

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NEIL ZIEGMANN, N.P.Z., INC.,
Petitioner,

v.

CARLIS G. STEPHENS,
Patent Owner.

Case IPR2015-01860
Patent 8,881,447 B2

Before DAVID P. RUSCHKE, *Chief Administrative Patent Judge*,
SCOTT R. BOALICK, *Deputy Chief Administrative Patent Judge*, and
MICHAEL W. KIM, CARL M. DeFRANCO, and JAMES J. MAYBERRY,
Administrative Patent Judges.

KIM, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING
37 C.F.R. §§ 42.5, 42.71(d)

On March 25, 2016, Petitioner filed a Request for Rehearing Pursuant
to 37 C.F.R. § 42.71 (Paper 12; “Req.”) concerning a Decision Denying
Inter Partes Review mailed February 24, 2016 (Paper 11; “Dec.”).

A request for rehearing “must specifically identify all matters the [dissatisfied] party believes the Board misapprehended or overlooked.” 37 C.F.R. § 42.71(d). Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,768 (Aug. 14, 2012). Moreover, as the moving party, the burden of persuasion falls on Petitioner. 37 C.F.R. § 42.20(c). When rehearing a decision on institution, we review the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion may arise if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors. *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *Arnold P’ship v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004); *In re Gartside*, 203 F.3d 1305, 1315–16 (Fed. Cir. 2000).

I. Expanded Panel Request

Petitioner suggests that this request be heard by an expanded panel. Req. 1, 15. Our governing statutes and regulations do not permit parties to request, or panels to authorize, an expanded panel. *See generally* 35 U.S.C. § 6; 37 C.F.R. § 41.1–42.412; *see also AOL Inc. v. Coho Licensing LLC*, Case IPR2014-00771, slip op. at 2 (PTAB Mar. 24, 2015) (Paper 12) (“[P]arties are not permitted to request, and panels do not authorize, panel expansion.”). Our standard operating procedures, however, provide the Chief Judge with discretion to expand a panel to include more than three judges. PTAB SOP 1, 1–3 (§§ II, III) (Rev. 14); *see id.* at 1 (introductory language explaining that the Director has delegated to the Chief Judge the authority to designate panels under 35 U.S.C. § 6); *see also In re Alappat*, 33 F.3d 1526, 1532 (Fed. Cir. 1994) (providing that Congress “expressly granted the Commissioner the authority to designate expanded Board panels

made up of more than three Board members.”). The Chief Judge may consider panel expansion upon a “suggestion” from a judge, panel, or party. *Id.* at 3–4; *see also Apple Inc. v. Rensselaer Polytechnic Inst.*, Case IPR2014-00319, slip op. at 2 n.1 (PTAB Dec. 12, 2014) (Paper 20) (expanded panel) (per curiam).

The standard operating procedure exemplifies some of the reasons for which the Chief Judge may expand a panel. PTAB SOP 1, 3 (§ III.A). For example, an expanded panel may be appropriate when “[t]he proceeding or AIA Review involves an issue of exceptional importance.” *Id.* (§ III.A.1).

In this case, the Chief Judge has considered whether expansion is warranted, and has decided to expand the panel due to the exceptional nature of the issues presented. As we discuss further below, petitions including prior art previously presented to the Office have been at issue in multiple cases before the Board. The Chief Judge has determined that an expanded panel is warranted to provide a discussion of considerations taken into account in the exercise of the Board’s discretion under 35 U.S.C. § 325(d).

II. Principles of Law

Section 314(a) provides:

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 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.*

III. Overview of Discretionary Authority to Deny Petitions Under Section 325(d)

A. Background

“For several decades, the Patent Office has . . . possessed the authority to reexamine—and perhaps cancel—a patent claim that it had previously allowed.” *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2137 (2016). More specifically, in 1980, Congress enacted a statute providing for “ex parte reexamination,” and in 1999 and 2002, Congress enacted statutes that established another, similar procedure, known as “inter partes reexamination.” *Id.* (citing Act to Amend the Patent and Trademark Laws, 35 U.S.C. § 301 *et seq.*; American Inventors Protection Act of 1999, § 297 *et seq.* (2006 ed.) (superseded)). A request for *inter partes* reexamination was required to raise a “substantial new question of patentability.” *Id.* (citing 35 U.S.C. § 312(a) (2006 ed.) (repealed)).

B. America Invents Act of 2011

In 2011, Congress enacted a statute that replaced “inter partes reexamination” with “inter partes review.” *Id.* The purpose of the statute was to “improve patent quality and restore confidence in the presumption of validity that comes with issued patents,” and “screen out bad patents while

bolstering valid ones.” *Id.* at 2140 (citing H.R. REP. NO. 112-98, pt. 1, 45, 48; 157 CONG. REC. 9778 (2011) (remarks of Rep. Goodlatte)).

To that end, Congress made several changes from *inter partes* reexamination. One change was to require that “a petition show ‘a reasonable likelihood that’ the challenger ‘would prevail.’” *Id.* (citing 35 U.S.C. § 314(a) (2012 ed.)); *see also* 157 CONG. REC. S1375 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl) (“The present bill dispenses with the test of ‘substantial new question of patentability,’ a standard that currently allows 95% of all requests to be granted Under section 314(a), *inter partes* review will employ a reasonable-likelihood-of-success threshold”). By contrast, *inter partes* reexamination had used the “substantial new question of patentability” standard. *Id.* at 2137. The “reasonable likelihood” standard is a higher threshold than “substantial new question of patentability.” 157 CONG. REC. S1326 (daily ed. Mar. 7, 2011) (statement of Sen. Sessions); *see also* 157 CONG. REC. S1375 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl) (“Among the most important protections for patent owners added by the present bill are its *elevated* thresholds for instituting *inter partes* and post-grant reviews.”) (emphasis added).

