

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner,

v.

CONTENTGUARD HOLDINGS, INC.,
Patent Owner.

Case IPR2015-00452
Patent 7,269,576 B2

Before MICHAEL R. ZECHER, PATRICK R. SCANLON, and
GEORGIANNA W. BRADEN, *Administrative Patent Judges*.

SCANLON, *Administrative Patent Judge*.

DECISION

Denying Institution of *Inter Partes* Review
35 U.S.C. § 314(a) and 37 C.F.R. § 42.108

I. INTRODUCTION

Petitioner, Apple Inc., filed a Petition (Paper 1, “Pet.”) requesting an *inter partes* review of claims 18, 19, 21, 24–27, 29, 32, and 34 of U.S. Patent No. 7,269,576 B2 (Ex. 1009, “the ’576 patent”). Patent Owner, ContentGuard Holdings, Inc., filed a Preliminary Response (Paper 8, “Prelim. Resp.”).

We have jurisdiction under 35 U.S.C. § 314, which provides that *inter partes* review may not be instituted unless “the information presented in the petition . . . and any [preliminary] response . . . shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. § 314(a).

For the reasons that follow, we deny the Petition.

II. BACKGROUND

A. Related Matters

The parties indicate that the ’576 patent is at issue in *ContentGuard Holdings Inc. v. Amazon.com, Inc.*, No. 2:13-cv-01112 (E.D. Tex.), *ContentGuard Holdings Inc. v. Google Inc.*, No. 2:14-cv-00061 (E.D. Tex.), and *Google Inc. v. ContentGuard Holdings Inc.*, No. 3:14-cv-00498 (N.D. Cal.). Pet. 2; Paper 7, 3.

Petitioner filed four other petitions seeking *inter partes* review of the ’576 patent: Cases IPR2015-00453 through IPR2015-00456. Pet. 2; Paper 7, 3. In addition, another Board panel issued a Final Decision involving a certain subset of claims of the ’576 patent: Case IPR2013-00139. Paper 7, 2. The Board panel determined that the petitioner in that case did not prove by a preponderance of evidence that the challenged claims were

unpatentable under 35 U.S.C. § 102(b). *ZTE Corp. v. ContentGuard Holdings, Inc.*, Case IPR2013-00139, Paper 57 (PTAB June 26, 2014).

Petitioner also filed petitions in Cases IPR2015-00351–358, 399, 400, 440–451, 457, and 458, challenging related U.S. Patent Nos. 6,963,859; 7,225,160; 7,523,072; 7,774,280; 8,001,053; 8,370,956; 8,393,007; and 8,583,556.

B. The '576 Patent (Ex. 1009)

The '576 patent, titled “Content Rendering Apparatus,” issued on September 11, 2007. The '576 patent generally relates to the distribution and usage rights enforcement of digitally encoded works. Ex. 1009, 1:5–6.

C. Illustrative Claim

Of the challenged claims, claim 18 is the sole independent claim. Claim 18 recites:

18. A method for controlling rendering of digital content on an apparatus having a rendering engine configured to render digital content and a storage for storing the digital content, said method comprising:

specifying rights within said apparatus for digital content stored in said storage, said rights specifying how digital content can be rendered;

storing digital content in said storage;

receiving a request for rendering of said digital content stored in the storage;

checking whether said request is for a permitted rendering of said digital content in accordance with said rights specified within said apparatus;

processing the request to make said digital content available to the rendering engine for rendering when said request is for a permitted rendering of said digital content;

authorizing a repository for making the digital content available for rendering, wherein the digital content can be made available for rendering only by an authorized repository, the repository performing the steps of:

making a request for an authorization object required to be included within the repository for rendering of the digital content; and

receiving the authorization object when it is determined that the request should be granted.

Ex. 1009, 53:58–54:16.

D. Evidence Relied Upon

Petitioner relies on the following prior art references:

1. European Patent Application 0 567 800 A1, published Nov. 3, 1993 (“Hartrick”) (Ex. 1021);
2. Liam Comerford & Steve R. White, *ABYSS: A Trusted Architecture for Software Protection* (1987) (“ABYSS”) (Ex. 1016); and
3. DOROTHY ELIZABETH ROBLING DENNING, *CRYPTOGRAPHY AND DATA SECURITY* (1983) (“Denning”) (Ex. 1017).

