

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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NINTENDO CO., LTD. and  
NINTENDO OF AMERICA INC.,

Petitioners,

v.

GAMEVICE, INC.,

Patent Owner.

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PTAB Case No. IPR2020-01197

Patent No. 10,391,393

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**PETITIONERS' REQUEST FOR REHEARING  
PURSUANT TO 37 C.F.R. § 42.71(D)**

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## I. INTRODUCTION

Nintendo respectfully requests rehearing of the Board's decision denying institution of Nintendo's Petition for *Inter Partes* Review of U.S. Patent No. 10,391,393 (the "'393 patent"). Using the factors set forth in *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (PTAB Mar. 30, 2020), the Board denied institution in view of a co-pending International Trade Commission ("ITC") investigation. That was an abuse of discretion. First, deference to the ITC deprives Nintendo of an important remedy: a binding decision that the '393 patent's claims are invalid. Second, the *Fintiv* factors, which relate to *district court litigation*, are a poor fit for *ITC investigations* and should not be applied to them. Because of the ITC's unique features, applying the factors to ITC investigations effectively results in a rule where the Board denies any parallel IPR petition. This inequitable outcome reflects that the fact-dependent *Fintiv* factors designed for district court cases were never intended to apply to ITC investigations.

In denying institution based on a parallel ITC investigation, the Board failed to appreciate a key aspect of the ITC as compared to other legal fora. Congress devised IPRs as a faster and cheaper alternative to district court litigation for challenging a patent's validity. In both IPRs and district court litigation, a patent challenger can obtain an invalidity ruling that binds other tribunals and precludes costly subsequent litigation. Thus, even if the Board defers to a district court and

denies an IPR on that basis, a petitioner can still obtain the same result—a binding invalidity ruling. By contrast, the ITC’s mission is to handle trade disputes; it cannot invalidate a patent. While the ITC considers patent invalidity in ruling on trade issues, and finds no trade violation if it believes a patent is invalid, such invalidity decisions do not apply to any other context and, although persuasive, are not binding on the Board or the courts. The Board failed to consider this distinction when denying Nintendo’s petition, and its deference to the ITC prevents Nintendo from obtaining the remedy it sought through an IPR—a binding ruling that invalidates the ’393 patent’s claims.

Deference to the ITC also creates the same inefficiencies that IPRs were intended to prevent. Because the ITC’s invalidity decisions are persuasive—but not binding—Board denials based on ITC investigations may require re-litigation of invalidity issues before a district court, which can issue a preclusive invalidity decision. When that occurs, denial gives rise to more district court litigation and frustrates Congress’s intent for IPRs to offer a faster and cheaper alternative to such litigation.

Furthermore, the Board created the *Fintiv* factors to assess potential inefficiency arising from parallel district court proceedings. The ITC differs from district courts in ways that caution against applying the *Fintiv* factors to parallel ITC investigations because those factors will almost invariably favor denial of an

IPR petition. Blanket denial based on ITC investigations makes little sense given that ITC invalidity decisions are not binding and leave open the possibility of further litigation.

The salient distinctions between the ITC and district courts are many. First, the *Fintiv* factors consider stays because district courts often pause litigation to allow the Board to assess invalidity in an IPR. In the ITC, stays are almost non-existent. Second, the *Fintiv* factors examine whether a district court will hold a trial before the Board issues a final decision. In an ITC investigation, the accelerated schedule all but ensures that the Administrative Law Judge (“ALJ”) will hold the evidentiary hearing and complete its entire investigation before the Board issues a final decision in any parallel IPR. Third, the *Fintiv* factors consider a district court’s and the Board’s investment in parallel proceedings. In the ITC, the compressed schedule dictates that discovery may be closed and the evidentiary hearing may have occurred before the Board can issue its institution decision in a parallel IPR, let alone a final written decision. Thus, the ITC will generally invest resources more quickly in an investigation than the Board will in a parallel IPR. Fourth, the *Fintiv* factors consider the amount of overlap between parallel proceedings at the Board and the district court, where each forum can issue the same remedy—a binding invalidity decision. In the ITC context there is no overlap since the Commission cannot cancel claims. Fifth, the *Fintiv* factors ask whether

the accused infringer in a district court case is the same as the petitioner in an IPR. The ITC differs here as well because the Commission can appoint its own “Staff” attorney to participate in the investigation and provide views on patent invalidity. Alone, and in combination, these differences demonstrate that the *Fintiv* factors are incompatible with ITC litigation.