Another change was 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.*

35 U.S.C. § 325(d) (emphasis added). Specifically, Congress changed the mandatory focus on “new” in “substantial new question of patentability” for

reexamination to the discretionary standard of “the same or substantially the same prior art or arguments previously were presented to the Office.” 157 CONG. REC. S1376 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl) (“Under section 325(d), second sentence . . . the Office could nevertheless refuse a subsequent request for ex parte reexamination . . . , *even if it raises a substantial new question of patentability*, because the issue previously was presented to the Office in the petition for inter partes or post-grant review.”) (emphasis added). A substantial new question in reexamination can be based on “a patent or printed publication [that] was previously cited by or to the Office or considered by the Office” during prosecution. 35 U.S.C. § 303.

C. Discretionary Authority to Deny Petitions

Section 325(d) recites “the Director may take into account whether, and reject the petition or request because” The express use of the terms “may” and “reject” provide the Office with discretionary authority to deny a petition based on “the same or substantially the same prior art or arguments previously . . . presented to the Office.” H.R. REP. NO. 112-98, pt. 1, at 76 (2011) (providing that Sections 315(d) and 325(d) allow the Office to “consolidate multiple proceedings or matters concerning the same patent and decline requests for repeated proceedings on the same question”); *see also* 154 CONG. REC. S9988 (daily ed. Sept. 27, 2008) (statement of Sen. Kyl) (commenting on a parallel provision in S. 3600, 110th Cong. (2008): “Section [325(d)] gives the PTO broad discretion to consolidate, stay, or terminate any PTO proceeding involving a patent if that patent is the subject of a post-grant review proceeding.”); *accord Cuozzo Speed Techs.*, 136 S. Ct. at 2140 (Section 314(a) recites “may . . . unless,” indicating that “the

agency's decision to deny a petition is a matter committed to the Patent Office's discretion. *See* [5 U.S.C. § 701(a)(2) ('agency action is committed to agency discretion by law')]; 35 U.S.C. § 314(a) (no mandate to institute review)."). The legislative history indicates that these proceedings "are not to be used as tools for harassment or a means to prevent market entry through repeated litigation and administrative attacks on the validity of a patent." H.R. REP. NO. 112-98, pt. 1, at 48 (2011). Accordingly, Section 325(d) informs that even where a petition may meet the elevated standard of a reasonable likelihood that a challenger would prevail, the Office has the discretion to deny the petition.

This is, of course, not to say that the Office's exercise of discretion with respect to Sections 314(a) and 325(d) is unfettered. For example, the Office's discretion to institute trial under Section 314(a) may be set aside if it is "in excess of statutory jurisdiction,' or 'arbitrary [and] capricious.'" *Cuozzo Speed Techs.*, 136 S. Ct. at 2142.

D. Authority to Determine What Constitutes "the same or substantially the same prior art or arguments previously . . . presented to the Office"

Section 325(d) confers authority on the Office to determine what constitutes "the same or substantially the same prior art or arguments previously . . . presented to the Office" when determining whether to deny a petition, because it recites expressly that the Director "may take into account . . . and reject the petition" where the aforementioned statutory condition is met. Of course, if the Director "may" do something, she is not required expressly to do so. It is not as necessary to precisely define the contours of what is "the same or substantially the same prior art or arguments" or "previously . . . presented to the Office" when denying a petition under

Section 325(d), because these are merely factors that the Director “may take into account.”

E. Considerations Taken into Account in Determining Whether “the same or substantially the same prior art or arguments [were] previously . . . presented to the Office”

Having confirmed that we have the authority to exercise the discretion to deny a petition under Section 325(d), we identify some considerations in our decision to exercise that discretion. There are benefits when the Office provides guidance as to considerations that will be taken into account in determining whether the Office should exercise discretion on any particular issue. To that end, for the application of Section 325(d), we focus on the phrase “the same or substantially the same prior art or arguments previously . . . presented to the Office.”

For the initial part of that phrase, the meaning of “same prior art or arguments” is self-evident, so we focus on the next part, “*substantially* the same prior art or arguments.” 35 U.S.C. § 325(d) (emphasis added). We conclude that a set of prior art or arguments may be considered “substantially the same” if they are “cumulative to or substantially overlap with issues previously considered by the Office with respect to the patent.” 157 CONG. REC. S1375 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl). In order for a party to bring this issue to the Office’s attention, the focus of the “substantially” analysis should be on the differences (or lack thereof) between the prior art and arguments presented in the petition, and those “previously . . . presented to the Office.” A party making assertions relevant to Section 325(d) should identify such differences (or lack thereof), whether substantive or procedural, and explain the relevance of those differences (or lack thereof).

For the latter part of that phrase, “previously . . . presented to the Office,” we conclude that it is interchangeable and synonymous with “previously considered by the Office” and “already before the Office.” 157 CONG. REC. S1376 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl) (“[T]he second sentence of section 325(d) . . . authorizes the Director to reject any . . . petition . . . on the basis that the same or substantially the same prior art or arguments previously were presented to the Office. This will prevent parties from mounting attacks on patents that raise issues that are substantially the same as issues that were already before the Office with respect to the patent. The Patent Office has indicated that it currently is forced to accept many requests . . . that are cumulative to or substantially overlap with issues previously considered by the Office with respect to the patent”).¹ The party who brings this issue to the Office’s attention should specify where the relevant prior art or arguments were previously presented, either in a previous petition, request, or paper in the prosecution history, and the nature of the consideration given those prior art or arguments.

