

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BLACKBERRY CORP.,
Petitioner,

v.

FACEBOOK, INC.,
Patent Owner.

Case IPR2019-01593
Patent 6,356,841 B1

Before, MIRIAM L. QUINN, SCOTT C. MOORE, and JASON M. REPKO,
Administrative Patent Judges.

QUINN, *Administrative Patent Judge.*

DECISION

Denying Petitioner's Request on Rehearing of
Decision Denying Institution of *Inter Partes* Review
37 C.F.R. § 42.71(d)

I. INTRODUCTION

On March 3, 2020, we issued a Decision Denying Institution of *Inter Partes* Review. Paper 7 (“Dec.”). We exercised our discretion under 35 U.S.C. § 314(a) and denied the Petition based on our determination that Petitioner has only demonstrated a reasonable likelihood of prevailing as to three claim challenges (out of 17).¹ Dec. 39–40. Petitioner filed a Request for Rehearing challenging several aspects of our Decision. Paper 8 (Req. Reh’g). In particular, Petitioner challenges our determination of the scope of “Global Positioning System data” (hereinafter “GPS Data”) a term recited in independent claim 23. Req. Reh’g 3–6. Petitioner further challenges our determination concerning the term “range of acceptable values,” recited in claim 23. *Id.* at 10–12. Thus, Petitioner argues, based on the correct interpretation of “GPS data” and “range of acceptable values,” we should have instituted trial because it demonstrated a reasonable likelihood of prevailing as to four or five out of eight challenged claims.² Req. Reh’g 13.

According to 37 C.F.R. § 42.71(d), “[t]he burden of showing a decision should be modified lies with the party challenging the decision,” and the “request must specifically identify all matters the party believes the Board misapprehended or overlooked.” The burden here, therefore, lies with Petitioner to show we misapprehended or overlooked the matters it requests

¹ We use the term “claim challenges” to reflect that Petitioner challenged claim 12, 15, 16, 23, and 25–28 (a total of 8 challenged claims) with some of those claims challenged under multiple grounds thus totaling 17 different claim challenges.

² Petitioner performs the calculation of challenges differently by tallying only the number of challenged claims, irrespective of the multiple grounds asserted for each claim.

that we review. We are not persuaded that Petitioner has shown that we misapprehended or overlooked the matters raised in the Request for Rehearing.

A. “GPS DATA”

In our Decision we determined that the term “GPS data,” as recited in claim 23 refers to location. Dec. 8–10. We relied on the Specification and the testimony of Patent Owner’s declarant, Dr. Schmandt. *Id.* (citing Ex.1001, 1:11–16, 1:35–40, 2:58–61, 2:67–3:2; Ex. 2001 ¶¶ 85–87). Petitioner argues that neither party provided a construction for the GPS-data term. Req. Reh’g 5. Petitioner also argues that “it was apparent from the parties’ analysis that the petition applied the term ‘GPS data’ to include data that is *derived from* and representative of GPS coordinates and time stamps and that the POPR limited the term GPS data to the GPS location information supplied from a GPS receiver.” *Id.* (internal citations omitted).

We do not agree with Petitioner’s assessment of the claim construction issue. Patent Owner explicitly addressed the construction of the term, a fact we acknowledged in our Decision. Dec. 8 (citing Prelim. Resp. 29–30). Petitioner did not address the scope of the term explicitly or implicitly. And it was *not* apparent from any of the now-cited portions of the Petition that Petitioner contended a scope of the term to include data that is derived from and representative of GPS coordinates and time stamps. Petitioner’s argument attempts to characterize its *omission* of a contention regarding claim construction as an oversight on our part. The argument is not persuasive as it is Petitioner’s burden to show *in the Petition* its contentions regarding how the challenged claim *is to be construed* and how,

so construed, the claim is rendered obvious by the asserted references. *See* 37 C.F.R. § 42.104(b)(3)–(4). Therefore, we could not have either overlooked Petitioner’s position on claim construction, since none was provided, or misapprehended a position of claim scope not made explicit.

