

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LIGHTSPEED COMMERCE INC.,
Petitioner,

v.

CLOUDOFCHANGE, LLC,
Patent Owner.

IPR2022-00997
Patent 10,083,012 B2

Before HUBERT C. LORIN, JEREMY M. PLENZLER, and
CARL M. DEFRANCO, *Administrative Patent Judges*.

PLENZLER, *Administrative Patent Judge*.

DECISION
Granting Institution of *Inter Partes* Review
35 U.S.C. § 314

I. INTRODUCTION

A. Background and Summary

Lightspeed Commerce Inc. (“Petitioner”) filed a Petition requesting *inter partes* review of claims 1–20 of U.S. Patent No. 10,083,012 B2 (Ex. 1001, “the ’012 patent”). Paper 1 (“Pet.”). CloudfChange, LLC (“Patent Owner”) file a Preliminary Response. Paper 7 (“Prelim. Resp.”).

Under 35 U.S.C. § 314(a), an *inter partes* review may not be instituted unless the information presented in the petition “shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” For the reasons stated below, we determine that Petitioner has established a reasonable likelihood that it would prevail with respect to at least one of the challenged claims. We hereby institute an *inter partes* review in this proceeding.

B. Related Matters

The parties indicate that the '012 patent is involved in *CloudofChange, LLC v. Lightspeed POS Inc.*, 6:21-cv-01102 (W.D. Tex. Oct. 22, 2021) (“the Lightspeed Litigation”). Pet. 1; Paper 4, 1. The parties also indicate that the '012 patent was previously involved in a lawsuit *CloudofChange, LLC v. NCR Corporation*, 6-19-cv-00513 (W.D. Tex. Aug. 30, 2019) (“the NCR Litigation”), which resulted in a jury verdict for Patent Owner, but is still pending final judgment. Pet. 1; Paper 4, 1.

The parties also identify IPR2022-00779, which is currently pending and relates to U.S. Patent No. 9,400,640 B2 (Ex. 1027, “the '640 patent”). Pet. 1; Paper 4, 1. Petitioner notes that the '640 patent was also involved in the NCR Litigation and is currently involved in the Lightspeed Litigation. Pet. 1. The '012 patent “is a continuation of U.S. patent application Ser. No. 15/198,117, filed Jun. 30, 2016, which is a continuation of U.S. patent application Ser. No. 12/012,666.” Ex. 1001, 1:3–5. U.S. patent application Ser. No. 12/012,666 ultimately issued as the '640 patent.

C. The '012 Patent

The '012 patent relates to “a system and a method for online, web-based point of sale (POS) building and configuration.” Ex. 1001, Abstract. According to the '012 patent, “[c]urrent practice in the field of assembling

point of sale systems includes manually coding front-of-screen information,” which “contains menu selections, page selections, and general answers to business questions.” *Id.* at 1:31–35.

The ’012 patent explains that “in the prior art, a specialized programmer had to design the layout and data for these POS touch keys,” but “[w]ith this invention, the store operator will be able to build his POS screens online over the Internet.” Ex. 1001, 3:2–4, 10–11.

The ’012 patent explains that its “POS builder system can be provided as a service or deployed within a corporation,” and notes that “[f]or example, Software as a Service (SAAS) is a software distribution model in which applications are hosted by a vendor or service provider and made available to customers over a network, typically the Internet.” Ex. 1001, 6:7–12.

D. Illustrative Claim

1. A web-based point of sale (POS) builder system comprising:

a web server including POS builder software installed thereon;

one or more POS terminals generated by said POS builder software and said one or more POS terminals configured to be accessible at one or more terminal devices, said POS terminals configured to accept POS transactions and collect corresponding transaction data; and

a POS builder interface configured to be accessible via network communication with said web server over a communications network;

wherein said POS builder interface is configured to be utilized to access said POS builder software for programmatically creating or modifying said one or more POS terminals in real time over the communications network, wherein said POS builder software is configured to interact with said one

or more POS terminals over the communications network in order for the web-based point of sale (POS) builder system to perform functions in accordance with instructions sent from the POS builder interface;

wherein said POS transactions and corresponding transaction data from said one or more POS terminals are configured to be transmitted to said web server via the communications network; and

wherein each POS transaction is correlated with corresponding transaction data occurring at said one or more POS terminals.

Ex. 1001, 6:26–54.

E. Evidence and Asserted Grounds

Petitioner asserts that claims 1–20 would have been unpatentable on the following grounds:

Claim(s) Challenged	35 U.S.C. §	Reference(s)/Basis
1–20	103	Woycik ¹
1–20	103	Olson ² , Woycik
1–20	103	Tengler ³

Petitioner submits a declaration from Stephen Gray (Ex. 1002).