Insofar as the prior art or arguments were previously presented to an examiner, the focus should be on whether or not any errors were made by the examiner with respect to the consideration of those previously presented

¹ We acknowledge that our reviewing court recently held that “the legislative history cannot supplant the statutory definition actually adopted.” *Unwired Planet, LLC v. Google, Inc.*, 841 F.3d 1376, 1381 (Fed. Cir. 2016) (citing *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) (“[W]e do not resort to legislative history to cloud a statutory text that is clear.”)). We conclude, however, that case is distinguishable, because the statute is clear in conferring discretion. We are unaware of any reason as to why it is inappropriate for the Office to consult legislative history in determining how to exercise that clear statutory conferral of discretion.

prior art or arguments, for example, the examiner's failure to properly consider prior art submitted in an Information Disclosure Statement ("IDS"). See 154 CONG. REC. S9988 (daily ed. Sept. 27, 2008) (statement of Sen. Kyl) (commenting on a parallel provision in S. 3600, 110th Cong. (2008):

"Subsection (a) is directed only at individual instances of error that PTO itself appreciates . . ."). In particular, when a prior art reference presented in a petition was already considered substantively by the Examiner, the petitioner has the initial burden to identify such errors made by the examiner with respect to that prior art reference. Cf. 35 U.S.C. § 316(e) ("[T]he petitioner shall have the burden of proving a proposition of unpatentability by a preponderance of the evidence."); *Ex parte Frye*, Appeal 2009-006013, 2010 WL 889747 *4 (BPAI Feb. 26, 2010) (precedential) (citing *In re Baxter Travenol Labs.*, 952 F.2d 388, 391 (Fed. Cir. 1991)) ("[T]he Board will generally not reach the merits of any issues not contested by an appellant."). Any factual finding made by the examiner and not contested by the petitioner may be treated as undisputed fact for the purposes of evaluating petitioner's assertions concerning examiner error under Section 325(d). Cf. *Yorkey v. Diab*, 601 F.3d 1279, 1284 (Fed. Cir. 2010) (The Board has discretion to give more weight to one item of evidence over another "unless no reasonable trier of fact could have done so."); *In re Fox*, 471 F.2d 1405, 1407 (CCPA 1973) ("In this court, [as] appellant has not denied the existence of the facts on which the examiner rested his obviousness rejection nor the added facts of which the board took judicial notice," we accepted them as accurate.).

F. Considerations Taken into Account in Determining Whether to Exercise Authority Under Section 325(d)

In determining whether to exercise our authority under Section 325(d), the Office is attempting to make a determination based on several competing policy goals articulated by Congress in promulgating the statute. In particular, the most challenging hypothetical scenario is where the petition meets the higher threshold of “a reasonable likelihood that the petitioner would prevail,” but the petition presents “the same or substantially the same prior art or arguments previously . . . presented to the Office.” On the one hand, granting the petition would realize the policy goal to “improve patent quality and restore confidence in the presumption of validity that comes with issued patents” and “screen out bad patents while bolstering valid ones.” *Cuozzo Speed Techs.*, 136 S. Ct. at 2140 (citing H.R. REP. No. 112-98, pt. 1, 45, 48; 157 CONG. REC. 9778 (2011) (remarks of Rep. Goodlatte)). On the other hand, denying the petition would realize the policy goal that these proceedings “are not to be used as tools for harassment or a means to prevent market entry through repeated litigation and administrative attacks on the validity of a patent.” H.R. REP. No. 112-98, pt. 1, at 48 (2011). Accordingly, in determining whether to exercise our discretionary authority under Section 325(d), the Office considers the relevance of any differences between the prior art and arguments presented in the petition and that were “previously . . . presented to the Office,” and/or any errors allegedly made by the examiner with respect to the consideration of those previously presented prior art or arguments.

G. The Board's Application of Section 325(d) to Prior Art or Arguments Previously Presented to the Examiner

Numerous Board decisions have applied Section 325(d) in a manner consistent with our above analysis. For example, with respect to “the same or substantially the same prior art or arguments,” numerous Board decisions have focused on the identified differences between the prior art and arguments, and the relevance of those differences. *See Nu Mark LLC v. Fontem Holdings 1, B.V.*, Case IPR2016-01309, slip op. at 9–11 (PTAB Dec. 15, 2016) (Paper 11) (Denying institution under Section 325(d) where “Patent Owner argues that Brooks is cumulative to the disclosures in the EP Publication and the ’875 patent, and, thus, the disclosure of Brooks was considered by the Examiner during the prosecution of the ’752 patent [W]e determine that the content of Brooks is the same or substantially the same as the disclosures in the EP Publication and the ’875 patent”); *Amneal Pharm., LLC v. Purdue Pharma L.P.*, Case IPR2016-01027, slip op. at 12–13 (PTAB Nov. 9, 2016) (Paper 13) (“We recognize that priority was awarded based on a request for adverse judgment by the Kumar Patent assignee rather than a decision ‘on the merits’ as to whether the application that issued as the ’976 patent was in fact entitled to priority. Nonetheless, the basis for our exercise of discretion under § 325(d) is not necessarily limited to only those arguments that were previously decided ‘on the merits.’”).

With respect to “previously . . . presented to the Office,” numerous Board decisions have focused on the amount of weight to be accorded any identified errors made by the Examiner with respect to the consideration of those previously presented prior art or arguments. *See Unified Patents Inc. v. Berman*, Case IPR2016-01571, slip op. at 11–12 (PTAB Dec. 14, 2016)

(Paper 10) (Denying institution under Section 325(d) where “Petitioner fails to present any argument distinguishing the Examiner’s prior consideration of Russell or to provide a compelling reason why we should readjudicate substantially the same prior art and arguments as those presented during prosecution and considered by the Examiner”).

Perhaps most instructive is the Board’s decision in *Black & Decker (U.S.) Inc. v. Christy, Inc.*, Case IPR2015-00468, slip op. at 13 (PTAB June 24, 2015) (Paper 13), where the Board noted that “[t]he Petition sufficiently shows that the Examiner’s decision not to reject the claims over Hayden is . . . based on an erroneous finding by the Examiner.” In other words, even though the ground of unpatentability and corresponding Examiner’s rejection were almost identical, the Board did **not** invoke Section 325(d) because the petitioner made a credible argument that a key finding made by the Examiner during prosecution was erroneous. An *inter partes* review was instituted, even though the factual posture sat firmly within the four corners of Section 325(d), because it was consistent with realizing the policy goal to “improve patent quality and restore confidence in the presumption of validity that comes with issued patents” and “screen out bad patents while bolstering valid ones.” *Cuozzo Speed Techs.*, 136 S. Ct. at 2140 (citing H.R. REP. NO. 112-98, pt. 1, 45, 48; 157 CONG. REC. 9778 (2011) (remarks of Rep. Goodlatte)).