Petitioner also relies upon the Declaration of Alan Sherman

Regarding U.S. Patent Nos. 6,963,859; 7,523,072; 8,370,956; 8,393,007; 7,269,576, dated December 20, 2014 (“Sherman Declaration”) (Ex. 1013).

E. The Asserted Grounds

Petitioner challenges claims 18, 19, 21, 24–27, 29, 32, and 34 of the ’576 patent on the following grounds:

References	Basis	Claims Challenged
ABYSS and Denning	§ 103	18, 19, 21, 24–27, 29, 32, and 34
ABYSS, Denning, and Hartrick	§ 103	18, 19, 21, 24–27, 29, 32, and 34

III. ANALYSIS

A. Procedural Defects

As a threshold matter, we note that the Petition has several significant procedural defects. For instance, a petition for *inter partes* review must “identif[y], in writing and with particularity, each claim challenged, the grounds on which the challenge to each claim is based, and the evidence that supports the grounds for the challenge to each claim.” 35 U.S.C.

§ 312(a)(3). According to 37 C.F.R. § 42.104(b)(4), a petition for *inter partes* review must identify “[h]ow the construed claim is unpatentable under the statutory grounds” on which the petitioner challenges the claims, and “must specify where each element of the claim is found in the prior art patents or printed publications relied upon.” Section 42.104(b)(5) of the Code of Federal Regulations adds that the Petition must “identify[] specific portions of the evidence that support the challenge.” Similarly, 37 C.F.R. § 42.22(a)(2) states that each petition must include “[a] full statement of the reasons for the relief requested, including a detailed explanation of the significance of the evidence including material facts, and the governing law, rules, and precedent.” The Office Patent Trial Practice Guide suggests that parties requesting *inter partes* review should “avoid submitting a repository of all the information that a judge could possibly consider, and instead focus on concise, well-organized, easy-to-follow arguments supported by readily identifiable evidence of record.” 77 Fed. Reg. 48,756, 48,763 (Aug. 14, 2012).

Patent Owner argues, and we agree, that the Petition fails to satisfy each of these requirements. See Prelim. Resp. 4–9. The entire Petition is riddled with vague, nested string citations to broad swaths of the references,

the Sherman Declaration, and internal cross-references to whole sections of the Petition. For example, in discussing the claim 18 limitation of “specifying rights within said apparatus for digital content stored in said storage, said rights specifying how digital content can be rendered,” the Petition cites, *inter alia*, “See § III.D.2 IV.B.2, IV.E.1” and “See § IV.B.2; Ex. 1016 at 40, 44-45, 49; Ex. 1013 at ¶ C148, C34-45, C123.” Pet. 47. As such, the analysis of this limitation comprises a single paragraph of the Petition, but cites, without specificity, to 14 paragraphs of the Sherman Declaration and at least 10 pages of internal sections of the Petition. This count does not include the further internal citations and cross references contained in the cross-cited portions of Petition.

The same problem exists in connection with the other limitations of claim 18. For example, although the unpatentability analysis of the “checking whether said request is for a permitted rendering of said digital content in accordance with said rights” limitation is only eight lines in the Petition (*see* Pet. 48–49), it cites 15 paragraphs of the Sherman Declaration and seven other pages of the Petition, which themselves cite to many other paragraphs of the Sherman Declaration. These nested citations to vast portions of the record obscure what exactly Petitioner is relying on as teaching or suggesting these elements. In another example, in its approximately three-page argument that ABYSS and Denning teach a repository (Pet. 42–44), Petitioner collectively cites to paragraphs C1–22, C82–89, C95–103, and C146–70 of the Sherman Declaration, which, in turn, cite to at least paragraphs A134–145, the entirety of Section B, C23–45, C55–67, C69–71, and C127–133, corresponding to approximately 95 pages of testimony.

