UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TIKTOK, INC.,

Petitioner,

v.

CELLSPIN SOFT, INC.,

Patent Owner

IPR2024-00759

U.S. Patent No. 8,862,757 B2

PATENT OWNER'S MOTION TO TERMINATE

TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE CCP'S CONTROL OVER TIKTOK RENDERS IT AN RPI 2

A. Corporate Structure Ties TikTok to a Chinese Parent Company Subject to CCP Control 2

B. U.S. Courts Have Confirmed the CCP's Control Over TikTok Through Its Corporate Parent - ByteDance 3

C. The CCP is a Real Party in Interest 6

D. The Present IPR Should Be Terminated and the Decision on Institution Should Be Vacated 7

III. TIKTOK IS BARRED FROM FILING AN IPR BASED ON THE SUPREME COURT'S RULING IN RETURN MAIL 11

A. The America Invents Act Permits Only "Persons" to File IPR Petitions, and Foreign Government–Controlled Corporations Do Not Qualify 11

B. Allowing Foreign Government–Controlled Corporations to Use IPRs Invites Strategic Abuse and Undermines the Integrity of the U.S. Patent System 13

C. Congress Has Not Clearly Authorized Foreign Government-Controlled Entities to Access IPR, and Courts Should Apply the Clear Statement Rule 14

V. CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Aerospace Commc'ns Holdings Co., Ltd. v. The Armor All/Step Prods. Co., IPR2016-00441, Paper 12 at 9 (PTAB June 28, 2016)..... 8, 9

Anderson v. Abbott, 321 U.S. 349, 362-363 (1944).....11

Applications in Internet Time, LLC v. RPX Corp., 897 F.3d 1336 (Fed. Cir. 2018)..... 6

Chicago, M. & St. p. Ry. Co. v. Minneapolis Civic & Commerce Assoc., 247 U.S. 490 (1918).....11

Elekta, Inc. v. Varian Med. Sys., Inc., IPR2015-01401, Paper 19 at 9 (PTAB Dec. 31, 2015)..... 8

Facebook, Inc. v. Windy City Innovations, LLC, 973 F.3d 1321, 1332 (Fed. Cir. 2020)..... 16, 17

First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 630 (1983)..... 12, 13

Holder v. Humanitarian Law Project, 561 U.S. 1, 36 (2010)..... 5

Lumentum Holdings, Inc. v. Capella Photonics, Inc., IPR2015-00739, Paper 38 at 6 (PTAB Mar. 4, 2016)..... 9

Proppant Express Investments, LLC et al. v. Oren Technologies, LLC, IPR2017-01917, Paper 86 at 6-9 (PTAB Feb. 13, 2019)..... 9

Return Mail Inc. v. United States Postal Service (587 U.S. 618 (2019)..... passim

SharkNinja Operating LLC v. iRobot Corp., IPR2020-00734, Paper 11, at 18..... 8

TikTok Inc. v. Garland, 122 F.4th 930 (CADC 2024)..... 3, 4, 10

TikTok Inc. v. Garland, 145 S.Ct. 57, 69 (2025)..... 5

United States v. Lehigh Valley R. Co., 220 U.S. 257 (1911).....11

United States v. Reading Co., 253 U.S. 26 (1920).....11

Ventex Co., Ltd. v. Columbia Sportswear N. Am., Inc., IPR2017-00651, Paper 152 at 6 6

Statutes

35 U.S.C. § 311(a) 1, 11, 17

35 U.S.C. § 312(a) 1, 7, 8

35 U.S.C. § 315..... 8, 10

35 U.S.C. § 315(b) 9, 10, 18

35 U.S.C. § 315(c) 16

35 U.S.C. § 321(a) 1

37 C.F.R. § 42.104 8

37 C.F.R. § 42.106 8

37 C.F.R. § 42.8(a)..... 9

37 C.F.R. § 42.8(b)(1)..... 8

Patent Trial and Appeal Board Consolidated Trial Practice Guide 13 (Nov. 2019)..... 6

