

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LIVE NATION ENTERTAINMENT, INC.,
Petitioner,

v.

COMPLETE ENTERTAINMENT RESOURCES B.V.,
Patent Owner.

Case PGR2017-00038
Patent 9,466,035

Before MICHAEL J. FITZPATRICK, BARBARA A. PARVIS, and
JASON W. MELVIN, *Administrative Patent Judges*.

FITZPATRICK, *Administrative Patent Judge*.

DECISION
Denying Institution of Post-Grant Review
35 U.S.C. § 325(d)

I. INTRODUCTION

Live Nation Entertainment, Inc. (“Petitioner”) filed a Petition to institute a post-grant review of all claims, *viz.* claims 1–19, of U.S. Patent No. 9,466,035 (“the ’035 patent”). Paper 1 (“Pet.”). Songkick.com B.V. filed a Preliminary Response. Paper 6 (“Prelim. Resp.”). Songkick.com B.V. subsequently changed its name to Complete Entertainment Resources B.V. (“Patent Owner”). Paper 7, 2.

The Petition is denied under 35 U.S.C. § 325(d).

A. The ’035 Patent

The ’035 patent, issued October 11, 2016, from U.S. Application serial no. 14/595,797 (“the ’797 application”), which was filed January 13, 2015. Ex. 1001, at [45], [21], and [22]. The ’035 patent does not claim the benefit of any earlier-filed application, and is, thus, eligible for post-grant review.¹

The ’035 patent is titled “Systems and Methods For Leveraging Social Queuing To Facilitate Event Ticket Distribution.” *Id.* at [54]. The ’035 patent points out that “ticket resellers utilize automated software for purchasing tickets,” and aspires “to provide event ticket systems and methods that reduce the unfair advantage in ticket purchases enjoyed by automated ticket purchasing software and associated [application programming interfaces].” Ex. 1001, 1:16–17, 1:50–53.

¹ The post-grant review process is available only to patents subject to the first-inventor-to-file provisions of the Leahy–Smith America Invents Act, Pub. L. No. 112–29, 125 Stat. 284 (2011) (“AIA”). AIA § 6(f)(2)(A). And, more specifically, the first-inventor-to-file provisions apply only to patents (such as the ’035 patent) issuing from applications that have an effective filing date on or after March 16, 2013. *Id.* at § 3(n)(1).

The claimed invention relates to “prioritizing potential event ticket purchasers” and using “purchaser behavior” to do so. *Id.* at 1:8–11. Generally, the ’035 patent concerns identifying different classes of ticket purchasers based on social media account history and other data. For example, a performing “entity may choose to award ticket purchasing priority to certain entity-loyal participants based on identifiable indications of loyalty associated with the social media IDs or other activity identifying information or websites of such entity-loyal participants.” *Id.* at 2:63–3:1. The ’035 Patent terms this “social queuing” and further explains that it “may also include limiting access, or denying access to certain participants based on account history corresponding to social media IDs or other suitable indicia.” *Id.* at 3:5–8. The activity identifying information may be “obtained from websites and/or apps such as Songkick™, iTunes™, Amazon™, YouTube™, or other such applications that track and/or monitor user affinity to select performers.” *Id.* at 3:10–13.

The ’035 patent performs this social queuing by performing an algorithm that computes an index value for each user/login, with the index value being based, at least, in part on account history retrieved from social media. *Id.* at 6:21–22. Such social media history may include a “time-stamped indication of affinity for an entity [e.g., a rock band] associated with the event [for which the ticket is being sold]” or “tagging of a photograph of” the entity. *Id.* at 6:44–56. The index value may also be based on “other historical information such as, for example, historical ticket purchases for performances that the user attended.” *Id.* at 6:32–34. “Historical purchase(s) of merchandise, such as t-shirts, mugs, or other

performer associated paraphernalia, may also indicate an affinity for the pre-determined entity.” *Id.* at 7:28–30.

In addition to discriminating between users/logins based on their affinity (or not) for a performing entity, the '035 patent also discriminates between users/logins based on whether they are likely to be human versus computer purchasers. *See, e.g., id.* at 7:35–38 (“The method may further include querying the account history to determine whether the account history includes one or more parameters that indicate whether the social media ID is related to an automated entity or a human entity.”).

Figure 8 of the '035 patent is reproduced below.

