

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

EARLY WARNING SERVICES, LLC,

Petitioner,

v.

INTELLECTUAL VENTURES II, LLC,

Patent Owner.

Case No. IPR2024-01221

U.S. Patent No. 7,314,167

PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW

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I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.71(d) and § 42.75(c), Patent Owner respectfully requests Director Review of the Board’s decision granting institution of *inter partes* review (Paper 10). This case presents the following legal issues:

(i) whether the Board exceeded its authority under the statute by basing a decision finding a reasonable likelihood that Petitioner would prevail and instituting an *inter partes* review on evidence not set forth in the petition, but which was submitted by Petitioner subsequent to the filing of the petition; and

(ii) whether the Board violated Patent Owner’s due process rights and acted in an arbitrary and capricious manner by granting Petitioner leave to file a pre-institution reply as well as supplemental evidence, without giving Patent Owner a full and fair opportunity to be heard, and without following the motion procedure set forth in the rules.

Under 35 U.S.C. §314(a), “[t]he Director may not authorize an *inter partes* review to be instituted unless the Director determines that the information presented in the petition ... shows that there is a reasonable likelihood that the petitioner would prevail.” Here, after Patent Owner filed its preliminary response (Paper 6), Petitioner requested leave to file a pre-institution reply and subsequently requested leave to submit supplemental evidence. Over Patent Owner’s objections, and without following the rules that would have afforded Patent Owner an opportunity to be

heard, the Board granted Petitioner's requests. Petitioner then filed its pre-institution reply together with over 300 pages of new exhibits and an 11 page Supplemental Declaration from Petitioner's expert. In the institution decision, the Board relied on Petitioner's post-petition evidence in making its findings that the petition had presented a reasonable likelihood that the Petitioner would prevail. This aspect of the Institution Decision cannot be reconciled with the statutory requirement that an institution decision be based on "the information presented in the petition" 35 U.S.C. 314(a).

II. STATUTORY THRESHOLD FOR INSTITUTION

The statute sets forth the requirements of a petition, including the requirement that the petition itself identify with particularity the evidence that supports the grounds for each challenge:

(a) REQUIREMENTS OF PETITION.—A petition filed under section 311 may be considered only if— ...

(3) the petition identifies, in writing and with particularity, each claim challenged, the grounds on which the challenge to each claim is based, and the evidence that supports the grounds for the challenge to each claim, including—

(A) copies of patents and printed publications that the Petitioner relies upon in support of the petition; and

(B) affidavits or declarations of supporting evidence and opinions, if the Petitioner relies on expert opinions ... 35 U.S.C. §311(a) (emphasis added).

Having set forth the requirement that the petition itself identify the evidence that supports the grounds, the statute provided that the threshold for institution must be met by the evidence presented in the petition:

(a) Threshold. The Director may not authorize an inter partes review to be instituted unless the Director determines that the information presented in the petition filed under section 311 and any response filed under section 313 shows that there is a reasonable likelihood that the Petitioner would prevail with respect to at least 1 of the claims challenged in the petition. (emphasis added).

The rules restate the same statutory threshold for institution:

37 C.F.R. § 42.108 - Institution of inter partes review.

...

(c) Inter partes review shall not be instituted unless the Board decides that the information presented in the petition demonstrates that there is a reasonable likelihood that at least one of the claims challenged in the petition is unpatentable. (emphasis added).

The statute and rules could not be more clear: institution cannot be granted unless the information in the petition itself demonstrates a reasonable likelihood that the Petitioner would prevail.

In *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348, (2018), the United States Supreme Court reiterated the statutory requirement that a decision to institute be grounded in the evidence presented in the petition itself:

The new *inter partes* review regime looks a good deal more like civil litigation. At its outset, a party must file “a petition to institute an inter partes review of [a] patent.” §311(a). The petition “may request to cancel as unpatentable 1 or more claims of [the] patent” on the ground that the claims are obvious or not novel. §311(b); see §§102 and 103. In doing so, the petition must identify “each claim challenged,” the grounds for the challenge, and the evidence supporting the challenge. §312(a)(3). Patent Owner, in turn, may respond with “a preliminary response to the petition” explaining “why no inter partes review should be instituted.” §313. With the parties’ submissions before him, the Director then decides “whether to institute an inter partes review . . . pursuant to [the] petition.” §314(b). (In practice, the agency’s Patent Trial and Appeal Board exercises this

authority on behalf of the Director, see 37 CFR §42.4(a) (2017).) 35 U. S. C. §314(a). (*id.*, 138 S. Ct. at 1353-1354 (emphasis added)).