Trial Practice Guide, 77 Fed. Reg. 48,756, 48,759 (Aug. 14, 2012) 6

TABLE OF EXHIBITS

Number	Description
2001	Declaration of Pavan M. Gajendragad
2002	Petitioner's District Court Disclosures
2003	Cohen
2004	Harrison
2005	Joint Claim Construction Statement
2006	2007 CCNA Cisco Certified Network Association Study Guide
2007	WAPARCH
2008	MMS 1.0 Specification Excerpts
2009	IrDA - OBEX Version 1.3
2010	Book Excerpts
2011	'030 File Wrapper
2012	Book Excerpts
2013	'766 File Wrapper
2014	'121 Patent Notice of Allowance
2015	'381 Patent Notice of Allowance
2016	2003 Bluetooth Specification, Version 1.1
2017	Website Excerpts
2018	MIT Article
2019	Wikipedia Page
2020	Oracle Document

2021	Wikipedia Page
2022	Order
2023	Transcript of March 18, 2025 Call with Board
2024	Data Security Business Advisory – Department of Homeland Security, Office of Strategy, Policy and Plans. Also available at https://www.dhs.gov/sites/default/files/publications/20_1222_data-security-business-advisory.pdf
2025	"TikTok parent ByteDance has special stock owned by China's government. Here's how 'golden shares' give Beijing influence over the social-media giant." Business Insider, March 29, 2023. Also available at: https://markets.businessinsider.com/news/stocks/tiktok-ban-bytedance-golden-shares-chinese-government-communist-party-board-2023-3
2026	"TikTok, ByteDance, and their ties to the Chinese Communist Party," Submission to the Australian Senate Select Committee on Foreign Interference through Social Media, March 14, 2023.
2027	Brief of *Amici Curiae* Chairman of the Select Committee on the CCP John R. Moolenaar, Ranking Member Raja Krishnamoorthi, and Fifty-Five Members of Congress In Support of Respondent
2028	Senate Report No. 111-18 (2009)
2029	157 Cong. Rec. S5319 (daily ed. Sept. 6, 2011) (Sen. Leahy)

I. INTRODUCTION

Recent evidence from U.S. courts, government filings, and other recent public revelations demonstrates that the Chinese Communist Party ("CCP") exercises pervasive control over Petitioner's parent company ByteDance Ltd., holds a direct stake in the outcome of all its litigations (including this IPR), maintains a relationship that renders it the true orchestrator of all its litigation (including this IPR), and thus renders it a real party in interest ("RPI") in the present IPR. However, Petitioner failed to name the CCP as a RPI in the present IPR even though it was aware of the CCP's pervasive control over Petitioner.

Accordingly, Patent Owner respectfully requests that the Board issue an Order terminating the present proceeding and vacating the Decision on Institution in the present IPR based on two related bases. The first basis is Petitioner's failure to name the CCP as a RPI, as required under 35 U.S.C. § 312(a). The second basis is the Supreme Court ruling in *Return Mail Inc. v. United States Postal Service* (587 U.S. 618 (2019)), which held that a "sovereign," such as a federal agency, does not qualify under 35 U.S.C. §§ 311(a) and 321(a) as a "person" eligible to challenge a patent via an administrative patent review, such as an IPR.

For the reasons set forth below, Patent Owner asserts that TikTok is an entity controlled by a sovereign, and as such is not a "person" eligible to challenge a patent via an administrative patent review. Thus, the petition filed by Petitioner is fundamentally flawed and the present proceeding should be terminated.

II. THE CCP'S CONTROL OVER TIKTOK RENDERS IT AN RPI

A. Corporate Structure Ties TikTok to a Chinese Parent Company Subject to CCP Control

Petitioner has only identified TikTok Inc, ByteDance Inc., ByteDance, Ltd., ByteDance PTE, Ltd and TikTok PTE, Ltd. as real parties-in-interest. TikTok is a wholly owned subsidiary of ByteDance Ltd. ("ByteDance"), a global technology company headquartered in Beijing, China. Under Chinese law—specifically the National Intelligence Law of the People's Republic of China (2017) – "any organization or citizen shall support, assist and cooperate with the state intelligence work" and "keep the secrets of the national intelligence work from becoming known to the public." Exh. 2024 at 6. Thus, ByteDance, as a corporation based in the

People's Republic of China ("PRC")[1], is subject to mandatory cooperation with the Chinese Communist Party's intelligence and national security apparatus.

