

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CISCO SYSTEMS, INC.,

Petitioner

v.

CENTRIPETAL NETWORKS, INC.,

Patent Owner.

Case IPR2018-01506

Patent 9,137,205 B2

Before BRIAN J. McNAMARA, STACEY G. WHITE, and
JOHN P. PINKERTON, *Administrative Patent Judges*.

McNAMARA, *Administrative Patent Judge*.

DECISION

Denying Petitioner's Request for Rehearing of
Denial of *inter Partes* Review
37 C.F.R. § 42.71(d)

INTRODUCTION

On April 5, 2019, Cisco Systems, Inc. (“Petitioner”) requested rehearing of our Decision Denying Institution of *Inter Partes* Review of U.S. Patent No. 9,137,205 B2 (Paper 7, “Decision”) entered on March 6, 2019. *See* Paper 8 (“Req. Reh’g”).

The burden of showing a decision should be modified lies with the party challenging the decision. 37 C.F.R. § 42.71(d). 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, an opposition, or a reply. *Id.* When reconsidering an institution decision, we look for an abuse of discretion, which may be found if there was (1) an erroneous interpretation of law, (2) a factual finding not supported by substantial evidence, or (3) unreasonable judgment in weighing relevant factors. *See* 37 C.F.R. § 42.71(c); *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). For the reason discussed below, Petitioner’s Request for Rehearing is denied.

ANALYSIS

In our Decision, we determined Petitioner did not provide sufficient evidence to establish that Ex. 1012 (“Ingate”) constitutes a prior art reference for purposes of *inter partes* review. Dec. 13–20. Petitioner’s Request for Rehearing asserts that in reaching our Decision we erred (i) by focusing our “analysis on whether the evidence showed Ingate was ‘meaningfully indexed’” and “overlooking that Ingate was accessed *in fact* by at least one member of the relevant public” (*see* Req. Reh’g 1, 5–10) and (ii) by failing to draw all inferences

in favor of Cisco in deciding whether Ingate was accessible to the public (*id.* at 10–15).

The burden of coming forth with evidence demonstrating that Ingate is a prior art reference is on Petitioner. *Acceleration Bay, LLC v. Activision Blizzard Inc.*, 908 F.3d 765, 772 (Fed. Cir. 2018) (petitioner has the burden of proving a reference is a printed publication). Petitioner argues that evidence of actual dissemination to at least one member of the public is sufficient to show Ingate was accessible to the public and “was meaningfully indexed.” Req. Reh’g 5–7. Petitioner contends statements made by Scott Beer that the Ingate reference “was published to the Ingate website and publically available on or around September 2, 2008” (Ex. 1023, Declaration of Scott Beer (“Beer Decl.”) ¶ 5) are corroborated by the date printed on the Ingate reference, 2008 metadata associated with the Ingate reference, the absence of confidential markings on the Ingate reference, Mr. Beer’s lack of bias and his familiarity with the subject matter of the Ingate reference, the lack of impeachment testimony, and the declaration of Petitioner’s counsel Christopher Davis. Req. Reh’g 7–8.

Mr. Davis testified that (i) in the process of preparing the Petition filed on June 25, 2018 (Paper 3), he accessed the Ingate reference at the web address http://www.ingate.com/appnotes/Ingate_Security_Best_Practices.pdf (“the Link”), (ii) he downloaded Adobe metadata indicating the Ingate reference was generated on September 2, 2008 in Word, and (iii) he located an article by K.V.N.R. Sai Krishna titled Safety Dimensions of Session Initiation Protocol published in the August 2013 *Journal of Computer Science and Mobile Computing* (“the Krishna Article”) that cites the Ingate reference in footnote 32 (footnote 32 includes a parenthetical stating that the author accessed the Ingate reference on April 4, 2012 using the Link). Ex. 1021 ¶ 5 (citing Ex. 1022 n.32).

According to Petitioner, we “overlooked how each piece of evidence corroborates the other to show that an interested member of the relevant public exercising reasonable diligence[] not only could . . . , but actually did locate Ingate.” Req. Reh’g 9. Petitioner argues

when the evidence is considered as a whole and in a light favorable to Cisco, the 2013 date of the article and Beer’s and Davis’ testimony corroborate the April 2012 access date. The web address for Ingate in the Krishna article matches the web address in Beer’s and Davis’s declarations, corroborating Beer’s testimony that the article was made available at that address in 2008.

Id.

