

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TIKTOK, INC.,
Petitioners

v.

DISTEFANO WEBSITE INNOVATIONS, LLC.,
Patent Owner

PTAB Case No. IPR2025-01224

Patent No. Re45,971

PATENT OWNER'S BRIEF IN SUPPORT OF DISCRETIONARY DENIAL

September 17, 2025

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Exhibit	Title
1001	Certified Copy of U.S. Patent No. Re45,971
1002	Certified File History of U.S. Patent No. Re45,971
1003	Declaration of Andy Cockburn
1004	Curriculum Vitae of Dr. Andy Cockburn
1005	Certified File History of 09/589,551
1006	Provisional U.S. Patent 60/172,983
1007	U.S. Patent Publication 2003/0050976A1
1008	U.S. Patent 6,016,504
1009	U.S. Patent 5,845,299
1010	IPR2019-00419, Paper No. 6, (POPR)
1011	<i>DiStefano Website Innovations, LLC v. Bytedance Ltd. Et al.</i> , Case no. 2:24-cv-00763, Complaint (W.D. Tex. Jul. 8, 2024)
1012	<i>DiStefano Website Innovations, LLC v. Bytedance Ltd. Et al.</i> , Case no. 2:24-cv-00874-RWS-RSP, Complaint (E.D. Tex. Oct. 29, 2024)
1013	RESERVED
1014	RESERVED
1015	U.S. Patent 5,995,099
1016	U.S. Patent 7,028,254
1017	U.S. Patent Publication 2001/0034646
1018	U.S. Patent 7,139,727
1019	U.S. Patent 6,629,135
1020	Six Degrees, https://web.archive.org/web/19980416103152/http://sixdegrees.com

Exhibit	Title
1021	Guide to Web Site Promotion: How Companies Can Draw More Qualified Traffic to Their World Wide Web Sites
1022	Turbo Promote, https://web.archive.org/web/19970418080213/http://www.turbopromote.com/links.html
1023	Puzzle Depot, https://web.archive.org/web/19990417052546/http://www.puzzledepot.com:80/recips.shtml
1024	https://www.w3.org/People/Berners-Lee/WorldWideWeb.html
1025	https://www.w3org/People/B
1026	Macromedia, https://web.archive.org/web/19990223214509/http://www.macromedia.com/software/dreamweaver/
1027	U.S. Patent 5,911,145
1028	RAE Technology, WIKIPEDIA, https://en.wikipedia.org/wiki/Rae_Technology
1029	Macromedia Hums the E-Business Tune, FORBES (Oct. 7, 1999), https://www.forbes.com/199910/07/mu3html
1030	<i>Macromedia, Inc. v. Adobe Sys. Inc.</i> , Case No. 01-03940 SSI, Complaint (N.D. Cal. Oct. 19, 2021)
1031	Macromedia, WIKIPEDIA, https://en.wikipedia.org/wiki/Macromedia
1032	IPR2019-00419, Paper 2 (Linkedin Petition)
1033	U.S. Patent 5,854,893
1034	U.S. Patent 7,996,259
1035	Andy Cockburn, Steve Jones. Which way now? Analysing and easing inadequacies in WWW navigation. <i>International Journal of Human-Computer Studies</i> , Volume 45, Issue 1, 1996, Pages 105-129, ISSN 1071-5819, https://doi.org/10.1006/ijhc.1996.0044
1036	A Cockburn, B McKenzie and M JasonSmith, <i>Pushing Back: Evaluating a New Behavior for the Back and Forward</i>

Exhibit	Title
	<i>Buttons in Web Browsers</i> , International Journal of Human-Computer Studies. 57(5):397-414, Academic Press. 2002.
1037	U.S. Patent 8,768,760
1038	Revised Opening Brief of Appellant DiStefano Patent Trust III, LLC filed in <i>DiStefano Patent Trust III v. LinkedIn Corporation</i> , Case No. 19-01210, Dkt. 25 (Fed. Cir. Mar. 27, 2019).
1039	<i>DiStefano Pat. Tr. III, LLC v. LinkedIn Corp.</i> , Civ. No. 1-17-cv-01798, Dkt. 1, Complaint (D. Del. Dec. 14, 2017)
1040	<i>DiStefano Pat. Tr. III, LLC v. LinkedIn Corp.</i> , 346 F. Supp. 3d 616, 623 (D. Del. 2018)
1041	https://www.oed.com/dictionary/site_n
1042	RESERVED
1043	RESERVED
1044	U.S. Patent 5,960,409
1045	U.S. Patent 6,058,417
1046	U.S. Patent 6,601,057
1047	U.S. Patent 6,330,575
1048	U.S. Patent 6,401,075
1049	U.S. Patent 5,937,392
1050	U.S. Patent 6,560,639
1051	Merriam-Webster's Dictionary of Basic English (2000)
1052	The Oxford Paperback Dictionary (Elaine Pollard ed., 4 th ed., 2000)
1053	U.S. Patent 5,774,660
1054	U.S. Patent 6,009,410