The statute, rules, and the Supreme Court’s opinion in *SAS Institute*, all make plain that, from an evidentiary perspective, the Board can only consider evidence submitted with the petition itself (as well as evidence submitted in a Patent Owner Preliminary Response) in evaluating whether the threshold for institution has been met. The institution decision, in this case, strayed from that requirement.

III. THE RULES DO NOT AUTHORIZE A PETITIONER TO SUBMIT SUPPLEMENTAL EVIDENCE WITH A PRE-INSTITUTION REPLY

The statute is silent with respect to pre-institution replies. The rules governing Trial Practice And Procedure specifically address pre-institution replies once -- in the same provision that prohibits institution unless the information presented in the petition itself demonstrates a reasonable likelihood of success:

37 C.F.R. § 42.108 - Institution of inter partes review.

...

(c) Inter partes review shall not be instituted unless the Board decides that the information presented in the petition demonstrates that there is a reasonable likelihood that at least one of the claims challenged in the petition is unpatentable. ... A petitioner may seek leave to file a reply to the preliminary response in accordance with §§ 42.23 and 42.24(c). Any such request must make a showing of good cause. (emphasis added).

Clearly, if the intent of this rule was to permit supplemental evidence to be submitted with a pre-institution reply and considered in rendering an institution decision, the rule would have been written to include the italicized language: “Inter

partes review shall not be instituted unless the Board decides that the information presented in the petition and any pre-institution reply demonstrates” Of course, the statute itself forecloses such an approach by unequivocally stating that “[t]he Director may not authorize an inter partes review to be instituted unless the Director determines that the information presented in the petition filed under section 311 and any response filed under section 313 shows that there is a reasonable likelihood that the petitioner would prevail ...” 35 U.S.C. §314(a)(emphasis added).

The only plausible reading of 37 C.F.R. § 42.108(c) that aligns with the statute is one that permits a Petitioner to seek leave to file a pre-institution reply limited to attorney argument explaining what the information in the petition demonstrates. Nothing in the statute or the rules permits a petitioner to supplement the evidentiary record through a pre-institution reply as was done in the present case. While the rules permit the filing of supplemental information by a petitioner, the rules make clear that such supplemental information can only be submitted “[o]nce a trial has been instituted.” In this regard, 37 C.F.R. § 42.123(a) provides:

§ 42.123 Filing of supplemental information.

(a) *Motion to submit supplemental information.* Once a trial has been instituted, a party may file a motion to submit supplemental information in accordance with the following requirements:

- (1) A request for the authorization to file a motion to submit supplemental information is made within one month of the date the trial is instituted. ... (emphasis added).

Again, if the intent of the rule was to permit consideration of supplemental

evidence prior to the institution of a trial, the rule would have stated so.

IV. THE RULES REQUIRE A PARTY SEEKING LEAVE TO FILE A PRE-INSTITUTION REPLY TO PROCEED BY WAY OF A MOTION THAT DEMONSTRATES GOOD CAUSE

The Board's Trial Practice and Procedure rules specify that a request for relief -- such as leave to file a pre-institution reply -- must be submitted in the form of a motion that was pre-authorized by the Board:

A. § 42.20 Generally.

(a) **Relief.** Relief, other than a petition requesting the institution of a trial, must be requested in the form of a motion.

(b) **Prior authorization.** A motion will not be entered without Board authorization. ...

Separately, 37 C.F.R. §42.108(c) specifies that a request to file a pre-institution reply must be supported by a showing of “good cause” and made “in accordance with §42.23” which requires that the request be made in the form of a motion:

B. § 42.23 Oppositions, replies, and sur-replies.

...

