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Paper 11
Entered: February 2, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ROBERT BOSCH LLC and DAIMLER AG,
Petitioner,

v.

ORBITAL AUSTRALIA PTY LIMITED,
Patent Owner.

Case IPR2015-01249
Patent 5,606,951

Before KEN B. BARRETT, HYUN J. JUNG, and
JEREMY M. PLENZLER, *Administrative Patent Judges*.

PLENZLER, *Administrative Patent Judge*.

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

I. INTRODUCTION

On January 20, 2016, Robert Bosch LLC and Daimler AG (collectively, "Petitioner") filed a Request for Rehearing (Paper 10, "Req. Reh'g") of our Decision (Paper 9, "Dec.") denying *inter partes* review of Petitioner's challenge to U.S. Patent No. 5,606,951 (Ex. 1001, "the '951 patent"). Our Decision denied *inter partes* review of each of Petitioner's challenges to claims 1–10, 12, 14, 15, 23, and 24.

Petitioner's Request alleges that the Board misapprehended or overlooked certain matters set forth in the Petition (Paper 3), and "request[s] rehearing and modification of the Board's Decision denying institution for claims 1, 3-7, 9, 12, 14, and 15 of the '951 patent." Req. Reh'g 1. Specifically, Petitioner's Request alleges that our Decision is based on a misunderstanding of Petitioner's proposed claim construction (Req. Reh'g 5–8), as well as overlooking Petitioner's express arguments regarding the alleged teaching in the asserted references of the "initial position" recited in the claims (*id.* at 8–15). Petitioner's arguments are directed specifically to its challenges to independent claims 1 and 9 based on anticipation by Buslepp[1] (*id.* at 8–12) and anticipation by Yoshida[2] (*id.* at 8–9, 12–15).

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." 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."

[1] U.S. Pat. No. 5,080,064, iss. Jan. 14, 1992 (Ex. 1004, "Buslepp").
[2] U.S. Pat. No. 5,078,109, iss. Jan. 7, 1992 (Ex. 1005, "Yoshida").

PPG Indus. Inc. v. Celanese Polymer Specialties Co., 840 F.2d 1565, 1567 (Fed. Cir. 1988) (citations omitted). In its request for rehearing, the dissatisfied party must identify the place in the record where it previously addressed each matter it submits for review. 37 C.F.R. § 42.71(d).

III. ANALYSIS

A. Claim Construction

Petitioner does not dispute our construction of the "initial position" recited in the claims. *See* Req. Reh'g 5–8. Petitioner, however, alleges that we incorrectly characterized their construction of that limitation. *Id.* at 5–6. We are not persuaded that we incorrectly characterized the construction set forth in the Petition. Notwithstanding that determination, Petitioner's arguments on this issue are unpersuasive because we evaluated their challenges based on our construction of the "initial position" recited in the claims, which, as noted above, Petitioner does not dispute.

B. Challenges

Initially we note that Petitioner's arguments cite only to the portions of the Petition addressing claim 1, and do not address specifically any particular argument related to claim 9 alone. Accordingly, our discussion focuses on claim 1.

1. Buslepp

Petitioner contends that "[t]he Board overlooked the express identification of *Buslepp*'s disclosure of a **feed-forward** determination in the form of the BASE VALUE." Req. Reh'g 9 (citing Pet. 1, 12). This is an inaccurate characterization of our Decision. Our Decision specifically notes Petitioner's reliance on Buslepp's "BASE VALUE" as corresponding to the claimed initial position (Dec. 9–10), and Petitioner cites to this portion of

our Decision in its Request (Req. Reh'g 11). Petitioner asserts that "[t]he only deficiency the Board notes with *Buslepp*, based on Patent Owner's misleading statements, is that the THROTTLE POSITION (a different variable from the BASE VALUE) is determined by a feedback control loop." *Id.* (citing Dec. 10). Ultimately, our Decision was based on Petitioner's failure to explain sufficiently how Buslepp's "BASE VALUE" discloses the claimed "initial position." *See* Dec. 10.

