

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

INDOOR SKYDIVING GERMANY GMBH,
Petitioner,

v.

IFLY HOLDINGS LLC,
Patent Owner.

Case IPR2015-01272
Patent RE43,028 E

Before RICHARD E. RICE, JEREMY M. PLENZLER, and
JAMES A. WORTH, *Administrative Patent Judges*.

RICE, *Administrative Patent Judge*.

DECISION
Request for Rehearing
37 C.F.R. § 42.71(d)

Petitioner requests rehearing of the Board's Decision Denying Institution (IPR2015-01272, Paper 12, "Dec.") entered on November 18, 2015, denying an *inter partes* review of claims 1–3, 12–16, 18, 19, 21, 22, 28–30, 43, and 44 of U.S. Patent No. RE43,028 (Ex. 1001, "the

'028 Patent”). Paper 13 (“Req. Reh’g”). For the reasons that follow, Petitioner’s Request for Rehearing is *denied*.

DISCUSSION

The applicable standard for granting a request for rehearing of a petition decision is abuse of discretion. 37 C.F.R. § 42.71(c). The requirements for a rehearing are set forth in 37 C.F.R. § 42.71(d), which provides in relevant part:

A party dissatisfied with a decision may file a request for rehearing, without prior authorization from the Board. The burden of showing a decision should be modified lies with the party challenging the decision. The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.

In this case, Petitioner seeks a rehearing with respect to challenges 1–4 and 7–8 of its Petition, on two grounds. Req. Reh’g 3. The two grounds are that: “(a) Petitioner has not been afforded an opportunity to respond under the rules, and/or (b) the determination that the documents did not qualify as prior art printed publications was clear error, and therefore it was an abuse of discretion to deny institution of the *inter partes* review on that basis.” *Id.* We consider Petitioner’s arguments below.

Petitioner first argues for “a rehearing to allow Petitioner to address the admissibility of the prior art publications and, subsequently, consideration of the prior art publications for institution of the *inter partes* review.” *Id.* at 5. Petitioner asserts that it “did not respond to the admissibility issue because Petitioner understood it could not respond substantively to admissibility of evidence prior to the ruling of institution by

the Board.” This argument misapprehends our Decision Denying Institution, in which we determined that Petitioner had failed to make even a threshold showing in its Petition that the documents at issue were prior art printed publications. Dec. 9–10, 11–12, 16–17. A request for rehearing is not an opportunity to present new evidence or to address issues for the first time. *See* 37 C.F.R. § 42.71(d).

Petitioner next argues that “the Board should have independently determined the documents at issue were viable prior art publications, and should not simply have accepted Patent Owner’s erroneous arguments.” Req. Reh’g 6. This argument is unpersuasive, because it attempts to shift, to the Board, Petitioner’s statutory burden to demonstrate a reasonable likelihood of prevailing with respect to the challenged claims. *See* 35 U.S.C. § 314(a).

Petitioner also argues that one of the documents at issue—a paper by A.I. Neihouse entitled *Design and Operating Techniques of Vertical Spin Tunnels* (Ex. 1005)—is listed under “Other Publications,” and cited at column 2, lines 2:32–33, of the ’028 Patent. Req. Reh’g 6–7. In our Decision Denying Institution, we described the Neihouse paper as follows: “Exhibit 1005 is a paper by A.I. Neihouse, titled ‘Design and Operating Techniques of Vertical Spin Tunnels,’ which is part of a collection of papers presented at the Sixth Meeting of the Wind Tunnel and Model Testing Panel of the Advisory Group for Aeronautical Research and Development (AGARD) in Paris, France on November 6, 1954.” Dec. 9. The citation at column 2 of the ’028 Patent reads: “AGARD Memorandum; Advisory Group for Aeronautical Research and Development, Paris France, 1954.” Ex. 1001, 2:32–33. This citation, by itself, does not identify the Neihouse

