

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC,
Petitioner,

v.

UNILOC 2017 LLC,
Patent Owner.

IPR2019-01584
Patent 6,519,005 B2

Before JAMESON LEE, KEVIN F. TURNER, and
THOMAS L. GIANNETTI, *Administrative Patent Judges*.

Opinion for the Board filed by *Administrative Patent Judge* TURNER

Opinion Dissenting filed by *Administrative Patent Judge* GIANNETTI

TURNER, *Administrative Patent Judge*.

DECISION
Denying Institution of *Inter Partes* Review
35 U.S.C. § 314

I. INTRODUCTION

Google LLC (“Petitioner”) filed a Petition requesting an *inter partes* review of claims 1–3, 5, 6, 8, 39, and 41 (“the challenged claims”) of U.S. Patent No. 6,519,005 B2 (Ex. 1001, “the ’005 Patent”). Paper 1 (“Pet.”). Uniloc 2017 LLC (“Patent Owner”) filed a Preliminary Response. Paper 6 (“Prelim. Resp.”).

An *inter partes* review may not be instituted unless the information presented in the petition “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). Based on the particular circumstances of this case, we exercise our discretion under 35 U.S.C. § 314(a) and deny the Petition.

A. Related Matters

The parties indicate that the ’005 Patent is the subject of multiple district court cases. *See* Pet. 1–3; Paper 4, 2. The ’005 Patent is also the subject of two other petitions, involving different petitioners: (1) IPR2019-01126, filed May 28, 2019, by petitioner Unified Patents Inc., where a trial was instituted in that proceeding on December 10, 2019 (Paper 8) (“Unified IPR”); and (2) IPR2019-01270, filed June 25, 2019, by petitioner Sling TV LLC, where a trial was instituted in that proceeding on January 9, 2020 (Paper 11) (“Sling TV IPR”).

B. The ’005 Patent

The ’005 Patent is generally related to “digital video compression, and, more particularly, to a motion estimation method and search engine for a digital video encoder.” Ex. 1001, 1:6–8. The ’005 Patent is titled

“Method of Concurrent Multiple-Mode Motion Estimation for Digital Video” and discloses improved methods of digital video encoding. *Id.* at code (54), Abs.

With respect to the prior art Moving Pictures Expert Group (MPEG) processes, the '005 Patent explains that audio and video data in the form of a multimedia data stream are encoded/compressed prior to transmission “in order to minimize the bandwidth required to transmit this digital video data stream for a given picture quality.” *Id.* at 1:12–17. The '005 Patent explains that, in accordance with the MPEG standards (MPEG-2 and its predecessor, MPEG-1), “the audio and video data comprising a multimedia data stream (or ‘bit stream’) are encoded/compressed in an intelligent manner using a compression technique generally known as ‘motion coding,’” to avoid transmitting each video frame in its entirety. *Id.* at 1:40–47.

The '005 Patent discusses “predictive” video frames using reference or anchor frames looking at macroblocks of 16x16 pixel regions. *Id.* at 1:61–65, Figs. 1A, 1B. For each macroblock, the system searches for a similar portion of the reference and results in a motion vector that identifies the position of the “best match” within reference frame relative to the position of the macroblock in the frame being encoded. *Id.* at 2:18–47. The '005 Patent details six standard ways to perform the motion estimation process, called “prediction modes,” with different modes being applied based on the “picture structure.” *Id.* at 9:36–40. For “frame” picture structures, the entire frame is considered a single picture, while for “field” picture structures, the frame is divided into a top field and a bottom field.

Id. at 7:27–61. Two of these different prediction modes are illustrated in Figures 2A and 2B and are reproduced below:

