

# TELEPHONIC HEARING 7/17/2020

<p style="text-align: right;">Page 1</p> <p>1 UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE PATENT TRIAL AND APPEAL BOARD</p> <p>2 APPLE INC.,</p> <p>3 Petitioner,</p> <p>4 vs. No. IPR2020-00204 Patent 6,928,306 B2</p> <p>5 MAXELL, LTD,</p> <p>6 Patent Owner.</p> <p>7 TELEPHONIC HEARING BEFORE ADMINISTRATIVE PATENT JUDGES LYNNE PETTIGREW, MINN CHUNG, JASON MELVIN JOHN HUDALLA, FREDERICK LANEY</p> <p>12 July 17, 2020</p> <p>13 Sandra Tippins, CCR</p> <p>14 (The conference began at 1:00 p.m.)</p> <p>15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 3</p> <p>1 A P P E A R A N C E S</p> <p>2 For the Petitioner:</p> <p>3 MR. ADAM P. SEITZ</p> <p>4 MR. PAUL R. HART</p> <p>5 ERISE IP, P.A.</p> <p>6 7015 College Boulevard, Suite 700 Overland Park, Kansas 66211 adam.seitz@eriseip.com</p> <p>7 For the Patent Owner:</p> <p>8 MR. ROBERT G. PLUTA</p> <p>9 MAYER BROWN LLP</p> <p>10 71 South Wacker Drive Chicago, Illinois 60606 rpluta@mayerbrown.com</p> <p>11 The Court Reporter:</p> <p>12</p> <p>13 Ms. Sandra Tippins</p> <p>14 Alaris Litigation Services 1608 Locust Street Kansas City, Missouri 64108</p> <p>15 16 17 18 19 20 21 22 23 24 25</p>
<p style="text-align: right;">Page 2</p> <p>1 UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE PATENT TRIAL AND APPEAL BOARD</p> <p>2 APPLE INC.,</p> <p>3 Petitioner,</p> <p>4 vs. No. IPR2020-00204 Patent 6,928,306 B2</p> <p>5 MAXELL, LTD,</p> <p>6 Patent Owner.</p> <p>7 TELEPHONIC HEARING, taken on the 17th 8 day of July, 2020, between the hours of nine 9 o'clock in the forenoon and five o'clock in the 10 afternoon of that day, via telephone, before 11 SAUNDRA TIPPINS, a Notary Public, and Certified 12 Court Reporter within and for the States of 13 Missouri and Kansas, in a certain cause now pending 14 before the U.S. Patent and Trademark Office, Before 15 the Patent Trial and Appeal Board, wherein APPLE 16 INC. is the Petitioner and MAXELL, LTD. is the 17 Patent Owner.</p> <p>18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 4</p> <p>1 JUDGE PETTIGREW: This is Judge</p> <p>2 Pettigrew. Also on the call with me are Judges</p> <p>3 Chung, Hudalla, Melvin and Laney. Who do we have</p> <p>4 on the call for Petitioner?</p> <p>5 MR. SEITZ: This is Adam Seitz for</p> <p>6 Petitioner Apple. Also joining me is my partner</p> <p>7 Paul Hart.</p> <p>8 JUDGE PETTIGREW: Thank you. And</p> <p>9 who do we have on the call for Patent Owner?</p> <p>10 MR. PLUTA: Good afternoon, your</p> <p>11 Honor. This is Robert Pluta on behalf of Patent</p> <p>12 Owner Maxell. And also on the call with me is my</p> <p>13 colleague Saqib Siddiqui.</p> <p>14 JUDGE PETTIGREW: Which party</p> <p>15 arranged for the court reporter?</p> <p>16 MR. SEITZ: That was Petitioner's</p> <p>17 counsel. This is Adam Seitz. We arranged for the</p> <p>18 reporter.</p> <p>19 JUDGE PETTIGREW: All right, thank</p> <p>20 you. So we ask you to file a transcript as soon</p> <p>21 as possible as an exhibit after the call.</p> <p>22 So we scheduled this call to address an</p> <p>23 email we received from Petitioner requesting</p> <p>24 authorization to file a two-page supplemental</p> <p>25 brief along with appropriate exhibits relating to</p>

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<p style="text-align: right;">Page 5</p> <p>1 a summary judgment motion that Maxell filed in  2 the parallel District Court proceeding involving  3 the three patents that are challenged in the  4 three IPRs before us.  5 Petitioner states in an email that the  6 summary judgment motion may impact our analysis  7 of Fintiv Factor 4, the potential overlap of  8 issues between the District Court litigation and  9 IPRs.  10 The emails do not specify whether Patent  11 Owner opposes the request. In the future, please  12 make sure the parties meet and confer before  13 contacting us with any requests. And also you  14 should specify in the email whether the other  15 party opposes the request.  16 Let's start with Petitioner. Please  17 explain briefly why you believe there's good  18 cause for the requested briefing. And in  19 particular we'd like to hear the subject of the  20 summary judgment motion and why it's relevant to  21 our Fintiv analysis.  