Trials@uspto.gov
571-272-7822

Paper No. 32
Entered: June 2, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TIKTOK INC.,
Petitioner,[1]

v.

CELLSPIN SOFT, INC.,
Patent Owner.

IPR2024-00757 (Patent 8,756,336 B2)
IPR2024-00759 (Patent 8,862,757 B2)
IPR2024-00760 (Patent 8,898,260 B2)
IPR2024-00767 (Patent 11,659,381 B2)
IPR2024-00768 (Patent 11,234,121 B2)
IPR2024-00769 (Patent 9,900,766 B2)
IPR2024-00770 (Patent 8,904,030 B2)

Before GREGG I. ANDERSON, CYNTHIA M. HARDMAN, and MICHAEL A. VALEK, *Administrative Patent Judges*.

PER CURIAM.

ORDER
Denying Patent Owner's Motion to Terminate
37 C.F.R. § 42.5

[1] LifeScan, Inc., Senseonics Holdings, Inc., and Ascensia Diabetes Care Holdings AG have been joined as Petitioners to IPR2024-00768, -769, and -770. This Order addresses issues common to the identified cases. The parties are not authorized to use this caption without express authorization.

Patent Owner Cellspin Soft, Inc. filed a Motion to Terminate in each of the above-noted IPRs. *See* Paper 21 ("Mot.").[2] Patent Owner requests that the Board terminate these IPRs and vacate the Decisions on Institution "based on two related bases." Mot. 1. First, Patent Owner argues that termination is required because Petitioner TikTok, Inc. ("Petitioner" or "TikTok") failed to name the Chinese Communist Party ("CCP") as a real party-in-interest ("RPI"), as required under 35 U.S.C. § 312(a). *Id.* Second, Patent Owner argues that "TikTok is an entity controlled by a sovereign," and pursuant to the Supreme Court ruling in *Return Mail Inc. v. United States Postal Service* (587 U.S. 618 (2019)), TikTok is thus "not a 'person' eligible to challenge a patent via an administrative patent review." *Id.* at 1–2.

TikTok opposes the motion. *See* Paper 24 ("Opp."). It argues that (1) the motion "should be denied as untimely and as waived"; (2) the CCP is not an RPI, and even if it were, "the remedy for failing to identify an RPI is not termination"; and (3) *Return Mail* "does not apply to any entity other than the U.S. Government or its proxies." Opp. 1–2.

[2] Patent Owner filed an identical motion in each case, except that in IPR2024-00768, -769, and -770, Patent Owner's motion contained additional argument regarding the impact of the joined petitioners. Petitioner and Patent Owner filed generally identical replies and sur-replies, respectively, in each case. Herein we cite papers and exhibits filed in IPR2024-00768.

After considering the parties' arguments, we deny Patent Owner's motion to terminate, for the reasons discussed below.

A. Whether Patent Owner Waived the RPI Issue

Petitioner argues that Patent Owner "waived the RPI issue by failing to raise it in the Patent Owner Response." Opp. 17 (title case omitted). We agree.

The Board's rules provide that "[a] party should seek relief promptly after the need for relief is identified. Delay in seeking relief may justify a denial of relief sought." 37 C.F.R. § 42.25(b). "A late action will be excused on a showing of good cause or upon a Board decision that consideration on the merits would be in the interests of justice." 37 C.F.R. § 42.5(c)(3).

Patent Owner was on notice that any argument not raised in its Patent Owner Response may be deemed waived. *See* Paper 9 (Scheduling Order), 10. Patent Owner did not raise the RPI issue in its Patent Owner Response (filed and due on January 3, 2025). Instead, Patent Owner states that it first notified Petitioner's counsel of its intent to raise the RPI issue on February 21, 2025, and first approached the Board about it on March 5, 2025. Mot. 1–2; Ex. 3001.

There is some discrepancy in Patent Owner's explanation for when and how it first became aware of the RPI issue. In a March conference call regarding Patent Owner's request to file this motion, Patent Owner stated that it first became aware of the RPI issue in January 2025, following a news

report discussing the CCP's alleged ownership of "secret" "golden shares" in ByteDance, a parent company of TikTok. *See* Ex. 2023 (transcript of March 18, 2025 conference call, filed March 24, 2025[3]) ("Tr."), 21:2–20. Patent Owner's counsel explained that the news report prompted Patent Owner to further research the relationship between TikTok and the CCP, which culminated in Patent Owner eventually communicating this potential argument to its counsel, who then brought it to the Board's attention on March 5, 2025. Tr. 22:6–23:6.

