

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NETFLIX, INC.,
PETITIONER,

v.

GOTV STREAMING, LLC,
PATENT OWNER.

CASE IPR2023-00757
PATENT 8,989,715

PATENT OWNER'S REQUEST FOR DIRECTOR
REVIEW OF FINAL WRITTEN DECISION
37 C.F.R. § 42.75

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I. ISSUES, PROCEDURAL HISTORY, AND REQUESTED RELIEF

Patent Owner seeks Director Review of the following two issues where guidance will clarify important PTAB law and policy.

A. Whether the Board Allows a Petitioner to Take Diametrically Opposed Claim Construction Positions before the PTAB and the District Court and for a Panel to Fail to Consider Evidence of the Same and Controlling Caselaw Supporting that a Petitioner May Not.

Netflix filed its petition in this IPR alleging invalidity on the basis that “POSITAs would have understood that the ‘application’ is *not* limited to one residing only on . . . a server.” Paper 2, 36 n.10 (emphasis added). Netflix then took the position in district court that “[t]he claimed application—it’s very clear in the claims in the patent—the application *has to be* executing on the server.” Ex. 2019, 209:12–14 (emphasis added). Patent Owner brought Petitioner’s change of position to the Panel’s attention, but the Panel said Petitioner’s about-face was of no moment, because “there is no requirement that a party present the same construction before the Board and the district court.” Paper 18, at 8 (citations omitted). There is disagreement among APJs whether this is true, and PTAB practitioners will benefit from the Director’s guidance on the issue.¹

¹ See, e.g., *Abbott Diabetes Care Inc. v. Dexcom, Inc.*, IPR2022-00921-15, at 1 (PTAB Nov. 3, 2022) (J. Tartal, dissenting) (“The grant of institution in this proceeding is based on the majority’s decision to turn a blind eye to Petitioner’s

(Footnote continued on next page.)

Additionally, at the institution stage, the Panel said it was “unclear from that evidence whether Petitioner advocated a claim construction or whether Petitioner attempted to identify flaws in Patent Owner’s infringement position based on a claim construction originating from Patent Owner.” Paper 18, at 7–8 (citations omitted). In response, Patent Owner supplemented its evidence with a percipient fact witness who attended the California trial and was subject to cross examination who testified that Petitioner’s position was “unreserved and unqualified,” Paper 21 at 25 (citing Ex. 2022 ¶¶106–07), yet the Panel did not address this evidence, saying “Patent Owner did not attempt to clarify the record by citing or submitting additional evidence from the California case,” Paper 39, at 54. Petitioner also provided additional Federal Circuit cases for the proposition that simultaneously arguing incongruous claim requirements for infringement in District Court versus invalidity at the PTAB should be prohibited, or should at least reduce a party’s credibility, Paper 21, at 26–27, and the Panel, likewise, did not address the newly presented cases from this agency’s reviewing court, Paper 39, at 54–55.

contrary arguments in district court.”); *Facebook, Inc. v. Sound View Innovations, LLC*, IPR2017-00998-13, at 17–18 (PTAB Sept. 5, 2017) (“Petitioner’s failure to inform [the PTAB] of its differing claim construction arguments before the district court raises the specter of lack of candor.”); *Hologic, Inc. v. Enzo Life Sciences, Inc.*, IPR2018-00019-21, at 2 (PTAB Nov. 28, 2018) (explaining that petitioner cannot advance a construction “with which it expressly disagrees”).

Patent Owner requests that the Director clarify that a Petitioner may not simultaneously take opposing positions for infringement in District Court and validity before the PTAB, and that Petitioner should have been found to have repudiated its earlier position and held to its later position. And as a result of both Parties advocating for the same position—that the application must be remote—Patent Owner requests the Director reverse and remand the Panel’s construction as uncontested, or, in the alternative, that the Director remand with the instruction that the Panel consider how the additional evidence, the unaddressed Federal Circuit caselaw, and Petitioner’s reversal bears on the issue. *See Qualcomm Inc., v. Intel Corp.*, 6 F.4th 1256, 1263–65 (Fed. Cir. 2021) (reversing final written decision that removed a limitation all parties agreed a term should have).

