

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VOVOMART (HK) ENTERPRISES CO., LTD.,
HK SANODESK CO., LTD., and LOCTEK, INC.,
Petitioner,

v.

OFFICE KICK, INC.,
Patent Owner.

PGR2022-00048
Patent 11,160,367 B1

Before BART A. GERSTENBLITH, JAMES A. TARTAL, and
ERIC C. JESCHKE, *Administrative Patent Judges*.

TARTAL, *Administrative Patent Judge*.

DECISION
Denying Petitioner's Request for Rehearing
37 C.F.R. § 42.71(d)

I. INTRODUCTION

Vovomart (HK) Enterprises Co., Ltd., HK Sanodesk Co., Ltd., and Loctek, Inc. (“Petitioner”) timely filed a request for rehearing (Paper 15, “Request”) of the Decision Denying Institution of *Inter Partes* Review (Paper 14, “Decision” or “Dec.”) of claims 1–10, 12, and 14–18 of U.S. Patent No. 11,160,367 B1 (Ex. 1001, “the ’367 patent”). For the reasons detailed in the Decision, and further summarized below, we do not find the Request persuasive and *deny* the Request.

II. STANDARD OF REVIEW

The applicable standard for a request for rehearing of a Board decision states in pertinent part as follows:

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.

37 C.F.R. § 42.71(d) (2021). Furthermore, “[w]hen rehearing a decision on petition, a panel will review the decision for an abuse of discretion.”

37 C.F.R. § 42.71(c). A request for rehearing is not an opportunity to present new arguments or evidence or merely to disagree with the panel’s assessment of the arguments or weighing of the evidence.

III. DISCUSSION

In the Decision, we explained, in determining whether to exercise discretion to deny the Petition under 35 U.S.C. § 325(d), as follows:

First, we determine “whether the same or substantially the same art previously was presented to the Office or whether the same or substantially the same arguments previously were presented to the Office.” [*Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH*, IPR2019-01469, Paper 6

at 8 (PTAB Feb. 13, 2020) (precedential).] Second, “if either condition of [the] first part of the framework is satisfied,” we consider “whether the petitioner has demonstrated that the Office erred in a manner material to the patentability of challenged claims.” *Id.*

Dec. 8. We found Patent Owner demonstrated that discretionary denial of the Petition under Section 325(d) was warranted because “Patent Owner has shown that the same or substantially the same art previously was presented to the Office,” that “Petitioner identifies no material error in the Examiner’s determination,” and that “our own evaluation of the evidence and facts presented in the Petition does not convince us of any material error by the Examiner.” Dec. 13–15. We noted that “Petitioner did not address discretionary denial under Section 325(d) in the Petition,” and “[m]oreover, after receiving Patent Owner’s Preliminary Response arguing discretionary denial under Section 325(d) is warranted in this proceeding, Petitioner did not seek leave to file a reply.” *Id.* at 7. On the record before us, we found, in regard to the references relied upon by Petitioner, as follows:

Chouinard, Stevens, and Franklin are each cited on the face of the ’367 patent, Flaherty is substantively duplicative to the ’644 patent cited on the face of the ’367 patent, Lindhal is substantively duplicative to the WO-966 reference cited on the face of the ’367 patent, and Yixu and Huang are substantially the same as Baudermann and Edmo, which are cited on the face of the ’367 patent.

Dec. 13.¹ In its Request, Petitioner does not dispute that it neither addressed the applicability of Section 325(d) in its Petition, despite basing its

¹ U.S. Patent No. 7,677,518 B2, issued Mar. 16, 2010 (Ex. 1016, “Chouinard”); CN 201657970 U, published Dec. 1, 2010 (Ex. 1017, “Yixu”); U.S. Patent No. 9,113,703 B2, issued Aug. 25, 2015 (Ex. 1018, “Flaherty”); CN 2637251 Y, issued Sept. 1, 2004 (Ex. 1019, “Huang”);

contentions in part on multiple references cited on the face of the challenged patent, nor sought to respond to Patent Owner’s extensive arguments in its Preliminary Response advocating for discretionary denial pursuant to Section 325(d). *See generally* Req.