Exhibit	Title
1055	Java Sun, https://web.archive.org/web/20000815063754/http://java.sun.com/docs/books/tutorial/getStarted/index.html
1056	Rick Darnell, Using Macromedia Dreamweaver 1.2 (1998)
1057	Russell M. Shumway, Common-Sense An Alternative Approach to Web Security. In Proceeding of the 21 st National information Systems Security Conference (NISSC), held October 5-8, 1998, in Arlington, Virginia
1058	Petitioner's <i>Sotera</i> Stipulation
2001	Scheduling Conference Order of August 13, 2025
2002	Email from Sinofaith dated November 6, 2022
2003	Executive Order of June 19, 2025
2004	Interim Processes for PTAB Workload Management at 1 (Mar. 26, 2025)
2005	PTAB Dashboard

I. INTRODUCTION.

Patent Owner requests the Director to exercise her discretion under *Fintiv* and 35 U.S.C. § 314(a) to deny institution of this *inter partes* review (IPR) because the same parties are litigating in district court the validity of this patent and four others (five in total). Petitioner filed Petitions seeking institution of IPR proceedings against two of five patents asserted against ByteDance and related Tik-Tok companies - IPR2025-01224 (filing date accorded July 8, 2025) and IPR2025-01061(filing date accorded June 23, 2025).

Petitioner has not filed a stay in the district court case. Even if the two patents were reviewed by the PTAB, the district court's resources would still be expended on all five cases. Litigating the same or similar issues at the Board would therefore be duplicative and contrary to the intent of IPRs, namely "providing a more efficient system for challenging patents" and "reducing unwarranted litigation costs." H.R. Rep No. 112-98 at 39-40 (2011), *see also NHK Spring Co. Ltd. V. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 at 19-20 (PTAB Sept. 12, 2018) (precedential). Other considerations include application of the Settled Expectations Doctrine and the other *Fintiv* factors, which strongly favor discretionary denial.

II. THE BOARD SHOULD DENY INSTITUTION UNDER § 314(A).

A. The *Fintiv* factors favor discretionary denial

When the patent owner raises an argument for discretionary denial due to an earlier trial date in a co-pending litigation, the Board weighs the following factors:

1. whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted;
2. proximity of the court's trial date to the Board's projected statutory deadline for a final written decision;
3. investment in the parallel proceeding by the court and the parties;
4. overlap between issues raised in the petition and in the parallel proceeding;
5. whether the petitioner and the defendant in the parallel proceeding are the same party; and
6. other circumstances that impact the Boards exercise of discretion, including the merits.

Apple Inc. v. Fintiv Inc., IPR2020-00019, Paper 11 at 5-6 (PTAB Mar. 20, 2020) (Precedential) (“*Fintiv*”). Petitioner's parent company ByteDance and other affiliated companies are involved in district court litigation with the Patent Owner and a scheduling conference occurred on September 8, 2025, and Infringement Contentions were due on August 25, 2025. *See* Exh. 2001. These factors, when considered as a whole, support *denying* institution.

1. Factor 1 – Favors denial because there is no indication that a stay order will be granted in the district court

The parties participated in a Scheduling Conference on September 8, 2025. *See* Exh. 2001, 1. Two weeks prior to the Scheduling Conference, Plaintiff filed their infringement contentions. *See* Exh. 2001. There are five patents at issue in the litigation, and only two have had IPRs filed. *See supra* I. To date, no stay has been requested by the district court Defendants, and IPRs do not affect the majority of patents in the litigation. There can be no inference of a stay occurring in the litigation. “In the absence of specific evidence, [the Board] will not attempt to predict how the district court in the related district court litigation will proceed because the court may determine whether or not to say any individual case...based on a variety of circumstances and facts beyond [the Board’s] control and to which the Board is not privy.” *Sand Revolution II, LLC v. Continental Intermodal Group – Tracking LLC*, IPR2019-01393, Paper 24 at 7 (PTAB June 16, 2020) (informative).

