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Paper 18
Date: June 8, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CLOVER NETWORK, LLC,
Petitioner,

v.

CLOUDOFCHANGE, LLC,
Patent Owner.

IPR2023-00232
Patent 9,400,640 B2

Before HUBERT C. LORIN, JEREMY M. PLENZLER, and CARL M. DEFRANCO, *Administrative Patent Judges.*

PLENZLER, *Administrative Patent Judge*.

DECISION
Granting Institution of *Inter Partes* Review
35 U.S.C. § 314
Granting Motion for Joinder 35 U.S.C. § 315(c)
37 C.F.R. § 42.122

I. INTRODUCTION

A. Background and Summary

Clover Network, LLC ("Petitioner") filed a Petition requesting *inter partes* review of claims 1–28 of U.S. Patent No. 9,400,640 B2 (Ex. 1001,

"the '640 patent"). Paper 4 ("Pet."). CloudofChange, LLC ("Patent Owner") file a Preliminary Response. Paper 13 ("Prelim. Resp.").

Concurrently with the Petition, Petitioner filed a Motion for Joinder in which it sought to join IPR2022-00779 (the "779 IPR") as a party. Paper 1 ("Mot." or "Motion"). Patent Owner opposed the Motion. Paper 8 ("Opp." or "Opposition"). Petitioner filed a reply in support of the Motion. Paper 9.

Under 35 U.S.C. § 314(a), 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." For the reasons stated below, we determine that Petitioner has established a reasonable likelihood that it would prevail with respect to at least one of the challenged claims. We hereby institute an *inter partes* review in this proceeding.

Additionally, for the reasons set forth below, we exercise our discretion to join Petitioner (Clover Network LLC) as a party to the 779 IPR. 35 U.S.C. § 315(c).

B. Related Matters

In addition to the 779 IPR, the parties indicate that the '640 patent is involved in *CloudofChange, LLC v. Lightspeed POS Inc.*, 6:21-cv-01102 (W.D. Tex. Oct. 22, 2021) ("the Lightspeed Litigation"). Pet. 1; Paper 5, 2. The parties also indicate that the '640 patent was previously involved in a lawsuit *CloudofChange, LLC v. NCR Corporation*, 6-19-cv-00513 (W.D. Tex. Aug. 30, 2019) ("the NCR Litigation"), which resulted in a jury verdict for Patent Owner, but is still pending final judgment. Pet. 1; Paper 5, 2.

C. The '640 Patent

The '640 patent relates to "a system and a method for online, web-based point of sale (POS) building and configuration." Ex. 1001, Abstract.

According to the '640 patent, "[c]urrent practice in the field of assembling point of sale systems includes manually coding front-of-screen information," which "contains menu selections, page selections, and general answers to business questions." *Id.* at 1:20–24.

The '640 patent explains that "in the prior art, a specialized programmer had to design the layout and data for these POS touch keys," but "[w]ith this invention, the store operator will be able to build his POS screens online over the Internet." Ex. 1001, 2:54–56, 61–63.

The '640 patent explains that its "POS builder system can be provided as a service or deployed within a corporation," and notes that "[f]or example, Software as a Service (SAAS) is a software distribution model in which applications are hosted by a vendor or service provider and made available to customers over a network, typically the Internet." Ex. 1001, 5:58–63.

D. Illustrative Claim

> 1. A web-based point of sale (POS) builder system comprising:
>
> one or more point of sale terminals, that display POS screens,
>
> an internet connection from said one or more point of sale terminals to a web server,
>
> one or more local or remote PC workstations, and
>
> point of sale builder software that runs on said web server, wherein said local or remote workstations are utilized to build or edit said POS terminals in real time, from anywhere in the world and over the worldwide web
>
> wherein said web servers are provided as a vendor subscription service wherein web server software resides and is hosted on said vendor's remote servers and wherein subscriber company's POS terminals access and repeatedly interact with

> said web server software from said vendor's remote servers, in order to perform the subscriber's desired terminal function, over a network, wherein the network comprises the Internet.

Ex. 1001, 6:11–28.

E. Evidence and Asserted Grounds

Petitioner asserts that claims 1–28 would have been unpatentable on the following grounds:

Claim(s) Challenged	35 U.S.C. §	Reference(s)/Basis
1–28	103	Manno[1]
1–28	103	Woycik[2]
1–28	103	Woycik, Manno
1–28	103	Olson[3], Woycik

The grounds listed above are virtually identical to those at issue in the 779 IPR. Petitioner submits a declaration from Todd Mowry (Ex. 1002). Patent Owner submits a declaration from Alex Chang. (Ex. 2006).

