

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC,
Petitioner,

v.

WILDSEED MOBILE, LLC,
Patent Owner.

IPR2023-00246
Patent 9,141,960 B2

Before KARL D. EASTHOM, TERRENCE W. McMILLIN, and
MICHAEL T. CYGAN, *Administrative Patent Judges*.

CYGAN, *Administrative Patent Judge*.

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

I. INTRODUCTION

A. *Background and Summary*

Google LLC (“Petitioner”) filed a Petition (Paper 2, “Pet.”) requesting institution of *inter partes* review of claims 1–25 of U.S. Patent No. 9,141,960 (Ex. 1001, the “’960 patent”). Wildseed Mobile LLC (“Patent Owner”) filed a Preliminary Response (“Prelim. Resp.”). Paper 6. We authorized additional briefing on certain matters. Exs. 3001, 3002. Petitioner filed a Reply (Paper 7, “Pet. Reply”) and Patent Owner filed a Sur-reply (Paper 8, “PO Sur-reply”).

Pursuant to 35 U.S.C. § 314(a), an *inter partes* review may be instituted only if “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.”

For the reasons given below, on this record Petitioner has established a reasonable likelihood that it would prevail in showing the unpatentability of at least claim 1 of the ’960 patent. Accordingly, we institute an *inter partes* review as to claims 1–25 of the ’960 patent and all of the asserted grounds of unpatentability.

B. *Real Parties in Interest*

Petitioner identifies Google LLC and YouTube, LLC as the real parties in interest. Pet. 79. Petitioner identifies Google LLC as a subsidiary of XXVI Holdings, Inc., which is a subsidiary of Alphabet Inc., but states that XXVI Holdings Inc. and Alphabet Inc. are not real parties in interest to this proceeding. *Id.* n.2. Patent Owner identifies Wildseed Mobile LLC as the real party in interest. Paper 5, 1.

C. Related Matters

The parties represent that the '960 patent is involved in *Wildseed Mobile LLC v. Google LLC et al.*, 3-22-cv-04928, (N.D. CA, filed August 29, 2022). Pet. 79; Paper 5, 1. Petitioner further represents that the '960 patent is involved in *Wildseed Mobile LLC v. Google LLC et al.*, 6-22-cv-00357 (W.D. TX, filed April 4, 2022); however, Patent Owner states that this is the original filing of the first-listed case. Pet. 79; Paper 5, 1. Petitioner further represents that the '960 patent is involved in *Wildseed Mobile LLC v. Google LLC et al.*, 6-21-cv-01245 (W.D. TX, filed Oct. 8, 2021); however, Patent Owner states that this case has been voluntarily dismissed. Pet. 79; Paper 5, 1.

Patent Owner represents that Petitioner has filed, at the same time that this Petition was filed, petitions for *inter partes* review against related family members U.S. Patent No. 10,251,021 (IPR2023-00244), U.S. Patent No. 10,959,040 (IPR2023-00245), U.S. Patent No. 10,869,169 (IPR2023-00247), and U.S. Patent No. 7,376,414 (IPR2023-00248). Paper 5, 1.

D. The '960 Patent

The '960 patent is titled "Venue and Event Recommendations for a User of a Portable Media Player Device." Ex. 1001, code (54). The '960 patent issued from Application Serial No. 12/144,532, filed on June 23, 2008, and claims priority to Provisional Application No. 60/945,677, filed on June 22, 2007. *Id.* at codes (21), (22), (60). Figure 1, reproduced below, illustrates an environment implementing the disclosed invention:

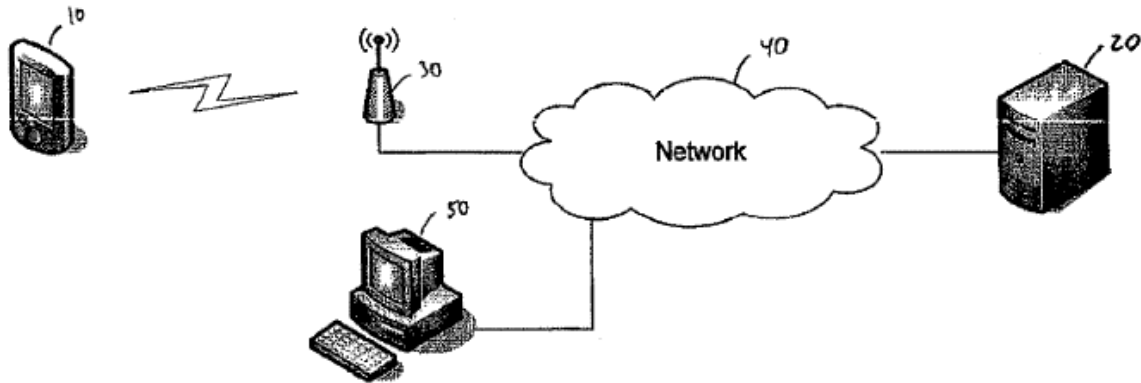


Figure 1 illustrates portable media player device 10 for storing media files associated with a user, wireless access point 30, network 40, computer 50 associated with media player device 10, and server 20 that “may infer a current location of the user[’s] . . . portable media player device 10,” and also “may transmit one or more recommendations for a venue or event, or information of interest to the user, e.g. to portable media player device 10.” Ex. 1001, 3:58–4:19.

The server “may determine one or more media preferences or interest for the user based in part upon the media and/or information about the media stored on or accessed using the portable media player device.” Ex. 1001, 5:19–22. Then,

the server may transmit a recommendation (or information) to a user, e.g. his portable music player device having jazz music stored on or accessed using the portable music player device for a club that plays live jazz or blues within a convenient walking or driving distance to the current location of the user and the portable media player device.

Id. at 6:5–10.

E. Illustrative Claim

Claim 1 is illustrative, and recites as follows:¹

[1.0] A method comprising:

[1.1] retrieving, by a server, a plurality of media stored on or accessed using a portable media player device, or information about said plurality of media;

[1.2] inferring, by the server, based at least in part on the retrieved plurality of media or the retrieved information about said plurality of media, one or more entertainment preferences of a user of the portable media player device;

[1.3] accessing, by the server, one or more sources of information about venues or events proximal to a current location of the user;

[1.4] identifying, by the server, at least one of said venues or events as being of interest to the user based at least in part on the one or more entertainment preferences inferred by the server and the current location of the user;

[1.5] generating, by the server, a recommendation indicating the identified venue or event as a venue or event of interest to the user; and

[1.6] communicating, by the server, the recommendation to the user.

