

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAMSUNG ELECTRONICS CO., LTD.,
SAMSUNG ELECTRONICS AMERICA, INC.,
Petitioner

v.

SLYDE ANALYTICS, LLC,
Patent Owner.

Case No. IPR2024-00040
U.S. Patent No. 9,804,678

PETITIONER'S REQUEST FOR DIRECTOR REVIEW

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I. INTRODUCTION

This Request for Director Review addresses the same important policy issue as the recently filed Request for Director Review in the '085 IPR (IPR2024-00041): namely, whether the Board can, or should be allowed to, issue a new claim construction not advanced by either party, without notice and an opportunity to be heard, and then treat that construction as dispositive to deny institution. But the circumstances here are even more problematic. In the present IPR, the same panel not only construed a term (“processor”) that was not identified by either party but also did so by relying on extrinsic evidence not of record in the proceeding. And the panel raised an non-obviousness argument that Patent Owner did not make.

As in the prior IPR, *sua sponte* raising a dispositive claim construction issue without the benefit of briefing on the construction and how the art applied thereto introduced significant errors, including the panel’s issuing an overly narrow construction and overlooking evidence that would have satisfied it. As this decision demonstrates, as a matter of due process and fairness, and in order to ensure correct decisions, the Board should provide parties with notice and an opportunity to respond before *sua sponte* making a dispositive claim construction, before adding extrinsic evidence to the record, and before raising arguments as to patentability not raised by the patent owner.

II. BACKGROUND

The '678 patent, filed on October 12, 2012, is directed to a wristwatch wherein some components can be operated in multiple power modes. Ex-1001 (Abstract 5:48-57). Samsung challenged all 15 claims under multiple grounds based on various § 102(b) references, including two from the same inventor, U.S. Patent No. 7,606,552 (“Orr”) (Ex-1005) and U.S. Application Publication No. 2010/0194682 (“Orr682”) (Ex-1006), which together teach the limitations of the claims at issue. These are the only references at issue for purposes of this request.

Independent claim 14 is representative and recites, in relevant part, “an inertial sensor comprising an accelerometer and *a processor and/or other processing means*, said accelerometer being arranged for generating an acceleration signal and the *processor and/or other processing means* being arranged for discriminating between gesture and no gesture based on a direction of said acceleration signal.”¹ Ex-1001 (12:29-36). Independent claim 1 includes substantially the same limitation. Other claim limitations are not at issue. The dependent claims are also not at issue.

Samsung argued that the combination of Orr and Orr682 teaches the claimed “processor.” Paper 3 at 31-37. Specifically, Samsung argued that the “processor”

¹ Emphasis added unless otherwise noted.

was taught by Orr’s trigger circuit 38, comprising main sub-system 42, that detects gestures. *Id.* at 31-32. And, when discussing the capability of such a processor, Samsung also pointed to Orr682 to “enhance” Orr’s processor. *Id.* at 18-19 (citing Ex-1006 ¶¶24, 83, 84, 89, 96, 106). Thus, Samsung argued: “the *combined* system of Orr-Orr682 would include (1) Orr’s accelerometer and inertial sensor processor *enhanced* to detect a direction, slope (including amplitude), and frequency of acceleration, *as disclosed by Orr682 . . .*” *Id.* at 21, 33-37. Given these combined teachings, Samsung did not formally construe “processor” or address “processing means,” recited in the alternative in the claims.

In its Preliminary Response, Patent Owner agreed that no construction of either term was necessary. And it did not dispute whether the prior art teaches “processor and/or processing means.” Rather, it challenged the overall motivation to combine Orr and Orr682 “with the wristwatch references.” Paper 9 at 9-13. It also addressed the element “a display of indication on the display,” which the panel did not address and is not at issue. *Id.* at 13-16.

As with the ’085 IPR, even though both Samsung and Patent Owner agreed that no claim terms required construction, the panel decided that “processor” needed to be expressly construed. Dec. 11-12. And, rather than ordering the parties to brief claim construction, or instituting so that such a construction could be addressed during the trial phase, the panel engaged in its own claim construction

analysis. It then treated its construction as dispositive and denied institution on that basis. However, the panel went further than in the '085 IPR. It relied on extrinsic evidence—a definition from an IEEE dictionary not of record—and addressed an element not challenged by Patent Owner. *See id.* at 11-12; Ex-3002.

