

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

KEYSIGHT TECHNOLOGIES, INC.,
Petitioner,

v.

CENTRIPETAL NETWORKS, LLC,
Patent Owner.

IPR2023-00446

U.S. Patent No. 10,567,343

**PETITIONER'S PRELIMINARY REPLY TO PATENT OWNER'S
PRELIMINARY RESPONSE ADDRESSING THE ISSUE OF
DISCRETIONARY DENIAL UNDER § 314(a)**

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Patent Owner’s (“PO”) arguments for discretionary denial under *General Plastic* are baseless. Palo Alto Networks (“PAN”) filed the prior IPR, not Keysight Technologies, Inc. (“Keysight”), and Keysight has no “significant relationship” with PAN required for discretionary denial. Further, PAN’s petition was discretionarily denied, so it provided no “roadmap” and this would be the first IPR of the ‘343 patent on the merits.

I. Keysight Has No “Significant Relationship” With The Prior Petitioner, And The Prior Petition Was Discretionarily Denied

Factor 1 evaluates whether the current petitioner has a “significant relationship” with the prior petitioner, such as being a co-defendant or accused of infringement based on the same product. *Valve Corp. v. Elec. Scripting Prods., Inc.*, IPR2019-00062, Paper 11 at 9-10 (Apr. 2, 2019) (precedential). Keysight has no “significant relationship” with PAN. PAN acted independently of Keysight in the prior IPR, which was filed in July 2021, long before PO asserted the ‘343 patent against Keysight in January 2022. Keysight likewise acted independently in pursuing this IPR. It did not coordinate with PAN or any other party.

In cases like this, with no significant relationship between the prior and current petitioners, discretionary denial is improper. *See Sony Mobile Comms. AB v. Ancora Tech., Inc.*, IPR2021-00663, Paper 17 at 10-11 (June 10, 2021) (rejecting discretionary denial, finding no significant relationship where petitioner “is neither a co-defendant with any other petitioners nor has it contributed to or coordinated

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with their IPR filings.”); *Apple, Inc. v. UUSI, LLC d/b/a Naraton*, IPR2019-00358, Paper 12 at 14–15 (Aug. 5, 2019) (rejecting discretionary denial where petitioners were not co-defendants and have separate products); *Google LLC v. Uniloc 2017 LLC*, IPR2020-00396, Paper 11 at 11, 16-17 (Aug. 3, 2020) (rejecting discretionary denial where competitors have been sued separately).

PO’s assertion that Keysight has an implicit relationship with PAN because it supposedly used PAN’s petition as a roadmap does not withstand scrutiny. POPR at 12. PAN filed its IPR petition in July 2021 and the preliminary response, preliminary reply, and preliminary sur-reply were all filed in 2021, before PO sued Petitioner asserting the ‘343 patent (and ten others) in January 2022. Moreover, settlement terms from a prior lawsuit between PO and Petitioner involving other patents barred Petitioner from challenging, or assisting others with challenging, the ‘343 patent in 2021. The Board denied PAN’s IPR on January 20, 2022, mere weeks after PO sued Petitioner asserting the ‘343 patent. Petitioner could not have reasonably filed an IPR petition challenging the ‘343 patent before the institution decision on PAN’s IPR. In short, PO’s argument fails because Petitioner could not have “strategically staged” its petition to benefit from PAN’s petition and the Board’s decision denying its institution. *General Plastic Indus. Co., Ltd. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19 at 17 (Sept. 6, 2017) (precedential).

Petitioner also could not have used the PAN IPR as a roadmap for the

independent reason that PAN presented substantially the same arguments already considered during prosecution. EX-1077 at 11-19. Indeed, it was on that basis – and not any substantive analysis of the merits of the IPR – that the Board discretionarily denied institution of that IPR. Accordingly, it did not, and could not, provide any “roadmap” that could be used for an improved petition or implicate the fairness concerns discussed in *General Plastic*. PO even acknowledges “the Board denied institution because it found that argument was previously considered.” POPR at 12, citing EX-1077 at 16, 18-19.