Ex. 1001, 8:5–25.

F. Evidence

Petitioner relies on the following evidence.

Name	Patent Document	Exhibit No.
Sasaki	U.S. Pat. Appl. Pub. No. 2006/0250994 A1	1004
Ellis	U.S. Pat. Appl. Pub. No. 2005/0020223 A1	1005
Jacobi	U.S. Pat. Appl. Pub. No. 2006/0195362 A1	1006
Teicher	U.S. Pat. Appl. Pub. No. 2006/0143214 A1	1007
Havinis	U.S. Pat. No. 6,169,899 B1	1008

Petitioner relies upon a declaration by Dr. Henry Houh. Ex. 1003.

¹ Petitioner's bracketing indicia have been added.

G. Prior Art and Asserted Grounds

Petitioner asserts that claims 1–25 would have been unpatentable on the following grounds:

Claim(s) Challenged	35 U.S.C. §	Reference(s)/Basis
1, 5–6, 8–11, 15–16, 20–21, 25	103(a) ²	Sasaki, Ellis, Jacobi
2–4, 12–14, 17–19, 22–23	103(a)	Sasaki, Ellis, Jacobi, Teicher
7, 24	103(a)	Sasaki, Ellis, Jacobi, Havinis

II. ANALYSIS

A. Legal Standards

A patent claim is unpatentable under 35 U.S.C. § 103(a) 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].” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including: (1) the scope and content of the prior art; (2) any differences between the claimed subject matter and the prior art; (3) the level of ordinary skill in the art; and (4) objective evidence of non-obviousness.³ *See Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966).

² Petitioner asserts, and we agree for purposes of institution, that the pre-AIA patentability statutory provisions apply to the ’960 patent. *See* Pet. 20.

³ Neither party presents evidence or arguments regarding objective evidence of non-obviousness at this stage.

B. Level of Ordinary Skill in the Art

Petitioner asserts that a person of ordinary skill in the art on or before June 22, 2007

would have been knowledgeable and familiar with the field of portable devices and venue or event recommendations That person would have a bachelor’s degree in electrical engineering, or equivalent training, and approximately two years of experience working in the field Lack of work experience can be remedied by additional education, and vice versa.

Pet. 12–13 (citing Ex. 1003 ¶¶ 19–21).

Patent Owner does not dispute Petitioner’s assessment of the level of ordinary skill. Prelim. Resp. 11–12. Determining the level of ordinary skill in the art involves various factors, including the “type of problems encountered in the art; prior art solutions to those problems; rapidity with which innovations are made; sophistication of the technology; and educational level of active workers in the field.” *In re GPAC Inc.*, 57 F.3d 1573, 1579 (Fed. Cir. 1995) (citation omitted). The prior art of record also reflects the level of ordinary skill in the art. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001). For purposes of this Institution Decision, we adopt the assessment offered by Petitioner, as it is consistent with the ’960 patent and the asserted prior art.

C. Weight of Dr. Houh’s Testimony

Patent Owner argues that Dr. Houh fails to show that “[he] has any experience related to portable devices or to venue or event recommendations, as required under Petitioner’s definition of a” person of ordinary skill in the art. Prelim. Resp. 13. Patent Owner also argues that “[k]ey portions of Dr. Houh’s declaration repeat—often *verbatim*—the

arguments presented in the Petition.” *Id.* at 15. Accordingly, Patent Owner asserts that Dr. Houh’s testimony is “entitled to little or no weight.” *Id.*

Regarding the first argument, Patent Owner explains that “[a]lthough Dr. Houh’s educational background includes degrees in electrical engineering and computer science, there is no indication that he obtained specific experience with portable devices and with venue or event recommendations during his education.” Prelim. Resp. 13 (citing Ex. 1003 ¶ 8; Ex. 1019, 1). Contrary to this explanation, as Patent Owner recognizes, Dr. Houh describes his doctoral research as “including design of network components, device drivers, setting up a web server, maintaining networking devices, and study of Ethernet specifications.” *Id.* He also “helped to maintain, install, and upgrade the networking devices used within the [Telemedia Network Systems] group [at the Laboratory for Computer Science at MIT], along with other graduate students.” Ex. 1003 ¶ 7. Dr. Houh also studied the prior art of record in forming his opinions. Ex. 1003 ¶¶ 4–5. Dr. Houh’s experience also includes “starting a company that provided website design services and targeted advertising opportunities,” as Patent Owner also recognizes. Prelim. Resp. 13. This experience involved “building college recruiting web sites and [selling] advertisements to companies wishing to target students to recruit at specific colleges,” and also, “develop[ing] technology that utilized the web user’s college affiliation to customize advertisements targeted to students at that college.” Ex. 1003 ¶ 14.

As Dr. Houh testifies, “[l]ack of work experience can be remedied by additional education, and vice versa.” Ex. 1003 ¶ 20. As indicated above (§ II.A), Patent Owner does not dispute this. And although Patent Owner characterizes Dr. Houh’s educational background as merely “includ[ing]

degrees in electrical engineering and computer science,” this characterization understates his “degrees.” In particular, Dr. Houh testifies that he “received a Ph.D. in Electrical Engineering and Computer Science from the Massachusetts Institute of Technology (‘MIT’) in 1998,” “a Master of Science degree in Electrical Engineering and Computer Science in 1991, a Bachelor of Science degree in Electrical Engineering and Computer Science in 1989, and a Bachelor of Science degree in Physics in 1990, all from MIT.” Ex. 1003 ¶ 8.

The field of network components, device drivers, web servers, and network devices, upgrading network devices, as supplemented by Dr. Houh’s other experiences, education, and study of the prior art, is sufficient on this preliminary record to at least include the requisite skill in the area of portable devices. In addition, Dr. Houh’s background in targeted advertising and website design implicitly embraces reaching students with portable or other computer devices who accessed the website. Patent Owner fails to explain how computer recommendation systems differ materially from computer advertisement systems. *See, e.g.*, Ex. 1004 ¶¶ 5–7 (describing prior art Internet based recommendation systems to foster selling and purchasing of goods). On this preliminary record, Dr. Houh’s experience, education, and study of the prior art, is sufficient to satisfy the requisite level of ordinary skill in the area of portable devices and venue or event recommendations.

