

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ARISTA NETWORKS, INC.,
Petitioner,

v.

CORRIGENT CORPORATION,
Patent Owner.

IPR2023-00839

Patent No. 9,118,602

PATENT OWNER'S PRELIMINARY RESPONSE

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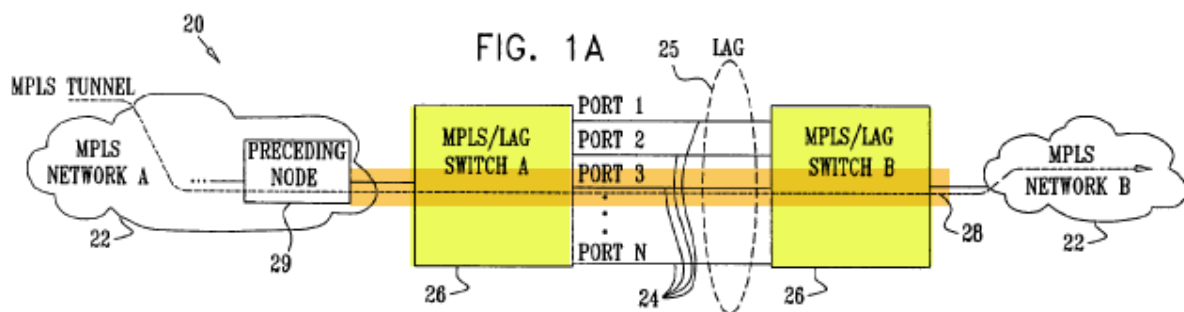
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EXHIBIT LIST

Exhibit Number	Description
2001	<i>Cisco Systems, Inc. v. Corrigent Corporation</i> , Case No. IPR2023-00447, Paper No. 1 (PTAB Jan. 10, 2023)

I. INTRODUCTION

The '602 Patent claims a novel and non-obvious apparatus and methods to process a data packet *between* two MPLS/LAG switches using specific and innovative tunnel provisioning techniques between those switches. Specifically, the '602 Patent employs a physical tunnel port of a link aggregation group (LAG) to ensure that data is properly and efficiently transmitted between a first and second MPLS/LAG switch using a single physical port. As the patent explains, the invention involves “receiving, by [a] first MPLS/LAG switch, a data packet including [a] data packet label at said first MPLS/LAG switch, and switching, by said first MPLS/LAG switch, said data packet to said single physical tunnel port according to said serial port number, and sending said data packet to a second MPLS/LAG switch via said single physical tunnel port.” EX1001 at 2:43-49.



In the example shown, Port 3 (highlighted in orange) is used as a tunneling port between MPLS/LAG switches A and B (highlighted in yellow).

Petitioner raises two ground of unpatentability in its IPR petition. The first challenges claims 1-26 of the '602 Patent based on two references—the Request

for Comments 3209, *RSVP-TE: Extensions to RSVP for LSP Tunnels* (“RFC 3209”) in view of U.S. Patent No. 7,466,697 to Raz et al. (“Raz”). The second ground also challenges claims 1-26 of the ’602 Patent and relies on RFC 3209 in view of Raz and further in view of U.S. Patent No. 7,277,386 to Ferguson et al. (“Ferguson”). The Petition concedes that none of these references discloses the invention claimed in the ’602 Patent in its entirety by conceding that none of the references anticipates any of the claims.

Institution should be denied, however, under 35 U.S.C. § 314 based on the *General Plastic* factors. As explained in detail below, five factors (1, 2, 4, 5, and 6) weigh strongly in favor of discretionary denial, whereas two factors (3 and 7) are neutral. Importantly, there is one other IPR filed against the ’602 Patent that has already been instituted. As is evidenced by Arista’s petition, Arista chose to use the previously filed IPR petition as a roadmap to its own petition. Arista’s gamesmanship of the system should not be rewarded with substantive consideration of its IPR petition. Accordingly, Patent Owner respectfully requests that the Board exercise its discretion and deny institution.

