

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC,
Petitioner,

v.

IPA TECHNOLOGIES INC.,
Patent Owner.

Case IPR2019-00728
Patent 6,851,115 B1

Before LYNNE E. PETTIGREW, MINN CHUNG, and KEVIN C. TROCK,
Administrative Patent Judges.

CHUNG, *Administrative Patent Judge.*

DECISION
Granting Institution of *Inter Partes* Review
35 U.S.C. § 314

I. INTRODUCTION

Google LLC (“Petitioner”) filed a Petition (Paper 1, “Pet.”) requesting an *inter partes* review of claims 61–70 (the “challenged claims”) of U.S. Patent No. 6,851,115 B1 (Ex. 1001, “the ’115 patent”). IPA Technologies Inc. (“Patent Owner”) filed a Preliminary Response (Paper 6, “Prelim. Resp.”). Upon our authorization (Paper 8), the parties filed briefs further addressing the issue of whether the Martin reference (Ex. 1011) qualifies as prior art under 35 U.S.C. § 102(a) (Papers 9 (“Reply”), 10 (“Sur-Reply”)).

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. § 42.4. Taking into account the arguments and the evidence presented in the Petition, Preliminary Response, Reply, and Sur-Reply, we determine that the information presented establishes that there is a reasonable likelihood that Petitioner would prevail in showing the unpatentability of at least one challenged claim. We thus institute an *inter partes* review of all challenged claims (61–70) of the ’115 patent, based on all grounds raised in the Petition. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359–60 (2018); U.S. Patent and Trademark Office, *Guidance on the impact of SAS on AIA trial proceedings* (Apr. 26, 2018), <https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/trials/guidance-impact-sas-aia-trial> (“SAS Guidance”).

II. BACKGROUND

A. Related Matters

According to the parties, the '115 patent is the subject of the following district court litigation: *IPA Techs. Inc. v. Google LLC*, No. 1:18-cv-00318 (D. Del.); *IPA Techs. Inc. v. Microsoft Corp.*, No. 1:18-cv-00001 (D. Del.); and *IPA Techs. Inc. v. Amazon.com, Inc.*, No. 1:16-cv-01266 (D. Del.). Pet. 2; Paper 5, 2.¹ The '115 patent is also the subject of a co-pending petition for *inter partes* review filed by Petitioner in Case IPR2019-00729. Pet. 3; Paper 5, 2.

B. The '115 Patent

The '115 patent describes “software-based architectures for communication and cooperation among distributed electronic agents.” Ex. 1001, 1:27–29. Figure 4 of the '115 patent is reproduced below.

¹ Paper 5, as filed, does not include page numbering as required by our rules. For purposes of this Decision, we number the first page (the caption page) as page number 1. Although the error here is harmless, the parties are reminded to format all papers and exhibits in accordance with 37 C.F.R. §§ 42.6 and 42.63.

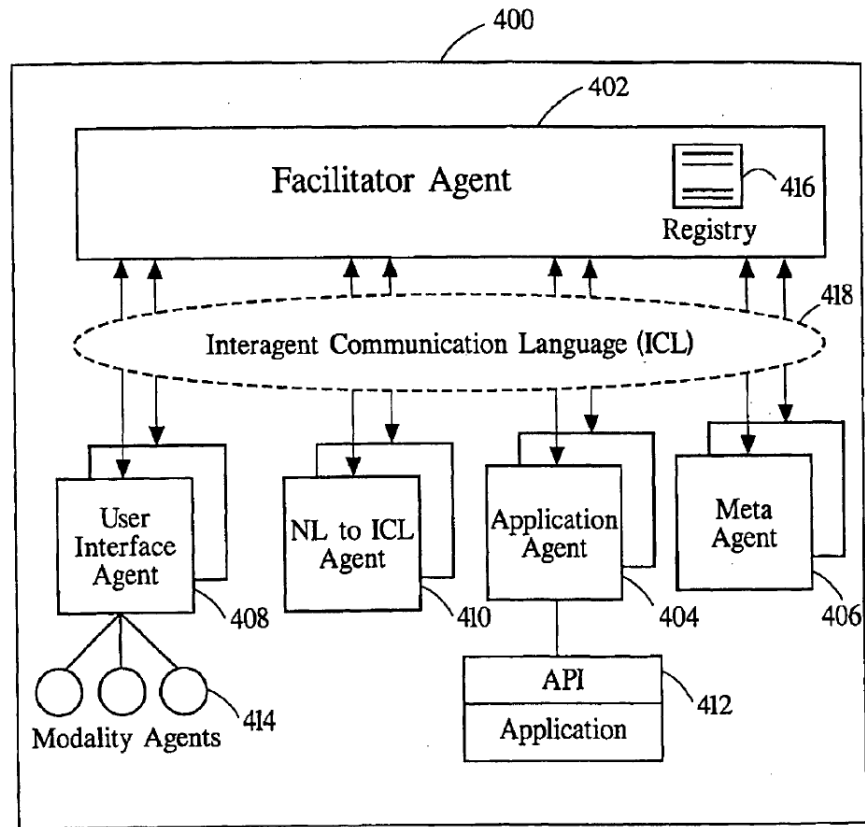


Fig. 4

Figure 4 depicts the structure of an exemplary distributed agent system of the '115 patent. *Id.* at 6:25–32. As shown in Figure 4, system 400 includes facilitator agent 402, user interface agents 408, application agents 404, and meta-agents 406. *Id.* at 6:25–28. The '115 patent describes that system 400 is organized “as a community of peers by their common relationship” to facilitator agent 402 (*id.* at 6:28–30), which is “a specialized server agent that is responsible for coordinating agent communications and cooperative problem-solving” (*id.* at 6:32–35).

According to the '115 patent, cooperation among agents is structured around a three-part approach as follows: (1) providers of services register their capabilities specifications with a facilitator; (2) requesters of services

construct goals and relay them to the facilitator; and (3) the facilitator coordinates the efforts of the appropriate service providers in satisfying these goals. *Id.* at 10:42–47. The ’115 patent describes that cooperation among agents is achieved via messages expressed in a common language, called the Interagent Communication Language (“ICL”). *Id.* at 10:40–48.

Referencing Figure 3 (not reproduced herein) and Figure 4, the ’115 patent describes the operation of a distributed agent system in a preferred embodiment. *Id.* at 7:13–39. The ’115 patent describes that, when invoked, a client agent makes a connection to a facilitator, e.g., facilitator agent 402, and registers with the facilitator a specification of the capabilities and services it can provide. *Id.* at 7:15–21. For example, a natural language agent may register the characteristics of its available natural language vocabulary. *Id.* at 7:21–23. When facilitator agent 402 receives a service request and determines that registered services 416 of one of its client agents will help satisfy a goal of the request, the facilitator sends that client a request expressed in ICL 418. *Id.* at 7:25–29. The client agent parses this request, processes it, and returns answers or status reports to the facilitator. *Id.* at 7:30–32.