For all these reasons, Nintendo requests that the Board reconsider its denial and institute review for Nintendo’s petition.

## **II. STATEMENT OF PRECISE RELIEF REQUESTED**

Nintendo respectfully requests rehearing and institution for its IPR petition.

## **III. LEGAL STANDARDS**

“A party dissatisfied with a decision may file a single request for rehearing” that “identif[ies] all matters the party believes the Board misapprehended or overlooked.” 37 C.F.R. § 42.71(d). In a rehearing on an institution decision, the Board reviews the decision for an abuse of discretion. *Id.* § 42.71(c). An abuse of discretion occurs when a “decision is based on an erroneous interpretation of law or clearly erroneous factfinding, or” ... “a clear error of judgment.” *In re Gartside*, 203 F.3d 1305, 1315-16 (Fed. Cir. 2000); *Apple Inc. v. DSS Tech. Mgmt., Inc.*, IPR2015-00369, Paper 14 at 3 (PTAB Aug. 12, 2015) (citation omitted). An abuse of discretion also occurs where an agency’s discretionary action is predicated on irrelevant factors. *See, e.g., City of Los Angeles v. U.S. Dep’t of Com.*, 307 F.3d

859, 874 (9th Cir. 2002).

#### **IV. DEFERRING TO THE ITC DEPRIVED NINTENDO OF AN IMPORTANT REMEDY**

Congress recognized there are two ways to invalidate a patent: (i) district court litigation and (ii) post-grant proceedings before the Patent Office. H.R. Rep. No. 112-98, pt. 1, at 45 (2011). A few years ago, Congress created IPRs as a “faster, less costly alternative[] to *civil litigation*” for challenging a patent’s validity. 157 Cong. Rec. S952 (Feb. 28, 2011) (statement of Sen. Chuck Grassley) (emphasis added). IPRs are an alternative to district courts because both the Board and the district courts can issue binding decisions on patent invalidity. Thus, if the Board denies an IPR petition in deference to a parallel district court proceeding, the petitioner can obtain a binding decision on invalidity from the court that would settle the issues and foreclose additional litigation.

That is not the case in the ITC. The ITC has no power to invalidate patents. Indeed, the ITC has an entirely different purpose: to investigate alleged violations of 19 U.S.C. § 1337, which relates to importation and trade. Given this fundamental difference, the Federal Circuit has repeatedly held that any decision on patent invalidity from the ITC, while persuasive, has no preclusive effect on other fora. *See, e.g., Texas Instruments Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1569 (Fed. Cir. 1996); *Bio-Technology Gen. Corp. v. Genentech, Inc.*, 80 F.3d 1553, 1564 (Fed. Cir. 1996). That legal distinction yields a significant



problem for an ITC respondent and IPR petitioner like Nintendo. Given the Board's institution denial, Nintendo cannot obtain from the ITC the remedy it sought by way of IPR—namely, a binding invalidity ruling. Even if the ITC decides invalidity issues in Nintendo's favor, additional litigation would be required, whether at the Board or the district courts, to produce the same preclusive invalidity decision the Board could have issued in an IPR. This leads to the same inefficiencies that IPRs were intended to prevent.

For this reason alone, as petitioners in IPR2020-00754 and IPR2020-00987 have argued in seeking POP review, and as others have contended during Board rulemaking efforts, a co-pending ITC investigation should not serve as the basis for a discretionary denial of an IPR. USPTO, *Public Views on Discretionary Institution of AIA Proceedings* (Jan. 2021) at 4 n.21, <https://www.uspto.gov/sites/default/files/documents/USPTOExecutiveSummaryofPublicViewsonDiscretionaryInstitutiononAIAProceedingsJanuary2021.pdf>. That is true generally and in this particular case. Accordingly, the Board erred by applying the *Fintiv* factors to deny Nintendo's petition.

## **V. THE *FINTIV* FACTORS ARE INCOMPATIBLE WITH ITC INVESTIGATIONS**

In denying Nintendo's petition, the Board also overlooked the incongruence between the *Fintiv* factors and ITC investigations. The *Fintiv* factors are specifically tailored to assess whether to deny institution based on parallel district

court litigation. Those factors, however, are incompatible with ITC investigations, which differ drastically from district court litigation. It follows that the Board should not apply the *Fintiv* factors to deny an IPR petition based on a parallel ITC investigation, including in this IPR. Recent Board institution decisions show the inequity of doing so. Because of deference to the ITC, a parallel ITC investigation now effectively precludes an IPR, even if the petition is strong and was filed quickly after an ITC complaint, as it was here. Paper 13 at 15, 20-21. Because of the incompatibility between the *Fintiv* factors and ITC litigation, Nintendo seeks rehearing and institution for its petition.

