

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ROLAND CORPORATION,
Petitioner,

v.

INMUSIC BRANDS, INC.,
Patent Owner.

Case IPR2018-00396
Patent 8,785,758 B2

Before DEBRA K. STEPHENS, J. JOHN LEE, and
KAMRAN JIVANI, *Administrative Patent Judges*.

JIVANI, *Administrative Patent Judge*.

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

I. INTRODUCTION

Petitioner Roland Corporation¹ filed a Request for Rehearing under 37 C.F.R. § 42.71(d) (Paper 14 (“Req. Reh’g”) of our Decision Denying Institution of *inter partes* review of claims 1–21 (the “challenged claims”) of U.S. Patent No. 8,785,758 B2 (Ex. 1001, the “’758 patent”). Paper 13, 23 (“Dec.”). Petitioner also filed *fifty-eight* (58) new exhibits (Exs. 1027–1085) after we entered our Decision Denying Institution and relies on these in support of its arguments requesting rehearing. Reh’g Req. 3–8.

Having considered the Request for Rehearing, we determine that Petitioner has not shown that we abused our discretion in denying institution. We deny Petitioner’s request for the following reasons.

II. STANDARD OF REVIEW

37 C.F.R. § 42.71(d) provides that:

A party dissatisfied with a decision may file a 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, opposition, or a reply.*

See Office Trial Practice Guide, 77 Fed. Reg. 48756, 48768 (Aug. 14, 2012) (emphasis added). 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

¹ Petitioner identifies Roland US as a real party in interest. Pet. 1.

judgment.” *PPG Indus., Inc. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1567 (Fed. Cir. 1988) (citations omitted).

III. ANALYSIS

A. *Petitioner’s Fifty-Eight New Exhibits*

As an initial matter, we address whether Petitioner followed the proper procedure for admitting Exhibits 1027–1084 into the record of this proceeding. Petitioner filed these fifty-eight new exhibits on July 30, 2018, the day after we entered our Decision Denying Institution. Consequently, these exhibits were not of record at the time of our Decision.

The rule governing a rehearing request permits “[a] party dissatisfied with a decision . . . [to] file *a single request for rehearing* without prior authorization from the Board.” 37 C.F.R. § 42.71(d) (emphasis added). This rule does not address explicitly whether the requesting party also may file new evidence with its rehearing request. The *Office Patent Trial Practice Guide*, 77 Fed. Reg. 48,756 (Aug. 14, 2012) (“*Practice Guide*”), however, is instructive on this matter. When discussing general procedures applicable to rehearing requests, the *Practice Guide* states that “[e]vidence not already of record at the time of the decision will not be admitted absent a showing of *good cause*.” *Id.* at 48,768 (emphasis added). Ideally, a party seeking to admit new evidence with a rehearing request would request a conference call with the Board prior to filing such a request so that it could argue good cause exists for admitting the new evidence. Alternatively, a party may argue good cause exists in the rehearing request itself.

Here, Petitioner did not request a conference call with the Board prior to submitting Exhibits 1027–1085. Nor did Petitioner explain why these exhibits should be admitted in the Request for Rehearing itself. *See*

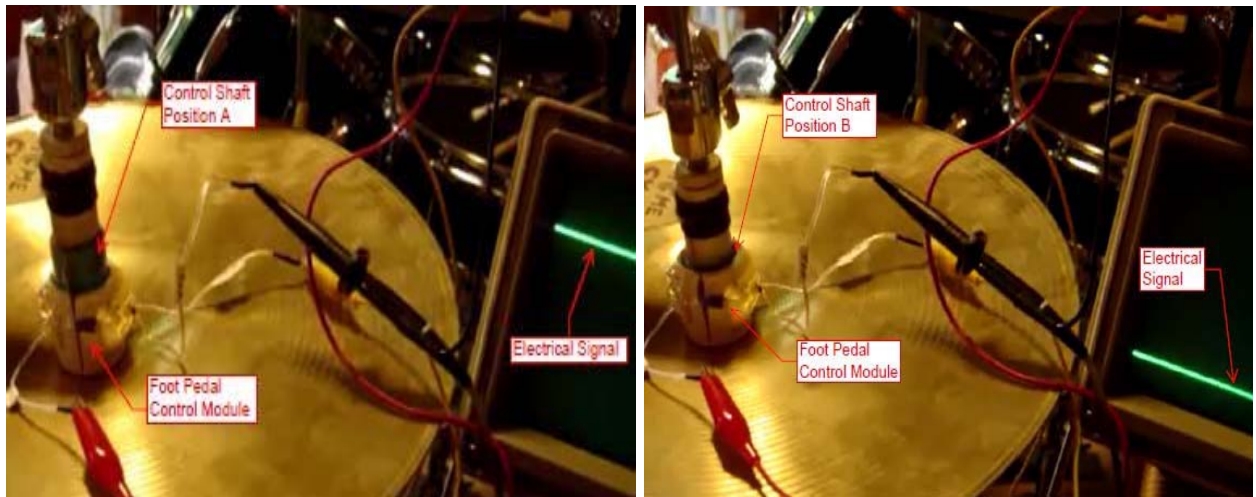
generally Req. Reh’g 1–10. Absent a showing of good cause prior to filing of the exhibits or in the Request for Rehearing itself, these exhibits should not be admitted and, therefore, they are not entitled to consideration. Consequently, we exercise our authority under 37 C.F.R. §§ 42.5(a) and 42.7(a) to expunge Exhibits 1027–1085.