The actions in the district court indicate that the case is progressing. Thus, *Fintiv* Factor 1 strongly favors the Patent Owner.

2. Factor 2 – Favors denial because the district court’s trial date is scheduled to occur before the projected final written decision

The second *Fintiv* factor weighs in favor of denying the institution because even though the district court’s scheduled trial date has not been set, the litigation will progress as only two of the five patents have IPRs. Thus, a trial will occur

regardless of institution. No resources will be saved by having both litigation in federal court and the USPTO occurring at the same time on the same patent family.

Thus, *Fintiv* Factor 2 weighs in favor of discretionary denial as it did in *Fintiv*. *Fintiv*, 9, *Fintiv* II, 13.

3. Factor 3 – Favors denial because substantial resources have been and are being invested in the parallel proceedings

Under the third *Fintiv* factor, “[t]he Board also has considered the amount and type of work already completed in the parallel litigation by the court and the parties *at the time of the institution decision.*” *Fintiv*, 9 (emphasis added). The deadline for issuing an institution decision is December 23, 2025. *See* IPR2025-01061, Paper 5. By this date, substantial work will have already been done in the district court, including Infringement Contentions (August 25, 2025), Invalidity Contentions, and Subject-Matter Eligibility Contentions (October 20, 2025), along with other fact discovery. *See* Exh. 2001.

Thus, *Fintiv* Factor 3 weighs in favor of discretionary denial.

4. Factor 4 – Favors denial because of substantial overlap between the IPR grounds and the invalidity contentions in the district court case

The fourth *Fintiv* factor – overlap between issues raised in the Petition and in the parallel district court proceeding – favors denying institution. The Petitioners have filed a “*Sotera*” stipulation, Exh. 1058, in which they stipulate, that “if the Board institutes *inter partes* review in this proceeding (IPR2025-01061) and said

institution is not later vacated, reversed or otherwise withdrawn; TikTok, its real-parties-in-interest, privies and the Defendants named in ... Case No. 2:24-cv-00874-RWS-RSP (E.D. Tex. Oct. 29, 2024) will not challenge the validity of the '316 patent in the EDTX Action based on either the (i) specific grounds raised in IPR2025-01061 or (ii) any other ground that could have reasonably been raised before the Board in this proceeding (i.e., any other ground that could have reasonably been raised under 35 U.S.C. §§ 102 or 103 on the basis of prior art patents or printed publications)." Exh. 1058, p.1. Petitioners are required to provide their "Invalidity Contentions" on October 20, 2025, in the Litigation. *See* Exh. 2001, p.3. The decision to institute or not is scheduled for October 20, 2025. *See* IPR2025-01061, Paper 5.

The Petitioners' stipulation is meaningless, as the Petitioners must decide to rely on the references asserted in the IPR before the institution decision that is due by December 23, 2025. Petitioners made no indication that they would not assert the references in the litigation or other 35 U.S.C. § 102 or 35 U.S.C. § 103 arguments in their invalidity contentions due on October 20, 2025, nor did the Petitioners state that they would dismiss their invalidity contentions based on the references, if previously asserted, and the IPR is instituted. Even if Petitioners were to submit an additional stipulation, it is too late – stipulations should be considered only if they are filed with sufficient time for a patent owner to address the impact of the

stipulation in its discretionary denial brief. *See FAQs for Interim Process for PTAB Workload Management*, FAQ 14, PTAB Boardside Chat on Interim Process for PTAB Workload Management (Apr. 17, 2025) (petitioners “must” file a stipulation within one month of the notice of filing date for consideration).

Based upon the current language of the stipulation and the litigation schedule, it is expected that there will be substantial overlap between the IPR grounds and the invalidity contentions. The only way the *Sotera* stipulation would have any meaning is if a stay were in place in the litigation, but no stay exists in the litigation. Litigation resources will be expended based on the asserted invalidity contentions.

Thus, *Fintiv* Factor 4 also weighs in favor of denial because there is no restriction or limitation on what will be asserted by Petitioners in the October 20, 2025, invalidity contentions, resulting in overlap between invalidity contentions and IPR grounds.

