

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CISCO SYSTEMS, INC., DELL TECHNOLOGIES INC.,
AND DELL INC.

Petitioners,

v.

CORRIGENT CORPORATION,
Patent Owner.

IPR2023-00168
Patent 7,113,485 B2

Before NATHAN A. ENGELS, CHRISTOPHER L. OGDEN, and
BRENT M. DOUGAL, *Administrative Patent Judges*.

ENGELS, *Administrative Patent Judge*.

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

I. INTRODUCTION

Cisco Systems, Inc., Dell Technologies Inc., and Dell Inc. (collectively, “Petitioner”) filed a Petition (Paper 3, “Pet.”) requesting *inter partes* review of claims 1–20 of U.S. Patent No. 7,113,485 B2 (Ex. 1001, “the ’485 patent”). Patent Owner Corrigent Corporation filed a Preliminary Response. Paper 7 (“Prelim. Resp.”).

Under 35 U.S.C. § 314(a), an *inter partes* review may not be instituted unless the information presented in the Petition and any response thereto shows “there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” Upon consideration of the Petition and the evidence of record, we determine Petitioner has demonstrated a reasonable likelihood of prevailing in establishing unpatentability of at least one claim of the ’485 patent. Accordingly, we institute *inter partes* review.

A. *Real Parties-in-Interest*

Petitioner identifies Cisco Systems, Inc., Dell Technologies Inc., and Dell Inc. as the real parties-in-interest. Pet. 76. Patent Owner identifies itself as the sole real party-in-interest. Paper 5, 2.

B. *Related Matters*

The parties indicate that the ’485 patent is involved in the following district court cases: *Corrigent Corp. v. Cisco Sys., Inc.*, No. 6-22-cv-00396 (W.D. Tex.), and *Corrigent Corp. v. Dell Techs., Inc.*, No. 1-22-cv-00496 (D. Del.). Pet. 76; Paper 5, 2.

C. *The Challenged Patent*

The ’485 patent relates to “improved methods and devices for measuring network latency, particularly in ring topologies.” Ex. 1001, 59–

61. Among other things, the '485 patent describes methods for measuring respective latencies of different classes of service, measuring round-trip latency between pairs of nodes, and monitoring latency variations over time. Ex. 1001, 2:62–3:3.

D. Illustrative Claim

Of the challenged claims, claims 1, 6, 9, 11, 16, and 19 are independent claims. Claim 6 is copied below with bracketed labels added to claim 6 to reflect those referenced in the Petition.

[6.0] A method for measuring latency in a network in which traffic is transmitted in a plurality of classes of service, the method comprising:

[6.1] generating a latency measurement packet containing an indication that the packet belongs to a selected one of the classes of service;

[6.2] transmitting the latency measurement packet from a source node in the network, so that the packet is passed through the network at a level of service accorded to the class;

[6.3] noting a time of receipt of the latency measurement packet at a destination node in the network; and

[6.4] calculating the latency for the selected one of the classes of service by taking a difference between a time of transmission of the latency measurement packet and the time of receipt thereof.

E. Alleged Grounds of Unpatentability

Petitioner asserts that claims 1–20 would have been unpatentable on the following grounds:

Claims Challenged	35 U.S.C. §	Reference(s)/Basis
6,7, 16, 17	103(a) ¹	Klassen ²
9, 19	103(a)	Klassen, Geiger ³
1–4, 8, 11–14, 18	103(a)	Klassen, Kao, ⁴ Poulin ⁵
10, 20	103(a)	Klassen, Kao, Geiger
5, 15	103(a)	Klassen, Kao, Poulin, Geiger

Pet. 11. Petitioner also supports its challenge with a Declaration of Henry Houh, Ph.D. Ex. 1003.

II. ANALYSIS

A. Level of Ordinary Skill in the Art

In determining the level of skill in the art, we consider the type of problems encountered in the art, the prior art solutions to those problems, the rapidity with which innovations are made, the sophistication of the technology, and the educational level of active workers in the field. *Custom Accessories, Inc. v. Jeffrey-Allan Indus., Inc.*, 807 F.2d 955, 962 (Fed. Cir. 1986); *Orthopedic Equip. Co. v. U.S.*, 702 F.2d 1005, 1011 (Fed. Cir. 1983).

Petitioner contends a person of ordinary skill in the art at the time of the invention would have had “a working knowledge of network

¹ The Leahy-Smith America Invents Act (“AIA”) included revisions to 35 U.S.C. § 103 that became effective on March 16, 2013. The ’485 patent was filed prior to the effective date of the AIA. Therefore, we apply the pre-AIA version of § 103; however, our analysis would be the same under the current version of the statute.

² US 6,711,137 B1; filed Mar. 12, 1999; issued Mar. 23, 2004. Ex. 1005.

³ US 5,701,302; issued Dec. 23, 1997. Ex. 1006.