With respect to Patent Owner’s second argument about Dr. Houh’s copying of statements in the Petition, Patent Owner directs attention to Petition pages 24–29 and the Houh Declaration at paragraphs 59–69. Prelim. Resp. 15. These cited paragraphs involve reasons to combine Sasaki with Ellis, and Sasaki and Ellis with Jacobi. Ex. 1003 ¶¶ 58–68.

Throughout the paragraphs, Dr. Houh provides support for the testimony by citing to Sasaki, Ellis, and Jacobi. *Id.* Therefore, even if some copying occurred, it is not clear, at this stage, how this undermines Dr. Houh’s testimony.

Based on the foregoing discussion, on this preliminary record, Patent Owner fails to provide a sufficient reason to discount the weight of Dr. Houh’s testimony.

D. 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) (2019). 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).

Here, Petitioner contends that “the terms of the Challenged Claims should be given their plain and ordinary meaning, and no terms require specific construction.” Pet. 13. Patent Owner “agrees with Petitioner that the terms of the challenged claims should be given their plain and ordinary meaning.” Prelim. Resp. 8. Patent Owner also asserts that the plain meaning of “plurality of media” is “*more than one media.*” *Id.* at 9. Patent Owner further asserts that the scope of “inferred” in the claims should be read in light of prior statements by Patent Owner on that term during prosecution. *Id.* We address Patent Owner’s claim construction discussion in addressing Petitioner’s challenge to claim 1. *See infra* § II.D.4.

At this stage, no need exists to construe any claim terms expressly to resolve the parties' disputes. *See Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1017 (Fed. Cir. 2017) (“[W]e need only construe 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))).

E. Obviousness over Sasaki, Ellis, and Jacobi

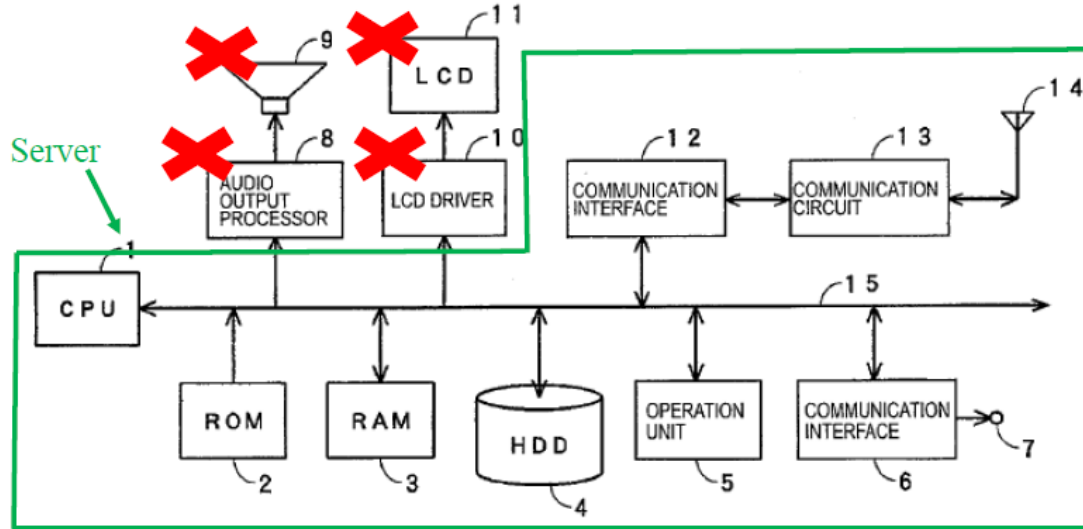
Petitioner asserts that claims 1, 5–6, 8–11, 15–16, 20–21, 24, and 25 are unpatentable under § 103(a) as obvious over Sasaki, Ellis and Jacobi. Patent Owner provides arguments and evidence against these assertions.

Upon consideration of Petitioner’s explanations and the totality of evidence in this current record, we are persuaded that Petitioner has demonstrated a reasonable likelihood of prevailing in showing that claim 1 is unpatentable under § 103(a) as obvious over the combination of Sasaki, Ellis and Jacobi.

1. Sasaki (Ex. 1004)

In a first embodiment, Sasaki relates to “[a] content recommendation system includ[ing] first and second communication devices which are connected to each other and in which content recommendation information is transmitted and received between both devices.” Ex. 1004, code (57). In a second embodiment, “content recommendation information is transmitted and received between a server at a service spot and a terminal device.” *Id.* ¶ 112. In both embodiments, terminal devices connect to a server. *Id.* ¶¶ 41, 47, 112. In general, “*the content recommendation system according to the [first] embodiment is applicable to a server (first communication device) and a communication device (second communication device).*” *Id.* ¶ 17 (emphases added).

Sasaki's Figure 1, as annotated by Petitioner, follows:



As annotated by Petitioner, Figure 1 above illustrates Sasaki's server (green box). *See* Pet. 30. Sasaki's server includes CPU (central processing unit) 1, ROM (read-only memory) 2, RAM (random access memory) 3, HDD (hard disk drive) 4, operation unit 5, communication interfaces 6, 12, communication circuit 13, and antenna 14. *See* Ex. 1004 ¶¶ 29, 112–113.

2. Ellis (Ex. 1005)

Ellis relates to “[a]n enhanced radio system . . . that provides for the capture and playback of one or more radio stations.” Ex. 1005, code (57). The system recommends content by “monitor[ing] the content listened to by the user, and automatically determin[ing] the groups liked and disliked by the user.” *Id.* ¶ 212. “Groups may be created by the user, programmer, or advertiser, based on a number of criteria.” *Id.*

“[A] group may be based on type of content, such as grouping all commercials, all songs, etc.” *Id.* ¶ 214. “[A] group may be based on a category of content, such as bluegrass music, alternative rock, or other music genre.” *Id.* “[A] group may be based on a specific performing artist, and may contain all songs performed by that artist.” *Id.* “[A] group may be

based a particular radio station, and may contain all content broadcast by that station.” *Id.*

Ellis describes collecting information about a user’s listening habits, e.g., “usage data.” Ex. 1005 ¶ 263. Ellis’s system uses a “central facility” for gathering data. *Id.* ¶ 236. Basically, the system acquires information about the user’s preferences and selects one or more stations to recommend to a user. *Id.* ¶ 220. “This may be done, for example, correlating the play list from each station to the list of songs, artists, and genres selected as likes and dislikes by the user, and choosing the closest match or matches.” *Id.* The system may create scores by weighting matches for likes and dislikes:

[A] score may be created for each station by adding a value for each match to a like and subtracting a value for each match to a dislike, with each value weighted by the level of like or dislike specified by the user. A higher value may be added for a music genre match, a lower value for an artist match, and a still lower value may be added for a song match.

