

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ACTIVISION BLIZZARD, INC.,
ELECTRONIC ARTS INC.,
TAKE-TWO INTERACTIVE SOFTWARE, INC.,
2K SPORTS, INC., and
ROCKSTAR GAMES, INC.,
Petitioner,

v.

ACCELERATION BAY, LLC,
Patent Owner.

Case IPR2016-00931
Patent 6,701,344 B1

Before SALLY C. MEDLEY, LYNNE E. PETTIGREW and
WILLIAM M. FINK, *Administrative Patent Judges*.

PETTIGREW, *Administrative Patent Judge*.

DECISION

Denying Institution of *Inter Partes* Review

37 C.F.R. § 42.108

Dismissing Motion for Joinder

37 C.F.R. § 122(b)

I. INTRODUCTION

A. Background

On April 21, 2016, Activision Blizzard, Inc., Electronic Arts Inc., Take-Two Interactive Software, Inc., 2K Sports, Inc., and Rockstar Games, Inc. (collectively, “Petitioner”) filed a Petition requesting an *inter partes* review of claim 12 of U.S. Patent No. 6,701,344 B1 (Ex. 1201, “the ’344 patent”). Paper 2 (“Pet.”). On the same day, Petitioner filed a Motion for Joinder pursuant to 35 U.S.C. § 315(c), seeking to join this proceeding with *Activision Blizzard, Inc., et al. v. Acceleration Bay, LLC*, Case IPR2015-01972 (“the 1972 IPR”). Paper 3 (“Mot.”). In the 1972 IPR, we instituted *inter partes* review of claims 1–11 and 16–19 of the ’344 patent, but we did not institute *inter partes* review of claims 12–15 of the ’344 patent. See 1972 IPR, slip op. at 1 (PTAB Mar. 24, 2016) (Paper 8).

Acceleration Bay, LLC (“Patent Owner”) filed a Preliminary Response. Paper 9 (“Prelim. Resp.”). Patent Owner also filed an Opposition to the Motion for Joinder. Paper 8 (“Opp.”).

Upon consideration of the Petition and Preliminary Response, we exercise our discretion, under 35 U.S.C. § 325(d), to deny institution of *inter partes* review as to claim 12.

B. The ’344 Patent

The ’344 patent relates to a “broadcast technique in which a broadcast channel overlays a point-to-point communications network.” Ex. 1201, 4:3–5. The broadcast technique overlays the underlying network system with a graph of point-to-point connections between host computers or nodes through which the broadcast channel is implemented. *Id.* at 4:23–26. Figure 1 of the ’344 patent is reproduced below:

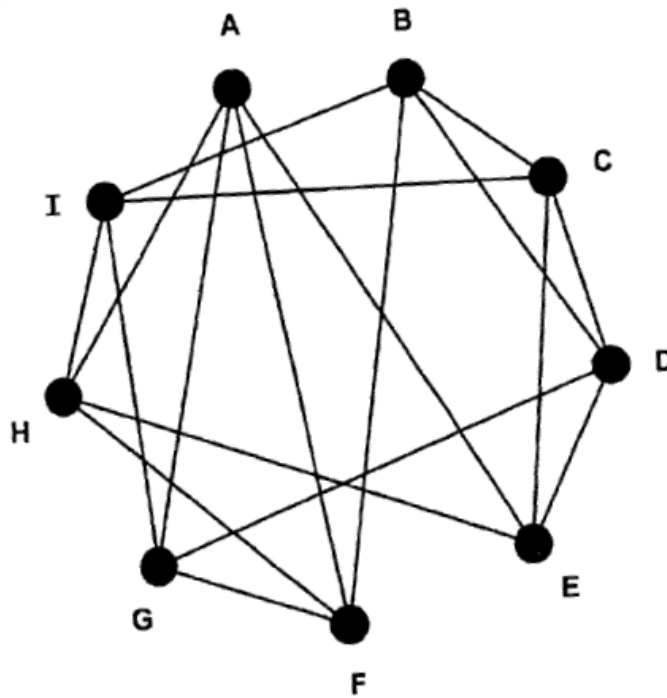


Fig. 1

Figure 1 illustrates a broadcast channel represented by a “4-regular, 4-connected” graph. *Id.* at 4:48–49. The graph of Figure 1 is “4-regular” because each node is connected to exactly four other nodes (e.g., node A is connected to nodes E, F, G, and H). *Id.* at 4:38–39, 4:49–53. A node in a 4-regular graph can only be disconnected if all four of the connections to its neighbors fail. *Id.* at 4:39–42. Moreover, the graph of Figure 1 is “4-connected” because it would take the failure of four nodes to divide the graph into two separate sub-graphs (i.e., two broadcast channels). *Id.* at 4:42–47.