B. Whether the Board May or Should Decide Dispositive Claim Constructions Based upon Board Characterizations of Examiner Rejections, and Board Portrayals of Prior Art Cited in those Rejections, in a Final Written Decision, Where No Party Argued the Prosecution History Had a Bearing on the Claim Constructions and Patent Owner Had No Chance to Consider and Respond to Such Characterizations and Portrayals.

In the final written decision, the Panel made three dispositive claim construction rulings, each relying in large part upon a rejection in the ’715 Patent’s parent prosecution history. Paper 39, at 30–32, 39–41, 52–53. In each instance, the Panel characterized the rejection as making an “implicit” claim construction. *Id.* 32, 41, and 53. Each implicit construction was further based upon the Panel’s

understanding of the Kembel reference that the Panel put into evidence with the judgement. *Id.* 31, 39–40, and 52; Ex. 3005. And the Panel found that applicants’ failure to dispute this implicit claim construction was tantamount to adoption of this alleged construction. *Id.*

However, the Final Written Decision was the first time Patent Owner’s attorneys had ever seen these arguments or the contents of the Kembel reference.

Patent Owner requests that the Director make clear that a Panel should not construe claims based upon new art/arguments not advocated by either Party, without giving the Parties the opportunity to respond. And Patent Owner requests the Director remand for the Panel’s reconsideration without relying upon the Board’s new art/argument, or, in the alternative, remand with the instruction that the Panel provide the Parties the opportunity to address the issues and evidence raised in the final written decision for the first time.

II. ARGUMENT

A. The Board Should Not Countenance Petitioner Taking Opposing Positions in the PTAB and District Court

1. Petitioner Absolutely Took Opposite Positions

While Petitioner accepted the Panel’s suggestion that Petitioner could argue it was only addressing “Patent Owner’s infringement position based on a claim construction originating from Patent Owner,” Paper 18 at 7–8; Paper 26 at 9 (“Petitioner was characterizing and addressing PO’s asserted infringement theory”),

such *post hoc* rationalization has no support in the record. Patent Owner put forth pages of Petitioner's expert's testimony and Petitioner's attorney's argument making Petitioner's position clear: the application must be remote. Paper 21 at 23–27 (citing Ex. 2019 (Petitioner Expert's Testimony), 209:12–14 (“The claimed application—it's very clear in the claims in the patent—the application has to be executing on the server.”); *id.* 216:8–10 (“So the patents, the asserted claims require an application that's executing on a server.”); *id.* 222:10–12 (“So it's important to emphasize that the claims require they recite an application, and that application has to be executing on the server.”); *id.* 225:11–12 (“Well, according to the patent, the application is—needs to be executing on the server.”); *id.* 228:6–9 (“Yeah. The—it has to be for an application, the claimed application. And the claimed application in the patents has to be executing on the server.”); *id.* 229:4–6 (“And that application has to be the same application that I discussed before, the one that's executing on the server.”); *id.* 243:4–24 (differentiating the claimed application from anything that could be called an application on the wireless device); and Ex. 2020 (Closing Argument by Petitioner), 39:7–13 (“So remember, I showed you the evidence that both experts agree that the application that's in the claim is a back-end application. In fact, you remember I asked [Patent Owner's Expert]: If I download the Netflix app on my phone, is that the application in the claim? He said no. He agreed with me. Both experts agree. The application must be on the back end.”), 42:12–13 (“[R]emember,

the application in the claims is what's on the server."); *id.* 46:10–17 (“[F]ocus[ing] on where that application lives . . . both [experts] agree that the application lives on the server, on the back end. No dispute about that.”)).

Additionally, Patent Owner provided the testimony of its expert, Mr. Lipoff, who attended the California trial. Paper 21 at 25 (citing Ex. 2022 ¶¶106–07). Mr. Lipoff was a percipient fact witness who also had the expertise to understand the claim construction arguments. *See* Ex. 2022 pp. 14–23 (describing Mr. Lipoff's background, including the fact that he is a professional engineer with years of experience regarding remote applications). And Mr. Lipoff testified Petitioner did not say that “under GoTV's construction where the application is remote” we would not infringe, but Petitioner unreservedly adopted this position as its own, simply noting that Patent Owner's position was the same. Ex. 2022 ¶107. Petitioner deposed Mr. Lipoff and chose not to test this testimony. *See* Ex. 1025.