The clarity problems caused by the pervasive use of internal cross-references and nested citations are exacerbated by the convoluted structure of the Petition. A brief description of the structure of the Petition will illustrate this problem. The Petition’s unpatentability analysis begins with a general discussion of what Petitioner contends ABYSS, Denning, and Hartrick disclose. Pet. 20–34. Although this section quotes heavily from each reference, it also includes extensive citations to the Sherman Declaration and various characterizations of the references. *See id.* Next, the Petition constructs an “implementation” of the ABYSS system using certain encryption techniques (public-key encryption (“PKI”)) taught in Denning, which Petitioner contends would be incorporated into at least four aspects of ABYSS. *See id.* at 34–37. The Petition then describes the “operation” of the “implemented” system. *See id.* at 37–40. The Petition next discusses how, based on the “operation” of the “implemented” system, the implementation discloses “usage rights,” “repositories,” and “authorization objects,” as Petitioner has construed those terms. *See id.* at 40–46. Finally, the Petition maps this hypothetical implementation of ABYSS and Denning onto the claims. *See id.* at 46–56. This mapping relies on all the previous summaries and descriptions. *Id.*

Regarding the asserted ground of unpatentability based on ABYSS, Denning, and Hartrick, which Petitioner asserts because “Patent Owner may argue that ABYSS does not disclose the use of a ‘usage rights language,’” Petitioner contends the hypothetical implementation of ABYSS and Denning could be altered to incorporate Hartrick’s Standardized General Markup Language (SGML) tags. *Id.* at 56–57. Petitioner also contends that Hartrick reinforces the teaching by the hypothetical implementation of using a

digitally signed message as an authorization message. *Id.* at 58. Other than this alleged reinforcement and the assertion that Hartrick teaches using “usage rights language,” the Petition bases this asserted ground on the same analysis described above in asserting that the claims are unpatentable. See *id.* at 57–58.

Thus, the unpatentability analysis for both asserted grounds relies on the description of the hypothetical operation of a hypothetical implementation of a system relying, in part, on Petitioner’s description and characterization of the disclosed system. The result of all these layers of abstraction is that the final unpatentability analysis is at least two or three levels removed from the actual disclosure of the references. Petitioner’s approach completely blurs the line between the actual teachings, Petitioner’s proposed modifications to the teachings, and Petitioner’s characterizations of those teachings. This approach improperly shifts the burden of deciphering Petitioner’s arguments onto Patent Owner and the Board, which is contrary to the statutory and regulatory provisions governing *inter partes* review proceedings discussed above, as well as the best practices outlined in the Office Patent Trial Practice Guide.

The lack of clarity in the Petition is further compounded by the improper incorporation by reference of the Sherman Declaration. The Petition is full of conclusory statements that cite to broad swathes of the lengthy Sherman Declaration. Indeed, without referring heavily to the Sherman Declaration many sections of the Petition would be unintelligible. Patent Owner properly directs our attention to the Board’s informative decision in *Cisco Systems, Inc. v. C-Cation Techs., LLC*, Case IPR2014-00454 (PTAB Aug. 29, 2014) (Paper 12) (informative). Prelim. Resp. 4–5,

7. As explained in *Cisco*, citations to “large portions of another document, without sufficient explanation of those portions, amounts to incorporation by reference.” *Cisco*, Case IPR2014-00454, slip op. at 8. Similarly, *Cisco* explains that the “practice of citing [a] Declaration to support conclusory statements that are not otherwise supported in the Petition also amounts to incorporation by reference.” *Id.* at 9.

Such incorporation by reference is impermissible under our rules. See 37 C.F.R. § 42.6(a)(3) (“Arguments must not be incorporated by reference from one document into another document.”). This incorporation by reference from the 474-page Sherman Declaration into the Petition “serves to circumvent the [60-]page limit[] imposed on petitions for *inter partes* review, while imposing on our time by asking us to sift through [hundreds of] pages of [the] Declaration (including numerous pages of claim charts) to locate the specific [relevant] arguments.” *Cisco*, Case IPR2014-00454, slip op. at 10; see 37 C.F.R. § 42.24(a)(1)(i). Arguments and information that are not presented and developed in the Petition, and instead are incorporated by reference to the Sherman Declaration, are not entitled to consideration.