Indeed, according to the U.S. Department of Homeland Security, there are "PRC laws and initiatives that compel PRC firms and entities to secretly cooperate with PRC security and intelligence services." *Id*. at 2. "The PRC legal and economic system blurs the line between government and non-government entities by co-opting PRC firms to act as proxies and tools of the CCP." *Id*. at 6.

Further, the CCP has a "golden share" in ByteDance's main Chinese subsidiary, which provides the Chinese government with special rights to influence corporate governance. Exh. 2025. This includes the right to appoint board members and veto certain business decisions.

B. U.S. Courts Have Confirmed the CCP's Control Over TikTok Through Its Corporate Parent: ByteDance

In *TikTok Inc. v. Garland*, 122 F.4th 930 (CADC 2024), TikTok sought review of the constitutionality of the Protecting Americans from Foreign Adversary

[1] The People's Republic of China (PRC) is a one-party state under the sole control of the CCP. *See* https://www.scmp.com/news/china/politics/article/3133672/why-chinas-communist-party-inseparable-state

Controlled Applications Act ("Act"). In affirming the constitutionality of the Act, United States Court of Appeals for the District of Columbia Federal Circuit noted that

> [a]s it relates to TikTok in the United States, the Government predicts that ByteDance and TikTok entities "would try to comply if the PRC asked for specific actions to be taken to manipulate content for censorship, propaganda, *or other malign purposes* on TikTok US." The Government says that ByteDance, which is subject to PRC laws requiring cooperation with the PRC, could do so by acting unilaterally *or by conscripting its U.S. entities*.

Garland, 122 F.4th at 954-955 (emphasis added). With regards to the conclusion that ByteDance and TikTok entities would try to comply if the PRC asked for specific actions to be taken, the Court noted that this is "evidenced by the fact that the PRC maintains a powerful Chinese Communist Party committee 'embedded in ByteDance' through which it can 'exert its will on the company.' *Id*. at 955. The Court noted that "[a]s of 2022, that committee 'was headed by the company's chief editor and comprised <u>at least 138 employees</u> at its Beijing office, including senior company managers." *Id.* (emphasis added).

With regards to the conclusion that ByteDance (if instructed by the PRC to take certain actions) could act unilaterally *or by conscripting U.S. entities*, such as TikTok, the Court noted that this "is supported by the fact that TikTok's U.S. operations are 'heavily reliant' on ByteDance. As TikTok's declarants have put it, 'TikTok in the United States is an integrated part of the global platform' supported by teams 'spread across several different corporate entities and countries," and TikTok is "highly integrated with ByteDance.' *Id*.

With regards to the evidence the Court relied on, it noted that "[t]he resulting judgment of the Congress and the Executive regarding the national security threat posed by the TikTok platform 'is entitled to significant weight, and we have persuasive evidence [in the public record] before us to sustain it.'" *Id*. (*citing Holder v. Humanitarian Law Project*, 561 U.S. 1, 36 (2010)).

The **U.S. Supreme Court affirmed** the CADC's ruling on January 17,2025 and, in doing so, noted that "[t]he Act's prohibitions and divestiture requirement are designed to prevent China – a designated foreign adversary – from *leveraging its control over ByteDance Ltd. . . . .*" *TikTok Inc. v. Garland*, 145 S.Ct. 57, 69 (2025) (emphasis added).

C. The CCP is a Real Party in Interest

Whether a non-party is a real party in interest is a "highly fact-dependent question." *Ventex Co., Ltd. v. Columbia Sportswear N. Am., Inc.,* IPR2017-00651, Paper 152 at 6 (quoting Trial Practice Guide, 77 Fed. Reg. 48,756, 48,759 (Aug. 14, 2012)); *see also* Patent Trial and Appeal Board Consolidated Trial Practice Guide 13 (Nov. 2019) ("Whether a party who is not a named participant in a given proceeding nonetheless constitutes a 'real party-in-interest' or 'privy' to that proceeding is a highly fact-dependent question").