Moreover, Patent Owner showed Petitioner filed a Motion for Judgment as a Matter of Law arguing that there was no infringement of the '715 Patent because “[t]he ‘application’ required by the claims is on the server.” Paper 21 at 25 (citing Ex. 2021, p. 6, ll. 2–3 (citing Ex. 2019, 209:12–14, 216:8–9, 222:7–16)).

Petitioner's statements were emphatic unqualified positions regarding what the claims meant for infringement, and claims are “given the same meaning for purposes of both validity and infringement analyses.” *Amazon.com, Inc. v.*

Barnesandnoble.com, Inc., 239 F.3d 1343, 1351 (Fed. Cir. 2001).

2. Petitioners Should Not Be Allowed to Game the System by Using the PTAB to Try Claim Constructions that Would Hurt Non-Infringement Positions in District Court.

This Agency recognizes that “parallel proceedings between the Office and district courts” provides the opportunity for “gamesmanship,” and that this should be minimized. Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation, at 2 (June 21, 2022). One such “game” is for a party to put forth one construction in district court for invalidity purposes and a different one in the PTAB for validity purposes.

While there are rules and common law meant to curb and punish a *patent owner* from taking inconsistent positions in the USPTO and other fora, *see, e.g.*, 35 U.S.C § 301 & 37 C.F.R. § 1.501(a)(2) (allowing statements of the patent owner in Federal Court regarding the scope of a claim to be filed with the Office); *Belcher Pharms., LLC v. Hospira, Inc.*, 11 F.4th 1345, 1353–54 (Fed. Cir. 2021) (invalidating patents when patent owner “performed an about-face and emphatically and repeatedly advanced the [new] position”), as set forth in Section II.A.1, the Panel has said that *petitioners* who submit to this Agency’s authority and seek to invalidate a patent do not have to play by the same rules.

Patent Owner believes that the Director has said this *is not* the case. The Consolidated Trial Practice Guide (Nov. 2019) instructs that Panels consider

“statements regarding claim construction” made by both the patent owners *and petitioners* filed in other proceedings. At 48.

Moreover, as previously argued, this *should not* be the case. Paper 21 at 26 & n.7. A Petitioner cannot state its belief that a claim means one thing in district court and simultaneously the reverse in the PTAB, because this necessitates that Petitioner is: (1) untruthful, *Facebook*, IPR2017-00998-13, at 17–18, (2) impermissibly advancing a position with which it expressly or implicitly disagrees, *see Hologic*, IPR2018-00019-21, at 2; or (3) has changed its position. Allowing only a petitioner to take inconsistent claim constructions clearly strikes at the “integrity of the Board’s process” and is unfair to Patent Owner. *Abbott Diabetes Care*, IPR2022-00921-15, at 2 (dissenting opinion).

Indeed, as previously set forth, Paper 21 at 26–27, the Federal Circuit prohibits “simultaneously argu[ing]” “incongru[ous] . . . claim[] requirements for infringement versus invalidity” in a single District Court case. *CommScope Techs. LLC v. Dali Wireless Inc.*, 10 F.4th 1289, 1299 (Fed. Cir. 2021). And this prohibition should be the same even if Petitioner tries invalidity at the PTAB, because “[t]he AIA [IPR] proceeding is structured as a complete alternative to litigation of . . . issues” dealing with unpatentability over printed publications and patents. *SAS Inst., Inc. v. ComplementSoft, LLC*, 825 F.3d 1341, 1354 (Fed. Cir. 2016) (citing 35 U.S.C. § 311(b)).

