

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

KEYSIGHT TECHNOLOGIES, INC.,
Petitioner,

v.

CENTRIPETAL NETWORKS, LLC,
Patent Owner.

Case IPR2023-00446
U.S. Patent No. 10,567,343

PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW

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Pursuant to 37 C.F.R. § 42.71(d) and the Revised Interim Director Review Process adopted on July 24, 2023, Patent Owner (Centripetal) respectfully requests Director Review of the Board's decision granting institution of *inter partes* review. Paper 9 ("DI").

I. THE BOARD'S § 325(D) ANALYSIS WAS AN ABUSE OF DISCRETION

A. Introduction

Centripetal respectfully requests Director Review of the Board's decision not to deny the Petition under 35 U.S.C. § 325(d) because Petitioner's combination of Sourcefire and Emerging Threats is entirely cumulative to the material considered during original prosecution of U.S. Patent No. 10,567,343 ("the '343 Patent"). The Board's decision instituting IPR misapplied binding precedent concerning what types of references are "cumulative" to those already considered and entirely disregarded Centripetal's arguments regarding the Office's extensive prior consideration of this and related Patents over Sourcefire.

In the Institution Decision, Board found that it was "beyond dispute" that Sourcefire was before the Office during examination of the '343 Patent. DI at 16. The Board nevertheless instituted trial on the basis that "Emerging Threats is [not] cumulative to Stolfo." DI at 17. The Board did not, however, apply the Federal Circuit's test for whether a later reference is cumulative to the first. If it had, it would have recognized that the Stolfo reference not only explicitly discloses the

relevant rules from Emerging Threats, but that Stolfo is “much more elaborate in its disclosure.” *Scripps Clinic & Research Found. v. Genentech, Inc.*, 927 F.2d 1565, 1582 (Fed. Cir. 1991) (holding that a reference is cumulative when it discloses the same subject matter as a more elaborate disclosure), *overruled on other grounds by Abbott Labs. v. Sandoz, Inc.*, 566 F.3d 1282 (Fed. Cir. 2009). The Board's determination that the less elaborate reference can be non-cumulative to the more elaborate reference is wrong as a matter of law.

Because of the Board's error on the first prong of the *Advanced Bionics* framework, it excused Petitioner's failure to identify any error in the Office's consideration of Sourcefire and Stolfo. The Director should, therefore, reverse the Institution Decision because Petitioner did not identify any errors in the Office's consideration of the more elaborate Stolfo reference.

B. The Board Exceeded Its Discretion by Instituting Review Using Cumulative Art

Under 37 C.F.R. § 42.71(d), a request must identify “all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, a reply, or a sur-reply.” This Request concerns Centripetal's argument that Emerging Threats is cumulative of Stolfo. See Paper 6 (“Preliminary Response”) at 2, 26-30. Centripetal respectfully seeks Director Review because the panel misapplied binding precedent for evaluating whether newly-asserted art is cumulative to art previously evaluated by

the Office, and overlooked the similarities between the new reference (*i.e.*, Emerging Threats) and art that the Examiner considered during original prosecution (*i.e.* Stolfo). Ex. 1020 (Emerging Threats); Ex. 2001 (Stolfo). The Board abused its discretion by instituting review even though the Office had already considered and rejected modifying Sourcefire with the substantially the same rules and techniques disclosed in the Emerging Threats reference, and there has been no showing of material error in the Office's evaluation. Far from deferring to the Office's prior consideration of substantially the same prior art and arguments, the Board applied a legally-erroneous conception of what constitutes "cumulative" art.

One reference is "cumulative" to another if it discloses nothing more, and is less elaborate, than the other reference. *Scripps Clinic*, 927 F.2d at 1582. Board panels typically apply this same understanding when conducting analyses under 35 U.S.C. § 325. See *Gator Bio, Inc. v. Sartorius Bioanalytical Instruments, Inc.*, No. IPR2023-00215, Paper 19 at 14 (P.T.A.B. June 20, 2023) (finding a later reference cumulative when it "does not disclose an [element] . . . with any more precision or clarity than does" the earlier reference). Neither the Board nor Petitioner "articulated any substantive differences between" Emerging Threats and Stolfo, that could support a conclusion other than that Emerging Threats is cumulative. *Becton, Dickinson & Co. and B. Braun Melsungen AG*, No. IPR2017-01587, Paper 8 at 22 (P.T.A.B. Dec. 15, 2017) (informative); see also DI at 17-18.