II. ANALYSIS

A. Legal Standards

Petitioner bears the burden of persuasion to prove unpatentability, by a preponderance of the evidence, of the claims challenged in the Petition. 35 U.S.C. § 316(e). This burden never shifts to Patent Owner. *Dynamic Drinkware, LLC v. Nat'l Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015). The Board may authorize an *inter partes* review if we determine that the information presented in the Petition and Patent

[1] US Patent Pub. No. US 2004/0181454 A1, published Sept. 16, 2004 (Ex. 1004).
[2] US Patent Pub. No. US 2007/0265935 A1, published Nov. 15, 2007 (Ex. 1005).
[3] US Patent Pub. No. US 2008/0208696 A1, published Aug. 28, 2008 (Ex. 1006).

Owner's Preliminary Response shows that there is a reasonable likelihood that Petitioner will prevail with respect to at least one of the claims challenged in the Petition. 35 U.S.C. § 314(a). "When instituting *inter partes* review, the Board will authorize the review to proceed on all of the challenged claims and on all grounds of unpatentability asserted for each claim."[4] 37 C.F.R. § 42.108(a) (2021).

B. Level of Ordinary Skill in the Art

Petitioner contends that "[a] 'person of ordinary skill in the art' (POSITA) at the time of the effective filing date of the '640 patent would have been someone with a working knowledge of designing and developing web-based software and systems" and "would have a Bachelor of Science in computer science or a related field, and approximately two years of professional experience or equivalent study in the design and development of web-based software and systems, including web-based POS systems." Pet. 8. Petitioner contends that "[a]dditional graduate education could substitute for professional experience, or significant experience in the field could substitute for formal education." *Id.*

Patent Owner responds: "Petitioner's proposed definition of a POSITA does not require any experience with retail POS systems—let alone **building POS screens**—that are the field of the '640 Patent." Prelim. Resp. 10. According to Patent Owner, "Petitioner's proposed definition of a POSITA makes experience in retail POS systems optional." *Id.* at 11. Patent Owner contends that its "proposed definition of a POSITA remedies this deficiency by including experience or equivalent study in the field of the

[4] Our discussion below focuses on claim 1.

'640 Patent, retail point of sale ("POS") systems, including experience with building POS screens." *Id.*

We fail to see how the alleged differences in the level of ordinary skill in the art advanced by Patent Owner affects our decision to institute in this proceeding. Accordingly, for purposes of this decision, we apply the level of skill set forth by Patent Owner.

C. Claim Construction

In an *inter partes* review, we construe a patent claim "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) (2021). Under this standard, the words of a claim generally are 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 v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed. Cir. 2005) (en banc).

Petitioner offers no particular construction for any claim term. Pet. 9. Patent Owner reproduces the claim constructions from the NCR Litigation. Prelim. Resp. 11–13. The majority of the claim constructions from the NCR Litigation are simply the "plain and ordinary meaning." Neither party articulates any of the asserted plain and ordinary meanings.

We do not need to construe any terms expressly to reach our decision. *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))).

D. Discretion on Whether to Institute Trial

1. 35 U.S.C. § 314(a)

Patent Owner asks that we deny institution under 35 U.S.C. § 314(a) in view of the Lightspeed Litigation. Prelim. Resp. 13–26.

The recent guidance from the Director of the United States Patent and Trademark Office regarding discretionary denials[5] requires that "the PTAB will not discretionarily deny institution in view of parallel district court litigation where a petitioner presents a stipulation not to pursue in a parallel proceeding the same grounds or any grounds that could have reasonably been raised before the PTAB." Guidance Memo 3.

In this proceeding, Petitioner stipulates that "if this IPR is instituted and *Fintiv*[6] remains precedential at the time of institution, [Petitioner] stipulates not to pursue in the district court any ground raised or that could have reasonably been raised in IPR (i.e., under §§ 102 or 103 based on prior art patents or printed publications alone)." Paper 14, 2.

Moreover, any timing issues or inefficiencies are moot in view of our decision on Petitioner's Joinder Motion.

Accordingly, we decline Patent Owner's invitation for us to apply our discretion under 35 U.S.C. § 314(a) to deny the petition.