For instance, one District Court ordered a petitioner to disclose that it had taken inconsistent claim construction positions regarding indefiniteness. *See Microsoft Corp. v. IPLearn-Focus, LLC*, IPR2015–00096 (PTAB filed Feb. 2, 2015) (Exhibit 2004). Another District Court awarded attorney’s fees as a sanction due in part to Plaintiff’s arguing one claim construction for infringement and an inconsistent claim construction to the USPTO for validity. *Kilopass Tech. Inc. v. Sidense Corp.*, No. 10-cv-02066, 2014 WL 3956703, at *7, *10 (N.D. Cal. Aug. 12, 2014). The PTAB should provide comity to District Courts and make clear that the PTAB also does not abide a Petitioner taking mutually exclusive claim constructions across fora.

3. At a Minimum, The Panel Should Consider the New Evidence and Controlling Caselaw Patent Owner Presented

After the Panel said that it was unclear if Petitioner disagreed that the application had to be remote and Petitioner was only arguing at the District Court that *if Patent Owner’s construction is correct* then Petitioner would not infringe,² Paper 18, at 7–8, Patent Owner supplemented its evidence with Mr. Lipoff’s testimony described above, Paper 21 at 25 (citing Ex. 1022 ¶¶106–07), and additional caselaw, including *SAS Inst.*, 825 F.3d 1341 (Fed. Cir. 2016) for the

² As explained in Section II.A.1 *supra*, a finding that Petitioner did not take opposing constructions is unsupported by substantial evidence.

proposition that the IPR proceeding should be treated as the invalidity portion of the district court litigation and *Ultratec, Inc. v. CaptionCall LLC*, 872 F.3d 1267, 1273 (Fed. Cir. 2017) supporting that Petitioner’s inconsistent claim construction should at least be factored into Petitioner’s credibility, Paper 21, at 26–27.

The Panel overlooked Patent Owner’s new evidence and legal citations, saying “Patent Owner did not attempt to clarify the record.”³ Paper 39 at 54–55. The Board should at least consider all presented evidence and law before rendering its decision. *See Weber, Inc. v Provisur Techs., Inc.*, IPR2022-00599-74, at 5 (PTAB Nov. 29, 2023) (granting Director Review and remanding where the Board explicitly said it did not consider Patent Owner’s evidence).

B. The Panel Should Not Cite New Evidence and Rely upon New Arguments Not Put Forth or Relied upon by Either Party without Allowing the Parties to Respond, Even if the Evidence and Argument Is Related to Prosecution Events

As set forth above, the Panel made dispositive claim construction rulings based upon an alleged examiner implicit claim construction, an understanding of the

³ The Panel also faulted Patent Owner for not addressing “Petitioner’s explanation” in the Sur-Reply, Paper 39 at 54–55; however, Patent Owner *already* presented substantial *objective evidence* that showed Petitioner’s unsupported *post hoc* rationale is implausible, and a party’s intent is “almost always” so inferred. *City of Mishawaka, Ind. v. Am. Elec. Power Co., Inc.*, 465 F. Supp. 1320, 1334 (N.D. Ind. 1979); *see also Belcher*, 11 F.4th at 1353–54.

contents of the Kimble reference Patent Owner’s IPR attorneys had not seen, and a determination of the significance of applicant’s choice of how to argue for patentability. *See* Paper 39, at 30–32, 39–41, 52–53; Ex. 3005.

The Federal Circuit has addressed similar situations, and said that a panel should not adopt a claim construction that neither party proposed without giving the parties a chance to address their position regarding the construction. *Qualcomm*, 6 F.4th at 1263. In the same vein, the Federal Circuit has said that it is a procedural rights violation for the PTAB to rely upon facts and assertions a Petitioner introduces into the proceeding for the first time at oral argument, after Patent Owner had a meaningful chance to respond. *Dell Inc. v. Accelaron, LLC*, 818 F.3d 1293, 1301 (Fed. Cir. 2016) (citing 5 U.S.C. § 554). It is equally unfair for a Panel to reject a party’s claim construction by relying upon facts and argument the Panel made for the first time in a final written decision.

First, that the unexpected evidence and argument came from the Panel—rather than Petitioner—does not change the character of the unfairness to Patent Owner.