Id.

3. *Jacobi (Ex. 1007)*

Jacobi relates to recommendation systems for books, compact discs, videos, authors, artists, etc. Ex. 1007 ¶ 11. The system conveys the recommendations to the users on web pages, emails, or facsimile. *Id.* ¶ 74, Fig. 6.

4. *Analysis of Claim 1*

We begin our analysis of Petitioner’s obviousness contentions with Petitioner’s assertions as to claim 1.

a) [1.0] *A method comprising:*

[1.1] retrieving, by a server, a plurality of media stored on or accessed using a portable media player device, or information about said plurality of media;

Petitioner asserts that this limitation, to the extent limiting, is rendered obvious by the combined teachings of Sasaki and Ellis. Petitioner points to Sasaki's description of a "method for providing recommendation information concerning various types of content, such as music content and audio/visual (AV) content," in which "first and second communication devices which are connected to each other and in which content recommendation information is transmitted and received between both devices." Pet. 29 (citing Ex. 1004, Abstr., ¶ 3). Petitioner further points to Sasaki's description of the communication devices as a server and a terminal device which is portable for playing various types of content, such as music and images. *Id.* at 30 (citing Ex. 1004 ¶¶ 21, 113). Petitioner further points to Sasaki's description of the server receiving and storing user preference information from the portable media device or a hard drive. *Id.* at 31 (citing Ex. 1004 ¶¶ 19, 98, 112, 126).

Petitioner further points to Ellis's description of collecting information in a portable media player such as usage data, including content that the user heard or skipped over, and sending such information to a central facility; i.e., a server. *Id.* at 31 (citing Ex. 1005 ¶¶ 136–137, 263–265, 274).

Petitioner asserts that the server of Sasaki that receives user preference information directly from a portable media player device (or from a hard drive), in view of Ellis's teaching of an individual network component that collects usage data about what a user listened to or accessed

using a portable media player device renders obvious this limitation. *Id.* (citing Ex. 1003, ¶¶ 75–83).

b) [1.2] inferring, by the server, based at least in part on the retrieved plurality of media or the retrieved information about said plurality of media, one or more entertainment preferences of a user of the portable media player device;

Building on the above assertions, Petitioner asserts that this limitation is rendered obvious by a combination of Sasaki’s server storing preference information about different media content provided by its users, and Ellis’s techniques for inferring the entertainment preferences of a user based on media usage information. *Id.* at 32–33. Patent Owner argues against these assertions. Prelim. Resp. 24.

Petitioner points to Ellis’s description of its system “**monitor[ing] the content listened to by the user, and automatically determin[ing] the groups liked and disliked by the user.**” Pet. 32–33 (citing Ex. 1005 ¶ 212). Petitioner further points to Ellis’s description that its system “‘may also determine user preferences automatically’ (inferring) by ‘monitoring what content the user listens to’ in order to find ‘content of interest, i.e., content that matches the user’s preferences.’” *Id.* (citing Ex. 1005 ¶ 185). Petitioner further points to description of Ellis’s system assigning points to a specific song, artist, genre, or grouping based on a listened-to item. *Id.* at 32–33 (citing Ex. 1005 ¶ 221).

Because Sasaki’s server stores user preferences about multiple types of content (music, still pictures, video, text), Petitioner asserts that adding Ellis’s technique of automatically determining a user’s preferences about content types based on monitoring usage information renders obvious limitation 1.2. *Id.* (citing Ex. 1003 ¶¶ 84–90; Ex. 1004 ¶ 74).

Patent Owner argues that Sasaki does not teach “inferring” a user’s preferences. Prelim. Resp. 24. Patent Owner argues that Sasaki instead relies upon explicit user entry of content type and keyword preferences that are relied upon to recommend content that matches the user’s preferences. *Id.* at 25 (citing Ex. 1004 ¶¶ 73, 85). According to Patent Owner, “explicitly providing user preference information, as disclosed in Sasaki, was disavowed during prosecution.” *Id.* (citing Prelim. Resp. §§ II.B, II.D; Ex. 1002, 210).

However, such argument is not persuasive because Petitioner relies upon, and sufficiently shows, that the combination of Sasaki and Ellis teaches “inferring . . . one or more entertainment preferences of a user.” For example, as Patent Owner recognizes, Petitioner relies on Ellis’s teaching that “[t]he system may also determine user preferences automatically by monitoring what content the user listens to,” by “[f]or example, . . . add[ing] points to a specific song, artist, genre, or other type of item or grouping, based on the user listening to an entire item.” *See* Prelim. Resp. 25–26 (quoting Ex. 1005 ¶¶ 185, 221); Pet. 35 (quoting same) (emphases omitted).

Furthermore, the preliminary record does not support a clear claim disavowal for inferring user preference information entered by a user. During prosecution, in *Ex parte Feldman*, No. 2012-010686 (PTAB Mar. 16, 2015) (reversing the Examiner’s decision rejecting claims of the application leading to the ’960 patent), the Board distinguished a prior art reference (Ng) based on a claim construction interpretation advanced by Appellant. However, Appellant did not dispute that Ng teaches “inferring” the user’s preferences. Ex. 1002, 12–13; Prelim. Resp. 6. Rather, Appellant appears to have distinguished Ng because Ng’s “inferring” was not based on “retrieved media or the retrieved information about the media.” *See id.*; Ex. 1002, 39.

Feldman did not determine whether explicit entry of preferences would meet the “inferring” limitation because no such argument was before it.

Moreover, Sasaki’s system teaches, as claimed, a server that infers one or more preferences “based at least in part on . . . retrieved information about the media.” Specifically, Patent Owner reproduces Sasaki’s Figure 3C, which includes generic preference key words entered by a user and stored by a server such as, for example, “ROCK” and “LOVE” for a music content type, and also includes generic preference key words such as “LANDSCAPE,” “SEA” for image content type. *See* Prelim. Resp. 25 (reproducing Ex. 1004, Fig. 3C), 29–30 (describing Sasaki’s system further). These key words are “information concerning a piece of content.” Pet. 22 (quoting Ex. 1004 ¶ 74). Thus, when the server retrieves these keywords and processes them to make recommendations, the server is acting on retrieved information about the media.