To that end, the above-analyzed *Black & Decker* case, and others, make clear that numerous Board decisions have weighed all relevant factors in determining whether to exercise our discretion under Section 325(d). *See, e.g., Apotex Inc. v. Osi Pharm, Inc.*, Case IPR2016-01284, slip op. at 6–8 (PTAB Jan. 9, 2017) (Paper 8) (“[B]alancing the competing interests

involved and taking full account of the facts and equities involved in this particular matter, we exercise our discretion, under 35 U.S.C. § 325(d), to deny the Petition and decline to institute inter partes review based on anticipation by Schnur.”); *Nu Mark LLC v. Fontem Holdings 1, B.V.*, Case IPR2016-01309, slip op. at 11–13 (PTAB Dec. 15, 2016) (Paper 11) (“[W]e deny the Petition [A]lthough we acknowledge that Petitioner has a direct interest in pursuing the instant Petition, we also acknowledge the burden and expense to Patent Owner in having to defend the ’752 patent based on substantially the same prior art or arguments already considered by the Office. Additionally, we are not persuaded that adjudicating a dispute on an already-considered issue is an efficient use of Board or party resources.”) The Board, however, can only consider those factors of which it is made aware. *Cf. Hyatt v. Dudas*, 551 F.3d 1307, 1313–14 (Fed. Cir. 2008) (treating arguments the appellant failed to make to the Board for a given ground of rejection as waived); *In re Watts*, 354 F.3d 1362, 1368 (Fed. Cir. 2004) (declining to consider the appellant’s new argument regarding the scope of a prior art patent when that argument was not raised before the Board); *In re Schreiber*, 128 F.3d 1473, 1479 (Fed. Cir. 1997) (declining to consider whether prior art cited in an obviousness rejection was non-analogous art when that argument was not raised before the Board).

IV. Analysis

With the above rubric in mind, we turn to the instant Request.

A. Decision Denying Institution

As set forth in our Decision, in determining whether to exercise our discretion under Section 325(d), 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 (hereinafter “first inquiry”). Then, we determine whether it is appropriate to exercise our discretion to deny institution (hereinafter “second inquiry”).

Dec. 6.

Our Decision articulated that the first inquiry was met in this proceeding concerning Ziegmann,² the primary reference relied upon by Petitioner, because Ziegmann was cited to the Examiner in an IDS, the Examiner acknowledged the IDS, and our analysis indicates why we were persuaded that the Examiner acknowledged the substantive consideration of Ziegmann. *Id.* at 9–10. Similarly, the Decision articulated the first inquiry was also met in this proceeding concerning Petitioner’s secondary references, in that we determined that all were directed to the “shaped-end trigger,” and so were “substantially the same” as the Examiner’s citation to Armstrong concerning the same.³ *Id.* at 11–12. Finally, the Decision indicated that the issue “concerning weighing evidence of secondary considerations relative to the Office’s previous analysis regarding modifying the primary reference to include the shaped-end trigger, was previously presented to and considered by the Office.” *Id.* at 11.

For the second inquiry, the Decision reads as follows:

We acknowledge that there are several factors weighing in Petitioner’s favor and against denying the instant Petition under § 325(d). Foremost among them include that the ’447 patent has not previously been before the Board, and Petitioner has not

² U.S. Patent No. 8,230,642 B2, issued July 31, 2012 (Ex. 1003).

³ Armstrong is U.S. Patent No. 872,041, issued Nov. 26, 1907. We note additionally that Armstrong was listed in the same IDS as Ziegmann and U.S. Patent Application Publication No. 2010/0275503 A1 (“Ziegmann ’503”). Ex. 1002, 181, 233.

challenged previously the '447 patent in a proceeding before the Office. Nevertheless, we determine that these factors are outweighed by the following countervailing factors. The same primary reference asserted by the Petitioner was previously presented to, and considered by, the Office in the same substantive manner as advocated for by Petitioner. Petitioner identifies the same difference between the primary reference and claims 12–15 as identified expressly and unambiguously by the Office, and, thus, asks the Board to, essentially, second-guess the Office's previous decision on substantially the same issue. And in requesting that second-guess, Petitioner asks the Board to reconsider evidence of secondary considerations that, again, the Office expressly determined was sufficient to overcome the expressly and unambiguously identified difference between the primary reference and claims 12–15. Indeed, given the relative clarity of the already-considered difference in scope between the primary reference and claims 12–15, we need not resort to undue speculation to conclude that the proceeding will devolve into a resource-consuming dispute concerning evidence with regards to secondary considerations, again, on an issue already and unambiguously presented previously to and considered by the Office. Under these facts, we are unpersuaded that adjudicating such a dispute on an already-considered issue is an efficient use of Board resources.

Id. at 13–14.

B. Analysis of Petitioner's Assertions Concerning Statutory Construction of Section 325(d)

Petitioner asserts that, as a matter of statutory construction, many of the prior art or arguments set forth in the Petition were not “presented to the Office” because, during prosecution, Patent Owner would not argue against the patentability of any claims, as Petitioner is doing here. If anything, Petitioner asserts that, at best, the Examiner made conclusions concerning patentability, but that those conclusions were not made based on prior art or arguments “presented to the Office,” in that no one was advocating before

the Office against the patentability of the claims. Req. 2–4 (“[T]he Office does not present arguments to itself.”). We disagree.

The legislative history indicates that “previously . . . presented to the Office” is interchangeable and synonymous with “previously considered by the Office” and “already before the Office.” 157 CONG. REC. S1376 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl). At a minimum, any prior art analyzed in the prosecution history, whether by the applicant or the examiner, is “previously considered by the Office” and “already before the Office.” That interpretation is consistent with other legislative history, which refers to “error that PTO itself appreciates.” 154 CONG. REC. S9988 (daily ed. Sept. 27, 2008) (statement of Sen. Kyl) (commenting on a parallel provision in S. 3600, 110th Cong. (2008)).