The panel's reliance on a dictionary rather than the intrinsic record, resulted in a narrow construction that required the "processor" "to execute code, program, or instructions" and that explicitly prohibited the "processor" from being "any electrical circuit." Dec. 12. In applying the term to the claim element, the panel also required that the processor "and nothing else" discriminate between gesture and no gesture. *Id.* at 18-19. The panel then concluded that Orr's trigger circuit 38 (including accelerometer sub-system 42) did not meet its construction. *Id.* The panel did not consider the specification, Samsung's evidence that Orr's circuit 38 would have been understood by a POSITA to be a processor and to execute software, or evidence as to Orr682 (including detailed testimony) that it would have been obvious to "enhance" Orr's circuit 38 to execute the processing described in Orr682 to perform more sophisticated gesture recognition. *See* Paper 3 at 31-32 (citing Ex-1002 ¶¶123-124).

III. ARGUMENT

A. A panel must, or should as a matter of fairness, allow parties to be heard on a *sua sponte* claim construction before a panel renders its decision whether to institute.²

It is well established that “IPR proceedings are formal administrative adjudications subject to the procedural requirements of the Administrative Procedure Act (‘APA’).” *SAS Inst., Inc. v. ComplementSoft, LLC*, 825 F.3d 1341, 1351 (Fed. Cir. 2016), *rev’d on other grounds sub nom., SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348 (2018). The APA requires due process in the form of “notice” and a “fair opportunity” to be heard. *See Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1080 (Fed. Cir. 2015).

As to claim construction issues, the Federal Circuit has held that the Board cannot diverge from an agreed-to construction of a claim term *sua sponte* without affording the parties an opportunity to be heard. *Qualcomm Inc. v. Intel Corp.*, 6 F.4th 1256, 1265 (Fed. Cir. 2021); *see also* Trial Practice Guide (“TPG”) at 45 (“If the Board raises a claim construction issue on its own, both parties will be afforded an opportunity to respond before a final written decision is issued.”). As noted above, the Director recently applied *Qualcomm* to vacate the decision in *Assa Abloy*, where a panel *sua sponte* switched from plain and ordinary meaning in its

² Samsung made substantially the same argument in IPR2024-00041.

institution decision to a construction not advanced by either party in its final written decision. *Assa Abloy AB v. CPC Pat. Techs. Pty., Ltd.*, IPR2022-01006, 2024 WL 1184586 (P.T.A.B. Mar. 15, 2024).

Where the Federal Circuit has found a panel’s new claim construction to be APA compliant, it has relied on the development of the record after institution. *See, e.g., TQ Delta, LLC v. Dish Network LLC*, 929 F.3d 1350, 1355 (Fed. Cir. 2019) (relying on exchange “[d]uring the Oral Hearing”); *Hamilton Beach Brands, Inc. v. freal Foods, LLC*, 908 F.3d 1328, 1338 (Fed. Cir. 2018) (relying on “adequate notice in [patent owner’s] post-institution response”); *Intell. Ventures II LLC v. Ericsson Inc.*, 686 F. App’x 900, 906 (Fed. Cir. 2017) (relying on “continuous focus on [the claim term] before and during oral arguments”); *see also* TPG at 44-45 (discussing iterative process of claim construction during AIA proceedings).

Here, Samsung had no opportunity to respond to the panel’s construction after institution because the panel’s construction was presented as the reason to deny institution. Moreover, Samsung could not have anticipated that the panel would engage in a detailed claim construction analysis and issue a narrow construction not even requested by Patent Owner.