(b) All arguments for the relief requested in a motion must be made in the motion. ... (emphasis added)

As required by the basic tenets of due process, the rules afford a party opposing a motion an opportunity to be heard by filing an opposition to the motion. See, 37 C.F.R. §42.25 (setting default filing deadlines for opposition to a motion). Had Patent Owner been afforded an opportunity to be heard, Patent Owner would have explained that “good cause” was lacking in the present case, because none of

this supplemental evidence was unavailable at the time of filing of the petition. In fact, Petitioner is alleging that these new exhibits were readily available to a POSITA as of the 2005 priority date of the current patent. Therefore, unlike in the Director Review Decision in *Vector Flow Inc. v. HID Global Corporation*, IPR2023-00353 (Paper 11), “good cause” is lacking because none of Petitioner’s supplemental evidence first came to light subsequent to the filing of the Petition.

V. PATENT OWNER WAS DENIED AN OPPORTUNITY TO BE HEARD IN CONNECTION WITH PETITIONER’S REQUEST TO FILE A PRE-INSTITUTION REPLY

After reviewing the POPR, Petitioner emailed¹ the Board requesting authorization to file a pre-institution reply. The email did not request leave to file additional evidence.

¹ The Board did not follow the practice of making emails part of the record by filing them as exhibits (numbered starting at Ex. 3001).

From: Kennedy, Nicki <NKennedy@ktslaw.com>

Sent: Tuesday, November 26, 2024 2:29 PM

To: Trials <Trials@USPTO.GOV>

Cc: Krieger, Justin <JKrieger@ktslaw.com>; Gibby, Darin <dgibby@ktslaw.com>; Spink, Torrey <TSpink@ktslaw.com>; btheiss@vklaw.com; rodonnell@vklaw.com; Robert D. Leonard <RLeonard@vklaw.com>; rigby@intven.com

Subject: IPR2024-01221 Petitioner's Request to File Reply to Patent Owner's Preliminary Response

CAUTION: This email has originated from a source outside of USPTO. PLEASE CONSIDER THE SOURCE before responding, clicking on links, or opening attachments.

**Petitioner's Request to File Reply to Patent Owner's Preliminary Response
IPR2024-01221**

Honorable Board,

Petitioner respectfully requests permission to file a Reply to Patent Owner's Preliminary Response in the above-referenced IPR. Good cause exists in accordance with 37 C.F.R. § 42.108(c) at least based on Patent Owner's unforeseeable claim construction of "embedded" and arguments concerning citations to Ex. 1006.

Petitioner requests a 7-page reply due 7 days from the order granting our request. Petitioner does not oppose a sur-reply of equal length for Patent Owner due 7 days after Petitioner's reply.

Petitioner has conferred with Patent Owner and Patent Owner opposes Petitioner's request.

Should the panel wish to convene a telephone conference, the parties are available on December 2 and 3 from 9 am to 5 pm (eastern).

Best,



Nicki Kennedy

Petitioner's email alerted the Board that Patent Owner opposed the request for additional briefing. Under the circumstances, the Board should have adhered to 37 C.F.R. § 42.20, which specifies that a request for relief such as leave to file a pre-institution reply, must be submitted in the form of a motion that has been pre-authorized by the Board.² Instead, the Board entirely skipped over the requirements and procedures set forth in 37 C.F.R. § 42.20. Before Patent Owner even had an opportunity to respond to Petitioner's request, and without convening a conference

² For example, when Petitioner in IPR2024-01244 requested leave to file a Pre-Institution Reply, the Board followed 37 C.F.R. § 42.20 by authorizing Petitioner to file a Motion For Leave, and affording Patent Owner the opportunity to respond, before ruling on the request. *See*, IPR2024-01224, Papers 8, 9 and 10.

call or providing Patent Owner any other opportunity to be heard, the Board granted Petitioner's request to file a pre-institution reply:

From: Trials <Trials@USPTO.GOV>
Sent: Wednesday, November 27, 2024 9:00 AM
To: Kennedy, Nicki <NKennedy@ktslaw.com>; Trials <Trials@USPTO.GOV>
Cc: Krieger, Justin <JKrieger@ktslaw.com>; Gibby, Darin <dgibby@ktslaw.com>; Spink, Torrey <TSpink@ktslaw.com>; btheiss@vklaw.com; rodonnell@vklaw.com; Robert D. Leonard <RLeonard@vklaw.com>; rrigby@intven.com
Subject: RE: IPR2024-01221 Petitioner's Request to File Reply to Patent Owner's Preliminary Response

****CAUTION: External Email****

Counsel,

From the Board –

Petitioner is authorized to file a five-page Reply to Patent Owner's Preliminary Response, no later than December 5th, limited to responding to Patent Owner's arguments relating to (1) claim construction of the term "embedded," and (2) the Petition's citations to Ex. 1006. Patent Owner is authorized to file a five-page Sur-reply, limited to responding to arguments made by Petitioner in its Reply, no later than December 12th.

Regards,

Esther Goldschlager
Supervisory Paralegal Specialist
Patent Trial & Appeal Board

VI. PATENT OWNER WAS DENIED A FAIR OPPORTUNITY TO BE HEARD IN CONNECTION WITH PETITIONER'S FOLLOW-ON REQUEST FOR LEAVE TO SUBMIT ADDITIONAL EVIDENCE WITH ITS PRE-INSTITUTION REPLY

The Board's actions in this case circumvented the established procedural safeguards designed to ensure fairness and due process in *inter partes* review proceedings. By granting Petitioner's request without following the motion procedures outlined in 37 C.F.R. § 42.20 and without affording Patent Owner a meaningful opportunity to respond, the Board effectively denied Patent Owner its right to be heard. This departure from fundamental procedural fairness not only contravenes the statutory requirement that institution decisions be based on the information presented in the petition but also undermines the integrity of the

adversarial process.

From: Krieger, Justin <JKrieger@ktslaw.com>
Sent: Tuesday, December 3, 2024 5:06 PM
To: Trials USPTO <trials@uspto.gov>
Cc: Gibby, Darin <dgibby@ktslaw.com>; Spink, Torrey <TSpink@ktslaw.com>; Brandon R. Theiss <BTheiss@vklaw.com>; Ryan O'Donnell <RODonnell@vklaw.com>; Robert D. Leonard <RLeonard@vklaw.com>; rrigby@intven.com; Kennedy, Nicki <NKennedy@ktslaw.com>
Subject: RE: IPR2024-01221 Petitioner's Request to File Reply to Patent Owner's Preliminary Response

**Petitioner's Request for Clarification of Prior Board Authorization
IPR2024-01221**

Honorable Board,

Petitioner respectfully seeks clarification of the Board's below email authorization to file a reply brief in the above-reference proceeding.

Specifically, Petitioner would like to confirm or alternatively request that it is authorized to submit exhibits with its reply brief responsive to the exhibits Patent Owner submitted with its POPR, limited to the construction of the term "embedded" as previously authorized. Good cause exists in that it was unforeseeable that Patent Owner would submit exhibits 2003-2007 and 2001 (citing same) with its POPR on the claim construction issue, and it is fair for Petitioner to be afforded a similar opportunity to present exhibits on this issue. Since Patent Owner is free to respond to such exhibits in its sur-reply, no prejudice would result in granting this request.

Patent Owner opposes this request. The parties are available for a telephone call with the Board, if necessary, any time tomorrow (Dec. 4).

Sincerely,

Justin Krieger
Counsel for Petitioner Early Warning Services, LLC

Two days before the due date for Petitioner's pre-institution reply, Petitioner again reached out again to the Board (above), seeking "to confirm or alternatively request that it is authorized to submit exhibits with its reply brief." (emphasis added). Since Petitioner had not previously requested authorization to file additional exhibits, this was, in fact, a new request for relief. Patent Owner promptly sent a response to the Board, objecting to Petitioner's request to submit supplemental evidence, and pointing out that, under 35 U.S.C. 314(a), the Board is required to base its institution decision on "the information presented in the petition," and that neither the statute nor the rules provide for the submission of additional evidence by way of a pre-institution reply:

From: Brandon R. Theiss
Sent: Wednesday, December 4, 2024 9:41 AM
To: 'Krieger, Justin'; Trials USPTO
Cc: Gibby, Darin; Spink, Torrey; Ryan O'Donnell; Robert D. Leonard; rrigby@intven.com; Kennedy, Nicki; Daniel H. Golub
Subject: RE: IPR2024-01221 Petitioner's Request to File Reply to Patent Owner's Preliminary Response

Honorable Board,

There was nothing unforeseeable about Patent Owner's proposed construction of embedding. As used in the patent, "embedding" is a term of art (which was plainly knowable by Petitioner), and Patent Owner has construed the term as such. Moreover, Petitioner cites no rule or decision authorizing Petitioner to submit additional evidence with a Pre-institution Reply. According to 35 U.S.C. 314(a), the Board is required to base its institution decision on "the information presented in the petition filed under section 311 and any response filed under section 313." Neither the statute nor the rules provide for the submission of additional information (evidence) at this point in the proceedings.

Regards,

Again, the Board skipped over the motion procedures set forth in 37 C.F.R. § 42.20. Instead, without giving Patent Owner a fair opportunity to respond to Petitioner's request, and without convening a conference call or providing Patent Owner any other opportunity to be heard, the Board granted Petitioner's request.

From: Trials <Trials@USPTO.GOV>
Sent: Wednesday, December 4, 2024 11:33 AM
To: Brandon R. Theiss; 'Krieger, Justin'; Trials USPTO
Cc: Gibby, Darin; Spink, Torrey; Ryan O'Donnell; Robert D. Leonard; rrigby@intven.com; Kennedy, Nicki; Daniel H. Golub
Subject: RE: IPR2024-01221 Petitioner's Request to File Reply to Patent Owner's Preliminary Response

Counsel,

Both parties are authorized to submit additional evidence in support of the supplemental briefing as to the claim construction of the term "embedded."

The parties are cautioned to refrain from submitting email correspondence to the Board that includes legal or factual arguments. Emails to the Board need only mention generally the relief requested and times when all parties are available for a conference call with the Board. The parties are also reminded of the Board's meet and confer requirement and are directed to confer in good faith to resolve disputes prior to contacting the Board.

Best regards,
Eric W. Hawthorne
Supervisory Paralegal Specialist
Patent Trial and Appeal Board

In its Order (above), the Board admonished Patent Owner for making an argument in its email to the Board. This admonishment demonstrates that the basic elements of due process - including the requirement that the party opposing the

requested relief be given a fair opportunity to be heard -- were foreclosed by the framework adopted by the Board in this case.

The fundamental principles of due process require that each party be given a fair opportunity to present its arguments, yet the framework employed by the Board in this case deprived Patent Owner of any meaningful chance to be heard. If (i) the Board is not going to require that relief be requested in the form of a written motion to which the opposing party can respond in writing, (ii) the Board does not convene a conference call where the party opposing the request can be heard orally, and (iii) the party opposing the relief is forbidden by the PTAB from submitting its position in writing to the Board by email or otherwise -- what opportunity does the party opposing relief have to be heard? The answer is plain: the process followed by the Board here provided the party opposing the requested relief (Patent Owner) no opportunity to be heard.

VII. THE PETITIONER'S VOLUMINOUS SUPPLEMENTAL EVIDENCE AND THE INSTITUTION DECISION

In connection with its pre-institution reply, and over Patent Owner's objection, Petitioner filed over 300 pages of new exhibits (see, Exhibits 1037-1042) and a supplemental expert declaration (Ex. 1036). After considering this post-petition evidence, the Board issued a decision instituting a trial. The decision explains that the Board's determination was based not only on "the information presented in the Petition" but also on what the Board referred to as "supporting

evidence,” which corresponded to the supplemental evidence submitted with the pre-institution reply discussed later in the institution decision. While the decision acknowledged the statutory requirement to determine if the information presented in the petition itself shows a reasonable likelihood of success, in the very next sentence, the Board explained that its decision was based a combination of the information in the petition and the “supporting evidence” which corresponded to the supplemental evidence submitted with the pre-institution reply discussed in the institution decision:

... To institute an inter partes review, we must determine that the information presented in the Petition shows “a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. § 314(a). Based on the information presented in the Petition and the supporting evidence, we are persuaded that there is a reasonable likelihood that Petitioner would prevail with respect to at least one of the challenged claims. Institution Decision, Paper 10, at 2 (emphasis added).

