

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

META PLATFORMS, INC., INSTAGRAM, INC., WHATSAPP LLC,
META PLATFORMS TECHNOLOGIES, LLC, AND GIPHY, INC.,
Petitioner,

v.

VL COLLECTIVE IP LLC,
Patent Owner.

IPR2023-00924
Patent 7,436,980 B2

Before KARL D. EASTHOM, JEFFREY S. SMITH, and
DAVID C. McKONE, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION
Denying Patent Owner's Request on Rehearing of
Institution of *Inter Partes* Review
37 C.F.R. § 42.71

I. INTRODUCTION

Patent Owner filed a Request for Rehearing (Paper 13, “Req.”) of our decision instituting *inter partes* review (Paper 11, “Dec.”) dated December 6, 2023. Patent Owner contends that the Decision misapprehended Patent Owner’s construction of the claimed “comparing the probabilities for each image” and misapprehended Petitioner’s arguments in the Petition and the teachings of Zhao. Req. 1. For the reasons set forth below, Patent Owner’s Request for Rehearing is denied.

II. STANDARD OF REVIEW

Section 37 C.F.R. § 42.71(d) states the following:

A party dissatisfied with a decision may file a single request for rehearing without prior authorization from the Board. The burden of showing a decision should be modified lies with the party challenging the decision. 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.

Under 37 C.F.R. § 42.71(d) (“*Petition decisions*”), “a panel will review the [institution] decision for an abuse of discretion.”

III. DISCUSSION

In its Request, Patent Owner contends (1) that we misapprehended Patent Owner’s claim construction of limitation 1[e] which recites “detecting the object in any image upon comparing the probabilities for each image to a threshold for detecting the object,” (2) that we misapprehended Petitioner’s mapping of limitation 1[e] to the teachings of Zhao, and (3) that we misapprehended Zhao’s teachings of detecting an object in an image by comparing probabilities for multiple images to a threshold. Req. 1–15.

With respect to Patent Owner’s first contention, in our Decision, we wrote that “[e]ven accepting Patent Owner’s construction that the scope of this term [limitation 1[e]] encompasses the specification’s disclosure that a ‘w-frame windowed smoothing algorithm’ may be used [] ‘where w is an odd integer ≥ 1 ,’ we are sufficiently persuaded that Zhao teaches this limitation.” Dec. 27. We wrote that “[t]he specification discloses that ‘with w=1, the algorithm resembles single frame component-based fusion,’ such as the single frame threshold taught by Zhao.” *Id.*

Patent Owner contends that we misapprehended Patent Owner’s contention that the plain language of the claims should not be over-ridden by the specification and that the actual words of the claim are the controlling focus. Req. 4–5. In particular, Patent Owner contends that “even though the specification discloses that ‘with w=1, the algorithm resembles single frame component-based fusion,’ claims 1 and 9 by their plain language are directed to embodiments where ‘w’ is greater than 1, not where w=1.” *Id.* at 6.

We could not have misapprehended Patent Owner’s contention that the plain language of the claims should not be over-ridden by the specification, that the actual words of the claim are the controlling focus, and that claims 1 and 9 by their plain language are directed to embodiments where w is greater than 1, because the Preliminary Response did not include these contentions. Rather, Patent Owner, in its Preliminary Response, contended that Patent Owner’s “understanding [of limitation 1[e]] is consistent with the ’980 patent’s specification,” which “thus teaches that ‘[a] w-frame windowed smoothing algorithm’ may be used ‘where w is an odd integer ≥ 1 .’” Prelim. Resp. 42–43. We addressed this contention in our Decision. Dec. 26–27.

With respect to Patent Owner’s second contention, in our Decision, we wrote that “Patent Owner’s contention that Zhao only compares one image to a threshold . . . is inconsistent with the teachings of Zhao,” because “Zhao discloses that motion information of limbs of an object, such as the person walking in the parking lot, obtained from other frames, can be used to predict the orientations of the limbs in a current frame.” Dec. 27–28. We concluded that “[t]hus, before comparing the current image to a threshold for detecting the object, Zhao has compared other images to a threshold, and uses the resulting information when comparing the current image to a threshold.” *Id.* at 28.

Patent Owner contends that this explanation of how Zhao meets limitation 1[e] is not in the Petition. Req. 9–10. Patent Owner contends that the Petition maps limitation 1[e] to pages 64 and 65 of Zhao, but our Decision relies on pages 91 through 93 of Zhao, which the Petition relies on to show limitations 1[a] and 1[b]. *Id.* at 10–11 (citing Pet. 15–17, 21–22, 26–27). According to Patent Owner, “nowhere in the Petition’s analysis of limitations 1[a] and 1[b] was there an assertion that what was being analyzed also satisfied the requirements of limitation 1[e].” *Id.* at 12. Patent Owner, citing several Federal Circuit cases, contends that we impermissibly raised a new theory of unpatentability. Req. 11; *see id.* at 8–12.

We disagree with Patent Owner’s second contention. In particular, we disagree with Patent Owner’s factual contention that we misapprehended the Petition’s mapping of limitation 1[e] to Zhao, and we disagree with Patent Owner’s legal contention that we raised a new theory of unpatentability by explaining why we disagree with Patent Owner about the teachings of Zhao.

