

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RPX CORPORATION,
Petitioner

v.

SPYCURITY LLC,
Patent Owner.

Case IPR2018-00304
Patent 5,809,118

Before JONI Y. CHANG, TREVOR M. JEFFERSON,
and AARON W. MOORE, *Administrative Patent Judges*.

MOORE, *Administrative Patent Judge*.

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

I. INTRODUCTION

RPX Corporation (“Petitioner”) filed a Request for Rehearing of our Decision Denying *Inter Partes* Review (Paper 7, “Decision”) of claims 1–16 of U.S. Patent No. 5,809,118 (Ex. 1001, “the ’118 patent”). Paper 8 (“Req. Reh’g”). For the reasons that follow, the Request for Rehearing is denied.

II. STANDARD OF REVIEW

A party requesting rehearing bears the burden of showing that the decision should be modified. 37 C.F.R. § 42.71(d). The party must identify specifically all matters that were misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply. *Id.* When reconsidering 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 determined 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); *The Arnold Partnership v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004); *In re Gartside*, 203 F.3d 1305, 1315–16 (Fed. Cir. 2000).

III. ANALYSIS

Petitioner argues “[t]he Decision did not address Petitioner’s construction” of “creates a connection between the host system and the Internet” and “connect to the Internet,” “nor did it explicitly construe these terms,” which is said to be “error because the denial of institution relied on an implied construction of these terms that is both contrary to Petitioner’s uncontested construction and inconsistent with the intrinsic evidence.” Req.

Reh’g 1. Petitioner asserts that “[u]nder Petitioner’s proposed construction, the combination of Crawford and Dial-Up IP satisfies these terms and the Petition establishes at least a reasonable likelihood that the challenged claims are obvious.” *Id.*

The core of Petitioner’s argument is that “the Decision ultimately relied on an implicit construction of ‘creates a connection between the host system and the Internet’ requiring that the connection between the host system and the Internet itself be made via the Internet.” Req. Reh’g 2. Petitioner concludes that “[p]roperly interpreted and analyzed, the Petition shows how [the] dial back connection to the Crawford online service creates a connection to the Internet — not because the Internet is used to reach that service, but because that service itself serves as a conduit to the Internet.” *Id.* at 14.

Petitioner’s arguments are insufficient to show that we abused our discretion because (a) the Request for Rehearing does not address the reason why the Petition failed, and (b) we construed the Internet limitations broadly, found the limitations *satisfied* in the formulation of the combination we considered, and the formulation we considered was *more favorable* to Petitioner than the formulation advanced in the Request for Rehearing, which would not have met the claim limitations.

Why the Petition Failed

The Decision found that Petitioner’s combination failed due to the “absence of articulated, rational reasoning to support the substitution of the Dial-Up method of connection for the ‘call back’ described in Crawford.” Decision 14. In other words, the Decision found that Petitioner failed to provide a sufficient rationale for substituting the Dial-Up connection for the

conventional, point-to-point modem connection described in the Crawford embodiment that used the ring pattern to cause the user system to call the backup system. That problem remains, as the Request for Rehearing does not address the issue. The combination thus fails before one reaches the question of where in the combination a connection to the Internet might be found. This alone is a sufficient reason to deny the Request for Rehearing.

Claim Construction

Petitioner’s argument that we construed the claims to “require[e] that the connection between the host system and the Internet *itself* be made *via the Internet*” (Req. Reh’g 2) is incorrect. Petitioner appears to confuse the fact that we found the claims *satisfied* by such an arrangement in the combination to mean that we *required* the claims to have that arrangement.

Our Decision understood the Petition’s combination to contemplate Dial-Up IP being used to connect to the Internet and then to the backup service over the Internet (e.g., via relay.cs.net). *See* Decision 12. That understanding was drawn from the Petition, which states, for example, “Crawford, in view of Dial-Up IP, teaches creating a connection between the customer computer . . . and the Internet (*through an ISP server*) using a communication device . . . connected to the host system.” Petition 34 (emphasis added). Critically, however, the arrangement considered in the Decision *included* a “connection between the host system and the Internet,” as claimed, specifically an Internet link between the user and the backup system. Because we found the Internet connection claim language would be *satisfied* in the version of the combination we considered, Petitioner has no reasoned basis for complaining about the constructions.

In fact, the scenario now described in the Request for Rehearing is significantly weaker than that considered in the Decision. Petitioner now argues the user would use the Dial-Up IP technique to connect to the online backup service *directly* and that the backup service would then provide the Internet connection. See Req. Reh’g 14. Although Dial-Up IP employs the Internet Protocol, it is still a point-to-point connection “over dial-up phone lines” (Ex. 1007, Abstract), not a “connection between the host system and the Internet,” as claimed. Thus, under the theory of the Request for Rehearing, there is no Internet connection between the user and the backup system. Instead, Petitioner asserts that “the modified Crawford Online Service System served as a form of ISP that was itself connected to the Internet.” Req. Reh’g 4. We find no evidentiary support for this. To the very limited extent the Internet embodiment is mentioned in Crawford, it is described only as a backup system, presumably some sort of secure server that would be an Internet destination, not an Internet gateway. We find that one of ordinary skill in the art would have interpreted Crawford’s statement that that “[a]n on-line service as described in the exemplary embodiment of this invention could become a commercial provider on the Internet,” to mean it could become a “commercial provider” of *backup services*, not Internet access, which is not even present in the “exemplary embodiment.” See Ex. 1001, 3:37–60. The non-Internet backup system of Crawford’s Figures 3

and 4 does not provide an Internet gateway,¹ so it is unclear why an Internet based version would, particularly where Crawford specifically warns of security problems on the Internet. *See* Ex. 1001, 4:7–12.

The Decision thus considered a stronger case for Petitioner than that advanced in the Request for Rehearing. That stronger case was not enough, however, given the lack of an articulated reason to make the combination supported by a rational underpinning.

IV. CONCLUSION

For the foregoing reasons, Petitioner has not demonstrated that we abused our discretion in denying institution and, consequently, the Request for Rehearing is denied.

¹ Although the Koperda Declaration (Ex. 1019 ¶ 38) states that “Crawford describes how its online service system triggered a customer computer to establish a connection to the Internet through a phone line connection to the online service system (e.g., Crawford at Figs. 3 and 12C, and associated text),” the referenced portions of Crawford (15:59–16:29 (describing Fig. 3) and 36:26–37:58 (describing Fig. 12C)) do not identify any Internet connection provided by Crawford.

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