Referencing Figures 5 and 6 (not reproduced herein), the ’115 patent describes an exemplary embodiment where user interface agent 408 runs on a user’s laptop, accepting user input, sending requests to facilitator agent 402 for delegation to appropriate agents, and displaying the results of the distributed computation. *Id.* at 7:53–63. As illustration, the ’115 patent describes that, when the question “What is my schedule?” is entered on user interface (UI) 408, UI 408 sends the request to facilitator agent 402, which

in turn asks natural language (NL) agent 426 to translate the query into ICL. *Id.* at 8:4–8. The translated ICL expression is then routed by facilitator agent 402 to appropriate agents, e.g., calendar agent 434, to execute the request. *Id.* at 8:13–15. Finally, results are sent back to UI agent 408 for display. *Id.* at 8:15–16.

C. Illustrative Claim

Of the challenged claims, only claim 61 is independent. Claim 61 is illustrative of the challenged claims and is reproduced below.

61. A facilitator agent arranged to coordinate cooperative task completion within a distributed computing environment having a plurality of autonomous service-providing electronic agents, the facilitator agent comprising:

an agent registry that declares capabilities of service-providing electronic agents currently active within the distributed computing environment; and

a facilitating engine operable to parse a service requesting order to interpret a compound goal set forth therein, the compound goal including both local and global constraints and control parameters, the service request formed according to an Interagent Communication Language (ICL), wherein the ICL includes:

a layer of conversational protocol defined by event types and parameter lists associated with one or more of the events, wherein the parameter lists further refine the one or more events; and

a content layer comprising one or more of goals, triggers and data elements associated with the events; and

the facilitating engine further operable to construct a goal satisfaction plan by using reasoning that includes one or more of domain-independent coordination strategies, domain-specific reasoning, and application-specific reasoning comprising rules and learning algorithms.

Ex. 1001, 35:4–29.

D. Asserted Prior Art and Grounds of Unpatentability

Petitioner cites the following references in its challenges to patentability.

Reference and Relevant Date	Designation	Exhibit No.
David L. Martin, Adam J. Cheyer, Douglas B. Moran, <i>Building Distributed Software Systems with the Open Agent Architecture</i> , PROCEEDINGS OF THE THIRD INTERNATIONAL CONFERENCE ON THE PRACTICAL APPLICATION OF INTELLIGENT AGENTS AND MULTI-AGENT TECHNOLOGY 355 (1998) ²	Martin	Ex. 1011
U.S. Patent No. 6,088,689 (filed Nov. 29, 1995)	Kohn ³	Ex. 1012
U.S. Patent No. 5,706,406 (issued Jan. 6, 1998)	Pollock	Ex. 1013

Petitioner also cites the Declaration of Dr. Dan R. Olsen Jr. (Ex. 1002, “Olsen Declaration” or “Olsen Decl.”) in support of its unpatentability contentions.

² Petitioner asserts that Martin was accessible to the public by November 1998 and submits various evidence in support of its contention. *See* Pet. 7–9. At this stage of the proceeding, Patent Owner does not dispute the publication date of Martin. As discussed below, we determine, for purposes of this Decision, that Petitioner has shown sufficiently that Martin was accessible to the public by November 1998.

³ For clarity and ease of reference, we only list the first named inventor.

Petitioner asserts the following grounds of unpatentability:

Claim(s) Challenged	Statutory Basis	References
61, 63–70	§ 103(a) ⁴	Martin and Kohn
62	§ 103(a)	Martin, Kohn, and Pollock

Pet. 4–5.

III. ANALYSIS

A. Whether Martin Qualifies As Prior Art Under 35 U.S.C. § 102(a)

We first address the threshold issue of whether Martin (Ex. 1011) qualifies as prior art in this proceeding. As indicated above, Petitioner relies on Martin as the primary reference in all of the asserted grounds of unpatentability presented in the Petition. *See* Pet. 1, 4–5.

Petitioner has the burden of persuasion to prove unpatentability by a preponderance of the evidence. *Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1379 (Fed. Cir. 2015). Petitioner also has the initial burden of production to show that a reference is prior art to the challenged claims under a relevant section of 35 U.S.C. § 102. *See id.* Once Petitioner has met that initial burden, the burden of production shifts to Patent Owner to argue or produce evidence that the asserted reference is not

⁴ The Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (“AIA”), amended 35 U.S.C. §§ 102 and 103. Because the ’115 patent has an effective filing date prior to the effective date of the applicable AIA amendments, we refer to the pre-AIA versions of §§ 102 and 103.

prior art to the claims. *Id.* at 1380. Once Patent Owner has met that burden of production, the burden of production returns to Petitioner. *Id.*

Petitioner asserts that Martin is prior art under 35 U.S.C. § 102(a) because (1) Martin was accessible to the public by November 1998 (Pet. 7–8) and (2) Martin describes “the work of a different inventive entity than the inventive entity of the ’115 patent” (*id.* at 11). Patent Owner disputes the second part of Petitioner’s contention. Patent Owner asserts that Martin is not prior art under § 102(a) because, during the prosecution of the ’115 patent, the Examiner determined that Martin represents the work of the same inventive entity as the ’115 patent and disqualified Martin as prior art. Prelim. Resp. 12–24. In what follows, we first take up this disputed issue—i.e., whether Martin describes the work of “another” under § 102(a)—then briefly discuss Petitioner’s contentions on the publication date of Martin, which Patent Owner does not dispute. For the reasons explained below, we determine that Petitioner has shown sufficiently, for purposes of this Decision, that Martin qualifies as prior art in this proceeding.

1. Whether Martin Describes the Work of “Another”

The pre-AIA version of § 102(a) states

A person shall be entitled to a patent unless —

(a) the invention was known or used *by others* in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent.

35 U.S.C. § 102(a) (emphasis added). This statutory language has been interpreted to mean that “a printed publication cannot stand as a reference under [§] 102(a) unless it is describing the work of *another*.” *In re Katz*, 687

F.2d 450, 454 (CCPA 1982) (emphasis added). In other words, “[an inventor’s] own work is not prior art under [§] 102(a) even though it has been disclosed to the public in a manner or form which otherwise would fall under [§] 102(a).” *Id.*; see also *In re DeBaun*, 687 F.2d 459, 462 (CCPA 1982) (“[A]n applicant’s own work, even though publicly disclosed prior to his application, may not be used against him as a reference [under § 102(a)], absent the existence of a time bar [under § 102(b)] to his application.” (citing *Katz*, 687 F.2d 450)); cf. *EmeraChem Holdings, LLC v. Volkswagen Grp. of Am., Inc.*, 859 F.3d 1341, 1345–47 (Fed. Cir. 2017) (discussing *Katz* and *DeBaun* as authority informing the determination whether a published patent application describes the work of “another” under § 102(e)); *Riverwood Int’l Corp. v. R.A. Jones & Co.*, 324 F.3d 1346, 1355–56 (Fed. Cir. 2003) (citing *DeBaun* as authority pertinent to determining whether a published patent application is a reference “by another” under 35 U.S.C. § 102(e)).