22 MR. SEITZ: Yes, your Honor. This  23 is Adam Seitz on behalf of Petitioner. Thank you.  24 Your Honor, in the summary judgment  25 argument submitted to the District Court, Maxell</p>	<p style="text-align: right;">Page 7</p> <p>1 First, probably the most fundamental thing,  2 Maxell bases its summary judgment motion to the  3 District Court on the fundamental premise that  4 the Abowd article, the question of whether it is  5 publicly available, whether Apple has proved that  6 it's publicly available at the District Court, is  7 one of clear and convincing, a standard that is  8 one of the highest if not the highest at the  9 civil level for District Courts. They say that  10 Apple has failed to show clear and convincing  11 evidence.  12 The board, however, applies a different  13 standard. Under the board's precedential  14 decision in Hulu, the board examines whether  15 Petitioner has shown a reasonable likelihood that  16 the reference, here Abowd, was publicly  17 accessible and a reasonable likelihood of whether  18 the reference qualifies as a printed publication.  19 So looping back to the question of  20 overlap, there is no scenario where there will be  21 inconsistent positions here. The District Court  22 could find on the highest burden of proof, that  23 clear and convincing evidence, that Apple made a  24 very strong showing but failed to meet the clear  25 and convincing standard. The board could find</p>
<p style="text-align: right;">Page 6</p> <p>1 challenges the invalidity case against the three  2 patents that are subject to the IPRs that we are  3 here discussing.  4 And we believe it is relevant to your  5 Honor's proceeding specifically in the Fintiv  6 analysis regarding the alleged overlap with the  7 District Court. In its sur-reply that was  8 granted to Maxell to discuss the Fintiv factors,  9 Maxell argued that there was overlap between  10 these proceedings at the PTAB and the District  11 Court and that the same issues would be decided,  12 and that under Fintiv that was an independent  13 grounds for denial, raising the questions of  14 whether there would be inconsistent rulings, et  15 cetera.  16 The summary judgment motion itself that  17 Maxell has filed challenges the reference Abowd,  18 A-b-o-w-d, and its public availability. That is  19 one of the issues that the parties have briefed  20 here as well. The question of Abowd and its  21 public availability was the subject of additional  22 briefing in the reply and the sur-reply in these  23 petitions or in these matters as well.  24 One of the most fundamental -- there's two  25 things I want to point out here, your Honor.</p>	<p style="text-align: right;">Page 8</p> <p>1 that very same evidence meets a reasonable  2 likelihood standard.  3 That is not an inconsistency such of the  4 type that Fintiv is looking at. That's applying  5 a different standard that Congress expressly  6 authorized as a difference between IPRs and the  7 District Court.  8 And secondarily, your Honor, the reason  9 that it's important to you is the summary  10 judgment argument rests on challenging Abowd as  11 it relates to the "do not circulate" stamp. That  12 also was subject of additional briefing and the  13 introduction of additional evidence by Petitioner  14 in the reply and sur-reply.  15 Maxell argues to the District Court that  16 the "do not circulate" stamp means that the  17 reference Abowd was not available to the public.  18 This is on page seven of its summary judgment  19 brief. They further argue that the "do not  20 circulate" warning indicates that the reference  21 was not meant to be disseminated to the public,  22 and the Court, if it makes a ruling, will do so  23 based on that false premise and an incomplete  24 record from that which the board has.  25 Very specifically, your Honor, in this</p>

