

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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COMCAST CABLE COMMUNICATIONS, LLC,  
Petitioner,

v.

TOUCHSTREAM TECHNOLOGIES, INC.,  
Patent Owner.

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Case No. IPR2024-00322  
U.S. Patent No. 8,356,251

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**PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW  
OF THE BOARD'S INSTITUTION DECISION**

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Patent Owner respectfully requests Director review of the Board’s decision instituting this *inter partes* review against U.S. Patent No. 8,356,251 (“the ’251 patent”). Director review is warranted because this matter presents both: i) important issues of law and policy regarding the Board’s application of *Fintiv*’s “compelling merits” standard, and ii) an abuse of discretion in applying this standard.<sup>1</sup> Here, after finding that *Fintiv* otherwise favored denial, the panel nonetheless granted institution based on finding that “compelling merits” existed for a challenge of a non-overlapping claim not asserted in litigation and *based on arguments Petitioner did not advance*. The law is clear that a panel may not rely on arguments not made in the Petition for a final written decision. The Director should grant review to confirm that the panel also cannot do so at institution in finding “compelling merits” under *Fintiv*.

In applying the Board’s precedent from *Apple Inc. v. Fintiv, Inc.* (“*Fintiv*”), IPR2020-00019, Paper 11 at 6 (PTAB Mar. 20, 2020) (precedential), the panel found “that the first five *Fintiv* factors favor discretionary denial” yet nevertheless granted institution because it found, under the sixth *Fintiv* factor, that “compelling merits”

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<sup>1</sup> See Revised Interim Director Review Process (“RIDRP”) § 2.B (accessible at <https://www.uspto.gov/patents/ptab/decisions/revised-interim-director-review-process>).

existed as to Petitioner’s challenge of claim 22. Paper 13 at 15–16, 36. Specifically, the panel first (1) found that claim 22 (unlike claim 1) did not require “conversion,” and then (2) found that “Danciu alone teaches [limitation 22C].” Paper 13 at 26-27. Neither of these arguments were made in the Petition, however. *See* Pet. at 55.

Finding “compelling merits” on a theory of the prior art not advanced in the Petition—as applied to a *sua sponte* interpretation of a claim—is legal error. The law requires the Board to only consider the actual grounds of unpatentability presented by the Petition and not adopt its own theories. *See, e.g., Sirona Dental Sys. GmbH v. Institut Straumann AG*, 892 F.3d 1349, 1356 (Fed. Cir. 2018) (“It would thus not be proper for the Board to deviate from the grounds in the petition and raise its own [unpatentability] theory.”); *see also SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 138 S. Ct. 1348, 1356 (2018) (holding that the statute confirms that “the petitioner’s petition, not the Director’s discretion, is supposed to guide the life of the litigation.”). Because the “compelling merits” standard for *Fintiv* factor six is not satisfied by the actual grounds presented by Petitioner here, and because the balance of the other five factors weighs in favor of discretionary denial, the panel should have concluded that the *Fintiv* factors weigh in favor of discretionary denial. Therefore, Director review should be granted and institution should be denied.

**I. THE *FINTIV* “COMPELLING MERITS” ASSESSMENT MUST BE CONFINED TO THE ARGUMENTS AND EVIDENCE IN THE PETITION AS AN IMPORTANT MATTER OF LAW AND POLICY**

The panel misapplied the proper scope of a “compelling merits” assessment, which, for reasons rooted in both law and policy, must be confined to the arguments and evidence set forth in the Petition. Indeed, *Fintiv* itself instructs that “if the merits *of a ground raised in the petition* seem particularly strong on the preliminary record, this fact has favored institution” and “[b]y contrast, if the merits *of the grounds raised in the petition* are a closer call, then that facts has favored denying institution when other factors favoring denial are present.” *Fintiv*, IPR2020-00019, Paper 11, at 14-15. Similarly, the Director’s guidance to the Board expressly states that “*Fintiv* factor six reflects that the PTAB considers the merits *of a petitioner’s challenge* when determining whether to institute a post-grant proceeding in view of parallel district court litigation.” U.S. Pat. & Trademark Off., Mem., Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation, at 4 (June 21, 2022) (“Memorandum”) (emphasis added).<sup>2</sup> The structure and policy goals of the *Fintiv* framework further support that the panel here should

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<sup>2</sup> Available at [https://www.uspto.gov/sites/default/files/documents/interim\\_proc\\_discretionary\\_denials\\_aia\\_parallel\\_district\\_court\\_litigation\\_memo\\_20220621.pdf](https://www.uspto.gov/sites/default/files/documents/interim_proc_discretionary_denials_aia_parallel_district_court_litigation_memo_20220621.pdf).

have limited itself to the Petitioner’s arguments, not the panel’s own theory, for claim 22.

