

No. ____

In the Supreme Court of the United States

Queen's University at Kingston,

Petitioner,

v.

Samsung Electronics Co., LTD., and Samsung Electronics America, Inc.,

Respondents.

ON APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION
FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S APPLICATION TO EXTEND TIME
TO FILE PETITION FOR A WRIT OF CERTIORARI

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To the Honorable Chief Justice Roberts, as Circuit Justice for the United States
Court of Appeals for the Federal Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, petitioner Queen's University at Kingston respectfully requests that the time to file a Petition for a Writ of Certiorari in this case be extended for 45 days to and including August 9, 2018. The court of appeals issued its opinion on January 10, 2018. *See* App. A, *infra*. The court denied a timely petition for rehearing en banc on March 27, 2018. *See* App. B, *infra*. Absent an extension of time, the petition therefore would be due on June 25, 2018. Petitioners are filing this application at

least ten days before that date. *See* Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review this case.

Background

This case involves the question of whether the Administrative Procedure Act (“APA”) allows the Patent Trial and Appeals Board (the “Board”) to impose judicially created burden shifting to deprive a patent owner of the ability to present rebuttal evidence on an issue on which the party challenging the patent bears the burden of proof.

1. The inventions of the patents at issue were created at a time when user interaction with technological devices, particularly mobile devices, was disruptive and inefficient. The patents disclose specific methods and apparatus for improving the effectiveness of interaction with computers and other devices. These inventions are the product of research by Dr. Roel Vertegaal on Attentive User Interfaces (“AUI”) and device-initiated communications between humans and technology. At the most basic level, the patents employ sensors that detect certain physical signs that a person is paying attention to a device, convert information derived from those sensors into a signal, then use that signal to alter the device’s operations on the basis of the person’s attention. The inventive devices respond to human attention by acting similarly to the way humans would perceive such cues, a significant advance in the art.

2. On July 28, 2015, the Board instituted Inter Partes Review of patents at issue based on the grounds of anticipation by prior art patent application, which never issued as a U.S. Patent, under 35 U.S.C. § 102(e). On July 27, 2016, the Board issued decisions finding the patents invalid as anticipated by that prior art patent application. The Board relied on new evidence in its final written decisions while denying Queen’s University the chance to submit rebuttal evidence.

3. Samsung (the petitioner before the Board) did not identify in its petitions any evidence of enablement of the prior art patent application. In response to the petitions, Queen’s University explained and submitted evidence showing that a key element taught by the prior art reference was not enabled on a cellular phone as required by the claims of the patents at issue. Because the prior art did not enable the claimed invention, it could not anticipate the claimed invention. In response, Samsung changed its theory of anticipation and submitted a 68-page declaration from a new expert, relying on at least 65 other new pieces of evidence. Throughout the proceedings, Queen’s University was denied any opportunity to provide evidence to rebut Samsung’s new evidence—evidence the Board used almost exclusively to support its decision finding the prior art enabled, thus invalidating the patents at issue.

4. Petitioner appealed and the Federal Circuit affirmed without opinion. App. A. Petitioner filed a petition for rehearing en banc. The court of appeals denied the petition. App. B.

Reasons For Granting An Extension Of Time

The time to file a Petition for a Writ of Certiorari should be extended for 45 days to and including August 9, 2018, for several reasons:

1. The forthcoming petition will present important questions regarding the Board's application of burden shifting, the presentation of evidence, and due process in administrative tribunals. For a formal adjudication like an Inter Partes Review, the APA imposes particular requirements on the Board in order to protect patent owners' due process rights. Most important to the present case, the Board must allow "a party . . . *to submit rebuttal evidence* . . . as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d) (emphasis added). The Board, following Federal Circuit precedent, denied Queen's University that right in this case.

2. The Board, Samsung, and the Federal Circuit panel at oral argument justified this result under a judicially created burden shifting framework. That framework is routinely applied by both the Board and the Federal Circuit. Under the patent statute and this Court's precedent, Samsung bore the burden of proving invalidity and therefore enablement of the prior art reference at all times. *See* 35 U.S.C. § 282; *Microsoft Corp. v. I4I Ltd. P'ship*, 564 U.S. 91, 95 (2011). Yet, Queen's University was never provided with any opportunity to rebut any of Samsung's evidence of enablement of the prior art with evidence of its own. This Court's intervention to restore patentees' right to rebut the evidence used to invalidate their patents is sorely needed.

3. Good cause exists for this motion. The drafter of Queen's University's Petition has had significant professional commitments in recent weeks and has such commitments in upcoming weeks. Those commitments—which include filing several briefs in state and federal courts of appeals, as well as numerous dispositive motions in trial courts in addition to arguing at several major hearings in trial courts—would make it extremely difficult to complete the petition without an extension.

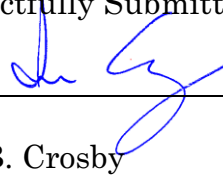
4. No prejudice would arise from the extension. Whether the extension is granted or not, the petition will not be considered until after the Court's summer recess—and will be considered in time to be resolved next Term if the petition is granted.

Conclusion

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended for 45 days to and including August 9, 2018.

Dated: June 12, 2018

Respectfully Submitted,



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