In *Advanced Bionics*, the panel explained that to determine whether an asserted reference was the same or substantially same as a reference previously considered, the Board considers whether the petitioner relies on the new reference in substantially the same manner as the examiner had cited the old reference during prosecution. *Advanced Bionics, LLC v. Med-El Elektromedizinische Geräte GmbH*, No. IPR2019-01469, Paper 6 at 15 (P.T.A.B. Feb. 13, 2020) (precedential). This comparison (to the examiner's consideration) is consistent with the purpose of the Office's discretion provided by 35 U.S.C. § 325(d), which was to "reflect[] a commitment to defer to previous Office evaluations of the evidence of record unless material error is shown." *Id.* at 9.

Applying this framework to the instant case, the Board was supposed to compare how Petitioner relies on the Emerging Threat reference with how the Examiner had relied on Stolfo during examination. *Id.* Centripetal laid out this comparison in its Preliminary Response, and the Board gave it no consideration. Preliminary Response at 26-27 (showing that the Examiner cited Stolfo's substantively identical rules for the same limitations as Petitioner cites the Emerging Threats rules); DI at 16-18. Stolfo was overcome, in part, by amending the claims to clarify that the at least one packet transformation function is configured to prevent an exfiltration operation, while allowing other outbound traffic to continue towards its destination. Ex. 1001 at 7:4-40; Ex. 1002 at 86-88, 77, 79-82. The Office was

persuaded by Centripetal's amendments and arguments that the nuanced approach of preventing exfiltration operations while allowing other outbound traffic to pass distinguished the claimed invention over Stolfo. Ex. 1002 at 35-40; *see also* Ex. 1077 at 15-16 (prior panel describing the prosecution history of the '343 Patent).

The Board did not compare Petitioner's use of Emerging Threats with the Examiner's use of Stolfo. DI at 17 (citing Ex. 1002 at 87, Ex. 2001 at ¶ 124); DI at 17-18 (citing Pet. at 37-43). Instead, the Board relied on additional non-cumulative information *from Stolfo* (*i.e.* the more elaborate reference) to determine that Emerging Threats (*i.e.* the less elaborate reference) was somehow non-cumulative. *Id.* This approach gets the § 325(d) analysis exactly backward. Petitioner cannot show that a less elaborate, but otherwise identical, reference is non-cumulative because it discloses *less* than the more elaborate reference. *Scripps Clinic*, 927 F. 2d at 1582.

If the Board had considered the evidence in Centripetal's arguments, it would have found that the intrusion rules Petitioner relies on in the Emerging Threats reference are substantially the same as those disclosed in Stolfo. Preliminary Resp. at 25-32. Petitioner relies on the Emerging Threats reference for allegedly disclosing Snort rules for preventing exfiltration. Pet. at 37-43. But, the Board overlooked that Stolfo discloses a "deception system 114 . . . using one or more pre-defined rules" (as cited by the Examiner during a final office action), Ex. 1002 at 100 (citing Ex.

2001 at ¶ 119), and even discloses using Snort during egress or exfiltration of documents in network traffic. Ex. 2001 at ¶ 155 (“A network intrusion detection system, such as Snort, can be used to detect these embedded beacons or tokens during the egress or exfiltration of the decoy document in network traffic”). Petitioner similarly relies on the Emerging Threats reference for allegedly disclosing a Snort rule (known as Rule ID 2002526) that searches for strings like “TOP SECRET”, “TS”, and “NOFORN.” Pet. at 37-40 (discussing Rule 2002526). But, the Board overlooked that Stolfo also discloses detecting keywords such as “confidential”, “top secret,” and “privileged.” Ex. 2001 at ¶ 81. The Snort rules in the Emerging Threats reference are cumulative to the techniques disclosed in Stolfo.