The “compelling merits” threshold articulated by the Director requires that a panel look at the preliminary record through the lens of a final written decision. The Director defines “[c]ompelling, meritorious challenges” as “those in which the evidence, if unrebutted in trial, would plainly lead to a conclusion that one or more claims are unpatentable by a preponderance of the evidence.” *Id.* This instructs the Board: (1) to assume trial has concluded without rebuttal evidence, and (2) to apply the standard of proof that governs final determinations of patentability. *Id.*; *see also* 35 U.S.C. §§ 316(e), 318(a).

In *OpenSky Industries, LLC v. VLSI Tech. LLC*, the Director further explained that for evidence to “plainly lead” to a conclusion of unpatentability requires that it be “highly likely that the petitioner would prevail.” IPR2021-01064, Paper 102, at 49 (PTAB Oct. 4, 2022) (precedential). This frames the inquiry in a manner analogous to the “likelihood of success on the merits” inquiry required for preliminary injunctions, where courts, like the Board here, must determine “the likelihood that patent invalidity would be established at trial.” *See, e.g., Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1346 (Fed. Cir. 2008). In that context, courts evaluate “the factual and legal arguments in light of the presumptions and burdens that will

inhere at trial.” *Id.* The “compelling merits” inquiry should be similarly forward-looking, taking into account the process that culminates in a final written decision.

In rendering a final written decision, the Board may not “adopt arguments on behalf of petitioners that could have been, but were not, raised by the petitioner during the IPR” to find challenged claims unpatentable. *In re Magnum Oil Tools Int’l, Ltd.*, 829 F.3d 1364, 1381 (Fed. Cir. 2016). Similarly, “[i]t would [] not be proper for the Board to deviate from the grounds in the petition and raise its own [unpatentability] theory.” *Sirona Dental*, 892 F.3d at 1356. And, as the Supreme Court confirmed, “the petitioner’s petition, not the Director’s discretion, is supposed to guide the life of the litigation.” *SAS*, 138 S. Ct. at 1356. The Director, and thereby the Board, does not “enjoy[] a license to depart from the petition and institute a *different* inter partes review of his [or her] own design.” *Id.* (emphasis in original).

Indeed, the Board, in determining whether a “reasonable likelihood” of prevailing has been shown for purposes of institution, will generally not consider alternative theories beyond those presented in the petition, such as whether a primary reference “alone” discloses a limitation that the petitioner only contended was disclosed by a secondary reference (similar to the new theory raised by the panel here). *See, e.g., Mfg. Res. Int’l, Inc. v. Samsung Elecs. Co. Ltd.*, No. IPR2023-01201, 2024 WL 477463, at \*10 (PTAB Feb. 7, 2024) (denying institution and noting “Petitioner is master of its Petition, and so we evaluate only the obviousness

rationale that is clearly expressed in the Petition, i.e., that Takahashi teaches limitation [1f] and thus cures the ‘deficiency’ of Karppanen. We also decline to evaluate limitation [1f] based solely on Petitioner’s analysis for Karppanen, because that is not the ground put forth by Petitioner and because Petitioner has not given reasonable notice to Patent Owner that it relies on Karppanen alone to meet limitation [1f].”).

The same proscription against deviating from the arguments raised in the petition must also apply during the “compelling merits” inquiry for *Fintiv*. A petitioner cannot be “highly likely” to prevail on an argument it never raised because “the Board must base its decision on arguments *that were advanced by a party*.” *In re Magnum Oil Tools*, 829 F.3d at 1381 (emphasis added); see *OpenSky*, IPR2021-01064, Paper 102, at 49 (the Director instructing the Board to issue an order on whether “*the Petition* presents a compelling, meritorious challenge”) (emphasis added).

