

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LG ELECTRONICS, INC.
Petitioner,

v.

ATI TECHNOLOGIES ULC.
Patent Owner.

Case IPR2015-01620

Patent 7,095,945

**PATENT OWNER'S OPPOSITION
TO MOTION FOR JOINDER**

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Rules

37 C.F.R. § 42.20(c) 3

EXHIBIT LIST

Ex. No.	Description
2001	Invalidity Contentions served by Counsel for LG Electronics, Inc. <i>et al.</i> , dated October 2, 2014, Case No. 3:14-cv-1012-SI
2002	Exhibit I-01 (945) US5517250 - Hoogenboom Service Chart

I. Introduction

Patent Owner, ATI Technologies ULC. (hereinafter “ATI”), respectfully requests that the Board deny LG’s Motion for Joinder. LG’s petition is time barred under 35 U.S.C. § 315(b), because it was filed more than a year after LG was served with a complaint alleging infringement of U.S. Patent No. 7,095,945 (the “’945 Patent”). LG now seeks to circumvent the one-year statutory bar by filing a motion for joinder (Paper 3; “Motion”) under 35 U.S.C. § 315(c). However, the Board has repeatedly denied joinder where a petitioner attempts to use a prior institution decision as a roadmap for remedying challenges that were unsuccessfully advanced in the first-filed petition, especially where the § 315(b) bar would apply absent joinder. *See, e.g., Medtronic, Inc. et al. v. Endotach LLC*, IPR2014-00695, Paper 18, pp. 3-4 (Sept. 25, 2014).

Consistent with Board precedent, the Board should deny LG’s motion for joinder because LG is not entitled to a “do over” of its failed previous attempt to challenge claim 21 of the ’945 Patent. LG’s Second Petition is nothing more than a “second bite at the apple” and an effort to remedy LG’s prior deficient challenge against claim 21. LG’s arguments and the facts surrounding this case, far from supporting joinder, actually weigh heavily against joinder. LG’s Motion fails to provide any good reasons to merit joinder at this stage. Nor does the Motion address similar cases holding joinder inappropriate. Lastly, contrary to LG’s self-

serving reasoning, joinder will indeed prejudice ATI. The Board should, therefore, deny LG's Motion.

II. Background

On or about July 12, 2012, ATI provided LG with a claim chart demonstrating LG's infringement of the '945 Patent. After years of unsuccessful licensing discussions, on March 5, 2014, ATI served LG a complaint alleging infringement of the '945 Patent. On December 10, 2014, after more than nine months of litigation, LG filed an *inter partes* review ("IPR") petition against the '945 Patent challenging claims 18 and 21 (the "First Petition," IPR2015-00321). The First Petition raised five grounds of unpatentability, including three separate grounds against claim 21. The Board instituted trial for claim 18 and denied institution for claim 21. IPR2015-00321, Paper 20 (Jun. 26, 2015).

In its Institution Decision, the Board held that the petition failed to advance any prior art that taught key limitations of claim 21. *Id.* at 11-17, 20-22. The following table summarizes the grounds in the First Petition and the Board's corresponding decision:

Ground	Claim	Challenge	Board Decision
1	18, 21	Claims 18 and 21 are anticipated by U.S. Patent No. 6,233,389 to Barton	Not Instituted
2	18	Claim is obvious over U.S. Patent No. 6,397,000 to Hatanaka	Instituted
3	21	Claim 21 is anticipated by Hatanaka	Not Instituted

Ground	Claim	Challenge	Board Decision
4	18	Claim 18 is obvious over Hatanaka in view of U.S. Patent No. 6,591,058 to O'Connor	Instituted
5	21	Claim 21 is obvious over U.S. Patent No. 5,521,922 to Fujinami	Not Instituted

On July 24, 2015—over 16 months after being served with a complaint—LG filed a second petition against the '945 Patent, which again sought to invalidate claim 21 (the “Second Petition,” IPR2015-01620). In an attempt to avoid the one year time limitation imposed by § 315(b), LG also filed the instant Motion seeking to join the Second Petition with the instituted proceeding, IPR2015-00321.