Patent Owner submits a declaration from Alex Chang. (Ex. 2012).

II. ANALYSIS

A. Legal Standards

Petitioner bears the burden of persuasion to prove unpatentability, by a preponderance of the evidence, of the claims challenged in the

¹ US Patent Pub. No. US 2007/0265935 A1, published Nov. 15, 2007 (Ex. 1004).

² US Patent Pub. No. US 2008/0208696 A1, published Aug. 28, 2008 (Ex. 1006).

³ US Patent Pub. No. US 2005/0049921 A1, published Mar. 3, 2005 (Ex. 1005).

Petition. 35 U.S.C. § 316(e). This burden never shifts to Patent Owner. *Dynamic Drinkware, LLC v. Nat'l Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015). The Board may authorize an *inter partes* review if we determine that the information presented in the Petition and Patent Owner's Preliminary Response shows that there is a reasonable likelihood that Petitioner will prevail with respect to at least one of the claims challenged in the Petition. 35 U.S.C. § 314(a). "When instituting *inter partes* review, the Board will authorize the review to proceed on all of the challenged claims and on all grounds of unpatentability asserted for each claim." 37 C.F.R. § 42.108(a) (2021).

B. Level of Ordinary Skill in the Art

Petitioner contends that "[a] 'person of ordinary skill in the art' (POSITA) at the time of the effective filing date of the '012 patent would have had a working knowledge of designing and developing web-based [software and] systems" and "would have a Bachelor of Science in computer science or a related field, and approximately two years of professional experience or equivalent study in the design and development of web-based systems, including web-based POS systems." Pet. 7; *see also* Ex. 1002 ¶ 17 (repeating the same). Petitioner contends that "[a]dditional graduate education could substitute for professional experience, or significant experience in the field could substitute for formal education." Pet. 7; *see also* Ex. 1002 ¶ 17 (repeating the same). Patent Owner does not contest Petitioner's articulation of the level of skill in the art. *See* Prelim. Resp. 7.

For purposes of this decision, we analyze the asserted prior art with respect to the level of skill set forth by Petitioner.

C. Claim Construction

In an *inter partes* review, we construe a patent claim “using the same claim construction standard that would be used to construe the claim in a civil action under 35 U.S.C. § 282(b).” 37 C.F.R. § 42.100(b) (2021). Under this standard, the words of a claim generally are given their “ordinary and customary meaning,” which is the meaning the term would have to a person of ordinary skill at the time of the invention, in the context of the entire patent including the specification. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed. Cir. 2005) (en banc).

According to Petitioner, other than “communications network,” “terms should be given ‘ordinary and customary meaning’” to those of skill in the art. Pet. at 8. Petitioner notes that “[p]rior Markman orders do not impact the Petition’s grounds. EX1024, EX1025.” *Id.* n.3. Patent Owner reproduces the claim constructions from the NCR Litigation (Prelim. Resp. 8–9) and “proposes that the PTAB adopt the Judge Albright’s final constructions in the NCR Litigation” (*id.* at 9).

Petitioner proposes an express construction for only the term “communications network.” Pet. 8–9. Patent Owner “believes that no construction is necessary beyond the plain and ordinary meaning, [and] does not dispute Petitioner’s construction at this stage in the proceeding.”⁴ Prelim. Resp. 9. There is no dispute at this time as to the construction of “communications network” and that limitation is not at issue in the disputed teachings of the asserted references.

⁴ Patent Owner mistakenly references the limitation as “communication means,” rather than “communications network.”

In a footnote, Petitioner additionally indicates that “[i]n the ’012 claims, ‘POS terminal’ is something ‘generated by POS builder software’ and ‘accessible at one or more terminal devices’ (e.g., the terminal device’s POS software and related interface configuration data), not the terminal device. EX1001, Claims 1, 14.” Pet. 8. n.4. Petitioner distinguishes from “the parent ’640 claims[where] ‘POS terminal’ refers to a terminal device ‘that displays POS screens.’ EX1027, Claim 1, Claim 14.” *Id.* Nevertheless, Petitioner asserts that “[n]o construction is needed, but this context may aid the Board.” *Id.* Patent Owner responds that “[r]ather than POS modifying terminal, ‘terminal’ modifies ‘device’ in the term ‘terminal device’ in Claim 1 of the ’012 Patent, the ‘device’ in ‘terminal device’ is the hardware portion of the ‘POS terminal.’” Prelim. Resp. 10. Again, this disagreement does not appear to affect the dispute between the parties related to Petitioner’s challenges at this stage of the proceeding.