Based on the deficiencies addressed above, the Petition fails: (1) to specify sufficiently where the limitations of the challenged claims are taught or suggested by either the combination of ABYSS and Denning or the combination of ABYSS, Denning, or Hartrick; and (2) to provide a sufficiently detailed explanation of the significance of the citations to these references and the Sherman Declaration—as required under 35 U.S.C. § 312(a)(3), 37 C.F.R. § 42.22(a)(2), and 37 C.F.R. § 42.104(b)(4)–(5).

B. Defects in the Proffered Obviousness Analysis

Despite the procedural defects discussed above, we attempted to evaluate the merits of the Petition. Yet, even considering the merits of the Petition, Petitioner’s analysis of the asserted grounds of obviousness over ABYSS and Denning, or ABYSS, Denning, and Hartrick, is deficient. As a caveat, we decline to consider any arguments beyond those presented and developed in the Petition. Given this constraint, we determine that the Petition’s obviousness analysis does not provide sufficient information to enable us to perform a proper *Graham* analysis, is driven by improper hindsight, and lacks sufficient articulated reasons with rational underpinnings to support the modifications it proposes.

1. *Insufficient Information for Graham Analysis*

A patent claim is unpatentable as obvious under 35 U.S.C. § 103(a)¹ if “the differences between” the claimed subject matter and the prior art “are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.” 35 U.S.C. § 103(a); *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The legal conclusion of obviousness is resolved on the basis of underlying factual determinations, including: (1) “the scope and content of the prior art,” (2) “differences between the prior art and the claims at issue,” (3) “the level of ordinary skill in the pertinent art,” and (4) any “secondary considerations,” or objective indicia, of nonobviousness. *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1,

¹ The Leahy-Smith America Invents Act (“AIA”), Pub. L. No. 112-29, 125 Stat. 284 (2011), revised 35 U.S.C. § 103, effective March 16, 2013. Because the ’576 patent was filed before March 16, 2013, our references and citations to § 103 in this decision are to the pre-AIA version.

17–18 (1966). These underlying factual determinations “must be considered by the trier of fact” in an obviousness analysis. *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 546 (Fed. Cir. 1998).

Here, as Patent Owner points out, the Petition fails to identify sufficiently the differences between the challenged claims of the ’576 patent and the asserted prior art references, ABYSS, Denning, and Hartrick. *See* Pet. 19–58; Prelim. Resp. 6–7. Rather than address these differences, the Petition, as discussed above, creates a hypothetical system for each of the two asserted grounds of unpatentability: one hypothetical system implementing ABYSS and Denning and another hypothetical system implementing ABYSS, Denning, and Hartrick. These hypothetical systems are based on how a person of ordinary skill in the art allegedly “would” or “could” combine the references into an integrated system—in an analysis that is divorced from the language of the challenged claims of the ’576 patent. *See* Pet. 34–40, 56–57. The Petition then argues, in conclusory fashion, that both of these hypothetical systems “would” meet each of the limitations of the challenged claims. *See id.* at 46–56, 57–58. These analyses—which compare the challenged claims to a hypothetical integrated system that allegedly implements elements of all of the references as well as the knowledge of one of ordinary skill in the art—obscure any comparison of the individual prior art references to the claim limitations. These analyses do not explain with any particularity which claim limitations are absent from the asserted references. Therefore, the Petition fails to provide sufficient information regarding its proffered grounds of unpatentability.

Accordingly, we determine that the Petition does not show a reasonable likelihood that Petitioner would prevail in showing that the

challenged claims would have been obvious over either the combination of ABYSS and Denning, or the combination of ABYSS, Denning, and Hartrick. *See Apple Inc. v. SmartFlash LLC*, Case CBM2015-00029, slip op. at 16–18 (PTAB May 28, 2015) (Paper 11) (denying institution of an asserted obviousness ground based on Petitioner’s failure to explain adequately any differences between the asserted prior art and the claimed invention); *Liberty Mut. Ins. Co. v. Progressive Casualty Ins. Co.*, Case CBM2012-00003, slip op. at 3 (PTAB Oct. 25, 2012) (Paper 7) (representative) (“A petitioner who does not state the differences between a challenged claim and the prior art, and relies instead on the Patent Owner and the Board to determine those differences . . . risks having the corresponding ground of obviousness not included for trial for failing to adequately state a claim for relief.”).

