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Paper No. 16
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AXON ENTERPRISE, INC.,
Petitioner,

v.

DIGITAL ALLY, INC.,
Patent Owner.

Case IPR2017-00515
Patent 9,253,452 B2

Before PHILLIP J. KAUFFMAN, MINN CHUNG, and ROBERT L. KINDER, *Administrative Patent Judges*.

CHUNG, *Administrative Patent Judge.*

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

I. INTRODUCTION

Axon Enterprise, Inc. ("Petitioner") filed a Request for Rehearing (Paper 15, "Request" or "Req. Reh'g") of the Decision (Paper 10, "Dec."), in which, based on the information presented in the Petition (Paper 1, "Pet."), we denied institution of an *inter partes* review of claims 10–17 and 20 (the "challenged claims") of U.S. Patent No. 9,253,452 B2 (Ex. 1001, "the '452 patent"). The Petition presented two separate grounds of unpatentability under 35 U.S.C. § 103(a): one based on the combination of Pierce (Ex. 1014) and Brundala (Ex. 1015) ("Ground 1"); and the other based on the combination of Vasavada (Ex. 1010) and Tabak (Ex. 1009) ("Ground 2"). Pet. 4. In our Decision, we determined the Petition did not demonstrate a reasonable likelihood that Petitioner would prevail in showing the unpatentability of any of the challenged claims on any of these asserted grounds. Dec. 2, 38. Petitioner's Request for Rehearing does not discuss our denial of institution on the ground based on Pierce and Brundala; rather, Petitioner's Request is directed only to the Decision's denial of the ground based on Vasavada and Tabak (i.e., Ground 2). Req. Reh'g 1. Petitioner contends that, in denying institution of Ground 2, the Decision overlooked Petitioner's evidence on a key claim limitation and misapplied the law on obviousness. *Id.* at 1–3. For the reasons stated below, Petitioner's Request for Rehearing is *denied*.

II. STANDARD OF REVIEW

"The burden of showing a decision should be modified lies with the party challenging the decision," and the challenging party "must specifically identify all matters the party believes the Board misapprehended or

overlooked, and the place where each matter was previously addressed" in a paper of record. 37 C.F.R. § 42.71(d). Because Petitioner seeks rehearing of our Decision denying institution of trial based on the Petition, it must show an abuse of discretion. *See* 37 C.F.R. § 42.71(c) ("When 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.*, 840 F.2d 1565, 1567 (Fed. Cir. 1988).

III. ANALYSIS

In the Decision, we determined that Petitioner did not demonstrate sufficiently that the combination of Vasavada and Tabak teaches or renders obvious all limitations of independent claim 10. Dec. 30–37. Our analysis focused on the limitations of claim 10 identified by Petitioner as limitations 10[D] and 10[G] (Pet. 58, 64), which recite "a recording device manager operable" (limitation 10[D]) to "broadcast, in response to receiving the trigger signal, at least one communication signal including correlation data to the first recording device and the second recording device instructing the first recording device to begin recording said first set of record data and instructing the second recording device to begin recording said second set of record data" (limitation 10[G]). Dec. 30–37. Claim 10 refers to the signal broadcast to the first and second recording devices as "the broadcast communication signal." Ex. 1001, 16:52–53.

In the Petition, Petitioner asserted that Vasavada alone discloses limitation 10[G], or, in the alternative, the combination of Vasavada and Tabak teaches or renders obvious limitation 10[G]. Pet. 64–66.

A. Petitioner's Contention That Vasavada Discloses Limitation 10[G]

In the Decision, addressing Petitioner's contention that "Vasavada discloses limitation 10[G]" (Pet. 64), we found that "Petitioner does not identify, nor do we discern, any express disclosure in Vasavada that signals 204 and 206 (the alleged 'broadcast communication signal') *instruct* the first and second recording devices (radio units 104 and 106) to begin recording." Dec. 32 (emphasis added). In its Request for Rehearing, Petitioner contends our Decision "applied an overly-restrictive test for obviousness (requiring 'express disclosure') when analyzing Vasavada" (Req. Reh'g 2) and "overlooked that Vasavada at least suggests" limitation 10[G], including the "'instructing' requirement." (*id.* at 9).

Petitioner mischaracterizes our Decision. We did not "require" Petitioner to show Vasavada expressly discloses limitation 10[G]. Rather, it was *Petitioner's contention* that "Vasavada *discloses* limitation 10[G]." Pet. 64 (emphasis added).

Petitioner's Request for Rehearing cites pages 64, 51–52, and 54 of the Petition as demonstrating Vasavada at least suggests the claimed "instructing" feature. Req. Reh'g 6 (citing Pet. 64), 7 (citing Pet. 54), 8 (citing Pet. 64), 10 (citing Pet. 51–52), 11 (citing Pet. 51–52). As discussed below, the only argument presented in these pages was that Vasavada *expressly discloses* limitation 10[G]. Contrary to Petitioner's contention in

the Request for Rehearing, none of these pages (nor any other portions) of the Petition discussed or explained that Vasavada suggests limitation 10[G].

Page 64 of the Petition addressing the "instructing" feature of limitation 10[G] is reproduced below in its entirety.

> Vasavada *discloses* limitation 10[G]. With regard to Fig.2 (above), Vasavada *discloses* that central control station 210 (i.e., recording device manager) retransmits signal 202 (i.e., communication signal, with the retransmission represented as signals 204, 206 in Fig.2) to radio units 104, 106 (i.e., first and second recording devices) over a communications network, such as cellular or WiFi, instructing the radio units to begin recording data related to the event. (Ex.1010, 2:31-46, 4:1-6, Fig.2; Ex.1003, ¶285). Vasavada *discloses* that this retransmission is in response to central control station 210 receiving signal 202 ("trigger signal") from radio unit 102. (Ex.1010, 4:4-6, Fig.4). In response to receiving the same retransmitted signal, radio units 104, 106 begin recording. (Ex.1010, 5:58-64, Fig.4 box 428; Ex.1003, ¶285). As such, central control station 210 sends a transmission simultaneously to multiple synced radio units instructing the devices to record. (Ex.1003, ¶285).

Pet. 64 (emphases added). Thus, page 64 of the Petition argued *only* that Vasavada *discloses* limitation 10[G]; Petitioner did not argue, much less explain, Vasavada at least suggests the "instructing" feature of limitation 10[G]. Pages 51–52 of the Petition present summaries of the Vasavada and Tabak references, while page 54 discusses the preamble of claim 10. *See id.* at 51–52, 54. Petitioner does not identify where in these pages the Petition presented arguments that Vasavada suggests limitation 10[G]. Thus, the record shows that, contrary to Petitioner's contention in the Request, the Petition did *not* present any argument that Vasavada at least *suggests* limitation 10[G]. Nor does Petitioner contend that it argued inherent

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