Furthermore, contrary to Patent Owner’s arguments, however, it is not clear on this preliminary record how recommending specific music or photographs based on matching *generic key words* entered by different users to describe an entertainment preference or a recommendation for entertainment amounts to a disavowed inference of a user entertainment preference. Different users for example, may have different (subjective) opinions of what “entertainment preference” arises from generic key words such as ROCK and LOVE, so that a match by the server of such a generic word provided by different users is an inference of an entertainment preference.⁴

⁴ On this preliminary record, it appears that Sasaki’s server collects “pieces of content recommendation information from many terminal devices” and stores that as recommendation information for other users and then matches

Patent Owner also argues that each feature set forth in limitation 1.2 is not taught by the combination of Sasaki and Ellis. Patent Owner also argues that Ellis teaches only radio content, not a plurality of media, and that Ellis determines preferences without the use of a server. Prelim. Resp. 26. Patent Owner’s argument does not undermine Petitioner’s showing, because Petitioner does not rely on Ellis to teach video, image or textual content, or use of a server. Rather, as discussed above, Petitioner relies on Sasaki for its server and its disclosure of the four media types listed in claim 1. *See* Pet. 32–33 (citing Ex. 1004 ¶ 74). *See Bradium Techs. LLC v. Iancu*, 923 F.3d 1032, 1050 (Fed. Cir. 2019) (arguments individually attacking the references in an obviousness combination are not persuasive) (citing *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986) (“Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references.”)).

On this preliminary record, we determine that the combination of Sasaki and Ellis sufficiently teaches limitation 1.2, for purposes of institution.

c) [1.3] *accessing, by the server, one or more sources of information about venues or events proximal to a current location of the user;*

Petitioner points to Sasaki’s teaching of “a *server* in communication with a *portable media player device*.” Pet. 34. Petitioner contends that Sasaki teaches transmitting location information (GPS or radio wave positional information) from its portable media player device. *Id.* (citing Ex. 1004 ¶¶ 69, 80, 81). Petitioner contends that this information is “necessary

key words associated therewith to stored user preference key words “so that a massive word of mouth sales promotion can be expected.” *See* Ex. 1004 ¶¶ 131–134.

information” and part of the “content recommendation information.” *Id.* (quoting Ex. 1004 ¶ 68).

Petitioner also relies on Ellis’s “technique that uses ‘geographic position information’ to ‘acquire information about local events.’” *Id.* (quoting Ex. 1005 ¶¶ 233–234; citing Ex. 1005 ¶ 225 (“use global positioning system monitor 160 to determine the user’s location”)). Petitioner Owner also asserts that Ellis teaches that it “download[s] information about local events and facilities” from a “web site.” *Id.* (quoting Ex. 1005 ¶ 236).

Petitioner asserts that it would have been obvious to modify Sasaki’s GPS-enabled portable media device and server communication system to include Ellis’s technique of using the user’s geographic location to access information about events and facilities local to the user in order to obtain local recommendation information. *Id.* at 35 (citing Ex. 1003 ¶¶ 91–96).

Patent Owner argues that neither reference nor their combination teaches a server that determines or uses the current location of the user that transmits its location to a server. Prelim. Resp. 27. First, Patent Owner argues that Sasaki teaches that the server may send recommendations to the portable device, and that the user’s portable device may transmit location information to another portable device, but that these are in separate and unrelated embodiments. *Id.* at 29 (citing Ex. 1004 ¶¶ 68–69, 80–81, 112–130). Patent Owner argues that Ellis is relied upon for using geographic information to make local recommendations, but not for providing user location information to a server. *Id.* at 30 (citing Pet. 34).

Patent Owner’s arguments are beyond the scope of claim 1 or attack the references’ teachings individually. Limitation 1.3 requires the server to access sources of information about venues or events local to the user.

Patent Owner recognizes that “the location of the [server at its] service spot is already known and communication happens only when the terminal device is close enough to receive an identifying signal from the server [at the service spot].” Prelim. Resp. 28–29 (citing Ex. 1004 ¶¶ 54, 113–114). And Patent Owner also recognizes that these local areas that include servers and users “are predetermined.” *Id.* at 29 (citing Ex. 1004 ¶¶ 113–114).

Therefore, Patent Owner’s arguments show that Sasaki’s server at least implicitly determines the location of the user’s portable terminal device by communicating with it (i.e., determines that a specific user is local to, or in the vicinity of, the known location of the server).

Moreover, Petitioner relies on Ellis to suggest downloading information about local events from a website based on GPS or other location information to improve Sasaki’s server system by automatically providing real time event recommendations to users from a server based on media types and locations of the user’s devices. *See* Pet. 34 (citing Ex. 1005 ¶¶ 225, 233–234, 236); *infra* § III.E.4 (analyzing similar limitation 1.1.4 regarding providing recommendations based on location information); *see also* Prelim. Resp. 30 (“Petitioner relies on Ellis for *using* the geographic information to make local recommendations.”). Toward that end, Petitioner contends that “Ellis specifically teaches that its techniques can be implemented in a ‘network component’ and/or a ‘central facility,’” with Ellis providing implementation details that an artisan of ordinary skill would have considered employing in Sasaki’s server system in a predictable manner using known techniques. *See* Pet. 26 (quoting Ex. 1005 ¶¶ 162, 236). Petitioner also points to Ellis’s disclosure of a similar recommendation system in which an individual network component and/or a “central facility,” “collect[s] . . . usage data,” rather than merely relying on the user

to provide information” according to a flow chart in Figure 37. *See id.* (quoting Ex. 1005 ¶¶ 236, 263 (describing Fig. 37)). At Figure 37, step 3740 indicates that a central facility receives user information and analyzes it (i.e., like a server).

Thus, Petitioner relies on Sasaki as disclosing processing preference information and other user-related information to provide recommendations in a server, and on Ellis as teaching the processing of similar information at a central facility. We agree with Petitioner that, on the current record, the combination renders obvious the claimed processing, at a server, of different forms of related information including location information to provide updated recommendations based on real time preferences obvious.

With respect to Patent Owner’s argument that Petitioner improperly combines aspects of Sasaki’s terminal/terminal and terminal/server embodiments by not providing a reason to combine them, Sasaki generally indicates that aspects of its content recommendation system apply to both embodiments. *See* Ex. 1004 ¶¶ 17 (“[T]he content recommendation system according to the [first] embodiment is applicable to a server (first communication device) and a communication device (second communication device).”), 112 (“Differently from the first [terminal/terminal] embodiment . . . in a second embodiment of the present invention, content recommendation information is transmitted and received between a server at a service spot and a terminal device.”).

