

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SOPHOS LIMITED AND SOPHOS INC.,
Petitioners

v.

FORTINET, INC.,
Patent Owner

U.S. Patent No. 8,205,251

Filing Date: May 24, 2011

Issue Date: June 19, 2012

Title: Policy-Based Content Filtering

Inter Partes Review No.: IPR2015-00911

**PETITIONER'S REQUEST FOR REHEARING OF
DECISION DENYING INSTITUTION OF *INTER PARTES* REVIEW OF
U.S. PATENT NO. 8,205,251**

I. Introduction

Pursuant to 37 CFR §42.71, Sophos Limited and Sophos Inc. (“Petitioner”) respectfully moves for rehearing of the Decision Denying Institution of *Inter Partes* Review issued on August 24, 2015 (Paper 8)(the “Decision”), as to claims 1, 6, 9, 12, 17, 18, 22, 26, 27, 29, 31, and 32 (“challenged claims”) of U.S. Patent No. 8,205,251 (the “251 patent”) (Ex. 1001).

Petitioner submitted its Petition in the above listed matter (“Petition”) on March 20, 2015. The Petition presented four grounds of unpatentability of the challenged claims. The grounds were based on three prior art references: U.S. Patent No. 6,728,885 (“Taylor”) (Ex. 1006), U.S. Patent No. 7,076,650 (“Sonnenberg”) (Ex. 1007), and Astaro Security Linux V5 (Version 5.026) User Manual, Release 8.0 © Astaro AG (2004) (“Astaro”) (Ex.1008). Petition at 3-4. The Petition and the grounds set forth therein were supported by the Declaration of Charles P. Pfleeger (“Pfleeger Declaration”) (Ex. 1009).

The Patent Owner filed its Preliminary Response to the Petition (Paper 6) on June 26, 2015. The Board citing to several of the Patent Owner’s arguments subsequently denied institution of *inter partes* review on all grounds in the Petition. In its Decision, the Board stated that it was not persuaded that Taylor taught “processing, *by the proxy* module,” “reassembling the application-level content from a plurality of packets of the packet stream,” and “reassembling and

scanning” application-level content. Decision at 10-11 (emphasis original). The Board was also not persuaded that Sonnenberg accounted for the processing and scanning limitations of these claims. *Id.* at 15-16. The Board denied the grounds that used Astaro as a secondary reference in combinations with Taylor (Ground 3) and Sonnenberg (Ground 4) because “Petitioner does not contend that Astaro teaches any of the independent claim limitations determined above to be missing in Taylor and Sonnenberg.” *Id.* at 16-17.

However, for the reasons set forth below, Petitioner respectfully submits that the Board misapprehended or overlooked the arguments and factual support set forth in the Petition, which were backed-up by the Pfleeger Declaration, and applied erroneous legal standards in its obviousness analysis. Under the appropriate legal standards (applied in the Petition), all challenged claims of the ’251 patent are obvious in view of Taylor and Sonnenberg alone or in respective combinations with Astaro for the reasons set forth in the Petition and the Pfleeger Declaration. Accordingly, it is respectfully submitted that the conclusions in the Decision amount to an abuse of discretion that warrants rehearing. To simplify the issues for the Board, however, Petitioner is only seeking rehearing of the grounds based on Taylor (i.e., Grounds 1 and 3).

II. Legal Standard

In considering a request for rehearing under 37 C.F.R. § 42.71(d), the Board reviews a prior decision “for an abuse of discretion.” 37 C.F.R. § 42.71(c). “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). “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.’” *Illumina, Inc. v. Trustees of Columbia University*, IPR2013-00011, Paper 44 at 2 (Patent Tr. & App. Bd. May 10, 2013) (citing *PPG Indus. Inc. v. Celanese Polymer Specialties Co. Inc.*, 840 F.2d 1565, 1567 (Fed. Cir. 1988)).

III. Argument

As established in the Petition and confirmed by Petitioners’ expert, Dr. Pfleeger, claims 1, 6, 12, 17, 18, 26, 27, 29, and 31 are unpatentable under 35 U.S.C. § 103(a) over Taylor because Taylor either disclosed, taught or suggested to a person of ordinary skill in the art all of the limitations of these claims. Petition at 6-27; Pfleeger Declaration at ¶¶ 79-106.

The Board, relying on Patent Owner’s arguments in its Preliminary Response (at 15-27), concluded that Taylor does not “account” for the

“processing,” “reassembling,” and “scanning” limitations as recited in independent claims 1, 17, and 26 of the ’251 patent. However, in reaching its conclusions, the Board appears to have misapprehended Petitioner’s arguments, overlooked argument and facts set forth in the Petition, and applied incorrect legal standards in its analysis.

A. The Board Overlooked Argument and Facts Showing That Taylor Disclosed “Processing,” “Reassembling,” and “Scanning” Application-Level Content

The Board concluded that Taylor did not render obvious claims 1, 6, 12, 17, 18, 26, 27, 29, and 31 for three reasons. Petitioner now explains why the factual findings and legal conclusions adopted by the Board are erroneous and amount to an abuse of discretion.

1. Taylor’s Proxy Applies Filtering Rules

In the Decision, the Board states that because Taylor’s filtering rules “are applied by DPF 207, not by proxy 211, we are not persuaded that such filtering constitutes ‘processing, *by the proxy module*’...” Decision at 10. To support this finding the Board cited to *selected* portions of Taylor’s disclosure while ignoring the conclusions of Petitioner’s expert and the understanding of the person of ordinary skill in the art (as established by Petitioner’s expert). Specifically, the Board relied on the following passages from Taylor to conclude that Taylor’s DPF applies filtering rules instead of its proxy module as argued by Petitioner and its

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