The date on the front page of the Ingate reference (there is no copyright notice) is not evidence of when (or if) the reference became accessible to the public. As there was no evidence of confidential markings, bias, or impeachment of Mr. Beer and we did not draw any negative inferences in our Decision based on these factors. We based our Decision on the evidence proffered by Petitioner, i.e., the testimony of Mr. Beer, the testimony of Mr. Davis, and the associated documents. As discussed below, the Request for Rehearing does not identify any information we overlooked or did not consider in its proper context. We cited the Beer Declaration and the Davis Declaration extensively in our Decision. Dec. 14–16. Nevertheless, as a whole, we found the testimony unpersuasive on the issue of public accessibility, even when viewed in the light most favorable to Petitioner.

Mr. Beer, the author of the Ingate reference, baldly asserted “the Ingate reference was published to the Ingate website and publically available on or around September 2, 2008.” Ex. 1023, Beer Decl. ¶ 5. As we noted in our Decision, Mr. Beer’s testimony lacks the requisite specificity concerning the posting of his article to the website:

Although Mr. Beer states that he has “personal knowledge regarding the content and publishing of the Ingate reference,” Mr. Beer does not assert that, except for his authorship, he had any role in publishing the Ingate reference. Ex. 1012, Beer Dec. ¶¶ 3–6. Mr. Beer does not state that he personally placed the Ingate reference on Ingate’s publically accessible website. *Id.* Mr. Beer offers no testimony as to what the legend “Ingate – Partner Information Guide” means or how the Ingate reference would have been published on the website, such that it would have been accessible to the public in the relevant time frame. *Id.* Mr. Beer provides no information about Ingate’s procedures for reviewing and approving articles prior to publication on Ingate’s website. Mr. Beer also does not describe how such articles were posted to the website, e.g., Mr. Beer does not describe procedures Ingate followed to load the reference to a publically accessible location, to assign a link to that location, who was responsible for carrying out such procedures, how long such procedures would have taken, how the reference would have been known to the public, or how an interested person would search for the Ingate reference.

Dec. 17–18. Mr. Beer’s testimony that the Ingate reference was accessible at the website provides insufficient facts from which we can conclude the Ingate reference was accessible to interested members of the public. Although the Rehearing Request criticizes our Decision as focused on “indexing” (Req. Reh’g 9–10), our comments on indexing concern the factual deficiencies in Mr. Beer’s declaration concerning how a member of the public would have known about or located the Ingate reference:

Mr. Beer’s Declaration also fails to address how, or if, the Ingate reference was indexed, or who was responsible for such indexing, such that interested members of the relevant public could obtain the information. For example, Mr. Beer’s declaration is silent about whether the website included any search feature or how keywords or other indicia would have been assigned to the Ingate reference to facilitate its identification by an interested person.

Dec. 18. Petitioner's Request for Rehearing does not identify any overlooked testimony from Mr. Beer addressing the factual deficiencies our Decision identified in his Declaration.

Petitioner argues that Mr. Beer's declaration that his article was posted to the website in September 2008 is corroborated by the testimony of Mr. Davis. Req. Reh'g 7. In our Decision, we noted that Mr. Beer's testimony stating that the Ingate reference was "published to the Ingate website" and that he "understand[s] that it is still available at [the Link]" (Ex. 2023 ¶ 5) does not state explicitly that the Ingate reference was published at the Link. Dec. 18. Indeed, Mr. Beer does not even state when he became aware of the Link or the basis of his understanding that the Ingate reference is "still available" at the Link. Petitioner argues Mr. Davis' testimony that Ingate currently is found at the same address as that in the Beer declaration corroborates Mr. Beer's testimony. Req. Reh'g 14. The Beer and Davis declarations are both dated July 27, 2018. Ex. 1021, 4; Ex. 1023, 3 (unnumbered). As Mr. Davis accessed the Link while preparing the Petition filed on July 25, 2018, Mr. Davis' testimony corroborates only the fact that the Ingate reference was actually available at the Link on the date Mr. Davis accessed it in 2018. Access by Mr. Davis at the Link in 2018 does not corroborate Mr. Beer's testimony that the Ingate reference "was published to the Ingate website" in 2008.