To broadcast a message over the network, an originating computer sends the message to each of its four neighbors using the point-to-point connections. *Id.* at 4:30–32. Each computer that receives the message sends

it to its other neighbors, such that the message is propagated to each computer in the network. *Id.* at 4:32–38. The minimum number of connections needed to traverse any two computers in the network is known as the “distance” between them, while the maximum of the distances in the network is called the “diameter” of the broadcast channel. *Id.* at 4:57–5:3. In Figure 1, the diameter is 2 because a message originating at any node (e.g., A) traverses no more than 2 connections to reach every other node. *Id.* at 5:3–6.

In one embodiment described in the ’344 patent, a distributed game environment is implemented using broadcast channels. *Id.* at 16:30–31. Each player’s computer executes a game application program, and a player joins a game by connecting to the broadcast channel on which the game is played. *Id.* at 16:31–36. Each time a player takes an action in the game, a message representing that action is broadcast on the game’s broadcast channel. *Id.* at 16:36–38.

C. Illustrative Claim

Claim 12, the only claim challenged in the Petition, depends from claim 1. Both claims are reproduced below.

1. A computer network for providing a game environment for a plurality of participants, each participant having connections to at least three neighbor participants, wherein an originating participant sends data to the other participants by sending the data through each of its connections to its neighbor participants and wherein each participant sends data that it receives from a neighbor participant to its other neighbor participants, further wherein the network is m-regular, where m is the exact number of neighbor participants of each participant

and further wherein the number of participants is at least two greater than m thus resulting in a non-complete graph.

12. The computer network of claim 1 wherein the interconnections of participants form a broadcast channel for a game of interest.

Id. at 19:26–37; 30:3–6.

D. Related Matters

Petitioner identifies the following pending judicial matters as relating to the '344 patent: *Activision Blizzard, Inc. v. Acceleration Bay LLC*, Case No. 3:16-cv-03375 (N.D. Cal., filed June 16, 2016); *Electronic Arts Inc. v. Acceleration Bay LLC*, Case No. 3:16-cv-03378 (N.D. Cal., filed June 16, 2016); *Take-Two Interactive Software, Inc. et al. v. Acceleration Bay LLC*, Case No. 4:16-cv-03377 (N.D. Cal., filed June 16, 2016); *Acceleration Bay LLC v. Activision Blizzard, Inc.*, Case No. 1:16-cv-00453 (D. Del., filed June 17, 2016); *Acceleration Bay LLC v. Electronic Arts Inc.*, Case No. 1:16-cv-00454 (D. Del., filed June 17, 2016); *Acceleration Bay LLC v. Take-Two Interactive Software, Inc. et al.*, Case No. 1:16-cv-00455 (D. Del., filed June 17, 2016). Paper 12, 2–3.

In addition to the 1972 IPR, the '344 patent is the subject of *inter partes* review in *Activision Blizzard, Inc., et al. v. Acceleration Bay, LLC*, Case IPR2015-01970 (“the 1970 IPR”). The '344 patent is also the subject of *Bungie, Inc. v. Acceleration Bay, LLC*, Case IPR2016-00933 and *Bungie, Inc. v. Acceleration Bay, LLC*, Case IPR2016-00934, for which institution decisions have not yet been made.

1. The 1972 IPR

As noted above, in the 1972 IPR, we instituted *inter partes* review as to claims 1–11 and 16–19 of the '344 patent, but we did not institute *inter*

partes review of claims 12–15 of the '344 patent. 1972 IPR, Paper 8 (“1972-Decision”). In the 1972 IPR, Petitioner also contended that claim 12 would have been obvious over Shoubridge¹ and DirectPlay.² See 1972 IPR, Paper 2 (“1972-Pet.”). As summarized in the 1972-Decision, Shoubridge models a communication network as a graph in which each node serves as a source of user traffic entering the network, where traffic can be sent to the other nodes in the network. 1972-Decision 12 (citing Ex. 1205,³ 2). Shoubridge describes a 64 node network with connectivity of degree 4 modeled as a large, regular graph and routing protocols known as constrained flooding and minimum hop routing. *Id.* Ultimately, Shoubridge proposes a hybrid routing strategy, which may rely on a combination of constrained flooding and minimum hop routing depending on whether valid routing information exists. *Id.*

The 1972-Decision also summarizes DirectPlay—an application program interface for providing medium-independent communications for multiplayer games over networks. 1972-Decision 19 (citing Ex. 1203, 15, 19⁴). As reflected in Figure 18-3, DirectPlay describes two possible network topologies for a multiplayer gaming session, including a peer-to-peer network, in which messages are routed between DirectPlay objects rather

¹ Peter J. Shoubridge & Arek Dadej, *Hybrid Routing in Dynamic Networks*, 3 IEEE INT’L CONF. ON COMMS. CONF. REC. 1381-86 (Montreal, 1997) (Ex. 1205) (“Shoubridge”).

