

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

WALMART INC.; Z-SHADE CO., LTD.;
COSTCO WHOLESALE CORPORATION;
LOWE'S HOME CENTERS, LLC; and
SHELTERLOGIC CORP.,
Petitioner,

v.

CARAVAN CANOPY INTERNATIONAL, INC.,
Patent Owner.

IPR2020-01026¹
Patent 5,944,040

Before BART A. GERSTENBLITH, JAMES J. MAYBERRY, and
ERIC C. JESCHKE, *Administrative Patent Judges*.

JESCHKE, *Administrative Patent Judge*.

DECISION

Denying Patent Owner's Request on Rehearing of
Final Written Decision Determining All Challenged Claims Unpatentable
37 C.F.R. § 42.71(d)

¹ Z-Shade Co., Ltd.; Costco Wholesale Corporation; Lowe's Home Centers, LLC; and ShelterLogic Corp., which filed a petition in IPR2021-00449, have been joined as petitioner in this proceeding.

I. BACKGROUND

Walmart Inc. filed a Petition to institute an *inter partes* review of claims 1–3 (the “challenged claims”) of U.S. Patent No. 5,944,040 (Ex. 1001, “the ’040 patent”). Paper 1 (“Pet.”). Patent Owner, Caravan Canopy International, Inc., filed a Preliminary Response. Paper 8. With Board authorization (Paper 9), Petitioner timely filed a Preliminary Reply to Patent Owner’s Preliminary Response (Paper 10), and Patent Owner timely filed a Preliminary Sur-reply to Petitioner’s Preliminary Reply (Paper 11). We instituted trial as to the challenged claims. Paper 12. During trial, Patent Owner filed a Response (Paper 20, “PO Resp.”), Petitioner filed a Reply (Paper 27, “Pet. Reply”), and Patent Owner filed a Sur-reply (Paper 37, “PO Sur-reply”).

After institution of trial in this proceeding, Z-Shade Co., Ltd.; Costco Wholesale Corporation; Lowe’s Home Centers, LLC; and ShelterLogic Corp.² filed a petition in IPR2021-00449, asserting the same grounds as asserted in this proceeding, and moved to join this proceeding. *See* IPR2021-00449, Papers 5 (Petition) & 6 (Motion for Joinder). We instituted *inter partes* review of the challenged claims in IPR2021-00449 and granted the motion for joinder. *See* IPR2021-00449, Paper 11.

An oral hearing was held on September 15, 2021, and a copy of the transcript was entered into the record. Paper 56. In the Final Written Decision, we determined that Petitioner had proven by a preponderance of

² We refer to Walmart Inc., Z-Shade Co., Ltd.; Costco Wholesale Corporation; Lowe’s Home Centers, LLC; and ShelterLogic Corp. collectively as “Petitioner.”

the evidence that claims 1–3 would have been obvious to one of ordinary skill in the art based on Yang³ and Lynch⁴. Paper 57 (“Dec.”).

Patent Owner timely filed a Request on Rehearing of the Final Written Decision. Paper 58 (“Request on Rehearing” or “Req. Reh’g”). For the reasons below, Patent Owner’s Request on Rehearing is *denied*.

II. DISCUSSION

A. Standard of Review

A party requesting rehearing bears the burden of showing that the decision should be modified. *See* 37 C.F.R. § 42.71(d) (2019). A request on rehearing “must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed” in the prior briefing. *Id.*

B. Patent Owner’s Arguments on Rehearing as to the Asserted Obviousness of Claims 1–3 Based on Yang and Lynch

In the Request on Rehearing, Patent Owner presents four issues allegedly misapprehended or overlooked as to the asserted ground based on Yang and Lynch. *See* Req. Reh’g 2–15. We address each of the four issues in turn below.

³ Japanese Publication No. H1-61370 (with translation and affidavit), published April 19, 1989 (Ex. 1005 (Japanese version) and Ex. 1004 (translation with affidavit), collectively “Yang”). With the Response, Patent Owner provided its own translation of Yang, as Exhibit 2030.

⁴ US 4,779,635, issued October 25, 1988 (Ex. 1007, “Lynch”).

1. Whether the Board Misapprehended or Overlooked That Petitioner Improperly Recast its “Increased Headroom” Motivation

First, Patent Owner contends that “the Board misapprehended and/or overlooked Patent Owner’s evidence and arguments” that “Petitioner improperly recast its ‘increased headroom’ ‘to increase space for activities’ motivation in its Petition to ‘increased headroom’ for ‘stationary users’ in its Reply.” Req. Reh’g 1; *id.* at 2–7 (entire argument). For the reasons below, we are not persuaded that we misapprehended or overlooked this issue.

Patent Owner argues that Petitioner has “recast” the alleged benefit of the “increased headroom” from modifying Yang with Lynch from “increased space for activities” to more space “for stationary users”:

In its Reply, rather than rebut Patent Owner’s evidence and argument that Petitioner’s proposed modification to Yang would not “increase space for activities,” Petitioner went in a new direction with a new approach supported solely by new evidence, arguing that “[a] POSITA^[5] would have been motivated to increase the total ceiling height, not just the clear ceiling height” because “[e]xtra headroom would enable taller persons to stand under the tent without their heads contacting the roof.”

Req. Reh’g 3–4 (quoting Pet. Reply 19–20).

As an initial matter, although Patent Owner asserted in the Sur-reply that “Petitioner recast[ed] its ‘increased headroom’ motivation” in the Reply, the basis for that argument was that Petitioner had allegedly improperly substituted “total ceiling height” in the Reply for the more general “headroom” in the Petition:

Petitioner recasts its “increased headroom” motivation, also described as “increase[d] space for activities,” as increased

⁵ “POSITA” is a person of ordinary skill in the art.

space under the canopy. This is improper. Petitioner *repeatedly* used “headroom”—not “space”—in the Petition and cited the ’040 patent and prior art, which tie headroom to the canopy support structure. (EX-2014, ¶¶47-49, 53-55). Thus, Prof. Rake was reasonable in understanding “headroom” to mean “clear ceiling height.” Petitioner cannot fault Patent Owner for not intuiting its arguments.

PO Sur-reply 14. The Final Decision addressed the Sur-reply argument, stating that “[w]e decline to limit the Petition in that way because, in the Reply, Petitioner clarifies that, with the term ‘headroom’ in the Petition, Petitioner meant ‘total ceiling height.’” Dec. 47 (citing Pet. Reply 19; *SAS Inst. v. Iancu*, 138 S. Ct. 1348, 1351 (2018) (stating the statute confirms that the petition “should guide the life of the litigation”)).

In contrast, in the Rehearing Request, Patent Owner raises a *different argument* than that in the Sur-reply, framing Petitioner’s alleged “recasting” as changing “increased space for activities” to space “for stationary users.” Req. Reh’g 4 (arguing that “Petitioner improperly proceeded in a new direction with a new approach relying entirely on new evidence in its Reply by changing from ‘space for activities’ to space for ‘stationary users’”). Patent Owner seeks to rely on its general Sur-reply argument that the Reply relied on new evidence (*see* Req. Reh’g 4 (citing PO Sur-reply 3)), but that argument did not address this *specific* issue. *See* PO Sur-reply 3–4.

Moreover, even if this argument were timely, we view Petitioner’s framing of the motivation as of the filing of the Reply as properly clarifying the motivation as of the filing of the Petition, in response to the Patent Owner Response. In other words, for the reasons below, Petitioner’s framing in the Reply is properly characterized as a “clarification of its prior position in response to [Patent Owner’s] arguments,” not “an entirely new

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