We do not need to construe any terms expressly to reach our decision. *See Realtime Data LLC v. Iancu*, 912 F.3d 1368, 1375 (Fed. Cir. 2019) (“The Board is required to construe ‘only those terms . . . that are in controversy, and only to the extent necessary to resolve the controversy.’” (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999))).

D. Discretion on Whether to Institute Trial

1. 35 U.S.C. § 314(a)

Patent Owner asks that we deny institution under 35 U.S.C. § 314(a) in view of the Lightspeed Litigation. Prelim. Resp. 14–24. Patent Owner acknowledges the recent guidance from the Director of the United States

Patent and Trademark Office regarding discretionary denials.⁵ *Id.* at 16–17. Patent Owner, however, fails to appreciate that the Guidance Memo requires that “the PTAB will not discretionarily deny institution in view of parallel district court litigation where a petitioner presents a stipulation not to pursue in a parallel proceeding the same grounds or any grounds that could have reasonably been raised before the PTAB.” Guidance Memo 3.

In this proceeding, Petitioner stipulates that “if this IPR is instituted and *Fintiv*^[6] remains precedential at the time of institution, Petitioner stipulates not to pursue in the district court any ground raised or that could have reasonably been raised in IPR (i.e., under §§102 or 103 based on prior art patents or printed publications alone).” Pet. 11. Accordingly, we decline Patent Owner’s invitation for us to apply our discretion under 35 U.S.C. § 314(a) to deny the petition.

E. Ground 1–Woycik

Petitioner asserts that claims 1–20 are unpatentable under 35 U.S.C. § 103 as obvious over Woycik in view of the knowledge of a person of ordinary skill in the art. Pet. 16–46.

1. Woycik

Woycik “relates generally to computer-based systems used for ordering goods and services and, more particularly, to self-service terminals

⁵ USPTO, Memorandum on Interim Procedure for Discretionary Denials in AIA Post-grant Proceedings with Parallel District Court Litigation (June 21, 2022), available at uspto.gov/sites/default/files/documents/interim_proc_discretionary_denials_aia_parallel_district_court_litigation_memo_20220621_.pdf (“Guidance Memo”).

⁶ *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (PTAB Mar. 20, 2020) (designated precedential May 5, 2020).

and software tools for administering self-service terminals.” Ex. 1004 ¶ 4. Woycik explains that “Point of Sale (POS) systems provide a means by which ordering and purchasing transactions can be carried out electronically at the store or other venue where the goods or services are supplied.” *Id.* ¶ 6. According to Woycik, “[s]elf-service POS systems typically have a central computer acting as a server and one or more terminals which are the individual client units that are used by customers to input their orders.” *Id.* ¶ 7.

Woycik describes an “administration tool application [that] includes a menu editor that enables the administrator to create and edit the interactive menu screens provided by the self-order application at the self-service client terminals.” Ex. 1004 ¶ 16. “The menu editor enables the administrator to, during creation/editing of an interactive menu screen, select a template for the interactive menu screen and associate functions with the buttons included on the selected template.” *Id.* ¶ 19.

Woycik explains that “there are many possible arrangements and the administrative tool application may be located at a variety of locations, including . . . an offsite location provided that the administrative tool application is able to communicate with the server.” Ex. 1004 ¶ 17. One “approach is to have the administrative tool loaded on the central server 22 and then provide the chain operator 20 with web access to the central server 22.” *Id.* ¶ 75.

With Woycik’s administration tool, “the store owner or chain operator can carry out administration of the system using a simplified user interface that requires little if any training or experience with computers.” Ex. 1004, ¶ 80. “Furthermore, the web services platform provided by .NET can be used to provide remote administration by the chain operator from any

Internet-connected computer (such as a home office computer) so that various store locations can be configured from a single computer.” *Id.* According to Woycik, “[t]he programming needed to implement this software architecture strategy is known to those skilled in the art.” *Id.*

2. Petitioner’s Challenge Based on Woycik

There does not appear to be any dispute that Woycik’s administration tool would be understood as point of sale builder software by one skilled in the art. Indeed, based on the record before us, we do not see any less disclosure in Woycik regarding its administration tool than that disclosed in the ’012 patent for its point of sale builder software.

The dispute with respect to Woycik’s teachings is based on whether Woycik teaches its administration tool installed on a web server. Prelim. Resp. 26–28. We have reviewed Petitioner’s contentions regarding the other limitations recited in claim 1, which Patent Owner does not dispute at this time, and determine that Petitioner has established sufficiently that Woycik teaches those limitations. Our discussion below is directed to the disputed limitation.

