

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VEEAM SOFTWARE CORPORATION
Petitioner

v.

SYMANTEC CORPORATION
Patent Owner

Case IPR2013-00150
Patent 7,093,086

Before THOMAS L. GIANNETTI, SCOTT E. KAMHOLZ, and
TRENTON A. WARD, *Administrative Patent Judges*.

WARD, *Administrative Patent Judge*.

DECISION
Patent Owner's Request for Rehearing
37 C.F.R. § 42.71

I. INTRODUCTION

Patent Owner Symantec Corporation filed a request for rehearing (Paper 12) of the Board's decision, dated Aug. 7, 2013 (Paper 10), which instituted *inter partes* review of claims 1, 11, 12, and 22 of U.S. Patent 7,093,086. Patent Owner contends that the Board should not have instituted review of claims 11 and 22 as obvious over "Checkpoint for Network Transferable Computer" by Suzaki (Exs. 1007-1009) ("Suzaki") and "Integrating Checkpointing with Transaction Processing" by Wang (Ex. 1010) ("Wang"). Req. Reh'g. 2. For the reasons stated below, Patent Owner's request is denied.

II. STANDARD OF REVIEW

Under 37 C.F.R. § 42.71(c), "[w]hen rehearing a decision on petition, a panel will review the decision for an abuse of discretion." An abuse of discretion occurs when a "decision was based on an erroneous conclusion of law or clearly erroneous factual findings, or . . . a clear error of judgment." *PPG Indus. Inc. v. Celanese Polymer Specialties Co. Inc.*, 840 F.2d 1565, 1567 (Fed. Cir. 1988) (citations omitted). The request must identify, specifically, all matters the party believes the Board misapprehended or overlooked. 37 C.F.R. § 42.71(d).

III. DISCUSSION

Patent Owner argues that the Board overlooked Patent Owner's argument in the Preliminary Response contesting Petitioner's challenge based on Suzaki and Wang. Req. Reh'g. 2. More particularly, Patent Owner argued: (1) that the combination of Suzaki and Wang failed to teach each and every limitation in claims 11 and 22 and (2) that the alleged combination was improper. Prelim. Resp. 46-48; Req. Reh'g. 4. The Board agrees that it overlooked Patent

Owner's arguments regarding the combination of Suzuki and Wang and addresses these arguments below. In sum, we nonetheless conclude that the overlooked arguments do not cause us to reach a different conclusion as to the adequacy of the Petitioner's challenges at issue here.

First, Patent Owner argues that the combination of Suzuki and Wang does not satisfy all of the limitations of challenged claims 11 and 22 because it fails to teach or suggest "creating a new log of uncommitted updates." Prelim. Resp. 47; Req. Reh'g. 7. Specifically, Patent Owner argues that the UNDO logs in Wang do not capture updates as required by the claims and instead store prior disk data for the purpose of rolling back to a previous version. *Id.*

We are not persuaded by Patent Owner's argument. Wang discloses that its process of checkpointing involves "recording critical memory and file state at a given point of program execution on stable storage." Dec. 20 (quoting Wang 304). Furthermore, Wang discloses that an UNDO log is created as part of the transactional file update process. *Id.* (citing Wang 306). Thus, the UNDO log is a log of updates. *See Id.* Accordingly, we are not persuaded by Patent Owner's argument that Suzuki in combination with Wang fails to teach or suggest "creating a new log of uncommitted updates," as recited in claims 11 and 22.

Second, Patent Owner argues that Suzuki and Wang are not properly combinable because Suzuki relies upon the operating system to capture the state of a virtual machine, while Wang relies upon an application to capture state information. Prelim. Resp. 46; Req. Reh'g. 5-6. Furthermore, Patent Owner argues that Wang teaches that files updated by an application are not shared by another application and Suzuki's system requires a sharing of resources. Prelim. Resp. 46; Req. Reh'g. 6.

We are, again, not persuaded by Patent Owner's arguments. Petitioner relies upon Wang for the limited teaching of creating an UNDO log as part of the checkpointing process (Pet. 35 (citing Wang 304, 306)); that Wang happens to disclose the UNDO log in the context of an application rather than an operating system is of no moment. Petitioner's argument that it would have been obvious to combine Suzaki and Wang is reasonable and supported by record evidence (*see* Dec. 20-21), and Patent Owner's arguments fails to persuade us otherwise.

Patent Owner has not demonstrated an abuse of discretion in instituting an *inter partes* review of claims 11 and 22 on the ground of obviousness in view of Suzaki and Wang.

IV. CONCLUSION

The Board denies the relief requested in the request for rehearing.

V. ORDER

Accordingly, it is hereby

ORDERED that Patent Owner's request for rehearing is *denied*.

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