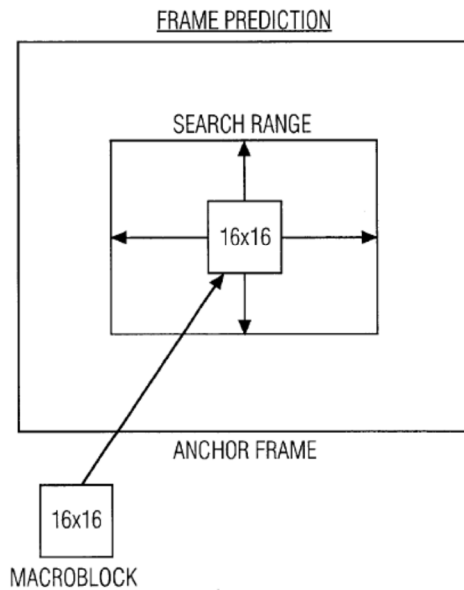


FIG. 2A

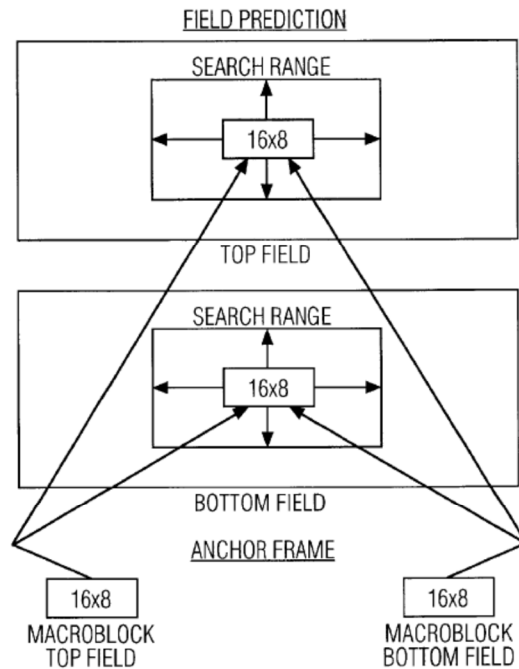


FIG. 2B

Figures 2A and 2B of the '005 Patent are diagrams that illustrate motion estimation for frame pictures using frame and field predictions.

In Figure 2A, “frame prediction” will treat the macroblock like a single 16x16 block, and the motion estimation search system will search for the 16x16 pixel portion of the reference picture that is the best match (e.g., minimizes the difference between the macroblock and a given portion of the reference picture), whereas Figure 2B shows “field prediction” for a “frame” picture, with the macroblock and the anchor picture divided into odd and even numbered rows of pixels (referred to as a “top” field, and a “bottom” field), and the system will try to find the best match for each of the two fields. *Id.* at 7:27–60. The '005 Patent discloses at least six prediction modes. *Id.* at 9:36–38, 15:38–46.

The '005 Patent states that conventional systems required a single prediction mode to be specified, without knowing which might be optimum, but the disclosed processes allow for the determination of the optimum prediction mode while performing motion estimation and generating motion vectors, without the need for pre-selection of a mode. *Id.* at 3:7–15, 40–49. The '005 Patent describes a “scheme for concurrently searching . . . each of a plurality of motion prediction modes” using a single search, which allows for optimum selection between the different options, i.e., different prediction modes. *Id.* at 3:53–61, 9:28–35. The '005 Patent also provides that, because the error metrics for different prediction modes are mathematically related to one another, a single search can “concurrently” calculate the error metrics for multiple prediction modes. *Id.* at 3:54–67, 8:14–23.

C. Illustrative Claim

Of the challenged claims, claims 1, 39, and 41 are independent. Claims 2, 3, 5, 6, and 8 ultimately depend from claim 1. Claim 1 is illustrative:

1. A method for motion coding an uncompressed digital video data stream, including the steps of:
comparing pixels of a first pixel array in a picture currently being coded with pixels of a plurality of second pixel arrays in at least one reference picture and concurrently performing motion estimation for each of a plurality of different prediction modes in order to determine which of the prediction modes is an optimum prediction mode;
determining which of the second pixel arrays constitutes a best match with respect to the first pixel array for the optimum prediction mode; and,

generating a motion vector for the first pixel array in response to the determining step.

Ex. 1001, 15:9–22.

D. Asserted Grounds of Unpatentability

Petitioner asserts the following grounds of unpatentability (Pet. 4)¹:

Claims Challenged	35 U.S.C. §	Reference(s)/Basis
1–3, 5, 6, 8, 39, 41	102(e)	Hanami ²
2, 5	103	Hanami, Mitchell ³

Petitioner also relies on the testimony of Dr. Majid Rabbani (Ex. 1002) to support the contentions in the Petition.

II. ANALYSIS

A. Claim Construction

In an *inter partes* review proceeding based on a petition filed on or after November 13, 2018, a patent claim shall be construed using the same claim construction standard that would be used to construe the claim in a civil action under 35 U.S.C. § 282(b). 37 C.F.R. § 42.100(b) (2019). This

¹ The claims at issue have an effective filing date of April 30, 1999, which is prior to March 16, 2013, the effective date of the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (“AIA”), and, thus, we apply the pre-AIA version of 35 U.S.C. § 103.