2. *Lack of Rationale to Combine and Improper Hindsight*

“[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006). The reason for this is that,

[w]hile the Supreme Court made clear that a mechanical application of the teaching-suggestion-motivation test, requiring an explicit teaching in the prior art, is inappropriate, “[w]e must still be careful not to allow hindsight reconstruction of references to reach the claimed invention without any explanation as to how or why the references would be combined to produce the claimed invention.”

Kinetic Concepts, Inc. v. Smith & Nephew, Inc., 688 F.3d 1342, 1368 (Fed. Cir. 2012) (quoting *Innogenetics, N.V. v. Abbott Labs.*, 512 F.3d 1363, 1374

n.3 (Fed. Cir. 2008)); *see also KSR*, 550 U.S. at 421 (“A factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning.”); *Graham*, 383 U.S. at 36 (warning against a “temptation to read into the prior art the teachings of the invention in issue” and instructing courts to “guard against slipping into use of hindsight” (citation omitted)). Thus, “[c]are must be taken to avoid hindsight reconstruction by using ‘the patent in suit as a guide through the maze of prior art references, combining the right references in the right way so as to achieve the result of the claims in suit.’” *Grain Processing Corp. v. Am.–Maize Prods. Co.*, 840 F.2d 902, 907 (Fed. Cir. 1988) (quoting *Orthopedic Equip. Co. v. United States*, 702 F.2d 1005, 1012 (Fed. Cir. 1983)).

With respect to the asserted ground based on ABYSS and Denning, Petitioner proposes a hypothetical “ABYSS-Denning System,” which Petitioner then compares to the challenged claims of the ’576 patent. Pet. 34–56. Petitioner appears to suggest making four primary changes to ABYSS to achieve this hypothetical implementation. *Id.* at 34–37. Other than asserting that each change would have been “an obvious implementation choice” (*id.* at 36), the Petition provides little rationale for these changes. For example, the first and second changes are justified only as allegedly being “routine.” *Id.* at 34, 35. The third change, using public key encryption to encrypt the Right-To-Execute of ABYSS, is justified only because, according to the Petition, “[t]his would allow the symmetric supervisor keys to be replaced by public-private pairs and digital certificates” (*id.* at 36), without any further explanation and with only a

citation to the Sherman Declaration (more than four pages of testimony) for support.

Moreover, although Petitioner frames the hypothetical ABYSS-Denning System as created by four primary modifications, each of these modifications include what appear to be additional modifications that are supported with only the most threadbare reasoning. For example, in the second modification Petitioner proposes, i.e., using public-key encryption to protect the integrity of software, the Petition further asserts that a person of ordinary skill “also would have understood the same technique should be applied to system software, such as updates to the supervisor software that operated the protected processor, as this would improve system integrity.” *Id.* at 35. This reasoning is deficient because the Petition already explained that the processor in ABYSS is protected. *See id.* at 21. The Petition provides insufficient rationale as to why a person of ordinary skill would seek additional integrity in this circumstance.

More seriously detrimental to the Petition are the unsupported hidden modifications that appear to litter the section titled, “The Operation of the Implemented System.” Pet. 37–40. In one paragraph, Petitioner proposes that a vendor “operating” the implemented system “could create a Right-To-Execute using the ‘targeted distribution’ technique described in ABYSS,” “could restrict distribution to processors that had a digital certificate issued by a particular authority for the group,” and “could specify as a condition that the Right-To-Execute can only be installed by workstations that have obtained a digitally signed receipt from the vendor.” *Id.* at 38–39. Although some of these choices are contained in different examples in ABYSS, the Petition fails to explain where these choices are and whether they represent

the same embodiment of ABYSS. Moreover, the Petition never explains whether a “vendor” is a person of ordinary skill, whether the series of specific operational choices the Petition proposes are necessary to create a system that practices the claimed invention, and why a “vendor” would make all those operational choices or provide some rationale or explanation for operating the system in the manner the Petition proposes.