LG's Second Petition presents two new grounds for invalidating claim 21 based on the same primary reference, Hatanaka, and two newly presented references—U.S. Patent No. 5,517,250 to Hoogenboom and U.S. Patent No. 6,275,507 to Anderson—and a new supporting expert declaration. Absent a decision by the Board to join this proceeding with IPR2015-00321, the Second Petition is time-barred under § 315(b).

III. Argument

A. LG has not met its burden in demonstrating why it should be entitled to a “second-bite at the apple.”

The Board should deny LG's Motion because LG fails to meet its burden under 37 C.F.R. § 42.20(c) to demonstrate that joinder is appropriate. Joinder is inappropriate for at least three reasons: (i) LG is not entitled to use the prior

Institution Decision as a roadmap for its Second Petition—“second bite at the apple”; (ii) LG fails to provide a good cause or reason to warrant a “second bite at the apple”; and (iii) the facts of this case merit denial of joinder. Accordingly, the Board should exercise its discretion under § 315(c) to deny LG’s Motion and dismiss the Second Petition, which is improper under § 315(b) .

1. LG is not entitled to use the First Petition’s Institution Decision as a roadmap for its Second Petition.

The Board should deny LG’s Motion because LG’s Second Petition seeks nothing more than “a second bite at the apple”—a second chance to challenge the same claim that was previously challenged and denied by the Board.

Numerous Board decisions have denied joinder when the petitioner attempts to use a prior institution decision as a roadmap for remedying challenges that were unsuccessfully advanced in the first petition. This is especially true when the § 315(b) bar would apply absent joinder. *See, e.g., Butamax Advanced Biofuels LLC v. Gevo, Inc.*, IPR2014-00581, Paper 8, pp. 12-13 (Oct. 14, 2015) (“the four obviousness grounds are ‘second bites at the apple,’ which use our prior decision as a roadmap to remedy [petitioner’s] prior, deficient challenge”); *Samsung Electronics Co. Ltd. et al. v. Affinity Labs of Texas, LLC*, IPR2015-00820, Paper 12, p. 4 (May 15, 2015) (“[t]his appears . . . to be a case where Petitioner seeks to use our Decision to Institute . . . as a guide to remedy deficiencies in the earlier

filed petition, i.e. a ‘second bite at the apple’”); *Toyota Motor Corp. v. American Vehicular Sciences LLC*, IPR2015-00262, Paper 10, p. 3 (Jan. 29, 2015); *Medtronic*, IPR2014-00695, Paper 18, at 3-4.

Such is the case here. LG’s Second Petition challenges claim 21 and uses the prior Institution Decision as a roadmap to remedy LG’s original deficient petition. Specifically, the Second Petition relies on the same primary reference, Hatanaka, which was previously rejected in IPR2015-00321, and adds two new references to address the First Petition’s shortcomings. *See* Paper 3, at 2-3. Thus, armed with knowledge of the deficiencies identified by the Board in the Institution Decision, LG now inappropriately requests the Board for a do-over. Such tactics should not be allowed, and LG’s Motion should be denied.

The Board has stated that it is concerned about encouraging, unnecessarily, the filing of petitions which are partially inadequate. *See ZTE Corp. et al. v. ContentGaurd Holdings, Inc.*, IPR2013-00454, Paper 12, pp. 5-6 (Sept. 25, 2013). The Board reasoned that “[a] decision to institute review on some claims should not act as an entry ticket, and a how-to guide . . . to challenge those claims which [the petitioner] unsuccessfully challenged in the first petition.” *Id.* By “[p]ermitting second chances” the Board needs to “be mindful not only of this proceeding, but of every proceeding” when exercising its discretion, for such cases will inevitably “tie[] up the Board’s limited resources.” *See Samsung Electronics, et al. v.*

Rembrandt Wireless Tech., LP, IPR2015-00555, Paper 20, p. 8 (Jun. 19, 2015). Accordingly, the Board, keeping these concerns in mind, should deny LG’s belated attempt to use a Second Petition to remedy its prior deficient arguments.

2. LG fails to provide a good cause or reason to warrant a “second bite at the apple.”

LG’s Motion fails to identify any new circumstances or good reasons that merit giving LG a second chance to challenge the patentability of claim 21 in its Second Petition. Generally, “when a § 315(b) bar would apply absent joinder,” the Board “hesitate[s] to allow a petitioner a second bite one month after institution in a first case, at the expense of . . . potential prejudice[] to Patent Owner, absent a *good reason* for doing so.” *See Amneal Pharm., LLC v. Endo Pharm. Inc.*, IPR2014-01365, Paper 13, p. 5 (Feb. 4, 2015) (emphasis added).