Deciding whether a reference qualifies as prior art under §§ 102(a) or 102(e) as the work of “another” involves a determination of “whether the portions of the reference relied on as prior art, and the subject matter of the claims in question, represent the work of a *common inventive entity*.” *EmeraChem Holdings*, 859 F.3d at 1345 (emphasis added) (quoting *Riverwood Int’l*, 324 F.3d at 1356).

Here, the ’115 patent lists Adam J. Cheyer and David L. Martin as co-inventors (Ex. 1001, [75]), whereas the Martin reference lists Adam J. Cheyer, David L. Martin, and Douglas B. Moran as co-authors (Ex. 1011,

10).⁵ The parties do not dispute that Adam J. Cheyer and David L. Martin are the co-inventors of the '115 patent. Nor do they argue Douglas B. Moran should have been listed as a co-inventor of the '115 patent. *See* Reply 2. That is, based on the current record, Adam J. Cheyer and David L. Martin are the undisputed inventive entity of the '115 patent. Thus, the relevant question here for determining whether Martin qualifies as prior art under § 102(a) is who invented the subject matter disclosed in *the Martin reference* relied upon by Petitioner. *See DeBaun*, 687 F.2d at 462 (when reviewing the Examiner's § 102(a) rejection based on a patent issued to the applicant and another person, "[t]he proper subject of inquiry was . . . *who invented the subject matter disclosed by (the reference)* which was relied on to support the rejection" (emphasis added) (citation omitted)).

If the subject matter disclosed in the Martin reference was invented by Adam J. Cheyer and David L. Martin, *and no other*—that is, Douglas B. Moran is *not* a co-inventor of the subject matter described in the Martin reference, despite the fact that he is listed as a co-author on the face of the reference—then the Martin reference and the '115 patent would represent the work of a common inventive entity, namely, Adam J. Cheyer and David L. Martin. If, on the other hand, Douglas B. Moran *is* a co-inventor of the subject matter described in the Martin reference relied upon by Petitioner, there is no commonality of inventorship between the relied-on subject matter of the prior art and the claimed subject matter of the '115 patent, and the

⁵ The page numbers for Martin refer to the page numbers inserted by Petitioner in the bottom, left-hand corner of each page.

Martin reference would qualify as prior art under § 102(a) as the work of “another.”

Petitioner contends that because the Martin reference lists Douglas B. Moran as a co-author, the Martin reference describes “the work of a different inventive entity than the inventive entity of the ’115 patent.” Pet. 11. In addition, Petitioner submits a Declaration from Dr. Douglas B. Moran (Ex. 1007) describing his inventive contributions to the Martin reference. Dr. Moran states in his Declaration that he worked on the Open Agent Architecture (OAA) project at SRI in 1994, becoming the project leader in August 1994. Ex. 1007 ¶¶ 23, 27. Dr. Moran also states that he made substantial contributions to the conception of various subject matter described in the Martin reference, including “various networking-related concepts described in the [Martin reference],” the “distributed technologies that are at the core of the [Martin reference] . . . , as described at Sections 2.5 and 3,” and “the distributed agent-based approach, and in particular using a facilitator, as described in the [Martin reference] at Section[s] 4 and 4.1–4.5.” *Id.* ¶ 39. Regarding the authorship and inventorship, Dr. Moran testifies that “[i]n computer science, AI, and many other scientific fields, the convention at the time of the [Martin reference] was (and still is) that authorship of a paper is accorded to all who made significant contributions to the work described.” *Id.* ¶ 37. He also states that “[i]f there are people who made smaller, but still noteworthy, contributions, they are listed in a section typically called ‘Acknowledgments.’” *Id.*

Patent Owner does not dispute Douglas B. Moran is a co-author of the Martin reference. Nor does Patent Owner present any evidence that

indicates Dr. Moran is not an inventor of the subject matter described in the Martin reference. Instead, Patent Owner largely focuses on the inventorship of the '115 patent, arguing that Dr. Moran is not a co-inventor of the subject matter of the '115 patent. *See* Prelim. Resp. 12–24. Patent Owner also challenges various aspects of Dr. Moran’s Declaration. *Id.* at 24–38. Patent Owner makes additional arguments in its Sur-Reply. Paper 10. We address Patent Owner’s evidence and arguments in turn.

First, Patent Owner points to the declarations submitted by the listed co-inventors of the '115 patent during the prosecution of the '115 patent as evidence allegedly supporting the conclusion that Martin represents the work of the same inventive entity as the '115 patent. *See* Prelim. Resp. 12–24. During the prosecution of the '115 patent, the Examiner rejected certain pending claims under § 102(a) based on Martin. Ex. 1004, 453–468.⁶ In response to the rejection, the applicants argued that Martin was “inapplicable prior art” (*id.* at 212–213) based on inventor declarations submitted under 37 C.F.R. § 1.132 (*id.* at 221–224). Petitioner asserts that the submitted inventor declarations were insufficient to disqualify Martin as § 102(a) prior art because the declarations did not include “any testimony at all as to [the inventorship of] the Martin reference.” Pet. 12–13.

Turning to the inventor declarations at issue, the § 1.132 declaration submitted by Adam J. Cheyer states that (1) he is “a co-inventor, along with David L. Martin, of the subject matter described and claimed in [the application for the '115 patent]; (2) he is a co-author of [the Martin

⁶ The page numbers for Exhibit 1004 refer to the page numbers inserted by Petitioner in the bottom, left-hand corner of each page.

reference], along with co-authors David L. Martin and Douglas B. Moran; (3) he and David L. Martin are “the inventors of the subject matter, which is claimed in claims 1–86 in the instant application”; and (4) “Douglas B. Moran is not a co-inventor of the subject matter described in the subject matter disclosed and claimed in the instant application.” Ex. 1004, 223–224. The declaration submitted by David L. Martin is essentially identical except that Mr. Martin names Adam J. Cheyer as the co-inventor of the ’115 patent and Adam J. Cheyer and Douglas B. Moran as co-authors of the Martin reference. *See id.* at 221–222.

