

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ACTIVISION BLIZZARD, INC.
Petitioner

v.

GAME AND TECHNOLOGY CO., LTD.,
Patent Owner

Case IPR2018-00157
Patent 7,682,243

PRELIMINARY RESPONSE TO PETITION UNDER 37 C.F.R. § 42.107

As permitted under 37 C.F.R. § 42.107, Game and Technology Co., Ltd. (“Patent Owner”) timely submits this Preliminary Response to Petition Under 37 C.F.R. § 42.107 (“Preliminary Response”). This Preliminary Response sets forth the reasons why the Petition for *Inter Partes* Review of U.S. Patent No. 7,682,243 (“Petition”) should be denied and dismissed by the Patent Trial and Appeal Board (“Board”).

I. INTRODUCTION

For the reasons discussed below, Patent Owner, Game and Technology Co., Ltd. (“GAT”), respectfully requests the Board to exercise its discretion to deny institution and dismiss the Petition because the Petition fails to demonstrate a reasonable likelihood that claims 1- 7 of the ‘243 Patent are unpatentable.

II. JOINDER

In the Motion for Joinder, Petitioner (Activision Blizzard) concedes that, when the Wargaming IPR was filed on March 13, 2017, “Petitioner was time-barred from filing any additional IPR petitions.” Motion for Joinder (Paper 3 at 14). Absent joinder, this Petition should be denied as barred under 35 U.S.C. § 315(b) and 37 C.F.R. § 42.101(b).

GAT provides the following status updated regarding copending IPR2017-01082. Patent Owner filed a Response to Petitioner’s Motion for Joinder (Paper 9) on December 6, 2017, before Patent Owner’s discovery period had closed in copending IPR2017-01082. The Patent Owner’s discovery period in copending IPR2017-01082 has closed and Wargaming’s expert has already been deposed.

II. NVIDIA FACTORS

Absent joinder, the Board should use its discretion to deny institution because all the *NVIDIA* factors weigh against institution of the instant Petition for *Inter Partes* Review (IPR) filed by the same party, Activision Blizzard.

Petitioner asserts that the *NVIDIA* follow-on factors weigh in favor of joinder:

1. whether the same petitioner previously filed a petition directed to the same claims of the same patent;
2. whether at the time of filing of the first petition the petitioner knew of the prior art asserted in the second petition or should have known of it;
3. whether at the time of filing of the second petition the petitioner already received the patent owner's preliminary response to the first petition or received the Board's decision on whether to institute review in the first petition;
4. the length of time that elapsed between the time the petitioner learned of the prior art asserted in the second petition and the filing of the second petition;
5. whether the petitioner provides adequate explanation for the time elapsed between the filings of multiple petitions directed to the same claims of the same patent;
6. the finite resources of the Board; and
7. the requirement under 35 U.S.C. § 316(a)(11) to issue a final determination not later than 1 year after the date on which the Director notices institution of review.

Gen. Plastic Indus. Co., Ltd. v. Canon Kabushiki Kaisha, IPR2016-01357, Paper 19 at 6-7. However, the factors considered in determining whether to institute petitions of follow-on petitioners ("*NVIDIA* Factors") weigh against institution.

A. Petitioner Previously Filed a Petition Directed to the Same Claims of the Same Patent

In *General Plastic Industrial*, the Board “noted that the same claims of the same patent were at issue in the follow-on petitions as in the first-filed petitions, where institutions were denied.” *Gen. Plastic*, Paper 19 at 10. In the instant case, Petitioner previously filed the First Activision Blizzard IPR on the same claims of the ‘243 patent. See Motion for Joinder at 13 (citing *Activision Blizzard, Inc. v. Game and Technology Co., Ltd*, IPR2016-01918, Paper 1 (Sep. 30, 2016)). This earlier petition was denied. *Activision Blizzard, Inc.* IPR2016-01918, Paper 14 at 2.

B. At the Time of Filing of the First Petition, Petitioner Should Have Known of the Prior Art Asserted in the Second Petition

Petitioner alleges unawareness of the prior art—Levine and Dungeons and Dragons—in the Wargaming IPR, despite (1) Petitioner’s assertion of “Dungeons & Dragons Player’s Handbook Core Rulebook I” (“*Dungeons & Dragons*”) on June 10, 2016, as shown in the Defendants’ Joint Invalidity Contentions served in Civil Action No.: 2:15-cv-01257-RWS-RSP (Ex[2001] at 24 & 27-34), and (2) a skilled searcher conducting a diligent prior art search (Motion for Joinder at 13). However, in the Petition for *Inter Partes* Review of this Second Activision Blizzard IPR, Petitioner asserts “Dungeons and Dragons created the RPG genre and has been *hugely influential*.” IPR2018-00193, Paper 8 at 5 (emphasis added).

As a result, Petitioner's position is, at best, internally inconsistent with its former actions, and it is unclear why a skilled searcher would have been unable to have located *Dungeons & Dragons*. Equally unclear is the absence of Levine, a published U.S. patent application (U.S. Pub. 2003/0177187), which should have been located upon diligent search.

C. At the Time of Filing, Petitioner Had Knowledge of Patent Owner's Preliminary Response to the First Petition and the Board's Decision on Whether to Institute Review in the First Petition

GAT filed its Preliminary Response in the First Activision Blizzard IPR on January 9, 2017, and the Board denied institution on March 21, 2017. IPR2016-01918, Papers 11, 14. Petitioner filed the instant Petition for *Inter Partes* Review on November 6, 2017. As such, Petitioner's knowledge of the Preliminary Response and the Board's Decision in this third factor weighs against joinder in this subsequent Petition.

D. Eight Months Elapsed Between the Time the Petitioner Learned of the Prior Art Asserted in the Second Petition and the Filing of the Second Petition

Petitioner acknowledges delay of approximately eight months after learning of Levine and *Dungeons & Dragons* before filing the subsequent Petition for *Inter Partes* Review. Motion for Joinder at 14.

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