Furthermore, we are unpersuaded that it was the intent of Congress to exclude, essentially, *all* determinations made by an examiner from the provisions of Section 325(d), where, in other admittedly different contexts, examiner determinations are accorded at least some deference. *See K/S Himpp v. Hear-Wear Techs, LLC*, 751 F.3d 1362, 1369 (Fed. Cir. 2014) (citing *Microsoft Corp. v. i4i Ltd. P’ship*, 131 S. Ct. 2238, 2243 (2011)) (“The assumption that PTO examiners will use their knowledge of the art when examining patents is the foundation for the presumption in 35 U.S.C. § 282(a) that issued patents are valid.”). Taking Petitioner’s position to its logical extreme would lead to the curious result where the Office could, on the one hand, deny a petition under Section 325(d) based solely on a reference cited to, but otherwise not considered by, the Office in any respect, but is prevented from doing so for a reference that was arguably not “presented to” the Office, but was nevertheless identified by the Examiner in

a search, and extensively considered.⁴ Indeed, even under the narrowest reading of “previously . . . presented,” we discern that an examiner identifying prior art independently and making it of record in the prosecution history via a Form PTO-892 is “presenting” that prior art “to the Office.”⁵

Indeed, the only way that Petitioner’s assertions have practical merit is if Section 325(d) is read to *only* permit taking into account prior art or arguments “previously . . . presented to the Office,” and, by implication, *requires excluding* prior art or arguments that were only introduced into the record by the Office itself. We are unpersuaded that any reading of Section 325(d), which explicitly recites the discretionary language “may” at the relevant portions, requires any such result, especially where such a result would be contrary to the legislative history, as indicated *supra*. Instead, we discern that while the inclusion of Section 325(d) provides guidance to the Office to favor denying the petition when “the same or substantially the same prior art or arguments previously were presented to the Office,” it does not mandate the opposite when the above condition is not met.

C. Whether “the same or substantially the same prior art or arguments [were] previously . . . presented to the Office”

Petitioner’s assertions concerning statutory construction are, in a sense, inapposite, because Petitioner unambiguously relies on references that

⁴ Indeed, we observe that the phrasing used in our Decision, “considered by the Office,” would appear to be more advantageous to Petitioner in that substantive “consideration” by the Office is required, and would exclude prior art “previously . . . presented to the Office” in only a ministerial manner, such as in an IDS.

⁵ For a more distinct analysis of “arguments previously . . . presented to the Office,” see Section IV.D.

were “previously . . . presented to the Office” pursuant to Section 325(d) under any construction. For example, Ziegmann, the primary reference relied upon by Petitioner for all proposed grounds of unpatentability, was previously presented to the Office in an IDS. Dec. 9 (citing Ex. 1002, 182, 234). Moreover, at least two of the secondary references relied upon by Petitioner, Custard⁶ and Danison,⁷ also were previously presented to the Office in an IDS, as was Armstrong, the reference relied upon by the Examiner for disclosing a “shaped-end trigger.” Ex. 1002, 181, 233. And, as all the secondary references cited by Petitioner are for their disclosure of a “shaped-end trigger,” we have no trouble finding that all of those secondary references are “substantially the same prior art . . . previously . . . presented to the Office,” such as Armstrong, Custard, and Danison, pursuant to Section 325(d). *See generally* Dec. 9–12; Pet. 24–50.

Of course, Petitioner presents other arguments in its Petition, including “lack of nexus” with respect to the secondary considerations evidence considered by the Examiner. Req. 3–7. Insofar as Petitioner may be asserting that each and every argument set forth in the petition must have been previously presented in order to invoke Section 325(d), we disagree. We determine that the use of the word “or” in “prior art or arguments” indicates that the presence of previously presented prior art *or* arguments is sufficient to invoke Section 325(d). To that end, we determined above that “the same or substantially the same prior art . . . previously [was] presented to the Office.” Thus, where we have determined already that the same *prior*

⁶ U.S. Patent No. 4,158,929, issued June 26, 1979 (Ex. 1007).

⁷ U.S. Patent No. 4,601,128, issued July 22, 1986 (Ex. 1008).

art was previously presented to the Office, whether or not Petitioner presented additional *arguments* is immaterial to our determination as to whether “the same or substantially the same prior art or arguments previously were presented to the Office.”⁸

Petitioner asserts that “the Board does not address the similarity of the prior art and arguments presented for the first time by the Petitioners to those previously presented to or considered by the Office, and thus, the Board lacks any basis to find that the Petitioners’ prior art and arguments are the same or substantially the same to those considered by the Office during examination.” *Id.* at 9. We disagree, as the Board did exactly such an analysis at pages 9–12 of the Decision. Furthermore, insofar as the Board’s previous analysis was lacking in any respect, it is supplemented herein.

Petitioner asserts additionally that the Board erred in asserting in a conclusory fashion that some of the secondary references directed to the “shaped-end tripper” are substantially similar to Armstrong. *Id.* at 7–8. More specifically, Petitioner asserts that the Board misapprehended or overlooked that some of the secondary references are stronger than Armstrong and, thus, are not similar. *Id.* As an initial matter, Petitioner’s assertion is misplaced, as Petitioner does not identify any analysis in the Petition concerning the relative strength of any of the secondary references

⁸ We note that page 11 of the Decision does address “nexus” generally, although admittedly not in much detail. We also note that the first inquiry, whether “the same or substantially the same prior art or arguments previously were presented to the Office,” is a precursor to the second, separate inquiry as to whether it is appropriate to exercise our discretion to deny institution when that first inquiry is satisfied. Petitioner’s presentation of any “additional” prior art or arguments are usually considered in that second inquiry.

as compared to Armstrong. The Board could not have misapprehended or overlooked an assertion that was never made. Moreover, Section 325(d) does not mention anything about “relative strengths” of secondary references; it only requires the prior art to be “substantially the same,” and nothing more.⁹

