

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC,
Petitioner,

v.

JAWBONE INNOVATIONS, LLC,
Patent Owner.

IPR2022-00889
Patent 8,326,611 B2

Before GEORGIANNA W. BRADEN, JASON M. REPKO, and
JULIET MITCHELL DIRBA, *Administrative Patent Judges*.

Opinion for the Board filed by *Administrative Patent Judge* DIRBA.

Opinion Dissenting filed by *Administrative Patent Judge* REPKO.

DIRBA, *Administrative Patent Judge*.

DECISION
Denying Petitioner's Request on Rehearing of
Decision Denying Institution
37 C.F.R. § 42.71(d)

On November 14, 2022, in a split decision, the Board denied institution of *inter partes* review of claims 29–44 of U.S. Patent No. 8,326,611 B2 (Ex. 1001, “the ’611 patent”). Paper 12 (“Decision” or “Dec.”). Petitioner filed a Request for Rehearing. Paper 13 (“Request” or “Req.”). For the reasons below, we *deny* Petitioner’s Request.

I. STANDARD FOR REHEARING

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.” 37 C.F.R. § 42.71(d). “The burden of showing a decision should be modified lies with the party challenging the decision.” *Id.*

“When rehearing a decision on petition, a panel will review the decision for an abuse of discretion.” 37 C.F.R. § 42.71(c). “An abuse of discretion is found if [a] decision: (1) is clearly unreasonable, arbitrary, or fanciful; (2) is based on an erroneous conclusion of law; (3) rests on clearly erroneous fact finding; or (4) involves a record that contains no evidence on which the Board could rationally base its decision.” *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1367 (Fed. Cir. 2016).

II. BACKGROUND

In the Petition, Petitioner contended that independent claim 29 was unpatentable as obvious over a combination of Elko, Boll, and Buck and over a combination of Elko, Boll, Buck, and Kanamori. Paper 1 (“Pet.”), 3. Claim 29 recites, in relevant part:

[b] forming a filter by generating a first quantity by applying a calibration to a second signal of a second physical microphone, [c] *generating a second quantity by applying the*

delay to a first signal of a first physical microphone, and [d] forming the filter as a ratio of the first quantity to the second quantity;

Ex. 1001, 38:35–40 (emphasis added). Petitioner relied upon Elko, Buck, and/or Kanamori to teach or suggest these limitations. Pet. 23–34, 67–70; *see* Dec. 10 n.11. In a split decision, the Board found that Petitioner failed to make a sufficient showing for element 29[c] (Dec. 8–22, 24–26), and as a result, it determined that Petitioner had failed to show a reasonable likelihood of prevailing on its challenge to any of the challenged claims (*id.* at 22–24, 26).

Specifically, the Petition provided three alternative contentions for element 29[c] (Pet. 29–33, 67–70), and in the Decision, the majority found each to be insufficiently explained (*see* Dec. 14–22, 24–26). First, Petitioner contended that Elko alone renders obvious element 29[c]. Pet. 29–31. Petitioner recognized that Elko discloses delaying the “second signal,” but contended that it would have been obvious to modify Elko to delay the “first signal” instead. *Id.* The Decision found that Petitioner failed to sufficiently explain *why* an ordinary artisan would have done so. Dec. 15–19. The Decision addressed the rationale articulated in the Petition, explained why it was insufficient, and also found that Elko’s disclosure undermined Petitioner’s rationale. *Id.*

Second, Petitioner contended that Buck teaches or suggests applying a delay to a signal (Pet. 31–32) and that it would have been obvious to apply this teaching to delay Elko’s first signal (*id.* at 32–33). After stating that Buck teaches or suggests element 29[c], the Petition provided the following explanation of the rationale to combine:

A POSITA thus would have known, at least from Buck and Elko's SNS system 1100 embodiment, that it was known to apply a delay to one signal relative to another. Ex. 1007 ¶68. Applying this teaching to delay Elko's first signal would have been nothing more than combining known elements (a delay to one of two microphone signals) to Elko's first signal to delay the first signal relative to the second. *Id.* A POSITA would have combined Elko and Buck's teachings for the reasons explained in Section V.A.[29b].