5. Factor 5 – Favors denial because the parties in the IPR overlap with the parties in the district court litigation

Under the fifth *Fintiv* factor, “[i]f a petitioner is unrelated to a defendant in an earlier court proceeding, the Board has weighed this fact against exercising discretion to deny institution....” *Fintiv*, 13-14. Here, both of the Petitioners are related to a defendant in the co-pending litigation. ByteDance Ltd., ByteDance Pte. Ltd., TikTok Ltd., and Heliophilia Pte. Ltd. are defendants in the district court litigation, and Petitioner, DiStefano Website Innovations, LLC, is the Plaintiff in

district court and Patent Owner in this IPR. *See* Pet., p.115; Exh. 1012, p.1 (Complaint). Even if Petitioners were unrelated to a defendant, “if the issues are the same as, or substantially similar to, those already or about to be litigated, or other circumstances weigh against redoing the work of another tribunal, the Board may, nonetheless, exercise the authority to deny institution.” *Fintiv* 14.

Thus, *Fintiv* Factor 5 weighs in favor of denial.

6. Factor 6 – Favors denial, but DiStefano Website Innovations will raise its merits argument in the POPR

Under the sixth *Fintiv* factor, the Board may consider other circumstances that impact the Board’s exercise of discretion, including the merits. *Fintiv*, 14-15. Patent Owner’s merits argument will be in its Patent Owner Preliminary Response (POPR), which will explain why the grounds fail to disclose the claim elements. The Director should consider these arguments when determining whether to exercise its discretion to deny institution under 35 U.S.C. § 314(a). *See* FAQs for Interim Process for PTAB Workload Management, FAQs (“The Director will receive each ... POPR”), FAQ12 (“the Director will consider the merits in the merits briefing if the parties ask the Director to do so.”) Thus, *Fintiv* Factor 6 weighs in favor of denial.

B. Other considerations also favor discretionary denial

The Board’s Memorandum on the Interim Process for PTAB Workload Management presents additional considerations for discretionary denial, including:

Whether the PTAB or another forum has already

adjudicated the validity or patentability of the challenged patent claims;

Whether there have been changes in the law or new judicial precedent issued since the issuance of the claims that may affect patentability;

The strength of the unpatentability challenge;

The extent of the petition's reliance on expert testimony;

Settled expectations of the parties, such as the length of time the claims have been in force;

Compelling economic, public health, or national security interests; and

Any other consideration bearing on the Director's discretion.

Interim Processes for PTAB Workload Management at 2 (Mar. 26, 2025).

Several considerations weigh in favor of discretionary denial here.

1. Instituting an IPR would not reduce the number of issues for the judge and jury to decide in the district court case

The Board should also deny institution because the Petitioners have not explained how instituting an IPR would reduce the number of issues adjudicated by the district court judge and decided by a jury. For example, Petitioners have not represented or indicated that the litigation involving the five patents would be simplified by having this IPR instituted.

2. Additional Party to IPR has yet to be identified

TikTok is currently under an executive order to cease operation in the United States that has been extended to September 17, 2025. *See* Exh. 2003. To avoid shutting down, September 15, 2025, the U.S. Government announced that a framework of a deal had been reached with China regarding the U.S. demand that TikTok be sold to a non-Chinese-owned company. Therefore, there is a party that has yet to be named that may have actual knowledge of the '316 patent. If such action occurs, an instituted IPR may have to be dismissed.

3. PTAB resources are better spent on *ex parte* appeals

The Director should also deny institution because its limited resources are better spent on the growing backlog of *ex parte* appeals. In 35 U.S.C. § 6(b)(1), the Board is tasked with “review[ing] adverse decisions of examiners upon applications for patent pursuant to section 134(a).” Congress also tasked the Board with reviewing appeals of reexaminations, derivation proceedings, IPRs, and PGRs. 35 U.S.C. § 6(b)(2)-(4). Current Office policy is to focus on *ex parte* appeals “[t]o ensure that the PTAB continues to meet its statutory obligations as to *ex parte* appeals, while continuing to maintain its capacity to conduct AIA proceedings, the Director will exercise her discretion on institution of AIA proceedings....” Interim Processes for PTAB Workload Management at 1 (Mar. 26, 2025).

The Board should exercise that discretion here because the pendency of *ex parte* appeals has increased (Exh. 2004, 7), nearly a quarter of *ex parte* appeals have been pending more than eleven months (Exh. 2005), and the backlog is growing month-over-month in almost all technology centers (Exh. 2004, 4).

In 2025, the pendency has increased in almost every technical center. The PTAB should focus its efforts on the pending *ex parte* appeals – not this IPR, especially since the district court is already scheduled to adjudicate validity months before the Board reaches its final decision.