² U.S. Patent No. 6,122,317, application filed November 20, 1997, issued September 19, 2000 (Ex. 1005, “Hanami”).

³ J. L. Mitchell et al., MPEG Video Compression Standard (Chapman & Hall) (1996) (Ex. 1006, “Mitchell”).

rule adopts the same claim construction standard used by Article III federal courts, which follow *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc), and its progeny.⁴ Under this standard, the words of a claim are generally given their “ordinary and customary meaning,” which is the meaning the term would have had to a person of ordinary skill at the time of the invention, in the context of the entire patent including the specification. *See Phillips*, 415 F.3d at 1312–13.

Petitioner asserts that it “believes that no express constructions of the claims are necessary to assess whether the prior art reads on the challenged claims.” Pet. 16 (citing Ex. 1002 ¶ 62). With respect to claim constructions proposed in the Unified and Sling TV IPRs, which we largely adopted in those proceedings, Petitioner identifies those constructions and provides explanations of how the instant prior art discloses the relevant claim terms under those constructions in the analysis of its grounds of unpatentability, discussed below. *Id.* at 16–17. Patent Owner does not provide arguments or constructions with respect to any claim term. *See generally* Prelim. Resp.

As such, we find that it is unnecessary to construe any claim terms expressly for our determination of whether to institute a review of the challenged claims. *See Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1017 (Fed. Cir. 2017) (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999)).

⁴ *See* Changes to the Claim Construction Standard for Interpreting Claims in Trial Proceedings Before the Patent Trial and Appeal Board, 83 Fed. Reg. 51,340 (Oct. 11, 2018).

B. Principles of Law

35 U.S.C. Section 314(a) states as follows:

(a)THRESHOLD.—

The Director may not authorize an inter partes review to be instituted unless the Director determines that the information presented in the petition filed under section 311 and any response filed under section 313 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).

C. Application of Discretion under 35 U.S.C. §§ 314, 325

1. Discretion under 35 U.S.C. § 325

Patent Owner contends that the instant Petition should be denied because it is cumulative of the petition filed by Unified Patents Inc., on May 28, 2019, as well as the petition filed by Sling TV LLC, on June 25, 2019, i.e., the Unified and Sling TV IPRs. Prelim. Resp. 7. Patent Owner argues that “Petitioner has not addressed the [*NHK Spring Co., Ltd., v Intri-Plex Techs., Inc.*, IPR2018-00752 (Paper 8) (PTAB Sept. 12, 2018) (precedential)] / [*Becton, Dickinson & Co. v. B. Braun Melsungen AG*, IPR2017-01586 (Paper 8) (PTAB Dec. 15, 2017) (informative, precedential as to § III.C.5)] factors in light of the two previously-filed petitions against the ’005 patent.” Prelim. Resp. 8. We disagree with Patent Owner.

We have discretion under 35 U.S.C. § 325(d) to reject a petition when the same or substantially the same prior art or arguments were presented previously in another proceeding before the Office. The relevant portions of that statute are reproduced below:

In 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 the Unified IPR, discussed above, we determined that Unified had established a reasonable likelihood that claims 1–16 and 39–42 of the ’005 Patent are unpatentable as obvious over Ishihara⁵ in view of the admitted prior art disclosed in the ’005 Patent, and instituted a trial based on the petition filed in the Unified IPR. Unified IPR, Paper 8, 10–20, 34. In the Sling TV IPR, also discussed above, we we determined that Unified had established a reasonable likelihood that claims 1–16 and 39–42 of the ’005 Patent are unpatentable as anticipated by Ishihara or obvious over Ishihara in view of additional references, and instituted a trial based on the petition filed in the Sling TV IPR. Sling TV IPR, Paper 11, 21–34.

Patent Owner argues that Hanami includes as a listed inventor Kazuya Ishihara, who is the lead author of the Ishihara publication relied upon in the other petitions, and that Petitioner does not distinguish Hanami from Ishihara. Prelim. Resp. 8–9. Patent Owner further argues that without “acknowledgement as to the overlapping origin of the references, or comparison of their teachings, Google’s Petition merely seeks to multiply proceedings that the Patent Owner must defend,” and that this lack of explanation should weigh against institution. *Id.* at 9–10 (citing *Medtronic, Inc. v. NuVasive, Inc.*, IPR2014-00487, Paper 8 at 6 (Sept. 11, 2014))

⁵ K. Ishihara et al., A Half-pel Precision MPEG2 Motion-Estimation Processor with Concurrent Three-Vector Search, 30 (12) IEEE J. of SolidState Circuits 1502–09 (Dec. 1995) (“Ishihara”). *See also* IPR2019-01126, Ex. 1004; IPR2019-01270, Ex. 1006 (same reference).