Samsung appreciates that the Director requires the Board to resolve disputed claim construction issues. *See Nearmap US, Inc. v. Eagle View Techs. Inc.*,

IPR2022-00734, 2024 WL 922247 at *4 n.5 (P.T.A.B. Feb. 20, 2024) (“where [a claim construction] dispute materially affects the Board’s determinations, it is necessary to resolve the dispute.”). But a panel should not engage in a detailed claim construction analysis resulting in a narrow construction not advocated for by either party *without notice to either party*. This is particularly problematic when the construction is the basis not to institute. Had the panel engaged in the same exercise, but instituted first, the parties would have been able to respond during trial phase briefing and oral argument. For this reason, in circumstances like this, panels often institute and advise parties to brief disputed claim construction issues during the trial phase of an IPR.

Even if APA due process is not mandated as to institution decisions, as a matter of fairness, the Office should require due process be afforded. In fact, the fairness and due process concerns are arguably greater at the institution phase given the limited development of the record and the fact that there is effectively no right to judicial review of a decision whether to institute an IPR. The Office acknowledged the importance of Director Review at the institution stage last year, when, in response to comments on the Director Review process, it changed the process to permit review of institution decisions even though such review was not

legally required.³ And, just last month, the Office underscored the importance of due process at the institution phase when it proposed rules requiring that both parties be heard before the Board can *sua sponte* deny institution based on discretionary institution factors. 89 Fed. Reg. 28693 (Apr. 19, 2024).

As explained in the background section of this request, notice and opportunity was not provided here. Neither party advanced an express claim construction nor engaged in a claim construction analysis. But the panel issued a dispositive construction Patent Owner never requested and based it on evidence neither party cited or discussed.⁴ If the Board believes that a claim term must be construed to assess patentability, it should provide notice and opportunity to

³ Revised Interim Director Review Process, UNITED STATES PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/patents/ptab/decisions/revised-interim-director-review-process> (Accessed Apr. 25, 2024) (“In *Arthrex*, the Supreme Court exclusively addressed the Director’s ability to review final decisions of the Board in *inter partes* review proceedings. . . . Nonetheless, for consistency and uniformity, Director Review requests are available for other areas of Board jurisdiction.”).

⁴ Had Patent Owner proffered the construction at issue, at least Samsung would have had the opportunity request a preliminary reply brief to respond before the panel adopted it. 37 C.F.R. § 42.108(c) (“A petitioner may seek leave to file a reply to the preliminary response in accordance with §§ 42.23 and 42.24(c). Any such request must make a showing of good cause.”).

respond either by permitting additional briefing before the institution decision or by instituting so that the parties can respond during the trial phase.⁵

B. A panel must, or should as a matter of fairness, allow the parties to be heard on evidence not of record and an argument to deny institution not raised by patent owner.

In *Magnum Oil*, the Federal Circuit held that “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.” *In re Magnum Oil Tools Int’l, Ltd.*, 829 F.3d 1364, 1381 (Fed. Cir. 2016).⁶ Even in situations where the Board is tasked to determine patentability in the first instance, such as with substitute claims, the Federal Circuit has held that it is required to provide the parties notice and an opportunity to respond. *See Nike, Inc. v. Adidas AG*, 955 F.3d 45, 51 (Fed. Cir. 2020) (“If the Board *sua sponte* identifies a patentability issue for a proposed

⁵ Moreover, the panel criticized Samsung for not “explain[ing]” how its prior art meets the panel’s construction. Dec. 18-19. Samsung cannot respond to a construction it has not seen, nor can it explain that the construction is in error if it is not permitted to respond.

⁶ In *Magnum Oil*, the Board advanced an argument not raised by the petitioner to support unpatentability. The Federal Circuit explained that, “while the PTO has broad authority to establish procedures for revisiting earlier-granted patents in IPRs, that authority is not so broad that it allows the PTO to raise, address, and decide unpatentability theories never presented by the petitioner and not supported by record evidence.” 829 F.3d at 1381.

substitute claim . . . it must provide notice of the issue and an opportunity for the parties to respond before issuing a final decision under 35 U.S.C. § 318(a).”).