In *Applications in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336 (Fed. Cir. 2018) ("*AIT*"), the Federal Circuit stated that: "[d]etermining whether a non-party is a 'real party in interest' demands a flexible approach that takes into account both equitable and practical considerations, with an eye toward *determining whether the non-party is a clear beneficiary that has a preexisting, established relationship with the petitioner*." *AIT*, 897 F.3d at 1351 (emphasis added).

As discussed *supra*, the CCP unequivocally not only has an established relationship with Petitioner TikTok, but it exercises pervasive control over TikTok

via TikTok's parent ByteDance. This makes the CCP a clear beneficiary of the present IPR.

For example, the CCP can use the IPR process as a tool of geopolitical leverage and economic interference. To wit, many Chinese controlled companies, such as TikTok, operate in strategic sectors (*e.g.*, telecommunications, defense, biotechnology) and the CCP may use IPRs, such as the present IPR, to invalidate U.S. patents as part of a broader state-sponsored industrial policy. Indeed, the CCP's involvement in intellectual property matters is well documented. *See* Exh. 2026 at 54-55 (discussing party-state control of ByteDance intellectual property).

For at least these reasons, the CCP is a RPI in the present IPR.

D. The Present IPR Should Be Terminated and the Decision on Institution Should Be Vacated

The present IPR should be terminated and the Decision on Institution should be vacated based on Petitioner's failure to name the CCP as a RPI, as required under 35 U.S.C. § 312(a).

The implementing regulations that carry out this statutory scheme state that a petition must identify all RPIs and that "no filing date will be accorded" to an

incomplete petition, such as one that fails to identify all RPIs. *See* 37 C.F.R. § 42.8(b)(1); 37 C.F.R. § 42.104; and 37 C.F.R. § 42.106.

Certain Board decisions suggest there is an exception to these rules. Those cases permit petitioners to update their identification of RPI without changing the filing date "[a]bsent any indication of an attempt to circumvent estoppel rules, a petitioner's bad faith, or prejudice to a patent owner caused by the delay." *Elekta, Inc. v. Varian Med. Sys., Inc.*, IPR2015-01401, Paper 19 at 9 (PTAB Dec. 31, 2015); *see also Aerospace Commc'ns Holdings Co., Ltd. v. The Armor All/Step Prods. Co.*, IPR2016-00441, Paper 12 at 9 (PTAB June 28, 2016) (adding "gamesmanship"). More recently, the Board has held that it need not consider whether an unnamed party is a RPI when the addition of that party "would not create a time bar or estoppel under 35 U.S.C. § 315." *SharkNinja Operating LLC v. iRobot Corp.*, IPR2020-00734, Paper 11, at 18.

These decisions cite the precedential *Lumentum* decision, but that case does not implicate 35 U.S.C. § 312(a) or the filing date regulations. There was no dispute in *Lumentum* that the Petition, when filed, identified all RPI, "and, therefore, the Petition was complete, was properly accorded a filing date, and was available to be

'considered' under § 312(a)." *Lumentum Holdings, Inc. v. Capella Photonics, Inc.*, IPR2015-00739, Paper 38 at 6 (PTAB Mar. 4, 2016). Petitioner merely needed to update its mandatory notices to identify entities that became RPI *after* the petition was instituted, pursuant to 37 C.F.R. § 42.8(a). *Id.* at 2-3, 5. In the present IPR, however, Petitioner failed to identify all RPI *when the Petition was filed*.