The institution decision is littered with references to the supplemental evidence submitted with the pre-institution reply. For example, on page 15 of the institution decision, the Board acknowledges that it rejected Patent Owner’s claim construction argument based on the supplemental declaration (Ex. 1036) of Petitioner’s expert, Mr. Purves, submitted as part of the pre-institution reply:

... Mr. Purves testifies, that as shown in blocks 1010 and 1110, “the transaction information derived from the barcode involves only information that [a person of ordinary skill in the art] would recognize as being readily known by both parties of the transaction: a merchant name, the sender’s identifier, and a transaction amount.” Ex. 1036 ¶ 10. At this

stage, we find Mr. Purves's testimony consistent with the disclosure of the '167 patent. Thus, we are not persuaded that an ordinarily skilled artisan would have understood the Specification as supporting Patent Owner's limiting construction. *Id.*, 15 (emphasis added).

The Board's consideration of the supplemental evidence submitted as part of the pre-institution reply further appear on pages 12, 14, and 16 of the decision.

As explained above, from an evidentiary perspective, the statute and rules constrain the Board to consider only evidence submitted with the petition itself (as well as evidence submitted in a Patent Owner Preliminary Response) in evaluating whether the threshold for institution has been must be met. Simply put, the institution decision in this case violated the statute and the rules by basing its decision to institute on extensive evidence submitted by Petitioner subsequent to the petition.

Accordingly, the Board's reliance on extensive supplemental evidence submitted after the Petition not only contravenes the statutory requirement that institution decisions be based solely on "the information presented in the petition" under 35 U.S.C. § 314(a), but also undermines the procedural safeguards designed to ensure fairness in inter partes review. By incorporating and relying upon Petitioner's post-petition submissions, including a supplemental expert declaration and over 300 pages of new exhibits, the Board exceeded its authority and improperly expanded the evidentiary record beyond what is permitted at the institution stage

VIII. CONCLUSION

Under 35 U.S.C. §314(a), "[t]he Director may not authorize an *inter partes*

review to be instituted unless the Director determines that *the information presented in the petition* ... shows that there is a reasonable likelihood that the petitioner would prevail.” Here, the evidentiary basis for the institution decision did not emanate only from the information presented in the petition itself, but also on evidence submitted by Petitioner after the petition. This was legal error.

Moreover, the Board violated Patent Owner’s due process rights by denying Patent Owner an opportunity to be heard with respect to Petitioner’s requests for a pre-institution reply and submission of supplemental evidence. The Board’s actions were arbitrary and capricious because those actions skipped over the motion requirements specified by the rules.

The Board should not have authorized Petitioner to supplement the evidentiary record prior to the institution decision, and, in any event, should not have considered such supplemental evidence in determining whether to institute. This “bell cannot be unrung,” because the Board cannot unknow the information that it should not have considered in the first place when making the institution decision. Patent Owner therefore requests that the Director vacate the institution decision, and enter an order denying institution.

Dated: February 28, 2025

Respectfully submitted,
By: /Daniel H. Golub/
Daniel H. Golub
Registration No. 33,701
Counsel for Patent Owner

CERTIFICATE OF SERVICE

The undersigned certifies that pursuant to 37 C.F.R. § 42.6(e), a copy of the foregoing **PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW** was served via email (as consented to by counsel) on February 28, 2025 to lead and backup counsel of record for Petitioners as follows:

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Respectfully submitted,

Dated: February 28, 2025

By: /Daniel H. Golub/
Daniel H. Golub
Registration No. 33,701
Counsel for Patent Owner
Intellectual Ventures II, LLC
