

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FORCEPOINT LLC,
Petitioner

v.

WEBROOT, INC. AND OPEN TEXT, INC.,
Patent Owners.

IPR2023-00784
U.S. Patent No. 8,438,386

PETITIONER'S REQUEST FOR REHEARING

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	LEGAL STANDARD	2
III.	ARGUMENT.....	3
	A. The Decision’s Claim Construction Lacks Nuance Which Fails to Account for the Close Relationship Between the Claimed Reputation Factors.....	3
	B. The Decision Overlooks that the Petition Cites Paragraph [0037] of Alperovitch in Support of Its Argument that Alperovitch Teaches the Claimed “Security History” Factory	6
IV.	CONCLUSION.....	7

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Arnold P'ship v. Dudas</i> , 362 F.3d 1338 (Fed. Cir. 2004)	2
<i>In re Gartside</i> , 203 F.3d 1305 (Fed. Cir. 2000)	2
<i>Phillips v. AWH Corp.</i> , 415 F.3d 1303 (Fed. Cir. 2005) (en banc)	3
<i>Star Fruits S.N.C. v. U.S.</i> , 393 F.3d 1277 (Fed. Cir. 2005)	2
Statutes	
35 U.S.C. 282(b)	2
Rules	
Rule 42.100(b)	2
Other Authorities	
37 C.F.R. § 42.8	3
37 C.F.R. § 42.71(c) (2021)	2
37 C.F.R. § 42.71(d)	1
37 C.F.R. § 42.108(c)	5
37 C.F.R. § 42.208(c)	5

Pursuant to 37 C.F.R. § 42.71(d), Forcepoint LLC (“Petitioner”) submits this Request for Rehearing of the Board’s Decision Denying Institution of Inter Partes Review of U.S. Patent No. 8,438,386 (Paper 15) (“Decision”). This is Petitioner’s first rehearing request. *See* 37 C.F.R. § 42.71(d).

I. INTRODUCTION

Petitioner respectfully requests that the Board grant rehearing of the Decision and institute an IPR trial. In reaching its conclusion that “security history” is a factor distinct from other claimed factors used to generate a reputation vector for an Internet resource, the Decision overlooks that the ’386 specification (1:51-58) analogizes the reputation of an Internet Resource to the credit score of an individual—both of which are based on a variety of “fairly tightly related factors” The Decision’s conclusion that the claimed “security history,” “legitimacy,” “behavior,” “associations,” and “location” factors are distinct suggests that the factors are readily distinguishable, when in fact their “fairly tight[]” relationship renders the attributes used to determine the claimed “reputation vector” to be correlated and have overlapping scope. For example, the ’386 specification (9:19-20) explains that a “behavior” can include browser hijacking, a well-known example of a security event (*e.g.*, malware).

Due to the lack of nuance in the Decision’s construction of “security history,” the Decision disregards or overlooks prior art teachings of security related events

merely because the prior art referred to those events as behavioral and not security related. This oversight is exemplified in Ground 2 where the Petition (at 73) points out that a POSITA would have understood Alperovitch’s “blacklist events” to constitute a historical security event, but the Decision (at 24) disagrees—mischaracterizing Alperovitch as being limited to “*behavioral* attributes” that “can be combined to derive a *behavioral* profile.”

II. LEGAL STANDARD

When rehearing a decision, the Board “review[s] the decision for an abuse of discretion.” 37 C.F.R. § 42.71(c) (2021). An abuse of discretion may arise if the decision is based on an erroneous interpretation of law, if substantial evidence does not support a factual finding, or if an unreasonable judgment is made in weighing relevant factors. *Star Fruits S.N.C. v. U.S.*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *Arnold P’ship v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004); *In re Gartside*, 203 F.3d 1305, 1315–16 (Fed. Cir. 2000).

And, when construing claim terms, Rule 42.100(b) instructs that:

[i]n an inter partes review proceeding, a claim of a patent, or a claim proposed in a motion to amend under § 42.121, shall be construed 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), including construing the claim in accordance with the ordinary and customary meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent.

III. ARGUMENT

A. The Decision's Claim Construction Lacks Nuance Which Fails to Account for the Close Relationship Between the Claimed Reputation Factors

The claims of the '386 patent require, *inter alia*, determining if a reputation index for an Internet resource is at or above a threshold value wherein the reputation index is generated from a reputation vector comprising “a plurality of factors for the Internet resource comprising security history, legitimacy, behavior, associations and location...” Ex. 1001. Although no express claim construction is provided in the Petition, the Petition (at 7) explains that “no terms need construction because the claims read on the prior art under any construction consistent with *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc).”

The Decision (at 9) acknowledges that the dispute between the parties turns on whether the term “security history” is a factor distinct from other factors including “legitimacy” and “behavior.” While the claimed reputation factors may have different meanings, Petitioner disputes that a POSITA would have understood the factors to be distinct to the extent that being distinct implies that the factors are not closely related and cannot have overlapping scope. The close relationship of the claimed factors is clear from the '386 specification (1:51-58) that analogizes the reputation of an Internet Resource to the credit score of an individual—both of which are based on a variety of “fairly tightly related factors”

Consistent with the '386 specification, the Petition implicitly recognizes the close relationship and overlapping scope of the claimed factors. The Decision does not. For example, the Petition (at 11-12) explains that Hubbard-495 describes in detail “provid[ing] a behavioral score or data associated with one or more behavior properties (e.g., a property such as ‘writes to registry’)” and then concludes that Alperovitch “[l]ikewise” discloses security history factors. In contrast, the Decision (at 24) concludes that the claimed “security history,” “legitimacy,” “behavior,” “associations,” and “location” factors are distinct, incorrectly implying that the claimed factors are readily distinguishable and cannot have overlapping scope.