Petitioner contends that we overlooked or erred in assessing as further corroboration Mr. Davis' testimony that he located the Krishna Article published in 2013 with footnote 32 stating Krishna accessed the Link on April 4, 2012. Req. Reh'g 8–9. Petitioner states that we "pointed to no reason to doubt the accuracy of Krishna's citation; nor did Patent Owner rebut the evidence." Req. Reh'g 9. Throughout the Rehearing Request, Petitioner assumes the Krishna article is evidence of actual access of the Ingate reference before the priority date of the '205

patent. *See, e.g., id.* at 3, 5, 9, 12. Petitioner argues that we “improperly discredited the Krishna article because Cisco did not show “evidence addressing how the author obtained or located the Link or if Ingate was ‘meaningfully indexed.’ Paper 7 at 19 (citing *Acceleration Bay*, 908 F.3d at 774).” Req. Reh’g 9.

The Krishna Article is an out of court statement, not subject to cross examination, that Petitioner relies upon to assert the truth of the matter asserted, i.e., that the Ingate reference was accessible to the public at least as early as April 4, 2012. Thus, the Krishna Article is hearsay for the purpose of establishing the date Ingate was accessible to the public and is not reliable evidence on that issue.

As authority for its position that the Krishna Article corroborates Mr. Beer’s testimony that the Ingate reference was accessible to the interested public before the priority date of the ’205 patent, Petitioner cites *Amazon.com, Inc. v. AC Techs. S.A.*, IPR2015-01803, Paper 32. Req. Reh’g 6–7. Petitioner notes that in *Amazon* “petitioner (1) submitted a declaration from the author of a prior art publication testifying that the publication was posted to a specific webpage before the priority date of the patent in question, and (2) corroborated that testimony by citing an IEEE article footnote that cited the publication.” *Id.*

Although Petitioner refers to “similar evidence” in the case before us (*id.* at 7), Petitioner fails to recognize important distinctions. In *Amazon*, the author of a December 1998 IEEE article (Rabinovich) was one of the authors of the article identified in the footnote (footnote 16, citing a March 1998 AT&T Technical Memorandum available on an AT&T website). *Amazon*, Ex. 1011, 5, 13. The petitioner in *Amazon* avoided the hearsay problem concerning the footnote in the 1988 IEEE article and overcame the deficiencies discussed above in the Beer declaration by obtaining Dr. Rabinovich’s testimony concerning his personal involvement in managing the posting of the earlier article referenced in the

footnote. *Id.* Ex. 1004 ¶¶ 3–8. In its Final Written Decision, the panel noted: “We credit the unrebutted testimony of Dr. Rabinovich regarding the consistency of his professional practice in 1998 for republication of his AT&T technical memoranda on a webpage that he managed on AT&T’s publicly accessible website.” *Id.* Paper 32, 12. In the case before us, we have no similar testimony from Krishna concerning his access of the Ingate reference or from Mr. Beer concerning his role, other than his authorship, in posting the Ingate reference to the website. Thus, footnote 32 in the Krishna Article, does not corroborate the testimony of Mr. Beer under *Amazon*.

Petitioner also argues that when Mr. Davis accessed the Link, he obtained Adobe Acrobat metadata indicating that the Ingate reference was created on September 2, 2008. Ex. 1021, 2–3. As we noted in our Decision, the metadata concerns the document properties of the Ingate reference, but there is no metadata evidence in the record concerning dissemination or accessibility of the Ingate reference.

Petitioner contends that our Decision overlooks the evidence as a whole. Req. Reh’g 9. As discussed above, the Beer Declaration fails to provide sufficient facts concerning how the Ingate reference was posted to the website and made accessible to the public. Mr. Davis’ testimony concerning his accessing of the Link in 2018, the metadata concerning the document properties of the Ingate reference, and the citation in footnote 32 of the Krishna Article do not corroborate Mr. Beer’s testimony that the Ingate reference was accessible to the public on any particular date.

The party seeking to introduce the reference “should produce sufficient proof of its dissemination or that it has otherwise been available and accessible to persons concerned with the art to which the document relates and thus most likely

to avail themselves of its contents.” *In re Wyer*, 655 F.2d 221, 227 (CCPA 1981). We are not persuaded that taken as a whole, the Beer Declaration, the Davis Declaration, and the related evidence presented by Petitioner satisfy Petitioner’s burden to make a threshold showing that the Ingate reference was disseminated or otherwise available to persons concerned with the art. Thus, we are not persuaded Petitioner has demonstrated a basis for revising our Decision that the Petition and the evidence submitted with the Petition failed to demonstrate the Ingate reference constitutes a prior art printed publication for purposes of instituting *inter partes* review.

In consideration of the above, Petitioner’s request for rehearing is DENIED.

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