

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GREAT WEST CASUALTY COMPANY; BITCO GENERAL
INSURANCE CORPORATION; and BITCO NATIONAL
INSURANCE COMPANY,
Petitioner,

v.

INTELLECTUAL VENTURES II LLC,
Patent Owner

Case IPR2016-01534
Patent 7,516,177 B2

Before MICHAEL W. KIM, PETER P. CHEN, and
ROBERT A. POLLOCK, *Administrative Patent Judges*.

KIM, *Administrative Patent Judge*.

DECISION
Denying Institution of *Inter Partes* Review
37 C.F.R. § 42.108(a)

I. INTRODUCTION

A. *Background*

On August 12, 2016, Great West Casualty Company, BITCO General Insurance Corporation, and BITCO National Insurance Company (collectively “Petitioner”) filed a Petition (Paper 1, “Pet.”) requesting an *inter partes* review of claims 11–20 of U.S. Patent No. 7,516,177 B2 (Ex. 1001, “the ’177 patent”), along with a Motion for Joinder (Paper 2; “Mot.”). Intellectual Ventures II LLC (“Patent Owner”) filed an Opposition to Motion for Joinder on September 12, 2016 (Paper 6; “Opp.”), and a Preliminary Response (Paper 8, “Prelim. Resp.”) on November 18, 2016. On January 24, 2017, Patent Owner’s Brief on Estoppel (Paper 11; “PO Brief”) and Petitioners’ Brief Regarding the Recent Final Written Decision (Paper 12; “Pet. Brief”) were filed by the respective parties.

Institution of *inter partes* review is discretionary. *See* 35 U.S.C. § 314(a); 37 C.F.R. § 42.108(a). In the circumstances of this case, we decline to exercise our discretion, and do not institute *inter partes* review on any of claims 11–20 of the ’177 patent on any ground. Petitioner’s Motion for Joinder is *denied*.

B. *Related Matters*

Petitioner and Patent Owner identify the following district court proceedings concerning the ’177 patent: *Intellectual Ventures I LLC et al. v. HCC Ins. Holdings, Inc. et al.*, Civ. No. 6-15-cv-00660 (E.D. Tex.); *Intellectual Ventures II LLC v. BITCO Gen. Ins. Corp. et al.*, Civ. No. 6-15-cv-00059 (E.D. Tex.); *Intellectual Ventures II LLC v. Great W. Cas. Co.*, Civ. No. 6-15-cv-00060 (E.D. Tex.); and *Intellectual Ventures II LLC v. Kemper Corp., et al.*, 6:16-cv-00081-JRG (E.D. Tex.). Pet. 1–2; Paper 6, 1.

Petitioner and Patent Owner identify also the following requests for review of the '177 patent: IPR2015-01706 (same parties; claims 11, 12, and 16–20 determined to be unpatentable); IPR2015-01707 (same parties; claims 11–13 and 15–20 determined to be unpatentable); CBM2015-00171 (same parties; institution denied); IPR2016-00453 (same parties; institution denied); and IPR2016-01434 (different petitioner; instituted on claims 11–20). Pet. 3; Paper 6, 1.

C. The '177 patent

The '177 patent, titled, “Apparatus for Distributing Content Objects to a Personalized Access Point of a User over a Network-based Environment and Method,” discloses the following under the heading “Technical Field”:

This invention pertains to electronic commerce and business. More particularly, the present invention relates to aggregating, enhancing, and distributing content objects with customers over a network-based environment such as via the Internet or some other form of interactive network.

Ex. 1001, [54], 1:22–26. The '177 patent asserts that the storage and retrieval of information has evolved from storing and retrieving information in textbooks and libraries, to storing and retrieving information from online networks such as the Internet. Ex. 1001, 1:30–33. According to the '177 patent, while such advances have led to a significant increase in information available to users, the users now have the problem of being overwhelmed by the amount of information, resulting in a failure to find specific information or losing track of the information that had already been found. Ex. 1001, 1:33–46. Thus, the '177 patent asserts that there is a need to provide improvements in the way demand for information is identified, content is

generated in response to a defined demand, and the way in which users access desired information. Ex. 1001, 2:23–26.

D. Illustrative Claim

Petitioner challenges claims 11–20 of the '177 patent. Of those, claims 11 and 16 are the only independent claims. Independent claim 11 is illustrative of the challenged claims and is reproduced below:

11. An apparatus for distributing content through one or more distributed information access points to a centralized access point of a user, comprising:

at least one server operative to store one or more of: a) content, b) links to content, c) information about content, and d) information about users including information about which content a user has chosen;

a centralized access point of a user accessible via a communications link and operative to provide the user with access to content chosen by or for the user;

at least one distributed information access point accessible via a communications link and operative to implement one or more of: a) list one or more content objects, b) allow a user to choose content for addition to their centralized access point, and c) provide the user with logon access to their centralized access point; and

an administrative interface in communication with the server and operative to create groupings of content into one or more distributed information access points;

wherein a user is enabled with the capability to log on to their centralized access point from one or more distributed information access point(s) and access content chosen from one or more distributed information access point(s).

E. Asserted Grounds of Unpatentability

Petitioner challenges claims 11–20 of the '177 patent as being obvious on the following grounds (Pet. 6).

Reference(s)	Basis	Challenged Claims
Robinson ¹ and Bezos ²	§ 103(a)	11–20
Robinson, Bezos, and Coates ³	§ 103(a)	13–15
Robinson, Bezos, and Excite ⁴	§ 103(a)	13, 15

II. ANALYSIS

A. *Discretionary Non-Institution*

1. *Procedural Background*

The instant Petition is the *fifth* petition filed by Petitioner challenging claims 11–20 of the '177 patent. Three of the other four petitions (IPR2015-01706, IPR2015-01707, CBM2015-00171) were filed on August 12, 2015, and the fourth (IPR2016-00453) was filed on January 11, 2016. In IPR2015-01706 and IPR2015-01707 (“prior completed proceedings”), the only two of the four petitions for which trial was instituted, Patent Owner’s

¹ CHERI ROBINSON, EARL JACKSON, JR., AND SCOTT DAVIS, OFFICIAL EXCITE INTERNET YELLOW PAGES (IDG Books Worldwide, Inc., Nov. 13, 1998) (Ex. 1004).