**A. The ITC is a peculiar legal forum unlike the district courts in several fundamental ways**

An ITC investigation is very different from federal district court litigation. The ITC is an independent federal agency in the executive branch that investigates alleged unfair trade practices, such as importation of products that “infringe a valid and enforceable United States patent.” 19 U.S.C. § 1337(a)(1)(B)(i). If a complainant in the ITC alleges a violation of this provision, the ITC is authorized to investigate and determine whether a violation has occurred. *Id.* § 1337(b)-(c). As part of that investigation, the ITC considers infringement and invalidity, but only in the context of a potential trade violation. *Texas Instruments*, 90 F.3d at 1568-69.

There are other significant differences. In a district court, a judge appointed

under the Constitution presides, and the parties have a right to a jury trial. In an ITC investigation, an Administrative Law Judge (“ALJ”) determines whether a violation occurred; there are no juries. 19 C.F.R. § 210.3; *see* USITC, *Answers to Frequently Asked Questions* (“ITC FAQs”) (Mar. 2009) at 1-2, [https://www.usitc.gov/intellectual\\_property/documents/337\\_faqs.pdf](https://www.usitc.gov/intellectual_property/documents/337_faqs.pdf). In addition, a district court case ordinarily involves just two parties: the plaintiff and the defendant. The situation is more complex in the ITC. The Commission has the authority to appoint a commission investigative (or “Staff”) attorney to “engage in investigatory activities” throughout the investigation. *See* 19 C.F.R. § 210.3. In addition to a complainant and a respondent, Staff is a third “full party to the investigation” that takes discovery and adopts positions, including on disputed issues such as patent infringement and invalidity. ITC FAQs at 2. Because Staff represents the Commission, its positions can influence the ultimate outcome of an investigation.

Furthermore, the ITC moves much more quickly than a district court. An ITC investigation must conclude “at the earliest practicable time.” 19 U.S.C. § 1337(b)(1). In response to that mandate, the ITC endeavors to “complete most investigations *in less than 15 months*.” ITC FAQs at 23 (emphasis added). The pace of an investigation is blistering. Discovery opens immediately after the ITC institutes an investigation, which happens a month or two after a complaint is filed.

Discovery is also voluminous. Parties can serve hundreds of document requests and interrogatories, as well as request depositions. 19 C.F.R. §§ 210.28-32.

Generally, discovery closes within a few months of institution. The ALJ then holds an “evidentiary hearing” that includes evidence presentation, such as witness cross-examination. ITC FAQs at 2. The hearing occurs as soon as five or six months after the investigation begins. *Id.* at 19-20. A few months later, the ALJ issues an initial determination. *Id.* at 2-3; 19 C.F.R. § 210.42. The ITC may adopt, modify, reverse, or decide not to review that determination, which then becomes final. ITC FAQs at 3. If a violation is found, the ITC can issue an order barring the importation of infringing products into the U.S. *Id.* The ITC cannot award damages or cancel any patent claims.

**B. The *Fintiv* factors relating to parallel district court proceedings should not be applied in the ITC context**

The Board originally identified the *Fintiv* factors as applying to parallel district court proceedings, building on its decision in *NHK Spring Co. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 (PTAB Sept. 12, 2018). In *NHK*, the Board exercised its discretion to deny institution because a district court trial was scheduled to occur before the estimated time when the Board would issue its final written decision. *Fintiv*, IPR2020-00019, Paper 11 at 2-3. In *Fintiv*, the Board identified six non-dispositive factors for panels to consider when addressing that particular issue, i.e., whether to deny institution when a trial date in a parallel

district court case is set to occur before the estimated completion of an IPR. *Id.* at 5-6.

The Board in *Fintiv* also suggested in passing that an early ITC trial date “may favor” denial of institution if the ITC will address the same or similar issues as in a requested IPR. *Id.* at 8. Since then, the Board has applied the *Fintiv* factors to parallel ITC investigations. This IPR is one example.

It was error to rely on the *Fintiv* factors to deny Nintendo’s petition. As explained below, nearly every *Fintiv* factor is incompatible with an ITC investigation due to differences between ITC and district court proceedings, which lead to institution denials in nearly every IPR parallel to an ITC investigation. Because of the misalignment between the *Fintiv* factors and ITC investigations, the Board should not apply the *Fintiv* factors to deny institution based on a parallel ITC investigation, both in general and in this IPR specifically.