In this posture, the Director has recognized “allowing [a petitioner] to pursue a decision on the merits” in a second-filed petition, when the first-filed petition was not evaluated on the merits, “best balances the desire to improve patent quality and patent-system efficiency against the abuse of the review process by repeated attacks on patents.” *Code200, UAB v. Bright Data Ltd.*, IPR2022-00861, Paper 18 at 4-5 (Aug. 23, 2022) (precedential), quoting *Intel Corp. v. VLSI Tech, LLC*, IPR2022-00366, Paper 14 at 9-10 (Jun. 8, 2022). Holding otherwise would undercut IPRs as mechanisms “to improve patent quality and restore confidence in the presumption of validity that comes with issued patents.” *Id.*, quoting *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 272 (2016). The Board discretionarily denied PAN’s petition, finding that substantially the same arguments were previously presented to the Office; it did not evaluate the petition on the merits.

EX-1077 at 14-19. Institution of this IPR thus would balance the goals of improving patent quality while avoiding abuses by allowing the patent to be re-evaluated on the merits for the first time.

The balance between improving patent quality and avoiding abuses of the review process weighs decidedly in favor of institution here, because the relevant Emerging Threats prior art was known to PO during prosecution but not disclosed for consideration by the Office. EX-1082 (PO’s 2014 press release regarding Emerging Threats). During prosecution, the application was allowed after PO argued that the preventing exfiltration limitation distinguished the claims over the prior art. Pet. at 1-2, citing EX-1077 at 15. However, the Sourcefire prior art considered by the Examiner implemented industry-standard Snort rules, and the Examiner did not consider the Emerging Threats publication, which shows known Snort rules for preventing exfiltration. Pet. at 2, citing Ex-1020. Discretionarily denying institution here would run contrary to the goal of improving patent quality and prevent the claims from being evaluated against known and relevant prior art.

General Plastic factor 1 therefore strongly supports institution.

II. The Remaining Factors Are Neutral Or Support Institution

The remaining *General Plastic* factors need not be considered because this is not a follow-on petition on the merits, but if considered they support institution.

PO acknowledges that factors 2 and 7 are neutral. POPR at 15, 22.

Factor 3 favors institution because, as explained above, the discretionary denial of PAN’s petition presents no roadmapping concern. *Code200*, IPR2022-00861, Paper 18 at 5 (rejecting discretionary denial on other grounds, but finding factor 3 only favors discretionary denial where there is a roadmapping concern).

Factor 4 favors institution because this is Keysight’s *first* petition challenging the ‘343 patent, and it has no significant relationship with PAN. *TLC Indus. V. Parkervision, Inc.*, IPR2021-00990, paper 9 at 22-23 (Nov. 22, 2021) (rejecting discretionary denial, finding that, even assuming seven months elapsed between Petitioner discovering the prior art and filing its petition, because it was petitioner’s first petition this factor favored institution).

Factor 5 favors institution since Keysight was sued in January 2022, long after PAN’s July 2021 IPR petition.

Factor 6 also favors institution because this challenge has not been previously considered. *Code200*, IPR2022-00861, Paper 18 at 5 (“Patent Owner’s concerns of fairness are outweighed by the benefits to the patent system of improving patent quality by reviewing the merits of the challenges raised in the petitions, which have not been addressed to date.”).

III. Conclusion

Controlling law and indisputable facts establish that the *General Plastic* factors support institution of this IPR.

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Respectfully submitted,

Date: May 30, 2023

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CERTIFICATE OF SERVICE

In accordance with 37 C.F.R. § 42.6(e), and pursuant to agreement by the parties that filing with the Board through the Patent Trial and Appeal Case Tracking System (P-TACTS) constitutes electronic service, the undersigned certifies that filing the foregoing **PETITIONER’S PRELIMINARY REPLY TO PATENT OWNER’S PRELIMINARY RESPONSE ADDRESSING THE ISSUE OF DISCRETIONARY DENIAL UNDER § 314(a)** on P-TACTS today, which constitutes service on the following Patent Owner’s representatives:

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