Having reviewed the inventor declarations, we do not discern, nor does Patent Owner identify, any statements by the declarants regarding the key question of “who invented the subject matter disclosed by” the Martin reference. *See DeBaun*, 687 F.2d at 462. The only statements by the declarants regarding inventorship are about the inventorship of the subject matter disclosed by the ’115 patent, *not* the Martin reference. For instance, although the declarants state identically in the last paragraph of their declarations that “*Douglas B. Moran is not a co-inventor of the subject matter described in the subject matter disclosed and claimed in the instant application*” (Ex. 1004, 222 (¶ 4), 224 (¶ 4) (emphases added)), they say nothing about whether Douglas B. Moran is a co-inventor of the subject matter disclosed in *the Martin reference*. In their only statements regarding the Martin reference, the declarants aver that Adam J. Cheyer, David L. Martin, and Douglas B. Moran are the co-authors of the Martin reference. *See id.* at 221 (¶ 2), 223 (¶ 2).

As discussed above, in order to establish that the '115 patent and the Martin reference represent the work of a common inventive entity, one needs to show that the subject matter disclosed in the Martin reference was invented by Adam J. Cheyer and David L. Martin, *and no other*—that is, Douglas B. Moran is *not* a co-inventor of the subject matter described in the Martin reference. Because the inventor declarations submitted under § 1.132 during the prosecution of the '115 patent include no statements on who invented the subject matter described in the Martin reference, we agree with Petitioner that the inventor declarations are facially deficient to disqualify Martin as § 102(a) prior art.

Patent Owner contends that the inventor declarations are “unequivocal,” and, therefore, were sufficient to overcome the Examiner’s rejections under § 102(a) based on Martin. Prelim. Resp. 13–16 (citing *DeBaun*, 687 F.2d at 460). In particular, Patent Owner asserts that “[b]oth inventors Cheyer and Martin submitted uncontroverted declarations that Douglas Moran is not a co-inventor of the subject matter described and claimed in *the instant application*.” *Id.* at 16 (emphasis added) (citing Ex. 1004, 221–224). As Petitioner notes (Pet. 12–13), however, this sentence does not mention the Martin reference and is focused only on the inventorship of the '115 patent.

Thus, we disagree with Patent Owner’s argument because, to the extent the inventor declarations on the subject of inventorship are “unequivocal,” they are “unequivocal” about the inventorship of the '115 patent, *not* the Martin reference. In fact, as discussed above, Patent Owner

does not identify any statements by the co-inventors regarding who invented the subject matter described in the Martin reference.

Patent Owner's reliance on *DeBaun* is misplaced. In *DeBaun*, the CCPA (predecessor to the Federal Circuit) found that when reviewing the Examiner's § 102(a) rejection based on a patent issued to the applicant and another person, the Board erroneously focused on the question of whether the submitted § 1.132 declarations "supported appellant's assertion of inventorship" of the subject matter claimed in the application. *DeBaun*, 687 F.2d at 462. The CCPA held, instead, "[t]he proper subject of inquiry was . . . who invented the subject matter disclosed by (the reference) which was relied on to support the rejection." *Id.* (emphases added) (citation omitted). Thus, *DeBaun* does *not* support Patent Owner's contention that "unequivocal" declarations by the co-inventors about the inventorship of the subject matter described *in the application* for the '115 patent were sufficient to overcome the Examiner's rejections under § 102(a) based on Martin.

Contrary to Patent Owner's contention, under *DeBaun*, Patent Owner's focus on the inventorship of the '115 patent is erroneous or misplaced because *DeBaun* requires us to focus on the question of who invented the subject matter described in the Martin reference, *not* the '115 patent. *See id.* As discussed above, the co-inventor declarations by Adam J. Cheyer and David L. Martin say nothing on this key question. Thus, we disagree with Patent Owner's argument that the inventor declarations were sufficient to overcome Martin as § 102(a) prior art. And we agree with Petitioner that the inventor declarations were insufficient to disqualify

Martin as prior art under § 102(a). We also agree with Petitioner that the Examiner should not have disqualified Martin as § 102(a) prior art based on the inventor declarations submitted under § 1.132. *See* Pet. 12.

Patent Owner presents additional arguments and evidence, all focusing on the inventorship of the '115 patent. Prelim. Resp. 16–24. For example, Patent Owner argues that the co-inventor declarations on the inventorship of the '115 patent corroborate each other. *Id.* at 16–17. Patent Owner also points to the source code files submitted during the prosecution of the '115 patent and argues that Dr. Moran is not an inventor of the '115 patent because Dr. Moran's name does not appear anywhere in the files. *Id.* at 17–18 (citing Ex. 1004, 625–762). In addition, Patent Owner asserts that the parallel prosecution of a co-pending continuation-in-part application shows that Dr. Moran should not be named as an inventor of the '115 patent. *Id.* at 18–21.

For the same reasons discussed above, Patent Owner's focus on the inventorship of the '115 patent in these arguments is misplaced because these arguments do not address the key question of who invented the subject matter described in the Martin reference.

Next, citing a recent Final Written Decision issued by the Board, Patent Owner argues that “inventorship of the patent bears directly on whether the purported inventor should be considered an author of the relevant subject matter in the prior art reference,” and, therefore, “the fact that Moran was not named as an inventor on the '115 Patent also suggests that he did not conceive the relevant subject matter in *Martin*.” Sur-Reply 2–3 (citing *Trans Ova Genetics, LC v. XY, LLC*, Case IPR2018-00250

(“*Trans Ova Genetics*”), slip op. at 16–17 (PTAB June 26, 2019) (Paper 35 (“*Trans Ova Genetics FWD*”)). Patent Owner’s reliance on *Trans Ova Genetics* is misplaced.

In *Trans Ova Genetics*, the issue was whether Mr. Green, who was not named as an author of the Lu reference or as an inventor of the challenged patent, should nonetheless be considered an author of certain subject matter described in the Lu reference. See *Trans Ova Genetics FWD*, slip op. at 14–17. But here, unlike *Trans Ova Genetics*, Dr. Moran *is* listed as an author of the Martin reference, and the parties do not dispute that Dr. Moran is a co-author of the Martin reference. In fact, Patent Owner appears to *concede* that Dr. Moran is a co-author of the Martin reference. See Ex. 1004, 221 (¶ 2), 223 (¶ 2); Prelim. Resp. 14–17 (asserting that the statements made in the co-inventors’ § 1.132 declarations should be trusted because they are “unequivocal” and “corroborated”). Patent Owner’s argument is unpersuasive because Patent Owner does not explain adequately how the facts of *Trans Ova Genetics* are relevant to the determination of whether Martin qualifies as prior art under § 102(a) in this case.