Second, despite the different posture in this case compared to *Dell* and *Qualcomm*, the critical question to determine a due process violation is whether “the Board’s decisions rested on any factual *or legal issues* as to which [Patent Owner] was denied notice or an opportunity to be heard at a meaningful point in the proceedings.” *Genzyme Therapeutic v. Biomarin Pharm.*, 825 F.3d 1360, 1367

(Fed. Cir. 2016) (emphasis added). And what the Examiner mapped to what claim limitation in an office action, what the Kembel reference teaches, and the importance of the Applicant's reaction to the rejection in view of the Kembel reference, are legal issues. *See, e.g., Ecolab, Inc. v. FMC Corp.*, 569 F.3d 1335, 1343 (Fed. Cir. 2009) (declining to find prosecution disclaimer merely because the examiner disagreed with an argument and the applicant "never repeated the allegedly disclaiming statements and instead offered alternative reasons to overcome" the prior art).

And the Board did deny Patent Owner notice or an opportunity to be heard regarding these issues. The Board and Petitioner never previously cited to the relied upon office action or the Kembel reference, much less gave Patent Owner notice of the specific portions of Kembel that the Board relied on for its claim construction in its final written decision. In the same way the Board should not rely upon such *sua sponte* argument and evidence to show a claim limitation was obvious, the Board should also not "raise[], address[], and decide[]" argument and evidence for the first time in a final written decision for claim construction. *See Nike, Inc. v. Adidas AG*, 955 F.3d 45, 54 (Fed. Cir. 2020).

Moreover, just like "it is unreasonable to expect parties to 'have briefed or argued, in the alternative, hypothetical constructions not asserted by their opponent,'" *Qualcomm*, 6 F.4th at 1263 (quoting *Dell*, 818 F.3d at 1301), it is equally unreasonable to expect Patent Owner to address claim construction

arguments and evidence not made or put forth by Petitioner (or the Panel), even if the prosecution history is available as an exhibit and the Kembel reference was publicly available. The Board is not “free to adopt arguments on behalf of petitioners that could have been, but were not, raised by the petitioner during an IPR . . . the Board must base its decision on arguments that were advanced by a party, and to which the opposing party was given a chance to respond.” *See In re Magnum Oil Tools Int’l, Ltd.*, 829 F.3d 1364, 1381 (Fed. Cir. 2016); *see also Sirona Dental Sys. v. Institut Straumann AG*, 892 F.3d 1349, 1356 (Fed. Cir. 2018) (“[T]he statute tells us that the petitioner’s contentions, not the Director’s discretion, define the scope of the litigation all the way from institution through to conclusion.”) (citation and internal quotes omitted).

The Panel anticipated an objection, and suggested its characterization of the prosecution history, the reference cited therein, and applicant’s lack of response in the final written decision was proper because the Panel was considering the intrinsic record. Paper 39 at 24 and 31 n.4. However, just because the Panel relied upon intrinsic evidence does not give the Board free reign to put forth a new basis for claim construction in the final written decision. *See, e.g., Honeywell Int’l v. Mexichem Amanco Holding*, 865 F.3d 1348, 1357–59 (Fed. Cir. 2017) (explaining in the *ex parte* reexamination context that the Board is not free to rely upon new facts and rationales even if it is based upon evidence in the record).

In any event, whether the Board *must* allow the parties to address new evidence and argument based upon the prosecution history, the Board *should* provide such an opportunity as a matter of policy, as the very foundation of the IPR adversarial system stems from the idea that the best judgments result from hearing all sides of an argument. *See Hunting Titan, Inc. v. DynaEnergetics Europe GmbH*, IPR2018-00600-67 at 11 (PTAB July 6, 2020) (precedential) (citing *Greenlaw v. United States*, 554 U.S. 237, 243–44 (2008)).

III. CONCLUSION

In light of the above, Patent Owner respectfully requests a Director Review, or rehearing by the Delegated Review Panel, and that the adjudicator vacate the Panel's Decision, to correct the Panel's errors, and/or to reverse or remand as appropriate.

Dated: December 5, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the fifth day of December, 2024, a complete and entire copy of the foregoing “PATENT OWNER’S REQUEST FOR DIRECTOR REVIEW OF FINAL WRITTEN DECISION,” was served on the date below on the following counsel of record via email per Petitioner’s consent to electronic service. Paper 2 at 79.

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