(informative); *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, IPR2013-00324, Paper 19 at 6 (Nov. 21, 2013) (informative); *Apple Inc. v. Corephotonics Ltd.*, IPR2018-01356, Paper 9 at 7–8 (Feb. 5, 2019)).

Patent Owner further asserts that there are at least certain specific non-exclusive factors we must evaluate in determining whether to deny a petition under 35 U.S.C. § 325(d). Prelim. Resp. 7–8 (citing *NHK Spring; Becton, Dickinson*). Based on these factors, Patent Owner argues that “[t]he Board should exercise its discretion under 35 U.S.C. § 325(d) to deny the Petition.” *Id.* at 10. Although we agree with Patent Owner that certain factors should be considered, we disagree with their applicability to the instant facts.

Both *Becton, Dickinson* and *NHK Spring* involved prior art references that had previously been considered by the Examiner during prosecution. *See Becton, Dickinson*, IPR2014-00487, Paper 8 at 18 (“Woehr, relied upon by Petitioner as the base reference here, was also the base reference in the Examiner’s Woehr/Rogers obviousness rejection during examination.”); *NHK Spring*, IPR2018-00752, Paper 8 at 12 (“As Petitioner acknowledges, the Examiner considered Braunheim and the AAPA during prosecution of the ’841 patent.”). Thus, in *Becton, Dickinson*, the Board weighed “the extent to which the asserted art was evaluated during examination, including whether the prior art was the basis for rejection.” *Becton, Dickinson*, IPR2014-00487, Paper 8 at 17. The Board’s analysis in *NHK Spring* was similar. *NHK Spring*, Paper 8 at 13.

In contrast, the Ishihara publication was relied on by the panel in instituting trial in the Unified and Sling TV IPRs, where Patent Owner alleges Ishihara is cumulative to the disclosure of Hanami, relied upon in the

grounds of the instant proceeding. There has been no showing that either was before the Examiner during prosecution of the '005 Patent. An earlier preliminary consideration by the Board in determining whether to institute a trial is not a sufficient demonstration that the reference was previously considered so as to satisfy *Becton, Dickinson* or the statute. In our decisions on institution, we have constantly reminded the parties that our findings on institution are preliminary, based on a limited pre-institution record, and are not final or binding upon us or the parties. Of course, a different result could follow from references considered in a final written decision, as recognized by the fact that the statutory estoppels provided by Congress are triggered by the issuance of a final written decision, and not by a decision to institute. *See* 35 U.S.C. § 315(e).⁶ Applying our discretion in the instant circumstances would give too much weight to the decision to institute, which is the Board's preliminary determination on a limited record that the Petitioner has demonstrated a "reasonable likelihood that the petitioner would prevail as to at least 1 of the claims challenged in the petition." 35 U.S.C. § 314(a).

As such, we determine that it is unwarranted to apply our discretion under 35 U.S.C. § 325(d) to deny the instant Petition simply because it relies on the same or similar references that we considered in an institution

⁶ Conversely, the Federal Circuit has held that estoppel does *not* apply to claims for which *inter partes* review is not instituted. "Because a final written decision does not determine the patentability of non-instituted claims, it follows that estoppel does not apply to those non-instituted claims in future proceedings before the PTO." *Credit Acceptance Corp. v. Westlake Services*, 859 F.3d 1044, 1052 (Fed. Cir. 2017).

decision in a prior petition. As discussed above, it would be very different if those references and/or arguments were relied upon in a final written decision or on appeal, such that further consideration would violate the principles of estoppel. *See, e.g., Unified Patents, Inc. v. PersonalWeb Tech., LLC and Level 3 Comm., LLC*, IPR2014-00702 (PTAB July 24, 2019) (Paper 13) (informative).