In its Sur-reply, Patent Owner newly contends that it already had "concerns regarding the CCP's control over" TikTok when it filed its Preliminary Response on July 5, 2024, but "did not feel it had sufficient evidence to raise the RPI issue" at that time. Paper 27 ("Sur-reply"), 1. It also now contends that it was the Supreme Court's decision in *TikTok, Inc. v. Garland*, 145 S. Ct. 57 (Jan. 17, 2025)—rather than the aforementioned news report—that allegedly triggered Patent Owner to "further research[]" the RPI issue. *Id.*

Regardless of which of its varying explanations is more accurate, we find that Patent Owner was not diligent in pursuing the RPI argument. Even

[3] Contrary to our rule requiring that each exhibit be "uniquely numbered sequentially" (*see* 37 CFR § 42.63(c)), Patent Owner reused exhibit numbers when filing new exhibits. As just one example, Patent Owner filed two different documents designated as Exhibit 2023—one on March 24, 2025, and one on May 2, 2025. To avoid confusion, when citing exhibit numbers that were used more than once, we include the exhibit filing date.

assuming that evidence underlying Patent Owner's position first became available in January 2025 (whether via the news report or the Supreme Court's decision), Patent Owner did not approach the Board with its request to file a motion to terminate until more than a month and a half later, on March 5, 2025. Patent Owner's Sur-reply attributes the delay to "further research[]," although during the conference call with the panel, Patent Owner's counsel more candidly stated that the delay occurred because his client did not bring this information to his attention sooner (and had no explanation for this apparent breakdown in communication with his client). Sur-reply 1–2; Tr. 22:2–24:16. We also note that despite its alleged "concerns regarding the CCP's control over" TikTok as early as July 5, 2024 (Sur-reply 1), Patent Owner waited more than eight months to request authorization to seek additional discovery directed to the RPI issue.[4] Tr. 14:9–15:8. We find that Patent Owner's delay (whatever its cause) demonstrates a lack of diligence given the scheduling order and statutory deadlines in the subject IPRs.

Moreover, the information Patent Owner relies on to support its allegation that the CCP is an RPI was publicly available long before Patent Owner filed its Patent Owner Response on January 3, 2025, and even before it filed its Preliminary Response on July 5, 2024. More specifically, Patent Owner cites three exhibits (i.e., Exhibits 2024–2026, filed April 17, 2025) to

[4] Patent Owner ultimately withdrew its request for authorization to file a motion for additional discovery. *See, e.g.*, Tr. 45:18–46:9.

demonstrate that the CCP is an RPI. *See* Mot. 2–7. Exhibit 2024 is a December 22, 2020[5] U.S. government report. Exhibit 2025 is a March 29, 2023 news article stating that "the CCP has a 'golden share' in ByteDance's main Chinese subsidiary, which provides the Chinese government with special rights to influence corporate governance." *Id.* at 3. Exhibit 2026 is a report, purportedly submitted to the Australian Senate, dated March 14, 2023. *Id.* at 7. All of these documents substantially pre-date the filing of the Patent Owner Response (and even the filing of the Petitions).

Patent Owner additionally cites the circuit court opinion in the *Garland* case (*TikTok Inc. v. Garland*, 122 F.4th 930 (D.C. Cir. 2024)), which issued on December 6, 2024. Mot. 4–5. Not only was this opinion available before Patent Owner filed its Patent Owner Response on January 3, 2025, but Patent Owner was clearly aware of the *Garland* case much earlier, as evidenced by its filing of a document from the case with its Preliminary Response. *See* Ex. 2008 (filed July 5, 2024) (TikTok's Petition for Review in *TikTok Inc. et al. v. Garland*, No. 24-1113 (D.C. Cir.)). With its Preliminary Response, Patent Owner also filed a declaration wherein the declarant asserted that ByteDance Ltd. "contains an internal corporate CCP committee through which the CCP exercises influence at the company." Ex. 2006 (filed July 5, 2024), 21.

[5] *See* https://www.dhs.gov/publication/data-security-business-advisory (last accessed May 21, 2025).

