

**IN UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD**

SAMSUNG ELECTRONICS CO., LTD. AND
SAMSUNG ELECTRONICS AMERICA, INC.

Petitioners,

v.

MAXELL, LTD.,
Patent Owner

Case: IPR2024-00828

U.S. Patent No. 8,982,086

PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW

Mail Stop **Patent Board**
Patent Trial and Appeal Board
U.S. Patent and Trademark Office
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PATENT OWNER'S EXHIBIT LIST

Description	Exhibit #
1st Amended Docket Control Order from District Court Litigation	2001
Original Docket Control Order from District Court Litigation	2002
Maxell's Supplemental Preliminary Election of Asserted Claims	2003
Defendants' Preliminary Election of Prior Art	2004

TABLE OF AUTHORITIES

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Cases

<i>Adaptics Ltd. v. Perfect Co.</i> , IPR2018-01596, Paper 20 (PTAB March 6, 2019)	4
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Statutes

35 U.S.C. § 325(d)	<i>passim</i>
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I. INTRODUCTION

The Petition represents a textbook example of when denial under 35 U.S.C. § 325(d) is appropriate based on the *Advanced Bionics* two part framework. *Advanced Bionics, LLC v. Med-El Elektromedizinische Geräte GMBH*, IPR2019-01469, Paper 6 (PTAB Feb. 13, 2020) (precedential) (“*Advanced Bionics*”) However, the Board raised Patent Owner's burden for Part 1, removed Petitioner's burden for Part 2 by collapsing Part 2 into the institution standard, and granted institution. This approach ignores the standard set forth in the precedential *Advanced Bionics* decision and renders §325(d) and prior reexamination proceedings meaningless. Director Review is necessary to correct the Board's abuse of discretion and restore §325(d) to its intended form—a commitment to defer to prior office examination.

First, the Board abused its discretion and applied a heightened standard to Patent Owner inconsistent with the Board's precedent when analyzing the Petition under 35 U.S.C. § 325(d) based on Part 1 of *Advanced Bionics*. The '086 Patent was (1) initially examined by the PTO, (2) underwent subsequent reexamination, and (3) now faces the present proceeding. In its preliminary response (POPR), Patent Owner demonstrated that Part 1 of *Advanced Bionics* was met because the asserted art was the same or substantially the same as art presented (and considered) during reexamination. POPR at 2-12. As a result, Petitioner was required to demonstrate material error under Part 2. But Patent Owner also demonstrated how Petitioner

failed to meet its burden. *Id.* at 13. Yet, the Board instituted anyway noting that the Petition satisfied “the compelling merits standard” Institution Decision (“ID”) at 47 (quoting Pet. at 81) and absolved Petitioner of demonstrating material error under Part 2. In so doing, the ID failed to apply the Board’s standard regarding Part 2 to Petitioner and devalued the reexamination process.

Second, facilitating this abuse of discretion was the Board’s approach to the §325(d) analysis. The Board’s approach represents an important question of law and policy regarding the consistent application of §325(d) and the treatment of the reexamination process: is the question of discretionary denial under §325(d) a threshold matter that must be resolved first or is the second prong of the *Advanced Bionics* test satisfied whenever the Board agrees with a Petition’s grounds? Here, the Board’s consideration of the Petition’s merits first and then consideration of §325(d) is plainly wrong—it replaces Part 2 with the institution standard. Substantively considering a petition’s argument before determining whether to exercise discretion under §325(d) leads to an abuse of discretion because IPR will be instituted in all cases in which a panel believes a petition shows a reasonable likelihood of success. This is particularly egregious where, as here, the Office previously addressed the same or substantially the same art and arguments raised by the petition in reexamination proceedings but reached a different conclusion. The Board’s approach here renders *Advanced Bionics* virtually meaningless by failing to

afford deference to past Office findings. Mere disagreement with the Office cannot possibly demonstrate a material error, particularly where showing Part 2 is Petitioner's burden.