² U.S. Patent No. 6,963,840 to Bezos et al. (issued Apr. 9, 1999) (Ex. 1005).

³ James Coates, *Excite.com In Synch With Personal Preferences of Users*, CHI. TRIB. (Sept. 5, 1999) (Ex. 1006).

⁴ *Add Your Site to Excite’s Database*, EXCITE <http://web.archive.org/web/19990117085806/http://excite.com/Info/listing.html> (Jan. 17, 1999) (Ex. 1007).

IPR2016-01534
Patent 7,516,177 B2

Response was filed on April 29, 2016, and Petitioner's Reply was filed on July 20, 2016. The petitions in CBM2015-00171 (Paper 10) and IPR2016-00453 (Paper 12) were denied.

On July 14, 2016, Oracle America Inc., Oracle Corporation, and HCC Insurance Holdings, Inc. ("other petitioners") filed a petition challenging claims 11–20 of the '177 patent in IPR2016-01434 ("other pending proceeding"). IPR2016-01434 (Paper 1). On August 12, 2016, Petitioner filed the instant Petition, with a Motion for Joinder (Paper 2; "Mot."). In the Petition, Petitioner asserts:

This petition is substantively identical to pending IPR2016-01434 filed by Oracle America Inc., Oracle Corporation and HCC Insurance Holdings, Inc. ("Oracle and HCC"), and relies on the same evidence and expert testimony. Petitioners request institution on the same grounds as any grounds instituted in the Oracle and HCC IPR, and concurrently move to join the Oracle and HCC IPR, if and when trial is instituted. *See* Paper 2.

Pet. 1; emphasis added.

Petitioners certify they are not barred or estopped from requesting IPR, they do not own the '177 Patent, they (or any real party-in-interest) have not filed a civil action challenging any '177 patent claim's validity. While Petitioners were served with a complaint alleging infringement of the '177 Patent more than one year before the date this petition is filed, the time limitation of 35 U.S.C. § 315(b) "shall not apply to a request for joinder under" 35 U.S.C. § 315(c). Because this petition is accompanied by such a request (Paper 2), it complies with 35 U.S.C. § 315(b).

Pet. 2–3. On September 12, 2016, Patent Owner filed an Opposition to Motion for Joinder, and on November 18, 2016, filed a Preliminary Response.

On January 17, 2017, a final written decision was issued in each of IPR2015-01706 and IPR2015-01707 determining, collectively, that claims 11–13 and 15–20 of the '177 patent are unpatentable. *See* Exs. 3001, 3002.⁵ On that same day, institution was granted in IPR2016-01434 for claims 11–20 on certain grounds. *See* Ex. 3003 (“Dec.”).

2. *Principles of Law*

Section 314(a) provides (emphasis added):

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.*

Section 315(c) provides (emphasis added):

JOINDER.—*If the Director institutes an inter partes review, the Director, in his or her discretion, may join as a party to that inter partes review any person who properly files a petition under section 311 that the Director, after receiving a preliminary response under section 313 or the expiration of the time for filing such a response, determines warrants the institution of an inter partes review under section 314.*

Section 315(d) provides (emphasis added):

MULTIPLE PROCEEDINGS.—*Notwithstanding sections 135(a), 251, and 252, and chapter 30, during the pendency of an inter partes review, if another proceeding or matter involving the patent is before the Office, the Director may determine the manner in which the inter partes review or other proceeding or matter may proceed, including providing for stay,*

⁵ No trial was instituted on dependent claim 14 in either IPR2015-01706 (Paper 10) or IPR2015-01707 (Paper 11).

transfer, consolidation, or termination of any such matter or proceeding.

Section 315(e)(1) provides (emphasis added):

PROCEEDINGS BEFORE THE OFFICE.—The petitioner in an inter partes review of a claim in a patent under this chapter that results in a final written decision under section 318(a), or the real party in interest or privy of the petitioner, *may not request or maintain a proceeding before the Office with respect to that claim on any ground that the petitioner raised or reasonably could have raised during that inter partes review.*

Section 325(d) provides (emphasis added):

MULTIPLE PROCEEDINGS.—Notwithstanding sections 135(a), 251, and 252, and chapter 30, during the pendency of any post-grant review under this chapter, if another proceeding or matter involving the patent is before the Office, the Director may determine the manner in which the post-grant review or other proceeding or matter may proceed, including providing for the stay, transfer, consolidation, or termination of any such matter or proceeding. In determining whether to institute or order a proceeding under this chapter, chapter 30, or chapter 31, *the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office.*

2. Analysis

The procedural posture of this proceeding is such that it renders relevant five statutory provisions of the AIA. As an initial matter, a final written decision involving the same Petitioner and some of the same claims has been issued in the prior completed proceedings, making relevant 35 U.S.C. § 315(e)(1). Furthermore, Petitioner seeks to invoke our discretionary joinder under 35 U.S.C. § 315(c). Additionally, as there are multiple proceedings involving the same patent, it also renders relevant our

discretionary authority under 35 U.S.C. § 315(d), and as the petitions in the instant proceeding and IPR2016-01434 are substantively identical, our discretionary authority under 35 U.S.C. § 325(d) is also relevant. And finally, the Board generally has also addressed serial petitions from the same petitioner under our general discretionary authority to institute trial under 35 U.S.C. § 314(a). *See NVIDIA Corp. v. Samsung Elecs. Co.*, Case IPR2016-00134, slip op. at 6–7 (PTAB May 4, 2016) (Paper 9). Ultimately, we determine that consideration of the above provisions from Sections 315(c), 315(d), and 325(d) in the aggregate informs our discretionary authority under 35 U.S.C. § 314(a).⁶ To arrive at that decision, however, we determine it necessary to evaluate each of the above statutory provisions in turn. Each exercise of discretion is highly fact dependent inquiry.

a. Final Written Decision Issued in Related Proceedings

Section 315(e)(1) reads,

The petitioner in an inter partes review of a claim in a patent under this chapter that results in a final written decision under section 318(a), or the real party in interest or privy of the petitioner, *may not request or maintain a proceeding before the Office with respect to that claim on any ground that the petitioner raised or reasonably could have raised during that inter partes review.*