Allowing the Board to institute trial based on finding the merits of its own *sua sponte* arguments to be compelling, despite finding facts that support discretionary denial, undermines the policy interests of efficiency and fairness protected by *Fintiv* and the Director’s related guidance. See *Fintiv*, IPR2020-00019, Paper 11, at 6 (listing “efficiency” and “fairness” among the interests served by considering the *Fintiv* factors); Memorandum at 1 (noting the Office’s concern with the “potential

for inefficiency and gamesmanship”). Such arguments—by definition not raised in the petition—would generally be improper to consider if raised during the trial. *See* 37 C.F.R. § 42.23(b); Consolidated Patent Trial Practice Guide (Nov. 2019)<sup>3</sup> at 73 (“Petitioner may not submit new evidence or argument in reply that it could have presented earlier, e.g. to make out a *prima facie* case of unpatentability.”); *see also* *Intelligent Bio-Sys., Inc. v. Illumina Cambridge, Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016) (affirming Board’s refusal to consider new argument in petitioner’s reply because “the expedited nature of IPRs bring with it an obligation for petitioners to make their case in their petition”). By allowing the introduction of *sua sponte* arguments, the Board would be able to manufacture a justification (where none exists) for initiating inefficient, parallel proceedings, contrary to the policy goals expressed in *Fintiv* and the Director’s related guidance.

Doing so *in the institution decision* also denies patent owners the opportunity to address, by preliminary response, “reasons why no inter partes review should be instituted” on the Board’s *sua sponte* arguments. 35 U.S.C. § 313; *see also* 37 C.F.R. § 42.71(d) (limiting the types of arguments that may be raised on rehearing). The opportunity to respond during trial is not an adequate substitute because it does not

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<sup>3</sup> Available at <https://www.uspto.gov/sites/default/files/documents/tpgnov.pdf?MURL=TrialsPracticeGuideConsolidated>.

protect the public's interest in the efficient use of resources. The Board's resources are best preserved by confining the "compelling merits" assessment to the arguments presented in the Petition.

Finally, there is no prejudice to petitioners from limiting the "compelling merits" assessment to the arguments and evidence presented in the petition in a given case. Petitioners, of course, have full control over the arguments they choose to raise and, thus, can heavily influence this *Fintiv* factor. Similarly, by exercising diligence, avoiding delay, and being judicious about whether to advance arguments in multiple fora, petitioners can have considerable influence over whether the first five *Fintiv* factors weigh in favor or against discretionary denial. *See Fintiv*, IPR2020-00019, Paper 11, at 6-14. They also can avoid discretionary denial under § 314(a) outright by agreeing to a *Sotera* stipulation, such that no "compelling merits" assessment is even needed. Memorandum, at 7–8. Thus, it is only fair and not prejudicial to petitioners to limit the "compelling merits" consideration to only the arguments presented in the petition.

The Director, therefore, should grant review regarding this important issue of law and policy to confirm that the Board cannot deviate from the arguments set forth in a petition when evaluating whether the "compelling merits" threshold is met for *Fintiv* factor six.

**II. ON THIS RECORD, THE PANEL ABUSED ITS DISCRETION BY ADOPTING ARGUMENTS PETITIONER DID NOT RAISE**

The panel found the “compelling merits” threshold had been met for claim 22, but in doing so, it relied on theories not set forth in the Petition. The panel abused its discretion by doing so. Had it limited itself to the arguments in the Petition, the panel would not have found the evidence sufficient to meet the “compelling merits” threshold.

**A. Petitioner Relied on Mahajan’s Alleged “Conversion” for Claim 22, But the Panel Substituted Its Own Theory Based on “Danciu Alone” in Place of Petitioner’s Argument**

The Petition argues that most of the limitations of claim 22 are taught by the combinations of “Danciu-Mahajan” and “Danciu-Mahajan-Calvert” “[a]s described in” the earlier Sections of the Petition laying out the arguments for claim 1. *See* Pet., 54–58. Specifically, with regard to limitation [22C], which is directed to “retrieving, by the display device from a server system, . . . first information . . . that indicates corresponding programming code to control playing of the first video file on the display device by the first media player in accordance with a first playback control command,” the Petition argues this limitation is taught by the combinations of “Danciu-Mahajan” and “Danciu-Mahajan-Calvert” and does *not* argue it is taught by Danciu alone. Pet., 55; *see also id.*, 57–58 (addressing similar limitations reciting *inter alia* “second information,” a “second playback control command,” etc., by incorporating prior arguments). To support the argument that the Danciu-Mahajan

combinations teach limitation [22C], the Petition relies on the earlier Sections of the Petition setting forth the arguments for claim 1. *Id.*