Notably, the Board stated that “Emerging Threats discloses its rules to be Snort rules for preventing exfiltration” as evidence that “Emerging Threats is [not] merely cumulative to Stolfo.” DI at 17-18. But Emerging Threats does not disclose this. Indeed, Emerging Threats does not contain any discussion whatsoever about the rules. It is just a list of rules.

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#US Top Secret Not Releasable to Foreign Nationals
#
#alert tcp $HOME_NET any -> $EXTERNAL_NET $HTTP_PORTS (msg:"ET POLICY HTTP - US Top Secret NOFORN"; flow:to_server,established; pcre:"/(TOP|SECRET|TS)/[\\s\\w,/-]*NOFORN[\\s\\w,/-]*"(?
=//(25)?X(1-9))/ism"; classtype:policy-violation; reference:url,doc.emergingthreats.net/bin/view/Main/2002526; reference:url,www.emergingthreats.net/cgi-
bin/cvsnweb.cgi/sigs/POLICY/POLICY_Classified_Information; sid:2002526; rev:4;)
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Ex. 1020 at 87 (illustrating Rule ID 2002526). Petitioner may not use the fact that Emerging Threats is *less* elaborate than Stolfo to avoid § 325(d).

Petitioner also failed to articulate any substantive differences between the Examiner's obviousness evaluation over Sourcefire and Stolfo, and the current assertion of Sourcefire and Emerging Threats. Indeed, Petitioner did not address Stolfo at all in the Petition (Pet. at 24-27). Nor did Petitioner ask the Board for a supplemental preliminary reply to address the 325(d) section even though it requested, and was granted, additional briefing on the *General Plastic* issue. This failure to "articulate[] any substantive differences between the prior art alone or in combination," demonstrates that the Petitioner is merely rearranging previously considered art with "little . . . persuasive new evidence of unpatentability." See *Becton Dickinson* at 22, 24-25. The Board's decision to institute *inter partes* review should be vacated.

II. GENERAL PLASTIC DOES NOT ADEQUATELY ADDRESS UNDESIRABLE INCREMENTAL PETITIONS¹

Centripetal also respectfully requests Director Review and rehearing because this case presents important issues relating to follow-on petitions. The current *General Plastic* framework does not adequately balance the public's interest in

¹ Centripetal has raised a similar Request for Director Review in IPR2023-00445. Today, the initial Petitioner, PAN, filed a Motion to Join IPR2023-00445 despite having its own petition denied on the merits. See IPR2023-01329.

recalling wrongly issued patents against the innovator's interest in quiet title. *General Plastic Indus. Co. v. Canon Kabushiki Kaisha*, No. IPR2016-01357, Paper 19 (“*General Plastic*”) at 17 (P.T.A.B. Sept. 6, 2017) (precedential). While the decision in *Valve Corp.* extended *General Plastic* to address serial petitions filed by different petitioners, it has all but confined its serial petition analysis to instances where the serial petitioners are in a “significant relationship.” *Valve Corp. v. Elec. Scripting Prods., Inc.*, No. IPR2019-00062, Paper 11 at 10 (P.T.A.B. Apr. 2, 2019) (precedential). But the problems with serial administrative attacks are not confined to such scenarios, and the Board's resources are better directed to initial petitions in most cases.

Congress carefully designed AIA trial proceedings to ensure that they not be used to prevent patent enforcement or market entry. Yet when entering a market requires a patent owner to enforce its intellectual property against multiple well-funded parties that have refused to take a license, serial administrative attacks frustrate the goals of the AIA and undermine faith in the Office. A new framework, therefore, is necessary to ensure that administrative proceedings do not provide parties with a way to indefinitely avoid patent enforcement once the PTAB has already reaffirmed patentability in a fairly-contested adversarial proceeding. See H.R. Rep. No. 112–98, pt. 1, at 48 (2011) (“The Committee recognizes the importance of quiet title to patent owners to ensure continued investment

resources.”). The *General Plastic* framework does not adequately address the inequities and prejudices stemming from incremental petitions, problems that do not depend on whether the first and second petitioners are the same, closely related, or completely unrelated. *General Plastic* at 11 (raising concerns of “sequential attacks against the same claims, with the opportunity to morph positions along the way”).

