UNITED STATES PATENT AND TRADEMARK OFFICE
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BEFORE THE PATENT TRIAL AND APPEAL BOARD
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ADOBE SYSTEMS INCORPORATED
and
LEVEL 3 COMMUNICATIONS, LLC
Petitioners

v.

AFLUO, LLC
Patent Owner

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Case IPR2014-00154
Patent 5,995,091

Before MICHAEL W. KIM, WILLIAM V. SAINDON, and
TINA E. HULSE, *Administrative Patent Judges.*

HULSE, *Administrative Patent Judge.*

DECISION
Order Denying Patent Owner's Request for Rehearing
*37 C.F.R. § 42.71*

# I.    INTRODUCTION

Adobe Systems Incorporated and Level 3 Communications, LLC (collectively, "Petitioners") filed a Petition requesting an *inter partes* review of claims 1 and 4-12 of U.S. Patent No. 5,995,091 (Ex. 1101, "the '091 patent"). Paper 2 ("Pet."). The Board issued a decision granting the petition in part and instituting an *inter partes* review of claims 1, 4, 5, and 8. Paper 9 ("Decision") at 25. Afluo, LLC ("Patent Owner") filed a request for rehearing of the Board's decision to institute trial on the ground that claim 5 is anticipated by U.S. Patent No. 5,819,004 to Azadegan (Ex. 1104). Paper 8 ("Req.") at 1. Patent Owner's request is *denied*.

# II.    ANALYSIS

A party requesting rehearing has the burden of showing a decision should be modified by specifically identifying all matters the party believes the Board misapprehended or overlooked. 37 C.F.R. § 42.71(d). When rehearing a decision on a petition, a panel will review the decision for an abuse of discretion. 37 C.F.R. § 42.71(c).

Patent Owner asserts that the Board misapprehended the scope of claim 5 and, in particular, the construction of "comparing said current level indicators with said original level indicators to identify one or more updated data elements" ("step [5D]"). Req. 2. Specifically, Patent Owner asserts that claim 5 requires that the "updated data elements" of step [5D] be in existence at the time of comparison. *Id.* at 2-3. Patent Owner argues that the Board overlooked the context of step [5D] in view of the claim as a whole. *Id.* at 5.

We disagree. As we explained in the Decision, nothing in the claim language requires that the updated data elements be in existence at the time of comparison. Decision 20. Patent Owner asserts that the patent's use of the past tense "updated" suggests that the data elements must be in existence. Req. 4-5. As an initial matter, we note that Patent Owner's "past tense" argument was not set forth in the Preliminary Response. Nevertheless, that the claims recite "updated" in the past tense does not necessitate the actual existence of data elements. Rather, the broadest reasonable interpretation of "updated data elements" may, for example, include data elements that are designated as updated, but have not yet been generated.

Moreover, the specification does not support Patent Owner's limited construction. The embodiment described in Figure 3 does not specifically indicate when the updated data elements are generated or whether the updated data elements are in existence at the time of step 307 (i.e., step [5D] of claim 5). Ex. 1101, 10:1-27. At most, step 307 requires the current list to be in existence, but not necessarily the updated data elements; the specification states that for step 307, the interleaver element determines "which, if any, of the multimedia data elements on the current list are updated version of the ones used in generating the playback data stream before." *Id.* at 10:15-17. We are also not persuaded that Patent Owner's depiction of claim 5 in Figure B-2 of the Preliminary Response and Request, which currently is limited to argument alone, can fill in the gaps to justify narrowing the interpretation of the claim. Accordingly, we decline to revise our construction of step [5D] to require updated data elements that are in existence at the time of comparison.

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Further, Patent Owner asserts that the Board misapprehended Azadegan. Patent Owner asserts that Azadegan does not disclose "comparing said current level indicators" because Azadegan's comparison involves an estimated number of bits that is subject to change, and not the actual number of bits to represent the re-encoded frames. Req. 6-7. We are not persuaded by Patent Owner's assertion. The claims only require "generating a current level indicator for each of said data elements in said current list," and then comparing those current level indicators with the original level indicators to identify the updated data elements. The specification does not preclude the use of estimated bit size as a current level indicator. That Azadegan may compare estimated bit size rather than actual bit size is irrelevant, as both can be used to identify updated data elements.

## III.     CONCLUSION

We conclude that the Board did not abuse its discretion when determining that Petitioners demonstrated a reasonable likelihood of prevailing on their assertion that claim 5 of the '091 patent is unpatentable over Azadegan.

## IV.     ORDER

In consideration of the foregoing, it is hereby ORDERED that Patent Owner's request for rehearing is *denied*.

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