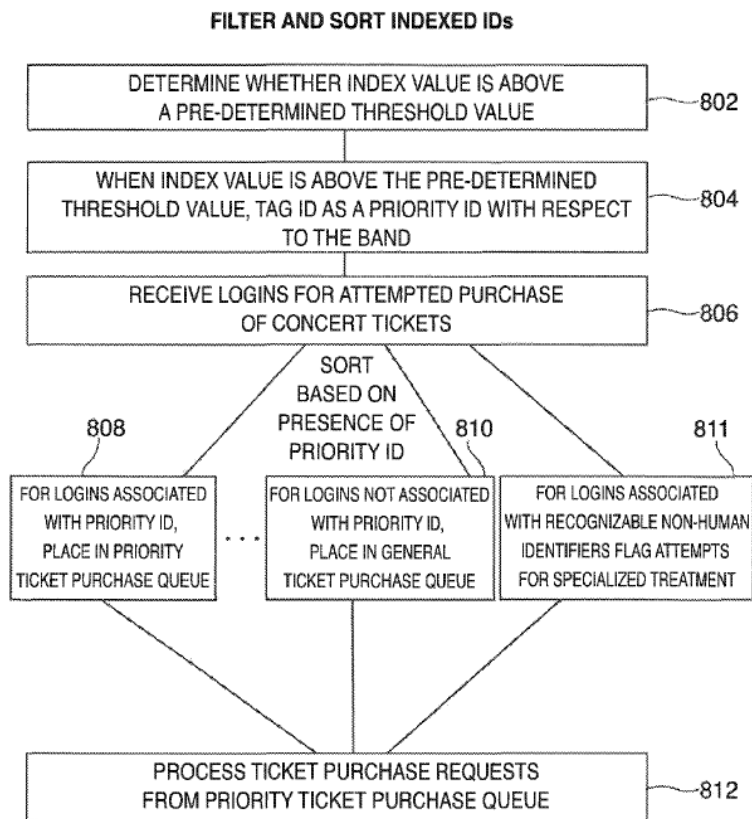


FIG. 8

Figure 8, reproduced above, shows a flow diagram of filtering and sorting ticket purchasing opportunities based on the index value. *Id.* at 2:55–56. In the embodiment of Figure 8, logins/users are sorted into three groups: (1) logins of priority users, (2) logins of non-priority users, and (3) logins associated with non-human users (e.g., automated ticket purchasing bots belonging to scalpers). *Id.* at Fig. 8: refs. 808, 810, 811. If a user's login is assigned an index value above a first threshold, it is assigned a priority flag, enabling that user to purchase a ticket not available to all users until a later time, if at all. *Id.* at 6:25–30, 13:38–60 (excerpt refers to Figure 6 but applies equally to Figure 8 (*see id.* at 14:32–33)), Fig. 8: ref. 808. If a user's login is assigned an index value below the first threshold but above a second threshold, it is not given a priority flag, and that user may purchase tickets after the window for priority user tickets purchases passes. *Id.* at 13:60–14:9, Fig. 8: ref. 810. If a user's login is assigned a value below the second threshold, it is because that user appears to be non-human per the algorithm's calculation, and the ability of that login to purchase tickets is restricted or prohibited altogether. *Id.* at 14:44–46, Fig. 8: ref. 811.

B. The Challenged Claims

The '035 patent includes 19 claims, all of which are challenged. Claims 1, 8, 15, and 19 are independent. Claims 1 and 19 are illustrative and reproduced below.

1. An event ticket distribution system comprising:

a receiver configured to receive a plurality of logins, each of the logins intended for an event ticket purchase; a processor configured to retrieve social media account history or other data source information associated with each of the plurality of logins, wherein each of the social media account history, or other data source information, comprises at least one time-stamped indication of affinity for a performing entity associated with the event, said at least one time-stamped indication of affinity comprising a time-stamp prior to the receipt of the login associated with the social media account history or other data source information;

wherein the processor is further configured to calculate an index value associated with the login, said index value being based, at least in part, on the retrieved account history or data source information; and

when the index value associated with a login is above a pre-determined threshold value, the processor is further configured to assign a priority flag to the login, wherein said priority flag enables a ticket event purchase in a first time window, when the index value is below the first threshold value but above a second threshold value, the processor is further configured to assign a non-priority flag, said non-priority flag that enables the login to make an event ticket purchase in a second time window, and when the index value is associated with a value under the second threshold value, the processor restricts the ticket purchasing rights associated with the login.