Emphasis added; *see also* 37 C.F.R. § 42.73(d) (applicable rule). Section 318(a), in turn, provides “[i]f an inter partes review is instituted and not

⁶ A predicate to granting joinder under Section 315(c) is that a petition merits institution under Section 314(a). Conversely, whether or not to grant joinder under Section 315(c) informs our analysis herein under Section 314(a). It is for this reason that we treat our analysis under Section 315(c) as a factor to inform our discretionary authority under Section 314(a).

dismissed under this chapter, the Patent Trial and Appeal Board shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner.” The Patent Office has stated that “35 U.S.C. 315(e), as amended, provides for estoppel on a claim-by-claim basis, for claims in a patent that result in a final written decision,” Changes to Implement Inter Partes Review Proceedings, Post-Grant Review Proceedings, and Transitional Program for Covered Business Method Patents, 77 Fed. Reg. 48,680, 48,703 (Aug. 14, 2012) (Response to Comment 60), and that

[t]he Board’s determination not to institute an inter partes review . . . is not a final written decision within the meaning of 35 U.S.C. 318(a), as amended, and 35 U.S.C. 328(a), and thereby does not trigger the estoppel provisions under 35 U.S.C. 315(e), as amended, and 35 U.S.C. 325(e).

Id. at 48,703–48,704 (Response to Comment 66). *See also Westlaw Services, LLC v. Credit Acceptance Corp.*, Case CBM2014-00176, slip op. at 3–5 (PTAB May 14, 2015) (Paper 28) (precedential) (“We agree with Petitioner that estoppel is applied on a claim-by-claim basis. By its terms, estoppel is invoked under Section 325(e)(1) as to ‘a claim in a patent’ that ‘results in a final written decision under’ 35 U.S.C. § 328(a).”)

As an initial matter, the parties agree that Petitioner is not estopped from maintaining a challenge against dependent claim 14. PO Brief 4 (“The Board should also deny institution and joinder on non-estopped claim 14”); Pet. Brief 5. Furthermore, concerning claims 11–13 and 15–20, neither party disputes that the Petitioner in this proceeding and the prior completed proceedings are the same, and that a final written decision was issued in the prior completed proceedings. PO Brief 1–2; Pet. Brief 2. Accordingly, the

entire dispute between the parties with respect to Section 315(e)(1) is the scope of “any ground that the petitioner raised or reasonably could have raised during that inter partes review,” i.e., IPR2015-01706 and IPR2015-01707. While the grounds set forth in the instant proceeding are over various combinations of Robinson, Bezos, Coates, and Excite, the parties largely direct their arguments to the primary reference asserted in the instant proceeding, i.e., Robinson, a reference that was not at issue in the prior completed proceedings. PO Brief 3–4; Pet. Brief 3–4. For that reason, we focus our analysis on whether Petitioner “reasonably could have raised” a ground of unpatentability based on Robinson during the prior completed proceedings.

Petitioner begins with the following:

[T]he Federal Circuit has interpreted the “reasonably could have raised during that inter partes review” language of Section 315(e) as limited to those grounds actually litigated in an *inter partes* review after the institution decision. *Shaw Indus. Grp., Inc. v. Automated Creel Sys., Inc.*, 817 F.3d 1293, 1300 (Fed. Cir.) (“The IPR does not begin until it is instituted. . . . Thus, Shaw did not raise—nor could it have reasonably raised—the Payne-based ground during the IPR.”). Shaw’s interpretation of Section 315(e) is binding on the Board. Indeed, this particular interpretation of Section 315(e) was adopted at the insistence of the Commissioner. *See* 817 F.3d at 1300. This is then the stated policy of the Office, and binding on the Board for this additional reason. *Shaw*’s reasoning, moreover, has also been held to apply with equal weight “to prior art references that were never presented to the PTAB at all.” *Intellectual Ventures I LLC v. Toshiba Corp.*, No. CV 13-453-SLR, 2016 WL 7341713, at *13 (D. Del. Dec. 19, 2016).

Pet. Brief. 2–3; *see also Verinata Health, Inc. v. Ariosa Diagnostics, Inc.*, No. 12-CV-05501-SI, 2017 WL 235048, at *3 (N.D. Cal. Jan. 19, 2017)

(“limiting IPR estoppel to *grounds actually instituted* ensures that estoppel applies only to those arguments, or potential arguments, that received (or reasonably could have received) proper judicial attention”) (emphasis added). As an initial matter, it is axiomatic that any decision from our reviewing courts, such as *Shaw Industries Group*, is binding on the Board. Accordingly, whether or not any holding in *Shaw Industries Group* is also a position of the Commissioner or a policy of the Office that is binding on the Board is immaterial.

We disagree, however, that *Shaw Industries Group* stands for the proposition for which Petitioner asserts. Specifically, we are unpersuaded that the words “reasonably could have raised during that inter partes review” from Section 315(e)(1) should be interpreted as limited to grounds actually raised during the prior completed proceedings. Primarily, the relevant part of Section 315(e)(1) reads, in full, “any ground that the petitioner raised or reasonably could have raised.” We discern that Congress would not have included the additional words “or reasonably could have raised” after “raised” if Congress had desired to limit the estoppel to grounds actually raised. Indeed, by contrast, in Section 18(a)(1)(D) of the America Invents Act, which governs the transitional program for covered business method patent reviews, Congress expressly limited estoppel to “any ground that the petitioner raised during that transitional proceeding.” Leahy-Smith America Invents Act (“AIA”) § 18, Pub. L. No. 112-29, 125 Stat. 284, 329–31 (2011). To that end, we discern that *Shaw Industries Group* held that estoppel does not apply to any ground of unpatentability that was presented in a petition, but denied institution. That is consistent with our above analysis of Section 315(e)(1).