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<p style="text-align: right;">Page 9</p> <p>1 proceeding Apple submitted, along with its reply,  2 a supplemental declaration from Mr. Mumford, our  3 librarian expert, showing the arguments made  4 regarding the "do not circulate" are incorrect;  5 that it was accessible to the public. Thus the  6 board has different evidence in front of it than  7 the District Court and a different standard,  8 reasonable likelihood, rather than clear and  9 convincing, than those being examined by the  10 District Court.  11 But if Maxell is successful in its  12 arguments to the board that the same issues will  13 be decided, the board will deny institution. If  14 it's successful convincing the jury or the Judge  15 to prevent this issue from going to the jury,  16 then Maxell will have its cake and eat it, too.  17 No tribunal or trier of fact in that  18 situation will look at the key evidence on why  19 Abowd was publicly available under the standards  20 before your Honors, and no tribunal will examine  21 the merits of whether the patents are invalid  22 under the teachings of Hayashida and Abowd as  23 we've put forward in our petition.  24 So, your Honor, I thought those were  25 significantly important as they impact the Fintiv</p>	<p style="text-align: right;">Page 11</p> <p>1 Yeah, we responded to the board with an email.  2 Hopefully the board received that email.  3 JUDGE PETTIGREW: Apparently we  4 did not get that email. I'm sorry for that.  5 MR. PLUTA: Okay, well, if the  6 board will indulge me, I'll summarize it in my  7 response.  8 JUDGE PETTIGREW: Thank you.  9 MR. PLUTA: So we do oppose their  10 request. We think there has been enough briefing  11 on the Fintiv issue for the board to make an  12 informed decision. However, to the extent the  13 board is considering Apple's request, we'd like to  14 put some things into context.  15 Apple's request actually highlights why  16 the board should utilize its discretion under  17 Section 314 and Fintiv to deny institution in  18 these proceedings.  19 On June 30th, the parties in the  20 underlying District Court action filed 16 motions  21 across the ten patents at issue there. At least  22 three of those motions filed were directed to the  23 validity of the patents at issue here in these  24 proceedings. Maxell filed two motions and Apple  25 filed a motion directed to these patents as well.</p>
<p style="text-align: right;">Page 10</p> <p>1 analysis such that we would like to bring that  2 before you.  3 JUDGE PETTIGREW: Let me  4 understand that last part of your argument,  5 counsel.  6 So you're saying if we denied using our  7 discretion under 314 applying the Fintiv factors  8 and then in the District Court, the District  9 Court granted Maxell's summary judgment motion,  10 then at that point isn't the District Court  11 saying that Maxell has shown by clear and  12 convincing evidence that the Abowd reference is  13 not publicly available prior art?  14 MR. SEITZ: That is correct, your  15 Honor, again based on a different standard. And  16 it would avoid a fundamental question of the  17 merits of whether Abowd and Hayashida, the  18 reference before your Honors in our petition, do  19 actually disclose the limitations in the claims.  20 But yes, your recitation was correct.  21 JUDGE PETTIGREW: Okay. Let's  22 hear from Patent Owner. First of all, do you  23 oppose the request? Because we didn't get that  24 information.  25 MR. PLUTA: Thank you, your Honor.</p>	<p style="text-align: right;">Page 12</p> <p>1 These motions were filed long after  2 completion of fact discovery and after completion  3 of expert discovery where both Apple's and  4 Maxell's experts were deposed on the patents at  5 issue in these proceedings. A hearing on those  6 motions is scheduled for September 15th, which is  7 about a month prior to trial in the District  8 Court action and 11 months before any final  9 written decision would be due in these  10 proceedings.  11 There are several features of both  12 Maxell's motion and Apple's motion that the  13 substantial overlap of issues and why if the  14 board institutes the parties, then the board will  15 have a heavy duplication of that effort.  16 For example, as Mr. Seitz alluded to, the  17 issue of whether the Abowd publication is prior  18 art is the same here as it is in the District  19 Court. Maxell's motion seeks a summary judgment  20 ruling that the Abowd publication is not prior  21 art, just as the arguments made here before the  22 board. The basis for that intention is the same  23 as it is here.  24 And importantly, Apple's evidence to show  25 that the publication is prior art is precisely</p>