⁴ US 7,212,490 B1; filed July 6, 2001; issued May 1, 2007. Ex. 1007.

⁵ US 6,545,979 B1; filed Nov. 27, 1998; issued Apr. 8, 2003. Ex. 1008.

communications, including ring networks and latency calculation methodologies” and “a bachelor’s degree in computer science, computer engineering, electrical engineering, or an equivalent training, and approximately two years of work experience in network communications.” Pet. 9 (citing Ex. 1003 ¶ 19). Petitioner also states that a lack of work experience can be remedied by additional education, and vice versa. Pet. 9 (citing Ex. 1003 ¶ 19).

Patent Owner does not address the level of ordinary skill in its Preliminary Response. For the purposes of this Decision, we apply Petitioner’s level of ordinary skill, which is consistent with the level reflected by the ’485 patent and the asserted prior art.

B. Claim Construction

We construe claims using the principles set forth in *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–17 (Fed. Cir. 2005) (en banc) and related cases. See 37 C.F.R. § 42.100(b) (2022). Under that precedent, the words of a claim are generally given their “ordinary and customary meaning,” which is the meaning the term would have to a person of ordinary skill at the time of the invention, in the context of the entire patent including the specification. *Phillips*, 415 F.3d at 1312–13.

Neither party proposes any express claim constructions. Pet. 10; see generally Prelim. Resp. At this stage, we determine it is unnecessary to construe any terms. See *Realtime Data, LLC v. Iancu*, 912 F.3d 1368, 1375 (Fed. Cir. 2019) (“The Board is required to construe ‘only those terms . . . that are in controversy, and only to the extent necessary to resolve the controversy.’” (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999))).

C. Discretionary Denial Under 35 U.S.C. § 314

Patent Owner contends the Board should exercise its discretion to deny institution under 35 U.S.C. § 314, citing the discretionary-denial factors articulated in *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (PTAB Mar. 20, 2020). Prelim. Resp. 3–15. Petitioner disagrees. Pet. 71–74. In particular, Patent Owner contends *Fintiv* factors 2, 3, 5, and 6 weigh in favor of discretionary denial (Prelim. Resp. 3), and Petitioner contends factors 2, 3, 4, and 6 weigh against discretionary denial (Pet. 70–74).

Addressing the *Fintiv* factors in order, (1) the parties agree the first factor is neutral because the parties have not requested a stay. (2) The second factor requires us to look at the most recent statistics on median time-to-trial for civil actions in the relevant district,⁶ which is 28.2 months in the Western District of Texas (and 33.7 months in the District of Delaware). Federal Case Management Statistics, available at <https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2023/03/31-1>.⁷ Because these dates would be after the projected deadline for a final written decision in this proceeding, the second factor weighs against discretionary

⁶ Katherine K. Vidal, *Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation* (June 21, 2022); available at https://www.uspto.gov/sites/default/files/documents/interim_proc_discretionary_denials_aia_parallel_district_court_litigation_memo_20220621_.pdf (“Interim Procedure”).

⁷ Petitioner cites official statistics for a 12-month period ending June 30, 2022. Pet. 72 (citing Ex. 1029, 14, 37). Patent Owner cites statistics from the Docket Navigator website (Ex. 2002) for a two-year period ending April 10, 2023. Consistent with the Interim Procedure, we take official notice of the most recently published median filing-to-trial times from the official Judicial Caselaw Profile for civil cases in the Western District of Texas, which is for the twelve-month period ending March 31, 2023. *See* Interim Procedure 9 n.12.

denial. (3) The third factor weighs in favor of discretionary denial because the district court has issued a Claim Construction Order (Ex. 2001) and fact discovery has begun (Prelim. Resp. 9). (4) The fourth factor weighs against discretionary denial because Petitioner states that, “[i]f the Board institutes trial, Petitioners will cease asserting in the co-pending litigations the combination of references on which trial is instituted for the claims on which trial is instituted, to the extent Petitioners even assert the same combination in the litigations against them” (Pet. 73). *See* Prelim. Resp. 9–10 (acknowledging Petitioner’s stipulation and arguing that the fourth factor “only marginally favors not exercising discretion to deny institution”). (5) The fifth factor is neutral because the defendants in the co-pending litigation are collectively the Petitioner in this proceeding. (6) Because we determine factors one through five do not, on balance, warrant discretionary denial, we consider the sixth factor neutral without determining whether Petitioner’s showings rise to the level of compelling merits.

Accordingly, weighing the *Fintiv* factors based on the current record, we decline to exercise our discretion to deny institution under § 314.

D. Petitioner’s Showings

Petitioner provides a claim-by-claim, limitation-by-limitation comparison of each of claims 1–20 to specific teachings of Klassen, with citations to testimony from Dr. Houh as additional supporting evidence. Pet. 14–70. Patent Owner addresses Petitioner’s showings generally, without substantive explanation or evidence rebutting Petitioner’s evidence or arguments. *See generally* Prelim. Resp. (addressing the *Fintiv* factors and requesting discretionary denial).