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[5] USPTO, Memorandum on Interim Procedure for Discretionary Denials in AIA Post-grant Proceedings with Parallel District Court Litigation (June 21, 2022), available at uspto.gov/sites/default/files/documents/interim_proc_discretionary_denials_aia_parallel_district_court_litigation_memo_20220621_.pdf ("Guidance Memo").

[6] *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (PTAB Mar. 20, 2020) (designated precedential May 5, 2020).

E. Secondary Considerations

Similar to the 779 IPR, Patent Owner alleges that the "Petition is . . . deficient for failing to address known evidence of secondary considerations . . . even if the evidence is non-dispositive." Prelim. Resp. 71. Based on the specific circumstances of this case, we decline Patent Owner's invitation to impose a requirement on Petitioner to predict and address, proactively in this proceeding, the particular evidence of secondary considerations that Patent Owner may or may not assert based on past proceedings, or that Patent Owner currently asserts in the 779 IPR.

We appreciate that consideration of evidence of non-obviousness is part of the obviousness analysis. Because, as explained below, we grant Petitioner's Motion, any evidence of secondary considerations will be addressed in the 779 IPR. Based on the record before us, consideration of that evidence in this decision is premature.

F. Asserted Grounds

Based on the specific circumstances of this case, we determine it appropriate to address only one of the asserted grounds presented by Petitioner and only one of the claims challenged in that ground. Because Petitioner has established a reasonable likelihood of success on at least that claim, we are able to consider the Joinder Motion, which we grant as explained below. And ultimately, it is simply the party (Petitioner) that is joined to the 779 IPR. We see no need to provide any further guidance on the particular Petition in this proceeding. Further, the 779 IPR is at an advanced stage, where virtually all Papers have been submitted, other than Patent Owner's Sur-Reply, which is due shortly after this institution decision.

We address claim 1 with respect to the Woycik ground below. Petitioner asserts that claims 1–28 are unpatentable under 35 U.S.C. § 103 as obvious over Woycik in view of the knowledge of a person of ordinary skill in the art. Pet. 38–65.

1. Woycik

Woycik "relates generally to computer-based systems used for ordering goods and services and, more particularly, to self-service terminals and software tools for administering self-service terminals." Ex. 1005 ¶ 4. Woycik explains that "Point of Sale (POS) systems provide a means by which ordering and purchasing transactions can be carried out electronically at the store or other venue where the goods or services are supplied." *Id.* ¶ 6. According to Woycik, "[s]elf-service POS systems typically have a central computer acting as a server and one or more terminals which are the individual client units that are used by customers to input their orders." *Id.* ¶ 7.

Woycik describes an "administration tool application [that] includes a menu editor that enables the administrator to create and edit the interactive menu screens provided by the self-order application at the self-service client terminals." Ex. 1005 ¶ 16. "The menu editor enables the administrator to, during creation/editing of an interactive menu screen, select a template for the interactive menu screen and associate functions with the buttons included on the selected template." *Id.* ¶ 19.

Woycik explains that "there are many possible arrangements and the administrative tool application may be located at a variety of locations, including . . . an offsite location provided that the administrative tool application is able to communicate with the server." Ex. 1005 ¶ 17. One "approach is to have the administrative tool loaded on the central server 22

and then provide the chain operator 20 with web access to the central server 22." *Id.* ¶ 75.

With Woycik's administration tool, "the store owner or chain operator can carry out administration of the system using a simplified user interface that requires little if any training or experience with computers." Ex. 1005, ¶ 80. "Furthermore, the web services platform provided by .NET can be used to provide remote administration by the chain operator from any Internet-connected computer (such as a home office computer) so that various store locations can be configured from a single computer." *Id.* According to Woycik, "[t]he programming needed to implement this software architecture strategy is known to those skilled in the art." *Id.*

2. Petitioner's Challenge Based on Woycik

Initially, we note that there does not appear to be any dispute that Woycik's administration tool would be understood as point of sale builder software by one skilled in the art. Prelim. Resp. 39–53.[7] Indeed, based on the record before us, we do not see any less disclosure in Woycik regarding its administration tool than that disclosed in the '640 patent for its point of sale builder software.