In rare, exceptional cases, the Board has previously granted joinder—when the § 315(b) bar would otherwise apply—where parties have demonstrated “good cause” for joinder. *See Microsoft Corp. v. Proxyconn, Inc.*, IPR2013-00109, Paper 15, at 3 (Feb. 25, 2013). For example, the Board has granted joinder where a patent owner asserted additional claims against the petitioner in a concurrent district court litigation and the petitioner “proceeded expeditiously in filing a second Petition after learning that additional claims were being asserted.” *Id.*; *see also Ericsson Inc. et al. v. Intellectual Ventures II LLC*, IPR2015-01077, Paper 11 (Jul. 10,

2015); *Sony Corp. v. Yissum*, IPR2013-00327, Paper 15 (Sept. 24, 2013). The Board has also granted joinder when a new product was launched leading to a threat of new assertions of infringement. *See Ariosa Diagnostics v. Isis Innovation, Ltd.*, IPR2013-00250, Paper 25 (Sept. 3, 2013). Here, there is no similar “good cause” or “good reason” as to why LG should be allowed a do-over or “second bite at the apple” despite the § 315(b) bar. No new claims were asserted against LG after its First Petition, nor was a new threat of infringement present.

Moreover, LG’s contention that the Board should allow joinder because “courts have joined petitions from the same party in *circumstances similar to these*” is meritless. Paper 3, at 6-7 (emphasis added). LG cites to *Sony* and *Target* for this contention, however, both *Sony* and *Target* represent proceedings where petitioners presented good cause to warrant joinder, which is in stark contrast to LG’s Motion. For example, in *Sony*, the petitioner filed a second petition (prior to the first institution decision), because the patent owner asserted new claims in a concurrent district court litigation after the first petition was filed. *See Sony Corp. v. Yissum*, IPR2013-00327, Paper 4, pp. 1-2, 5 (Jul. 3, 2013). And in the second petition, *Sony* only challenged the newly asserted claims. *Id.*

In *Target*, the petitioner provided good reason to merit joinder where it relied on a reference previously unknown to the Petitioner—Japanese office action revealing Japanese Utility Model No. 3086624—in its second petition. *See Target*

Corp. v. Destination Maternity Corp., IPR2014-00508, Paper 31 (Feb. 12, 2015); Paper 3, at 2, 5-6 (Mar. 14, 2014). This newly discovered reference was revealed to the petitioner by the patent owner **only after** the institution decision. *See id.* LG has neither the *Sony* facts (newly asserted claim and second petition filed prior to institution decision) nor the *Target* facts (newly discovered prior art) in its favor. Both cases are thus distinguishable and do not support LG's position. Accordingly, the Board should deny LG's Motion, because LG fails to apprise the Board of any justifiable "reason that merits a second chance." *See Samsung v. Rembrandt*, IPR2015-00555, Paper 20, p. 8 (Jun. 19, 2015).

3. The facts of this case merit denial of joinder.

The Board should also deny LG's Motion because previous Board decisions have rejected joinder under similar fact patterns. *See* section III.A.1. LG fails to provide any reasons as to why it could not advance the grounds present in the Second Petition in the First Petition. Moreover, the cases cited by LG to warrant joinder are all factually distinguishable. Joinder is not automatic; it is a fact specific inquiry. The Board determines "whether to grant joinder on a case-by-case basis, taking into account the particular facts of each case." *See Medtronic*, IPR2014-00695, Paper 18, at 4.

Similar to the instant proceeding, the Board has previously denied joinder when a petitioner possessed, at the time of filing the first petition, the references

asserted in the later-filed second petition. *See, e.g., Toyota Motor Corp.*, IPR2015-00262, Paper 10, at 3 (determining that the “Petitioner could have presented in the earlier petition the grounds and arguments it now asserts, but it did not do so”). For example, in *Samsung v. Rembrandt*, the Board denied joinder where the petitioner unsuccessfully advanced certain grounds in an earlier IPR proceeding and filed a subsequent IPR after the § 315(b) bar. IPR2015-00555, Paper 20, at 7-9. The Board concluded that there was no justification for joinder:

The difference between what Petitioner presents in this proceeding and what Petitioner presented in [the first IPR] with respect to claim 21 of the '228 patent is that Petitioner now offers Siwiak as support for the asserted obviousness *Petitioner, however, presents no argument or evidence that Siwiak was not known or available to it at the time of filing IPR '892.*

Id. at 7-8 (internal citations omitted) (emphasis added).

