

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

I-BLASON LLC,
Petitioner,

v.

AEVOE CORP.,
Patent Owner.

Case IPR2016-00231
Patent 8,044,942 B1

Before JONI Y. CHANG, MICHAEL R. ZECHER, and
SHEILA F. McSHANE, *Administrative Patent Judges*.

McSHANE, *Administrative Patent Judge*.

DECISION

Denying Petitioner's Request for Rehearing
37 C.F.R. § 42.71(d)

I. INTRODUCTION

I-Blason LLC, (hereafter “I-Blason” or “Petitioner”) filed a Request for Rehearing (Paper 8, “Req. Reh’g”) of the Decision entered in this case (Paper 6, “Dec.”), in which we denied I-Blason’s Petition for *inter partes* review of claims 1, 2, 5, 7, and 11–14 of U.S. Patent No. 8,044,942 B1 (“the ’942 patent,” Ex. 1001). In its Request for Rehearing, I-Blason contends that, in the context of its challenges, (1) we misapprehended issues related to the “interference pattern” limitation; and (2) we erred in determining that there was insufficient evidence that the iVisor webpage is a printed publication within the meaning of 35 U.S.C. § 102. Req. Reh’g 1–8. I-Blason also contends we misapprehended or overlooked the supporting testimony of its Declarant, Mark Ross, Ph.D., and failed to afford appropriate evidentiary weight to this testimony. *Id.* at 2–5. For the reasons set forth below, I-Blason’s Request for Rehearing is *denied*.

II. DISCUSSION

A party requesting rehearing has the burden to show a decision should be modified by specifically identifying all matters the party believes we misapprehended or overlooked, and the place where each matter was addressed previously in a motion, opposition, or a reply. 37 C.F.R. § 42.71(d). When rehearing a decision on institution, we review the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion may be indicated if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors. *Star Fruits S.N.C. v. U.S.*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *Arnold P’ship v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004); *In re Gartside*, 203

F.3d 1305, 1315–16 (Fed. Cir. 2000). We address the I-Blason’s contentions outlined above in turn.

Alleged Misapprehension of Issues Relating to the Claim 1 Limitation of “Producing Visible Interference Patterns”

First, as to I-Blason’s assertion that we erred by failing to treat claim 1’s limitations of spacing of plastic film “near but not in contact with the touch screen portion” and “while preventing direct contact of a user’s fingers with the touch screen portion and without producing visible interference patterns during use,” as “relate[d] to each other by cause and effect,” we do not agree. See Req. Reh’g 2–3. In the challenge presented in the Petition, I-Blason did not allege that the claim limitations were related in that manner, so there could be no failure to apprehend the issue. In other words, we could not have misapprehended this argument because it was presented for the first time in the Request for Rehearing.

Second, I-Blason argues that Dr. Ross “inferred that Murphy does not produce visible interference patterns because Murphy forms a single air gap (rather than multiple bubbles).” Req. Reh’g 3–4. This issue was not argued in this manner in the Petition or Ross Declaration. Moreover, even if we were to consider this variation, we still would not be persuaded. The Decision indicated that there was a failure by Dr. Ross to “explain adequately why the interference patterns would not occur in Murphy.” Dec. 12. Even with the variation on the argument raised in this Request, we still find adequate explanation lacking. I-Blason states in a conclusory manner that “[t]o hold that there is a possibility that Murphy produces interference patterns without screen protector contact would contradict a [person of ordinary skill in the art’s] understanding of how interference

patterns such as Newton Rings are created,” citing to the background section of the Ross Declaration concerning bubble-free screen protectors. Req. Reh’g 4 (citing Ex. 1018 ¶¶ 19, 20). These references do little to aid in an understanding of how an air gap configuration would not necessarily produce interference patterns.

Finally, we are not persuaded by I-Blason’s argument that we misinterpreted the evidence because “the prevention of interference patterns has nothing to do with a special type of material or treatment alone, but rather, represents the effect of positioning the screen protector away from the screen (e.g., through anti-static forces),” and that we were misled by “believing that the interference patterns are caused by something other than placing the screen protector away from the screen.” Req. Reh’g 4–5. We note that the Petition itself argued that “the Ross Declaration states that the types of membrane film disclosed in Murphy could be manually actuated without producing interference patterns,” which implies that the type of material could be relevant to the formation of interference patterns.¹ Petition (“Pet.”), Paper 2, 22. In any event, our decision acknowledged that Murphy’s air gap might have the functionality of not producing interference patterns, however, the Petition failed to explain adequately why it would necessarily function in that manner. See Dec. 12. After consideration of I-Blason’s arguments, we maintain our initial determination that Murphy

¹ As noted in the Decision, we could not discern that the types of membrane films of Murphy were referred to by Dr. Ross in his discussion concerning interference patterns. Dec. 10 n.1. The Request for Rehearing does not address this issue.

does not disclose, either explicitly or inherently, the “interference pattern” limitation of claim 1.

Reconsideration of iVisor’s Public Availability

I-Blason requests that we reconsider the issue of whether the iVisor publication (Ex. 1005) is a printed publication within the meaning of 35 U.S.C. § 102. Req. Reh’g 7–8. I-Blason cites a Board decision that found that a web page with a note of “last modified on February 2, 1999” was a printed publication as of that date. *Id.* at 7 (citing *American Megatrends, Inc. v. Kinglite Holdings, Inc.*, Case IPR2015-01079, slip op. 11 (PTAB October 29, 2015) (Paper 17)). As we explained in the Decision (see Dec. 14), the evaluation as to whether a document is a printed publication is considered on a case-by-case basis. *See In re Klopfenstein*, 380 F.3d 1345, 1350 (Fed. Cir. 2004). Here, the iVisor document appears to be a type of web page that could be subject to frequent changes and updates. Moreover, other than unsubstantiated testimony from I-Blason’s counsel of record concerning a 2015 version of the document (Ex. 1019 ¶ 3), I-Blason provides no evidence to demonstrate that the version of iVisor filed in this proceeding was made publicly available in 2009. Upon reconsideration, we maintain our initial determination that I-Blason has failed to make a threshold showing that iVisor is a printed publication.

We, therefore, are not persuaded that we misapprehended or overlooked any matter in making our determination that I-Blason did not establish a reasonable likelihood of prevailing on its challenges as to claims 1, 2, 5, 7, and 11–14 of the ’942 patent.

III. CONCLUSION

For the foregoing reasons, I-Blason has not shown that we abused our discretion when determining not to institute an *inter partes* review as to claims 1, 2, 5, 7, and 11–14 of the '942 patent.

IV. ORDER

For the foregoing reasons, I-Blason's Request for Rehearing is *denied*.

IPR2016-00231
Patent 8,044,942 B1

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