UNITED STATES PATENT AND TRADEMARK OFFICE
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BEFORE THE PATENT TRIAL AND APPEAL BOARD
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TALARI NETWORKS, INC.,
Petitioner,

v.

FATPIPE NETWORKS PRIVATE LIMITED[1],
Patent Owner.

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Case IPR2016-00976
Patent 6,775,235 B2

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Before STACEY G. WHITE, MICHELLE N. WORMMEESTER, and
CHRISTA P. ZADO, *Administrative Patent Judges*.

WHITE, *Administrative Patent Judge*.

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

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[1] We note that Patent Owner's Updated Mandatory Notice changed the name
of the Patent Owner. Paper 30.

I. INTRODUCTION

FatPipe Networks Private Limited ("Patent Owner") seeks rehearing (Paper 33, "Request" or "Req. Reh'g") of our determination in the Final Written Decision (Paper 32, "Decision" or "Dec.") that claims 4 and 9[2] of U.S. Patent No. 6,775,235 B2 (Ex. 1001, "the '235 patent") would have been obvious over Karol. Patent Owner argues that we erred in our determination that (1) it would have been obvious to modify Karol's routing in the manner proposed by Petitioner; (2) we misapprehended the passages from the '235 patent describing path selection based on origin; and (3) we "overlooked and/or misapprehended that routing based on the source address will forward all packets from the same source to the same network." Req. Reh'g 1–2.

"The burden of showing a decision should be modified lies with the party challenging the decision." 37 C.F.R. § 42.71(d). When requesting rehearing of a decision, the challenging party must identify specifically all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in the record. *Id.* We have considered Patent Owner's Request and for reasons that follow, we clarify our reasoning in the Decision regarding the unpatentability of claims 4 and 9 and we maintain our determination that Petitioner established by a preponderance of the evidence the unpatentability of claims 4 and 9.

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[2] We also found that Petitioner demonstrated by a preponderance of the evidence that claims 5, 7–8, and 10–15 of the '235 patent are unpatentable. Patent Owner does not challenge these determinations in this Request for Rehearing.

II. DISCUSSION

Patent Owner argues that we erred in our determinations regarding claim 4 and claim 9. Req. Reh'g 2–6. Petitioner asserted that these claims were anticipated by and would have been obvious over Karol. Pet. 10–17, 24–25 (anticipation); *id.* at 42–47, 54 (obviousness).

Claim 4 recites, in relevant part, "a packet path selector which selects between network interfaces on a per-packet basis according to at least: a destination of the packet, an optional presence of alternate paths to that destination, and at least one specified criterion for selecting between alternate paths when such alternate paths are present." Claim 9 depends from claim 5 and recites, in relevant part, "the selecting step make[s] network path selections on a packet-by-packet basis." In our Final Written Decision, we construed the phrase "selects between network interfaces on a per-packet basis" to mean "selecting a network path/interface for each packet." Dec. 9. Based on the evidence and arguments presented, we found Petitioner's anticipation argument to be insufficient because "we determine[d] that Karol's routing decisions are made for a flow of packets and not for an individual packet." *Id.* at 18.

Petitioner also argued that claims 4 and 9 would have been obvious over Karol if we construed "per-packet basis" to require selection for each packet. Pet. 45, 54. We found Petitioner's obviousness argument to be legally sufficient and held that Petitioner had meet its burden to establish the unpatentability of claims 4 and 9 as obvious over Karol. Dec. 19–22, 30–31. On rehearing, Patent Owner asserts that this determination was incorrect because the modified Karol system would not select packets based on destination address as recited in claims 4 and 9. Req. Reh'g 2–6.

As an initial matter, we note that this argument is different from the argument presented during the trial. Patent Owner had argued that

> Karol does not disclose selecting a network on a per packet basis because (1) Karol does not "select" a network when a packet arrives but simply routes packets based on the forwarding database's pre-computed route and (2) Karol's forwarding database facilitates network path selection/changes only when updated with LSAs, which occurs only infrequently and not on a per-packet basis.

Paper 22 ("PO Resp.") 24. Thus, despite the fact that Patent Owner stated that "Karol does not disclose *or render obvious* the per-packet network path selection required by claim 4" the argument was directed to Petitioner's anticipation argument and not the obviousness argument over Karol alone. *id.* (emphasis added); *see also id.* at 51 ("for the same reasons set forth above for independent claim 4, Karol also fails to anticipate or render obvious claim 9"). As such, we could not have overlooked or misapprehended an argument that was not made. *See also* Paper 8, 6 ("The patent owner is cautioned that any arguments for patentability not raised in the response will be deemed waived.").

Even if these arguments had been raised, however, they would not have been persuasive because they misconstrue Petitioner's arguments. In its Request for Rehearing, Patent Owner points out that in the Decision, we stated "that it would have been obvious to modify Karol by limiting the routing decision to an analysis of the packet's source address." Req. Reh'g 3 (quoting Dec. 19–20). According to Patent Owner, this would not meet the limitations of claim 4 because that claim recites selection criteria which include the destination of the packet. Specifically, claim 4 recites, in relevant part,

> a packet path selector which selects between network
> interfaces on a per-packet basis according to at least:
>> [1] a destination of the packet,
>> [2] an optional presence of alternate paths to that
> destination, and
>> [3] at least one specified criterion for selecting between
> alternate paths when such alternate paths are present;

Ex. 1001, 17:46–51. Patent Owner argues that because claim 4 requires that the destination of the packet is used to select between network interfaces on a per-packet basis, the proposed modification to Karol is insufficient because it limits the routing decision to an analysis of the packet's source address. Req. Reh'g 4. Patent Owner is correct in its assertion that claim 4 requires path selection based on criteria which includes the packet's destination. Petitioner, however, addresses the selection criteria in its argument. Petitioner asserts that,

> To route the packets to a destination of the packet, Karol
> discloses a "forwarding database 432" within the gateway
> processor to determine if a particular packet matches a
> combination of "Destination IP address; Next hop router;
> Outgoing port (interface)" that would cause such a packet to be
> routed to the CL network or to be considered for routing over
> the CO network. (Ex. 1006 at 7:36-41; Ex. 1005 at ¶ 183.)

> For packets that are candidates for the CO network,
> Karol also discloses that each such packet is compared at the
> gateway processor with the "flow database 433" to determine if
> a particular packet matches a desired combination of "(a) an
> outgoing port field, which indicates the port on which a
> datagram whose entries match a particular record's entries is
> forwarded; (b) if the outgoing port is 'invalid,' the next field
> 'forward or hold'[] entry indicates whether packet should be
> forwarded or held in packet buffer 440; (c) destination address;
> (d) source address; (e) source port; (f) destination port; (g) type

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