These same principles apply, or should apply as a matter of fairness, to the petitioner at the institution phase. It is true that the Board, on behalf of the Director, is tasked in determining whether a petitioner has met the reasonable likelihood standard, even when a patent owner does not respond to a petition. 35 U.S.C. § 314(a). But, when a patent owner exercises its right to preliminarily respond, the circumstances are different. At that juncture, the Board should consider Patent Owner’s arguments in the first instance before raising independent bases to deny institution. Such an approach is consistent with the adversarial nature of IPRs. *See, e.g., Hunting Titan, Inc. v. Dynaenergetics Eur. GmbH*, IPR2018-00600, 2020 WL 3669653 at *3 (P.T.A.B. July 6, 2020) (precedential) (discussing the “party-directed, adversarial” nature of AIA proceedings as creating sufficient incentives for the parties to identify pertinent evidence and to make the best arguments). Moreover, whether a patent owner files a preliminary response or not, the Board should not rely on evidence outside the record in making an institution decision without providing the parties notice and an opportunity to respond.

And, as noted above, this approach is consistent with the Notice of Proposed Rulemaking issued last month, where the Office underscored the importance of due process at the institution phase. 89 Fed. Reg. 28693 (Apr. 19, 2024).

As explained in the background section of this request, the panel *sua sponte* identified an independent basis to deny institution not raised by Patent Owner: that the prior art did not teach the claimed “processor.” In order to articulate that basis, the panel relied on extrinsic evidence in the form of an IEEE dictionary neither party made of record. Dec. 11-12.⁷ As with claim construction, if the Board believes that a patentability issue must be addressed and/or outside evidence must be considered, it should provide notice and opportunity to respond either by permitting additional briefing before the institution decision or by instituting so that the parties can have notice and an opportunity to respond during the trial phase. Among other reasons, that approach would have allowed the parties to submit their own extrinsic evidence as to the meaning of “processor.”⁸

⁷ The panel made the IEEE definition of record as Exhibit 3002. Dec. 12. But because the panel did not institute, adding the definition to the record did not cure the due process problem.

⁸ See, e.g., R. Graf, *Modern Dictionary of Electronics* 7th ed. (1999) at 590 (defining “processor” more broadly as “computer or part of a computer capable of receiving data, manipulating it, and supplying results”). A later version of the IEEE dictionary cited by the panel, but still predating the patent application, also includes a broader definition of “processor” as “software or hardware that in any manner processes data” or a “circuit . . . which is utilized in the completion of a given process.” *Wiley Electrical and Electronics Engineering Dictionary* (2004) at 605.

C. The panel issued an erroneously narrow construction of the term “processor” and failed to consider Samsung’s evidence under that construction that would have satisfied it.

The panel construed the term “processor” as having “to execute code, program, or instructions” and stated that it “cannot be met simply by any electrical circuit.” Dec. 12.⁹ The panel also stated that in the context of the claims the processor *alone* must determine whether a gesture has been properly formed. Dec. 18 (“Petitioner has not asserted, much less demonstrated, that only a processor, *and nothing else*, can be used to detect a specific gesture, detect each component of the gesture, and analysis each component to determine whether has gesture has been properly formed.”), 18-19 (“Although a processor may perform those functions, the record is inadequate to show, even for institution purposes, *that only a processor, nothing but a processor*, can perform those functions and that one of ordinary skill in the art would have so recognized.”).

Again, Patent Owner did not argue for such a limiting construction, and there is no support for limiting the term “processor” in this manner. The specification only uses the term “processor” once, as follows:

The inertial sensor 23 could be an accelerometer with embedded power processing capabilities . . . The embedded power processing capabilities comprise *a processor or other processing means* for executing programmable software code for analyzing the

⁹ Samsung did not argue that “processor” may be met by any electrical circuit.

accelerations values delivered by the accelerometer, and for generating signals or values when certain conditions are met.

Ex-1001 (6:10-22). As a description of one embodiment, this discussion of processor is not limiting. *See, e.g., Phillips v. AWH Corp.*, 415 F.3d 1303, 1320 (Fed. Cir. 2005). Additionally, the claims are broader than this one description. The claims recite “an inertial sensor comprising an accelerometer and a processor and/or other processing means” without requiring that the processor be capable of “executing programmable software code.” Ex-1001 (12:29-36). And, as noted *supra* (footnote 8), other dictionary definitions do not require a processor to execute code, supporting the plain and ordinary meaning that Samsung (and Patent Owner) assumed.¹⁰ Moreover, the panel never considered the relevance of “other processing means” from the claims. While neither party identified this term for construction (*see* Paper 3 at 6-8, Paper 9 at 6), its inclusion shows the breadth that applicant intended for this claim element, which by statute includes all known equivalents. *See* 35 U.S.C. § 112(6).