Even when that assertion is considered, however, it is still unpersuasive. Specifically, Petitioner asserts that some of the secondary references are stronger than Armstrong, and, thus, not “substantially the same,” because the Examiner only relied on Armstrong, which only discloses a circular trigger, for the size of the trigger, while the actual claim limitation is “encompassing a substantial cross-section portion of said hollow body.” *Id.* at 7–8. Petitioner asserts that the Examiner bridged the gap between a “circular trigger” and “substantial cross-section portion” of the trigger only with reasoning, and not evidentiary support. According to Petitioner, because some of the newly identified secondary references now provide robust, dissimilar evidentiary support for that gap, those newly identified secondary references are not “substantially the same” as Armstrong. Petitioner’s assertion is unpersuasive, because the argument considered to be “the same or substantially the same” is whether there was an adequate rationale to modify the primary reference to account properly for the claim limitation of “encompassing a substantial cross-section portion of said hollow body.” The fact that one rationale is arguably “better” than

⁹ Indeed, even if were to accept Petitioner’s assertions concerning the secondary references, the presence of Ziegmann alone, both in the Petition and the prosecution history, is a sufficient basis to exercise our discretion under Section 325(d). *See* Section IV.F.

another is not itself dispositive, as that would allow a Petitioner to make an end-run around Section 325(d) by merely making minor tweaks to the Examiner's rationale.

Instead, what Petitioner is actually asserting is that given the now-stronger rationale for modification, the evidence of secondary considerations in the prosecution history is no longer sufficient to support the Examiner's determination of non-obviousness. That assertion is also misplaced, as the Examiner did not give any indication that the rationale in the prosecution history had any weakness. Indeed, if anything, the Examiner indicated to the contrary because, as Petitioner indicates, the Examiner maintained the same basic rejection "five times before withdrawing because of the purported evidence of secondary considerations." *Id.* at 8. Accordingly, as the Examiner has all-but-stated that the proffered rationale for modification was sound, i.e., had no gaps, we are unpersuaded that any purported evidentiary support for filling in that otherwise unrealized "gap" concerning the proffered rationale for modification alters our analysis in a dispositive manner.

Petitioner asserts also that the Board misapprehended or overlooked the fact that "[t]he subject matter of claims 12–15 of the '447 Patent is predictable." *Id.* at 8 (citing Pet. 34). More specifically, Petitioner asserts that the Board misapprehended or overlooked the fact that Petitioner presented a rationale for modification completely different from that identified by the Examiner, and, thus, was not "the same or substantially the same prior art or arguments previously . . . presented to the Office." Petitioner's assertion is misplaced for the same reasons as set forth above in our analysis of "lack of nexus," in that Section 325(d) does not require *every*

prior art or argument presented in the Petition to have been “the same or substantially the same prior art or arguments previously . . . presented to the Office.” Moreover, the assertion is unpersuasive for the reasons set forth *supra* concerning the “better” rationale.

D. Analysis of Petitioner’s Assertions as to Whether “Lack of Nexus” Was “Previously . . . Presented to the Office”

Petitioner asserts that arguments or evidence of “lack of nexus” would not have been previously presented to the Examiner during prosecution, because only the Examiner, and no advocate, would take such a position. Req. 4–5. As an initial matter, Petitioner’s assertions are misplaced, because the argument is more properly framed as “presence of nexus” and not “lack of nexus.” To that end, arguments concerning “presence of nexus” were “previously . . . presented to the Office” during prosecution. Ex. 1002, 32–35, 130–137, 163–164, 198–199 (discussing evidence of secondary considerations). Even if that were not the case, however, we discern that Petitioner’s assertions are incorrect for the same reasons as set forth above concerning “previously . . . presented to the Office,” in that the Examiner, in not being persuaded by several rounds of evidence of secondary considerations, was asserting “lack of nexus.”

Petitioner further asserts that even if an examiner could be deemed capable of considering “lack of nexus” during prosecution, the Board misapprehended or overlooked the fact that any such consideration was ambiguous here, because “[t]he record is silent on the issue of whether the examiner found a nexus between the secondary considerations and the trigger shape feature in the secondary reference as opposed to the two-way trigger in the primary reference.” Req. 4–5. We disagree. In our Decision, we stated expressly that we were persuaded the Examiner considered

explicitly the specific relationship between the shaped-end trigger and the evidence of secondary considerations. Dec. 11–12 (“[T]he prosecution history indicates that the difference overcome by the evidence of secondary considerations was the shaped-end trigger, and not the claimed two-way/push-pull trigger. Ex. 1002, 69.”). Indeed, despite the evidence of secondary considerations, the Examiner nevertheless continued to maintain several obviousness rejections where the Examiner only identified the shaped-end trigger as missing from the primary reference. Dec. 8. Although the words “lack of nexus” were not used explicitly in the prosecution history with regard to those actions taken by the Examiner, we are unpersuaded that the Examiner’s actions can be considered anything substantively different.

E. Analysis of Petitioner’s Assertions Concerning New Evidence Regarding “Lack of Nexus”

Petitioner next asserts that even if the Office previously considered “lack of nexus,” the Board misapprehended or overlooked the fact that such a consideration was made based on uncontested evidence of secondary considerations. Req. 4–5.¹⁰ We agree that the fact that evidence of secondary considerations was uncontested is relevant. The proper question, however, is not whether the evidence of secondary considerations was uncontested, but why that relevance is material to our determination under Section 325(d).

¹⁰ We have determined above that Ziegmann alone satisfies the first inquiry, i.e., 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. Nevertheless, we address Petitioner’s assertions concerning new evidence (1) for completeness, and (2) because these assertions are relevant to the second inquiry, i.e., determining whether it is appropriate to exercise our discretion to deny institution, when the first inquiry is satisfied.

To that end, Petitioner asserts that the uncontested nature of the evidence of secondary considerations is relevant, because Petitioner now presents new evidence contesting the sufficiency of the evidence of secondary considerations. *Id.* at 4–6. We agree to an extent, in that although we agree the presence of new evidence is relevant, the presence of new evidence alone is insufficient to carry the day; the significance of that new evidence must be explained.