Id. at 33 (alterations in original). In the Decision, the majority found this analysis to be insufficient. Dec. 19–22. Specifically, it determined that the Petition fails to explain *why* the ordinary artisan would have made the proposed combination and noted that Petitioner's failure to provide a rationale was "particularly problematic" given Elko's disclosure. *Id.* at 19–20. As for the final sentence of Petitioner's rationale, which refers to the discussion of element 29[b], the majority found that portion of the Petition to lack the requisite explanation. *See id.* at 20–21. The dissent disagreed. *See id.* at 31–32.

Finally, Petitioner contended that Kanamori discloses element 29[c] (Pet. 67–68) and that an ordinary artisan would have been motivated to combine Elko and Kanamori (*id.* at 68–70). The Decision determined that, as before, the Petition failed explain *why* a person of ordinary skill in the art would have had reason to add Kanamori's delay to Elko's system to yield the claimed subject matter. Dec. 25–26.

III. ANALYSIS

Petitioner requests rehearing of the Decision. *See* Req. We have considered each of Petitioner's arguments, but none reveal that the Decision misapprehended or overlooked a matter or constitutes an abuse of discretion.

First, Petitioner argues that the Decision is arbitrary and capricious because it is at odds with the Board’s decision granting institution in another proceeding. Req. 1, 7–8 (citing *Google LLC v. Jawbone Innovations, LLC*, IPR2022-00797 (“the 797 IPR”), Paper 12 (PTAB Dec. 1, 2022)). According to Petitioner, dependent claim 21 in the 797 IPR recites substantially similar subject matter and Petitioner advanced “nearly identical” arguments, yet the Board determined that Petitioner had established a reasonable likelihood of prevailing on its challenge to that claim. *Id.* at 7–8.

This argument is unpersuasive. The Board’s institution decision in the 797 IPR was entered *after* the Decision, and we cannot have abused our discretion by failing to consider a decision that had not yet issued. Even if we were persuaded of a conflict between these decisions,¹ we would not be persuaded that the Decision is in error. The Board specifically addressed the dispositive issues at length in the Decision (*see* Dec. 8–22); however, the institution decision in the 797 IPR includes no corollary discussion (*see Google, IPR2022-00797, Paper 12 at 49–50, 56–58, 63–65, 71–72* (addressing most dependent claims, including claim 21, collectively)). If either party maintains that these decisions are in conflict, those arguments should be timely raised in the 797 IPR so that they can be considered.

Second, according to Petitioner, the Board misapprehended the Petition by determining that the Petition did not sufficiently explain why an

¹ We specifically decline to address whether these decisions are in conflict. That determination is unnecessary here and would require a detailed comparison of Petitioner’s contentions in this proceeding with those advanced for dependent claim 21 in the 797 IPR. It would also likely impact the pending 797 IPR proceeding.

ordinary artisan would have combined Elko and Buck. Req. 1–2, 8–10; *see also id.* at 10–11 (advancing related argument).² In support, Petitioner points to its contentions that: Buck’s time delay compensation logic 104 teaches element 29[c]; the application of a delay to Elko’s first signal “would have been nothing more than combining known elements”; and “the resulting combination was predictable” by showing that the filter is formed from a ratio of the first and second quantities, in connection with element 29[d]. *Id.* at 9 (citing Pet. 31–34); *see id.* at 11.

This argument is also unpersuasive. Even assuming *arguendo* that Buck teaches element 29[c] and that the combination would have been “nothing more than combining known elements” and “predictable” (Req. 9, 11), the Decision found this to be insufficient (*see* Dec. 19–20). Specifically, the Decision states that “even assuming that it was known to delay one signal relative to another, Elko already discloses delaying the *second* microphone channel, and Petitioner fails to explain why an ordinary artisan would have been motivated to move that delay to Elko’s *first* microphone channel.” *Id.* at 20; *see also, e.g., ActiveVideo Networks, Inc. v. Verizon Commc’ns, Inc.*, 694 F.3d 1312, 1328 (Fed. Cir. 2012) (finding evidence of obviousness to be insufficient where it “fails to explain why a person of ordinary skill in the art would have combined elements from specific references *in the way the claimed invention does*”). Petitioner’s

² Petitioner also argues that “[t]here is no requirement for Petitioner to modify Elko to be superior to Elko’s system by itself” (Req. 10; *see also id.* at 2), but this misses the mark. The Decision did not require a showing that the Elko-Buck combination was “superior”; rather, it merely noted the lack of such a showing as part of its explanation for why Petitioner’s rationale to combine the references was insufficient. *See, e.g.,* Dec. 15–17.