For the abovementioned reasons, Patent Owner’s arguments do not undermine the Petition. During trial, the parties will have the opportunity to explore this issue further.

Based on the foregoing discussion, Petitioner’s showing for limitation 1.3 is sufficient for purposes of institution.

d) [1.4] identifying, by the server, at least one of said venues or events as being of interest to the user based at least in part on the one or more entertainment preferences inferred by the server and the current location of the user;

Petitioner points to Ellis’s description of its “system . . . select[ing] one or more recommended events . . . by comparing information about each event with user information, and selecting events that most closely match user preferences.” Pet. 36 (citing Ex. 1005 ¶¶ 233–234) (emphases omitted). Petitioner asserts that the combination of Ellis’s system selection of events based on user preferences with Sasaki’s server-based recommendations to a portable media device renders obvious this limitation. *Id.*

e) [1.5] generating, by the server, a recommendation indicating the identified venue or event as a venue or event of interest to the user; [1.6] communicating, by the server, the recommendation to the user.

Petitioner points to Sasaki’s description that its server provides content recommendation information to a user’s terminal device, and the above-disclosed combination with Ellis’s recommendation of venues or events. *Id.* at 37–38 (citing Ex. 1004 ¶ 115).

Petitioner further points to Jacobi’s generation of a recommendation message to a user, such as by creating a web page or email with links to information on items that are of interest to the user. *Id.* at 38 (citing Ex. 1006 ¶¶ 72, 74). Petitioner asserts that the combination of Jacobi’s generation of a recommendation message, in combination with the server-generated recommendation of events or venues of interest to the user taught by the combination of Sasaki and Ellis, renders obvious this limitation. *Id.* at 38–39 (citing Ex. 1003 ¶¶ 106–109).

f) Reasons to Combine

Petitioner asserts that a person having ordinary skill in the art would have found it obvious to combine the teachings of Ellis with those of Sasaki because Ellis teaches implementation details of a recommendation system that would be of use to those contemplating use of Sasaki's recommendation system. Pet. 24. For example, Sasaki teaches providing recommendations based upon user preferences, and Ellis describes monitoring content accessed by the user to automatically determine user preferences in near-real time. *Id.* (citing Ex. 1004 ¶¶ 115, 212). Dr. Houh states that a person having ordinary skill in the art would recognize the benefit of having such preferences determined automatically, without reliance upon user input, and adapting to changing user interests. *Id.* (citing Ex. 1003 ¶ 61). Petitioner further asserts that such a combination would be the result of using known techniques (Ellis's implementation details) to improve a similar system (Sasaki's recommendation system) in the same way (to provide recommendations to a portable media player device). *Id.* at 26 (citing Ex. 1003 ¶ 63). Petitioner also asserts that the similarities in their systems, both having a portable user device, acquiring and saving user preferences, providing recommendations, implementation in Sasaki's "server" and Ellis's "central facility," indicate that such a combination would have reasonable expectation of success. *Id.* at 25–26 (citing Ex. 1004 ¶ 141; Ex. 1005 ¶¶ 160, 162, 236; Ex. 1003 ¶ 62).

Patent Owner argues that a person having ordinary skill in the art would not have made such a combination because the references address distinct problems. Prelim. Resp. 30. Patent Owner argues that Ellis applies to radio content only, and Sasaki relates to non-radio content. Patent Owner points to statements in Ellis distinguishing advances in television as

irrelevant to radio. *Id.* at 30–31. For example, television is watched at home, wherein a program is watched through completion, whereas radio involves mobile environments in which content is often switched. *Id.* (citing Ex. 1005 ¶¶ 6, 10). Patent Owner asserts that Petitioner and Dr. Houh have disregarded these passages in their assessment of obviousness. *Id.* at 32.

On this preliminary record, Patent Owner’s arguments do not show a teaching away from the claimed invention or a lack of motivation to combine the references’ teachings. Even if Ellis teaches away from television systems, neither the invention nor Sasaki relates to a television system. To the extent the systems include differences in types of media content, this does not amount to a teaching away because both recommendation systems handle different media in digital format, and both address portable devices, for which the alleged drawbacks of stationary televisions do not apply. For example, as summarized above, Petitioner sufficiently shows that Sasaki and Ellis address similar problems associated with providing recommendations to users of portable digital media for all types of events. *See, e.g.*, Ex. 1004 ¶¶ 74, 114 (disclosing a recommendation system that collects information about different media content types, such as music, still pictures, video, and text to provide recommendations to guide purchases at facilities such as CD/DVD shops and bookstores, sightseeing areas, attraction places, art museums, museums, movie theaters, coffee shops, hotel lobbies, and other public facilities); Ex. 1005 ¶¶ 7, 15–17, 57, 162 (describing a system for controlling audio or other digital content data or software (including from radio stations or the Internet) and providing recommendations for music, shopping for music, concert venues, radio station events, etc.).

Patent Owner's arguments also do not specifically address Petitioner's showing of a reason to combine the Ellis and Sasaki (i.e., motivation). As summarized above, Petitioner's reasons for combining the references (e.g., providing automatic recommendations based on determined preferences and digital consumption in real time and addressing similar problems) are sufficient for purposes of institution.

Petitioner asserts that a person having ordinary skill in the art would have found it obvious to combine the teachings of Jacobi with those of Ellis and Sasaki because Jacobi teaches techniques for generating and displaying recommendations to a user that would be useful to those contemplating use of the recommendation system as proposed through the combined teachings of Sasaki and Ellis. Pet. 27 (citing Ex. 1003 ¶ 64). For example, Petitioner points to recommendation of local events and facilities on a display device in its proposed Sasaki-Ellis combination, and that Jacobi describes transmitting a recommendation message through a web page or email. *Id.* at 27–28 (citing Ex 1006 ¶ 74; 1003 ¶ 66). Petitioner asserts that a person having ordinary skill in the art would recognize these recommendation generating details to expand the capabilities of the Sasaki-Ellis system, and thereby motivate their combination. *Id.* (citing Ex. 1003 ¶ 67). Petitioner further asserts that a person having ordinary skill in the art would have a reasonable expectation of success in their combination because Sasaki “already contemplates displaying text, images and icons to the user and that the user can access the server via the Internet,” and that Jacobi's recommendation messages are generated via Web pages or email. *Id.* (citing Ex. 1004 ¶¶ 39, 128; Ex. 1006 ¶ 74; Ex. 1003 ¶ 68).

g) Determination

In view of the foregoing, we determine that Petitioner has sufficiently shown, for purposes of institution, that each element of claim 1 has been taught or suggested by the combined references. Further, that Petitioner has sufficiently shown, for purposes of institution, that a person having ordinary skill in the art would have reason to combine the references as suggested by Petitioner, and would have a reasonable expectation of success in doing so.