Even assuming the modifications described by the Petition can be understood adequately, the Petition lacks adequate reasoning, with rational underpinning, to show sufficiently that a person of ordinary skill would have had reason to combine the teachings of ABYSS and Denning and the knowledge in the art to reach the hypothetical ABYSS-Denning System, which the Petition alleges would account for each feature of the challenged claims. In other words, we are not persuaded that the Petition sufficiently explains why a person of ordinary skill would simultaneously make all of the many particular proposed changes and implementation choices to combine ABYSS and Denning. We see no difference between conclusory statements that each of these modifications is an “obvious implementation choice” and stating that these changes are “common sense,” which, without more, is insufficient to support an obviousness analysis. *See Mintz v. Dietz & Watson*, 679 F.3d 1372, 1377 (Fed. Cir. 2012) (“The mere recitation of the words ‘common sense’ without any support adds nothing to the obviousness equation.”). Moreover, the mere fact that individual changes might have been obvious does not make doing all of the changes at once obvious. *See In re Irani*, 427 F.2d 806, 809 (CCPA 1970) (“Obviousness, however, must not be judged by hindsight, and a ‘little modification’ can be a most unobvious one.”).

Rather, given the extent of the proposed modifications, as well as the thin reasoning proffered for each modification, we conclude that the Petition improperly uses the challenged claims of the '576 patent as a guide in constructing a system loosely based on ABYSS and Denning that resembles the claimed invention embodied in the challenged claims. *See Plantronics v. Aliph, Inc.*, 724 F.3d 1343, 1354 (Fed. Cir. 2013) (“Where, as here, the necessary reasoning is absent, we cannot simply assume that ‘an ordinary artisan would be awakened to modify prior art in such a way as to lead to an obviousness rejection.’ It is in such circumstances, moreover, that it is especially important to guard against the dangers of hindsight bias.” (citation omitted)); *see also W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1552 (Fed. Cir. 1983) (“The result is that the claims were used as a frame, and individual, naked parts of separate prior art references were employed as a mosaic to recreate a facsimile of the claimed invention. At no point did the district court, nor does Garlock, explain why that mosaic would have been obvious to one skilled in the art . . .”). This analysis infected with impermissible hindsight cannot form the basis of an obviousness conclusion. *See KSR*, 550 U.S. at 421 (“A factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning.”); *Graham*, 383 U.S. at 36 (warning against a “temptation to read into the prior art the teachings of the invention in issue” and instructing courts to “‘guard against slipping into use of hindsight’” (citation omitted)).

Regarding the asserted ground of unpatentability based on ABYSS, Denning, and Hartrick, the Petition relies on Hartrick primarily as an alternative teaching of “usage rights language.” Pet. 56–58. As such, the

Petition's reliance on Hartrick does not cure the deficiencies in the combination of ABYSS and Denning noted above.

In sum, we are not persuaded that the Petition shows sufficiently why one of ordinary skill in the art—without improper hindsight—would have combined ABYSS and Denning, or ABYSS, Denning, and Hartrick, to account for all the features of the challenged claims of the '576 patent. Therefore, we determine that the Petition does not establish a reasonable likelihood that Petitioner would prevail in showing that any of the challenged claims would have been obvious over the combination of ABYSS and Denning, or the combination of ABYSS, Denning, and Hartrick.

C. Conclusion

For the foregoing reasons, we determine that the Petition fails to show there is a reasonable likelihood that Petitioner would prevail with respect to at least one of the claims challenged in the Petition. *See* 35 U.S.C. § 314(a); 37 C.F.R. § 42.108(c).

IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that pursuant to 35 U.S.C. § 314(a), the Petition is *denied*.

IPR2015-00452
Patent 7,269,576 B2

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