Third, the Board abused its discretion by instituting this IPR because the ID rests on clearly erroneous fact finding on the merits, where the Board arbitrarily manufactured arguments for both Patent Owner and Petitioner that have no basis in the record. In particular, regarding claim element 1[f], the Board criticizes Patent Owner in claiming "all of Patent Owner's arguments are directed against Rogers." ID at 31. But this is not supported in the record. With regard to this same element, the Board shifted the burden onto Patent Owner and ignored the Petition's utter lack of evidence with respect to the claimed registering modes. The Board's introduction of new arguments and evidence to remedy the Petition's deficiencies violates the well-established requirement that the Petition set forth its entire case in chief at the time of filing. *See Adaptics Ltd. v. Perfect Co.*, IPR2018-01596, Paper 20, at 15-16 (PTAB March 6, 2019) (informative). The Board abused its discretion and ignored the actual arguments and evidence that the Petition raised, and instead substituted its own reasoning and evidence to fill the Petition's gaps. The ID thus presents erroneous findings of fact regarding the prior art and involves a record that contains no evidence on which the Board could rationally base its decision. Director review is also necessary to address this abuse of discretion.

II. LEGAL STANDARD

“Requests for Director Review of the Board’s decision whether to institute an AIA trial ... shall be limited to decisions presenting (a) an abuse of discretion or (b) important issues of law or policy.” USPTO, Director Review Process, Sec. 2.B., <https://www.uspto.gov/patents/ptab/decisions/director-review-process>. “An abuse of discretion is found if [a] decision: (1) is clearly unreasonable, arbitrary, or fanciful; (2) is based on an erroneous conclusion of law; (3) rests on clearly erroneous fact finding; or (4) involves a record that contains no evidence on which the Board could rationally base its decision.” *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1367 (Fed. Cir. 2016) (internal citation omitted).

III. BACKGROUND OF THE PATENT AND PROSECUTION HISTORY

The '086 Patent is generally directed to a “portable terminal” to enable various operations including tapping, dragging, flicking, pinching, and unlocking based on different types of input provided to the touch interface of the portable terminal. Ex. 1001, 3:39-49. The '086 Patent was thoroughly reexamined by the PTO as Reexamination Request No. 90/014,638, which resulted in a Reexamination Certificate issued on September 28, 2021. Ex. 1004 at 3-4. All original claims were confirmed and claims 5-15 were added during reexamination. Additionally, the '086 Patent’s parent—U.S. Patent No. 8,654,093—went through extensive reissue proceedings. *See generally* Ex. 1005.

Here, the IPR-asserted art is “the same or substantially the same” because two of the references—Rogers and Rosenberg—as admitted by Petitioner, were previously presented to and considered by the Office during reexamination of the '086 Patent. Ex. 1004 at 30-33; 77-79; 85-98; 158-162; 176-271. Rogers and Rosenberg were also considered during the parent reissue proceedings. *See* Ex. 1005 at 83; 573. Rogers is the main reference for all four grounds presented in the Petition.

IV. ARGUMENT

The Board abused its discretion by (1) applying an incorrect standard in its 35 U.S.C. §325(d) analysis and (2) making erroneous findings regarding the prior art with no basis in the record to find the asserted art teaches all the limitations of Claim 1. Moreover, important issues of law and policy highlight the Board's approach to 35 U.S.C. §325(d) was incorrect.

A. The Board Abused Its Discretion By Applying An Incorrect Standard For Discretionary Denial under 35 U.S.C. § 325(d) And Devaluing the Reexamination Process

The Board abused its discretion by not applying the correct standard in its 35 U.S.C. § 325(d) analysis by raising the standard for Part 1 and shifting the burden of Part 2 from Petitioner to Patent Owner. As a result, the ID renders the reexamination process meaningless and results in an inconsistent application of *Advanced Bionics*.

Under *Advanced Bionics*, PTAB employs a framework that “reflects a **commitment to defer to previous Office evaluations** of the evidence of record

unless material error is shown.” *Advanced Bionics* at 8. *Advanced Bionics* dictates that whether the Board should exercise its discretion under 35 U.S.C. § 325(d) to deny institution is a threshold issue to be addressed *first* because “it is dispositive of [the] decision whether to institute *inter partes* review.” *Id.* The Director has made clear that the Board should first consider §325(d) discretionary denial and only address the merits of the petition if that does not apply. *Id.* at 6-7; *see also* *Wolfspeed, Inc. v. The Trustees of Purdue University*, IPR2022-00761, Paper 13 at 3 (P.T.A.B. Mar. 30, 2023) (“**If** the Board determines that it should not exercise its discretion to deny institution of *inter partes* review under §325(d), **then** the Board should address the remaining issues raised in the Petition and Preliminary Response to determine whether to institute an *inter partes* review.”) (emphasis added).