Petitioner appears to place heightened emphasis on the word “during” of “during that *inter partes* review,” in that because an *inter partes* review does not begin until a trial has been instituted, and that trial is limited to the instituted grounds, no other grounds “reasonably could have [been] raised” during that proceeding. We disagree. As set forth above, such an interpretation of Section 315(e)(1) would render superfluous “reasonably could have raised.” Moreover, we discern a substantive distinction between a ground that a petitioner attempted to raise, but was denied a trial, and a ground that a petitioner could have raised, but elected not to raise in its previous petition or petitions. Basic principles of fairness and due process dictate that the petitioner should not be estopped in the former. *See HP Inc. v. MPHJ Tech. Invs., LLC*, 817 F.3d 1339, 1347 (Fed. Cir. 2016) (“[T]he noninstituted grounds do not become a part of the IPR [T]he noninstituted grounds were not raised and, as review was denied, could not be raised in the IPR.”) In the latter, a petitioner makes an affirmative choice to avail itself of *inter partes* review only on certain grounds. That choice, however, comes with consequences, most prominently, that grounds petitioner elects not to raise in its petition for *inter partes* review may be subject to the consequences of Section 315(e)(1).

Finally, with respect to Petitioner’s reference to a district court decision in *Intellectual Ventures I LLC* that purportedly supports its proposition (*see* Pet. Brief. 2–3), while the Board has considered the relevant portions of that decision, and respectfully accord it all due deference, we are unpersuaded that the district court’s reasoning should be adopted here, for several reasons. First, a decision in a district court proceeding is generally not binding on the Board. Second, *Shaw Industries Group* does not address

the fact scenario in either the district court proceeding or the instant proceeding, for the reasons set forth above. Finally, the district court decision acknowledges the following:

Although IV’s argument in this regard is perfectly plausible, in the sense that Toshiba certainly could have raised these additional obviousness grounds based on public documents at the outset of their IPR petition, the Federal Circuit has construed the above language quite literally. *See Shaw Indus. Grp., Inc. v. Automated Creel Sys., Inc.*, 817 F.3d 1293 (Fed. Cir. 2016). More specifically, the Court determined in *Shaw* that, because the PTAB rejected a certain invalidity ground proposed by the IPR petitioner, no IPR was instituted on that ground and, therefore, petitioner “did not raise—nor could it have reasonably raised—the [rejected] ground **during** the IPR.” *Id.* at 1300 (emphasis in original). Although extending the above logic to prior art references that were never presented to the PTAB at all (despite their public nature) confounds the very purpose of this parallel administrative proceeding, the court cannot divine a reasoned way around the Federal Circuit’s interpretation in *Shaw*.

Intellectual Ventures I LLC, 2016 WL 7341713, at *13 (underlining added).

In our view, our analysis comports with *Shaw Industries Group*, which did not address the scenario presented here.

Petitioner next asserts that even if the Board disagrees with its interpretation of Section 315(e)(1), a ground based on Robinson is, nevertheless, not a ground that Petitioner “reasonably could have raised” because (1) Petitioner was unaware of Robinson prior to the filing of the petition in IPR2016-01434 “despite an exhaustive, litigation-motivated prior art search,” and (2) “there is not a shred of evidence suggesting that Robinson could be found in the types of places a diligent prior art searcher

would look or that it would be adequately described in those places.” Pet. Brief 3–4.

Against these assertions, we weigh Patent Owner’s assertions that Robinson “was readily identifiable in a diligent search.” PO Brief 1–3 (citing *Apotex Inc. v. Wyeth LLC*, IPR2015-00873, slip op. at 6 (PTAB Sept. 16, 2015) (Paper 8) (quoting 157 Cong. Rec. S1375 (daily ed. Mar. 8, 2011) (“What a petitioner ‘could have raised’ was broadly described in the legislative history of the America Invents Act (‘AIA’) to include ‘prior art which a skilled searcher conducting a diligent search reasonably could have been expected to discover.’”))). In particular, Patent Owner asserts:

Oracle’s petition explains, for example, that “Robinson would have appeared as a result in a search of the subject ‘web portals’ in the Library of Congress’s database.” *Id.* at 6. Moreover, as explained in IV’s prior papers, Robinson would also have been found in a search of www.worldcat.org, a popular online library catalog. Paper 6 at 6–7; Paper 8 at 13.

PO Brief 3. Patent Owner asserts further that Petitioner has exhibited familiarity with the Excite web site system, and, thus, that Robinson, which is entitled “OFFICIAL EXCITE INTERNET YELLOW PAGES,” was a reference sufficiently related to the Excite web site system that Petitioner reasonably could have been expected to discover. PO Brief 3–4.

In the aggregate, we agree with Patent Owner. With respect to Petitioner’s assertion (1), above, we accept at face value that it conducted an extensive search which did not turn up the Robinson reference. We, nevertheless, discount that assertion somewhat because Petitioner did not present search parameters such that we could evaluate the “reasonableness” of its search. Mot. 7–8; Pet. Brief 3. Petitioner’s assertion (2) above, however, is persuasively refuted by Patent Owner. Specifically, while

Patent Owner's assertions concerning www.worldcat.org may perhaps be discounted somewhat as litigation inspired posturing, the explanation and evidence presented in the petition in IPR2016-01434, by unrelated petitioners, as to the indexing of Robinson at the Library of Congress under "web portal," coupled with Petitioner's undisputed familiarity with the Excite web site system generally, strongly supports Patent Owner's assertion that Robinson "was readily identifiable in a diligent search" (157 Cong. Rec. S1375 (daily ed. Mar. 8, 2011)), and, thus, that a ground based on Robinson is one that Petitioner "reasonably could have raised" in the prior completed proceedings. *See Oracle America Inc., v. Intellectual Ventures II LLC*, Case IPR2016-01434, Paper 4 (PTAB July 14, 2016) (citing paragraphs 6–12 of Ex. 1010 in IPR2016-01434).

In light of the above, and on these facts, we determine that Petitioner is estopped under Section 315(e)(1) from challenging claims 11–13 and 15–20 of the '177 patent in this proceeding.

b. Motion for Joinder⁷

The AIA created administrative trial proceedings, including *inter partes* review, as an efficient, streamlined, and cost-effective alternative to district court litigation. The AIA permits the joinder of like proceedings. The Board, acting on behalf of the Director, has the discretion to join an *inter partes* review with another *inter partes* review. 35 U.S.C. § 315(c). Section 315(c) provides (emphasis added):

⁷ We address Petitioner's Motion for Joinder for all claims, and assess the interplay between joinder and estoppel below in our analysis of Section 314(a).

JOINDER.—If the Director institutes an inter partes review, *the Director, in his or her discretion, may join as a party to that inter partes review any person who properly files a petition under section 311* that the Director, after receiving a preliminary response under section 313 or the expiration of the time for filing such a response, determines warrants the institution of an inter partes review under section 314.