Patent Owner presents a number of contentions that do not appear tied to any particular claim requirement. For example, Patent Owner presents contentions regarding the use of a local server *in addition to* the web server in Woycik, without clearly explaining how those contentions relate to any

[7] In passing, Patent Owner alleges, without explanation, that "*Woycik* does not mention or refer to '**POS builder software**' '**builder software**' or a '**builder**,' let alone such builder running on a **web server**." Prelim. Resp. 50 (citing (Ex. 1005, *passim*; Ex. 2006 ¶ 88)). Paragraph 88 of Mr. Chen's testimony (Ex. 2006) referenced by Patent Owner is a discussion of Manno's teachings.

particular claim requirement. *See, e.g.*, *id.* at 49 (alleging that Woycik's "local server as the middleman for all communications"). The actual dispute with respect to Woycik's teachings as related to claim 1, appears to be based on whether Woycik teaches its administration tool running on a web server (Prelim. Resp. 43–51) and whether providing access to that web server hosting the administration tool as a vendor subscription service would have been obvious (*id.* at 52–53). We have reviewed Petitioner's contentions regarding the other limitations recited in claim 1, which Patent Owner does not dispute at this time, and determine that Petitioner has established sufficiently that Woycik teaches those limitations. Our discussion below is directed to the disputed limitations.

Petitioner contends that Woycik teaches point of sale builder software (the administration tool) running on a web server (central server 22/84). Pet. 46–47 (citing, e.g., Ex. 1005 ¶ 75). Paragraph 75 of Woycik provides a number of different approaches. As explained above, Woycik expressly states that one "approach is to have the administrative tool loaded on the central server 22 and then provide the chain operator 20 with web access to the central server 22." Ex. 1005 ¶ 75.

Patent Owner contends, for example, that, "[i]n each different version of [Woycik's] administrative tool, the tool is used to update the configuration information at the in-store server 16." Prelim. Resp. 43 (citing Ex. 1005 ¶ 75; Ex. 2006 ¶ 64). The testimony of Mr. Chen repeats Patent Owner's contentions.

There does not appear to be any dispute that Woycik's central server 22 is a web server. And, as noted above, Woycik expressly states that "the administrative tool [can be] loaded on the central server 22." Ex. 1005 ¶ 75. That is, Woycik teaches its point of sale builder software (the administration

tool) can be loaded on a web server (central server 22), consistent with Petitioner's contentions noted above. It is unclear, based on the record before us, what in claim 1 Patent Owner believes to be missing from Woycik. Moreover, we note that Patent Owner does not appear to allege any particular deficiency in our institution decision from IPR2022-00779, which was based on essentially the same arguments and evidence as before us now.

As for the subscription aspect of the claims, Petitioner reasons that one skilled in the art "would have been motivated to provide central server as a subscription service for franchisees" because "[a] shared central server would minimize costs and IT complexity for individual franchisees by sharing a central server maintained by the franchiser and provide 'POS consistency across franchisees.'" Pet. 47 (citing Ex. 1002 ¶ 132) (internal quotations omitted). Petitioner further explains, for example, that "[i]mplementing central server and its software as a subscription service would enable a franchiser to monetize central server 22/84 and software, distribute server costs among subscribing franchisees, and reduce startup costs for franchisees." *Id.* at 48 (citing Ex. 1002 ¶ 133) (internal quotations omitted).

Patent Owner responds that "Woycik does not disclose and is silent with respect to 'vendor' or 'subscription.'" Prelim. Resp. 52. Patent Owner's contention does not address the basis for the challenge in the Petition. Patent Owner additionally contends that "this argument has been raised by the Examiner, who then allowed the claims." *Id.* at 29 (citing Ex. 1003-32). Exhibit 1003 is the prosecution history for the '640 patent. The page cited by Patent Owner from Exhibit 1003 is simply a "Notice of References Cited."

Moreover, we see no additional structure required by claim 1's recitation that the "web servers are provided as a vendor subscription service." And the '640 patent, itself, provides no information for this limitation beyond a generic indication that "the POS builder system can be provided as a service or deployed within a corporation," along with a statement that "Software as a Service (SAAS) is a software distribution model in which applications are hosted by a vendor or service provider and made available to customers over a network, typically the Internet." Ex. 1001, 5:58–63.

We additionally note that Patent Owner presents contentions regarding the consideration of Woycik by a jury in the NCR Litigation similar to those we found unpersuasive in the 779 IPR. *See* Prelim. Resp. 39–40; IPR2022-00779, Paper 10 at 16–17.