When evaluated in light of the correct construction of “security history,” the Petition makes a sufficient showing to satisfy its reasonable likelihood of success burden. Regarding Ground 1, the Petition (at 25) points out that Hubbard-495 discusses “historical data associated with the IP address of the URL host” and explains that this “historical data” could include historical security data such as “certificate details associated with the URL (e.g., for secure (such as HTTPS) access schemes).” In response, Patent Owner argues (Prelim. Resp. at 39) that “[t]hese criteria do not teach the claimed ‘security history’ factor and, at most, relate to ‘legitimacy’ of an internet resource.” The Decision (at 19) agrees with Patent Owner and concludes that Patent Owner’s expert’s testimony is supported by the '386 patent’s disclosure that “[l]egitimacy is determined by . . . the investment in the

Internet resource (virtual hosting with non-affiliated sites, multiple hosting and *SSL security*).” The Decision, however, misapprehends the close relationship between “security history” and “legitimacy” factors and fails to follow the guidance provided in the Consolidated Trial Practice Guide. In scenarios such as here, whether Hubbard-495’s “certificate details associated with the URL” constitutes the claimed “security history” factor is a genuine issue of material fact created by testimonial evidence that should be viewed “in the light most favorable to the petitioner solely for purposes of deciding whether to institute [a review].” 37 C.F.R. §§ 42.108(c), 42.208(c).

Regarding Ground 2, the Petition (at 73) points out that a POSITA would have understood Alperovitch’s “blacklist events” to constitute a historical security event, but the Decision (at 24) disagrees—mischaracterizing Alperovitch as being limited to “*behavioral* attributes” that “can be combined to derive a *behavioral* profile.” Again, the Decision misapprehends the close relationship between the claimed reputation factors. Alperovitch’s discussion of behavioral attributes and a behavioral profile would not have prevented a POSITA from concluding that “blacklist events” constitute “security history.” Rather, as discussed in the Petition (at 73), a POSITA would have understood that “blacklist events” to be previous security events that would flag a site for placement on the “blacklist” or a list of

entities that are blocked from communicating with or logging into a computer, site, or network. Ex.1002, ¶215.

For at least these reasons, trial should be granted to determine whether Petitioner has met its burden under a construction of the '386 claims that recognizes the close and overlapping relationship between the claimed reputation factors.

B. The Decision Overlooks that the Petition Cites Paragraph [0037] of Alperovitch in Support of Its Argument that Alperovitch Teaches the Claimed “Security History” Factory

The Decision (at 24) concludes that “[w]e do not discern disclosure in Alperovitch of use of a history of security events or sufficient explanation by Petitioner as to how Alperovitch teaches a history of security events.” The Decision, however, overlooks the argument in the Petition (at 72-73) that a POSITA would have had a reasonable expectation of success in enhancing the system of Hubbard-495 and Hubbard-174 with Alperovitch due to the security history related information collected about Alperovitch’s entities 300a-c. In particular, Alperovitch teaches at paragraph [0037]:

Examination and analysis of communications can allow the security agents 100a-b to collect information about the entities 300a-c sending and receiving messages, including, transmission patterns, volume, or whether the entity has a tendency to send certain kinds of message (e.g., legitimate messages, spam, virus, bulk mail, etc.), among many others.

Alperovitch's use of security agents to collect information about the entities 300a-c (in particular the collection of information indicating whether the entity has a tendency to send spam, virus etc.) constitutes "security history" even under the Decision's narrow construction of the term.

As Alperovitch teaches the claimed "security history" factor under the Decision's construction of the term, trial should be granted.

IV. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Board reconsider its Decision and institute trial.

Dated: November 27, 2023

By: /Kat Li/
Kat Li (Reg. No. 64,857)
kat.li@kirkland.com
Nadia E. Haghighatian (*pro hac vice*
admission)
nadia.haghighatian@kirkland.com
KIRKLAND & ELLIS LLP
401 Congress Avenue
Austin, TX 78701
Telephone: (512) 678-9100
Facsimile: (512) 678-9101

W. Todd Baker (No. 45,265)
todd.baker@kirkland.com
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 389-3135
Facsimile: (202) 389-5200

Akshay S. Deoras (*pro hac vice*
admission)
akshay.deoras@kirkland.com
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, CA 94104
Telephone: (415) 439-1400
Facsimile: (415) 439-1500

CERTIFICATE OF SERVICE

In compliance with 37 C.F.R. § 42.6(e), the undersigned hereby certifies that a copy of the foregoing document was served on November 27, 2023, via electronic mail to OpenText_Webroot@kslaw.com and the attorneys of record below:

BRIAN J. EUTERMOSER
beutermoser@kslaw.com
MIKAELA STONE
Mikaela.stone@kslaw.com
KING & SPALDING LLP
1401 Lawrence Street, Suite 1900
Denver, Colorado 80202
Telephone: (720) 535-2300
Telecopier: (720) 535-2400

RUSSELL E. BLYTHE
rblythe@kslaw.com
KING & SPALDING LLP
1180 Peachtree Street NE
Atlanta, GA 30309
Telephone: (404) 572-4600

/Kat Li/

Kat Li (Reg. No. 64,857)