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<p>1 the same. In fact, Apple has set forth a nearly 2 identical declaration from the librarian, 3 Mr. Mumford, in the District Court as it has in 4 these proceedings. And Mr. Maxell has already 5 taken Mr. Mumford's deposition. 6 To Mr. Seitz's points or arguments that 7 there's a supplemental declaration here from 8 Mr. Mumford whereas that supplemental declaration 9 doesn't exist in the District Court, that 10 argument should have no merit because Apple could 11 certainly have, A, gotten that information in 12 during the deposition of Mr. Mumford, or simply 13 filed a supplemental declaration from Mr. Mumford 14 in the District Court. You may even still have 15 the opportunity to do so. 16 So the fact that there's different 17 evidence here is kind of a misnomer. In Apple's 18 Motion for Summary Judgment, it seeks invalidity 19 of the patents based on Section 101, but 20 importantly it support its motion arguing that 21 Hayashida, the same reference as used in the 22 petition, is known art. And to illustrate this 23 Apple relies on many of the same references from 24 Hayashida as it does in the petition. 25 So Apple's concern -- and that's putting</p>	<p>1 The District Court's ruling on summary 2 judgment will not be whether the reference Abowd 3 is prior art. The summary judgment challenges 4 whether Apple has submitted sufficient evidence 5 to meet the clear and convincing standard. 6 So the ruling that would come out of the 7 District Court would be a question of whether the 8 evidence before the District Court is sufficient 9 to meet the clear and convincing standard. The 10 reason I want to clarify that is because you the 11 board have a different standard, reasonable 12 likelihood, and you the board have different 13 evidence. 14 Now, Mr. Pluta seemed to brush that under 15 the table, and perhaps Apple does -- I'm not 16 litigation counsel -- perhaps they do clarify the 17 record. Maxell did not make any reference to the 18 additional evidence from the IPR and inform the 19 District Court about that. Perhaps Apple will. 20 But the point is you have different 21 evidence and a different standard available to 22 you to find whether on a reasonable likelihood 23 standard Abowd is publicly available. The 24 Court's ruling will not be inconsistent with 25 yours because it's one of whether Apple has met</p>
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<p>1 aside even the 103 arguments that overlap between 2 the two proceedings. So Apple's concern that the 3 summary judgment motions present a risk of Maxell 4 convincing both forums to forego looking at 5 invalidity is incorrect. The District Court will 6 look at invalidity and look at it first prior to 7 the board, nearly a year prior to the board, 8 which goes to the very heart of why the board 9 found Fintiv precedential. 10 The substantial overlap of issues favors 11 denial here. Well before the final written 12 decision, the Court will either grant summary 13 judgment in Maxell's or Apple's favor or a jury 14 will decide the issues surrounding the validity 15 of the patent. 16 JUDGE PETTIGREW: Thank you, 17 counsel. Petitioner, I'll give you a brief 18 rebuttal. 19 MR. SEITZ: Thank you, your Honor. 20 I want to start with responding to Mr. Pluta. 21 This is Mr. Seitz responding by clarifying one 22 thing Mr. Pluta said and also going back to your 23 question, Judge Pettigrew, because I think there's 24 a fundamental point that I don't want to get lost 25 in a mess here.</p>	<p>1 its evidentiary standard under the clear and 2 convincing standard. 3 JUDGE PETTIGREW: All right, thank 4 you, counsel. Patent Owner, I'll give you one 5 last word if there's anything else you want to 6 say. 7 We can't hear you. 8 MR. PLUTA: I'm sorry, your Honor, 9 I was on mute. The perils of doing this call from 10 my cell phone in the work-at-home environment. I 11 apologize. 12 JUDGE PETTIGREW: Understood. 13 MR. PLUTA: I will keep it very 14 brief then. 15 It's not incumbent upon Maxell to 16 supplement the District Court record to match the 17 evidence that Apple submitted in this proceeding. 18 That's Apple's job. 19 But as you pointed out, your Honor, in 20 response to Mr. Seitz's arguments, I mean the 21 burden is on us and in the District Court. So if 22 we meet that burden and summary judgment is 23 granted, the judge in the District Court will 24 address the invalidity issues of the patents. 25 And if we do not meet that burden and the case</p>