35 U.S.C. § 315(b) bars institution of an *inter partes* review when the petition is filed more than one year after the petitioner (or the petitioner’s real party-in-interest or privy) is served with a complaint alleging infringement of the patent. 35 U.S.C. § 315(b); 37 C.F.R. § 42.101(b). The one-year time bar, however, does not apply to a request for joinder. 35 U.S.C. § 315(b) (“The time limitation set forth in the preceding sentence shall not apply to a request for joinder under subsection (c).”); 37 C.F.R. § 42.122(b). Petitioner was served with a complaint alleging infringement of the ’177 patent on January 20, 2015—more than one year before filing the instant Petition. *See* Mot. 1; Opp. 1. Thus, absent joinder with IPR2016-01434, the Petition in the instant proceeding is time-barred.

Joinder may be authorized when warranted, but the decision to grant joinder is discretionary. *See* 35 U.S.C. § 315(c); 37 C.F.R. § 42.122. The Board determines whether to grant joinder on a case-by-case basis, taking into account the particular facts of each case, substantive and procedural issues, and other considerations. *See* 157 CONG. REC. S1376 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl) (when determining whether and when to allow joinder, the Office may consider factors including “the breadth or unusualness of the claim scope” and claim construction issues). When exercising its discretion, the Board is mindful that the regulations governing trial practice and procedure before the Board, including the rules for joinder,

must be construed to secure the just, speedy, and inexpensive resolution of every proceeding. *See* 37 C.F.R. § 42.1(b).

As the moving party, Petitioner has the burden of proof in establishing entitlement to the requested relief. 37 C.F.R. §§ 42.20(c), 42.122(b). A motion for joinder should: (1) set forth the reasons why joinder is appropriate; (2) identify any new ground(s) of unpatentability asserted in the petition; and (3) explain what impact (if any) joinder would have on the trial schedule for the existing review. *See* Frequently Asked Question H5 on the Board’s website at <http://www.uspto.gov/ip/boards/bpai/prps.jsp>. Petitioner should address specifically how briefing and/or discovery may be simplified to minimize schedule impact. *See Kyocera Corp. v. SoftView LLC*, Case IPR2013-00004, slip op. at 4 (PTAB Apr. 24, 2013) (Paper 15) (representative).

Petitioner addresses the aforementioned factors in its Motion for Joinder. Among them, Petitioner asserts (1) that the instant Petition and the petition in IPR2016-01434 are substantially identical, including presenting the same grounds and references, and using the same expert, (2) that due to the timing of the Motion, the trial schedule in IPR2016-01434 will not be affected, (3) that “Petitioners, Oracle, and HCC will engage in consolidated filings and discovery, which will simplify the briefing and discovery process. Petitioners will assume an ‘understudy’ role, and only assume an active role in the event that Oracle and HCC settle with Patent Owner,” and (4) that there is no prejudice to Patent Owner. Mot. 2–8.

As an initial matter, we note that our discretionary authority to grant joinder cannot be invoked unless it is determined that “a petition under section 311 . . . warrants the institution of an inter partes review under

section 314.” We determined that the grounds of unpatentability set forth in the petition filed in IPR2016-01434 indicated “a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” Dec. 1, 30–31. The grounds of unpatentability set forth in the instant Petition are substantively identical.⁸

Having analyzed the substance of the grounds of unpatentability set forth in the instant Petition, we move on to joinder. Patent Owner asserts that Petitioner’s sole reason for requesting joinder, to “promote judicial efficiency,” is incorrect because denying the Petition would actually be “*less expensive* and *more judicially efficient* than joinder.” Opp. 3, 7. While perhaps literally correct, as any grant of joinder creates at least some attendant complications, Patent Owner’s assertion is misplaced, insofar as the statute specifically authorizes joinder. Instead, we read Petitioner’s assertion concerning judicial efficiency as more of an acknowledgment of efficient administration of the AIA overall, which we discern would be served by granting joinder in this proceeding.

Patent Owner asserts further that Patent Owner would be severely prejudiced by joinder, because the instant Petition represents Petitioner’s “fifth bite” at the apple. Opp. 4–5. We are unclear as to the connection between those points. Specifically, we have already instituted trial in

⁸ Even if the grounds of unpatentability set forth in the instant Petition meet the *substantive* standards for institution, that alone does not indicate that the instant Petition *warrants* institution. For example, a petition that meets the substantive standards, but is nevertheless time-barred under Section 315(b), would not warrant institution under Section 314. For these and other reasons, we treat joinder as merely a factor in assessing whether or not to institute review under Section 314(a).

IPR2016-01434 and Petitioner has agreed to take a passive role in the joined proceeding, absent a settlement between Patent Owner and the other petitioners. Accordingly if joinder is granted, Patent Owner would have to respond to only one set of papers in IPR2016-01434, and would be prejudiced only if the other petitioners in IPR2016-01434 settled—with, of course, the acquiescence of Patent Owner. We are unpersuaded that the possibility of such a speculative burden, a burden over which Patent Owner has at least some control, constitutes “severe prejudice.” Our analysis is the same for the related proposition that Patent Owner would be severely prejudiced because Petitioner is not raising any ground that could not have been raised when filing its earlier petitions. Opp. 5–6.

Patent Owner asserts additionally that granting joinder would be unjust because it is a blatant attempt by Petitioner to make an end-run around the one-year bar date of 35 U.S.C. § 315(b). The assertion is ultimately misplaced. To the extent Petitioner’s actions may be an “end-run,” it is an “end-run” specifically and expressly permitted by statute.

Patent Owner asserts also that granting joinder will result in Petitioner “ghost writing” certain “portions of papers, deposition questions, and oral hearing presentations,” all the while allowing Petitioner to use Patent Owner’s prior responses and Board papers as roadmaps in an attempt to perfect previously made arguments. Opp. 4–5. We are unpersuaded that this is a valid concern because (1) all the papers in all previous related proceedings are public, and the other petitioners in the other pending proceeding are free to rely on any of those same papers in fashioning its arguments, and (2) the instant Petitioner is not in the proverbial “driver’s seat” in IPR2016-01434 and is not entitled to file any papers as a matter of

right, and Patent Owner has not shown persuasively why the other petitioners would be willing to just cede that control to Petitioner for any “ghost writing.”