Petitioner argues that, in determining Patent Owner sufficiently showed Yixu was substantially the same as art previously presented to the Office, i.e., Baudermann and Edmo, we misapprehended the disclosure of Yixu. Req. 3–7. Petitioner, however, directs us to no misapprehension of Yixu in the Decision. Instead, Petitioner argues for the first time that “Yixu is distinct from the cited prior art in two ways that are meaningful to patentability.” *Id.* at 3. According to Petitioner, we did not recognize that Yixu teaches a spring attached to an upper work surface in an anti-rotational configuration. *Id.* at 4–7. Petitioner asserts, without supporting citation to the Decision, that its arguments based on Yixu “simply cannot have been cumulative as the Board concluded.” *Id.* at 6. Petitioner’s argument fails for at least two reasons.

First, we made no determination in the Decision that Petitioner’s arguments are cumulative. We determined that Patent Owner had shown on the record before us that the same or substantially the same art was previously presented to the Office. Petitioner’s assertion that its arguments of unpatentability were not previously considered does not refute Patent

EP 0531385 B1, published Aug. 2, 1995 (Ex. 1020, “Lindhal”); U.S. Patent No. 5,400,720, issued Mar. 28, 1995 (Ex. 1021, “Stevens”); U.S. Patent No. 4,558,648, issued Dec. 17, 1995 (Ex. 1022, “Franklin”); DE102013008020, published Nov. 13, 2014 (Ex. 1002, 140–59; Ex. 2006, “Baudermann”); U.S. Patent No. 4,577,821, issued Mar. 25, 1986 (Ex. 2007, “Edmo”).

Owner's showing that Yixu is substantially similar to art previously presented to the Office, based on the record before us at that time. Second, to the extent Petitioner now argues that Yixu is materially different from art previously presented, Petitioner fails to show where it previously made that argument, or that the Decision based on the record before us was an abuse of discretion.

Petitioner further argues that "the Petition includes a fundamentally different argument that directly addresses the Examiner's position" in regard to the applicability of Edmo based on Petitioner's reliance on Stevens. *Id.* at 7–8. As noted above, Stevens is cited on the face of the '367 patent. Our exercise of discretion to deny the Petition was not based on a determination that Petitioner presented substantially the same arguments as previously considered by the Examiner. Rather, once we determined that the same or substantially the same art previously was presented to the Office, we then considered whether Petitioner demonstrated that the Office erred in a manner material to the patentability of the challenged claims. *See* Dec. 13. Petitioner failed to suggest, much less show, any material error by the Examiner in the Petition.

Petitioner also argues that that there should be no "adverse inference" attributed to its failure to request leave to reply to Patent Owner's Preliminary Response. Req. 8–9. Petitioner's argument has no basis as we applied no "adverse inference" in the Decision. Our determination was based on the arguments and evidence presented for our consideration, not on any "adverse inference" attributed to Petitioner's decision not to address Section 325(d).

Petitioner additionally seeks to support its decision not to address the applicability of Section 325(d) in the Petition or in a reply by arguing that “Petitioner believed that the Board would readily see the differences between the arguments made during prosecution and those in the Petition.” *Id.* at 9. We are aware of no support for the notion that the Board will “readily see” arguments not advanced by either party. The nonprecedential decisions cited by Petitioner addressing instances in which a request for leave to file a reply was denied provide no support for the notion that Petitioner may raise arguments for the first time in a request for rehearing because Petitioner assumed “the Board would readily see” an argument Petitioner never addressed. Moreover, as explained above, Patent Owner has shown that the same or substantially the same art previously was presented to the Office. Thus, the first part of the *Advanced Bionics* framework was satisfied by Patent Owner. *See* IPR2019-01469, Paper 6 at 8. Thus, contrary to Petitioner’s argument, the Decision did not turn on any readily apparent “differences between the arguments made during prosecution and those in the Petition.” *Id.*

Finally, where, as here, Petitioner is unable to identify in its Request “the place where each matter was previously addressed” by Petitioner, we could not have misapprehended or overlooked arguments presented by Petitioner for the first time in its Request, and there was no abuse of discretion in reaching the Decision.

IV. CONCLUSION

For the reasons discussed above, Petitioner has not demonstrated that we misapprehended or overlooked any matters in the Decision, as required by 37 C.F.R. § 42.71(d), or that the Decision was an abuse of discretion.

V. ORDER

Upon consideration of the record before us, it is:

ORDERED that Petitioner's Request for Rehearing is *denied*.

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