19. An article of manufacture comprising a non-transitory computer usable medium having computer readable program code embodied therein, the code when executed by one or more processors for configuring a computer to execute a

method to prioritize automated ticket purchasers, the method comprising:

using a receiver to receive a plurality of logins, each of the logins intended for an event ticket purchase, each of the logins corresponding, at least in part, to stored or retrieved data source information (“user information”), wherein the user information comprises at least one time-stamped indication of affinity for a performing entity associated with the event, said at least one time-stamped indication of affinity comprising a time-stamp prior to the receipt of the login associated with the user information;

using a processor to retrieve account history associated with the user information;

using the processor to calculate an index value associated with the user information, said index value being based, at least in part, on the retrieved account history; and

when the index value associated with a login is above a pre-determined threshold value, using the processor to assign a priority flag to the login, wherein said priority flag enables an event ticket purchase, and the processor eliminates ticket purchasing rights for a login associated with a value under the threshold value.

Claims 2 through 18, like claim 1 shown above, require a processor configured to assign index values into *three* categories and correspondingly treat logins in one of *three* manners with respect to the ability (or not) to purchase tickets. Claim 19 is different. Claim 19 requires a processor configured to assign index values into just *two* categories and correspondingly treat logins in one of *two* manners with respect to the ability (or not) to purchase tickets.

C. Asserted Grounds of Unpatentability

Petitioner asserts the following grounds of unpatentability:

References	Basis	Claims
Not applicable	Judicial exception to § 101	1–19
Scarborough (Ex. 1004) ² and McEwen (Ex. 1005) ³	§ 103	1, 4–9, 12–16, and 19
Scarborough, McEwen, and Shivakumar (Ex. 1006) ⁴	§ 103	2, 3, 10, 11, 17, and 18

Pet. 4–5.

D. Related Matters

Petitioner does not identify any related matters, stating— incompletely—“Petitioner is aware of no other matters *involving the ’035 patent.*” Pet. 2 (emphasis added). The parties, however, are obligated to identify more than just matters involving the subject patent. More specifically, they must “[i]dentify any other judicial or administrative matter that would affect, or be affected by, a decision in the proceeding.” 37 C.F.R. § 42.8(b).

Patent Owner identifies U.S. Patent No. 9,639,811 (“the ’811 patent”) (Ex. 2001) as a related matter. Paper 4, 2. The ’811 patent (Ex. 2001) issued from U.S. Application serial no. 15/099,750 (“the ’750 application”).

² U.S. Patent App. Pub. No. 2015/0066546 A1, published March 5, 2015 in the name of Scarborough et al.

³ U.S. Patent App. Pub. No. 2016/0078370 A1, published March 17, 2016 in the name of McEwen et al.

⁴ U.S. Patent App. Pub. No. 2015/0134371 A1, published May 14, 2015 in the name of Shivakumar et al.

The '750 application is a continuation of the '797 application that issued as the '035 patent being challenged here. Ex. 2001, at [63]. During prosecution of the related '811 patent, an unknown third party filed a Pre-issuance Submission (“third party submission”) pursuant to 35 U.S.C. § 122(e) and 37 C.F.R. § 1.290. Ex. 2002, 57–97. The third party submission presented arguments and art to the Examiner that are extremely similar to those presented in the instant Petition. *Compare id.* at 58–90, *with* Pet. 31–75; *compare* Ex. 2002, 94–96, *with* Pet. 21–31. Despite those arguments and art, the Examiner allowed the claims of the '811 patent to issue. *Id.* at 8–23. Further, the claims of the '811 patent are very similar to the claims of the '035 patent. *See, e.g.*, Prelim. Resp. 29–30 (side-by-side comparison of claim 1 of the '035 patent and claim 1 of the '811 patent).

Petitioner was aware of the third party submission in the '750 application, as it copied portions of it into the Petition. *See* Prelim. Resp. 37–38 (*comparing* Exhibit 2002, 95–96, *with* Pet. 36). The Petition even mistakenly refers to the '035 patent as an “application,” an error presumably derived from the act of copying material from the third party submission. *See* Pet. 27 (“Thus, like the claims in *FairWarning*, the claims in the present application are directed to the concept of analyzing records of human activity to detect certain behaviors, and taking certain actions based on the results of the analysis.”), 28 (“Similarly, the present application implements the rules of an old process (i.e., prioritizing ticket sales for fan club members and other “true fans” of a performer) in a new environment (i.e., using data from social media accounts).”).