² Bradley Bargaen & Peter Donnelly, *INSIDE DIRECTX* (Microsoft Press, 1998) (Ex. 1203) (“DirectPlay”).

³ In the 1972-Decision, Shoubridge was filed as Exhibit 1105 and DirectPlay was filed as Exhibit 1103. For convenience, we refer to the respective exhibit numbers in the instant proceeding unless otherwise noted.

⁴ We refer to the Exhibit pagination.

than through a host. *Id.* at 19–20. DirectPlay also provides a “matchmaking service” for players to meet in a virtual lobby to identify game sessions they want to connect with. *Id.* at 20. Once players decide to play a game, the virtual lobby launches the networked gaming session. *Id.*

In the 1972 IPR, Petitioner argued that Shoubridge discloses the limitations of claim 1. 1972-Pet. 28–34. For claim 12, Petitioner relied on DirectPlay to teach the recited “computer network of claim 1 wherein the interconnections of participants form a broadcast channel for a game of interest.” *Id.* at 42–43. Petitioner contended it would have been obvious to a person of ordinary skill in the art to apply Shoubridge’s teaching of flooding over a network to the gaming environment taught by DirectPlay to achieve DirectPlay’s objective of high reliability. *Id.* at 23–27. However, we determined Petitioner’s obviousness analysis to be insufficient. 1972-Decision 21–23. Specifically, we concluded:

[W]e agree with Patent Owner that DirectPlay contemplates a static network in which all participants are known *a priori*. Thus, the circumstances described in Shoubridge for using constrained flooding at every node do not appear to be present in DirectPlay. Moreover, neither Petitioner nor its declarant have sufficiently addressed why a person of ordinary skill in the art, upon reading Shoubridge, would be motivated to try its constrained flooding approach in DirectPlay to achieve scaling and reliability. If anything, Shoubridge suggests these objectives would not be satisfied for the disclosed 64 node network except by combining constrained flooding with a routing table approach, in which case not every node would be visited as required by claims 1, 16, and 18.

Id. at 23 (internal citations omitted). Accordingly, we found Petitioner did not establish a reasonable likelihood of prevailing in its challenge against claim 12. *Id.*

E. Asserted Grounds of Unpatentability

Petitioner asserts that claim 12 is unpatentable based on two grounds: Shoubridge alone,⁵ and Shoubridge in view of DirectPlay. Pet. 2–3. In its first theory, Petitioner contends Shoubridge describes the broadcast of user traffic through a network, which Petitioner contends teaches a “broadcast channel for a game of interest,” as recited in claim 12. Pet. 27–28 (citing, e.g., Ex. 1205, 1, 3; Ex. 1219 ¶¶ 94–98). In its second theory, Petitioner contends a person of ordinary skill in the art would have been motivated to apply DirectPlay’s teachings of broadcasting a game to Shoubridge’s network, to allow participants in Shoubridge’s network to participate in the game. Pet. 32–35 (citing, e.g., Ex. 1203, 21–24; Ex. 1219 ¶¶ 112–116). Petitioner contends that although the Board previously considered DirectPlay in combination with Shoubridge, neither of the grounds advanced here was previously considered by the Board. *Id.* at 2–3.

II. ANALYSIS

As a threshold matter, Patent Owner argues that the Board should deny Petitioner’s proposed grounds under 35 U.S.C. § 325(d) “because the Petition recycles substantially the same prior art as well as substantially the same arguments that were already presented to the Patent Office.” Prelim. Resp. 10. Petitioner does not address the applicability of 35 U.S.C. § 325(d) to its proposed grounds.

⁵ Petitioner articulates this ground as obviousness based on “Shoubridge and the knowledge of a POSITA.” Pet. 10. Because obviousness is determined from the perspective of a person of ordinary skill in the art, we refer to this ground simply as obviousness over Shoubridge.

Institution of *inter partes* review is subject to the Board's discretion. See 37 C.F.R. § 42.108(b). In particular, "[i]n determining whether to institute or order a proceeding under this chapter, chapter 30, or chapter 31, the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office." 35 U.S.C. § 325(d). In making this determination, we may consider whether Petitioner uses our prior Decision to bolster challenges it advanced unsuccessfully. See, e.g., *Unilever, Inc. v. The Procter & Gamble Co.*, Case IPR2014-00506, slip op. at 8 (PTAB July 7, 2014) (Paper 17) (informative).