C. Settled Expectations Doctrine supports Denying the Petitioner

In view of the “Settled Expectations Doctrine,” which has recently been applied in IPRs, such as the decision issued by the Board in *iRhythm*. *See iRhythm Tech. v. Welch Allyn, Inc.*, IPR2025-00363, paper 10 (June 6, 2025) decision. This Petition must be discretionarily denied because Petitioner had actual knowledge of the ’971 Patent for over three years and constructive knowledge of the patent with an issue date of April 12, 2016¹ for over eight years, with public knowledge of the continuation family dating back to August 9, 2011, with U.S. Patent 7,996,259² for almost twelve years, and the Petitioners’ failure to file an IPR earlier.

¹ *See* Patent Center for U.S. Patent Re45,971.

² *See* Patent Center for U.S. Patent 7,996,259.

1. TikTok had Constructive Notice of the Patent Family

There is no requirement that the petitioner had specific notice or knowledge of the patent. In *Dabico Airport Solutions Inc. v. AXA Power ApS*. (No. IPR2025-00408), Paper 21, the opinion found for Patent Owner’s “settled expectations” and relied only on the publication of the issued patent to provide constructive notice to the public and competitors. *Dabico*, Paper 21, p. 3. Petitioner had over eight (8) years of constructive notice since the Re45,971 Patent’s issue date of April 12, 2016, and almost twelve (12) years of constructive notice for the parent patent’s (U.S. Patent 7,996,259) issue date of August 9, 2011.

In *Dabico*, Paper 21, the PTAB denied institution of Dabico’s IPR based on Patent Owner’s “settled expectations” finding the challenged patent had issued. In the Decision, the Director acknowledged that “Patent Owner’s arguments regarding 35 U.S.C. § 325(d) are unpersuasive.” *Dabico*, Paper 21, 2. Nonetheless, the USPTO noted that considerations in favor of discretionary denial, particularly settled expectations, outweighed the counterarguments, stating: “In particular, the challenged patent has been in force almost eight years, creating settled expectations.” *Dabico*, Paper 21, 2. The PTAB noted that there is “no bright-line rule on when expectations become settled” but that “the longer the patent has been in force, the more settled expectations should be,” analogizing the approach to the six-year statute of limitations for infringement damages. *Dabico*, Paper 21, 3. Similar to *Dabico*, TikTok had over

two years from the '971 Patent's issuance and 11 years from when the application was published and constructive notice of the patent family for thirteen years, creating settled expectations for the Patent Owner, and the particularly settled expectations outweighed any of Petitioner's counterarguments.

2. TikTok's Actual Notice of the '061 Patent.

As in *iRhythm*, TikTok knew of the '971 Patent's family and application prior to issuance of the patent. On November 6, 2022, Patent Owner was notified that ByteDance (TikTok's parent) was "interested to getting more info" in the patent family on November 6, 2022. *See* Exh. 2002.

There are "settled expectations" regarding the '971 Patent due to TikTok's interactions with the Patent Owner and the constructive notice provided by the publication and issuance of the '971 patent, along with the patent that the '971 depends on as a direct continuation. Because of both the '971 Patent's publication date and TikTok's inaction, the Director should exercise discretion and deny the institution of this Petition.

III. CONCLUSION

The majority of *Fintiv* Factors all weigh in favor of denial, and no factor weighs against exercising the Director's discretion to deny institution, in addition to the Settled Expectations Doctrine supporting denial. Litigating the same or similar issues at the Board as the issues that are already scheduled to get resolved in the

district court would be duplicative and contrary to the intent of IPRs for “providing a more efficient system for challenging patents” and “reducing unwarranted litigation costs.” H.R. Rep. No. 112-98 at 39-40 (2011); *see also NHK Spring*, IPR2018-00752, Paper 8 at 19-20. The Board’s limited resources would be better spent elsewhere.

September 16, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies the service of Patent Owner DISTEFANO WEBSITE INNOVATIONS, LLC, served PATENT OWNER'S BRIEF IN SUPPORT OF DISCRETIONARY DENIAL on the counsel of record for Petitioners TIKTOK INC., by filing this document through the P-TACTS, as well as delivering a copy via electronic mail to the following:

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CERTIFICATE OF WORD COUNT

Pursuant to *Interim Processes for PTAB Workload Management* (Mar. 26, 2025), Patent Owner certifies that this PATENT OWNER'S BRIEF IN SUPPORT OF DISCRETIONARY DENIAL includes 2,770 words, as measured by Microsoft Word, exclusive of the table of contents, table of exhibits, and exhibits.

Dated: September 16, 2025

By: /s/ *Gregory B. Gulliver*
Gregory B. Gulliver