Request fails to show that the Decision misapprehended any argument. *See* Req. 8–10. In addition, it identifies no support for Petitioner’s argument that obviousness can be established simply by showing that the claimed elements individually were known and their combination was predictable. *See id.*; *see also id.* at 10–11. As a result, this argument does not persuade us to grant rehearing.

Third, Petitioner argues that the Decision misapprehends Petitioner’s arguments regarding the Elko-Buck combination as well as the function of Elko’s filter in that combination (Req. 2, 10–12), stating:

The Majority’s finding that the resulting combination would render Elko’s filter 1020 superfluous directly contradicts Petitioner’s and Dr. Vipperman’s explanation of the filter’s purposes: to “minimize[] the differences between its microphone signals, eliminating amplitude and phase error.” Pet. at 33 (citing Ex. 1007 ¶¶69–75). At the same time, Buck explains the utility of its time delay: time-aligning “microphones [that] have different acoustic distances from the source of the speech signal.” *Id.* at 32 (citing Ex. 1004 at 3:35–47).

To the extent the Majority contends that Elko’s filter 1020 *already* delays Elko’s first signal in accounting for “modal angle variation,” this would only further support the obviousness of the claims because it would show that the “delay” element is taught directly by Elko.

Id. at 12.

These arguments are unpersuasive because they are premised on a misunderstanding of the Decision. They refer to a passage in which the Decision addressed a possible alternative contention (*see* Req. 10 (quoting Dec. 21)), which was found to be insufficiently advanced in the Petition (*see* Dec. 21; *see id.* at 19 & n.16). The relevant paragraph of the Decision begins by stating: “Moreover, even if the Petition had” included the

particular contention, “we do not discern (and Petitioner does not explain) why the ordinary artisan would have nonetheless retained Elko’s filter.”

Dec. 21. The Request does not argue that the Decision overlooked a portion of the Petition that advanced the relevant contention. *See* Req. 10–12.

Moreover, the Request misrepresents the Decision’s finding by stating that the majority “[found] that the resulting combination would render Elko’s filter 1020 superfluous” (*id.* at 12), where the Decision instead determined that Petitioner failed to explain sufficiently “why the ordinary artisan would have . . . retained Elko’s filter 1020” when adding Buck’s self-calibration logic 202 and time delay compensation logic 104 to both of Elko’s first and second signals (Dec. 21).

In addition, these arguments are unpersuasive because they fail to show that the Decision misapprehended or overlooked any matter. The Decision clarified that Petitioner’s explanation of this issue was insufficient because the Petition contended that “Elko’s adaptive filter $h(n)$. . . compensates for modal angle variability only” after Buck’s self-calibration logic 202 is added to Elko, and “the addition of Buck’s time delay compensation logic 104 would compensate for modal angle variability, leaving no apparent purpose for Elko’s filter 1020.” Dec. 21 (emphasis omitted) (quoting Pet. 28). The Request fails to address this reasoning. *See* Req. 12. Instead, it merely provides a conclusory assertion that the Petition explained the filter’s purpose and cites the discussion of element 29[d] and the purpose of Buck’s logic 104. *See* Req. 12 (citing Pet. 32, 33). The Decision considered those portions of the Petition and found that they did not include the missing explanation. *See* Dec. 21 (citing Pet. 32), 21 n.17

(citing Pet. 33–34). Thus, Petitioner’s arguments do not persuade us that the Decision misapprehended or overlooked any matter.