Having considered the parties' contentions, we determine the grounds at issue here challenging claim 12 as unpatentable over Shoubridge alone and Shoubridge in view of DirectPlay rely on the same prior art and substantially the same arguments that we found insufficient in the 1972 IPR. Although Shoubridge alone was not raised as a basis for challenging claim 12 in the 1972 IPR, it was raised as a basis for challenging claim 1, from which claim 12, among other claims, depends. 1972-Decision 11–12. Moreover, the claim mapping provided for claim 12 in the instant petition relies on nearly identical disclosures in Shoubridge as relied upon for claim 1 in the previous petition. Compare Pet. 27–28 (citing Ex. 1205, 2 ¶ 11–3 ¶ 1) (mapping Shoubridge's disclosures of broadcasting a user packet on outgoing links to claim 12's "broadcast channel for a game of interest"), with 1972-Pet. 30–31 (citing Ex. 1205, 2 ¶ 11–3 ¶ 1) (mapping Shoubridge's disclosures of broadcasting a user packet on outgoing links to claim 1's "send[ing] data to the other participants"). Petitioner presents no

persuasive reason why it could not have challenged claim 12 based on Shoubridge alone in the 1972 IPR.

Similarly, regarding the challenge to claim 12 based on Shoubridge in view of DirectPlay, Petitioner previously presented this prior art as DirectPlay in view of Shoubridge. *See* 1972-Pet. 27 (“DirectPlay is presented as the primary reference.”). As an initial matter, characterizing the instant grounds as Shoubridge in view of DirectPlay instead of the other way around is itself of “no significance.” *See In re Bush*, 296 F.2d 491, 496 (CCPA 1961). Significantly, Petitioner relies in large part upon the same disclosures in DirectPlay, e.g., pages 21–24, in contending that a person of ordinary skill in the art would have combined Shoubridge and DirectPlay. Pet. 33–34. We recognize that Petitioner now adds citation to additional disclosures at pages 47, 50, and 51 of DirectPlay. *Id.* at 31. Petitioner contends this additional evidence rebuts Patent Owner’s alleged mischaracterization of DirectPlay as limited to static networks. *Id.* at 8–9. However, Petitioner provides no persuasive reason that it could not have anticipated Patent Owner’s argument given Shoubridge’s teaching that “flooding results in very low network utilization, and therefore better routing strategies need to be sought.” *See* 1972-Decision 22 (quoting Ex. 1205, 4). Consequently, we find this to be a “second bite at the apple” (Prelim. Resp. 11–12) used to bolster previously unsuccessful arguments. *See Unilever*, slip op. at 7–8; *Travelocity.com L.P. v. Cronos Techs., LLC*, Case CBM2015-00047, slip op. at 12–13 (PTAB June 15, 2015) (Paper 7) (new indefiniteness argument); *Samsung Elecs. Co., Ltd., v. Affinity Labs of Tex., LLC*, Case No. IPR2015-00820, slip op. at 4 (PTAB May 15, 2015) (Paper 12) (new reference).

Although Petitioner does not address the applicability of 35 U.S.C. § 325(d), it does contend “the public interest in having consistency of outcomes” outweighs the minimal additional work on the part of the Patent Owner in addressing these grounds. Pet. 5. We disagree. First, we are not persuaded the addition of claim 12 to existing proceedings would create minimal additional work on the part of the Patent Owner, given the stage of the proceeding and the fact that the proposed ground based on Shoubridge and DirectPlay is not presently in either of the two ongoing proceedings challenging claims of the ’344 patent. Second, because the proposed ground of obviousness over Shoubridge and DirectPlay is not applicable to either ongoing proceeding, Petitioner does not explain how instituting *inter partes* review of claim 12 based on this ground would add to consistency of outcomes. See Prelim. Resp. 13. We have considered that claim 12 is already subject to challenge based on DirectPlay and Lin in the related 1970 IPR. However, a determination that claim 12 is unpatentable on this ground would not be inconsistent with a decision not to institute on the new grounds proposed here. Moreover, the parallel challenge to claim 12 based on DirectPlay and Lin in the 1972 IPR is a further reason to exercise our discretion not to institute the challenge to claim 12 here under § 325(d). See *Medtronic, Inc. v. Robert Bosch Healthcare Sys., Inc.*, Case IPR2014-00436, slip op. at 11–12 (PTAB June 19, 2014) (Paper 17) (informative); *Samsung*, slip op. at 4–5.

Accordingly, for the foregoing reasons, we are persuaded that we should exercise our discretion to deny institution under § 325(d).

III. CONCLUSION

We exercise our discretion to deny the Petition under 35 U.S.C. § 325(d). Because we deny the Petition, we dismiss Petitioner's Motion for Joinder as moot.

IV. ORDER

Accordingly, it is:

ORDERED that, pursuant to 35 U.S.C. § 325(d), an *inter partes* review is not instituted for claim 12 of U.S. Patent No. 6,701,344 B1; and

FURTHER ORDERED that Petitioner's Motion for Joinder is dismissed as moot.

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