Citing the same *Trans Ova Genetics FWD*, Patent Owner next asserts that by urging the Board to institute an IPR, Petitioner attempts to shift onto Patent Owner the burden of proving that Dr. Moran is not an inventor of the subject matter described in the Martin reference. Sur-Reply 3. Patent Owner contends that this is contrary to established Board practice. *Id.* at 3–4 (citing *Trans Ova Genetics FWD*, slip op. at 8 n.8).⁷

⁷ Patent Owner’s citation to *Trans Ova Genetics FWD* appears to be mistaken. The text quoted by Patent Owner in pages 3–4 of its Sur-Reply

Patent Owner's reliance on *Trans Ova Genetics* FWD is again misplaced. As noted above, the *Trans Ova Genetics* FWD is a Final Written Decision issued upon completion of an instituted trial. *See Trans Ova Genetics* FWD, slip op. at 1–2. The portion of the *Trans Ova Genetics* FWD cited by Patent Owner states that in an instituted IPR proceeding, Petitioner bears the burden of persuasion to prove unpatentability by a preponderance of the evidence, including the burden to establish that the references relied upon qualify as prior art. At this preliminary stage of the proceeding, however, different burdens apply, including certain burden of production which is shifted onto Patent Owner.

As discussed above, Petitioner bears the ultimate burden of persuasion to prove unpatentability by a preponderance of the evidence, which never shifts to Patent Owner. *Dynamic Drinkware*, 800 F.3d at 1378–79. At this preliminary stage of the proceeding, however, Petitioner has the initial burden of production to show that the Martin reference is prior art under § 102(a). *See id.* at 1379. Once Petitioner has met this initial burden of production, the burden of production shifts to Patent Owner to argue or produce evidence that the Martin reference is not prior art to the challenged claims. *See id.* at 1380. Indeed, the same shifting burden of production was applied at the institution stage of the proceeding in the *Trans Ova Genetics* case relied upon by Patent Owner. *See Trans Ova Genetics*, slip op. at 10 (PTAB June 27, 2018) (Paper 9) (citing *Dynamic Drinkware*, 800 F.3d at

appears on page 14 of the *Trans Ova Genetics* FWD, *not* in footnote 8 on page 8.

1379) (explaining different burdens that apply at different stages of an IPR proceeding).

Thus, Patent Owner's argument on the purported impropriety of shifting burden to Patent Owner is unpersuasive because it appears to be based on a misunderstanding of different burdens that apply at different stages of an IPR proceeding.

Next, addressing different inventive entities listed on the face of the Martin reference and the '115 patent, Patent Owner asserts that "authorship of an article by itself does not raise a presumption of inventorship with respect to the subject matter disclosed in the article" (Prelim. Resp. 28 (quoting *Katz*, 687 F.2d at 455)), so "coauthors may not be presumed to be coinventors merely from the fact of coauthorship" (*id.*). Patent Owner argues, therefore, "the mere listing of Moran as a coauthor of Martin does not raise the presumption that Moran is an inventor of any subject matter contained in Martin." *Id.*

In *Katz*, the CCPA was considering an appeal of a final decision by the Board affirming the Examiner's rejections. *See Katz*, 687 F.2d at 452–453. Here, however, we are not making a final determination whether the Martin reference qualifies as prior art based on a full record developed during trial. Rather, at this preliminary stage of the proceeding, we are considering, based on the current record, whether Petitioner has made a threshold showing to demonstrate a reasonable likelihood of *prevailing during trial* in showing that the Martin reference qualifies as prior art under § 102(a). *See* 35 U.S.C. § 314(a); *cf. RPX Corp. v. Iridescent Networks, Inc.*, Case IPR2017-01662, slip op. at 18 (PTAB Dec. 13, 2017) (Paper 9)

(finding that “there is a reasonable likelihood that Petitioner may yet, *during the course of trial*, adduce evidence sufficient to prove” a reference was publicly available before the critical date (emphasis added)). If this IPR proceeds to final stages of trial, we may not presume inventorship of the Martin reference in our Final Written Decision merely because the reference lists Dr. Moran as an author, but, for purposes of this Decision whether to institute trial, the fact that different inventive entities are listed on the face of the Martin reference and the ’115 patent may be a factor to consider in determining whether Petitioner has made a sufficient threshold showing to warrant going forward to trial. *See Varian Med. Sys., Inc. v. William Beaumont Hosp.*, Case IPR2016-00163, slip op. at 13–15 (PTAB May 6, 2016) (Paper 14) (finding that differences in inventive entities were sufficient to demonstrate that references relied upon by Petitioner were “by ‘another’” for purposes of institution).

Next, addressing the Declaration of Dr. Moran, Patent Owner challenges the reliability and credibility of Dr. Moran’s testimony because Dr. Moran’s Declaration is uncorroborated and submitted nearly twenty years after the prosecution of the ’115 patent. Prelim. Resp. 24–25. Patent Owner also asserts that Dr. Moran’s Declaration “raises questions about the reliability of Moran’s memory.” *Id.* at 26.

As discussed above, however, both of the co-inventors averred in their sworn declarations submitted during the prosecution of the ’115 patent that Dr. Moran is a co-author of the Martin reference. Ex. 1004, 221 (¶ 2), 223 (¶ 2). This fact alone provides some corroboration that Dr. Moran made

material contributions to the subject matter described in the Martin reference.

In addition, Patent Owner does not appear to contest specifically Dr. Moran's statements on the authorship and inventorship that "[i]n computer science, AI, and many other scientific fields, the convention at the time of the [Martin reference] was (and still is) that authorship of a paper is accorded to all who made significant contributions to the work described" and that "[i]f there are people who made smaller, but still noteworthy, contributions, they are listed in a section typically called 'Acknowledgments.'" Ex. 1007 ¶ 37. That is, the fact that Dr. Moran is listed as an author of the Martin reference, and not merely mentioned in an "Acknowledgments" section, appears to suggest that he made "significant contributions" to the subject matter described in the Martin reference. This inference appears to be consistent with Dr. Moran's statements that provide a relatively detailed and specific account of various material contributions he purportedly made to the subject matter described in the Martin reference. *See, e.g., id.* ¶ 39 (stating that Dr. Moran made substantial contributions to the conception of various subject matter described in the Martin reference, including "various networking-related concepts described in the [Martin reference]," the "distributed technologies that are at the core of the [Martin reference] . . . , as described at Sections 2.5 and 3," and "the distributed agent-based approach, and in particular using a facilitator, as described in the [Martin reference] at Section[s] 4 and 4.1–4.5").

As discussed above, at this stage of the proceeding, Patent Owner does *not* present any evidence of record that indicates that Dr. Moran is *not*

an inventor of the subject matter described in the Martin reference, although Patent Owner concedes that Dr. Moran is a co-author of the Martin reference. Considering the evidence and arguments presented by Petitioner—including the evidence that different inventive entities are listed on the face of the Martin reference and the '115 patent, the contemporaneous sworn declarations by the co-inventors of the '115 patent testifying that Dr. Moran is a co-author of the Martin reference, and the Declaration of Dr. Moran discussed above—as well as the evidence and arguments presented by Patent Owner, we determine that Petitioner has made a threshold showing that it is reasonably likely Petitioner will prevail in showing that the Martin reference qualifies as prior art under § 102(a). A final determination on this particular issue will be made based on a full record developed during the course of trial.