Fourth, Petitioner contends that the Decision misapprehended the proposed Elko-Boll-Buck combination (Req. 12–13), stating:

The Majority’s assertion that “Petitioner fails to explain why an ordinary artisan would have been motivated to move *that* delay [i.e., Elko’s second signal delay] to Elko’s *first* microphone channel” also misapprehends Petitioner’s grounds. . . . That Elko “already discloses delaying the second microphone channel” does not address delaying a first signal in Elko’s SNS system 1000 based on Buck’s teaching. Petitioner asserted a combination of Elko and Buck, and faulting the rationale based on the teachings of Elko alone is legally incorrect.

Id. (citing Dec. 20, 24; Pet. 31–33) (emphasis and alterations in original).

These arguments are not persuasive because they are belied by the Petition. Petitioner contended that Elko alone renders obvious element 29[c] (Pet. 29–31), and it expressly proposed moving Elko’s delay from the second channel to the first channel, as shown in Petitioner’s annotation of Figure 10 (reproduced below) (*id.* at 31).

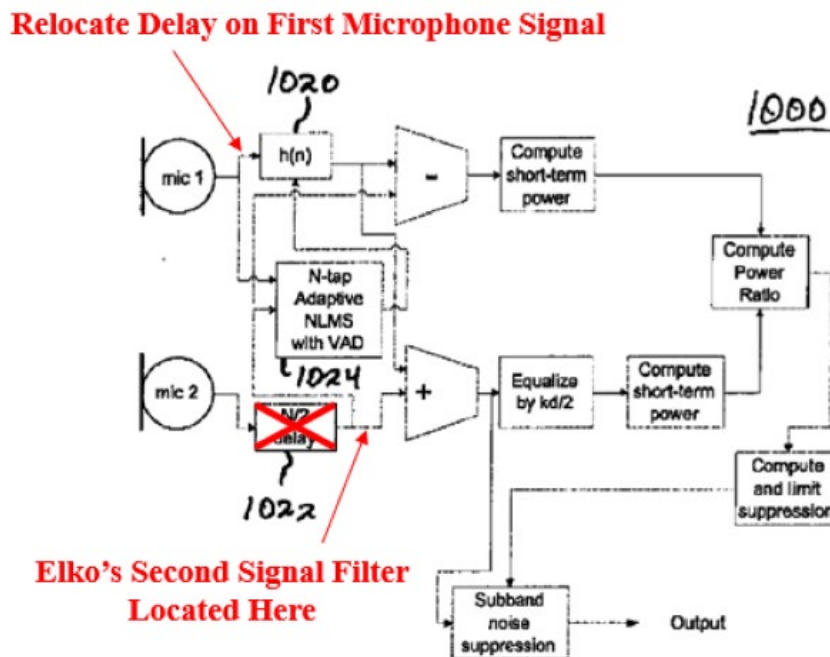


Fig. 10:

Petitioner's annotation of Figure 10 (shown above) includes: a red lines striking-out Elko's delay 1022 on the second microphone channel, and red text and a red arrow proposing the "[r]elocat[ion]" of the delay to the first microphone channel. Pet. 31. After advancing this Elko-only alternative, the Petition presented an alternative contention based on the combination of Elko and Buck, arguing that Buck shows that "it was common in the art of dual-microphone arrays to filter one microphone signal relative to another" (*id.* at 31–32) and proposing to "delay [Elko's] first signal relative to the second" (*id.* at 33). As a result, the Decision properly analyzed Petitioner's Elko-only alternative (Dec. 14–19) and Petitioner's Elko-Buck alternative (*id.* at 19–22). Thus, this argument also fails to show that the Decision misapprehended or overlooked any matter.