As in *Samsung*, the Board should deny LG’s Second Petition, because it involves the same patent claims challenged in its First Petition and uses art that was previously known or available to LG. Notably, LG’s Motion fails to provide any explanation why it could not have presented the new references—Hoogenboom and Anderson—in its First Petition. LG admits that it advances these two additional references to support its ground of unpatentability “based on the same primary reference as the instituted ground” (Paper 3 at 7), but fails to

articulate any “persuasive reason[s] why, using reasonable efforts, the [references] could not have been identified and relied upon in the earlier, timely-filed petition[.]” *See Samsung v. Affinity*, IPR2015-00820, Paper 12, p. 4 (May 15, 2015). In fact, LG provides no reason at all for its delayed reliance on the Hoogenboom and Anderson references.

Indeed, LG was aware of the Hoogenboom reference at the time of filing, but choose not to rely on it in its First Petition. As evidence of this, LG’s invalidity contentions dated October 1, 2014, in the concurrent litigation cited to the Hoogenboom reference (more than two months prior to LG’s filing of the first IPR petition on December 10, 2014). *See* Ex. 2001 at 150-151;¹ *see also* Ex. 2002. Additionally, the Anderson reference is a published U.S. patent. *See* Ex. 1010. LG has not argued that Anderson was not also known to LG at the time that the instant IPR petition was filed or that Anderson could not have been included in the first IPR petition.

Further, LG inaccurately argues that the subject matter and issues regarding claim 21 are “nearly identical” or “overlap in subject matter” with claim 18 and the grounds instituted in IPR2015-00321. *See* Paper 3, at 4-7. Independent claims 18

¹ Exhibit 2001 is dated October 1, 2014. However, LG served Exhibit 2001 to ATI on October 2, 2015.

and 21, contrary to LG's assertions, are not identical.² Claims 18 and 21 are of different scope and recite different claim limitations and structures. Indeed, LG has already acknowledged the differences between the claims when they presented different grounds of unpatentability against each claim in its First Petition.

Similarly, LG's argument that joinder should be granted because the "subject matter of [claims 18 and 21] and the issues in this proceeding are *nearly identical*," which "weighs in favor of joinder" is misplaced. Paper 3, at 4-5 (emphasis added). First, LG is wrong on the facts—as ATI has shown, the issues raised in IPR2015-00321 are materially and substantially different from the issues raised by the Second Petition.

Second, the cases cited by LG are significantly different from the present situation. LG relies on the following proceedings when advancing this argument: *Dell Inc. v. Network-1 Security Sols., Inc.*, IPR2013-00385, Paper 17 (July 29, 2013), *SAP Am. Inc. v. Clouding IP, LLC*, IPR2014-00306, Paper 13 (May 19,

² Moreover, LG's reliance on *Oxford Nanopore Tech. Ltd. v. Univ. of Washington* is misplaced because the two proceedings in *Oxford* involved the same claim and the same reference, not a different claim and different references, as in the current proceeding. IPR2015-00057, Paper 10, p. 23 (Apr. 27, 2015)

2014), and *Sony Corp. and Hewlett-Packard Co. v. Network-1 Security Sols., Inc.*, IPR2013-00495, Paper 13 (Sept. 16, 2013). However, these cases are easily distinguishable over the present proceeding. In these cases, the Board permitted joinder of *parties*, rather than joinder of issues, because the grounds of unpatentability were “*identical*” to those in the other party’s petition. *See SAP Am. Inc.*, IPR2014-00306, Paper 13, at 3 (emphasis added). And the petitions “raise[d] no new issues beyond what [was] already before the Board in the existing proceeding.” *See Dell, Inc.*, IPR2013-00385, Paper 17, at 7; *see also Sony Corp.* IPR2013-00495, Paper 13, at 5.

