

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

INTEL CORPORATION,
Petitioner,

v.

ALACRITECH, INC.,
Patent Owner.

Case IPR2017-01406
Patent 7,673,072 B2

Before STEPHEN C. SIU, DANIEL N. FISHMAN, and
WILLIAM M. FINK, *Administrative Patent Judges*.

FINK, *Administrative Patent Judge*.

DECISION

Institution of *Inter Partes* Review
37 C.F.R. § 42.108

I. INTRODUCTION

Intel Corporation (“Petitioner”) requests *inter partes* review of claims 1–21 of U.S. Patent No. 7,673,072 B2 (“the ’072 patent,” Ex. 1001) pursuant to 35 U.S.C. §§ 311 *et seq.* Paper 1 (“Pet.”). Alacritech, Inc. (“Patent Owner”) filed a preliminary response. Paper 9 (“Prelim. Resp.”). Institution

of an *inter partes* review is authorized by statute when “the information presented in the petition . . . and any response . . . 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.” 35 U.S.C. § 314(a); *see* 37 C.F.R. § 42.108. Upon consideration of the Petition and Preliminary Response, we conclude the information presented shows there is a reasonable likelihood that Petitioner would prevail in establishing the unpatentability of at least one of claims 1–21 of the ’072 patent.

A. *Related Matters*

We are informed that the ’072 patent is presently related to the following: *Alacritech, Inc. v. CenturyLink, Inc.*, Case No. 2:16-cv-00693-JRG-RSP (E.D. Tex.); *Alacritech, Inc. v. Wistron Corp.*, Case No. 2:16-cv-00692-JRG-RSP (E.D. Tex.); and *Alacritech, Inc. v. Dell Inc.*, Case No. 2:16-cv-00695-RWS-RSP (E.D. Tex.). Pet. 3.

B. *The ’072 Patent (Ex. 1001)*

The ’072 patent describes a system and method “that greatly increases the speed of [processing network communication] and the efficiency of transferring data being communicated.” Ex. 1001, 5:24–27.

C. *Illustrative Claim*

Independent claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A method comprising:
establishing, at a host computer, a transport layer connection, including creating a context that includes protocol header information for the connection;
transferring the protocol header information to an interface

device;

transferring data from the network host to the interface device, after transferring the protocol header information to the interface device;

dividing, by the interface device, the data into segments;

creating headers for the segments, by the interface device, from a template header containing the protocol header information; and

prepending the headers to the segments to form transmit packets.

Id. at 97:17–31.

D. Asserted Grounds of Unpatentability

Petitioner asserts that claims 1–21 are unpatentable on the following grounds (Pet. 14–15):

Reference(s)	Basis	Claims challenged
Erickson ¹ and Tanenbaum ²	§ 103	1–21

II. DISCUSSION

A. Real Party in Interest

Intel Corporation identifies itself as a real party in interest in these proceedings and represents that “[n]o other parties exercised or could have exercised control over this [P]etition; no other parties funded or directed this Petition.” Pet. 2. Patent Owner argues that “the Petition . . . fails to identify at least Dell Inc. (‘Dell’) and Cavium Inc. (‘Cavium’)” as real parties-in-interest and that “[t]he Board should deny institution . . . because the Petition

¹ U.S. Patent No. 5,768,618, issued June 16, 1998 (“Erickson,” Ex. 1005).

² Andrew S. Tanenbaum, *COMPUTER NETWORKS* (3rd ed. 1996) (“Tanenbaum,” Ex. 1006).

fails to identify all real parties in interest as required by 35 U.S.C. § 312(a)(2) and 37 CFR § 42.8(b)(1).” Prelim. Resp. 12–13. We disagree.

As an initial matter, as Patent Owner points out, in determining whether a party is a real party-in-interest, “[a] common consideration is whether the non-party exercised or could have exercised control over a party’s participation in a proceeding.” *Id.* at 13–14 (citing Office Patent Trial Practice Guide, 77 Fed. Reg. 48756, 48759–60). Patent Owner further argues that “Intel has agreed to defend and partially indemnify Dell,” “Intel is Dell’s supplier with regard to Dell’s accused products,” “Intel admitted that it would have to work closely with Dell in . . . litigation,” “Intel also admitted that it has a close relationship to Dell financially in the district court case,” “Intel chose . . . to *passively* reimburse Dell [and also] play an *active* role to assist, protect, and defend Dell,” “Dell [was] originally accused of infringing the ’072 patent in the district court case, not Intel,” “Intel’s products were not accused in the original pleading,” “Dell desires review of the ’072 Patent,” “Dell and Intel have repeatedly coordinated their invalidity theories,” “Dell and Intel also shared a technical expert, Mr. Mark Lanning,” and that “Intel has effective choice of invalidity theories and proofs.” *Id.* at 14–20.

Even accepting all of these contentions, for purposes of this Decision, we are not persuaded on these facts that Dell exercised or could have exercised control over the preparation or filing of the present Petition. Indeed, the alleged financial relationship with Intel as the indemnitor of Dell suggests that, if anything, Intel would be the one to control the preparation and filing of and present Petition. The other assertions relating to coordinating theories and sharing experts are common activities between

cooperating co-defendants in related litigation and are not suggestive of control of or ability to control *this* petition. *See Weatherford Int'l, LLC, et al. v. Packers Plus Energy Services, Inc.*, Case IPR2016-01514, slip op. 12–16 (PTAB Feb. 22, 2017) (Paper 23).

Patent Owner also argues that “Cavium is also a supplier of Dell,” “petitions filed by Intel and Cavium also share an identical declaration from the same expert, Dr. Robert Horst,” and “Cavium also filed an almost verbatim petition.” Prelim. Resp. 19. However, for reasons similar to those discussed above, we are not persuaded by Patent Owner’s argument that Cavium should have been identified as a real party-in-interest on these facts.

We reject Patent Owner’s argument that we deny institution on this basis for an additional reason. Significantly, Patent Owner does not allege that inclusion of either Dell or Cavium as a real party in interest would have *barred* the Petition under 35 U.S.C. § 315. Aside from a bar defense, under the Board’s precedential decision in *Lumentum Holdings, Inc. v. Capella Photonics, Inc.*, our jurisdiction to consider a petition does not require a “correct” identification of all real parties in interest in a petition. Case IPR2015-00739, slip op. at 6 (PTAB March 4, 2016) (Paper 38) (precedential); *see also Blue Coat Sys., Inc. v. Finjan, Inc.*, Case IPR2016-01444, slip op. 10 (PTAB July 18, 2017) (Paper 11) (“Evidence [of failure to identify all real parties in interest] is, at best, suggestive of an issue that is not jurisdictional.”). Consequently, even if Dell and Cavium should be named real parties-in-interest, as Patent Owner alleges, failure to identify them as such at the time the Petition was filed does not require us to terminate the proceeding. Indeed, later PTAB decisions indicate that a petition may be corrected after *institution of trial* to add a real party in

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