2. *Public Accessibility of Martin*

A printed publication is not effective as a prior art reference until the date it becomes publicly accessible. *In re Hall*, 781 F.2d 897, 899 (Fed. Cir. 1986). The application leading to the '115 patent was filed on January 5, 1999. Ex. 1001, [22]. Petitioner contends that Martin was accessible to the public by November 1998, and, therefore, qualifies as a prior art printed publication under § 102(a). Pet. 7–9.

Whether a reference qualifies as a prior art “printed publication” under § 102 involves a case-by-case inquiry into the facts and circumstances surrounding the reference’s disclosure to members of the public. *In re Klopfenstein*, 380 F.3d 1345, 1350 (Fed. Cir. 2004). The key inquiry is whether the reference was made “sufficiently accessible to the public

interested in the art” before the critical date. *In re Lister*, 583 F.3d 1307, 1311 (Fed. Cir. 2009) (quoting *In re Cronyn*, 890 F.2d 1158, 1160 (Fed. Cir. 1989)). “A reference will be considered publicly accessible if it was ‘disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence, can locate it.’” *Blue Calypso, LLC v. Groupon, Inc.*, 815 F.3d 1331, 1348 (Fed. Cir. 2016) (quoting *Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1350 (Fed. Cir. 2008)).

First, Petitioner contends that Martin was presented in the Proceedings of the Third International Conference on the Practical Application of Intelligent Agents and Multi-Agent Technology (PAAM98), which was held on March 23–25, 1998, in London, United Kingdom. Pet. 7. In support of its contention, Petitioner points to the declarations submitted by the co-inventors during the prosecution of the ’115 patent, which states that the Martin reference was “published in March 1998.” *Id.* at 8 (citing Ex. 1004, 221, 223). In addition, Petitioner cites the Declaration of Dr. Moran, in which Dr. Moran states that Martin was presented at the PAAM98 conference in March 1998 and that conferences such as PAAM98

were generally open to any member of the public willing to attend, including professionals in the area of networked computer systems and those otherwise interested or performing research in the field. Proceedings from such conferences were typically distributed in printed/hardcopy format (including the text of papers accepted by the conferences) to attendees who paid the registration fees for the conferences.

Id. at 8–9 (quoting Ex. 1007 ¶ 35). Thus, Petitioner argues that the Martin reference was accessible to the public by March 1998 based on dissemination during the PAAM98 conference. *Id.* at 9.

In addition, Petitioner asserts that Martin was made accessible to the public in book format by the British Library in November 1998. *Id.* In support of its contention, Petitioner submits the Declaration of Ingrid Hsieh-Yee, Ph.D. (Ex. 1009), an expert on library cataloging and classification, according to Petitioner, who considered numerous facts relating to Martin (e.g., bibliographic and MARC records (Exs. 1116, 1117), a date stamp, a confirmation letter from a library (Ex. 1118), and pre-filing date citations to Martin) and explains on the basis of such evidence that Martin was accessible to the public in November 1998. Pet. 9 (citing Ex. 1009 ¶¶ 42–54).

Patent Owner does not dispute that Martin was published before the filing date of the '115 patent. *See* Ex. 1004, 221 (¶ 2), 223 (¶).

Based on the record presented, we determine, for purposes of this Decision, Petitioner has established sufficiently that Martin was accessible to the public by November 1998.

3. Conclusion

Based on the foregoing and upon considering the current record, we conclude, for purposes of this Decision, Petitioner has demonstrated sufficiently that Martin qualifies as prior art under 35 U.S.C. § 102(a).

B. 35 U.S.C. § 325(d)

Patent Owner urges us to exercise our discretion to deny institution under 35 U.S.C. § 325(d) on the basis that the Examiner considered Martin during the prosecution of the '115 patent. Prelim. Resp. 38–46 (citing *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, Case IPR2017-01586 (PTAB Dec. 15, 2017) (Paper 8) (§ III.C.5, first para., designated precedential Aug. 2, 2019)). In its § 325(d) argument, however, Patent Owner leaves out a crucial fact that undermines its position—one that featured prominently in its argument to disqualify Martin as prior art—i.e., the Examiner removed Martin as § 102(a) prior art and withdrew the rejections based on Martin before any of the claims of the '115 patent were allowed. This critical fact undercuts Patent Owner's seemingly oblivious application of the *Becton Dickinson* factors.

In *Becton Dickinson*, the Board exercised its discretion to deny an asserted ground because, based on an evaluation of the relevant factors, it was determined that the petition presents the same arguments as were “*meritoriously* overcome by the Applicant” during prosecution. *Becton Dickinson*, slip op. at 28 (emphasis added). Here, unlike *Becton Dickinson*, the Examiner's rejections based on Martin were *not* “*meritoriously* overcome” during the prosecution of the '115 patent because, as Patent Owner repeatedly emphasized in its arguments to disqualify Martin as prior art, the Examiner removed Martin as prior art and withdrew the rejections upon considering the applicants' argument that Martin was “inapplicable prior art” under § 102(a) (Ex. 1004, 212–213) based on inventor declarations

on inventorship submitted under 37 C.F.R. § 1.132 (*id.* at 221–224) *before* any of the claims of the '115 patent were allowed.

Put another way, Martin was not applied against any allowed claims of the '115 patent, much less the challenged claims in this proceeding, because the Examiner disqualified Martin as prior art under § 102(a) before the claims were allowed. *Cf. Bowtech, Inc. v. MCP IP, LLC*, Case IPR2019-00379, slip op. at 18 (PTAB July 3, 2019) (Paper 14) (“We have consistently held that a reference that ‘was neither applied against the claims nor discussed by the Examiner’ does not weigh in favor of exercising our discretion under § 325(d).”) (citations omitted).

Because the substantive merit of an argument applying Martin against the challenged claims was never considered by the Office, we determine that exercising our discretion under 35 U.S.C. § 325(d) to deny institution is not appropriate in this case.

C. Level of Ordinary Skill in the Art

Petitioner’s declarant, Dr. Olsen, opines that a person of ordinary skill in the art at the time of the invention of the '115 patent would have had at least a Bachelor’s degree in computer science, electrical engineering, or a similar discipline, and one to two years of work experience in networked computer systems or a related area. Ex. 1002 ¶ 14. At this stage of the proceeding, Patent Owner does not dispute Dr. Olsen’s assessment of the level of ordinary skill in the art. Prelim. Resp. 5.

Based on the current record, we find Petitioner’s proposal consistent with the level of ordinary skill in the art reflected by the prior art of record. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001); *In re*

GPAC Inc., 57 F.3d 1573, 1579 (Fed. Cir. 1995). Therefore, for purposes of this Decision, we adopt Petitioner’s unopposed position as to the level of ordinary skill in the art.