Nevertheless, Petitioner insists that the Specification alludes to other types of information that are GPS data, such as idle time. The portions of the Specification that Petitioner now cites, however, do not show that the GPS data is not, at a minimum, location information. As we stated in our Decision, other types of data may be transmitted from the remote unit to the central location, but the GPS data does refer to location information. Dec. 9. Moreover, Petitioner points out that the Specification discusses vehicle speed, idle time, movement, and actual windshield time as examples of calculated values, arguably from GPS location and time information. Req. Reh’g 3. But the Specification actually refers to these values to determine exceptions to be logged and noted (Ex. 1001, 4:41–49, 4:65–67, 6:1–3), which proves only that the system may use non-GPS data, in combination with GPS data, to determine exceptions.

We acknowledge that claim 23’s recitation of GPS data could seem, at first blush, to potentially encompass every comparison that the Specification explains. Claim 23, however, must be interpreted in a manner that accounts for the recited two-part structure. In the first part, the claim recites a first comparison that involves the GPS data; and in the second part, the claim recites the second comparison that does not mention GPS data. Our analysis of the term GPS data in our Decision did *not* assume that the two comparisons involved the same data, e.g., GPS data. This is where Petitioner disagrees with our assessment, because it urges us to construe

GPS data as including values and information recited in the second comparison, i.e., the idle time or recited “stationary time.” Petitioner’s position cannot be correct because the claim does not require that the “stationary time” also be GPS data. Further, the comparison that claim 23 recites with respect to GPS data does not mention exceptions at all, so it does not follow that all the Specification’s descriptions of exceptions encompass GPS data. The second comparison recited in claim 23 (comparing the stationary time to a predetermined stationary time), in contrast, is expressly performed for the purpose of noting an exception. Claim 23 (“if the length of time that the remote unit remains in a stationary position is greater than the predetermined stationary time, the system notes an exception.”). Thus, Petitioner, even in arguing for the first time its claim construction position, has not shown that *derived* data must also be GPS data according to the plain reading of the claim language. Consequently, having reviewed Petitioner’s arguments, we are not persuaded that GPS data means data that is derived from and representative of GPS coordinates and time stamps, as argued for the first time in the Request for Rehearing.³

Petitioner also argues that we “overlooked the fact that the idle-time-to-stationary-time-parameter comparison is an indirect comparison of the GPS data received at the central location to the stationary time parameter.” Req. Reh’g 5. According to Petitioner, “idle time may have a different value

³ Is worth noting here that Petitioner does not cite the Specification at column 6, lines 44–46, which states: “All G.P.S. data received in the In-Vehicle Control Unit (ICU) from the G.P.S. receiver includes the G.P.S. signal status information.” The ’841 patent Specification here addresses GPS data explicitly as data output by the GPS receiver.

from the values of GPS data.” *Id.* This argument of the claim encompassing an “indirect comparison” was not made in the Petition, and, therefore, we could not have overlooked it. Furthermore, Petitioner’s argument ignores our determination that the remote unit may transmit other data (non-GPS data), which results in the central location having information in addition to location with which to determine other exceptions (in accordance with the second recited comparison).

We also are not persuaded by the argument that, because “neither party has proposed a construction of GPS data, trial should be instituted so that this issue can be addressed and developed through the presentation of evidence and argument.” Req. Reh’g 4. First, we disagree with Petitioner’s assertion because Patent Owner expressly raised the claim construction issue. Second, the fact that Patent Owner raised the claim construction issue in the Preliminary Response should have put Petitioner on notice that the issue would be addressed at the institution stage. The Board’s rules provide for an opportunity for Petitioner to file a reply that addresses issues raised in the preliminary response for good cause shown. *See* 37 C.F.R. § 108(c). Petitioner did not request leave to file a reply. Therefore, although we acknowledge that we had a limited record before us, we are guided by the ultimate burden on Petitioner to clearly put forth its contentions in the Petition and to show a reasonable likelihood of prevailing. In any event, arguing that we should grant trial notwithstanding our determination of no reasonable likelihood is contrary to our statutory mandate. 35 U.S.C. § 314(a).