III. DISCRETIONARY INSTITUTION, § 314(A)

Institution of an *inter partes* review is discretionary. *See* 35 U.S.C. § 314(a) (authorizing institution of an *inter partes* review under particular circumstances, but not requiring institution under any circumstances); *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 273 (2016) (“[T]he agency’s decision to deny a petition is a matter committed to the Patent Office’s discretion.”); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1356 (2018) (“[Section] 314(a) invests the Director with discretion on the question whether to institute review” (emphasis omitted)); *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1367 (Fed. Cir. 2016) (“[T]he PTO is permitted, but never compelled, to institute an IPR proceeding.”).⁵

Patent Owner urges the Board to exercise discretion to deny institution of *inter partes* review under § 314(a) based on the factors established in *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 at 2–3 (PTAB Mar. 20, 2020) (precedential) (“*Fintiv*”). Prelim. Resp. 50–54.

⁵ On June 21, 2022, the USPTO issued an Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation, *available at* https://www.uspto.gov/sites/default/files/documents/interim_proc_discretionary_denials_aia_parallel_district_court_litigation_memo_20220621_.pdf (the “Interim Procedure”).

An advanced state of a parallel district court proceeding is a “factor that weighs in favor of denying the Petition under § 314(a).” *NHK Spring Co. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 at 20 (PTAB Sept. 12, 2018) (precedential) (“*NHK*”). Specifically, an early trial date is part of a “balanced assessment of all relevant circumstances in the case, including the merits.” Patent Trial and Appeal Board Consolidated Trial Practice Guide (November 2019) (“TPG”) 58.⁶

This balanced assessment involves consideration of the following factors:

1. whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted;
2. proximity of the court’s trial date to the Board’s projected statutory deadline for a final written decision;
3. investment in the parallel proceeding by the court and the parties;
4. overlap between issues raised in the petition and in the parallel proceeding;
5. whether the petitioner and the defendant in the parallel proceeding are the same party; and
6. other circumstances that impact the Board’s exercise of discretion, including the merits.

Fintiv, Paper 11 at 5–6.

Factor 1: whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted

The parties agree that neither party has moved for a stay and this factor is neutral. Pet. Reply 1; PO Sur-reply 1.

⁶ Available at <https://www.uspto.gov/TrialPracticeGuideConsolidated>.

Accordingly, this factor is neutral in exercising discretion to deny institution.

Factor 2: proximity of the court’s trial date to the Board’s projected statutory deadline for a final written decision

On August 22, 2022, the Western District of Texas transferred the California litigation to the Northern District of California after an agreement to transfer by the parties. *See* Pet. 16 (citing Ex. 1017); *supra* § I.B. The parties agree that the Northern District of California has not set a trial date. *See* Pet. 17 (citing Ex. 1021); Pet. Reply 1; Prelim. Resp. 38; PO Sur-reply 1. Petitioner provides evidence that “the median time-to-trial in the Northern District of California is 34.7 months.” Pet. 17 (citing Ex. 1018, 9). According to Petitioner, “[b]ased on these statistics, trial would occur approximately in June 2025 (as calculated from the case opening in the Northern District of California),” about a year after any final written decision in the instant case. *See id.*

As Petitioner argues, this timing favors not exercising discretion to deny institution. Pet. Reply 1 (citing *Meta Platforms Inc. v. Thales Visionix, Inc.*, IPR2022-01301, Paper 11 at 11 (PTAB Mar. 13, 2023); *Google LLC v. Ikorongo Tech. LLC*, IPR2021-00204, Paper 16 at 8–9 (PTAB Jan. 25, 2022) (“factor[] 2 . . . favor[s] not exercising our discretion because there is no trial date”).

Accordingly, this factor weighs against exercising discretion to deny institution.

Factor 3: investment in the parallel proceeding by the court and the parties

“This investment factor is related to the trial date factor, in that more work completed by the parties and court in the parallel proceeding tends to

support the arguments that the parallel proceeding is more advanced, a stay may be less likely, and instituting would lead to duplicative costs.” *Fintiv*, Paper 11 at 10. If, at the time of the institution decision, a district court has issued substantive orders related to the challenged patent, such as a claim construction order, this circumstance weighs in favor of denial. *See id.* at 9–10. On the other hand, if the district court has not issued such orders, this circumstance weighs against discretionary denial. *Id.* at 10. Moreover, in evaluating this factor, “[i]f the evidence shows that the petitioner filed the petition expeditiously, such as promptly after becoming aware of the claims being asserted, this fact has weighed against exercising the authority to deny institution under *NHK*.” *Id.* at 11.

Petitioner contends that “the claim construction hearing will occur on July 12, 2023 (Ex. 1020, 11), while institution decisions will issue no later than June 14, 2023 (*see* 35 U.S.C. § 314(b)(1)).” Pet. Reply 2.

Patent Owner argues that “the parallel litigation proceeded for twelve months prior to the filing of the Petition on November 30, 2022, one day before the § 315(b) deadline.” Prelim. Resp. 39. Patent Owner also contends as follows:

The parties served infringement contentions and invalidity contentions prior to the case’s transfer to the Northern District of California. Since the transfer, Patent Owner has served infringement contentions, Petitioner served invalidity contentions on March 3, 2023, and the parties have served and responded to written discovery requests. By the institution decision due date, the parties will have exchanged proposed terms for construction and will have completed claim construction discovery.

Prelim. Resp. 39.

Patent Owner does not point to any substantive orders related to claim construction or the validity of the '960 patent prior to, or after, the transfer. The record shows some investment in the District Court in terms of actions by parties toward the patentability issues presented here but “much work remains.” *See Sand Revolution II, LLC v. Cont'l Intermodal Grp.—Trucking LLC*, IPR2019-01393, Paper 24 at 11 (PTAB June 16, 2020) (informative) (“[W]e recognize that much work remains in the district court case as it relates to invalidity: fact discovery is still ongoing, expert reports are not yet due, and substantive motion practice is yet to come.”) (“*Sand Revolution*”); Prelim. Resp. 39 (indicating discovery is ongoing).