In permitting a petitioner to amend its identification of real parties in interest while maintaining the original filing date, panels of the Board have looked to whether there have been: (1) attempts to circumvent the § 315(b) bar or estoppel rules; (2) bad faith by the petitioner; (3) prejudice to the patent owner caused by the delay, or (4) gamesmanship by the petitioner. *Proppant Express Investments, LLC et al. v. Oren Technologies, LLC*, IPR2017-01917, Paper 86 at 6-9 (PTAB Feb. 13, 2019) (*citing Aerospace Communications Holdings Co. v. Armor All/Step Products Co.*, IPR2016-00441, slip op. 3 (PTAB June 28, 2016) (Paper 12)).

In the present case, the failure to name the CCP as a RPI was: (a) in bad faith; and (b) gamesmanship on the part of Petitioner given their knowledge of the CCP's control. The U.S. House Select Committee on the CCP called out this bad faith and gamesmanship in a Brief of *Amici Curiae* filed in support of Respondent in the

Garland case. Exh. 2027 at 15 ("'TikTok's **misrepresentation**' about its corporate structure that 'undermine[d] longstanding claims by TikTok's management that the company's operations were firewalled from the CCP's demands" (emphasis added)).

Further, this failure was prejudicial to Patent Owner, as it deprived Patent Owner of the opportunity to make arguments to the Board regarding the applicability of *Return Mail* prior to an institution decision (as discussed *infra*).

In addition, although the addition of the CCP would not create a time bar or estoppel under 35 U.S.C. § 315, Patent Owner asserts that the addition of the CCP as a RPI would make Petitioner ineligible to challenge a patent via an administrative patent review under *Return Mail* (as discussed *infra*), *and would thus be as dispositive as a time bar under 35 U.S.C. § 315*.

This mandates that the filing date of the present Petition be changed, making the Petition filing date well past the one-year bar under 35 U.S.C. § 315(b). Accordingly, the present IPR should be terminated and the Decision on Institution should be vacated.

III. TIKTOK IS BARRED FROM FILING AN IPR BASED ON THE SUPREME COURT'S RULING IN RETURN MAIL

A. The America Invents Act Permits Only "Persons" to File IPR Petitions, and Foreign Government-Controlled Corporations Do Not Qualify

The America Invents Act (AIA), 35 U.S.C. § 311(a), permits a "person who is not the owner of a patent" to file a petition for inter partes review (IPR). The statute does not define "person." However, in *Return Mail*, the Supreme Court held that the term "person" presumptively excludes sovereign entities, including the federal government, *absent a clear statutory indication to the contrary*. *Return Mail*, 587 U.S. at 626.

"It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement." *Anderson v. Abbott*, 321 U.S. 349, 362-363 (1944) (*citing United States v. Lehigh Valley R. Co.*, 220 U.S. 257 (1911); *Chicago, M. & St. p. Ry. Co. v. Minneapolis Civic & Commerce Assoc.*, 247 U.S. 490 (1918); *United States v. Reading Co.*, 253 U.S. 26 (1920)). *See also Chicago, M. & St. P. Ry. Co. v. Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490, 501 (1918) ("the courts will not permit themselves to be blinded or deceived by mere forms of law" but will deal

"with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.").

In *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 630 (1983), the Supreme Court concluded that, although government instrumentalities incorporated as juridical entities distinct from their sovereign should normally be treated as such, the presumption of separate treatment can be overcome in cases of extensive control or where separate treatment would result in fraud and injustice. "Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy." *Id.* at 630.

Accordingly, where a corporation (such as TikTok) is owned, directed, or significantly influenced by a foreign government, it should be treated as the sovereign itself for purposes of statutory interpretation. As discussed *supra*, the CCP exercises pervasive control over TikTok. Further, allowing TikTok to benefit from its separate status vis-à-vis the CCP would defeat overriding public policy and create inequity, as discussed in more detail *infra*. Thus, TikTok should be treated as the CCP itself for purposes of statutory interpretation.

Applying the presumption in *Return Mail*, Congress did not *clearly authorize* foreign governments to file IPRs. Therefore, treating TikTok as the CCP itself for purposes of statutory interpretation (as required under *First Nat. City Bank*), it falls outside the category of "persons" permitted to file under § 311, and should not be permitted to act as a proxy challenger in the present IPR.