Based on this framework, the Director will discretionarily deny institution when: (1) “the same or substantially the same art previously **was presented** to the Office or whether the same” or “the same arguments previously were **presented** to the Office”; and (2) the **petitioner does not** “demonstrate[] that the Office erred in a manner material to the patentability of challenged claims.” *Advanced Bionics* at 6-7 (emphasis added).

1. Part 1 of *Advanced Bionics* Was Met

For Part 1 of the *Advanced Bionics* framework, the Board first evaluates *Becton Dickinson* factors (a), (b), and (d). *Advanced Bionics* at 10. If it is determined

that the same or substantially the same art or arguments **were previously presented** to the USPTO, then under Part 2 the Board considers factors (c), (e), and (f) to assess “**whether the petitioner has demonstrated a material error by the Office**” in its prior consideration of that art or arguments. *Id.* Factor (c) evaluates “the extent to which the asserted art was evaluated during examination, including whether the prior art was the basis for rejection and factor (e) evaluates “whether Petitioner has pointed out sufficiently how the Examiner erred in its evaluation of the asserted prior art.” Petitioner never addressed either of these factors and the Board improperly raised the standard for Part 1 by requiring Patent Owner to address factor (c) in Part 1.¹

The POPR demonstrated Part 1 was met—the IPR-asserted art is “the same or substantially the same” because two of the references—Rogers and Rosenberg—as *admitted by Petitioner*, were previously presented to (and considered by) the Office during reexamination of the '086 Patent. POPR at 4 (citing Ex. 1004 at 30-33; 77-79; 85-98; 158-162; 176-271). Rogers and Rosenberg were also considered during the parent reissue proceedings. *Id.* (citing Ex. 1005 at 83; 573).

The POPR extensively highlighted how Rogers and Rosenberg were previously presented to the Office. POPR at 5-10. Even the Petition admits that the

¹ Notably, Patent Owner *did* address the extent to which the art was considered and Board failed to accord it appropriate weight. *See* POPR at 4-13.

Office considered Rogers and Rosenberg. Paper 1 at 80. “Previously presented art includes art made of record by the Examiner, and art provided to the Office by an applicant, such as on an Information Disclosure Statement (IDS), in the prosecution history of the challenged patent.” *Advanced Bionics* at 7-8. Yet, the Board found:

none of the cited pages show that Rogers or the combination of Rogers and Rosenberg was given any consideration by the Office during the reexamination of the '086 Patent. Indeed, the only references to Rogers in the file history of the reexamination of the '086 patent that the Patent Owner directs our attention to are found in two paragraphs of a lengthy declaration (96 pages, 104 numbered paragraphs) submitted by the requestor of the reexamination.

ID at 46. While this may be relevant under Factor (c) in Part 2 (which Petitioner never addresses), Rogers and Rosenberg were clearly previously presented to the Office, and substantively cited during the reexamination proceedings as set forth by Patent Owner, satisfying Part 1. POPR at 5-10. It was therefore an abuse of discretion for the Board to (1) discount these references in the reexamination proceeding, (2) assume the Examiner simply failed to give any consideration to Rogers and Rosenberg—with no support for such a statement in the record or the Petition, and (3) require that the Examiner to explicitly “consider” Rogers and Rosenberg in order to find that the references were previously presented to the Office under Part 1. *See Clim-A-Tech Ind., Inc. v. William A. Ebert*, IPR2017-01863, Paper 13, at 18-19

(PTAB Feb. 12, 2018) (denying institution even though the 'Examiner did not base a rejection' on the reference asserted in the petition); *Biocon Pharma Ltd. v. Novartis Pharm. Corp.*, IPR2020- 01263, Paper 12, 9 (PTAB Feb. 16, 2021) (holding that cited but unapplied references supported denying institution); *Sony Interactive Entm't LLC v. Terminal Reality, Inc.*, IPR2020-00711, Paper 15, at 11 (PTAB Oct. 13, 2020) (finding reference was previously considered by the PTO because it was listed in the Examiner's Notice of References Cited).

The Board did not stop there. Instead, it found **"Patent Owner has not established that Rogers**, the primary reference relied on in all the asserted grounds in the Petition (see Pet. 1), **was 'previously fully considered by the Office'"** for Part 1. ID at 47 (emphasis added). Requiring Patent Owner to establish Rogers was **"previously fully considered** by the Office" is an abuse of discretion insofar as the Board heightened the standard for Part 1 rather than analyzing whether Rogers and Rosenberg were **"previously presented** to the Office" as *Advanced Bionics* requires.