When no “significant relationship” exists between petitioners, most of the *General Plastic* factors are neutral or weigh toward instituting trial because they focus on the petitioner’s behavior instead of prejudices to the patent owner. See *Volkswagen Grp. of Am., Inc. v. Neo Wireless LLC*, No. IPR2022-01537, Paper 8 at 11 (P.T.A.B. May 5, 2023) (finding that factors 2, 4, and 5 have limited relevance in the context of a follow-on petition filed by an unrelated petitioner) (citing *Code200, UAB v. Bright Data Ltd.*, No. IPR2022-00861, Paper 18 at 6 (P.T.A.B. Aug. 23, 2022) (precedential) (finding that factors 2, 4, and 5 “have limited relevance”)). Accordingly, while the *General Plastic* factors help the Board identify abusive petitions, their myopic focus on abuse of process by a single petitioner does not adequately address the problem of “undesirable, incremental petitioning” more generally. *In re Vivint, Inc.*, 14 F.4th 1342, 1353-54 (Fed. Cir. 2021). The problem with using the Board’s “decisions as a roadmap, until a ground is found that results in the grant of review” exists whether or not the first and second petitioners are related. *General Plastic* at 17.

When multiple deep-pocketed parties refuse to license a patent that has already survived an administrative challenge, patent owners have no option but to engage in resource-intensive litigation just to break into the market. The question when determining whether a follow-on petition filed by an unrelated party serves the interest of the public and furthers the goals of the AIA should focus on whether the earlier petition was decided on the merits. *See Code200*, Paper 18 at 4-5. If the earlier decision was on the merits, the Board should only consider instituting trial in rare circumstances, such as if the prior art asserted in the follow-on petition legitimately could not have been located at the time of the earlier petition or when there is evidence that the original petitioner abused the process by attempting to blackmail the patent owner, as occurred in *OpenSky*. *OpenSky Indus., LLC, v. VLSI Tech. LLC*, No. IPR2021-01064, Paper 102 at 3-5 (P.T.A.B. Oct. 4, 2022).

Because the current *General Plastic* framework does not adequately address undesirable, incremental petitions when filed by different parties, the Office should establish a new framework that discourages follow-on petitions in most circumstances when the first petition was rejected on the merits.

A. In Most Cases, Follow-On Petitions Do not Serve the Goals of the AIA

The objective of the AIA is to provide a quick and efficient “alternative” to district court litigation, not an additional ongoing tool to keep high-quality, valuable patents in administrative jail. *See* H.R. Rep. No. 112–98, pt. 1, at 48. The true

concern here is different deep-pocketed petitioners that violate a patent but lodge successive administrative challenges focused on curing deficiencies found in an earlier petition can tie up such patents for long periods of time, effectively nullifying a patent owner's right to enforce its patents.

To align with the constitutional mandate of promoting the progress of the useful arts, the patent system was designed to incentivize inventors to publicly disclose innovations in exchange for the grant of a patent upon which an “exclusive enjoyment is guaranteed.” *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 186 (1933); *see also Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480-81 (1974); *Patterson v. Kentucky*, 97 U.S. 501, 507 (1878) (“The sole operation of the statute is to enable him to prevent others from using the products of his labors except with his consent.”). That is, “when [the government] grants a patent the grantee is *entitled to it as a matter of right*, and does not receive it . . . as a matter of grace and favor.” *James v. Campbell*, 104 U.S. 356, 358 (1881) (emphasis added).