Because we are not persuaded that we misapprehended or overlooked Petitioner’s arguments and contentions regarding the proper scope of GPS

data, we are not persuaded by Petitioner’s arguments challenging our determination that the Petition failed to show by a reasonable likelihood that Dean teaches the limitations of claim 23 in this regard.

B. LEMELSON’S GPS DATA CONTENTIONS

Petitioner argues that we overlooked the Petition’s mention of “records” or “parameters” in Lemelson constituting GPS data. Req. Reh’g 8. Petitioner argues that “Lemelson unequivocally discloses that the GPS data received from the remote units is compared to a range of acceptable values,” because Lemelson describes “location” as data received from the remote units. *Id.* at 8–10. Petitioner takes issue with our explanation in the Decision where we find that Lemelson’s discussion of “location” does not show that the transmitted data contains the location. *See* Dec. 32–33 (stating that the Petition is “carefully drafted” to assume that Lemelson transmits location, but that under our reading of Lemelson, the transmission does not include the location data).

We are not persuaded that we overlooked the Petition’s discussion of Lemelson’s location, because we discussed every embodiment that Petitioner cited for the comparison step and involving the alleged “location” in Lemelson (discussed in the Petition at pages 40–41). Dec. 30 (citing Ex. 1005, 9:51–59, 14:36–42, 23:29–58, and additionally Figs. 13, 23, 24, 8:12–15, 22:3–7, 23:28–58, 17:54–18:10). We determined that none of the embodiments relied on, according to the statements made in the Petition, and including the portions that Petitioner now asserts we overlooked, showed a transmission of the location. *Id.* at 30–34. Petitioner urges that we revise our view of Lemelson in preference of Petitioner’s characterization of a

“big-picture description” of Lemelson. Req. Reh’g 9. This does not show that we overlooked Petitioner’s contentions or the cited evidence. Rather, this shows a disagreement with our understanding of Lemelson in light of Petitioner’s vague contentions, which we noted in our Decision. *See* Dec. 34 (finding that Petitioner failed to explain with particularity the grounds and evidence that supports the grounds under 35 U.S.C. § 312(a)(3)(2018)). Accordingly, we are not persuaded by Petitioner’s arguments concerning Lemelson and the “GPS data” recited in claim 23.

C. “RANGE OF ACCEPTABLE VALUES

Petitioner also contends that it presented, for claim 23, an “alternative” argument in which Dean compares GPS locations with a “range of acceptable values” in the form of areas of a map. Req. Reh’g 10–12. Petitioner contends that we overlooked or misapprehended that the ’841 patent identifies areas of a map as a “range of acceptable values.” *Id.* at 10. Petitioner argues that the Specification supports this position because, at column 4, lines 50 to 55, the Specification states that the “system also includes provisions for monitoring certain regions by placing a parameter around those *areas or regions*.” *Id.* at 11 (referring also to monitoring a region and that when a vehicle fails to reach a region (for example a client site) an exception would be noted). Petitioner further argues that we overlooked that Dean’s central office compares GPS location data to job-assignment locations noted graphically on a map. *Id.* Petitioner notes that its declarant opined that each of Dean’s job locations “would encompass a range of GPS location values to account for the fact that a single job location might be large enough to encompass plural GPS location values, for example, if there are multiple parking spots on site.” *Id.* (quoting

Ex. 1006 ¶ 72). Because Petitioner's expert opinion is un rebutted, Petitioner argues trial should be instituted. *Id.* at 12. But, if there is any opinion by Patent Owner's declarant on this issue, Petitioner argues that whether the job locations constitute a range of acceptable values "creates a genuine issue of material fact that must be resolved in favor of the petitioner at the pre-trial stage." *Id.*

We are not persuaded by Petitioner's arguments. First, the Petition does not explain Petitioner's contention that a "range of acceptable values" as a job location would be equivalent to examples of the '841 patent. This argument is presented now for the first time, and, therefore, is untimely. We could not have overlooked or misapprehended Petitioner's contention that a map location (job site) would encompass a "range of acceptable values" because Petitioner did not put forth any construction for that term with the alleged '841 patent Specification support.