Based on the record before us, Petitioner has established a reasonable likelihood of success on at least its challenge to claim 1 based on Woycik.

III. JOINDER

The Petition in this proceeding was filed on November 21, 2022. The 779 IPR had an institution date of October 20, 2022. Petitioner filed its Motion on November 21, 2022, which is within one month of the 779 IPR's institution date.[8]

The statutory provision governing joinder in *inter partes* review proceedings is 35 U.S.C. § 315(c), which reads:

> If the Director institutes an inter partes review, the Director, in his or her discretion, may join as a party to that inter partes review any person who properly files a petition under section 311 that the Director, after receiving a preliminary response under section 313 or the expiration of the time for filing such a

[8] November 20, 2022 fell on a Sunday.

> response, determines warrants the institution of an inter partes review under section 314.

Section 315(c) "authorizes joinder of a person as a party, not 'joinder' of two proceedings" and "does not authorize the joined party to bring new issues from its new proceeding into the existing proceeding." *Facebook, Inc. v. Windy City Innovations, LLC*, 973 F.3d 1321, 1335 (Fed. Cir. 2020).

Here, Petitioner's Motion requests no more than the statute allows. Petitioner represents that the current Petition and that from the 779 IPR are identical in all substantive respects, including "identical grounds, prior art, and analysis." Mot. 3. And although Petitioner used a different declarant than the one used in the 779 IPR, there is no briefing remaining for the petitioner in the 779 IPR, as Petitioner's Reply in that proceeding was entered on May 10, 2023. *See* IPR2022-00779, Paper 20. Moreover, Petitioner agrees to use the declarant from the 779 IPR if joinder is granted. *See* Paper 14, 2; Ex. 1033, 11:8–15:24; Ex. 1034, 16:13–17:7.

Given the advanced stage of the 779 IPR proceeding, if Petitioner is joined as a party to the 779 IPR, Petitioner's only possible remaining role would be to present oral argument or potentially request rehearing or appeal our final written decision in the 779 IPR if the initial petitioner in that proceeding drops out.

Patent Owner opposes the Motion, contending that joinder would increase complexity and costs, as well as delay the schedule of the 779 IPR. Paper 8, 6–13. But those concerns are unfounded, particularly in view of the advanced stage of the 779 IPR. Indeed, Patent Owner acknowledges that, at this stage of the proceeding, there is nothing left for Petitioner to deal with as far as briefing or declarant testimony in the 779 IPR. *See*, *e.g.*, Ex. 1033, 18:2–20.

We see no increase in complexity and costs, or any schedule delay in the 779 IPR as asserted by Patent Owner. Accordingly, we grant Petitioner's Motion, and add it as a party to the 779 IPR.

IV. CONCLUSION

For the above reasons, we institute *inter partes* review and grant Petitioner's Motion for joinder.

V. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that, pursuant to 35 U.S.C. § 314(a), an *inter partes* review of claims 1–28 in the '640 patent is instituted on all challenges included in the Petition;

FURTHER ORDERED that, according to 35 U.S.C. § 314(c) and 37 C.F.R. § 42.4, notice is hereby given of the institution of a trial that commences on the entry date of this Decision;

FURTHER ORDERED that the Motion for Joinder is *granted*, and Clover Network, LLC is hereby joined as a petitioner in IPR2022-00779;

FURTHER ORDERED that the grounds on which trial was instituted in IPR2022-00779 are unchanged, and no other grounds are added;

FURTHER ORDERED that Clover Network, LLC's role in IPR2022-00779 shall be limited to understudy, unless and until Lightspeed Commerce, Inc. is terminated from that proceeding;

FURTHER ORDERED that the Scheduling Order in place for IPR2022-00779 (Papers 11 and 19) shall continue to govern the proceeding after the joinder of Clover Network, LLC as a petitioner;

FURTHER ORDERED that all future filings are to be made only in IPR2022-00779;

FURTHER ORDERED that the case caption in IPR2022-00779 shall be changed to reflect the joinder of Clover Network, LLC in accordance with the example below; and

FURTHER ORDERED that a copy of this Decision shall be entered into the record of IPR2022-00779.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LIGHTSPEED COMMERCE, INC., AND

CLOVER NETWORK, LLC,
Petitioner,

v.

CLOUDOFCHANGE, LLC,
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IPR2022-00779
Patent 9,400,640 B2

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