “Carmel”).

⁴ International Standard Reference number ISO/IEC 11172-1:1993(E) (Exs. 1007–1009, “ISO-11172”).

III. DISCUSSION

A. Claim Interpretation

Our Decision Denying Institution agreed with Petitioner’s proposed construction and construed “playback rate” (as recited in claims 1, 3, 8, 9, and 14) as “a rate at which the data is encoded for playback to a user.” Dec. 6–7 (citing Paper 2 (“Pet.”) 12; Paper 6 (“Prelim. Resp.”) 17). We also declined to adopt Petitioner’s proposed construction for “at about playback rate” as indefinite as it could represent “any rate” (Pet. 12). Dec. 7. We adopted Patent Owner’s proposed construction that “at about playback rate” as recited in claims 1, 8, and 14, should be construed as “at approximately the rate at which the media will be played out.” Dec. 7 (citing Prelim. Resp. 16–18; Ex. 1001, 3:40–42, 4:33–35, 4:47–50, 5:37–40).

Petitioner contends that “at about playback rate” in the two constructions are inconsistent, because “[o]n the one hand, it means ‘at about a rate at which the data is encoded for playback to a user’ while, on the other hand, it means ‘at approximately the rate at which the media will be played out.’” Reh’g Req. 3. Petitioner contends that: “the Board should construe ‘playback rate’ to be ‘the rate at which the media will be played out.’ Ex. 1001 at 5:37-42 (‘rate at which it will be played out (the ‘playback rate’)).” Reh’g Req. 3 (quoting Dec. 6).

Based on the arguments presented, we agree that “playback rate” should be construed as “the rate at which the media will be played out.”

Petitioner further contends that the Board’s construction imparts special meaning to “about” in “at about playback rate” based on Patent Owner’s attorney argument, whereas the ’611 patent uses the term without

any reference to the data encoding rate of the media. Reh’g Req. 3–6 (citing Ex. 1001, 3:37–43). Petitioner contends that in proper context of the ’611 patent claims and specification, “playback rate” is distinct from “data rate” and properly refers to the rate between “the media player of the user computer and the observer—which occurs after the reception of the media data.” Reh’g Req. 5 (citing Ex. 1001, 5:37–42, 6:34–41, 9:52–55).

Petitioner, without conceding its argument that “at about playback” is indefinite, contends, in the alternative, that “the Board erred in giving a special meaning to ‘about’ or ‘approximately’ in the context of the playback rate as being related to variations that may arise as a result of variable encoding. Petitioners submit that ‘about’ should be ‘approximately’ without imparting such special meaning to the term.” Reh’g Req. 6 (citing *Merck & Co. v. Teva Pharms. USA, Inc.*, 395 F.3d 1364, 1372 (Fed. Cir. 2005); *Duraflame, Inc. v. Hearthmark, LLC*, 2013 U.S. Dist. LEXIS 21229, *23 (N.D. Cal. Feb. 14, 2013)).

We disagree with Petitioner’s arguments that the term “about” in the claim phrase “about playback rate” requires further construction. We note that Petitioner’s rehearing request argument with respect to Chen, Chen FH, Carmel, and ISO-11172 teaching that “the media data elements is sent at a rate that matches the constant fill rate of a server buffer” does not depend on the revised construction of either “playback rate” or the construction of “about” in the claim phrase “about playback rate.” Thus, for purposes of this rehearing decision, we do not further construe “about playback rate”

B. Obviousness based on Chen, Chen FH, Carmel, and ISO-11172

Petitioner argues that the Board misapprehended Petitioner's Ground 3 based on Chen, Chen FH, Carmel, and ISO-11172 (Pet. 58–60), failing to understand that the small buffer in Chen “has significance to the rate matching of the data into and out of the stream buffer.” Reh’g Req. 3, 7–8. Petitioner argues that the size of the Chen server buffer is significant because it insures “that the rate of data flowing out of the server buffer is at the playback rate.” Reh’g Req. 8. Petitioner argues that because of the small buffer in Chen (only 1–5 frames), during Normal transmission mode where the server buffer is at playback rate, the data flowing out of the server buffer is also at the playback rate to avoid overflow and underflow conditions. *Id.* at 8–9 (citing Pet. 19, 31, Ex. 1004, claim 16, 27, 42). Specifically, Petitioner argues that the case where one frame of data leaves the buffer at each frame interval in Chen supports its position, stating that:

Because the stream buffer is small (only 1-5 frames), Petitioners presented that “in Normal mode where transmission is paced at the playback rate and the stream buffer is therefore emptying at about the playback rate, the stream buffer fills at ‘about’ the playback rate to avoid overflow or underflow conditions.” Petition at 19, 31; Ex. 1004 at claims 16, 27, 42. This is particularly the case when the stream buffer holds only one frame of data. In that case, one frame of data leaves the stream buffer at each frame interval. *See* Petition at 19; Ex. 1003 at ¶63. This necessarily means that one frame of data must be loaded to the stream buffer in a frame interval so that it is ready to transmit at the next frame interval. Thus, the stream buffer is loaded at the playback rate to avoid overflow or underflow conditions. Ex. 1003 at ¶63. The case where the stream buffer holds one frame of data is an example where the data rate into the buffer and the data rate out of the buffer match and are also equal to the playback rate. The Board’s decision is thus in error

with respect to its finding that Chen and the Chen File History do not teach the “matching” limitation of the claims.