In that regard, Petitioner asserts that the Board misapprehended or overlooked that new evidence. *Id.* We agree-in-part, in that although the Board did consider such new evidence in rendering our Decision, we agree that the Decision does not indicate explicitly that the new evidence was considered. Accordingly, to that extent, we grant Petitioner’s request for reconsideration of that new evidence.

In particular, Petitioner identifies new evidence that purportedly casts doubt on the Examiner’s determination of persuasiveness of secondary considerations, in the prosecution history, in two respects. First, Petitioner asserts that new evidence shows that the Examiner erroneously considered certain evidence as being relevant to the non-obviousness of a shaped-end trigger, when that evidence actually was directed to a two-way/push-pull trigger. *Id.* Thus, in this respect, Petitioner argues a “lack of nexus.” Second, Petitioner presents additional new evidence that purportedly contradicts the Examiner’s determination, and asserts that when this contrary evidence is considered with the evidence of secondary considerations already set forth in the prosecution history, there is sufficient doubt cast on the Examiner’s determination of persuasiveness of secondary considerations, such that a trial should be instituted. *Id.* As an initial matter, to put into

perspective our evaluation of Petitioner's new evidence, we summarize the evidentiary basis for the Examiner's implicit determination that the proper nexus was considered, i.e., "shaped-end trigger."

Most prominently, the Examiner found explicitly that U.S. Patent Application Publication No. 2005/0274057 A1 ("McCulloch") discloses the two-way/push-pull trigger (Ex. 1002, 68–70, 172–173, 217), identified explicitly that the sole difference from McCulloch is the shaped-end trigger (Ex. 1002, 69, 173, 217), and identified and focused explicitly on the relationship between secondary considerations and the shaped-end trigger (Ex. 1002, 70–71, 174–175). In determining that the evidence of secondary considerations was sufficient, the Examiner did not withdraw the rejection until Patent Owner had submitted *seven* affidavits (Ex. 1002, 36–57, 201–204) and *at least seven other* pieces of evidence (Ex. 1002, 135, 138–146).¹¹ We have reviewed anew that evidence, and determine that it is more than adequate to support the Examiner's determination. Accordingly, in view of these explicit statements and prosecution history, it is difficult to fathom how the Examiner's determination of persuasiveness of secondary considerations can be characterized as being directed to anything other than, and having a nexus with, the shaped-end trigger.

Nevertheless, to show that the Examiner's determination was erroneous, Petitioner presents an excerpt from a deposition of Mr. Hastings (Ex. 1029). Mr. Hastings is one of the Declarants who submitted a

¹¹ Indeed, we note that the Examiner continued to maintain this rejection of the relevant claims (Ex. 1002, 68–71, 119–120) even after Patent Owner submitted one affidavit (Ex. 1002, 201–204) and the other non-affidavit evidence (Ex. 1002, 135, 138–146).

Declaration during prosecution (Ex. 1002, 36–41), and Petitioner asserts that his deposition testimony contradicts his testimony in the Declaration that the success of Patent Owner’s trap was due to the shaped-end trigger. As an initial matter, we note that of the *seven* affidavits and *at least seven other* pieces of evidence considered by the Examiner, this affidavit is the only one challenged, leaving uncontested the weight accorded by the Examiner to the *other six* affidavits and *at least seven other* pieces of evidence. As Petitioner did not challenge those affidavits and evidence, and our evaluation of those affidavits and evidence finds them to be credible, we will treat them as undisputed fact for the purposes of Section 325(d). *Yorkey v. Diab*, 601 F.3d at 1284 (The Board has discretion to give more weight to one item of evidence over another “unless no reasonable trier of fact could have done so.”); *In re Fox*, 471 F.2d at 1407.

Moreover, insofar as Petitioner is asserting that the deposition shows that the Examiner’s reliance on Mr. Hastings’ testimony was erroneous, we determine that it is misplaced. Paragraph 17 of Mr. Hastings’ Declaration identifies already that *either* the two-way/push-pull trigger or the shaped-end trigger could have been the basis for nexus (Ex. 1002, 40). This indicates that the Office was presented with, and the Examiner considered already, the argument that Mr. Hastings’ testimony could have been directed to the two-way/push-pull trigger.

As new evidence, Petitioner also presents an advertisement in *Fur Taker Magazine* (Ex. 1027) and the Declaration of Neil Ziegmann (Ex. 1024) that purportedly show that the Examiner’s determination was erroneous. We note that Mr. Ziegmann’s testimony is discounted, in that he is an interested party in this proceeding. *Cf. Finnigan Corp. v. ITC*, 180

F.3d 1354, 1369 (Fed. Cir. 1999) (“[T]he level of interest of the testifying witness is an important consideration when such testimony is offered to corroborate another witness’s testimony.”). Moreover, even when accorded some weight, we are unpersuaded that the Fur Taker advertisement and Mr. Ziegmann’s testimony come close to showing that the Examiner’s determination concerning nexus was erroneous. In particular, the vast majority of the evidence concerning secondary considerations in the prosecution history has not been challenged by Petitioner, and, thus, for the reasons set forth above, is treated as undisputed fact. To hold otherwise would allow Petitioner to make an end-run around Section 325(d) by merely submitting any piece of new evidence, no matter how minor or inconsequential.

F. Analysis of Petitioner’s Assertions Concerning the Board’s Exercise of Discretion

Petitioner asserts that “the Board’s position seems to be that it is irrelevant how persuasive Petitioners’ arguments are with respect to arguments previously considered by the examiner, because both arguments would be substantially the same if addressing the same issue (e.g., secondary considerations).” Req. 10. Petitioner’s assertions are misplaced. The Board stated that the persuasiveness of Petitioner’s argument is irrelevant with respect to the first inquiry, i.e., *whether “the same or substantially the same prior art or arguments previously were presented to the Office.”* Any purported persuasiveness of Petitioner’s argument is relevant to the second inquiry, i.e., whether or not to exercise our discretion under Section 325(d) when the language of Section 325(d) is satisfied, and was taken into consideration on pages 12–14 of our Decision, as well as in our analysis set forth above.