II. ANALYSIS

A. Claim Construction

“A claim in an unexpired patent shall be given its broadest reasonable construction in light of the specification of the patent in which it appears.” 37 C.F.R. § 42.200(b). Pursuant to that standard, the claim language should be read in light of the specification, as it would be interpreted by one of ordinary skill in the art. *In re Suitco Surface, Inc.*, 603 F.3d 1255, 1260 (Fed. Cir. 2010). Thus, we generally give claim terms their ordinary and customary meaning. *See In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007) (“The ordinary and customary meaning ‘is the meaning that the term would have to a person of ordinary skill in the art in question.’” (quoting *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (en banc))).

Petitioner proposes express constructions for certain limitations. Pet. 17–21. Patent Owner does not propose any express constructions in its Preliminary Response. Prelim. Resp. 43–44. No express constructions are required by our Decision today.

B. Section 325(d)

“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); *see also* 37 C.F.R. § 42.4(a) (Director delegating institution authority to the Board). As discussed below, substantially the same prior art and arguments were previously presented to the Office during prosecution of

the '811 patent. For that reason, and pursuant to § 325(d), we reject the Petition.

1. Ground 1 -- Judicial exception to § 101

Petitioner argues that all of the claims of the '035 patent are directed to ineligible subject matter under the judicial exception to 35 U.S.C. § 101. Pet. 21–30. Under this judicial exception, claims may be ineligible for patent protection even though they are directed to one or more of the statutory classes of subject matter, i.e., a “process, machine, manufacture, or composition of matter” identified by 35 U.S.C. § 101. *See, e.g., Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (2013) (“We have long held that [§ 101] contains an important implicit exception.”) (quotation marks omitted). “Laws of nature, natural phenomena, and abstract ideas are not patentable.” *Id.*

In *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 132 S. Ct. 1289 (2012), the Supreme Court set forth a two-step test for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts. First, we determine whether a patent claim is directed to one of those patent-ineligible concepts. *Id.* at 1296–97. If so, we then ask, “[w]hat else is there in the claim[] before us?” *Id.* at 1297. To answer that question, we consider the elements of the claim both individually and “as an ordered combination” to determine whether the additional elements “transform the nature of the claim” into a patent-eligible application. *Id.* at 1297–98.

In *FairWarning IP, LLC, vs. Iatric Systems, Inc.*, 839 F.3d 1089 (Fed. Cir. 2016), the Court of Appeals affirmed a district court’s holding that patent claims being asserted were invalid as patent-ineligible. The accused

infringer had moved to dismiss the complaint under Federal Rules of Civil Procedure Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *FairWarning*, 839 F.3d at 1092. “Following the two-step test for patent-eligibility . . . , the [district] court first found the claims were directed to a patent-ineligible abstract idea: the concept of analyzing records of human activity to detect suspicious behavior.” *Id.* (citation and quotation marks omitted). “Turning to step two, the [district] court found that the claims contained nothing to transform the abstract idea into a patentable concept.” *Id.* (quotation marks and brackets omitted). The Court of Appeals agreed with the district court and affirmed. *Id.* at 1081.

The thrust of Petitioner’s argument before us is that the claims of the ’035 patent are ineligible for patenting because they are similar to the claims affirmed as patent-ineligible in *FairWarning*. Pet. 25–30. This is the same argument presented to the Examiner in the third party submission during prosecution of the ’811 patent. *See* Ex. 2002, 94–96. The Examiner rejected those arguments in a detailed analysis. Ex. 2002, 13–15.

The claims of the ’811 patent are of very similar scope to those being challenged here. *See, e.g.*, Prelim. Resp. 29–30 (side-by-side comparison of claim 1 of the ’035 patent and claim 1 of the ’811 patent). Moreover, Petitioner has not identified any differences between the claims of the ’811 patent and those of the challenged ’035 patent, let alone any differences that could be material to our application of § 325(d). In other words, on the record presented, Petitioner’s patent-ineligibility arguments are substantially the same as those previously presented to the Office during prosecution of the ’811 patent.