**1. *Factor 1 (whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted)***

District courts routinely stay cases because of co-pending IPRs, which can allay concerns about inefficiency and duplication of effort. *Fintiv*, IPR2020-00019, Paper 11 at 6. By contrast, the ITC must complete investigations as quickly as possible and therefore almost never grants stays. *See, e.g., Certain Memory Modules and Components Thereof*, Inv. No. 337-TA-1089, Order No. 49 at 2 (“Stays are generally disfavored.”) (USITC Apr. 11, 2019). Thus, unlike with

district court proceedings, where the possibility of a stay in an individual case could favor institution, this factor will rarely, if ever, favor institution of an IPR petition involving a parallel ITC investigation.

**2. Factor 2 (proximity of the court’s trial date to the Board’s projected statutory deadline for a final written decision)**

In recent years, the median time-to-trial for district court cases has been roughly two-and-a-half years. PricewaterhouseCoopers, *2018 Patent Litigation Study*, at 4, <https://www.pwc.com/us/en/forensic-services/publications/assets/2018-pwc-patent-litigation-study.pdf>. District court trials may or may not occur before the Board’s final written decision in a parallel IPR, which is due about 18 months after a petition is filed, depending on the schedule set in any individual district court case. 37 C.F.R. § 42.107(b); 35 U.S.C. § 314(b); 35 U.S.C. § 316(a)(11).

In comparison, ITC hearings will, except in rare circumstances, predate the Board’s final written decision deadline. The ITC targets completing an investigation in under 15 months and schedules its hearing to occur just months after institution. Even if a petitioner files an IPR petition immediately after the ITC institutes an investigation, the ITC hearing will occur before the Board’s final written decision deadline and perhaps even before the Board issues its institution decision. That was the case in this IPR where the ITC hearing occurred before the Board issued its decision, even though Nintendo was diligent in filing

its petition, as the Board itself recognized. Paper 13 at 12, 15. Moreover, the ITC is likely to complete its entire investigation months before the deadline for any IPR final written decision. As such, this factor will nearly always favor denial of a co-pending petition when applied to a parallel ITC investigation.

**3. Factor 3 (investment in the parallel proceeding by the court and the parties)**

Under this factor, the Board compares the amount of work a district court has done, such as by issuing substantive orders (e.g., a claim construction order) with the amount of work the Board has done in an IPR. *Fintiv*, IPR2020-00019, Paper 11 at 9-12. The factor encourages IPR petitioners to file their petitions quickly by favoring denial when a petitioner “waits until the district court trial has progressed significantly before filing a petition.” *Id.* at 11.

This factor does not fit well with an ITC investigation. For district courts, the factor makes sense because, depending on the facts, the court may or may not invest resources more quickly than the Board does in a co-pending IPR. The ITC is different: because of the accelerated schedule, it will always invest more time and resources than the Board will in any IPR filed after ITC institution. By the time the Board issues an institution decision in such an IPR, fact discovery in the ITC may be closed and the ITC hearing may have occurred, as happened in the ITC investigation parallel to this IPR. Paper 13 at 12. Unless an ITC investigation is delayed, this factor will favor denial of institution when applied to a parallel

ITC investigation.

**4. Factor 4 (overlap between issues raised in the petition and in the parallel proceeding)**

This factor concerns overlap between an IPR and “prior art arguments that [a]re at issue in [a parallel] district court” proceeding, which may create “inefficiency and the possibility of conflicting decisions.” IPR2020-00019, Paper 11 at 12. When applied to ITC investigations, however, this factor achieves the opposite of its intended effect. Unlike Board and district court judgments, the ITC’s decisions on patent issues, while persuasive, have no preclusive effect. *Texas Instruments*, 90 F.3d at 1569-70; *see also 3Shape A/S v. Align Tech., Inc.*, IPR2020-00223, Paper 12 at 33-34 (PTAB May 26, 2020); *Samsung Elecs. Co. v. Dynamics Inc.*, IPR2020-00499, Paper 41 at 13 (PTAB Aug. 12, 2020). Thus, ITC proceedings do not and cannot overlap with any co-pending IPR. For instance, even if the ITC decides the ’393 patent’s claims are invalid while evaluating a potential trade violation, Gamevice can still sue in a district court on them, which would require Nintendo to re-litigate the same invalidity issues. That creates costly inefficiency rather than avoiding it.