Finally, Petitioner contends that the Decision overlooked "multiple reasons why a skilled artisan would have added a delay to Elko's first signal" that were provided in Petition's discussion of dependent claim 30 in

the Elko-Boll-Buck-Kanamori ground. Req. 2, 13–15; *see* Pet. 70 (citing analysis of claim 30 in discussion of element 29[c]). According to Petitioner, the Decision “passes over these arguments with one sentence, without giving them full consideration.” Req. 15 (citing Dec. 25–26).³

We are not persuaded. In the cited portion of the Petition (*see* Pet. 70–79), Petitioner contends that an ordinary artisan “would have found it obvious to modify Elko with the teachings of Kanamori to form virtual microphones with similar responses to noise in the farfield, and dissimilar response to speech in the near field, as contemplated by Elko,” and in support, it purports to provide reasons why an ordinary artisan would have modified Elko to incorporate “Kanamori’s arrangement in Figure 16A.” *Id.* at 74–75. As the Decision explained, although that figure of Kanamori shows a delay on a microphone channel (Dec. 25), the Petition “fails to provide any reason why an ordinary artisan would have added [that] delay to [Elko’s] first microphone channel” (*id.* at 26 (citing Pet. 74–79)). The Request quotes several sentences from the Petition, but fails to explain how any of them allegedly provide the missing explanation. *See* Req. 13–14 (citing Pet. 74–75). Indeed, aside from stating that the Decision overlooked reasons why an artisan would have added a delay (*id.* at 13), Petitioner’s argument does not even include the word “delay” (*id.* at 13–15).

³ Although Petitioner faults the Decision for addressing its contention in “one sentence,” it fails to recognize that the Petition also included only one relevant sentence in its discussion of the dispositive limitation. Req. 15; *see* Pet. 70 (“A [person of ordinary skill in the art] would additionally have been motivated to combine Elko with Kanamori for the reasons explained *supra* [sic—*infra*] in Section VIII.B.”). This sentence cites the discussion of a different claim, but as noted by the Decision, no portion of that ten-page discussion addresses the salient issue. *See* Pet. 70–79; Dec. 25–26.

Ultimately, Petitioner's Request disagrees with our Decision and argues that we should have reached a different result; however, mere disagreement with the Board's analysis or conclusion is not a proper basis for rehearing.

IV. CONCLUSION

We have considered each of Petitioner's arguments in the request, but none persuade us that the Decision misapprehended or overlooked any matter or constituted an abused of discretion. Accordingly, we are not persuaded to modify the Decision.

V. ORDER

Accordingly, it is:

ORDERED that Petitioner's Request for Rehearing (Paper 13) is *denied*.

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JULIET MITCHELL DIRBA, *Administrative Patent Judges*.

REPKO, *Administrative Patent Judge*, dissenting.

I respectfully dissent from the Majority’s decision to deny the Request because I agree with Petitioner that the Petition contains a sufficient explanation of why a person of ordinary skill in the art would have combined Elko and Buck. *See* Req. 8–10. In particular, Petitioner argues that the Petition explains why adding Buck’s delay to Elko would synchronize the microphone signals. *Id.* at 9–10 (citing Pet. 32–34). I agree with Petitioner that this is a sufficient rationale for adding Buck to Elko for the reasons stated in my dissent to the Majority’s Decision Denying Institution in this case. *See* Dec. 29–35. For example, the Petition explains how and why Buck’s delay works:

Buck explains that its time delay compensation logic 104 “compensates for time delays between microphone signals,” which can arise “when the microphones have different acoustic distances from the source of the speech signal.” [Ex. 1004], 3:35–47. The time delay compensation logic 104 receives both signals and delays one signal to “synchroniz[e] the microphone signals.” *Id.*

Pet. 32, *discussed in* Dec. 32. The Petition then explains that one of ordinary skill in the art would have added Buck’s delay to Elko for the same reason that Buck’s calibration would have been added—i.e., to compensate for the differences between the microphone signals. Pet. 33 (citing § V.A. of the Petition). Thus, I would grant Petitioner’s Request.

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PETITIONER:

Erika Arner
Daniel Cooley
Alexander Boyer
Kevin Rodkey
FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.
erika.arner@finnegan.com
daniel.cooley@finnegan.com
alexander.boyer@finnegan.com
kevin.rodkey@finnegan.com

PATENT OWNER:

Peter Lambrianakos
Vincent Rubino
Enrique Iturralde
Richard Cowell
FABRICANT LLP
plambrianakos@fabricantllp.com
vrubino@fabricantllp.com
eiturralde@fabricantllp.com
rcowell@fabricantllp.com