

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Microsoft Corporation and HP

Inc.,

Petitioners, v.

SYNKLOUD TECHNOLOGIES, LLC,

Patent Owner.

IPR2020-00316

U.S. 9,098,526

PATENT OWNER SUR-REPLY

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I. Introduction.

Under the proper claim construction as set forth by Patent Owner SynKloud Technologies, LLC (“PO” or “SynKloud”), none of the claims of U.S. Patent 9,098,526 (“the ’526 patent”) would have been obvious. Many of the claim limitations are wholly absent from the prior art.

Under these circumstances, documentary evidence is required to establish that the absent limitations would have been obvious. *K/S HIMPP v. Hear-Wear Technologies, LLC*, 751 F.3d 1362, 1366 (Fed. Cir. 2014) (“an assessment of basic knowledge and common sense as a replacement for documentary evidence for factual findings lacks substantial evidence support.”). But Petitioners make no attempt in its Reply to provide the documentary evidence required to establish obviousness. Nor does it attempt to argue that *K/S HIMPP* is not the law.

Instead, Petitioners restate their sole reliance on their expert declaration to advance the theory that the limitations that are absent from the prior art would have been obvious. *See* Reply, 7-25. For this very reason, Petitioners’ argument violates the mandate of *K/S HIMPP*. It is improper to rely on after-the-fact expert declarations, rather than contemporaneous documentary evidence, to support an obviousness theory that relies on modifications of the prior art to supply missing limitations. Indeed, Petitioners’ Reply ignores the testimony of SynKloud’s expert Mr. Jawadi, which explains why a person of ordinary skill in the art (POSITA) would not have been motivated to modify the prior art

to include the missing claim limitations.

Moreover, Petitioners' arguments are based on erroneous claim constructions. Although Petitioners contend that the claims would have been obvious under SynKloud's constructions, they do not, in fact, apply SynKloud's constructions in their Petition or Reply.

Petitioners' Reply and Petition are based on erroneous claim constructions and the mistaken view that the claim limitations that are wholly absent from the prior art would have been obvious just because it says so (*i.e.*, without any supporting documentary evidence). Petitioners have not nearly met its burden to show by a preponderance of the evidence that any claim of the '526 patent would have been obvious.

II. PO's Claim Constructions Are Consistent With the Plain and Ordinary Meaning Of The Claims As Understood By A POSITA In Light Of The Specification.

A. Predefined Capacity

As explained by PO, the proper construction of "a storage space of a predefined capacity assigned exclusively to the user of a wireless device by a storage server" requires "deciding or setting in advance by a storage server an amount of storage server an amount of storage space exclusively to a user of a wireless device." PO Response, 12.

In response, Petitioners build and then knock down a straw man argument that SynKloud never made. According to Petitioners, SynKloud's attention to the plain and ordinary meaning of this claim limitation as understood by a POSITA means that SynKloud's construction "represent[s] a wholesale rewriting of the claim language."

Reply, 6. But this is plainly not so.

SynKloud agrees with and endorses the Federal Circuit’s prohibition against rewriting claims. But it is simply not relevant here. SynKloud does not make the argument prohibited by the Federal Circuit. Rather, SynKloud explains that its construction is consistent with the plain and ordinary meaning as understood by a POSITA. As explained by Mr. Jawadi, a POSITA would have understood that predefining capacity is different than allocating storage:

a POSITA would have understood the predefining capacity to mean defining (i.e., deciding or setting in advance) the amount of storage before the storage is allocated or assigned to the user (EX2014, § 102);

a POSITA would not have conflated predefining capacity (predefining an amount of storage before the storage is allocated (reserved or assigned) and allocating (reserving or assigning) storage (which happens later). (*id.* at §103).

Indeed, the prefix “pre” in “predefined” means “before.” *Ibid.*¹ Moreover, the claims explicitly recite that “a storage space of a predefined capacity,” is “assigned exclusively

¹ Petitioners’ statements that SynKloud did not provide a “sufficient basis” for its proposed construction and did not cite to supporting evidence (Reply, 6) are demonstrably false. SynKloud explained—with support from the claim language, the Specification, and expert testimony as to how a POSITA would have understood the claims—that the prefix “pre” in the claim term “predefined” means that the storage is set in advance. PO Response, 12-13.

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