Finally, the claims do not require that the processor “and nothing else” “discriminat[e] between gesture and no gesture.” While it is not entirely clear what

¹⁰ Even if the definition of processor required executing code, Petitioner’s expert testified that Orr’s processor could execute software and, alternatively, that it could be an application-specific integrated circuit (“ASIC”) with a hard-coded algorithm. Ex-1002 ¶124. As discussed, the panel did not consider this evidence of record.

the panel intended with this point, to the extent it is further narrowing the construction in the form of a negative limitation, that is not supported. To the extent the panel is referring to Samsung’s argument that “trigger circuit 38 including subsystem 42 *must be a processor*” because it discriminates between gestures “while both touch controller (navigation ASIC) and microprocessor 18 are in a lower-power sleep state,” that argument conforms to the plain and ordinary meaning of “processor” as demonstrated by the dictionary definitions cited *supra*. Because the panel was relying on an overly narrow definition of processor, it misapprehended Samsung’s argument—further demonstrating the danger of introducing extrinsic evidence without notice to the parties.

But, even if the panel’s construction of “processor” were correct, the panel erred by failing to consider all of Samsung’s evidence as to Orr and *any* of its evidence as to Orr. 682 F.2d 118-19; *see In re Keller*, 642 F.2d 413, 425 (C.C.P.A. 1981) (the test for obviousness “is what the combined teachings of the references would have suggested to those of ordinary skill in the art”). The Federal Circuit has held that the failure to consider relevant evidence is an abuse of discretion under the Administrative Procedure Act (“APA”). *See Provisur Techs., Inc. v. Weber, Inc.*, 50 F.4th 117, 124 (Fed. Cir. 2022) (holding the Board violated the APA because it did not “explicitly address [a party’s] arguments or even implicitly

explain” its analysis of the prior art “in a way that fairly contemplates and resolves those arguments”).

Samsung argued that Orr’s “trigger circuit 38” with accelerometer sub-system teaches a “processor,” which was enough even under the panel’s construction. But Samsung also argued, based on its expert’s testimony, that a POSITA “would have understood” circuit 38 to be a processor and to execute software. *See* Paper 3 at 31-32 (citing Ex-1002 ¶¶123-124). And Samsung argued in detail that Orr’s “trigger circuit 38” would be “enhanced” by the teachings of Orr682, which performs the more complex gesture recognition processing discussed in that reference. *See* Paper 3 at 33-37. The panel did not consider any of this evidence, which is an error of law. But, in view of this evidence, the panel also lacked substantial evidence in finding the teaching of a “processor” lacking, even under its narrow construction. Given that the only deficiency the panel identified was whether the references taught the claimed “processor,” this alone warrants reconsideration of the decision not to institute.

IV. CONCLUSION

For the reasons herein, Samsung respectfully requests that the Director review the panel’s decision and reverse or vacate the panel’s conclusions and findings so that the *inter partes* review proceeding can be instituted.

Respectfully Submitted,

/s/ William M. Fink

William M. Fink (Reg. No. 72,332)

CERTIFICATION OF WORD COUNT

Pursuant to 37 C.F.R. § 42.24(d), the undersigned certifies that this Request for Director Review complies with the 15-page limit exclusive of the parts exempted as provided in 37 C.F.R. § 42.24(a).

Respectfully Submitted,

/s/ William M. Fink

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CERTIFICATE OF SERVICE

The undersigned certifies pursuant to 37 C.F.R. §§ 42.6(e) and 42.105 that on May 16, 2024, a true and correct copy of REQUEST FOR DIRECTOR REVIEW was served in its entirety by filing this document through the PTAB P-TACTS System, as well as by email to counsel of record for the Patent Owner. Concurrently, notification is being provided to the Director of the USPTO at Director_PTABDecision_Review@uspto.gov.

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