Compounding this abuse, the Board failed to address Patent Owner's argument that Rogers is merely cumulative to Bayram—the primary reference utilized during the reexamination. POPR at 7-8. Like Rogers here, Bayram was used in combination with Rosenberg in the reexamination proceedings. *Id.* (citing Ex. 1004 at 153-162). In the reexamination proceedings, the third-party requestor's expert described to the Examiner the interrelatedness of Bayram and Rogers as these

references purportedly related to Claim element 1[e]. *Id.* (citing Ex. 1004 at 234-235).

The Board also failed to address Rosenberg's thorough consideration during reexamination. POPR at 9-10 (citing Ex. 1004 at 30-33; 77-79; 85-98; 158-162; 257-271). As stated in the POPR, Petitioner uses Rosenberg in substantially the same way as the third-party requestor used Rosenberg in the reexamination proceedings for Claim element 1[f] to fill in the gaps in Rogers and Bayram. POPR at 9-10.

The Board also completely ignored Patent Owner's argument and evidentiary support that the remaining references—Rekimoto and Miyazawa—are cumulative of those previously presented to the Office. The POPR showed how Miyazawa is cumulative to at least Aguera-Arcas and Wang (POPR at 10-12) and how Rekimoto is cumulative to at least Rosenberg (POPR at 12-13).

If Patent Owner's overwhelming evidence for meeting Part 1 was not enough, it is unclear how Part 1 of *Advanced Bionics* could ever be met.

2. Petitioner Failed to Meet Its Burden Under Part 2

Patent Owner provided overwhelming evidence that Part 1 was met for all of the asserted art. As a result, Petitioner was required to demonstrate material error under Part 2. Petitioner failed to meet its burden—the Petition is silent on this point and thus Petitioner fails to demonstrate “that the Office erred in a manner material

to the patentability of the challenged claims,” as required under Part 2 and denial of institution was appropriate. *Advanced Bionics* at 6-7.

“If a condition in the first part of the framework is satisfied and the petitioner fails to make a showing of material error, the Director generally will exercise discretion not to institute [] review.” *Albany Int’l Corp. v. Kimberly-Clark Worldwide, Inc.*, PGR2021-00019, Paper 22, 8-9 (PTAB June 22, 2021) (denying institution). Petitioner fails to even state any alleged material error by the Office. Petitioner’s failure to address Part 2 should have ended the inquiry and resulted in denial of institution under §325(d). The Board abused its discretion in finding otherwise.

To evaluate material error, the Board weighs *Becton Dickinson* factors (c), (e) and (f). **The Petition does not reference any of these factors**, let alone analyze them. *Vital Connect, Inc. v. Bardy Diagnostics, Inc.*, IPR2023-00381, Paper 7, 20 (PTAB July 11, 2023) (“[W]hile there are no ‘magic words’ necessary to address material error, Petitioner’s alleged grounds of unpatentability cannot establish material error per se under our binding precedent. . . . Otherwise, the reasonable likelihood standard of § 314(a) and the second part of the *Advanced Bionics* framework (‘material error’) would collapse into one.”). Thus, with respect to Part 2 of the *Advanced Bionics* framework, the Board abused its discretion by not requiring Petitioner to show material error. The Petition fails to show material error

with respect to the previously considered references—Rogers and Rosenberg. Pet. at 80. Yet, instead of placing the burden squarely on Petitioner for Part 2, the Board shifted the burden to Patent Owner, finding “no evidence that any of the Examiners handling these matters appreciated that the art cited in this proceeding taught all the elements of any challenged claim, particularly claim 1.” ID at 47-48. The Board abused its discretion.

B. The Board's Inconsistent Application of 35 U.S.C. § 325(d) And Treatment Of The Reexamination Process Represents Important Issues of Law and Policy

The Board's approach to 35 U.S.C. § 325(d) put the cart before the horse. Here, the Board substantively considered the petition's arguments before addressing the threshold issue of whether to exercise its discretion under §325(d). Such an approach lead to an erroneous conclusion of law respecting discretionary denial where it instituted the IPR based on a reasonable likelihood of success despite Patent Owner demonstrating Part 1 of *Advanced Bionics* and Petitioner failing to address Part 2. Such an approach renders *Advanced Bionics* meaningless. Mere disagreement by the Board with the Office cannot possibly show that a material error occurred. If it did, the underlying purpose of *Advanced Bionics* and §325(d)—affording deference to past Office findings—would be negated. In other words, because the Board preliminary agreed with the grounds presented in the petition, it determined

the Office necessarily made a material error even though it never explained what that error was or required Petitioner to establish that error under Part 2.

