

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

AVER INFORMATION INC. AND IPEVO, INC.,  
Petitioner,

v.

PATHWAY INNOVATIONS AND TECHNOLOGIES, INC.,  
Patent Owner.

---

Case IPR2017-02108  
Patent 8,508,751 B1

---

Before JONI Y. CHANG, THOMAS L. GIANNETTI, and  
NORMAN H. BEAMER, *Administrative Patent Judges*.

BEAMER, *Administrative Patent Judge*.

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

## I. INTRODUCTION

Pathway Innovations and Technologies, Inc. (“Patent Owner”) filed a Request for Rehearing (Paper 32, “Request”) of our Final Written Decision (Paper 31, “Final Decision”) in which, *inter alia*, we denied Patent Owner’s motion to amend U.S. Patent No. 8,508,751 B1 (Ex. 1001, “the ’751 patent”) as to proposed substitute claims 21–25 and 27. The Request seeks “reconsideration of the Board’s finding that proposed substitute claims 21–27 are obvious. . . .” Request 1.<sup>1</sup> For the reasons that follow, Patent Owner’s Request for Rehearing is denied.

## II. THE REQUEST FOR REHEARING

In pertinent part, 37 C.F.R. § 42.71(d) states:

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.

Thus, a request for rehearing is not an opportunity merely to disagree with the Board’s assessment of the arguments or weighing of the evidence, or to present new arguments or evidence.

Patent Owner first argues that reconsideration is appropriate because the parties have not had an opportunity to present arguments under the

---

<sup>1</sup> Although the Request is directed to claims 21–27, substitute claim 26 was proposed to replace issued claim 6. Paper 19, 21. Claim 6 is not subject to review because it was not challenged by Petitioner. Paper 3, 1. *See* 35 U.S.C. § 316(d)(1)(B) (which only permits amendment to challenged claims). Therefore substitute claim 26 has not been considered and so cannot be reconsidered. Paper 27, 4.

Board’s construction of the claim limitation “a video stream comprising a series of frame images,” which was added to proposed substitute independent claims 21 and 23, and, by dependency, to proposed substitute claims 22, 24, 25, and 27. Request 1, 4–6. Patent Owner does not request additional briefing on construction of this claim limitation, or attempt to explain why the Board’s claim construction was based on misapprehension or oversight.

Patent Owner also argues the Board did not perform a proper inquiry in determining proposed substitute claims 21–25 and 27 would have been obvious, thereby denying the motion to amend. *Id.* at 1–2, 6–14.

We have reviewed Patent Owner’s Request and carefully considered all of the arguments presented. For the following reasons, we are not persuaded that we misapprehended or overlooked any arguments or evidence. We, therefore, deny the Request.

### III. DISCUSSION

#### A. Claim Construction

In our Decision to Institute *Inter Partes* Review, we concluded the phrase, “a series of frame images,” in original independent claims 1 and 3 encompassed both still and video frame images, and so the claims would not be limited to capturing video frame images. Institution Dec. 9–13. Applying this construction, we rejected Patent Owner’s argument that the claims distinguish from the Morichika reference on the ground that it received still frame images rather than video frame images was unsuccessful. *Id.* at 21–22.

In response to our construction, Patent Owner, in its motion to amend, sought to substitute proposed claims 21 and 23 for claims 1 and 3, amending

the phrase “a series of frame images” to read, “a video stream comprising a series of frame images.” Paper 19, 19. Thus, as a result of this amendment, the claims would no longer literally read on a series of frame images captured manually — *e.g.*, by successively pressing a shutter button of a still camera — as is disclosed in *Morichika*. *Cf.*, Institution Dec. 18, 21–22.

In our Final Decision, we construed “a video stream comprising a series of frame images” as “a series of frame images captured automatically, but not necessarily continuously at a constant rate.” Decision 14. Because this exact language was added to the claim by the motion to amend, we could not have construed it earlier. We do not agree, however, that Patent Owner was denied “an opportunity to present argument under the Board’s new construction.” Request 1. Patent Owner has long been on notice that construction of the term “video,” and the distinction between still frame images and an image made up of a video stream, was central to the case. In particular, Petitioner, relying on its expert, argued that a video image is made up of a series of still images: “The plurality of still images, which are captured, constitute the video image.” Paper 3, 9; Ex. 1020 ¶ 24; *see also* Paper 16, 11 (“still images make up the video image”). During cross examination, Patent Owner’s testimony supported the view that a single frame image of a video stream is essentially the same as a still frame image. Rodriguez Dep. 13:14–19, 14:6–13, 15:12–16, 16:14–20. Petitioner emphasized that only “in *some* scenarios, a series of frame images can form a video image. . . .” Paper 16, 10. In arguing that it would have been obvious to modify the prior art *Morichika* reference to use a video camera in place of a still camera, Petitioner asserted that such substitution amounted to “continuously capturing images of a target area using a video camera [to]

avoid having to manually cause a new image to be captured every time the object or document to be displayed was moved.” Paper 3, 21; Ex. 1020 ¶ 56.

In response to these arguments by Petitioner, Patent Owner addressed this issue at length in its Preliminary Response (Paper 6, 10–14, 19), its Patent Owner Response 9 (Paper 11, 7–12, 21–22) as well as its Motion to Amend (Paper 12, 14–15). *See infra*. Patent Owner has had ample opportunity to present its views on the issue.

Patent Owner asserts that its amendment “was offered to obviate the need for claim construction.” Patent Owner argues it was inappropriate for the Board to construe “video stream,” after that phrase was first introduced into the proceeding. Request 5. We disagree. The proposed amendment, which was offered non-contingently to replace the original claims, only made it unnecessary to decide whether “frame images” should be limited to “video frame images.” Paper 11, 6–11. It did not “obviate” the need for construction of entirely new claim language.

Patent Owner further asserts that the Board’s construction of “a video stream comprising a series of frame images” is “different from Petitioner’s proposed construction, Patent Owner’s proposed construction, Patent Owner’s proposal for no construction, and the Board’s prior construction in the Decision to Institute Inter Partes Review.” Request 5. We find this argument to be unconvincing. As discussed *supra*, the issue is not whether the Board’s construction was “different.” The question is whether Patent Owner has had an adequate opportunity to address the issue of how this claim limitation should be construed. We determine that Patent Owner has

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.