In summary, on these facts, our above analysis of the instant Petition under 35 U.S.C. § 315(c) weighs in favor of granting institution under Section 314(a).

*c. Multiple Proceedings Under 35 U.S.C. § 325(d)*⁹

Our discretion as to whether to institute is further guided by 35 U.S.C. § 325(d), which provides, in relevant part:

MULTIPLE PROCEEDINGS -- . . . In determining whether to institute or order a proceeding under this chapter, chapter 30, or chapter 31, the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office.

In that regard, we first examine whether the grounds asserted in the instant Petition present “the same or substantially the same prior art or arguments” as those previously presented to the Office. Then, we determine whether it is appropriate to exercise our discretion to deny institution.

To that end, the analysis of the first inquiry is unremarkable. No party disputes that the grounds of unpatentability set forth in the instant Petition are substantively identical to that set forth in the petition filed in IPR2016-01434.

⁹ We address the applicability of Section 325(d) for all claims, and assess the interplay between Section 325(d) and estoppel below in our analysis of Section 314(a).

For the second inquiry, we discern that it is appropriate to consider factors similar to those considered by this and other panels in determining whether to exercise our discretion not to institute review under 35 U.S.C. § 314(a), when the parties in the relevant proceedings are the same. *See Great W. Cas. Co. v. Intellectual Ventures II LLC*, Case IPR2016-00453, slip op. at 7–8 (PTAB June 9, 2016) (Paper 12).¹⁰ Among the factors we may consider in deciding whether to exercise discretion not to institute review are:

- (1) the resources of the Board;
- (2) the requirement under 35 U.S.C. § 316(a)(11) to issue a final determination not later than 1 year after the date on which the Director notices institution of review;
- (3) whether the same petitioner already previously filed a petition directed to the same claims of the same patent;
- (4) whether at the time of filing of the first petition the petitioner knew of the prior art asserted in the second petition or should have known about it;¹¹
- (5) whether at the time of filing of the second petition the petitioner already received patent owner’s preliminary

¹⁰ As we have already addressed estoppel and joinder above, those issues will not be considered expressly in our analysis concerning Section 325(d), unless indicated otherwise. In our overall determination as to whether to institute trial under Section 314(a), however, we will consider estoppel and joinder at that juncture, along with all the other factors set forth herein.

¹¹ *See Conopco, Inc. v. Proctor & Gamble Co.*, Case IPR2014-00506, slip op. at 4 (PTAB Dec. 10, 2014) (Paper 25) (informative), and slip op. at 6 (PTAB July 7, 2014) (Paper 17); *Toyota Motor Corp. v. Cellport Sys., Inc.*, Case IPR2015-01423, slip op. at 8 (PTAB Oct. 28, 2015) (Paper 7).

response to the first petition or received the Board's decision on whether to institute review in the first petition;¹²

- (6) the length of time that elapsed between the time petitioner learned of the prior art asserted in the second petition and filing of the second petition; and
- (7) whether petitioner provides adequate explanation for the time elapsed between the filings of multiple petitions directed to the same claims of the same patent.

See NVIDIA Corp. v. Samsung Elec. Co., Ltd., Case IPR2016-00134, slip. op. at 6–7 (PTAB May 4, 2016) (Paper 9).

In general, we evaluate whether to exercise our discretion not to institute review of a subsequent petition from the same petitioner using the above factors, because, fundamentally, we are concerned with fairness for both petitioner and patent owner and also with the limited resources of the Board. In particular, the potential inequity based on a petitioner's filing of serial and similar attacks against the same claims of the same patent, while having the opportunity to adjust litigation positions along the way based on either a patent owner's contentions responding to prior challenges or the Board's decision on prior challenges, is real and cannot be ignored. That is especially so if petitioner, at the time of filing of the earlier petition was aware of or should have been aware of the prior art references newly cited and applied in the later petition *See* 157 Cong. Rec. S1375 (daily ed. Mar. 8,

¹² *See Conopco, Inc. v. Proctor & Gamble Co.*, Case IPR2014-00628, slip op. at 11 (PTAB October 20, 2014) (Paper 21) (discouraging filing of a first petition that holds back prior art for use in later attacks against the same patent if the first petition is denied); *Toyota Motor Corp.*, slip op. at 8 (“[T]he opportunity to read Patent Owner's Preliminary Response in IPR2015-00634, prior to filing the Petition here, is unjust.”).

2011). It is for these reasons that, in line with other burdens placed on petitioner, we place the burden on petitioner to justify institution in view of these factors, because petitioner cannot expect automatic institution on multiple petitions submitted for consideration, especially if they are against the same claims of the same patent. *See* 37 C.F.R. § 42.20(c) (“The moving party has the burden of proof to establish that it is entitled to the requested relief.”) This is not to say, however, that multiple petitions against the same claims of the same patent are never permitted. Rather, each case depends on its own facts. We look to and consider, in each case, as we do here, what rationale a petitioner offers for filing multiple petitions and for the time elapsed between those filings. We weigh the above factors individually and in turn.

Concerning factor (1), Patent Owner asserts that instituting on Petitioner’s fifth petition directed to the same patent would be a waste of Board resources. Prelim. Resp. 10–11. More specifically, despite Petitioner’s assertions that the parties will work seamlessly together, Patent Owner asserts that increasing the number of parties unavoidably introduces complexity and expense, and that in the event of settlement between the parties in underlying IPR2016-01434, the Board will expend more resources in continuing a proceeding that otherwise would have been terminated. We agree with Patent Owner that granting the instant Petition cannot be characterized as anything other than a greater use of Board resources, however marginal. While we acknowledge that this factor does weigh against granting the instant Petition, we discount the weight accorded this factor because every trial institution necessitates an expenditure of Board resources. The more relevant question is whether that additional expenditure

is a worthwhile use of limited Board resources, a question which can be answered, for example, by evaluating the other factors set forth below.

Concerning factor (2), neither party has addressed expressly this factor. Nevertheless, we discern that less than one month has elapsed since our institution of trial in IPR2016-01434, and in any case, the Board “may adjust the time periods in this paragraph in the case of joinder under section 315(c).” *See* 35 U.S.C. § 316(a)(11). This factor, therefore, weighs in favor of granting the instant Petition.