II. THE BOARD SHOULD USE ITS DISCRETION AND DENY INSTITUTION UNDER THE *GENERAL PLASTICS* FACTORS

The Board should exercise its discretion to deny institution of *inter partes* review under 35 U.S.C. § 314(a) because the instant Petition presents essentially the same grounds and challenges the same claims as Cisco’s prior petition.

EX2001. As explained below, denial of institution here is supported by each of the factors in *General Plastic Indus. Co., Ltd. v. Kaisha*, IPR2016-01357, Paper 19 at 9–10 (P.T.A.B. Sept. 6, 2017) (precedential) (“*General Plastic*”). Tellingly, Petitioner fails to argue that the *General Plastic* factors do not favor denial, making no mention of *General Plastic* anywhere in its Petition. That is because they do.

A. Factor 1: Whether the same petitioner previously filed a petition directed to the same claims of the same patent.

This factor favors denying institution because the Cisco IPR petition and the Petition here challenge the same claims of the same patent and, while the Petitions were not filed by the same Petitioner, there is a significant relationship between Arista and Cisco. As the Board has found, even if petitioners are not the same, Factor 1 also weighs against institution when there is a “significant relationship” between the parties that have filed the IPR petitions and the IPR petitions challenge the same claims of the same patent. *Valve Corp. v. Elec. Scripting Prods., Inc.*, IPR2019-00062, Paper 11 at 9–10 (P.T.A.B. Apr. 2, 2019) (precedential). That is the case here.

Arista does not attempt to argue otherwise. *See generally* Petition. That is because Arista chose to use Cisco’s Petition as a roadmap and thus “implicitly created such a relationship by using [Cisco’s] work as a menu and picking and choosing from their work product.” *Ericsson Inc. v. Uniloc 2017, LLC*, IPR2019-

01550, Paper 8 at 11–12 (P.T.A.B. Mar. 17, 2020) (“The instant Petitioner’s decision to use the prior petitions as a roadmap for its own petition ties the interests of all of the petitioners together.”). In fact, two of the three prior art references in Arista’s IPR are the same as the only references asserted in the Cisco IPR. Not only that, but the purported motivations to combine references are nearly identical, as evidenced when comparing Arista’s Ground 2 with Cisco’s Ground 2. While the combinations may vary slightly, Petitioner’s reliance on Raz in the first ground and Raz in view of Ferguson in the second ground establish that Arista used the Cisco IPR as a roadmap when preparing the instant petition. *Compare* EX2001 at 52-59 (containing Cisco’s IPR Petition’s discussion of why it would be obvious to combine Raz and Ferguson) *with* Petition at 53-60 (containing Arista’s nearly identical discussion of the purported motivation to combine RFC 3209 with Raz and Ferguson).

Further, it is undisputed that Arista is challenging the same claims of the same patent.

As explained above, Arista’s Petition is the epitome of road mapping. Arista had months to study and analyze the Cisco petition, copy the Cisco petition nearly verbatim for many of the claim limitations and then add additional prior art and obviousness arguments to those claim limitations that it deemed vulnerable to a

denial of institution on the merits. Arista's gamesmanship in staggering its IPR petition after Cisco's petition, should not be rewarded with institution.

Accordingly, this factor favors denying institution.

B. Factor 2: Whether at the time of filing of the first petition the petitioner knew of the prior art asserted in the second petition or should have known of it.

Factor 2 also favors denying institution. Under the second *General Plastic* factor, the Board considers "whether at the time of filing of the first petition the petitioner knew of the prior art asserted in the second petition or should have known of it." *General Plastic* at 9–10. Again, Arista provides no discussion of any *General Plastic* Factor, including Factor 2.