2. *Discretion under 35 U.S.C. § 314*

The Director's discretion, under 35 U.S.C. § 314, is informed by 35 U.S.C. § 316(b), which requires the Director to "consider the effect of any such regulation [under this section] on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to timely complete proceedings instituted under this chapter." Consolidated Trial Practice Guide (November 2019) ("CTPG"), 56. In *General Plastic Industrial Co., Ltd. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19 (PTAB Sept. 6, 2017) (designated precedential in relevant part), the Board recognized these goals of the AIA, but also "recognize[d] the potential for abuse of the review process by repeated attacks on patents." CTPG at 56 (quoting *General Plastic*, Paper 19 at 16–17). "The General Plastic factors *are also not exclusive and are not intended to represent all situations where it may be appropriate to deny a petition.*" *Id.* at 58 (emphasis added). "Based on the Board's experience, one petition should be sufficient to challenge the claims of a patent in most situations. Two or more petitions filed against the same patent at or about the same time (e.g., before the first preliminary response by the patent owner) may place a substantial and unnecessary burden on the Board and the patent owner and

could raise fairness, timing, and efficiency concerns. *See* 35 U.S.C. § 316(b).” *Id.* at 59.

Although it is clear that this is the first petition filed against the ’005 Patent by Petitioner, it is also clear that these same claims are presently subject to *inter partes* review in two other proceedings, i.e., the Unified and Sling TV IPRs, as discussed above. Institution in this proceeding would create a third trial directed to the same claims over art that is not substantially different.

Petitioner does not explain why a third petition or *inter partes* proceeding is needed in light of two on-going reviews. In fact, although Petitioner asserts that the prior art asserted in this petition is “different than the prior art asserted in the Unified IPR and Sling TV IPR,” Petitioner also asserts that it “is not attempting to correct deficiencies or change prior art grounds from any previous petition.” Pet. 72–74. That begs the question as to why a third petition directed to the challenged claims is needed or necessary. Petitioner had opportunities to mitigate efficiency concerns relating to a third challenge to this patent, for example, by filing a petition accompanied by a motion for joinder to join one of the earlier petitions. Petitioner does not explain why it filed this separate petition instead, months later, based on “different” prior art.

Petitioner argues that given the number of separate entities engaged in litigation by Patent Owner, Patent Owner cannot convincingly argue that “it could not have expected separate challenges.” Pet. 76. Although that goes to the expectation of Patent Owner, it does not address why we need consider a third petition, and potentially a third trial proceeding. Petitioner also asserts that the instant challenged claims are a subset of those

challenged in the Unified and Sling TV IPRs because those were the claims Patent Owner asserted against Petitioner in the parallel litigation. *Id.* That may address why Petitioner is focused on its subset of claims, but does not address why we need to focus on such a subset when the overall set is facing patentability considerations already.

In addition, as Patent Owner points out, the length of time between when Petitioner was first sued for infringement of the '005 Patent in a complaint (October 31, 2018) and when Unified Patents, Inc. filed its petition (May 28, 2019) is not insignificant. Prelim. Resp. 12. Additionally, the prior petitions were filed over four months (Unified IPR) or over three months (Sling TV IPR) before the instant Petition, even though it appears that Petitioner was served by Patent Owner for patent infringement prior to the other petitioners. *See* Pet. 1–3; Paper 4, 2.

Petitioner also asserts that “since being served the complaint on January 28, 2019, Petitioner diligently worked to meet deadlines in the litigation and file this IPR petition well within the one-year statutory bar.” Pet. 77. Given, however, that Petitioner has not addressed when it became aware of Hanami, or why it could not have filed the Petition earlier, we cannot presume diligence without actual evidence thereof. Indeed, Patent Owner argues that “Google reasonably should have known of the Hanami reference by the time Unified filed its petition on May 28, 2019,” and that “Google does not provide any explanation as to how Hanami was discovered in time to file its Petition but would not have been found by a reasonable search in time for the filing of the Unified IPR.” Prelim. Resp. 12.

Additionally, Petitioner does not provide a meaningful distinction between the references applied here and the references applied in the two

previous petitions. We acknowledge that Petitioner asserts that the prior art cited in the instant Petition is different than the art asserted in the Unified and Sling TV IPRs, and also asserts that “there is no overlap between the grounds of this petition and the grounds in the Unified IPR and Sling TV IPR.” Pet. 73–75. We note, however, there is an overlap in authorship/inventorship between the references here and the references in the two prior petitions, which makes even more important an explanation by Petitioner here of the distinction between references. Hanami and Ishihara have many features in common, including the determination of optimum motion vectors, according to different predictive modes, for motion compensation in moving images. *See* Ex. 1005, Abs., 1:6-19; Ishihara, Abs., 1502. In addition, multiple patents with Kazuya Ishihara as a co-inventor were cited in the grounds of the petition in the Sling TV IPR. *See* IPR2019-01270, Exs. 1011, 1012. It is difficult to assume that one being aware of the first reference (Ishihara) would not have located the second (Hanami) through a typical search of the prior art.