Concerning factor (3), Patent Owner asserts that Petitioner has already had multiple full and fair opportunities to challenge claims 11–20 of the ’177 patent, and that granting this fifth challenge against the same claims would be inequitable. We agree that this factor weighs heavily against granting the instant Petition.

Concerning factor (4), Petitioner asserts the following:

Prior to the filing of the Oracle and HCC petition, Petitioners were unaware of the principal prior art reference relied on here, Robinson (Ex. 1004), a 1999 book entitled “Official Excite Internet Yellow Pages.” While Petitioners knew of the Excite web site system after the initiation of parallel litigation with Patent Owner, such a prior art system cannot be the basis for an inter partes review, and Robinson itself—the printed publication describing the system—was not located in Petitioners’ prior art searching. Petitioners, moreover, are insurance companies. There is therefore no reason why they should have been aware of an obscure book about a website not related to the insurance industry. Petitioners therefore did not know of, and had no reason to know of, the principal reference underlying this petition.

Mot. 7–8. As an initial matter, Patent Owner clarifies that the standard is not whether Petitioner knew about the relevant prior art, but whether Petitioner

“should have known about it.” To that end, Patent Owner asserts that Petitioner’s above assertions concerning factor (3) are not credible because (a) the MyLibrary reference cited in IPR2015-01706 explicitly refers to Excite, (b) Petitioner admits that it “knew of the Excite web site system,” (c) Petitioner relied heavily on Excite in its invalidity contentions filed July 24, 2015 in a related district court proceeding, and (d) “a simple search of the terms ‘Excite’ and ‘Internet’ in www.worldcat.org, a popular library catalog search engine aggregating library catalogs around the world, would have found the Robinson reference in the top results—result number 8. Ex. 2001 at 2; Ex. 2002 at 1.” Prelim. Resp. 12–13; *see also* Prelim. Resp. 15–16 (reiterating the same). Portions of our above analysis concerning Section 315(e)(1) concerning “reasonably could have raised,” which weighs in favor of Patent Owner, are also applicable here. For these reasons, we are unpersuaded that Petitioner has refuted sufficiently that they “should have known about” Robinson. Accordingly, this factor also weighs against granting the instant Petition.

Concerning factor (5), there is no dispute that the instant Petition was filed after the filing of all of the Patent Owner’s Preliminary Response, the Decision on Institution, and Patent Owner’s Response in each of IPR2015-01706 and IPR2015-01707. Accordingly, this factor further weighs against granting the instant Petition.

Concerning factor (6), the instant Petition was filed less than one month after the filing of the petition in IPR2016-01434. Accordingly, this factor weighs in favor of granting the instant Petition.

Concerning factor (7), Petitioner asserts that institution will promote judicial efficiency, in that “Congress, of course, created these proceedings as

a more efficient way to litigate patent validity issues,” and “will . . . promote administrative and judicial economy before the Board and in district court.” Mot. 8. Patent Owner asserts that Petitioner’s justification is inadequate. Prelim. Resp. 16–17. We agree with Patent Owner. While these proceedings were created by Congress as an alternate forum for patent validity issues in order to effect some administrative and judicial economy, both before the Board and in the district court, this factor, if applied literally, would require the Board to grant almost every petition. Accordingly, instead, we seek from petitioners an adequate explanation, and, here, we determine that Petitioner’s generic explanation is too vague and non-specific to meet its burden as to why the later-filed instant Petition is justified. Accordingly, in light of Petitioner’s exceedingly weak explanation, we determine that this factor does not appreciably assist Petitioner in meeting its burden as to why the instant Petition should be granted.

Each exercise of discretion is a highly fact dependent inquiry. Considered in the aggregate, the above factors weigh heavily against granting the instant Petition under Section 314(a). In particular, this is Petitioner’s fifth petition challenging the same claims of the ’177 patent, and Petitioner has not provided adequate explanation to justify granting the instant Petition.

*d. Multiple Proceedings Under 35 U.S.C. § 315(d)*¹³

The Board, acting on behalf of the Director, has the discretion to consolidate any proceeding or matter involving a patent before the Office

¹³ We address the applicability of Section 315(d) for all claims, and assess the interplay between Section 315(d) and estoppel below in our analysis of Section 314(a).

with a co-pending *inter partes* review involving the same patent. 35 U.S.C. § 315(d). Section 315(d) provides (emphasis added):

MULTIPLE PROCEEDINGS.—Notwithstanding sections 135(a), 251, and 252, and chapter 30, during the pendency of an *inter partes* review, *if another proceeding or matter involving the patent is before the Office, the Director may determine the manner in which the inter partes review or other proceeding or matter may proceed*, including providing for stay, transfer, consolidation, or termination of any such matter or proceeding.

Although Section 315(d) has been primarily used by the Board to exercise discretion over proceedings and matters in other parts of the Office involving the same patent, e.g., a co-pending reissue application concerning the involved patent, the Board has also exercised its discretion under Section 315(d) to consolidate multiple *inter partes* reviews. *See Geosys-Intl, Inc. v. Farmer’s Edge Precision Consulting, Inc.*, Case IPR2015-00709 (PTAB Apr. 19, 2016) (Paper 30) (staying examination of reissue application) ; *Google Inc. v. Vedanti Systems Ltd.*, Case IPR2016-00215, slip op. at 2 (PTAB May 20, 2016) (Paper 7) (consolidating proceeding with IPR2016-00212). IPR2015-01434 is pending and involves the same patent, and, thus, the Board has the authority to exercise its discretion under Section 315(d) to determine the manner in which the instant proceeding is to proceed.