With regard to the common concept of “programming code,” claim 1 recites, in part, “converting, by the server system, the universal playback control command into corresponding programming code to control playing of the video content on the display device by the particular media player.” Ex. 1001 at 11:43–46. The Petition contends that this limitation (labeled [1G]) is only taught by Mahajan, which describes translating a generic command (the alleged “universal playback control command”) into a platform-specific command (the alleged “corresponding programming code”). Pet., 39–42. The Petition relies on these same disclosures of Mahajan for the first recitation of the “universal playback control command.” *See id.*, 28–31.

In arguing that the combination of “Danciu-Mahajan or Danciu-Mahajan-Calvert” meets limitations [22G]–[22J], the Petition expressly argues that the prior art operation “includes converting the command to a second playback control command.” *Id.*, 58. And—through a chain of internal cross-references—the Petition cites back to its prior discussion of how Mahajan’s “translation” function teaches the converting of commands into corresponding programming code. *See id.*, 57–58, 55–57, 25–42. Thus, Petitioner’s theory of unpatentability for claim 22 construes claim 22 as requiring converting a playback control command into corresponding

programming code, similar to claim 1, and Petitioner relies only on Mahajan as teaching this requirement, *not* Danciu alone. Indeed, the panel acknowledges the Petition “***relies on Mahajan*** for limitations in claims 1 and 11 that recite converting, by the server, a playback command from the personal computing device into a ‘programming code’ for transmission to the display device.” Paper 13 at 25 (emphasis added), 27 (“Petitioner relies on Mahajan . . . for converting playback commands into programming code.”).

Unlike the Petition, however, the panel construed claim 22 as having “no such conversion requirement” and “only [requiring the server] to transmit information that *indicates* programming code.” Paper 13 at 26 (emphasis in original). As a result, the panel elected to deviate from the Petition’s reliance on Mahajan for teaching conversion, by the server, of playback control commands into programming code—instead adopting a theory that “Danciu alone” teaches “that the display device retrieves information that *indicates* programming code to execute.” Paper 13 at 26 (emphasis in original).

The panel then suggests that “Petitioner’s arguments and evidence show that ***Danciu alone*** teaches ‘retrieving, by the display device from the server system, first information . . . that indicates corresponding programming code to control playing of the first video file on the display device by the first media player in accordance with a first playback control command,’” (i.e., limitation [22C]). Paper 13 at 26-27

(emphasis added). But the panel *does not include a citation to the Petition supporting this assertion. See id.* Indeed, the panel only cites pages 38-39 of the Petition in its analysis of Danciu with regard to the claimed “programming code,” but only in support of the panel’s assertion that “Danciu teaches that the display device retrieves information that *indicates* programming code to execute.” Paper 13 at 26 (citing Pet., 38–39). Pages 38–39 of the Petition, however, do not argue that Danciu alone teaches anything with regard to information that indicates programming code generally—much less “programming code to control playing . . . in accordance with a first playback control command,” as required by limitation [22C]. *See* Pet., 38–39. Instead, consistent with the Petition’s reliance on Mahajan, page 39 argues that “*in view of Mahajan*, [Danciu’s] commands comprise playback commands such as ‘play,’ ‘pause,’ or ‘restart.’” Pet., 39 (emphasis added). Thus, as evidenced by the pages of the Petition cited to by the panel, the Petition relies on Mahajan and does *not* argue that “Danciu alone” teaches this limitation [22C]. The panel, therefore, improperly deviated from the Petition’s grounds and adopted its own theory of unpatentability.