Patent Owner alleges that “*Woycik* does not teach or describe any POS software running on a web server, let alone POS builder software running on a web server.” Prelim. Resp. 27. As explained above, and by Petitioner (Pet. 16–19), however, Woycik expressly states that one “approach is to have the administrative tool loaded on the central server 22 and then provide the chain operator 20 with web access to the central server 22” (Ex. 1004 ¶ 75). As Petitioner explains, Woycik’s central server 22 is a web server. *See, e.g.*, Pet. 16.

Patent Owner does not address the specific teachings in Woycik referenced by Petitioner. Patent Owner’s citation to Mr. Cheng’s testimony

to support its position does not help, and instead, undercuts the credibility of Mr. Cheng’s testimony because that testimony is contrary to the express teachings of Woycik discussed above. *See* Prelim. Resp. 27 (citing Ex. 2012 ¶ 63, which reiterates Patent Owner’s allegation).

Based on the record before us, Petitioner has established sufficiently that Woycik teaches “a web server including POS builder software installed thereon.”

We additionally note Patent Owner’s contentions regarding the consideration of Woycik by a jury in the NCR Litigation. *See* Prelim. Resp. 28–29. Specifically, Patent Owner contends that “the ’012 Patent has been litigated and found by a jury to be not invalid, specifically over obviousness arguments based on Woycik.” *Id.* at 28. Patent Owner contends that review based on Woycik violates the Seventh Amendment to the Constitution because it would result in reexamination of a fact tried by a jury. *Id.* at 29. Patent Owner faults Petitioner for “fail[ing] to identify any failure in the jury’s verdict.” *Id.* Patent Owner’s position lacks merit.

A trial court does not declare a patent valid, only that the patent challenger did not carry the “burden of establishing invalidity in the particular case before the court.” *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1569 (Fed. Cir. 1987). “[T]he patent simply remains valid until another challenger carries [its] burden.” *Id.* at 1570; *see also Shelcore, Inc. v. Durham Industries, Inc.*, 745 F.2d 621, 627 (Fed. Cir. 1984) (“A patent is not held valid for all purposes but, rather, not invalid on the record before the court”).

In the NCR Litigation, the jury reached a determination that the defendant had not established invalidity of the ’012 patent in view of Woycik. *See* Ex. 2008 (Jury Verdict Form), 6 (stating that NCR, the

defendant in the NCR Litigation, did not prove by clear and convincing evidence that certain claims of the '012 patent are invalid). That determination was not that the '012 patent is valid, but, rather, that the specific case presented by the defendant in the NCR Litigation was deficient.

We are reviewing the case presented by Petitioner, who is different than the defendant in the NCR Litigation. We additionally note that the burden in this proceeding is different than in the NCR litigation. This proceeding applies the preponderance of the evidence standard. *See* 35 U.S.C. § 316(e). The NCR Litigation, on the other hand, applied the higher standard of clear and convincing evidence. *See Kaufman Co. v. Lantech, Inc.*, 807 F.2d 970, 973 (Fed. Cir. 1986) (“Under 35 U.S.C. § 282, a patent is presumed valid, and one attacking validity has the burden of proving facts supporting a conclusion of invalidity by clear and convincing evidence.”). Moreover, as Petitioner notes, the NCR Litigation is still pending final judgment.

For at least these reasons, we are not persuaded by Patent Owner’s contentions regarding the alleged violation of the Seventh Amendment.

Based on the record before us, Petitioner has established a reasonable likelihood of success on at least its challenge to claim 1 based on Woycik.

F. Ground 2– Olson and Woycik

Petitioner asserts that claims 1–20 are unpatentable under 35 U.S.C. § 103 as obvious over Olson and Woycik. Pet. 47–68. Patent Owner disputes that Olson qualifies as prior art. *See* Prelim. Resp. 30–31. As discussed above, we determine Petitioner has established a reasonable likelihood of success on its challenge based on Woycik, itself. Accordingly,

we need not address specifically Petitioner’s challenges based on Olson for purposes of this decision.

G. Ground 3–Tengler

Petitioner asserts that claims 1–20 are unpatentable under 35 U.S.C. § 103 as obvious over Tengler in view of the knowledge of a person of ordinary skill in the art. Pet. 68–99.