Regarding whether or not to exercise that authority, we discern that, given that both Sections 315(d) and 325(d) deal with multiple proceedings and have permissive “may” language, it is appropriate to consider factors similar to those considered by this and other panels in determining whether to exercise our discretion not to institute review under 35 U.S.C. § 314(a), when the parties in the proceedings at issue are the same. *See Great W. Cas.*

Co. v. Intellectual Ventures II LLC, Case IPR2016-00453, slip op. at 7–8 (PTAB June 9, 2016) (Paper 12) (citing *NVIDIA Corp. v. Samsung Elec. Co., Ltd.*, Case IPR2016-00134, slip. op at 6–7 (PTAB May 4, 2016) (Paper 9)). To that end, our analysis and conclusions are the same as set forth above in our analysis under Section 325(d), and need not be repeated here.

e. Aggregate Weighing Under 35 U.S.C. § 314(a)

Consideration of all of the above statutory provisions in the aggregate ultimately informs our discretionary authority under 35 U.S.C. § 314(a). *See also* 37 C.F.R. §§ 42.108(a), (b). Each exercise of discretion is a highly fact dependent inquiry. In summary, the factors to be weighed are as follows. No estoppel under Section 315(e)(1) is present for dependent claim 14. Our analysis under Section 315(c) weighs in favor of granting institution (as in IPR2016-01434) and, hence, joinder. Our analyses under Section 325(d) and 315(d) weigh heavily against granting the instant Petition. When all of these factors are considered in the aggregate, on these facts, we discern the ultimate determination comes down to whether the Board should grant institution for dependent claim 14.

As an initial matter, we note that Patent Owner asserts the following with regards to the potential for limiting institution to dependent claim 14:

Further, as in *Dell*, joining Great West on just one claim of Oracle’s ten challenged claims would unnecessarily complicate the Oracle IPR. While the Board could theoretically join Great West to Oracle’s IPR on claim 14 only, Great West’s participation would have to be limited to claim 14. Monitoring Great West’s compliance with that restriction would be administratively infeasible. Moreover, managing a multi-front trial against Oracle and Great West would entail unnecessary

“effort and expense that will fall to Patent Owner.” *See Dell*, IPR2015-00549, Paper 10 at 8.

PO Brief 5. While we respectfully acknowledge the concerns expressed in *Dell Inc. v. Electronics and Telecommunications Research, Inst.*, IPR2015-00549, slip op. at 4 (PTAB Mar. 26, 2015) (Paper 10), for the reasons expressed below, and on the specific facts and procedural posture of this proceeding, we disagree.

As set forth above in our analysis of Section 315(c), Patent Owner’s concerns are premised largely on the other petitioners ceding control of the other pending proceeding to Petitioner. This concern seems highly speculative, given that it is unclear why the other petitioners would cede control to Petitioner. Furthermore, the joined parties will be allowed to file only one set of papers, and so, again, we are unclear what additional effort or expense would fall to Patent Owner. Additionally, were the other petitioners to settle with Patent Owner, we are unclear as to why enforcing the parameters of Petitioner’s participation, i.e., limiting briefing to dependent claim 14 only, would be difficult to administer or enforce. While, in the event of settlement, Patent Owner would have the marginal expense related to defending dependent claim 14 that it would not have had to expend were institution, and the related joinder, not to be granted, that is the point of Petitioner’s request for joinder, and so we are unpersuaded it should figure so disproportionately in our analysis, as advocated by Patent Owner.

Moving to the more relevant issue at hand, we revisit the appropriate factor under *NVIDIA Corp.*, namely, “whether petitioner provides adequate explanation for the time elapsed between the filings of multiple petitions directed to the same claims of the same patent.” We place heavy weight on

this factor, because an adequate explanation by Petitioner may be enough to outweigh all of the other factors under *NVIDIA Corp.* In that regard, Petitioner asserts that the main reason a trial was not instituted on dependent claim 14 in the prior proceedings was because Patent Owner surprised Petitioner with a claim construction position in those proceedings, namely, in its preliminary responses, that was completely at odds with its positions in the related district court proceeding. Pet. Brief 4–5. Petitioner implies that Patent Owner should not be permitted to benefit from such inconsistencies, a concern we acknowledge is real and disfavored. *See Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1351 (Fed. Cir. 2001) (“A patent may not, like a ‘nose of wax,’ be twisted one way to avoid anticipation and another to find infringement” (quoting *Sterner Lighting, Inc. v. Allied Elec. Supply, Inc.*, 431 F.2d 539, 544 (5th Cir. 1970))).¹⁴ Accordingly, Petitioner asserts that granting institution here, even for just dependent claim 14, would remedy that inequity. We disagree, primarily because Petitioner did not raise this alleged “inequity” in a timely manner.

Specifically, Petitioner had the opportunity to raise this concern via several avenues, for example, by requesting a reply to the preliminary response in the appropriate prior completed proceeding, or by timely filing a further petition. Indeed, Petitioner expressly availed itself of the latter opportunity by filing a petition in IPR2016-00453, which was filed after the preliminary responses were filed in the prior completed proceedings, and in

¹⁴ We note that, by the same reasoning, it would be equally improper for Petitioner, upon agreeing to a broad construction in District Court, to use this forum to attempt to obtain a more narrow construction to upset that agreement and avoid a finding of infringement in the District Court.

that petition, specifically asserted that the petition was being filed to address a claim construction position taken by Patent Owner in the prior completed proceedings, which at the time were still pending. Ex. 3004, 2–4. Notably, in that petition, Petitioner did not mention the claim construction inconsistency set forth above, which we would have expected Petitioner to make if the alleged inconsistency was as egregious as Petitioner asserts.

Each exercise of discretion is a highly fact dependent inquiry. When all the above factors are weighed above in the aggregate, with particular weight given to Petitioner’s inadequate explanation as to why the above factor under *NVIDIA Corp.* weighs in favor of granting institution for just dependent claim 14, and that this is Petitioner’s *fifth* petition challenging claims 11–20 of the ’177 patent, which includes dependent claim 14, on these facts, we decline to exercise our discretion under Section 314(a), and do not institute *inter partes* review on any of claims 11–20 of the ’177 patent on any ground. And as the instant Petition does not warrant institution, Petitioner’s Motion for Joinder is also denied.

III. CONCLUSION

For the foregoing reasons, we do not institute *inter partes* review on any of claims 11–20 of the ’177 patent on any ground. Petitioner’s Motion for Joinder is *denied*.

IV. ORDER

It is

ORDERED that no trial or *inter partes* review is instituted for any claim of the ’177 patent on any ground in this proceeding; and

FURTHER ORDERED that Petitioner’s Motion for Joinder is *denied*.

IPR2016-01534
Patent 7,516,177 B2

IPR2016-01534
Patent 7,516,177 B2

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