2. Grounds 2 and 3 -- Obviousness Based on Scarborough et al.

Petitioner argues that all of the claims of the '035 patent are unpatentable because they would have been obvious over Scarborough and McEwen (claims 1, 4–9, 12–16, and 19) or Scarborough, McEwen, and Shivakumar (claims 2, 3, 10, 11, 17, and 18). Pet. 31–75. The Petition relies particularly on Scarborough. In fact, the Petition cites to Scarborough (Ex. 1004) for *every* limitation of *every* challenged claim. *Id.* at 32–36, 39, 41, 43, 48, 50–51, 53–69, 71, 74–75 (claim charts). For some limitations, the Petition additionally relies on another reference. *See, e.g., id.* at 43 (portion of claim chart for claim 1 citing to McEwen in addition to Scarborough), 71 (claim chart for claims 2 and 3 citing to Shivakumar in addition to Scarborough).

a. Arguments and Art Previously Presented

During prosecution of the '811 patent, the third party submission presented a detailed claim chart purporting to map Scarborough to every limitation of every claim of the '811 patent. Ex. 2002, 58–90. The Examiner considered the third party submission but concluded that Scarborough neither anticipated nor rendered obvious any claim of the '811 patent. Ex. 2002, 21. The Examiner based his decision to allow the claims of the '811 patent, in part, on Scarborough failing to teach or suggest a requirement that is common to most of the claims of the '811 patent and all of claims 1 through 18 of '035 patent, namely the requirement to sort logins/users into *three* classes (e.g., priority, non-priority, and restricted). In that regard, the Examiner stated the following:

[T]he Examiner has carefully considered the third party submissions provided under 37 CFR 1.290 and listed and initialed in the executed Form PTO/SB/429 attached to this

Official action. While U.S. Pat. Pub. No. 2015/0066546 to Scarborough et al. (“Scarborough”) bears some similarity to the instant application in desired outcome and in analysis of social media data for authorization of ticket purchases, the Examiner submits that it does not anticipate or render obvious the claims of the instant application. Scarborough discloses a ticket management system providing biased ticket offers to “good” actors. However, the instant application is clearly distinguished from Scarborough in that Scarborough makes a determination whether a user is a “good” actor based on an index being above (or below) a given threshold (Fig. 4; para. [0115]) and gives preferential treatment to good actors (para. [0115]). However, if the “good” actor threshold is not met, the system merely defaults to use of the normal protocol for ticket sales (Fig. 4; para. [0116]). In contrast, the instant application discloses and claims (e.g., claims 1, 8 and 15 and claims depending therefrom) generating an index and dividing the possible outcomes into three categories: index values above the first pre-determined threshold are given a priority ID (e.g., “good” actors) and are placed in a priority ticket purchase queue, index values below the first predetermined threshold value but above a second threshold (e.g., “normal” actors) and are placed in a general ticket purchase queue, and index values below the second threshold (e.g., “robots” or “bad” actors) are restricted from purchasing tickets (Fig. 8; para. [101]). The Examiner submits that this 3-way decision tree disclosed in the instant application is not anticipated by and would not have been obvious over the 2-way decision disclosed in Scarborough.

Ex. 2002, 20–21 (bold typeface removed).

The remainder of the claims of the ’811 patent, like claim 19 of the ’035 patent, require sorting logins into just *two* classes (e.g., priority and prohibited). Although the Examiner found that Scarborough teaches distinguishing between two classes, i.e., “good actors” and “other actors” (*see, e.g.*, Ex. 1004 ¶66), the Examiner found that Scarborough did not teach a processor that “restricts ticket purchasing rights” of the other actors, as

recited by claims 19, 20, and 24 of the '811 patent. In that regard, the Examiner stated the following:

[T]he alternative 2-way embodiments disclosed in the claims of the instant application (e.g., claims 19, 20 and 24 and claims depending therefrom) are also distinct from that disclosed in Scarborough in that they provide priority ticket queue access when above the pre-determined threshold, but restrict access when below the pre-determined threshold as opposed to merely providing normal access to tickets, as disclosed in Scarborough, which is contrary and distinct from the disclosure of the instant application.