The test set forth in *Advanced Bionics* is meant to “reflect[] a commitment to ***defer to previous Office evaluations*** of the evidence of record unless material error is shown.” *Advanced Bionics* at 9 (emphasis added). It was an abuse of discretion and an error of law for the Board to substitute its own judgment for the Office’s prior finding without either Petitioner or the Board identifying any material error with that earlier determination. As a result, the ID collapses Part 2 into the institution standard and misapplies the *Advanced Bionics* test. *Vital Connect, Inc.*, IPR2023-00381, Paper 7, 20. Director Review is necessary as a matter of policy to restore *Advanced Bionics* and §325(d) to the threshold inquiry it was created to address.

C. The Board Abused Its Discretion By Glossing Over The Significant Gaps In Evidence In The Petition And Making Erroneous Findings of Fact Having No Basis In The Record

The Board also abused its discretion in finding Petitioner satisfied its burden with respect to claim element 1[f] because the record contains no evidence on which the Board could rationally base its decision. Claim element 1[f] recites a registering mode where “in said registering mode, there are provided a first registering mode for inputting input information by a pad of the finger, and a second registering mode for inputting input information by an end of the finger, and said second information relating to the identification of the user is produced upon basis of the input

information, which is inputted at least in the first or second mode.” But Rogers or the Rogers-Rosenberg combination does not disclose two registering modes. POPR at 30.

The Board correctly notes that Patent Owner argues that the cited art fails to teach two registering modes. ID at 31. But the Board erred in ignoring the Petition's failure to show that Rosenberg has registering modes, instead contending that “all of Patent Owner's arguments are directed against Rogers.” For both Grounds 1 and 3, Petitioners contend that Rogers alone renders obvious claim element 1[f]. The Petition's addition of Rosenberg (Ground 1) and Rekimoto (Ground 3) for this claim element is merely “[t]o the extent PO argues that Rogers does not fully disclose limitation [1f] because Rogers does not explicitly recite the use of finger pad and fingertip inputs....” **The Petition provides no evidence** that Rosenberg or Rekimoto disclose registering modes. POPR at 30 n.2; *see also* Paper 1 at 36-38 (Rosenberg), 68-71 (Rekimoto).

Yet, again, the Board abused its discretion by misstating Patent Owner's arguments in a manner that overlooked and failed to address the actual rational set forth in the POPR. The Board states “Patent Owner acknowledges that, in a context analogous to the claim invention, Rosenberg teaches two modes—a first fingertip interaction mode and a second finger pad interaction mode.” ID at 32. The Board then further shifted the burden to Patent Owner: “As Patent Owner's argument fails

to adequately address the combined teachings of Rogers and Rosenberg and is inconsistent with Patent Owner's own description of the cited art, we determine that this argument lacks merit." *Id.* The Board makes the same error with respect Ground 3 and the Petition's failure of proof with respect to Rekimoto. *Id.* at 40.

In so doing, the Board overlooked Patent Owner's explicit arguments that Rogers or the Rogers-Rosenberg/Rogers-Rekimoto combination does not disclose two registering modes. POPR at 30. For support, Patent Owner cited to the expert declaration of Jacob Wobbrock, offered in the reexamination proceedings, on why Rogers fails to disclose two registering modes. *Id.* at 33-35. The Board abused its discretion by ignoring this evidence, and shifting the burden away from Petitioner by ignoring the Petition's complete lack of evidence with respect any registering modes in Rosenberg or Rekimoto. Instead, the Board blamed Patent Owner for focusing on Rogers and then the Board backfilled the evidence absent in the Petition and found that Rogers/Rosenberg and Rogers/Rekimoto disclose the claimed two registering modes.

V. CONCLUSION

For at least the foregoing reasons, Director Review of the Institution Decision is warranted because the Board's burden-shifting decision amounts to an impermissible abuse of discretion. Additionally, this request presents important issues of law and policy that also merit Director Review.

Patent No. 8,982,086
Patent Owner's Request for Director Review

Dated: November 18, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November, 2024, a copy of the attached PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW, together with all exhibits was served by electronic mail to the attorneys of record, at the following addresses:

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Respectfully submitted,

Date: November 18, 2024

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