The only evidence offered in support of the Motion that post-dates Patent Owner's Response is a single citation to the aforementioned Supreme Court *Garland* opinion. *See* Mot. 5. Patent Owner's assertion that this opinion "fundamentally altered the evidentiary landscape with respect to TikTok and the CCP" is unconvincing. Sur-reply 2. First, Patent Owner's motion rests largely on citations to other exhibits and to the circuit court opinion; the motion cites the Supreme Court *Garland* opinion only once (on page 5). Second, the issue in *Garland* was the constitutionality of the Protecting Americans from Foreign Adversary Controlled Applications Act. *See Garland*, 145 S. Ct. at 62; Sur-reply 1. The Supreme Court was not acting as a fact-finder, and Patent Owner fails to explain how the Court's decision "fundamentally altered" or otherwise shed new light on the facts on which Patent Owner's motion is based.

Thus, all of the facts Patent Owner relies on to establish that the CCP is an RPI were public, and indeed appear to have been known to Patent Owner, prior to the filing of the Patent Owner Response. Where, as here, Patent Owner could have raised, but did not raise, the RPI issue in its Patent Owner Response, a finding of waiver is appropriate. *See, e.g.*, *Apple Inc. v. MemoryWeb, LLC*, IPR2022-00031, Paper 85, 20–32 (PTAB Dec. 8, 2023); *Unified Patents v. JustService.net LLC*, IPR2020-01258, Paper 41, 3 (PTAB Feb. 16, 2022); *Unified Patents Inc. v. Mobility Workx, LLC*, IPR2018-01150, Paper 26, 3 (PTAB Dec. 2, 2019); *Funai Elec. Co. v. Gold Charm Ltd.*, IPR2015-01468, Paper 40, 49–50 (PTAB Dec. 27, 2016); *Unified*

Patents Inc. v. Nonend Inventions N.V., IPR2016-00174, Paper 26, 6–7 (PTAB May 8, 2017).

In view of the above, we find that Patent Owner could have provided timely notice of the RPI issue in its Patent Owner Response but did not do so. On this record, Patent Owner has not established good cause to excuse the late action. Accordingly, we find that Patent Owner has waived any right it may have had to raise the RPI issue as a basis to terminate these proceedings.

For completeness, we address some of Patent Owner's other arguments in its Motion.

B. Whether Termination is Appropriate

Patent Owner contends that, assuming the CCP were an unnamed RPI,[6] TikTok's IPRs should be terminated either for failure to name the CCP in the Petitions, or under the rationale in the *Return Mail* case. We address each argument in turn.

1. Termination Based on Failure to Name the CCP as an RPI in the Petitions

Even assuming, *arguendo*, the CCP is an unnamed RPI, Patent Owner has not shown that the failure to name it in the Petitions requires termination of TikTok's IPRs. *See* Mot. 7–8.

[6] We make no finding regarding whether the CCP is, in fact, a RPI with respect to these IPRs.

"[O]ur jurisdiction to consider a petition does not require a 'correct' identification of all RPIs in a petition." *SharkNinja Operating LLC v. iRobot Corp.*, IPR2020-00734, Paper 11, 18 (PTAB Oct. 6, 2020) (precedential) (quoting *Lumentum Holdings, Inc. v. Capella Photonics, Inc.*, IPR2015-00739, Paper 38 at 6 (PTAB Mar. 4, 2016) (precedential)). Additionally, our precedent holds that we need not consider whether an unnamed party is an RPI when the addition of that party "would not create a time bar or estoppel under 35 U.S.C. § 315." *SharkNinja*, IPR2020-00734, Paper 11, at 18.

Here, Patent Owner concedes that the addition of the CCP as a real party in interest would not create time bar or estoppel issues. Mot. 10; Tr. 25:5–25. Accordingly, on the facts here, Patent Owner has not demonstrated that even if the CCP were an unnamed RPI, that that fact, standing alone, would require termination.

Patent Owner seeks to avoid this controlling precedent by arguing that TikTok's "failure to name the CCP as a RPI" is "in bad faith" and constitutes "gamesmanship." Mot. 9. In support, Patent Owner asserts that "[t]he U.S. House Select Committee on the CCP called out this bad faith and gamesmanship in a Brief of *Amici Curiae* filed in support of Respondent in the *Garland* case." *Id.* at 9–10 (citing Ex. 2027, 15 ("'TikTok's **misrepresentation**' about its corporate structure . . . 'undermine[d] longstanding claims by TikTok's management that the company's operations were firewalled from the CCP's demands.'")) (emphasis Patent

Owner's). Even so, we are not persuaded how this would be considered gamesmanship in the context of these proceedings given the "two related purposes" of the RPI requirement, i.e.,

> (1) to ensure that third parties who have sufficiently close relationships with IPR petitioners would be bound by the outcome of instituted IPRs under § 315(e), the related IPR estoppel provision; and (2) to safeguard patent owners from having to defend their patents against belated administrative attacks by related parties via § 315(b).