Petitioner essentially disagrees with our Decision, which is not a proper basis for requesting rehearing. As noted above, there is no dispute regarding the proper construction of the "initial position," and we considered the arguments asserted in the Petition identifying Buslepp's "BASE VALUE" as corresponding to the claimed "initial position." Furthermore, as Petitioner acknowledges (Req. Reh'g 11), our Decision explicitly acknowledged that Buslepp's "BASE VALUE" is an open-loop determination. *See* Dec. 10. The Petition failed to establish that Buslepp discloses that the BASE VALUE is the initial position for its throttle valve, rather than merely a value used to determine a position for the throttle valve. Claim 1 not only requires "determining an initial position of said throttle means," but also "moving the throttle means to said initial position."

2. Yoshida

With respect to the Yoshida challenge, Petitioner contends that "[t]he Board acknowledges that Petitioners relied on the 'target degree of throttle opening' as the initial position, but [incorrectly] found that *Yoshida* is silent as to whether this is a 'feed-forward' determination." Req. Reh'g 12. Our Decision notes that "[t]he *cited portions* of Yoshida . . . are silent as to whether the 'target degree of opening of the throttle' is a 'feed-forward'

determination, and *the Petition offers no explanation* as to whether one skilled in the art would read Yoshida as providing such a teaching." Dec. 11 (emphasis added). Indeed, even in its Request, Petitioner fails to identify any portion of Yoshida that *explicitly* discloses the "target degree of opening of the throttle" being a feed-forward determination.

Petitioner cites to pages 1–2 of the Petition to support its contention. Req. Reh'g 12–13.[3] Page 2 of the Petition is part of a "Preliminary Statement," which provides a general summary of the asserted references. *See* Pet. 2. In that section, the Petition notes that "*Yoshida* (Ex. 1005) discloses a similar system, in which a 'target degree of opening of a throttle is determined.' *Id.* at 9:51–56. This 'target degree,' which is the basis for the 'feed forward loop,' is calculated solely from the depression of the accelerator pedal. *Id.* at 2:60–65." Pet. 2.

Similar to the Petition, the Petitioner's Request offers no explanation as to why the cited portions of Yoshida support its contention that the "'target degree' . . . is calculated solely from the depression of the accelerator pedal." Column 2, lines 60–65 of Yoshida state that "it can be read, from the position of depression of an accelerator pedal or the state of operation of the accelerator pedal, such as the depression speed, that the driver makes a request for a predetermined engine output, and the throttle valve can be controlled to produce the requested engine output." This passage does not even reference the "target degree," nor does the portion of the challenge based on Yoshida directed to claim 1's "determining an initial

[3] Petitioner additionally cites to page 12 of the Petition. Req. Reh'g 13. It is unclear, however, how that portion of the Petition is relevant to Petitioner's contentions as it is directed to the challenge based on Buslepp. *See* Pet. 12.

position" reference this passage. *See* Pet. 24.[4] Petitioner additionally reproduces portions of the text from Yoshida cited in the Petition and concludes that "[t]hese disclosures from *Yoshida* show that it teaches the claims' requirement of a 'feed-forward' determination of an 'initial position'" without further explanation. Req. Reh'g 13. These conclusory statements do not apprise us of error.

Petitioner further contends that "Patent Owner does not contest the fact that the 'target degree of opening' is obtained through a 'feed-forward' determination" (*id.*), but fails to explain why that should affect our Decision at this stage of the proceeding. *See* 37 C.F.R. § 108(c) ("*Inter partes* review shall not be instituted for a ground of unpatentability unless the Board decides that the petition supporting the ground would demonstrate that there is a reasonable likelihood that at least one of the claims challenged in the petition is unpatentable.").

IV. ORDER

For the reasons given, it is

ORDERED that Petitioner's Request is *denied*.

[4] This passage from Yoshida is referenced as corresponding to the step of "determining the air demand in response to a driver initiated signal." Pet. 24.

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