UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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APPLE INC.,
Petitioner,

v.

UNILOC 2017 LLC,
Patent Owner.

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Case IPR2018-01027
Patent 8,712,723 B1

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Before SALLY C. MEDLEY, MIRIAM L. QUINN, and
SEAN P. O'HANLON, *Administrative Patent Judges*.

O'HANLON, *Administrative Patent Judge*.

DECISION
Denying Petitioner's Request for Rehearing
35 C.F.R. § 42.71

I. INTRODUCTION

On May 4, 2018, Apple Inc. ("Petitioner") filed a Petition (Paper 2, "Pet.") for *inter partes* review of claims 4 and 19 of U.S. Patent No. 8,712,723 (Ex. 1001, "the '723 patent"). On August 21, 2018, Uniloc Luxembourg S.A., a predecessor in interest of Uniloc 2017 LLC ("Patent Owner"), filed a Preliminary Response. Paper 7 ("Prelim. Resp."). In our Decision dated October 18, 2018 (Paper 8, "Decision" or "Dec."), we declined to institute *inter partes* review. Dec. 23. On November 19, 2018, Petitioner filed a Request for Rehearing (Paper 9, "Request" or "Req. Reh'g"). For the reasons set forth below, Petitioner's Request is *denied*.

II. STANDARD OF REVIEW

Under 37 C.F.R. § 42.71(c), "[w]hen rehearing a decision on petition, a panel will review the decision for an abuse of discretion." A request for rehearing is not an opportunity merely to disagree with the panel's assessment of the arguments or weighing of the evidence, or to present new arguments or evidence. "The burden of showing a decision should be modified lies with the party challenging the decision." 37 C.F.R. § 42.71(d). Further, "[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 in a motion, an opposition, or a reply." *Id.*

III. ANALYSIS

In its Request, Petitioner argues that the Board overlooked or misapprehended several items. *See* Req. Reh'g 3–14. We address each of these items separately below.

A. *Application of Harris*

As set forth in the Decision, we determined that Petitioner's challenge failed to establish a reasonable likelihood that Petitioner would prevail in showing the unpatentability of claims 4 and 19 because, *inter alia*, we found that Harris does not support either (1) Petitioner's arguments that Harris teaches the limitation recited in claim 5 (Exhibit 1011) or (2) Petitioner's stated rationale for modifying Richardson (Exhibit 1007). *See* Dec. 15–17.

Petitioner argues that "the Board misapprehended how the evidence within Harris is applicable to the combination of Fabio, Pasolini, and Richardson." Req. Reh'g 3. Specifically, Petitioner argues that "[t]he contradiction perceived by [the] Board is predicated on the 'current period' in Harris being analogous to the 'stepping/sample period' in Richardson." *Id.* at 4. Petitioner argues that "[t]he 'current period' in Harris is not analogous to the 'stepping/sample period' in Richardson" because "[t]he term 'stepping/sample period' in Richardson reflects acceleration data associated with <u>multiple</u> footfalls stored in one of Richardson's buffers at a given time." *Id.*

> Not appreciating that Richardson's "sample/stepping periods" contain data about multiple footfalls that are used to generate a moving average, led the Board to conclude incorrectly that "Petitioner's stated rationale or the teachings of Harris" do not comport with "Petitioner's contention that using data from only the current stepping period would 'yield a smoother acceleration threshold.'"

Id. at 5.

We disagree with Petitioner's contentions. Initially, we disagree with Petitioner's improper attempt to broaden its assertions made in the Petition. Petitioner defined its "smaller sample size" as a "stepping period," not a

"sample period." *See* Pet. 45 ("a smaller sample size (i.e., one stepping period)"). By common definition, a "stepping period" is the length of time required for one step to occur. *See* http://www.oed.com/view/Entry/140968 (last visited January 22, 2019) (defining period as "*Physics.* The interval of time between successive occurrences of the same state or phase in an oscillatory or cyclic phenomenon (e.g. a mechanical vibration, an alternating current, or a variable star)."). Petitioner has not explained persuasively how a "stepping period," as asserted in the Petition, is understood to be the same as a "sample period" that includes "multiple footfalls."

Turning to the Decision, in contradistinction to Petitioner's contentions, we recognized that the data in Richardson's buffers is acquired during and indicative of multiple footfalls. *See* Dec. 14–15 (reproducing and discussing Richardson's Figure 13a). The inconsistency we noted was not in regard to the number of footfalls within Richardson's buffer data; rather, it was in regard to the Petitioner's assertions regarding the teaching of Harris. Petitioner relied on Harris to teach "that a moving average is often used in data analysis 'to smooth the curve of a data series and make general trends more visible.'" Pet. 45 (quoting Ex. 1011, 243); Dec. 16. Harris explains that "[e]ach point on a moving average curve is generally calculated by averaging the value for the current period *plus a fixed number of prior periods*" and "the *greater* the number of intervals, the smoother the moving average curve." Ex. 1011, 243 (emphases added); Dec. 17. Thus, Harris teaches that a *greater* number of data points used in the calculation of the moving average results in a smoother curve.

Petitioner contradicts this teaching of Harris by *reducing* the number of data points used to calculate the moving average: "applying a moving

average of accelerations *with a smaller sample size (i.e., one stepping period)*, as disclosed in Richardson, would be beneficial to Pasolini in that it would yield a smoother acceleration threshold." Pet. 45. We remain persuaded that Harris does not support Petitioner's contention that it would have been obvious to use a *smaller* sample size to generate a smoother moving average.

Accordingly, Petitioner's assertions do not persuade us that we misapprehended the application of Harris to the combination of Fabio, Pasolini, and Richardson.

B. Richardson's Moving Average

Petitioner contends that we "incorrectly concluded that 'there is no explicit disclosure in Richardson that the moving average, or baseline, is generated based on data in only the current sample period.'" Req. Reh'g 6 (quoting Dec. 18). Petitioner argues that "the 'current sample period' in Richardson is all the data in the buffer (which reflects multiple steps), and the explicit disclosure in Richardson indicates that the data in a single buffer is analyzed." *Id.* (citing Ex. 1007, 28:34–36). Petitioner argues that "the first step in this analysis is computing the moving average for the data in the buffer." *Id.* (citing Ex. 1007, 28:36–39).

We agree that Richardson uses two buffers and that the data in one buffer is analyzed while data is input into the other buffer. *See* Dec. 14 (citing Ex. 1007, 27:60–28:36). We also agree that the first step of Richardson's analysis is to compute a moving average. *See id.* (citing Ex. 1007, 28:36–39). We disagree, however, with Petitioner's assertion that

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