Id.

Petitioner references the Petition (Pet. 19, 31) and the declaration of Nathaniel Polish, Ph.D. (Ex. 1003 ¶ 63) in arguing that the Board erred in finding that Chen and the Chen FH did not “teach or suggest that the server buffer in Chen fills at a constant rate that matches the rate of data coming out of the buffer” as recited in challenged claims. Reh’g Req. 7–9 (quoting Dec. 15.). The Petition, however, makes no reference to “the case where the stream buffer holds one frame of data” and argues only that in Normal mode the Chen server buffer empties at about playback rate to avoid overflow and underflow conditions. Pet. 19; *see also* Pet. 31 (citing claim 42 of Chen). In addition, neither the Petition nor Dr. Polish’s declaration cited therein discusses the case where one frame of data is in the Chen stream buffer and subsequently leaves the stream buffer, i.e., that one and only one frame of data is loaded into the stream buffer. *Compare* Req. Reh’g 9 with Pet. 19, 31; Ex. 1003 ¶ 63. The Board did not misapprehend or overlook arguments that were not presented.

In addition, Petitioner’s arguments based on the size of the server buffer in Chen, as presented in the Petition, failed to persuasively show that the server buffer in Chen fills at a constant rate that matches the rate of data coming out of the buffer or that rate into its buffer is constant. Petitioner’s arguments that a one frame buffer “necessarily” shows that one frame is loaded into the Chen buffer is conclusory and not persuasive to the extent it was argued in the Petition.

With respect to the combination of Chen, Chen FH, and Carmel as discussed in Ground 3, Petitioner argues that

Chen already has a server buffer, which, as discussed above, already has data flowing out at the playback rate. Petition at 31; Ex. 1003 at ¶63; Ex. 1004 at 8:16–32, 9:21–30, 10:3–4. In particular, Chen discloses that the transmission scheduler schedules its execution based on *the timing specifications in the multimedia files*.

Reh’g Req. 10 (citing Pet. 31 (citing Ex. 1004, 9:21–30)). Thus, Chen in combination with Carmel’s disclosure of a technique for real-time broadcasting teaches a server buffer in which the rate of data flowing into the server buffer matches the rate of data flowing out of the server buffer (and also matches the playback rate).” Reh’g Req. 11; *see id.* (citing Pet. 57–58, Ex. 1003 ¶ 76).

We disagree with Petitioner that the Board overlooked the combination of Carmel and Chen and Chen FH. We are not persuaded by Petitioner’s argument and evidence that the real-time broadcast transmission of data slices as indexed files in Carmel (Pet. 57–58) in combination with Chen and Chen FH yields a “constant fill rate” of the server buffer.

Petitioner’s rehearing argument that Chen’s server buffer, relying on the transmission scheduler using the timing specifications in the multimedia files being delivered in combination with Carmel, was not presented persuasively in the Petition. *See* Pet. 57–58; Ex. 1003 ¶¶ 74–76. The Board did not misapprehend or overlook arguments regarding the combination of Chen and Chen FH and Carmel that were not presented. Indeed, the declaration evidence cited by Petitioner in both the Petition and request for rehearing fails to discuss the import or operation of the transmission scheduler in combination with the real-time broadcasting in Carmel.

Finally, with respect to Ground 3, Petitioner contends that the Board misapprehended the use of ISO-11172, which discloses a constant bit rate, in combination with Chen, Chen FH, and Carmel. Reh’g Req. 11–12.

Petitioner argues that:

The combination of Chen, the Chen File History, and Carmel discussed above provide Chen’s server buffer in which the data flow into and out of the modified Chen buffer match at the playback rate. In further view of the MPEG-1 standard (ISO-11172), the use of constant bit rate is an obvious choice. Petition at 59; Ex. 1003 at ¶¶ 78-79. Thus, Chen’s server buffer may be filled and emptied at matching rates that are constant in view of the use of constant bit rate encoding as disclosed by ISO-11172.

Petitioner’s argument in the request for rehearing, like the argument in the Petition for the combination of ISO-11172 and Chen, Chen FH, and Carmel, is conclusory and fails to show persuasively that by using a constant bit rate, the server will have a constant fill rate when the server buffer is filled at the playback rate. See Pet. 59 (citing Ex. 1003 ¶¶ 77–79). Indeed, Petitioner’s rehearing argument states that “Chen’s server buffer *may* be filled and emptied at matching rates” but fails to explain how the evidence and argument as presented in the Petition support that the use of constant bit rate as disclosed in ISO-11172 in the server of Chen, Chen FH, and Carmel yields a server buffer that is filled at a “constant fill rate.”

Based on the foregoing, we are not persuaded that the Board misapprehended Petitioner’s use of Chen, Chen FH, Carmel, and ISO-11172 in finding that the information presented in the Petition failed to show persuasively that these references in combination teach that “the media data elements is sent at a rate that matches the constant fill rate of a server buffer.” See Dec. 17.

In light of the foregoing, the arguments in Petitioner's request for rehearing that Chen, Chen FH, Carmel, and ISO-11172 teach the remaining limitations of the challenged claims in Ground 3 under the revised claim construction of "playback rate" is not persuasive and does not change our decision to deny institution. Reh'g Req. 12–15.

IV. CONCLUSION

The Board denies the relief requested in Petitioner's request for rehearing.

V. ORDER

Accordingly, it is

ORDERED that Petitioner's request for rehearing is denied.

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