Unlike *Dell*, *Sony*, and *SAP*, LG does not seek a joinder of *parties* to an *identical* petition raising *identical* issues. LG’s Second Petition (i) is not identical to its First Petition; (ii) raises new grounds of unpatentability; and (iii) presents new issues not previously before the Board in the first proceeding. Accordingly, Board precedent strongly supports that joinder is inappropriate and that LG’s motion should be denied.

B. The Board should deny LG’s Motion because joinder will prejudice ATI.

Granting joinder will needlessly prejudice ATI and substantially increase the costs. LG’s self-serving suggestion to “accelerate[] the due date on which Patent Owner’s preliminary response [is] due” to minimize the impact of the current trial

schedule clearly prejudices ATI. *See* Paper 3, at 8-9. Here, ATI will have to review and substantively address new arguments for two new references that LG seeks to add to mitigate the deficiencies identified by the Institution Decision. *See Medtronic*, IPR2014-00695, Paper 18, at 8 (determining that the patent owner was prejudiced where petitioner presented and relied on “three new grounds,” containing two new “references never cited by [p]etitioner before institution” even though there was an “overlap in relation to one reference,” which was previously cited in the institution decision). ATI is entitled to an adequate period of time to analyze LG’s Second Petition and formulate a sufficient response to protect its patent rights. ATI will undoubtedly be negatively impacted and prejudiced if LG’s proposition is accepted.

Further, LG’s reliance on *Samsung v. Virginia*, IPR2014-00557, Paper 10 (Jun. 13, 2014) and *Sony v. Yissum* to support this accelerated schedule is also misplaced. Paper 3, at 7. The petitioner in *Samsung* did not rely on any additional references; all of the references were previously cited in the original petition. *See* IPR2014-00557, Paper 10, at 17-18. Moreover, the dependent claims that were joined to the proceeding only added one new limitation that was already addressed in a corresponding IPR proceeding. *See id.* (“the only additional subject matter added . . . [is] the Seaman reference” which has been “addressed already in the context of trials concerning unpatentability of certain claims in related

proceedings”). Similarly, in *Sony*, the second petition was filed **prior to** the institution decision and only added one reference allowing the patent owners ample time to review and address Sony’s petition. *See Sony*, IPR2013-00327, Paper 4, at 5. Unlike *Samsung* and *Sony*, ATI will be prejudiced with the proposed schedule suggested by LG and, therefore, the Board should deny its Motion.

C. The Board should deny LG’s Motion because the statute does not authorize the joinder of the same party to an instituted IPR.

Not only is joinder of the Second Petition unwarranted for the reasons discussed above, joinder is also impermissible under a proper interpretation of 35 U.S.C. § 315(c). Properly construed, the statute does not allow joinder of a petitioner that is already a party to the instituted review. *See Skyhawk Tech., LLC v. L&H Concepts, LLC*, IPR2014-01485, Paper 13, p. 3 (Mar. 20, 2015). In pertinent part, § 315(c) provides: “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.” Because LG is already a party in IPR2015-00321, however, LG’s joinder request is fundamentally flawed: a “person cannot be joined as a party to a proceeding in which it is already a party.” *See Skyhawk Tech., LLC*, IPR2014-01485, Paper 13, at 3. ATI acknowledges that there has been disagreement between Board panels regarding this issue and statutory construction, but ATI submits that granting LG’s Motion

would require the Board to exceed the statutory authority granted to the Board for the purpose of joinder. *See Samsung v. Affinity*, Paper 12, at 4. Accordingly, the Board should deny LG's Motion.

IV. Conclusion

LG fails to meet its burden demonstrating that the joinder is appropriate. LG is not entitled to a "second bite of the apple." LG has not provided any justification for getting a "second bite at the apple." Nor has LG provided any explanation as to why it could not have presented the art and arguments in the earlier proceeding that it now makes in its Second Petition. Further, contrary to LG's self-serving reasoning, joinder will indeed prejudice ATI. Thus, for at least these reasons discussed above, ATI respectfully requests the Board to deny LG's Motion for joinder of IPR2015-01620 to IPR2015-00321.

Respectfully submitted,

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CERTIFICATION OF SERVICE

The undersigned hereby certifies that the foregoing **PATENT OWNER'S OPPOSITION TO MOTION FOR JOINDER** was served electronically via e-mail on August 24, 2015, in their entirety on the following:

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