Petitioner asserts further that “even if the Board had such discretion under section 325(d), the Board exercised such discretion in an unreasonable and arbitrary manner by not considering the merits of Petitioners’ prior art, evidence, and arguments, which demonstrated factual and legal error in the Office’s prior examination of the application.” Req. 10–12. While the Board did consider the merits of Petitioners’ prior art, evidence, and arguments in rendering its Decision, we agree that analysis was not set forth in the Decision as clearly as it could have been. Accordingly, it is now set forth herein.

G. Analysis of Petitioner’s Assertions that the Board Applies Section 325(d) Inconsistently With Its Own Informative Decisions

Petitioner asserts that the panel’s application of Section 325(d) is inconsistent with the Board’s informative decisions because, of the seven informative decisions, six deal with previous contested proceedings, and the one exception is prosecution based on evidence presented in a contested proceeding. Req. 12–14. In essence, Petitioner is asserting that, for the most part, Section 325(d) is not meant to be applicable to prior art or arguments set forth only in the prosecution history. We disagree for the reasons set forth above in Section IV.B, which need not be repeated here, and Section III.G provides numerous examples to the contrary. *See also Funai Electric Co. v. Gold Charm Limited*, Case IPR2015-01491, slip op. at 20 (PTAB Dec. 28, 2015) (Paper 15); *Volkswagen Group of Am., Inc. v. Joao Control & Monitoring Sys., LLC*, Case IPR2015-01612, slip op. at 9–10 (PTAB Jan. 26, 2016) (Paper 7); *Palo Alto Networks, Inc. v. Finjan, Inc.*, Case IPR2015-01974, slip op. at 6–9 (PTAB Mar. 29, 2016) (Paper 7); *Apple Inc. v. Limestone Memory Sys. LLC*, Case IPR2016-01567, slip op. at 9–12 (PTAB Jan. 18, 2017) (Paper 11); *Fustibal, LLC v. Bayer Healthcare*

LLC, Case IPR2016-01490, slip op. at 11 (PTAB Feb. 8, 2017) (Paper 9); *Robert Bosch Tool Corp. v. SD3, LLC*, Case IPR2016-01754, slip op. at 6–21 (PTAB Mar. 22, 2017) (Paper 15); *Arctic Cat v. Polaris Indus, Inc.*, Case IPR2017-00199, slip op. at 4–10 (PTAB Apr. 17, 2017) (Paper 8); *Yotrio Corp. v. LakeSouth Holdings, LLC*, Case IPR2017-00299, slip op. at 9–14 (PTAB May 17, 2017) (Paper 7); *Dorco Company, Ltd. v. The Gillette Company, LLC*, Case IPR2017-00500, slip op. at 14–20 (PTAB June 21, 2017) (Paper 7); *Juniper Networks Inc. v. Mobile Telecomms. Techs., LLC*, Case IPR2017-00642, slip op. at 7–13 (PTAB July 27, 2017) (Paper 24).

Petitioner asserts further that “one of the principle functions of the Board is to adjudicate the decisions by examiners through appeals and trials, and, thus, the Board’s concern with second guessing the examiner seems to contradict the very reason for the Board’s existence.” Req. 14. Petitioner’s assertion is misplaced, in that the language of each of Sections 314(a) and 325(d) does not require adjudication of *every* such dispute, but instead confers on the Board the discretion to adjudicate *some* of those disputes, taking into account certain statutory language and competing principles analyzed in Sections III.B, III.F, and III.G.

Petitioner asserts additionally that taking into account factors such as whether a proceeding will be a “resource consuming dispute” is inappropriate, because “[t]his new application of 325(d) as an unfettered means for resource management clearly goes against the intent of the statute, and is an approach recently chastised by the Federal Circuit.” Req. 14–15. As an initial matter, we note that “resource consuming dispute” is not limited to management of Board resources, but also party resources, and that the Board is expressly permitted, by rule, to take resources into account in

resolving whether the petition should be granted. *See* 37 C.F.R. § 42.1(b) (“This part shall be construed to secure the just, speedy, and *inexpensive* resolution of every proceeding” (emphasis added)).

Regarding Board resources, however, we disagree with Petitioner’s assertions, as the express language of each of Sections 314(a) and 325(d) provides the Board with discretion to deny petitions. *See* Section III.C. Furthermore, we note that resource management was identified in the legislative history as a proper reason to deny petitions. *See* 157 CONG. REC. S1377 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl) (“[I]t is better that the Office turn away some petitions that otherwise satisfy the threshold for instituting an inter partes or post-grant review than it is to allow the Office to develop a backlog of instituted reviews that precludes the Office from timely completing all proceedings.”); *see also Heckler v. Chaney*, 470 U.S. 821, 842 (1985) (“As long as the agency is choosing how to allocate finite enforcement resources, the agency’s choice will be entitled to substantial deference, for the choice among valid alternative enforcement policies is precisely the sort of choice over which agencies generally have been left substantial discretion by their enabling statutes.”).¹²

Petitioner also cites Judge Reyna’s concurring opinion in *Shaw Indus. Group, Inc. v. Automated Creel Systems, Inc.*, 817 F.3d 1293 (Fed. Cir. 2016), for “criticizing the PTO’s claim to unchecked discretion as unprecedented and lacking any reasoning.” Req. 15 n.2. Petitioner’s

¹² We acknowledge that an agency cannot, under the guise of resource allocation, “‘consciously and expressly adopt[] a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.” *Heckler*, 470 U.S. at 833 n.4 (citing *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc)).

citation is misplaced, as the Board does not take the position that its discretion can be exercised in an unfettered manner without any reasoning. To the contrary, it is for that purpose that the Board provided such reasoning in the Decision, as well as herein.

V. *Order*

IT IS ORDERED that the request for an expanded panel is *granted* and, insofar as we have addressed above the assertions set forth in Petitioner's Request for Rehearing (Paper 12), the Request is *granted*. In all other respects, the Request is *denied*.

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