Recognizing that AIA post grant proceedings could be used as tools for harassment and means to delay district court actions, Congress attempted to incorporate protections to ensure that “constitutionally mandated patent rights were not abrogated without due process.” *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 826 F.3d 1366, 1367 (Fed. Cir. 2016) (J. Newman, dissenting); H.R. Rep. No. 112–98, pt.1, at 48 (AIA post grant proceedings conducted under the AIA “are not to be

used as tools for harassment or a means to prevent market entry through repeated litigation and administrative attacks on the validity of a patent.”). For instance, Congress proposed a number of provisions that were designed to limit the use of AIA post grant proceedings as a delay tactic and to mitigate any negative impact on the enforcement of patent rights. See 154 Cong. Rec. S9987 (daily ed. Sept. 27, 2008) (statement of Sen. Kyl) (discussing a number of “provisions that are designed to limit the use of post grant review proceedings as a delaying tactic and to mitigate these proceedings’ negative impact on efforts to enforce a patent.”).

Despite congressional efforts, there are insufficient safeguards currently in place that protect patent owners from repeated administrative attacks by different deep-pocket petitioners who (after reviewing prior IPRs) lodge additional, expensive do-over IPRs to delay patent enforcement and market entry. Under the *General Plastic* framework, multiple, staggered petitions are welcomed so long as they are filed by a different party. Worse yet, panels under *General Plastic* have shifted the blame to patent owners for filing multiple litigation actions. *Microsoft Corp. v. Iron Oak Techs., LLC*, No. IPR2019-00107, Paper 8 at 53-54 (P.T.A.B. May 15, 2019).

In this regard, *General Plastic* signifies that do-over IPRs filed by different accused infringers are welcomed at the PTAB and can be used as an ongoing tool to delay or avoid district court litigation and patent enforcement given that district courts might stay cases when the PTAB grants review of the patent. See *Centripetal*

Networks, LLC v. Cisco Sys., Inc., No. 18-cv-00094-EWH, Dkt. No. 715, Order Granting Stay (E.D. Va. June 7, 2023). For instance, a prior petitioner (whose post grant petition was unsuccessful) can extend the stay of its district court trial pending the outcome of the subsequent AIA proceeding while the instant petitioner can request a stay pending resolution. As such, these do-over IPRs further delay district court action to prevent patent enforcement and market entry. That the review process acts to prevent market entry and patent enforcement is contrary to Congress's intent of having the post grant review process act as an "alternative[] to litigation," not an additional ongoing tool. H.R. Rep. No. 112–98, pt. 1, at 48.

Congress afforded the Director substantial discretion to "address potential abuses and current inefficiencies under its expanded procedural authority." *See id.* For instance, in its mandate, Congress instructed that the Director shall prescribe appropriate regulations and listed "the integrity of the patent system" as a factor that should be considered. 35 U.S.C. §§ 316(a)-(b). Therefore, to balance the desire to improve patent quality against the potential for abuse of the review process by serial attacks on a patent, the Director should prescribe regulations that deny a second petition if the Board substantively addressed the merits of the prior petition. This includes situations where the Board recognizes that the merits of the prior petition have already been considered by the Office, and, absent material error, defers to the Office's previous evaluations under 35 U.S.C. § 325(d).

As the Director recognized in *Code200*, this approach “best balances the desires to improve patent quality and patent-system efficiency against the potential for abuse of the review process by repeated attacks on patents.” *Code200*, Paper 18 at 4-5. Such a framework would not prejudice follow-on petitioners, who still have the opportunity to challenge validity in district court. The Director should also prescribe regulations that evaluate the state of any co-pending district court action and whether instituting review of a do-over IPR would negatively impact patent owners' efforts to enforce their patent rights.

B. The Director Should Reverse the Institution Decision

Here, such prescribed regulations would curb any inequities and prejudices faced by Centripetal. In the first IPR petition, the Board found that the merits of the petition had already been evaluated during examination of the '343 Patent, as well as during post-issuance proceedings of related patents, and denied institution under 35 U.S.C. § 325(d). *See* Ex. 1077 at 17-18 (finding no material error in the Office's evaluation of Sourcefire in allowing the '343 Patent); *id.* at 18 (also finding Sourcefire was “considered extensively” in the reexamination of a U.S. Patent No. 9,686,193). This decision should have been sufficient to assuage the public's concern over litigation with poor-quality patents.