Applications in Internet Time, LLC v. RPX Corp., 897 F.3d 1336, 1350 (Fed. Cir. 2018) ("*AIT*"); *RPX Corp. v. Applications in Internet Time, LLC*, IPR2015-01750, Paper 128 (PTAB Oct. 2, 2020) (precedential).[7] Because none of these purposes or concerns are implicated here, we fail to see how allegations of bad faith or gamesmanship in other contexts dictates termination of these proceedings.[8]

[7] The RPI requirement also assists members of the Board in identifying potential conflicts. *See Adello Biologics LLC v. Amgen Inc.*, PGR2019-00001, Paper 11, 4 (Feb. 14, 2019) (precedential); Patent Trial and Appeal Board Consolidated Trial Practice Guide, November 2019, *available at* www.uspto.gov/patents/ptab/trials/practice-guides, at 12. For the avoidance of doubt, the panel members do not have a conflict with any of the identified or alleged RPI in these proceedings.

[8] Patent Owner also does not persuade us that, even if the CCP were an RPI, this would require changing the filing date of the Petitions such that a time bar is created for TikTok and/or the joined Petitioners. *See* Mot. 10, 17–18. Where an unnamed RPI was not subject to a time bar when the petition was filed, our precedent permits parties to update their mandatory notices

2. *Termination Based on Return Mail*

Patent Owner raises a separate, but related, theory for termination, namely that "TikTok is an entity controlled by a sovereign" (i.e., the CCP), and thus under *Return Mail*, "is not a 'person' eligible to challenge a patent via an administrative patent review." Mot. 2. Even assuming, *arguendo*, the CCP were an RPI, Patent Owner does not persuade us that *Return Mail* applies to the instant IPRs.

In *Return Mail*, the Supreme Court explained that under the America Invents Act ("AIA"), "only 'a person' other than the patent owner may file with the Office a petition to institute" a post-grant review, an *inter partes* review, or (at the time of the *Return Mail* case), a covered business method review of an issued patent. *Return Mail*, 587 U.S. at 626 (citing 35 U.S.C. §§ 311(a), 321(a); AIA § 18(a)(1)(B), 125 Stat. 330). There, the U.S. Postal Service filed a petition for covered business method review of a patent. *Id.* at 625. The question presented was whether a federal agency is a "person" able to petition for post-issuance review of a patent. *See id.* at 621. The Court found that it is not. *See id.* In relevant part, the Court "applie[d] a 'longstanding interpretive presumption that "person" does not include the sovereign,' and thus excludes a federal agency like the Postal Service." *Id.* at 626 (quoting *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 780–81 (2000)).

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without a loss of filing date. *See, e.g.*, *Proppant Express Investments, LLC v. Oren Techs., LLC*, IPR2017-01917, Paper 86, 8–9 (PTAB Feb. 13, 2019).

The facts of *Return Mail* are significantly different than those here, including because here, the alleged "sovereign" is not a U.S. federal agency, but rather a foreign entity (the CCP).[9] Patent Owner nevertheless argues that we should extend the holding of *Return Mail* to the present situation because

> in *Return Mail* the Supreme Court held that the federal government is not a "person" who may petition for IPR or CBM review, *citing the absence of a clear statement from Congress*. *Return Mail*, 587 U.S. at 626. If the United States itself is not a "person" for purposes of the AIA, then *a fortiori*, a foreign sovereign-controlled entity – which presents even more serious issues of jurisdiction, diplomacy, and sovereignty—is not a "person" under the statute in view of the absence of a clear statement from Congress that "person" includes a foreign sovereign-controlled entity.

Mot. 14.

Patent Owner does not persuade us to extend the holding of *Return Mail* to these IPRs. As Petitioner aptly points out, the Court's analysis in *Return Mail* "observes several factors that are unique to the U.S. Government that do not apply to foreign governments or foreign political parties." Opp. 14–16. We adopt that analysis and agree with Petitioner that "[t]he overarching notion underlying *Return Mail's* analysis is that the U.S. Government is treated differently than private parties in adversarial,

[9] For purposes of expediency, in this decision we assume without deciding that the CCP is a "sovereign."

adjudicatory patent proceedings." *Id.* at 16 (citing *Return Mail*, 587 U.S. at 634–36). On this record, Patent Owner does not persuade us that these same considerations apply to a foreign government or foreign political party, such that we should extend *Return Mail's* holding to foreign governments or foreign political parties.

