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Paper 9
Entered: October 19, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

HTC CORPORATION AND HTC AMERICA, INC.,
Petitioner,

v.

U.S. PHILIPS CORPORATION,
Patent Owner.

Case IPR2017-00856
Patent 5,910,797

Before KRISTEN L. DROESCH, BARBARA A. PARVIS, and MICHELLE N. WORMMEESTER, *Administrative Patent Judges.*

DROESCH, *Administrative Patent Judge.*

DECISION

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

I. INTRODUCTION

HTC Corporation and HTC America, Inc. ("Petitioner") filed a Petition (Paper 2, "Pet.") for *inter partes* review of claims 1, 4, 6–9, and 11, of U.S. Patent No. 5,910,797 (Ex. 1001, "the '797 Patent"). *See* 35 U.S.C. §§ 311–312. U.S. Philips Corporation ("Patent Owner") timely filed a Preliminary Response (Paper 6, "Prelim. Resp."). On August 18, 2017, we denied institution of *inter partes* review. Paper 7 ("Decision" or "Dec."). Petitioner filed a Request for Rehearing (Paper 8, "Req. Reh'g") of our Decision.

II. STANDARD OF REVIEW

When rehearing a decision on institution, the Board reviews the decision for an abuse of discretion. *See* 37 C.F.R. § 42.71(c). An abuse of discretion may arise if the decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if an unreasonable judgment is made in weighing relevant factors. *Star Fruits S.N.C. v. U.S.*, 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). The burden of showing that the decision should be modified is on Petitioner, the party challenging the decision. *See* 37 C.F.R. § 42.71(d). In addition, "[t]he request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed." *Id.*

II. ANALYSIS

Background of Petition, Preliminary Response, and Decision

For the phrase "programmed calculating means for under control of a screen motion sensed by said sensing means imparting an acceleration based

motion pattern to a predetermined selection among said objects," recited in claim 1, Petitioner offered the following explicit construction:

> The proposed function for this means-plus-function term is "under control of a screen motion sensed by sensing means in a manipulatable apparatus, imparting an acceleration based motion pattern to a predetermined selection among objects displayed on a screen means." Ex. 1001 4:48-51; Parulski Decl. ¶¶99-100.
>
> The descriptions in the 797 Patent that may recite structure are as follows. Parulski Decl. ¶101. "The apparatus has a programmed data processor for under control of a predetermined range of spatial orientations imparting a non-stationary motion pattern to a predetermined selection among the objects." Ex. 1001 Abstract. "FIG. 1 shows an apparatus diagram according to the invention. The apparatus 20 comprises a housing 20, data microprocessor 22, display screen 24 . . ." Ex. 1001 2:42-44, Fig. 1, Ref. 22. "The above configuration can operate in a way that has been widely practised for handheld calculators, handheld game-oriented devices, or so-called Personal Digital Assistants." Ex. 1001 2:50-53. "FIG. 5 is a flow chart for use with the invention, such as in a manipulatory game" which includes steps such as initializing the object on the display, amending the motion of the object if an inclination or change in inclination is detected, determining whether an obstacle is encountered by the object, and determination of other conditions which would cause the game to finish. Ex. 1001 Fig. 5, 4:15-39.

Pet. 26–27. Patent Owner offered the following explicit claim construction for "an acceleration based motion pattern":

> **"An acceleration based motion pattern"** (claims 1 and 11) – This term refers to a motion pattern that reflects acceleration. (Ex. 1001, col. 3, line 63 through col. 4, line 14.) Acceleration is defined as "[t]he rate of change of velocity with respect to time." (Ex. 2001, p. 11.) Thus, this term is properly construed to mean **"a pattern of motion which reflects acceleration."**

Prelim. Resp. 13. In the Decision, we stated:

> [W]e understand Petitioner to assert that the claimed function includes "imparting an acceleration based motion pattern to a predetermined selection among said objects," and the structure corresponding to the claimed function is a programmed data processor or data microprocessor 22, and the flow chart of Figure 5.
>
> Patent Owner does not dispute Petitioner's claim constructions for "data processing means" and "programmed calculating means." *See* Prelim. Resp. 12–14. Patent Owner, however, provides an explicit claim construction for "an acceleration based motion pattern" as "a pattern of motion which reflects acceleration." *Id*. at 13 (citing Ex. 1001, 3:63–4:14; Ex. 2001, 11); *see id*. at 18.

Dec. 10–11. We further explained:

> The '797 Patent disclosures cited by Petitioner reveal no more than a general purpose "programmed data processor." *See* Pet. 24–27; Ex. 1001, Abstract, 2:42–44, 50–53, 57–60, 4:15–39, Figs. 1, 5. The cited '797 Patent disclosures do not describe an algorithm, expressed as a mathematical formula, in prose, or as a flow chart, or in any other manner that provides sufficient structure for "imparting an acceleration based motion pattern to a predetermined selection among said objects." *See* Pet. 24–27; Ex. 1001, Abstract, 2:42–44, 50–53, 57–60, 4:15–39, Figs. 1, 5.
>
> To the extent that Petitioner contends that the Figure 5 flow chart is the algorithm for the programmed data processor, as explained before, the cited '797 Patent disclosures related to Figure 5 are silent with respect to "imparting an acceleration based motion pattern to a predetermined selection among the objects."

Dec. 12.

Request for Rehearing

From the outset, Petitioner disagrees with the statement in our Decision that "Patent Owner does not dispute Petitioner's claim constructions for 'data processing means' and 'programmed calculation

means.'" *See* Req. Reh'g 3 (citing Dec. 10, Prelim. Resp. 12–14). Petitioner contends that, although the Decision notes that Patent Owner provides an explicit claim construction for "an acceleration based motion pattern," the Decision overlooks that the term is a portion of the "programmed calculating means," recited in claim 1. *See id*. Petitioner further contends, "Patent Owner noted that its construction of 'an acceleration based motion pattern' differs from Petitioner and provides more detail and explanation." *Id*. at 4 (citing Prelim. Resp. 10, 13). Petitioner contends, on this basis, that Patent Owner's explanation of the construction for "an acceleration based motion pattern" and the cited specification in support of its construction are relevant to the construction of the "programmed calculating means" encompassing the "acceleration based motion pattern" limitation. *See id*. at 4–5.

We are not persuaded that we overlooked any arguments and evidence in rendering our Decision. Specifically, Petitioner does not direct us to any Patent Owner arguments explicitly disputing Petitioner's claim constructions. *See* Req. Reh'g 3 (citing Prelim. Resp. 12–14). Similarly, Petitioner does not direct us to any Patent Owner arguments "not[ing] that its construction of 'an acceleration based motion pattern' differs from Petitioner." *Id*. at 4. In support of the latter argument, Petitioner cites pages 10 and 13 of the Preliminary Response. At page 10 of the Preliminary Response, in a section entitled "The patent and its claims," summarizing the '797 Patent disclosure and claims, Patent Owner asserts:

> The term "acceleration based motion pattern," as discussed in more detail below, is properly construed to mean a pattern of motion that reflects acceleration. Thus, for example, where a displayed object's position is calculated such that it

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