

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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DISPERSIVE NETWORKS, INC.,  
Petitioner,

v.

NICIRA, INC.,  
Patent Owner.

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Case PGR2018-00063  
Patent 9,722,815 B2

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Before DEBRA K. STEPHENS, GARTH D. BAER, and  
KAMRAN JIVANI, *Administrative Patent Judges*.

STEPHENS, *Administrative Patent Judge*.

DECISION

Granting in Part Patent Owner's Request for Rehearing  
*37 C.F.R. § 42.71*

## I. INTRODUCTION

Nicira, Inc.<sup>1</sup> (“Patent Owner”) filed a Request for Rehearing (Paper 27, “Request” or “Req. Reh’g”) of our Decision to Institute (Paper 25, “Decision” or “Dec.”) entered on November 15, 2018. Patent Owner’s Request seeks reconsideration of our Decision granting institution of post-grant review with respect to claims 1–11 as indefinite under 35 U.S.C. § 112(b).

For the reasons provided below, we *grant-in-part* Patent Owner’s Request.

## II. LEGAL STANDARDS

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

When rehearing a decision on a petition, we review the decision for an abuse of discretion (*see* 37 C.F.R. § 42.71(c)). An abuse of discretion may be indicated if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors (*see Star Fruits S.N.C. v. United States*, 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

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<sup>1</sup> Nicira, Inc. identifies VMware, Inc. as an additional real party in interest. (Paper 5, 3).

F.3d 1305, 1315–16 (Fed. Cir. 2000)). With this in mind, we address the arguments Patent Owner presents.

### III. ANALYSIS

#### A. *Claim 1: 35 U.S.C. § 112(b)*

##### 1. *Argument that Petitioner did not advocate the basis for institution in the decision*

In the Petition, Petitioner alleged the limitation “setting another MP network flow parameter based on the optimal multipath network flow setting” is indefinite (Pet. 19). Patent Owner argues that the reasoning stated in the Decision on page 20 was not explicitly argued by Petitioner (Req. Reh’g 3). In particular, Patent Owner contends “Petitioner failed to identify which of the . . . words or phrases specifically have a meaning that is unclear, or why they are unclear” (*id.* (quoting Paper 17 (“Prelim. Resp.”) 26)). Thus, according to Patent Owner, Petitioner “never argued this as a basis for alleging that claim 1 is indefinite . . . and thus, could not have possibly met its burden to establish that claim 1 is more likely than not indefinite on this basis” (*id.* at 3–4).

Based on the record before us, we disagree. The reasoning now identified by Patent Owner is our analysis of Patent Owner’s own argument from Patent Owner’s Preliminary Response (Prelim. Resp. 31). Specifically, Patent Owner identifies and asserts the following is a new argument formulated by the Board: “[t]he cited portions of the ’815 patent do not discuss ‘setting another parameter’, rather, those portions describe updating or changing a parameter that is already set” (Req. Reh’g 3 (citing Dec. 19–20)). However, the “cited portions of the ’815 Patent” were cited by Patent Owner in the Preliminary Response on page 31 (*see* Dec. 19 (“[T]he

portions cited by Patent Owner discuss *updating* or *changing*: ... (Prelim. Resp. 31 (citing '815 Patent, Ex. 1001, 9:38–54))). Thus, the text identified by Patent Owner from the Decision at page 20 is our analysis of Patent Owner's own argument, not a "Board formulated" argument as Patent Owner now asserts.

For these reasons, we are not persuaded we misapprehended or overlooked any argument, based on the record before us.

2. *Argument that "setting" is the same as updating or changing*

Patent Owner next asserts that we overlooked Patent Owner's argument that the claim 1 limitation "'setting another MP parameter' is clear and definite on its face," and overlooked "the evidence cited in support thereof" (Req. Reh'g 5 (citing Prelim Resp. 27–28)). Moreover, according to Patent Owner, we did "not address the fundamental issue of whether one of ordinary skill in the art would even need to resort to the contents of the specification to understand the meaning of the above-quoted limitation, or explain why the language on the face of the claim is unclear or indefinite" (*id.* at 5). Patent Owner further argues that the Specification describes "an example of 'setting another MP flow parameter[' as] changing a load-balancing setting to a new replication setting for future packets in the MP flow" (Req. Reh'g 5–6). Patent Owner again argues "Petitioner did not allege that the word 'setting' was unclear" and that if Petitioner had, Patent Owner could have explained "that 'setting' is the same as updating or changing" (*id.* at 6).

Based on the record before us, we disagree we overlooked the argument because our Decision analyzes Patent Owner's argument regarding the meaning of "setting" and the cited section of the '815 Patent (Dec. 19–

20). Our Decision quotes Patent Owner’s cited section of the ’815 Patent and explains why “setting” is indefinite:

Therefore, the claim is unclear as to what the “setting another . . . parameter” refers. The cited portions of the ’815 Patent do not discuss “setting another parameter”; rather, those portions describe updating or changing a parameter that is already set. At this juncture, we have not identified portions of the ’815 Patent that would support Patent Owner’s interpretation. Accordingly, based on this record, we determine the claim, even when read in light of the ’815 Patent’s Specification, fails to delineate the bounds of the invention, to an ordinarily skilled artisan

(Dec. 20 (referring to cited portions of the ’815 Patent, Ex. 1001, 9:38–54)).

The above quotation addresses Patent Owner’s argument. Thus, as we explained, Patent Owner’s Specification describes “updating or changing” a parameter but not “setting *another* MP network flow parameter.”

Accordingly, based on the record before us, we determined Petitioner has shown, more likely than not, that the limitation is indefinite. Patent Owner, however, has the opportunity to develop the record during the trial.

For these reasons, we are not persuaded we misapprehended or overlooked Patent Owner’s argument.

3. *Argument for claim 1 that Nautilus is the correct indefiniteness standard for PGRs*

Patent Owner asserts that the Decision misapprehended or overlooked Patent Owner’s argument that the standard set forth in *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 212 (2014), is the correct standard to be applied in post-grant review (PGR) proceedings (Req. Reh’g 7, 11–12, 15–16; Prelim. Resp. 25–26). Patent Owner cites no controlling authority that supports this assertion (Prelim. Resp. 25–26).

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