B. Allowing Foreign Government–Controlled Corporations to Use IPRs Invites Strategic Abuse and Undermines the Integrity of the U.S. Patent System

Post-grant proceedings, such as an IPR, were designed as a cost-effective, apolitical mechanism for resolving patent validity disputes between private parties. Allowing foreign government-controlled actors to use this forum risks converting it into a tool of geopolitical leverage and economic interference.

As noted *supra*, many foreign government-controlled entities operate in strategic sectors (e.g., telecommunications, defense, biotechnology) and may use IPRs to invalidate U.S. patents as part of a broader state-sponsored industrial policy. This presents a significant risk of abuse, particularly in adversarial contexts. Unlike private companies, foreign government-controlled entities may not be motivated by

market incentives, but rather by state objectives, including economic espionage or suppression of U.S. technological advantages.

C. Congress Has Not Clearly Authorized Foreign Government-Controlled Entities to Access IPR, and Courts Should Apply the Clear Statement Rule

Courts apply the clear statement rule to ensure that Congress does not inadvertently authorize extraordinary consequences – such as empowering sovereign governments to engage in domestic adjudicatory or regulatory processes – through ambiguous statutory language.

As discussed *supra*, in *Return Mail* the Supreme Court held that the federal government is not a "person" who may petition for IPR or CBM review, *citing the absence of a clear statement from Congress*. *Return Mail*, 587 U.S. at 626. If the United States itself is not a "person" for purposes of the AIA, then *a fortiori*, a foreign sovereign-controlled entity – which presents even more serious issues of jurisdiction, diplomacy, and sovereignty—is not a "person" under the statute in view of the absence of a clear statement from Congress that "person" includes a foreign sovereign-controlled entity. *Return Mail's* reasoning is directly applicable and controlling.

Further, the legislative record confirms that Congress designed the IPR process primarily to enable *private parties*, especially those threatened with infringement suits, to efficiently challenge potentially invalid patents:

- The Senate Report accompanying the AIA emphasizes that it "is designed to establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs." Exh. 2028 at 3.
- Statements during floor debates reference the *burdens faced by private-sector actors*, such as small businesses and innovative startups, but do not contemplate sovereign participation. *See, e.g.*, Exh. 2029.
- Congress showed a clear intent to preserve judicial review and due process rights for patent owners facing challenges from private competitors—not governments with diplomatic or geopolitical interests.

Simply put, if a United States agency is not considered a "person" eligible to bring an IPR action, then it was known to TikTok that with a proper disclosure under Section 311, there was no possibility that the PTAB would implement an IPR for the CCP.

IV. CONCLUSION

For at least the reasons set forth above, the present IPR should be terminated and the Decision on Institution vacated.

Date: April 17, 2025

Respectfully submitted,

By: */René A. Vazquez/*
René A. Vazquez (Lead Counsel)
Reg. No. 38,647
M. Scott Fuller (Backup Counsel)
Reg. No. 54,716

Counsel for Patent Owner

CERTIFICATION OF SERVICE

Pursuant to 37 C.F.R. §§ 42.6(e) and 42.105(b), the undersigned certifies that on April 17, 2025, a copy of the foregoing document was served by electronic mail on the following:

Lead Counsel

W. Karl Renner, Reg. No. 41,265
Fish & Richardson P.C.
60 South Sixth Street
Minneapolis, MN 55402
Tel: 202-783-5070
Fax: 877-769-7945
Email: IPR50048-0057IP1@fr.com

Back-Up Counsel

Kim H. Leung, Reg. No. 64,399
Baile Xie, Reg. No. 78,380
Fish & Richardson P.C.
60 South Sixth Street
Minneapolis, MN 55402
Tel: 202-783-5070
Fax: 877-769-7945
IPR50048-0057IP1@fr.com

Dated: April 17, 2025

By: */René A. Vazquez/*
René A. Vazquez (Lead Counsel)
Reg. No. 38,647
M. Scott Fuller (Backup Counsel)
Reg. No. 54,716

Counsel for Patent Owner