

Filed on behalf of: Jaguar Land Rover Limited

Entered: December 11, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BENTLEY MOTORS LIMITED
and
BENTLEY MOTORS, INC.,
Petitioner,

v.

JAGUAR LAND ROVER LIMITED,
Patent Owner.

Case IPR2019-01539
Patent RE46,828

**PATENT OWNER'S RESPONSE TO
PETITIONERS' RANKING STATEMENT**

I. Introduction

Petitioners filed two Petitions challenging the same 13 claims of U.S. Patent No. RE46,828. The Board should institute at most one of these IPRs because Petitioners have not demonstrated sufficient material differences between their Petitions to justify the added burden imposed on the Board and the Patent Owner.

In *Pfenex*, the Board denied institution of a second IPR because the petitioner failed to show that any differences in their petitions were “sufficiently material to outweigh the inefficiencies and costs to the Board and Patent Owner that would result from instituting on both” petitions. *Pfenex Inc. v. GlaxoSmithKline Biologicals SA*, IPR2019-01027, Paper 12 at 11-13 (Nov. 13, 2019) (“*Pfenex*”); see Trial Practice Guide Update (July 2019) at 26 (“Two or more petitions filed against the same patent at or about the same time ... may place a substantial and unnecessary burden on the Board and the patent owner and could raise fairness, timing, and efficiency concerns.”).

The same is true here. As in *Pfenex*, the two “Petitions were filed by the same Petitioner and challenge the same claims of the same patent.” *Phenex*, IPR2019-01027, Paper 12 at 12 (emphasis in original). The *Pfenex* petitioner challenged only 12 claims, *id.* at 13, and here, Petitioners challenge only 13 claims. In fact, Petitioners have a weaker case for two IPRs than in *Pfenex*, where the two petitions applied different art and a different statutory basis (anticipation vs. obviousness). *Id.* at 12. Here, both Petitions assert obviousness over largely the same or similar art. In addition, the -01502 IPR relies on the Porsche 959 references for the Base Claim elements, and the -01539 IPR relies on the

Mitsubishi Lancer references and GB '580, a British patent application. Other than the primary references targeting the Base Claim elements, the two IPRs generally rely on the same art, as shown below:

Claims	IPR2019-01502 Art	IPR2019-01539 Art
30, 32	Porsche 959	Lancer, GB '580
45	Porsche 959, BMW, GB '580	Lancer, GB '580
33, 34, 41, 42	Porsche 959, Ford, GB '580	Lancer, GB '580 , '859 patent
37, 39	Porsche 959, '318 patent	Lancer, GB '580, '318 patent
46	Porsche 959, '614 patent	Lancer, GB '580, '614 patent
21, 24, 43	Porsche 959, Hummer	Lancer, GB '580, Hummer

Petitioners contend two IPRs are warranted because (i) it needed many references to cover different claim elements and disputed claim constructions, and (ii) the IPR estoppel would preclude it from asserting the art in court. But Petitioners did not need to use many different references as discussed further below. And as shown above, the Petitioners relied on many of the same references in both Petitions. In addition, the IPR estoppel would not preclude Petitioners from asserting their art in court because the district court trial in is scheduled months before any final written decision will issue in either IPR. Ex. 2024 at 1.

II. The Two Petitions Use Much Of The Same Art And Same Claim Constructions

Petitioners contend that two petitions are necessary because, aside from the base claim elements, “[t]he challenged claims are lengthy and recite limitations that invoke multiple vehicle subsystems [including] brakes, suspension, transmission, throttle control, and powertrain.” Ranking at 3, 5 (Paper 3).

But Petitioners failed to inform the Board that both Petitions generally use the same art for those subsystems, as shown in the table above. This weighs heavily against instituting a second IPR. In *Comcast*, the petitioner filed two IPRs against the same patent, and argued that “material differences justif[ied] institution of both petitions.” *Comcast Cable Commc’ns v. Rovi Guides, Inc.*, IPR2019-00232, Paper 14 at 11 (May 20, 2019) (“*Comcast*”). The Board disagreed, noting that “[f]or certain of these alleged material differences, . . . Petitioner relies on secondary references in the instant proceeding, which . . . are asserted in [the other IPR].” *Id.*

The same is true here. The primary difference between the Petitions is in the primary references used to challenge the Base Claim elements, as the *same art* is used for the expressly claimed subsystems. But even the primary references are cumulative in relevant respects. For the -01502 IPR, Petitioner relied on the Porsche 959’s all-wheel drive control system that controls the car’s center and rear differentials (called “interaxle differential” and “lateral lock”), alleging that the two differentials were multiple “vehicle subsystems” having multiple “subsystem configuration modes” for a respective driving surface. -01502 POPR 15-16; -01502 Pet. 19-26. In the -01539 IPR, Petitioner similarly relied on the Lancer’s integrated controller for its center and rear differentials to show multiple “vehicle subsystems” having multiple “subsystem configuration modes” for a respective driving surface. -01539 POPR 18-31; -01539 Pet. 24-29. Thus, both Petitions rely on similar differential control systems as teaching the same claim limitation—

multiple “vehicle subsystems” having multiple “subsystem configuration modes” for a respective driving surface.

Petitioners also allege that claim construction is somehow an issue in one IPR and not the other. Ranking 2, 5. But both Petitions contain the exact same claim construction sections and similar allegations regarding their respective teachings. -01502 Pet. 12-16 (claim construction), 25-26 (alleging Porsche's traction and snow modes are off-road modes); -01539 Pet. 12-15 (claim construction), 29-30 (alleging Lancer's gravel and snow modes are off-road modes). And Patent Owner does not dispute any constructions for the purposes of opposing institution of either IPR. So again, Petitioners have failed to identify any material differences between their Petitions that warrant a second IPR. *See Comcast*, IPR2019-00232, Paper 14 at 12 (rejecting the petitioner's “shifting claim construction” argument where both petitions had the same claim-construction theories).

III. The IPR Estoppel Is Not An Issue Here Because Trial Is Scheduled Four Months Before Any Final Written Decision Will Issue

Petitioners contend they must provide the Board with all “well-grounded bases for finding the challenged '828 claims unpatentable, or run the risk of being estopped in district court.” Ranking at 4.

Petitioners are wrong. IPR estoppel is triggered by a final written decision, 35 U.S.C. § 315(e)(2), and no final written decision is scheduled to issue until late February 2021—four months *after* the one-week trial set for October 13, 2020 in the parallel district court action. *See Ex. 2024* at 1. Petitioners thus have no

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