Second, Petitioner now alludes to the notion that a job location is not a *single* GPS pinpoint. Req. Reh'g 11. Again, that notion was not explained in the Petition and was not expressed in the supporting declaration in any meaningful manner such that we would be able to rely on it as an issue of fact to resolve in favor of Petitioner. Paragraph 72 of Exhibit 1006 (Caloyannides Declaration) is copied verbatim in the Petition, and there is no further explanation that a person of ordinary skill in the art would have understood that Dean's specific map location would constitute a "range of acceptable values." Thus, we could not have overlooked a fact not presented. To the extent Petitioner now argues that we should have discerned this fact from the conclusory opinion of the expert, we are not persuaded that we misapprehended the content of the Petition. Petitioner has

the burden to show a reasonable likelihood of prevailing. And we noted in our Decision that Petitioner had not been persuasive in its contention of how a discrete map location (or a list of such locations) would constitute a “range of acceptable values.” Dec. 23 (“Petitioner has not shown persuasively that a discrete value teaches a range of acceptable values. And likewise, Petitioner has failed to show that a list of discrete values teaches a range of acceptable values.”). If the only support for this proposition is the conclusory opinion of Petitioner’s declarant, then all we have are unpersuasive conclusions lacking adequate factual support and explanation.⁴

Furthermore, putting aside the issue of a “range” and Dean’s GPS locations, we note that Patent Owner also raised sufficient doubt as to Petitioner’s contention regarding the “acceptable values” of the alleged “range” in Dean. According to Patent Owner, the distinction between “business” and “personal” purposes does not by itself teach that the system assesses acceptable values or otherwise. Prelim. Resp. 34–35. Perhaps the contention Petitioner meant to make was that a “business” purpose assumption would mean that a job location is within an “acceptable value,” while the “personal” purpose would mean that a location was not in the range of “acceptable values.” But the Petition does not explain this either. In any event, we are not persuaded that Petitioner has shown that we misapprehended or overlooked its contentions regarding a “range of

⁴ The conclusion that multiple parking spots at a job location would constitute a range of GPS location values is also factually unsupported by either Dean or any source. There is no explanation in the record that at the time of the invention or Dean’s disclosure (1999), the GPS location resolution and accuracy would allow for parking spots at a particular job site to each be a GPS location value.

acceptable values,” as those contentions were not explained sufficiently and were not factually supported in the record before us.

In sum, because we are not persuaded that we misapprehended or overlooked Petitioner’s arguments and contentions regarding the scope of “range of acceptable values,” we are not persuaded by Petitioner’s arguments challenging our determination that the Petition failed to show by a reasonable likelihood that Dean teaches the limitations of claim 23 in this regard.

D. EXERCISE OF DISCRETION

Petitioner argues that if its “request for rehearing is granted and the Board determines that there is a reasonable likelihood of petitioner prevailing with respect to claim 23, then there would be a reasonable likelihood of petitioner prevailing on at least: both independent claims, 4 of the 8 challenged claims, and portions of 2 of the 3 proposed grounds of unpatentability.” Req. Reh’g 13. We are not granting the request for rehearing as none of Petitioner’s arguments have been persuasive to show that we misapprehended or overlooked the alleged matters. Our determination concerning the exercise of discretion in our Decision, therefore, is unaltered and the outcome of that determination continues to be that the Petition is denied.

II. ORDER

Petitioner’s Request for Rehearing is *denied*.

IPR2019-01593
Patent 6,356,841 B1

PETITIONER:

Robert C. Mattson
John S. Kern
OBLON, MCCLELLAND, MAIER & NEUSTADT, LLP
CPDocketMattson@oblon.com
CPDocketKern@oblon.com

PATENT OWNER:

Heidi L. Keefe
Andrew C. Mace
COOLEY LLP
hkeefe@cooley.com
amace@cooley.com