UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD
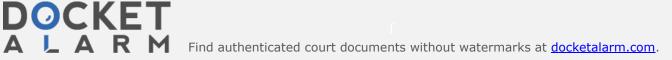
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SOPHOS LTD. and SOPHOS, INC.,
Petitioner,

v.

FORTINET, INC.,
Patent Owner.

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Case IPR2015-00911
Patent 8,205,251 B2

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Before MICHAEL R. ZECHER, MATTHEW R. CLEMENTS, and
MINN CHUNG, *Administrative Patent Judges*.

CLEMENTS, *Administrative Patent Judge*.

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

I. INTRODUCTION

Petitioner, Sophos Limited and Sophos Incorporated ("Sophos"), timely filed a Request for Rehearing under 37 C.F.R. § 42.71(d). Paper 9 ("Req. Reh'g"). Sophos' Request for Rehearing seeks reconsideration of our Decision Denying Institution (Paper 8, "Dec."), particularly our determination not to institute an *inter partes* review as to Sophos' asserted grounds of unpatentability ("grounds") based, in whole or in part, on Taylor.[1] Req. Reh'g 2 (Sophos "only seek[s] rehearing of the grounds based on Taylor"); s*ee* Dec. 7–12, 16–17.

In its Request for Rehearing, Sophos contends that our determination not to institute an *inter partes* review as to its asserted grounds based, in whole or in part, on Taylor is improper for at least three reasons. First, Sophos argues that we overlooked certain disclosures in Taylor and testimony from Charles P. Pfleeger, Ph.D. that supports its assertion that Taylor's proxy 211 applies filtering rules. Req. Reh'g. 4–6. Second, Sophos argues that we overlooked certain disclosures in Taylor and the testimony of Dr. Pfleeger that support its assertion that one of ordinary skill in the art would have understood that Tayler describes "reassembling the application-level content from a plurality of packets of the packet stream," as recited in independent claims 1, 17, and 26. *Id*. at 6–8. Third, Sophos argues that we applied the wrong legal standard when determining that the "reassembling" and "scanning" of application-level content, as required by independent claims 1, 17, and 26, is not disclosed, either expressly or inherently, in Taylor. *Id*. 8–10.

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[1] U.S. Patent No. 6,728,885 B1, issued Apr. 27, 2004 (Ex. 1006, "Taylor").

As we explain below, we have considered the arguments presented by Sophos in its Request for Rehearing, but we discern no sufficient reason to modify the Decision Denying Institution. As a consequence, we deny Sophos' Request for Rehearing.

II. STANDARD OF REVIEW

A party requesting rehearing bears the burden of showing that the decision should be modified. 37 C.F.R. § 42.71(d). The party must identify specifically all matters we misapprehended or overlooked, and the place where each matter was addressed previously in a motion, an opposition, or a reply. *Id*. When rehearing a decision on a petition, we review the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion may be indicated if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors. *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *Arnold P'ship v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004); *In re Gartside*, 203 F.3d 1305, 1315–16 (Fed. Cir. 2000). With this in mind, we address the arguments presented by Sophos in turn.

III. ANALYSIS

A. *We Did Not Misapprehend or Overlook Sophos' Argument Directed to Whether Taylor Teaches the "Processing" Step, as Required by Independent Claims 1, 17, and 26*

Sophos contends the we erroneously relied on "selected" portions of Taylor's disclosure to support our determination that Taylors' filtering rules are applied by Dynamic Packet Filter module 207 ("DPF 207")—not by

proxy 211. Req. Reh'g 4 (emphasis omitted). In reaching this purported erroneous determination, Sophos asserts that we ignored conclusions from its expert witness, Dr. Pfleeger, as well as ignored the understanding of one of ordinary skill in the art, as established by Dr. Pfleeger. *Id.* Sophos then argues that Taylor's proxy 211, indeed, applies filtering rules. *Id.* at 5. To support this assertion, Sophos directs us to various disclosures in Taylor and the Declaration of Dr. Pfleeger. *Id.* (citing Ex. 1006, 6:22–25, 6:58–60, 11:46–48; Ex. 1009 ¶¶ 58, 82, 83, 99).

We do not agree with Sophos that we misapprehended or overlooked its argument that Taylor's proxy 211 applies filtering rules. In its Request for Rehearing, Sophos focuses on new disclosures in Taylor that purportedly explain how Taylor's proxy 211 uses filtering rules to allow a connection. *Compare* Pet. 11–12 (citing Ex. 1006, Abstract, 2:60–63, 6:40–44, 11:46–48), *with* Req. Reh'g 4 (citing Ex. 1006, 6:22–25, 6:58–60, 11:46–48). To support this new argument, Sophos also directs us to new paragraphs in the Declaration of Dr. Pfleeger. *Compare* Pet. 11–12 (citing Ex. 1009 ¶¶ 83–88), *with* Req. Reh'g. 5 (citing Ex. 1009 ¶¶ 58, 82, 83, 99). A request for rehearing is not an opportunity to present new arguments or evidence that could have been presented and developed in the Petition. Put simply, we could not have overlooked or misapprehended arguments or evidence not presented and developed by Sophos in the Petition.

Even if we were to consider Sophos' newly minted theory that Taylor's proxy 211 applies filtering rules, we still would not be persuaded that Taylor properly accounts for the "processing" step performed by a proxy module, as required by independent claims 1, 17, and 26. In its Request for Rehearing, Sophos directs us to disparate disclosures in Taylor,

and then generally asserts that Taylor accounts for all the features recited in the "processing" step. For instance, Sophos cites to and relies upon the following disclosures in Taylor: (1) one embodiment of the firewall, as illustrated in Figure 3 of Taylor, *see, e.g.*, Ex. 1006, 6:22–25, 6:58–60; and (2) the transparency procedure, as illustrated in Figure 6 of Taylor, *see, e.g., id.* at 11:46–48. Neither Sophos, nor its expert witness, Dr. Pfleeger, provides a credible or sufficient explanation as to how one of ordinary skill in the art might combine these cited disclosures in Taylor to teach that proxy 211—not DPF 207—performs the claimed "processing" step. We, therefore, maintain our position that Sophos does not present sufficient evidence in its Petition to support a finding that Taylor describes the "processing" step performed by a proxy module, as required by independent claims 1, 17, and 26. *See* Dec. 10–12.

B. We Did Not Misapprehend or Overlook Sophos' Arguments Directed to Whether Taylor Teaches the "Reassembling" and "Scanning" Steps, as Required by Independent Claims 1, 17, and 26

Sophos contends that we erroneously determined that it did not present sufficient evidence in its Petition to support a finding that Taylor teaches "reassembling the application-level content from a plurality of packets of the packet stream," as recited in independent claims 1, 17, and 26. Req. Reh'g 6. To support this assertion, Sophos essentially reiterates the arguments and supporting evidence presented in its Petition that purportedly explain how Taylor's process of filtering "all" packets inherently discloses reassembling application-level content. *Id.* (citing Pet. 11–12; Ex. 1009 ¶¶ 55–57, 83–85).

We considered these arguments presented in in Sophos' Petition, but we were not persuaded. *See* Dec. 9–12. Sophos' arguments in this regard

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