1. Tengler

Tengler relates to “an apparatus that includes stations in a quick-serve commercial establishment . . . enabling users to enter orders, check the status of orders, and assemble orders for delivery” and “a network interconnecting the stations.” Tengler ¶ 11. “[T]he invention features a method that includes enabling a manager to access a management database of a quick-serve restaurant location remotely through a web interface.” *Id.* ¶ 22. “[M]anagers can view information about the multiple restaurants 2 using interfaces 192 and 196 over the Internet” and “can also modify menus and change prices using interfaces 192 and 196.” *Id.* ¶ 73. “A user interface designer 614 allows management to edit the user interface of the register and self-service applications and also saves the specifications in the database 602.” *Id.* ¶ 103. “A store resident web server 620 enables external managers to view restaurant status information in the database 602 using the interface 190.” *Id.* “The store resident web server 620 also allows managers to edit the user interface of the register and self-service applications and also saves the specifications in the database 602.” *Id.*

2. Petitioner’s Challenge Based on Tengler

One dispute regarding Petitioner’s challenge based on Tengler relates to the recitation in claim 1 that the “POS builder interface is configured to be utilized to access said POS builder software.” Petitioner cites Tengler’s user

interface designer 614 as corresponding to the recited POS builder software and interfaces 192, 196 as corresponding to the recited “POS builder interface.” Pet. 73, 76. Petitioner contends that “Tengler’s manager interfaces are utilized to access user interface designer (i.e., POS builder software) for creating or modifying user interfaces of register and self-service applications.” *Id.* at 80 (citing Ex. 1005 ¶¶ 73, 103, Figs. 7A–B).

The dispute relates to whether Tengler’s interfaces 192, 196 are used to access user interface designer 614 (Pet. 71; Prelim. Resp. 37) and whether user interface designer 614 is installed on a web server (Pet. 71–72; Prelim. Resp. 33–35, 38–40). Patent Owner responds that “*Tengler* teaches two methods for ‘edit[ing] the user interface of the register and self-service applications’: *first*, via the user interface designer **614**; and *second*, via the manager interfaces **192** and **196** accessed through the web server **620**.” Prelim. Resp. 37. Patent Owner contends that Tengler’s user interface designer 614 and manager interfaces 192, 196 are “two separate systems” that “Petitioner combines . . . in an attempt to recreate the elements of the claimed invention” and “Petitioner has failed to demonstrate that Tengler teaches that the manager GUI interfaces **192** and **196** are used to access the user interface designer **614**.” *Id.* at 36.

Patent Owner has the better position. Petitioner fails to identify anything in Tengler that teaches manager GUI interfaces 192 and 196 being used to access the user interface designer 614. Paragraph 73 of Tengler explains that “managers can . . . modify menus and change prices using interfaces 192 and 196” and “[t]he manager’s interface is linked directly to the database,” but says nothing about user interface designer 614. Paragraph 103 of Tengler explains that “user interface designer 614 allows management to edit the user interface of the register and self-service

applications and also saves the specifications in the database 602,” but says nothing about interactions between interfaces 192 and 196 and user interface designer 614.

At best, Tengler is silent as to whether interfaces 192 and 196 interact with user interface designer 614. Based on our review of the record, it appears that interfaces 192 and 196 allow managers to modify a database associated with an existing user interface, while user interface designer 614 is used to create or edit the graphical user interface. This understanding is further supported by interfaces 192 and 196 and interface designer 614 each directly accessing the database. *See* Ex. 1005 ¶¶ 73, 107.

Simply stated, the Petition fails to establish that Tengler teaches interfaces 192 and 196 being used to access user interface designer 614.

The only other independent claim, claim 14, is addressed in a cursory manner in the Petition. *See* Pet. 99. Petitioner’s challenge simply states that “[c]laims 14–20 recite similar limitations as previous claims identified below, and [are] therefore obvious for the same reasons.” *Id.* (citing Ex. 1002 ¶ 271, which simply reiterates this portion of the Petition). Petitioner provides a table mapping portions of claim 14 to its contentions regarding claim 1.

Because Petitioner does not identify any differences between claims 1 and 14, the basis for the challenge to claim 14 is deficient for the same reasons as those noted above for claim 1.

III. CONCLUSION

For the above reasons, we institute *inter partes* review for all challenged claims and on all grounds. Notwithstanding the deficiencies in the Petition’s challenge based on Tengler, *inter partes* review is instituted

for that challenge. *See* 37 C.F.R. § 42.108(a) (requiring institution to be on all claims and all grounds).

IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that, pursuant to 35 U.S.C. § 314(a), an *inter partes* review of claims 1–20 in the '012 patent is instituted on all challenges included in the Petition; and

FURTHER ORDERED that, according to 35 U.S.C. § 314(c) and 37 C.F.R. § 42.4, notice is hereby given of the institution of a trial that commences on the entry date of this Decision.

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