Therefore, although the grounds of unpatentability provided in the instant Petition are not identical to the grounds provided in the petitions of the Unified and Sling TV IPRs, we are not persuaded that they are distinctive; nor are we persuaded that the instant grounds are not cumulative with respect to the grounds provided in the petitions of the Unified and Sling TV IPRs, such that an additional examination of the challenged claims is warranted.

Overall, a third trial under these circumstances it is not an efficient use of the Board’s resources. Petitioner does not address in its Petition why a third IPR proceeding against this patent is an efficient use of Board

resources to justify instituting a third IPR proceeding against this patent.

As such, upon review of the evidence and consideration of 35 U.S.C. § 314 (a), we are persuaded that we should apply our discretion based on the facts of this case. Taking into consideration the efficient administration of the Office under 35 U.S.C. § 316(b), we exercise our discretion under 35 U.S.C. § 314 (a) and deny the Petition in this proceeding.

III. ORDER

Accordingly, it is ORDERED that the Petition is DENIED.

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GIANNETTI, *Administrative Patent Judge*, dissenting.

I dissent respectfully from the panel majority's discretionary denial of the Petition in this case. The majority decision does not rely on any precedential authority that would compel this result. The fact is, recent Board jurisprudence on discretionary denials is not supportive of the panel majority's denial here.

Thus, the majority recognizes that the denials of institution in both *Becton, Dickinson*⁷ and *NHK Spring*⁸ involved prior art references that had previously been considered by the Examiner during prosecution. Majority Dec. 10–11. In contrast, there is no showing that either Hanami, cited here, or the Ishihara publication at issue in the Unified and Sling TV IPRs, was before the Examiner during prosecution of the '005 patent. *Id.* at 11. Thus, the panel majority correctly declined to dismiss the Petition here under 35 U.S.C. § 325(d). *Id.* at 12.

The panel majority acknowledges differences between this case and *General Plastic Industrial Co., Ltd. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19 (PTAB Sept. 6, 2017) (designated precedential in relevant part). Majority Dec. 13. *General Plastic* addresses situations where the same petitioner files “follow-on petitions” against the same patents, after a first round of petitions is denied on the merits. *General Plastic*, Paper 19 at 2–3. However, as the panel majority recognizes, “this is the first petition filed against the '005 Patent by Petitioner.” Majority Dec. 13.

Admittedly, *General Plastic* has not been limited to instances where multiple petitions are filed by the same petitioner. *Valve Corp. v. Elec. Scripting Prods., Inc.*, IPR2019-00062, Paper 11 (PTAB Apr. 2, 2019) (precedential). In *Valve Corp.*, the Board denied institution. But in evaluating the first *General Plastic* factor (whether the same petitioner

⁷ *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper 8 at 17–18 (PTAB Dec. 15, 2017) (informative, precedential as to § III.C.5).

⁸ *NHK Spring Co., Ltd., v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 at 11 (PTAB Sept. 12, 2018) (precedential).

previously filed a petition directed to the same claims of the same patent), the Board considered the “significant relationship” between the two different parties filing the petitions, among other factors. *Id.* at 10. The panel majority here fails to address the lack of any proof of a “significant relationship” between Petitioner and the two prior petitioners, Unified and Sling TV. In fact, the majority does not even acknowledge *Valve Corp.*

Instead, the panel majority’s stated concern is that a third trial is not an “efficient” use of Board resources. Majority Dec. 16. At the same time, the majority determines that the art cited here (Hanami) is “not substantially different” from the art (Ishihara) in the two prior trials. *Id.* at 13. The majority does not attempt to quantify how much additional work might be necessary to manage a third trial involving a patent that is identical and prior art that is substantially the same. It would not seem to be such a heavy lift for the Board.

The net result of the panel majority’s decision is that we are now one step closer to setting up a race to file the first petition. The losers of the race are denied a chance to present their own case to the Board, and must depend on others whose interests may not align fully with theirs.

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