Additionally, in *Return Mail*, the only petitioner was itself a sovereign entity, whereas here, the petitioner, TikTok, is a corporation that is allegedly "controlled by a sovereign." Mot. 2. Corporations are "person[s]" eligible under 35 U.S.C. § 311(a) to petition for IPR. *See* Opp. 11 (citing 1 U.S.C. § 1). Thus, even assuming the CCP is an RPI, the Petitions were still filed by a "person" under the statute. Accordingly, the rationale for the Supreme Court's decision in *Return Mail*, i.e., that a sovereign entity cannot petition for *inter partes* review because it is not a "person," does not apply to the particular facts here. *See Return Mail*, 587 U.S. at 626.

Patent Owner seeks to avoid this reality (i.e., that TikTok is a corporation and therefore a "person" eligible to petition for IPR) by asserting that we should treat the CCP and TikTok as one and the same. Mot. 12. Patent Owner asserts that "the presumption of separate treatment can be overcome in cases of extensive control or where separate treatment would result in fraud and injustice." *Id.* (citing *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 630 (1983)). In support of this argument, Patent Owner speculates that "many foreign government-controlled entities operate in strategic sectors (e.g., telecommunications,

defense, biotechnology) and may use IPRs to invalidate U.S. patents as part of a broader state-sponsored industrial policy." *Id.* at 13. It also argues that "foreign government-controlled entities may not be motivated by market incentives, but rather by state objectives, including economic espionage or suppression of U.S. technological advantages." *Id.* at 13–14.

These arguments are not supported by the evidence of record and are too speculative to be credited here. We agree with Petitioner that on this record, Patent Owner does not demonstrate "how TikTok Inc. is being used 'to defeat an overriding public policy' or that disregarding TikTok Inc.'s corporate form would be 'in the interests of justice.'" Opp. 12–13. Accordingly, Patent Owner does not persuade us that "TikTok should be treated as the CCP itself." Mot. 12. And because TikTok, not a foreign government, filed the IPRs, Patent Owner's argument that "Congress did not *clearly authorize* foreign governments to file IPRs" is irrelevant. *Id.* at 13.

In sum, even if the CCP were an RPI, Patent Owner has not persuaded us that *Return Mail* is applicable to the facts here or that it should be extended to require termination of these IPRs.

C. *Joined Parties*

As noted above (*supra* n.1), IPR2024-00768, -769, and -770 include joined petitioners LifeScan, Inc., Senseonics Holdings, Inc., and Ascensia Diabetes Care Holdings AG.

Patent Owner argues that "[j]oined parties cannot 'bootstrap' their way into a valid IPR through joinder *to a petition that never should have*

been instituted." Mot. 17. Patent Owner appears to suggest that if we terminate TikTok's IPRs, we must also terminate the joined parties' IPRs. *See id.* at 16–17. This argument is unavailing, because pursuant to 35 U.S.C. § 315(c), we first instituted the joined parties' petitions based on the merits of those petitions, and then joined them to TikTok's IPRs. *See, e.g.*, IPR2025-00102, Paper 9 (Inst. Dec.), 10–13. There is no assertion that the joined parties were time-barred at the time of filing their petitions. Thus, even if we terminated TikTok's IPRs, this would not require termination of the joined parties' IPRs.

ORDER

In consideration of the foregoing, it is hereby

ORDERED that Patent Owner's motion to terminate the above-noted IPRs is *denied*.

IPR2024-00757 (Patent 8,756,336 B2)
IPR2024-00759 (Patent 8,862,757 B2)
IPR2024-00760 (Patent 8,898,260 B2)
IPR2024-00767 (Patent 11,659,381 B2)
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For PETITIONER:

W. Karl Renner
Kim Leung
Baile Xie
FISH & RICHARDSON P.C
axf-ptab@fr.com
leung@fr.com
xie@fr.com

For JOINED PETITIONER IN IPR2024-00768, -769, -770:

Joseph Hynds
Michael Battaglia
ROTHWELL, FIGG, ERNST & MANBECK, P.C.
jhynds@rfem.com
mbattaglia@rfem.com

Charles McMahon
Thomas DaMario
BENESCH FRIEDLANDER COPLAN & ARONOFF LLP
cmcmahon@beneschlaw.com
tdamario@beneschlaw.com

FOR PATENT OWNER:

Michael Fuller
Garteiser Honea PLLC
sfuller@ghiplaw.com

Rene Vazquez
Sinergia Tech. Law Group, PLLC
rvazquez@sinergialaw.com