As to the timing of the Petition’s filing, according to Petitioner, after filing its first complaint in the Western District of Texas on December 1, 2021, Patent Owner filed an amended complaint on February 28, 2022, and then voluntarily dismissed the suit on April 4, 2022. *See* Pet. 15–16 (citing Exs. 1012, 1013, 1014). On the same day, April 4, 2022, Patent Owner filed another complaint in the Western District of Texas and then filed an amended complaint on May 9, 2022. *Id.* (citing Ex. 1016). After Petitioner filed its answer, the parties agreed to transfer the case to the Northern District of California and the court ordered the transfer on August 29, 2022. *Id.* (citing Ex. 1017). Patent Owner does not dispute these facts as asserted by Petitioner. *See generally* Prelim. Resp.

It appears that after the parties agreed to transfer the case, Petitioner filed the Petition on November 30, 2022, no more than three months after Patent Owner filed its infringement contentions (which Patent Owner filed sometime after the August 29, 2022 transfer), and about three months prior to the service of Petitioner’s final invalidity contentions in the Northern District of California on March 3, 2023. *See* Prelim. Resp. 39; Pet. 18.

This timing, spurred at least in part by the voluntary dismissal by Patent Owner, the subsequent complaint, and the subsequent agreement to transfer, combined with the lack of substantive orders, tilts against exercising discretion to deny institution.

Therefore, this factor weighs against exercising discretion to deny institution.

Factor 4: overlap between issues raised in the petition and in the parallel proceeding

Petitioner stipulates that “it will not pursue in the parallel [California] litigation the grounds raised in the Petition.” Pet. Reply 3. Patent Owner argues that “[a]s in *Sand Revolution*, this factor *at best* ‘weighs *marginally* in favor of not exercising discretion to deny institution.’” PO Sur-reply 3 (quoting *Sand Revolution*, Paper 24 at 11–12).

As indicated above, the Western District of Texas recently granted the parties’ transfer motion, there is no trial date set yet, and any trial for the California litigation likely will occur about a year after any final written decision is due here (i.e., June 2024). Therefore, under 35. U.S.C. § 315(e)(2), Petitioner likely will be estopped from raising an invalidity defense in the California litigation based on a “ground that the petitioner raised or reasonably could have raised” here, thereby, precluding any overlapping and conflicting findings with respect to the instant proceeding.

Under a holistic analysis, not only does Petitioner’s stipulation “mitigate[] to some degree the concerns of duplicative efforts between the district court and the Board, as well as concerns of potentially conflicting decisions,” *see Sand Revolution*, Paper 24 at 12, Patent Owner does not show that duplicative efforts or conflicting District Court findings related to

substantive invalidity issues are likely to occur due to the estoppel effects of 35 U.S.C. § 315(e)(2).

Therefore, this factor weighs against exercising discretion to deny institution.

Factor 5: whether the petitioner and the defendant in the parallel proceeding are the same party

The parties agree that Petitioner is a defendant in the parallel proceeding. Pet. Reply 3; PO Sur-reply 4. Petitioner contends that “multiple panels have recognized that, even when the petitioner is the defendant in the parallel litigation, ‘this factor favors denial if trial precedes the Board’s Final Written Decision and favors institution if the opposite is true.’” Pet. Reply 3 (quoting *Huawei Tech Co. v. WSOU Inv., LLC*, IPR2021-00225, Paper 11 at 14 (PTAB June 14, 2021); citing *Google LLC v. Parus Holdings, Inc.*, IPR2020-00846, Paper 9 at 21 (PTAB Oct. 21, 2020) (“Petitioner is the defendant in the parallel proceeding. This fact could weigh either in favor of, or **against, exercising discretion** to deny institution, depending on which tribunal was likely to address the challenged patent first.”)).

Patent Owner does not address the timing of the final written decision relative to the trial date in the California litigation as raised by Petitioner. See PO Sur-reply 4 (arguing this factor favors exercising discretion to deny without addressing the timing).

Accordingly, because our Final Written Decision is likely to occur before the District Court’s judgment, this factor weighs against exercising discretion to deny institution.

Factor 6: other circumstances that impact the Board's exercise of discretion, including the merits

The factors typically considered in the exercise of discretion are part of a balanced assessment of all the relevant circumstances in the case, including the merits. *Fintiv*, Paper 11 at 14. For example, if the merits of a ground raised in the petition seem particularly strong on the preliminary record, this fact has favored institution. *Id.* at 14–15. By contrast, if the merits of the grounds raised in the petition are a closer call, then that fact has favored denying institution when other factors favoring denial are present. *Id.* at 15. As indicated above, Petitioner shows a reasonable likelihood of prevailing in its showing of obviousness.

Therefore, this factor is neutral in exercising discretion to deny institution.

Conclusion

The Board “holistic[ally] view[s] . . . whether efficiency and integrity of the system are best served by denying or instituting review” when evaluating the *Fintiv* factors under § 314(a). *Fintiv*, Paper 11 at 6. As shown above, we determine that factors 1 and 6 are neutral and that factors 2–5 weigh against exercising discretion to deny institution. Evaluating all of the factors on this record, we decline to exercise discretion under § 314(a) to deny institution of *inter partes* review.

IV. CONCLUSION

For the reasons discussed above, we conclude Petitioner has shown a reasonable likelihood of prevailing with respect to at least claim 1 of the ’960 patent. We determine that the record supports institution. Accordingly, we institute an *inter partes* review of all challenged claims under both grounds set forth in the Petition.

Our determination at this stage of the proceeding is based on the evidentiary record currently before us. This decision to institute trial is not a final decision as to patentability of any claim for which *inter partes* review has been instituted. Our final decision will be based on the full record developed during trial.

V. ORDER

For the foregoing reasons, it is:

ORDERED that pursuant to 35 U.S.C. § 314(a), an *inter partes* review is hereby instituted for the following asserted grounds:

Claims Challenged	35 U.S.C. §	Reference(s)/Basis
1, 5–6, 8–11, 15–16, 20–21, 25	103(a)	Sasaki, Ellis, Jacobi
2–4, 12–14, 17–19, 22–23	103(a)	Sasaki, Ellis, Jacobi, Teicher
7, 24	103(a)	Sasaki, Ellis, Jacobi, Havinis

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

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