paper, and Petitioner has not brought to our attention any other evidence or indication, in the Petition, that the Neihouse paper and the cited “AGARD Memorandum” are one and the same. We note, furthermore, that the document listed under “Other Publications” in the ’028 Patent is “AGARD Memorandum; Advisory Group for Aeronautical Research and Development, Paris, France 1954, *Revised Oct. 1971.*” Ex. 1001, at (56) (emphasis added). Petitioner has not argued that the document filed as Exhibit 1005 was revised in 1971. For these reasons, and because Petitioner did not raise these issues in its Petition, we are not persuaded that we misapprehended or overlooked any matter in determining that Petitioner did not make a threshold showing that the Neihouse paper is a prior art printed publication. Dec. 9–10.

Petitioner further argues: “Even if the Board overlooked the fact this prior art reference was cited in the ’028 patent, the Board erroneously failed to evaluate its authenticity under the Federal Rules of Evidence.” Req. Reh’g 7. Petitioner contends that the Neihouse paper qualifies as prior art pursuant to Rule 901(8) of the Federal Rules of Evidence as an ancient document. *Id.* at 7–8. This argument is new and, therefore, not appropriate in a request for rehearing. *See* 37 C.F.R. § 42.71(d). Further, the issue of whether the Neihouse paper qualifies as a prior art printed publication does not depend on its authenticity, but rather on whether the document was publicly accessible¹ in the prior art time frame. *See* Dec. 9–10.

¹ As we stated in our Decision Denying Institution: “A reference is publicly accessible upon a satisfactory showing that such document has been disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art exercising

Petitioner also argues that another of the disputed documents, Exhibit 1032, is a prior art printed publication, as evidenced by the fact that it was cited in U.S. Patent No. 4,917,333, filed May 11, 1988, and issued April 17, 1990. Req. Reh’g 8. Petitioner has not identified, however, where this argument/evidence was presented in the Petition. A request for rehearing is not a vehicle to present new arguments or new evidence. *See* 37 C.F.R. § 42.71(d).

Similar to its argument with respect to Exhibit 1005, Petitioner argues that Exhibits 1006, 1007, 1009, 1019, and 1032 qualify as prior art pursuant to Rule 901(8) of the Federal Rules of Evidence because they are ancient documents. *See* Req. Reh’g 8–12. Petitioner also argues that Exhibit 1019 is self-authenticating under FRE 902(6). *Id.* at 11. As we stated in connection with Petitioner’s similar argument with respect to Exhibit 1005, these new arguments are not appropriate in a request for rehearing. *See* 37 C.F.R. § 42.71(d). Furthermore, the issue of whether these exhibits qualify as prior art printed publications does not depend on their authenticity, but rather on their public accessibility in the prior art time frame. Petitioner has not persuaded us that we overlooked or misapprehended any matter relating to the public accessibility of these documents.

reasonable diligence, can locate it.” Dec. 8 (quoting *Kyocera Wireless Corp. v. ITC*, 545 F.3d 1340, 1350 (Fed. Cir. 2008) (internal citation and quotation marks omitted)).

Petitioner also presents new evidence, in the form of Google search results, that Exhibit 1019 was publicly accessible. Req. Reh’g 11–12. We do not consider this new evidence. *See* 37 C.F.R. § 42.71(d).

Finally, Petitioner argues that we could have considered Exhibit 1008 “individually” in our analysis of the challenges in the Petition that were based in part on the “Wright-Patterson Documents”—a the collection of exhibits consisting of Exhibits 1008, 1009, and 1010. Req. Reh’g 12. Petitioner does not contend, however, that Exhibit 1008 was asserted individually in the Petition. We are not persuaded that we misapprehended or overlooked any matter by considering, in our Decision Denying Institution, only the challenges that Petitioner actually asserted.

CONCLUSION

Petitioner has not persuaded us that the determination not to institute an *inter partes* review was an abuse of our discretion, or that we misapprehended or overlooked any matter. Accordingly, we *deny* the Request for Rehearing.

ORDER

For the reasons given, it is

ORDERED that the Request for Rehearing is *denied*.

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