D. Claim Construction

In an *inter partes* review filed on or after November 13, 2018, we apply the same claim construction standard that would be used in a civil action under 35 U.S.C. § 282(b), following the standard articulated in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc). 37 C.F.R. § 42.100(b) (2019); 83 Fed. Reg. 51340, 51,340–41, 51,343 (Oct. 11, 2018).

In applying such standard, claim terms are generally given their ordinary and customary meaning, as would be understood by a person of ordinary skill in the art, at the time of the invention and in the context of the entire patent disclosure. *Phillips*, 415 F.3d at 1312–13. “In determining the meaning of the disputed claim limitation, we look principally to the intrinsic evidence of record, examining the claim language itself, the written description, and the prosecution history, if in evidence.” *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 469 F.3d 1005, 1014 (Fed. Cir. 2006) (citing *Phillips*, 415 F.3d at 1312–17).

The parties do not propose a construction for any claim term. Petitioner avers that no express constructions are required (Pet. 17), and Patent Owner concurs, at least for purposes of deciding whether to institute a review (Prelim. Resp. 5).

Based on the current record, we determine no claim terms require express construction at this time. *See Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999) (holding that only terms that are in

controversy need to be construed, and “only to the extent necessary to resolve the controversy”); *see also Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1017 (Fed. Cir. 2017) (applying *Vivid Techs.* in the context of an *inter partes* review).

E. Obviousness over Martin and Kohn

In this asserted ground of obviousness, Petitioner contends that claims 61 and 63–70 are unpatentable under 35 U.S.C. § 103(a) as obvious over the combination of Martin and Kohn. Pet. 18–63. Petitioner provides detailed explanations and specific citations to the prior art indicating where in the references the claimed features are disclosed or explaining how the differences between the claimed subject matter and the prior art are such that the subject matter would have been obvious to a person of ordinary skill in the art. *Id.* In addition, Petitioner relies upon the Declaration of Dr. Olsen (Ex. 1002) to support its position. *Id.*

At this stage of the proceeding, Patent Owner does not dispute that the proposed combination of Martin and Kohn teaches all limitations of claims 61 and 63–70. Nor does Patent Owner dispute the rationales for combining Martin and Kohn proffered by Petitioner. For the reasons discussed below, we are persuaded that Petitioner has demonstrated a reasonable likelihood that it will prevail in its challenge to claims 61 and 63–70 as obvious over the combination of Martin and Kohn.

1. Relevant Principles of Law

A claim is unpatentable under 35 U.S.C. § 103(a) if the differences between the claimed subject matter and the prior art are such that the subject matter, as a whole, would have been obvious at the time the invention was

made to a person having ordinary skill in the art to which the subject matter pertains. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual determinations, including: (1) the scope and content of the prior art; (2) any differences between the claimed subject matter and the prior art; (3) the level of skill in the art; and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966). We analyze these asserted grounds based on obviousness with the principles identified above in mind.

2. Overview of Martin (Ex. 1011)

Martin relates to the Open Agent Architecture (OAA), which “makes it possible for software services to be provided through the cooperative efforts of distributed collections of autonomous agents.” Ex. 1011, 10 (Abstract).⁸ According to Martin, “[c]ommunication and cooperation between agents are brokered by one or more facilitators, which are

⁸ The page numbers for Exhibit 1011 refer to the page numbers inserted by Petitioner in the bottom, left-hand corner of each page. Although Petitioner uses the original page numbers for Martin throughout the Petition, the original page numbers are missing on many pages. *See, e.g.*, Ex. 1011, 15, 17, 20–25. The parties are reminded to format all papers and exhibits in accordance with 37 C.F.R. §§ 42.6 and 42.63. The parties are also *directed* to use the page numbers inserted by Petitioner in the bottom, left-hand corner of each page *when citing to Martin*. Continued use of Martin’s original page numbers, which are missing on many pages, may cause confusion and further error. A party’s continued failure to comply with our rules and directions may result in sanctions, including excluding from consideration the portions of evidence referenced with non-compliant citations.

responsible for matching requests, from users and agents, with descriptions of the capabilities of other agents.” *Id.*

Figure 1 of Martin is reproduced below.

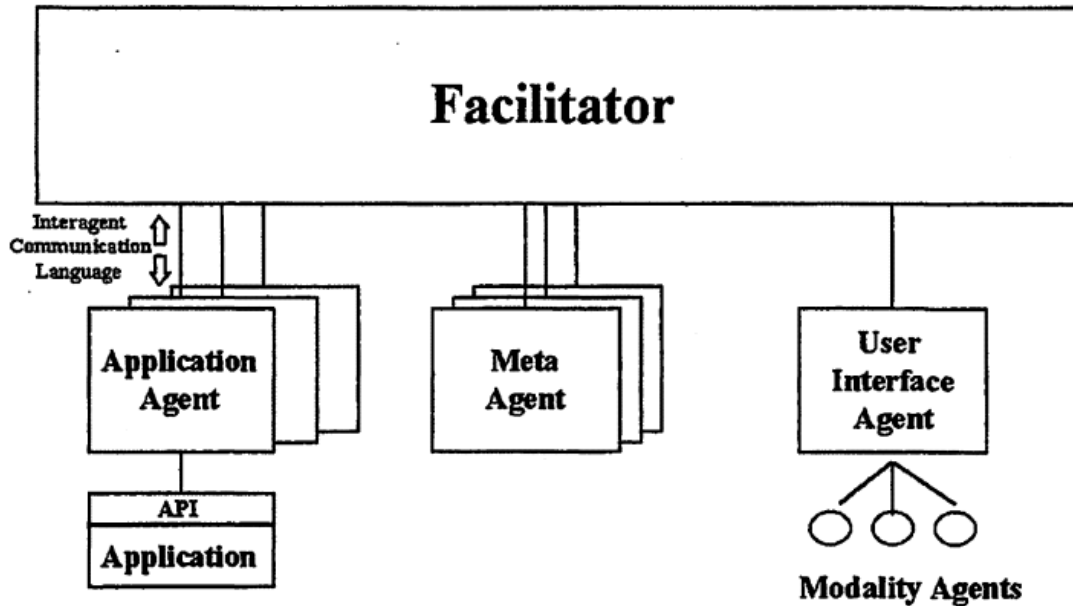


Figure 1: OAA System Structure.

Figure 1 depicts the structure typical of a small OAA system, showing a user interface agent, several application agents, and meta-agents, organized as a community of peers by their common relationship to a facilitator agent. *Id.* at 14. Figure 1 also shows an Interagent Communication Language. *Id.* at 16, Fig. 1.

According to Martin, cooperation among the agents of an OAA system is achieved via messages expressed in a common language, Interagent Communication Language (ICL). *Id.* at 17. Martin describes “Mechanisms of Cooperation” as follows.