What is more, the fact that the ITC cannot issue decisions with preclusive effect, while the Board can, renders all *Fintiv* factors moot to an ITC investigation. It does not matter whether the ITC has issued a stay, set a hearing date before the IPR final decision deadline, or performed more work than the



Board because the ITC cannot cancel claims while the Board can do so.

**5. *Factor 5 (whether the petitioner and the defendant in the parallel proceeding are the same party)***

A district court action usually involves just two parties with an interest in the case: a patent holder (usually the plaintiff) and an accused infringer (usually the defendant). Each party has a clear objective: the accused infringer attacks the validity of an asserted patent, while the patent holder defends it.

Here again, the ITC is different. In the ITC investigation relevant to this IPR, as with most others, the ITC appointed a Staff attorney to represent the Commission in the investigation. Staff is wholly independent and does not favor either the complainant or the respondent in an ITC investigation. For example, Staff takes its own positions on patent invalidity, and those positions can affect how the ALJ, and the Commission, decide invalidity issues in the context of a trade dispute. Under these circumstances, this *Fintiv* factor cannot meaningfully be applied to parallel ITC investigations. Because of Staff's role in an ITC investigation, an ITC respondent does not have the same control over invalidity issues as it would in a district court proceeding.

**C. *IPR institution statistics reflect the mismatch between the *Fintiv* factors and ITC investigations***

Real-world data support Nintendo's argument that the *Fintiv* factors are a poor fit for parallel ITC investigations. Recent statistics show that the *Fintiv*

factors, which allow for different outcomes when applied to the specific facts of individual district court cases, nearly universally lead to denial of IPR petitions parallel to ongoing ITC investigations. Since October 1, 2020, the Board has decided 22 IPRs in which a parallel ITC investigation was ongoing at the time of the institution decision. The Board has instituted review in only one of those proceedings. In addition to this IPR, the Board denied institution in IPR2020-01317, IPR2020-01097, IPR2020-01239, IPR2020-01240, IPR2020-00991, IPR2020-00992, IPR2020-01036, IPR2020-00981, IPR2020-00982, IPR2020-00987, IPR2020-00968, IPR2020-00754, IPR2020-00946, IPR2020-00947, IPR2020-00772, IPR2020-00771, IPR2020-00919, IPR2020-00800, IPR2020-00801, and IPR2020-00802.

These skewed results evince that something is innately amiss with applying the *Fintiv* factors to a parallel ITC investigation. As explained above, the *Fintiv* factors were designed to apply to district court cases and do not fit the unique circumstances presented by ITC investigations. Because of this mismatch, the *Fintiv* factors should not be applied to deny Nintendo's petition. Nintendo requests that the Board reconsider and institute review for its petition.

## **VI. CONCLUSION**

For reasons described above, the Board should grant Nintendo's rehearing request.

Dated: February 11, 2021

Respectfully submitted,

PERKINS COIE LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000

          / Tyler R. Bowen /            
Lead Counsel  
Tyler R. Bowen, Reg. No. 60,461

Back-up Counsel  
Grant E. Kinsel, *Pro hac vice*  
Kevin A. Zeck, *Pro hac vice*  
Christian Ruiz, *Pro hac vice*

*Attorneys for Petitioners Nintendo Co., Ltd.  
and Nintendo of America Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2021, true and correct copies of the foregoing REQUEST FOR REHEARING PURSUANT TO 37 C.F.R. § 42.71(D) were served via electronic mail upon the following counsel of record for Petitioner:

Rajeev Gupta  
Joshua L. Goldberg  
Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P.  
901 New York Avenue, N.W.  
Washington, D.C. 20001-4413  
[raj.gupta@finnegan.com](mailto:raj.gupta@finnegan.com)  
[joshua.goldberg@finnegan.com](mailto:joshua.goldberg@finnegan.com)  
[Gamevice-IPR-FH@finnegan.com](mailto:Gamevice-IPR-FH@finnegan.com)

Dated: February 11, 2021

Respectfully submitted,

PERKINS COIE LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000

          / Tyler R. Bowen /            
Lead Counsel  
Tyler R. Bowen, Reg. No. 60,461  
  
Back-up Counsel  
Grant E. Kinsel, *Pro hac vice*  
Kevin A. Zeck, *Pro hac vice*  
Christian Ruiz, *Pro hac vice*

*Attorneys for Petitioners Nintendo Co., Ltd.  
and Nintendo of America Inc.*