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<p style="text-align: right;">Page 17</p> <p>1 goes to trial, the jury will.</p> <p>2 JUDGE PETTIGREW: All right.</p> <p>3 Thank you, counsel. I'm going to put everybody on</p> <p>4 hold for a short period of time while I confer</p> <p>5 with my colleagues.</p> <p>6 (Off the record.)</p> <p>7 JUDGE PETTIGREW: The panel is</p> <p>8 back on the call. We're going to take this matter</p> <p>9 under advisement.</p> <p>10 Petitioner, you arranged for the court</p> <p>11 reporter. We would like to have the transcript</p> <p>12 of this call filed as soon as possible.</p> <p>13 MR. SEITZ: Yes. Will do, your</p> <p>14 Honor. I'll file -- there was a similar</p> <p>15 proceeding between the parties where we had a</p> <p>16 discussion like this on Monday, and they asked me,</p> <p>17 IPR 2020-202, they asked me to submit the rough</p> <p>18 transcript immediate after the call and then the</p> <p>19 final when it was done. Would you like me to</p> <p>20 proceed the same here?</p> <p>21 JUDGE PETTIGREW: Yes, we would</p> <p>22 like that, thank you.</p> <p>23 MR. PLUTA: This is Robert. Could</p> <p>24 you make one point? I just want wanted to clarify</p> <p>25 to the extent the board does allow further</p>	<p style="text-align: right;">Page 19</p> <p>1 JUDGE PETTIGREW: Mr. Pluta, can</p> <p>2 you clarify? Is it the 101 summary judgment</p> <p>3 motion?</p> <p>4 MR. PLUTA: Yes, your Honor, that</p> <p>5 is the motion. However, I disagree with</p> <p>6 Mr. Seitz's characterization of the passing</p> <p>7 reference.</p> <p>8 There are six or seven references to the</p> <p>9 Hayashida reference including about seven</p> <p>10 paragraphs of Apple's expert that discuss and are</p> <p>11 cited in the motion that discuss the Hayashida</p> <p>12 reference and its alleged applicability to the</p> <p>13 validity of the patents at issue here.</p> <p>14 JUDGE PETTIGREW: Thank you. If</p> <p>15 there's nothing else from the parties, then this</p> <p>16 call is adjourned. Thank you.</p> <p>17 (The hearing concluded at 1:21</p> <p>18 p.m.)</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 18</p> <p>1 submissions in addition to what Apple requested to</p> <p>2 be submitted, we would also then request to</p> <p>3 complete the record and submit the other motions,</p> <p>4 the relevant motions.</p> <p>5 JUDGE PETTIGREW: And what are the</p> <p>6 relevant motions?</p> <p>7 MR. PLUTA: Apple's Motion for</p> <p>8 Summary Judgment as well that further highlights</p> <p>9 the substantial overlap of the Hayashida</p> <p>10 reference.</p> <p>11 JUDGE PETTIGREW: Okay.</p> <p>12 MR. SEITZ: Your Honor, may I ask</p> <p>13 a brief clarification on that? This is Mr. Seitz.</p> <p>14 JUDGE PETTIGREW: Yes. Go ahead,</p> <p>15 counsel.</p> <p>16 MR. SEITZ: The only other motion</p> <p>17 I'm aware of to which he could be referring is a</p> <p>18 101 motion, and I'm wondering if that's it.</p> <p>19 There's only a passing reference to the Hayashida</p> <p>20 in saying that people have been doing navigation</p> <p>21 on devices like this for years.</p> <p>22 If that's what he's referring to, I guess</p> <p>23 I'm just wondering if perhaps there's another</p> <p>24 motion that he's referring to that I'm unaware</p> <p>25 of.</p>	<p style="text-align: right;">Page 20</p> <p>1 CERTIFICATE OF REPORTER</p> <p>2 I, Sandra Tippins, Certified Court Reporter</p> <p>3 (Missouri) and Certified Shorthand Reporter</p> <p>4 (Kansas), do hereby certify that the foregoing</p> <p>5 hearing was taken by me to the best of my ability</p> <p>6 and thereafter reduced to typewriting under my</p> <p>7 direction; that I am neither counsel for, related</p> <p>8 to, nor employed by any of the parties to the</p> <p>9 action in which this hearing was taken, and further</p> <p>10 that I am not a relative or employee of any</p> <p>11 attorney or counsel employed by the parties</p> <p>12 thereto, nor financially or otherwise interested in</p> <p>13 the outcome of the action.</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <div style="text-align: right;">  <p><i>Sandra Tippins</i> Certified Court Reporter Within and for the State of Missouri</p> </div>

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