Regarding the mapping issue, the Petition states that “Figure 5.4 illustrates Zhao’s detection method used on a series of image frames . . . of a person walking.” Pet. 21–22 (citing Ex. 1006, 92). The Petition states that “Zhao describes a ‘coarse-to-fine procedure to identify and locate body parts.’” Pet. 23–34 (citing Ex. 1006, 26, 40, 43, 57, Figs. 1.9, 2.4). The Petition states that “[w]hen detecting humans . . . ‘[m]otion information obtained from previous frames can be used to predict the orientations of limbs’” so that “an obvious pattern of walking can be observed.” *Id.* at 16–17 (citing Ex. 1006, 91–94). The Petition states that Zhao “perform[s] human detection” by “determining a probability that the object is in each image.” *Id.* at 25–26 (citing Ex. 1006, 54–56, 64–65). The Petition states that “[a]fter determining the probability that the object is in each image, Zhao compares the probability to a threshold to detect the object.” Pet. 26–27 (citing Ex. 1006, 64–65; Ex. 1004 ¶¶ 98–100). Thus, the Petition states that Zhao detects an object in a current image using a detection method that includes using motion information about the object as detected in a previous image, where the object was detected in the previous image by comparing the probability that the object was in the previous image to a threshold.

In discussing limitation 1[e], the Petition states that “[a]fter determining the probability that the object is in each image, Zhao compares the probability to a threshold to detect the object.” Pet. 26. Contrary to Patent Owner’s argument, Petitioner’s contention implicitly includes the Petition’s analysis of how Zhao determines the probability that the object is in a given image, namely, by using motion information from an object detected in a previous image, where the object was detected in the previous

image by comparing the probability that the object was in the previous image to a threshold.

We also disagree with Patent Owner's premise that Zhao's disclosure on pages 91 through 93 is disconnected from Zhao's disclosure on pages 64 and 65. Zhao, on pages 91 through 94, shows experimental results of detecting objects using the probability determined by the Bayesian similarity measure discussed on pages 64 and 65. In particular, Zhao discloses that "the body parts are identified based on the Bayesian similarity measure illustrated in Chapter 3" and that "the covered body parts can still be located accurately using the dynamically assembled human model, the Bayesian similarity measure, and the coarse-to-fine localization approach." Ex. 1006, 93. Patent Owner has not shown that we misapprehended the Petition's mapping of limitation 1[e] to the teachings of Zhao.

We also disagree with Patent Owner's legal contention that we misapprehended the Supreme Court's guidance in *SAS Inst., Inc. v. Iancu*, 138 S.Ct. 1348 (2018) and subsequent Federal Circuit cases and raised a new theory of unpatentability. Req. 8. Contrary to Patent Owner's contention, the Federal Circuit has held that an explanation of why the Board disagrees with Patent Owner about the scope and content of the prior art does not raise a new theory of unpatentability. *See Arthrex, Inc. v. Smith & Nephew, Inc.*, 935 F.3d 1319, 1326–27 (Fed. Cir. 2019) (The Board, although using different language than the petition, did not raise a new theory when it "resolved the parties' dispute about the scope and content of [a prior art] disclosure in order to evaluate the theory of obviousness raised in [the] petition").

Further, the cases cited by Patent Owner do not support Patent Owner's contention, that our explanation of why we disagree with Patent Owner about the scope and content of the prior art, is a new theory of unpatentability. For example, in *Sirona Dental Systems GmbH v. Institut Straumann AG*, cited by Patent Owner on pages 8 and 11 of the Request, the Federal Circuit affirmed the Board even though the Board characterized a reference as providing "geometry data" rather than as providing 3-D plaster model data, as the Petition had. 892 F.3d 1349, 1356 (Fed. Cir. 2018). The Federal Circuit explained that, as in this case, the Board had cited the same disclosure as the Petition and the parties had disputed the meaning of that disclosure throughout the trial. As a result, the Petition provided Patent Owner with notice and an opportunity to address the portions of the reference relied on by the Board, and the Federal Circuit found no Administrative Procedure Act (APA) violation. *Id.*; see also *Arthrex* at 1327–28. Patent Owner has not shown that we misapprehended the law in stating that "Patent Owner's contention that Zhao only compares one image to a threshold . . . is inconsistent with the teachings of Zhao."

With respect to Patent Owner's third contention, Patent Owner has not shown that we misapprehended the teachings of Zhao. Patent Owner contends that "Zhao does not teach that 'motion information' involves probabilities or the results of comparing them to a threshold. . . . Nor does Zhao teach that 'the prediction from previous frames' involves probabilities or the results of comparing probabilities to a threshold—all it says is that 'constant angular velocity is assumed.'" Req. 14. We disagree with Patent Owner's third contention. Even under Patent Owner's newly proposed construction that "limitation 1[e] . . . require[s] 'comparing the probabilities

for *two or more* images” to a threshold (Req. 4; *see id.* at 6), Patent Owner has not shown that we misunderstood Zhao’s teachings of comparing the probability that the object is in a previous image to a threshold, using motion information from the previous image to predict the orientations of limbs of the object in a current image, and comparing the probability that the object is in the current image to a threshold.

IV. CONCLUSION

For the foregoing reasons, Patent Owner did not show that the Board abused its discretion or misapprehended or overlooked any arguments or evidence presented by the Petition or the Preliminary Response.

V. ORDER

Accordingly, it is

ORDERED that the Request for Rehearing is denied.

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