Instead, the '343 Patent is now tied up in administrative proceedings once again, after the co-pending district court litigation between Centripetal and prior-

petitioner, Palo Alto Networks, Inc., was stayed for roughly 14 months, as the timeline in Fig. 1 below shows:

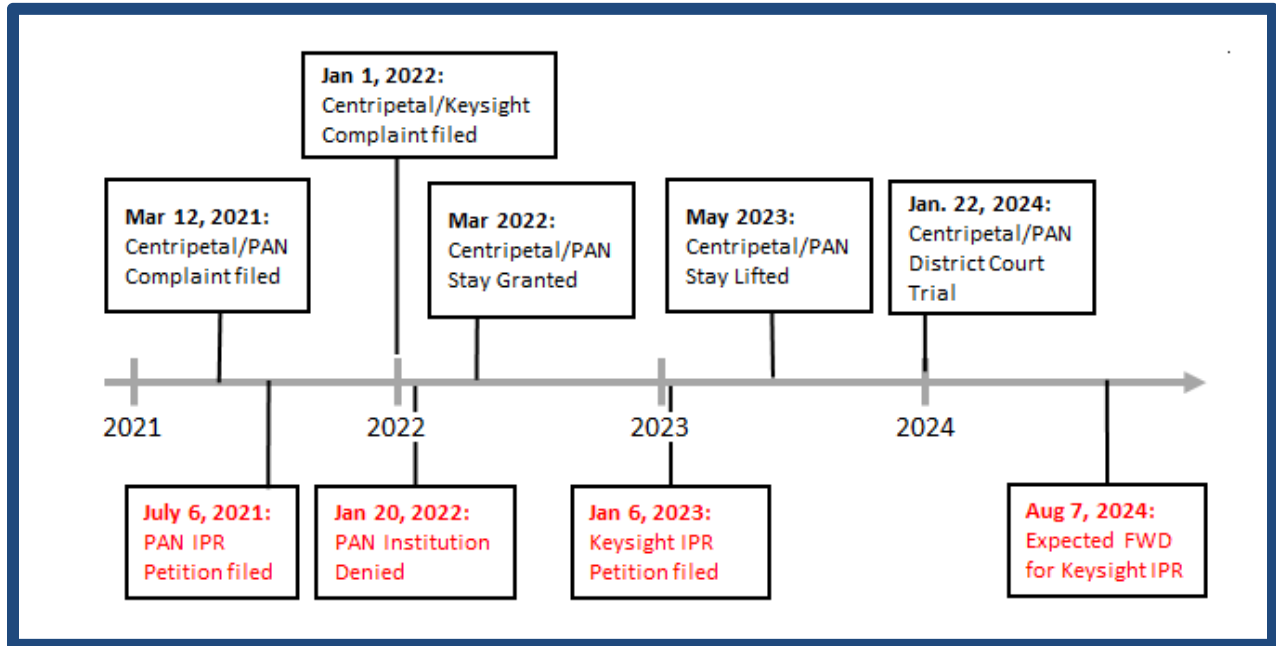


FIG. 1

That stay was only recently lifted, and this follow-on petition will only delay Centripetal's ability to enforce the patent even further. Further, the timing of that pending district court trial raises with the possibility of inconsistent results and inefficient use of Office resources as the patentability of the '343 Patent is challenged in district court as well.

III. CONCLUSION

For all of these reasons, Centripetal respectfully requests that the Director grants its request for Director Review of the institution decision of the '343 Patent.

Respectfully submitted,

Dated: August 21, 2023

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CERTIFICATE OF SERVICE

The undersigned certifies, 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, that service was made on Petitioner as detailed below.

<i>Date of service</i>	August 21, 2023
<i>Manner of service</i>	Electronic Filing with the Board
<i>Documents served</i>	PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW
<i>Persons Served</i>	REED SMITH LLP Gerard M. Donovan Peter J. Chassman Walter M. Egbert Jonathan I. Detrixhe Sidharth Kapoor gdonovan@reedsmith.com pchassman@reedsmith.com wegbert@reedsmith.com jdetrixhe@reedsmith.com skapoor@reedsmith.com

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