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Paper 44
Entered: July 24, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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APPLE INC., TWITTER, INC., AND YELP INC.,
Petitioner,

v.

EVOLUTIONARY INTELLIGENCE, LLC,
Patent Owner.

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Case IPR2014-00086
Case IPR2014-00812
Patent 7,010,536 B1

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Before KALYAN K. DESHPANDE, BRIAN J. McNAMARA, and GREGG I. ANDERSON, *Administrative Patent Judges.*

ANDERSON, *Administrative Patent Judge.*

DECISION
Petitioner's Request for Rehearing
*37 C.F.R. § 42.71*

## INTRODUCTION

On October 22, 2013, Apple, Inc. ("Petitioner")[1] filed a Petition requesting *inter partes* review of claims 2–14 and 16 of U.S. Patent No. 7,010,536 (Ex. 1001, "the '536 patent"). Paper 1 ("Pet."). On April 25, 2014, we granted the Petition and instituted trial for claims 2–12, 14, and 16 of the '536 patent on all of the grounds of unpatentability alleged in the Petition. Paper 8 ("Decision on Institution" or "Dec. Inst."). Evolutionary Intelligence, LLC ("Patent Owner") filed a Patent Owner Response. Paper 20 ("PO Resp."). Petitioner filed a Reply. Paper 28 ("Pet. Reply").

An oral hearing was held on January 6, 2015. The transcript of the consolidated hearing has been entered into the record. Paper 41 ("Tr."). In our Final Written Decision entered April 16, 2015 (Paper 41, "Final Decision" or "Final Dec."), we determined that Petitioner had not shown by a preponderance of the evidence that claims 2–12, 14, and 16 of the '536 patent were unpatentable as anticipated under 35 U.S.C. § 102(e) by Gibbs (Ex. 1006). Final Dec. 29.

Petitioner requests rehearing of our Final Decision (Paper 43, "Request" or "Req. Reh'g"). Petitioner asserts three grounds for rehearing. The first ground is that we misapprehended the evidence regarding whether Gibbs discloses the claimed container. Req. Reh'g. 2–10. Second, it is alleged we erred as a matter of law in our construction of "a first register

[1] Twitter, Inc. and Yelp Inc. filed a Petition in case IPR2014-00812 against the same patent, which case was joined with this case. Decision Granting Motion for Joinder (Paper 16). Twitter, Inc. and Yelp Inc. are also collectively referred to as "Petitioner" in this case.

having a unique container identification value." *Id.* at 10–13. Last, Petitioner contends we misapprehended the evidence whether Gibbs' discloses a neutral space register. *Id.* at 14–15.

For at least the reasons that follow, Petitioner's Request for Rehearing is denied.

## ANALYSIS

### *A. Standard Applied*

Petitioner bears the burden of showing the decision should be modified. 37 C.F.R. § 42.71(d). Further, Petitioner "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, opposition, or a reply." *Id.*

### *B. Gibbs Discloses a "container" as Claimed*

The Final Decision made the determination that Gibbs does disclose a "container" but did not disclose the container "as claimed." Final Dec. 19. Petitioner makes two arguments that Gibbs discloses the claimed container.

#### *1. Gibbs Logical Data Structure is a "container"*

First, Petitioner argues we misapprehended Gibbs, which Petitioner alleges discloses a single, logically defined enclosure comprising the instantiated transport, map, and report objects. Req. Reh'g. 2–8. As Petitioner argued in its Petition, in the Final Decision we determined that the separate objects of Gibbs were containers. Final Dec. 17, 19. However, we did not find Gibbs discloses the container as claimed where "container" is defined further as including the specified registers, *which registers interact with each other*. *Id.* at 19–20. We concluded:

Thus, while Gibbs may disclose some objects that function like

> the claimed registers, Gibbs does not disclose the claimed container. Rather, the "attributes or data items disclosed by Gibbs are each described as belonging to particular objects, *not as generically belonging to every object in Gibbs'[s] system*." PO Resp. 26.

Final Dec. 23–24 (emphasis added). Petitioner's final position is that Gibbs is a system that discloses an architecture and objects which anticipate the claims. *See* Final Dec. 18–19 (citing Pet. Reply 1, 3). However, Petitioner did not establish that *all* of the objects of the Gibbs system *interact* with a *every other object*, i.e., belong with every other object.

We have reviewed the evidence relied on by Petitioner in its Request, specifically the Houh Declaration (Ex. 1003) and Hough Supplemental Declaration (Ex. 1009). We referenced both declarations throughout the Final Decision. *See* Final Dec. 11, 15, 18, 19, 20, 22, 23, 24, 25, and 26. We credited the testimony of Patent Owner's expert, Dr. Green, that the transport object library of Gibbs is distinct from the service object library. Final Dec. 23 (citing Ex. 2006 ¶¶ 86–94; *see* Ex. 1006, Fig. 4). We specifically agreed with Dr. Green's conclusion that:

> Gibbs thus discloses the objects in Figure 4 as falling into two genuses: transport objects and service objects. Gibbs discloses each of these genuses as a library (i.e., "transport object library 64" and service object library 66") that consists of specific types of objects.

*Id.* (citing Ex. 2006 ¶ 88). Conversely, the Houh testimony presented with the Petition was that the objects of Gibbs "exemplify the 'containers' claimed in claim 2 of the '536 patent." Final Dec. 22

(citing Ex. 1003 ¶ 110).

As Patent Owner argued in its Response, Petitioner's final position is arguably a change from its original contention set forth in the Petition. PO Resp. 24, 37–38; *see* Final Dec. 18–19. Patent Owner argued that the testimony regarding where the "container" element was shown in Gibbs changed between the original Houh Declaration (Ex. 1003), filed with the Petition, and the later filed Houh Supplemental Declaration (Ex. 1009) and the Houh Deposition (Ex. 1010). PO Resp. 24, 37–38 Petitioner's final position, repeated in the Request, mirrors the later Houh testimony. *See, e.g.*, Req. Reh'g. 3, 4, 5, 6, 7. We did not misapprehend those arguments. Rather, we found them unpersuasive.

Petitioner argues we misapprehended or overlooked evidence that the Gibbs train management software "in operation creates 'containers.'" Req. Reh'g. 4. Petitioner concludes that because the single map object interacts with report and transport objects the interactive registers are disclosed in Gibbs. *Id.* at 5. This argument again relies on the Houh testimony. *Id.* at 4 (citing Ex. 1003 ¶¶ 91, 93, 128, 161, 166, 172; Ex. 1009 ¶¶ 14, 33–34). We specifically addressed this argument, and found it unpersuasive, in the Final Decision. Final Dec. 18, 20, 22. Neither the Petition nor the Houh Declaration stated specifically that a collection of objects that run in the system of Gibbs is the claimed container. *Id.* at 22 (citing Ex. 1003 ¶¶ 90, 92, 94, 96–97, 104). The Houh Declaration identified only Gibbs' objects as meeting the container limitation, and not the Gibbs system as Petitioner now argues. *Id.* "As such, Petitioner's evidence is inconsistent and does not specify where the container element is found in Gibbs." *Id.* at 23.

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