**B. Petitioner Failed to Meet the “Compelling Merits” Threshold on Its “Converting” Theory**

Had the panel applied Petitioner’s actual theory, which (1) construes claim 22 as requiring information indicating programming code that has been converted by

the server and (2) that relies on Mahajan as teaching this limitation, the panel would not have been able to conclude that the “compelling merits” standard was met. This is reinforced by the same panel’s decision denying institution in IPR2024-00326, which involved applying the same proposed combination of Danciu with Mahajan to a patent related to the ’251 patent at issue here. In that proceeding, the panel found that Mahajan teaches performing the conversion *on the client*, after receipt from the server, rather than performing the conversion *on the server*, as required by the claims. IPR2024-00326, Paper 13, at 18–23. As such, the panel found that Petitioner’s obviousness contentions based on Danciu and Mahajan “do not meet the compelling merits standard.” *Id.* at 23. So too here. Mahajan’s server does not perform the converting that Petitioner relies on for its theory as to how the display device allegedly retrieves information indicating programming code from the server. *Id.* at 18–23.

Petitioner argues in the alternative that it would have been obvious for Mahajan’s conversion to occur at Danciu’s server (Pet., 41). But this obviousness argument, which the panel admitted has weaknesses, does not demonstrate compelling merits for the same reasons this argument fails to demonstrate compelling merits for claims 1 and 11, as discussed below. *See* Sec. II.C, *infra*.

Finally, the panel contends as a fallback that even if Petitioner’s combination of Mahajan with Danciu is applied (rather than the panel’s own theory applying

Danciu alone) that “the command that is transmitted from the server to the client would still ‘indicate[] corresponding programming code.’” Paper 13 at 28. First, this is yet another theory raised by the panel on its own and not raised by the Petitioner, so it should be disregarded for the reasons discussed above. Second, the panel cites no evidence in support of this assertion and the “compelling merits” inquiry requires consideration of whether “the evidence, if unrebutted in trial” would “plainly lead” to a conclusion of unpatentability. *See, e.g.*, Memorandum at 4. As such, this fallback does not present “compelling merits.”

**C. The “Compelling Merits” Threshold is Not Satisfied by  
Petitioner’s Challenges as to the Other Independent Claims**

With regard to claims 1 and 11, which the panel agrees require the server to convert a playback command into corresponding programming code, Petitioner’s obviousness contention that Mahajan’s conversion “could” occur at a server in Danciu (Paper 13, at 33 (citing Pet. at 41)), instead of at a client, as taught by Mahajan, also fails to satisfy the compelling merits standard. The panel’s analysis demonstrates the weaknesses in this argument. Noting inconsistencies in Petitioner’s arguments, the panel found that there is “tension between Petitioner’s contentions” regarding the alleged predictable results of this obviousness combination. Paper 13, at 34. And in response to Patent Owner’s argument that the Petition only contended the conversion “could” operate at a server in Danciu (not that a POSITA “would”

have done so), the panel merely found that the Petition is not “devoid of reasoning to combine,” noting that “[w]hether or not such reasoning is persuasive is an issue that will be resolved on a full trial record.” *Id.* Finally, the panel concluded that Mahajan’s disclosure regarding a “distributed computing environment” provides “*some support*” for Petitioner’s argument that Mahajan’s conversion “could” operate at a server in Danciu. *Id.* at 35 (emphasis added). These statements demonstrate that the panel viewed this obviousness argument as having multiple weaknesses. Thus, it is not “highly likely” that it would prevail, and as such, it does not satisfy the “compelling merits” threshold.<sup>4</sup>

### III. CONCLUSION

Because the “compelling merits” standard of *Fintiv* factor six is not satisfied based on the actual grounds set forth in the Petition and because the other five factors favor discretionary denial of institution, Patent Owner respectfully requests that the Director review the panel’s institution decision and exercise discretion to deny institution under *Fintiv*.

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<sup>4</sup> This conclusion is reinforced by the denial of institution in IPR2024-00326 where the same panel found a lack of “compelling merits” based on Mahajan failing to teach conversion to programming code that controls playback by a particular media player. *See* IPR2024-00326, Paper 13, at 23; *see generally id.* at 13–23.

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**CERTIFICATE OF SERVICE**

Pursuant to 37 CFR § 42.6(e), the undersigned certifies that on August 15, 2024, a complete and entire copy of this Patent Owner's Request for Director Review was provided via email to Petitioner's counsel of record as follows:

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