Ex. 2002, 22 (bold typeface removed). The corresponding limitation of claim 19 of the '035 patent is at least as narrow as the restricting ticket purchasing rights limitation of claims 19, 20, and 24 of the '811 patent. Specifically, claim 19 of the '035 patent recites that “the processor *eliminates* ticket purchasing rights for a login associated with a value under the threshold value.” (Emphasis added).

b. Petitioner Raises the Same or Substantially the Same Prior Art and Arguments

Petitioner's obviousness challenges rely on the same or substantially the same prior art and arguments that were presented and rejected by the Examiner during prosecution of the '811 patent. This is so notwithstanding Petitioner's additional inclusion of McEwen and Shivakumar in its challenges.

With respect to claim 1 (and by extension claims 2–18), Petitioner first argues that Scarborough alone discloses “three classes of actors ... stratified according to ‘index value’ as recited in the claim.” Pet. 43. This is the same argument presented and rejected during prosecution of the '811 patent. *See* Ex. 2002, 22 (“The Examiner submits that this 3-way decision

tree disclosed in the instant application is not anticipated by and would not have been obvious over the 2-way decision disclosed in Scarborough.”).

Petitioner, however, then argues that a different reference—McEwen—independently meets the limitations directed to sorting logins into three classes. Pet. 45 (“Additionally, McEwen discloses three tiers of users.”). In that regard, the Petition proceeds to explain how McEwen purportedly teaches three such tiers. *Id.* But, the Petition does *not* explain why a person of ordinary skill in the art would have incorporated that particular teaching from McEwen into Scarborough. *Id.* at 12–14. Indeed, the Petition does not even attempt an explanation.

The Petition points out that Scarborough and McEwen are published applications belonging to Petitioner and generally argues that a person of ordinary skill in the art “looking at either Scarborough or McEwen would naturally look to related references generated by Petitioner, including Petitioner’s pending applications directed to related aspects of the same technology.” Pet. 12–13. However, the only specific reasoning Petitioner provides for combining McEwen with Scarborough is directed to a different feature of McEwen that Petitioner relies on for a different limitation. *See id.* at 13 (“A [person of ordinary skill in the art] would have understood that there were multiple known techniques for including this temporal information, and thus would have been motivated to combine Scarborough with McEwen’s teaching of a system that adjusts a user’s score upward ‘if the user has continuously/ repeatedly purchased 1 or 2 tickets . . . for rock concerts over the previous year.’”) (quoting Ex. 1005 (McEwen) ¶109). Without an adequate reason to incorporate McEwen’s purported teaching of three tiers into Scarborough, Petitioner’s challenge amounts to merely

rearguing that Scarborough alone meets the limitations directed to sorting logins into three classes.

With respect to claim 19, Petitioner relies exclusively on Scarborough to meet the limitation that “the processor eliminates ticket purchasing rights for a login associated with a value under the threshold value.”⁵ Pet. 69. This is the same argument presented and rejected by the Examiner for meeting the corresponding limitation of, for example, claim 19 of the ’811 patent reciting that “the processor restricts ticket purchasing rights for a login associated with a value under the threshold value.” *See* Ex. 2002, 22.

Lastly, Petitioner does not rely on Shivakumar to cure the deficiencies the Examiner found in Scarborough. *See* Pet. 71, 74–75 (relying on Shivakumar only for limitations added by dependent claims 2, 3, 10, 11, 17, and 18).

For the forgoing reasons, Petitioner’s obviousness challenges present the same or substantially the same prior art and arguments that were presented and rejected by the Examiner during prosecution of the ’811 patent.

III. CONCLUSION

“In determining whether to institute [a post-grant review, among other proceedings, we] 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). The Petition before us presents the same or substantially the same arguments and prior art

⁵ This is not to say that Petitioner does not also rely on a declaration by Joseph Phinney, Ph.D. (Ex. 1020), but rather to say that the only prior art reference relied on for this limitation is Scarborough.

PGR2017-00038
Patent 9,466,035

as were presented to the Office during prosecution of the related '811 patent.
Accordingly, we may and do reject the Petition under 35 U.S.C. § 325(d).

IV. ORDER

In consideration of the foregoing, the Petition is denied.

PETITIONER:

Scott Kolassa
Thomas Franklin
Brian Brisnehan
Alton Absher III
KILPATRICK TOWNSEND & STOCKTON LLP
skolassa@kilpatricktownsend.com
tfranklin@kilpatricktownsend.com
bbrisnehan@kilpatricktownsend.com
aabsher@kilpatricktownsend.com

PATENT OWNER:

Joel Weiss
WEISS & ARONS
jweiss@weissarons.com