B. Petitioner’s Arguments

In its Request for Rehearing, Petitioner argues that we erred in our Decision because: (i) “Exhibit 1016 shows a proportional relationship between the electrical signal generated by the foot pedal control module and the position of the control shaft;” and (ii) we “improperly relied on inappropriate dictionary definitions for [our] construction of ‘proportional.’” Req. Reh’g 3, 8 (emphasis omitted). We address each argument in turn.

1. Petitioner’s Assertions Regarding the Claimed Proportional Relationship

Petitioner contends, “[v]iewing Ex.1016, and specifically between the referenced time periods of 2:59 and 3:01, plainly shows the electrical signal generated by the foot pedal control module being in a constant relationship relative to the position of the control shaft.” Reh’g. Req. 4. Petitioner’s argument is an improper attempt to assert now arguments that it failed to make in its Petition. In its Petition, Petitioner asserts, “[s]creenshots taken at 2:59 and 3:01 of Segment 2 [of YouTubePost] show electrical signals on an oscilloscope at two different values (upper screen and lower screen values) proportional to two different positions of the shaft (positions A and B) relative to the foot pedal control module (light beam generator).” Pet. 27. Petitioner’s annotated screenshots are reproduced below.



Id. The foregoing screenshots, as annotated by Petitioner, show merely a representation on a monitor of an electrical signal in two positions and a control shaft of the Hi-Hat symbols in two positions. The accompanying cited narration indicates that a user may toggle between these two positions using a foot pedal at varying speed. Pet. 26–27 (citing Ex. 1013, 6:21–7:1). Petitioner makes no further attempt in the Petition to explain how these two signal representations meet the claimed proportional relationship. See Pet. 26–27, 32–33, 38–39, 43.

Our Decision Denying Institution addressed Petitioner’s failure to explain how these two signal representations meet the claimed proportional relationship. Dec. 19. Specifically, we stated:

Upon review of the arguments and evidence cited, we determine Petitioner has not addressed sufficiently how the YouTubePost discloses that the electrical signal proportional signal generated by YouTubePost’s foot pedal control module is *proportional* to the position of the control shaft relative to the foot pedal control module. . . . Here, the cited portions of YouTubePost and Petitioner’s corresponding argument, at best, show only that the electrical signal generated by YouTubePost’s foot pedal control module can be toggled between two positions,

either quickly or slowly. Pet. 26–27, 31–33. Dr. Paradiso’s testimony on this issue is unavailing because it merely repeats the statements of the Petition. *Compare id.*, with Ex. 1002, 25, 29–30.

Id.

In stark contrast to its earlier assertion, Petitioner now sets forth in its Request for Rehearing detailed arguments relying on fifty-eight new exhibits derived from Exhibit 1016 to show the claimed proportional relationship. Reh’g Req. 3–8. For example, Petitioner advances a new argument based on newly presented Exhibits 1027–1083 and X-Y-Z calculations based on the Pythagorean Theorem. *Id.* at 4. Petitioner argues that “simple X-Y-Z calculations based on Pythagorean Theorem further verify a constant, approximately linear relationship.” *Id.* As another example, Petitioner relies on newly presented Exhibit 1084, which is a chart plotting data extracted from YouTubePost and which features a newly presented “Trendline,” to argue that the data shows an approximately “linear relationship across the range of movement of the control shaft relative to the control module signal.” *See id.* at 6 (citing Ex. 1084).

A Request for Rehearing is not an opportunity to present new arguments and evidence. 37 C.F.R. § 42.71(d) (A request for rehearing “must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed.”). “Because we do not consider an argument made in a request for rehearing unless the request [specifically identif[ies]] . . . the place where [that argument] was previously addressed in a motion, an opposition, or a reply,” we do not consider Petitioner’s newly presented information here. *Commvault Sys., Inc. v. Realtime Data LLC*, IPR2017-

02178, 2018 WL 3490804, at *1 (July 19, 2018) (citing 37 C.F.R. § 42.71(d)). Under our rules, the Petition must contain a “full statement of the reasons for the relief requested, including a detailed explanation of the significance of the evidence” 37 C.F.R. § 42.22(a)(2). If the Petition does not demonstrate that there is a reasonable likelihood of success, then the Board shall not institute an *inter partes* review. See 37 C.F.R. § 42.108(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.”).