Cooperation among the agents of an OAA system is achieved via messages expressed in a common language, ICL, and is normally structured around a 3-part approach: providers of services

register capabilities specifications with a facilitator; requesters of services construct goals and relay them to a facilitator, and facilitators coordinate the efforts of the appropriate service providers in satisfying these goals.

Id.

According to Martin, all agents that are not facilitators are called client agents. *Id.* at 16. Martin describes that when invoked, a client agent makes a connection to a facilitator. *Id.* at 16–17. Upon connection, an agent informs the facilitator of the services it can provide. *Id.* at 17. When the agent is needed, the facilitator sends it a request expressed in ICL. *Id.* The agent parses this request, processes it, and returns answers or status reports to the facilitator. *Id.*

3. *Overview of Kohn (Ex. 1012)*

Kohn describes a Multiple-Agent Hybrid Control Architecture (MAHCA) which uses agents to analyze, design, and implement intelligent control of distributed processes. Ex. 1012, [57]. According to Kohn, a single agent can be configured to control a local process, or a network of agents can be configured to control more complex, distributed processes. *Id.* Kohn describes that the network of multiple agents interact through messages to create a global behavior. *Id.* For example, each individual agent may take local actions in accordance with local and global constraints. *Id.* at 16:20–22. Also, a network of cooperating control agents may implement local control actions to synchronize attainment of global goals. *Id.* at 16:23–25.

4. *Independent Claim 61*

Petitioner asserts that the agent-based systems and processes for servicing requests disclosed in Martin and the '115 patent are virtually identical, using the same nomenclature relating to the Open Agent Architecture and its components. Pet. 11 (comparing Figure 4 of the '115 patent with Figure 1 of Martin, and comparing the Abstract of the '115 patent with the Abstract of Martin). Petitioner contends that Martin teaches all limitations of claim 61, except for “local and global constraints” for which Petitioner relies on Kohn. Pet. 18–45. To support its arguments, Petitioner identifies specific passages in the cited references and explains in detail the significance of each passage in reference to the corresponding claim limitation. *Id.* Petitioner also cites the Declaration of Dr. Olsen and asserts that a person of ordinary skill in the art would have been motivated to combine Martin with Kohn to provide flexibility in handling various requests, including accommodating requests with local and global constraints. *Id.* at 34–35 (citing Ex. 1002 ¶ 87).

We have reviewed Petitioner’s arguments and evidence on claim 61 and, at this stage of the proceeding, we are persuaded that Petitioner sufficiently shows that the combination of Martin and Kohn teaches the limitations of claim 61 and provides a sufficient rationale for combining the references. Based on the record presented, we are persuaded that Petitioner has demonstrated a reasonable likelihood of prevailing in its challenge to claim 61 under 35 U.S.C. § 103(a) as obvious over the combination of Martin and Kohn.

5. *Dependent Claims 63–70*

Claims 63–70 each depend directly or indirectly from claim 61. Petitioner asserts that Martin teaches all of the additionally recited limitations of these dependent claims. Pet. 46–63. Petitioner provides detailed explanations and specific citations to Martin indicating where in the reference each of the additionally recited limitations of claims 63–70 is disclosed. *Id.* Petitioner also relies on the testimony of Dr. Olsen to support its position. *Id.*

We have reviewed Petitioner’s arguments and evidence and, at this stage of the proceeding, we are persuaded that Petitioner has demonstrated sufficiently that Martin teaches the additionally recited limitations of dependent claims 63–70. Based on the record presented, we are persuaded that Petitioner has demonstrated a reasonable likelihood of prevailing in its challenge to claims 63–70 under 35 U.S.C. § 103(a) as obvious over the combination of Martin and Kohn.

F. Claim 62 as Obvious over Martin, Kohn, and Pollock

Claim 62 depends from claim 61 and further recites “the facilitating engine is capable of modifying the goal satisfaction plan during execution, the modifying initiated by events such as new agent declarations within the agent registry, decisions made by remote agents, and information, provided to the facilitating engine by remote agents.” Ex. 1001, 35:29–34.

Petitioner adds the teachings of Pollock (Ex. 1013) to the basic combination of Martin and Kohn in an asserted ground of obviousness as to claim 62. Pet. 63–66. Pollock describes an “artificial agent” that is “capable of planning and executing plans.” Ex. 1013, 1:40–41. Petitioner asserts that

Pollock teaches “modifying the goal satisfaction plan during execution,” as recited in claim 62, because Pollock describes that “[a] rational agent monitors the course of plan execution” and may modify the plan “by further scheduling as plan execution proceeds.” Pet. 63–65 (citing Ex. 1013, 133:16–17, 133:26–28).

Petitioner contends that the phrase “such as new agent declarations within the agent registry, decisions made by remote agents, and information, provided to the facilitating engine by remote agents” recited in claim 62 is not entitled to patentable weight because it merely recites examples. *Id.* at 65. Petitioner, however, does not cite any authority in support of this argument.

In the alternative, citing the testimony of Dr. Olsen, Petitioner asserts that it would have been obvious to implement the recited feature in the combined Martin-Kohn-Pollock facilitator agent. *Id.* (citing Ex. 1002 ¶ 144). In the cited paragraph of his Declaration, however, Dr. Olsen largely focuses on explaining why a person of ordinary skill in the art would have been motivated to implement the recited feature, and does not explain adequately how the proposed combination teaches the claimed feature. *See* Ex. 1002 ¶ 144.

Accordingly, we are unable to determine based on the current record that Petitioner has shown a reasonable likelihood it would prevail in showing that the subject matter of claim 62 would have been obvious over the combination of Martin, Kohn, and Pollock. Nevertheless, as discussed above, because Petitioner has demonstrated a reasonable likelihood of

success in proving that at least one claim of the '115 patent is unpatentable, we will institute on all grounds and all claims raised in the Petition.

IV. CONCLUSION

For the foregoing reasons, taking into account the arguments presented in Patent Owner's Preliminary Response, we conclude that the information presented in the Petition establishes a reasonable likelihood that Petitioner would prevail in challenging at least one claim of the '115 patent as unpatentable under § 103(a). Accordingly, we institute an *inter partes* review, which will include all challenged claims and grounds asserted in the Petition.

At this stage of the proceeding, we have not made a final determination as to the patentability of any of the challenged claims. Our final determination will be based on the record as fully developed during trial.

V. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that pursuant to 35 U.S.C. § 314, an *inter partes* review of all challenged claims (61–70) of the '115 patent is instituted with respect to all grounds set forth in the Petition; and

FURTHER ORDERED that pursuant to 35 U.S.C. § 314(c) and 37 C.F.R. § 42.4, notice is hereby given of the institution of a trial, the trial commencing on the entry date of this Decision.

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