Based on the preliminary record, we determine Petitioner’s arguments and evidence sufficiently show that Petitioner is likely to prevail in its challenge as to at least one of claims 1–20. Below, we highlight Petitioner’s showings for claim 6 as representative of Petitioner’s arguments and address Patent Owner’s general arguments regarding the sufficiency of Petitioner’s showings.

Petitioner cites Klassen as teaching “a ‘**method for network measurement** and planning’ where ‘probative testing’ is used to ‘deriv[e] . . . **latency**.’” Pet. 14 (quoting Ex. 1005, claims 16, 40) (citing Ex. 1005, 3:66–4:3, 8:43–52; Ex. 1003 ¶¶ 45–47). Petitioner cites Klassen’s teachings regarding “probative test packets” (cited as the claimed “latency measurement packets”) that include “type of service” and “class of service” bits in the packet headers. Pet. 15 (citing Ex. 1005, 2:53–60, 7:49–55, 11:50–51, 16:17–33; Ex. 1003 ¶¶ 50–53). Petitioner contends Klassen’s probative test packets include one-way packets and two-way packets that are generated and transmitted by an “apparent network speed analysis (ANSA) application” (cited as the claimed “source node in the network”) to measure latency at different priority levels. Pet. 16–20 (citing Ex. 1005, 1:52–55, 1:59–63, 4:7–12, 7:56–60, 8:24–32, 8:53–59, 9:32–46, 16:17–33; Ex. 1003 ¶¶ 56–57). Petitioner states Klassen’s “target station” (cited as the claimed “destination node in the network”) receives the probative test packets, and, according to Petitioner, it would have been obvious for the target stations to follow the Internet Control Message Protocol (ICMP) standard such that the target station notes a time of receipt of the probative test packets. Pet. 20–21. According to Petitioner, “[d]epending on the type of latency measurement being performed, target station 24 would either return a receipt

timestamp to the ANSA or would return the packet with the timestamp to the ANSA.” Pet. 21 (citing Ex. 1005, 1:58–63; Ex. 1003 ¶¶ 82–83). Further, Petitioner cites Dr. Houh’s testimony and additional supporting references for the proposition that a person of ordinary skill would have understood that subtracting packet send time stamps from packet receipt time stamps “was the most common way to calculate latency from packet timestamps.” Pet. 23–24 (citing Ex. 1003 ¶¶ 86–89, 91; Ex. 1005, 7:56–60, 8:43–52; Ex. 1017; Ex. 1026; Ex. 1033; Ex. 1035; Ex. 1036; Ex. 1044; Ex. 1045; Ex. 1048)

Patent Owner argues that Klassen “does not employ the latency measurement packets disclosed in the ’485 [p]atent” and that “the latency measurement packet and specific techniques recited in the ’485 [p]atent are not disclosed in Klassen.” Prelim. Resp. 2. Further, Patent Owner contends Petitioner uses hindsight to assert obviousness. Prelim. Resp. 2–3.

At this stage, Patent Owner’s arguments do not sufficiently rebut any of Petitioner’s showings nor cite any specific deficiency in Petitioner’s evidence and arguments. *See Johnston v. IVAC Corp.*, 885 F.2d 1574, 1581 (Fed. Cir. 1989) (“Attorney[] argument is no substitute for evidence.”). It is unclear on the current record what “latency measurement packet and specific techniques” in the ’485 patent (Prelim. Resp. 2) might be reflected in claim 6 (or other claims), and the parties are encouraged to clarify any issues relating to claim scope during the trial portion of this proceeding. On the current record, we determine Petitioner has adequately shown that Klassen teaches or reasonably suggests each limitation of claim 6, such that Petitioner has shown that it is reasonably likely to prevail in showing that claim 6 is unpatentable in view of Klassen.

Because Petitioner has shown a reasonable likelihood of prevailing with respect to claim 6, we institute on all claims and all grounds raised in the Petition. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359–60 (2018); *AC Techs. S.A. v. Amazon.com, Inc.*, 912 F.3d 1358, 1364 (Fed. Cir. 2019) (“[I]f the Board institutes an IPR, it must . . . address all grounds of unpatentability raised by the petitioner.”).

III. CONCLUSION

For the reasons set forth above, we determine that Petitioner has demonstrated a reasonable likelihood that it will prevail with respect to at least one of claims 1–20 of the ’485 patent. Accordingly, we institute an *inter partes* review.

IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that, pursuant to 35 U.S.C. § 314(a), *inter partes* review is instituted as to claims 1–20 of the ’485 patent on each of the grounds set forth in the Petition; and

FURTHER ORDERED that, pursuant to 35 U.S.C. § 314(c) and 37 C.F.R. § 42.4(b), *inter partes* review of the ’485 patent shall commence on the entry date of this Decision, and notice is hereby given of the institution of a trial.

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