Because Petitioner failed to set forth its analysis of the claimed proportional relationship *in the Petition*, we are not persuaded that we erred in finding Petitioner’s analysis insufficient to show a reasonable likelihood of success on this anticipation challenge.

2. *Petitioner’s Assertions Regarding Claim Construction*

Independent claims 1, 8, and 15 each recite an “electrical signal” that “is *proportional* to the position of the control shaft relative to the foot pedal control module.” Ex. 1001, 5:32–34, 6:4–6, 6:37–39 (emphasis added). We construed the term “proportional” as “requiring a constant relationship, such as, for example, a linear relationship.” Dec. 16. In so doing, we found that “the claims and Specification of the ’758 patent do not elaborate on [the] nature of the control signal generated by the foot pedal control module beyond describing one embodiment in which the signal is ‘proportional to the plunger 116 position to the drum synthesizer through the cables.’” *Id.* (citing Ex. 1001, 4:30–33). We further found that “[t]he prosecution history also does not explicitly define the term ‘proportional;’ however, the

Examiner relies on the ‘position-proportional signal’ as a reason for allowance of the claims.” *Id.* (citing Ex. 1005, 6). Recognizing that “[a]lthough extrinsic evidence ‘is generally of less significance than the intrinsic record’ in matters of claim construction,” we turned to “certain extrinsic evidence [to] inform[] our construction in the absence of a more fulsome intrinsic record.” *Id.* at 16–17 (citing *Wi-LAN, Inc. v. Apple Inc.*, 811 F.3d 455, 462 (Fed. Cir. 2016)). In particular, we relied upon “a relevant technical dictionary, namely *The Authoritative Dictionary of IEEE Standards Terms*,” to “show the common understanding that usage of term ‘proportional’ when used to describe an electrical signal indicates the signal maintains a constant relationship, such as, for example, a linear relationship.” *Id.* at 17 (citing Ex. 3001, 690, 879–80). We also observed that the dictionary.com “definition Patent Owner proffers supports our construction of ‘proportional’ as requiring a constant relationship.” *Id.* (citing Ex. 2002).

Petitioner takes issue with our reliance on *The Authoritative Dictionary of IEE Standard Terms* and recognition of Patent Owner’s proffered dictionary definition because “[t]he ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question *at the time of the invention*, i.e., as of the effective filing date of the patent application.” Reh’g. Req. 9 (citing *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005)). According to Petitioner, “the proper dictionary to consult is one that was publicly available at the time of the invention, when the ordinary and customary meaning is determined.” *Id.* (citing *Cornell Univ. v. Hewlett-Packard Co.*, 313 F. Supp. 2d 114, 126 (N.D.N.Y. 2004)). Petitioner suggests that the

proper dictionary definition would be one from “the time of the invention,” i.e., in the 2010–2011 time frame.” *Id.*

Petitioner’s arguments is not persuasive. *The Authoritative Dictionary of IEEE Standards Terms* cited in our Decision was published in 2000 and, therefore, was available in 2010. Ex. 3001. Petitioner does not argue and does not proffer evidence showing a change in the ordinary meaning of the term “proportional” from its definition by the IEEE in 2000 and “the time of the invention” that Petitioner alleges. To the contrary, Patent Owner’s proffered *dictionary.com* definition, last accessed in 2018, shows the opposite—namely, that the plain and ordinary meaning of the term has not changed since 2000 because the *dictionary.com* definition “supports our construction of ‘proportional’ as requiring a constant relationship.” Dec. 17 (citing Ex. 2002).

Petitioner includes in its argument, for the first time, a proposed construction of the claim term proportional. Reh’g. Req. 10. A Request for Rehearing is not an opportunity to present new arguments and evidence. 37 C.F.R. § 42.71(d). Further, Petitioner fails to support to its proposed construction with *any* evidence. *See* Reh’g. Req. 10. Moreover, Petitioner fails to identify *any* evidence, either intrinsic or extrinsic, that refutes our construction of the term “proportional.” *See generally* Reh’g. Req. Indeed, despite Petitioner’s instance that we rely only upon a dictionary definition from “the time of the invention,” Petitioner fails to proffer any dictionary definitions supporting its new theory or refuting our construction. *Id.*

For the foregoing reasons, we are not persuaded that we erred in construing the term “proportional,” as recited in independent claims 1, 8, and 15.

IV. CONCLUSION

Having considered Petitioner's arguments and the evidence properly of record, Petitioner has failed to show that we misapprehended or overlooked arguments or evidence in our Decision Denying Institution. Petitioner, therefore, has not demonstrated that we abused our discretion in denying institution.

V. ORDER

Accordingly, it is hereby:

ORDERED that Petitioner's Exhibits 1027–1085 are *expunged* from the record of this proceeding; and

FURTHER ORDERED that Petitioner's Request for Rehearing is *denied*.

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