The reason for this is clear, they cannot dispute that they had knowledge of, or should have known of, the prior art asserted in its Petition at the time the Cisco IPR petition was filed. The only reference that Arista uses in Grounds 1 and 2 that is not in the Cisco petition is RFC 3209. But RFC 3209 was explicitly discussed in the Cisco IPR. *See, e.g.*, EX2001 at 27. In fact, in the instant IPR, Arista uses the same exhibit number for RFC 3209 (EX1010) as was used in the Cisco IPR. Thus, it can be inferred that Arista did know of, or should have known of, the prior art asserted in its petition at the time the Cisco petition was filed.

C. Factor 3: Whether at the time of filing of the second petition the petitioner already received the patent owner’s preliminary response to the first petition or received the Board’s decision on whether to institute review in the first petition.

Factor 3 is at least neutral. Patent Owner admits that when Arista filed its Petition, Patent Owner had not yet filed its preliminary response in the Cisco IPR. Arista, however, strategically delayed filing the instant Petition until the day before the one-year time bar expired to file the instant Petition, which was over three months after Cisco’s petition was filed. EX2001 at 66 (filed on January 10, 2023). Petitioner should not be rewarded for its gamesmanship under Factor 3. Accordingly, Factor 3 should be, at the least, neutral.

D. Factor 4: The length of time that elapsed between the time the petitioner learned of the prior art asserted in the second petition and the filing of the second petition.

Factor 4 further favors denying institution. Arista makes no attempt to explain why it waited over three months after Cisco filed its petition, which first disclosed this Petition’s asserted prior art, to file its Petition. *See generally* Petition. Accordingly, this Factor weighs in favor of denying institution. *Apple Inc. v. Uniloc 2017 LLC*, IPR2020-00854, Paper 9 at 11 (P.T.A.B. Oct. 28, 2020) (“Because of the lack of explanation, we conclude that this fourth *General Plastic* factor weighs in favor of denying institution of the proceeding.”).

E. Factor 5: Whether the petitioner provides adequate explanation for the time elapsed between the filings of multiple petitions directed to the same claims of the same patent.

This fifth factor also weighs in favor of denying institution because Arista provides no explanation for the delay in filing this Petition. As stated above with respect to Factor 4, Arista makes no attempt to explain why it waited over three months to file this Petition after the filing of the Cisco petition, which first disclosed the Petition's asserted prior art. Accordingly, this factor weighs in favor of denying institution. *Apple*, IPR2020-00854, Paper 9 at 11 ("For the same reasons stated above, for instance, Apple's lack of explanation, we conclude that this fifth *General Plastic* factor also weighs in favor of denying institution.").

F. Factor 6: The Finite Resources Of The Board

There is already a pending *inter partes* review challenging all of the same claims of the '602 Patent based upon two of the three the same core references (Raz and Ferguson). Arista fails to explain why the Board should further extend its resources to consider an additional, substantially similar *inter partes* review. Instead of seeking to join Cisco's IPR, Arista instead waited over three months after the Cisco IPR was filed to file its own, substantially similar, IPR Petition. Arista's gamesmanship is an unnecessary waste of the Board's finite resources and should result in denial of institution.

G. Factor 7: The Requirement Under 35 U.S.C. § 316(a)(11) To Issue A Final Determination Not Later Than 1 Year After The Date On Which The Director Notices Institution Of Review

There is no indication that the Board could not issue a decision within 1 year after institution. Although factor 7 may be considered neutral to the analysis, the remaining *General Plastic* factors (and, thus, the factors as-a-whole) clearly favor discretionary denial of Arista's Petition.

III. CONCLUSION

For the foregoing reasons, the Board should deny institution.

Date: September 14, 2023

Respectfully submitted,

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CERTIFICATION UNDER 37 C.F.R. § 42.24

Under the provisions of 37 C.F.R. § 42.24, the undersigned hereby certifies that the foregoing document contains 1,759 words, and thus complies with the word-count limits of 37 C.F.R. § 42.24.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing PATENT OWNER'S PRELIMINARY RESPONSE was served on September 14, 2023 by filing this document through the P-TACTS platform as well as by delivering a copy via the delivery method indicated to the attorneys of record for the Petitioner as follows:

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