

Nos. 2020-1565, 2020-1567

**United States Court of Appeals for the
Federal Circuit**

CYWEE GROUP LTD.,
Appellant

v.

**GOOGLE LLC, SAMSUNG ELECTRONICS CO., LTD., LG
ELECTRONICS INC., HUAWEI DEVICE USA, INC., HUAWEI DEVICE
CO., LTD., HUAWEI TECHNOLOGIES CO., LTD., HUAWEI DEVICE
(DONGGUAN) CO., LTD., HUAWEI INVESTMENT & HOLDING CO.
LTD, HUAWEI TECH. INVESTMENT CO. LTD., HUAWEI DEVICE
(HONG KONG) CO. LTD.,**
Appellees

**ANDREW HIRSHFELD, PERFORMING THE FUNCTIONS AND DUTIES
OF THE UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL
PROPERTY AND DIRECTOR OF THE UNITED STATES PATENT AND
TRADEMARK OFFICE,**
Intervenor

Appeals from the United States Patent and Trademark Office, Patent Trial and
Appeal Board in Nos. IPR2018-01257, IPR2018-01258

**CYWEE GROUP LTD.'S CORRECTED COMBINED PETITION FOR
REHEARING *EN BANC* AND PANEL REHEARING**

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May 3, 2021

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 2020-1565 and 2020-1567
Short Case Caption CYWEE GROUP LTD. v. GOOGLE LLC
Filing Party/Entity CYWEE GROUP LTD.

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 05/03/2021

Signature: /s/ Jay P. Kesan

Name: Jay P. Kesan

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).	3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. <input checked="" type="checkbox"/> None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. <input type="checkbox"/> None/Not Applicable
CyWee Group Ltd.		Access Universal Investment Limited
		Perfect Max Investment Limited
		Zhou Ye

Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable Additional pages attached

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

None/Not Applicable Additional pages attached

Google LLC v. CyWee Group Ltd., IPR2018-01257 (PTAB)	Google LLC v. CyWee Group LLC IPR2018-01258 (PTAB)	ZTE USA, Inc. v. CyWee Group Ltd., IPR2019-00143 (PTAB)
CyWee Group Ltd. v. Google, Inc., No. 1:18-cv-00571 (D. Del.)	CyWee Group Ltd. v. ZTE Corp., No. 3:17-cv-02130 (S.D. Cal.)	CyWee Group Ltd. v. HTC Corp., No. 2:17-cv-00932 (W.D. Wash.)
CyWee Group Ltd. v. Motorola Mobility LLC, No. 1:17-cv-00780 (D. Del.)	CyWee Group Ltd. v. LG Electronics, Inc., No. 3:17-cv-01102 (S.D. Cal.)	CyWee Group Ltd. v. Samsung Electronics Co. Ltd., No. 2:17-cv-00140

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable Additional pages attached

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**STATEMENT OF COUNSEL PURSUANT TO
FEDERAL CIRCUIT RULE 35(b)**

Based on my professional judgment, I believe this appeal requires an answer to the following precedent-setting questions of exceptional importance:

1. Whether the panel decision holding that all post-institution discovery rulings related to real-parties-in-interest issues are unreviewable upon appeal should be allowed to stand.
2. Whether that panel decision should be allowed to stand when it sanctions arbitrary and capricious decision making by the Patent Trial and Appeal Board in direct contravention of the rules that the Board established to be relied upon by petitioners and patent owners for post-institution discovery related to real-parties-in-interest issues.

Based on my professional judgment, I believe the panel decision is contrary to the following decisions of the Supreme Court of the United States and precedents in this Court: *Cuozzo Speed Tech., LLC v. Lee*, 136 S. Ct. 2131 (2016); *Thryv, Inc v. Click-To-Call Techs., LP*, 140 S. Ct. 1367 (2020); *ESIP Series 2, LLC v. Puzhen Life USA, LLC*, 958 F.3d 1378 (Fed. Cir. 2020); and *Facebook, Inc. v. Windy City Innovations, LLC*, 973 F.3d 1321 (Fed. Cir. 2021).

Dated: May 3, 2021

/s/ Jay P. Kesan
Jay P. Kesan

ATTORNEY OF RECORD FOR APPELLANT

**I. INTRODUCTION AND POINTS OF LAW OR FACT
OVERLOOKED OR MISAPPREHENDED BY THE PANEL**

The panel's decision in this appeal renders all post-institution discovery rulings related to disclosure of the real-parties-in-interest (RPI) in an IPR proceeding unreviewable upon appeal.

In the PTAB proceedings, Appellant CyWee presented and sought evidence through discovery related to the real-parties-in-interest only after institution. BB 35-36. The USPTO, as Intervenor, agreed that "CyWee only raised the real-parties-in-interest arguments ... after the Board's institution decisions." GB 4-5.

This panel, citing *ESIP Series 2, LLC v. Pushed Life USA, LLC*, 958 F.3d 1378, 1386 (Fed. Cir. 2020), concluded that it is precluded from reviewing a challenge regarding whether Appellee Google met its real-party-in-interest disclosure obligations imposed by § 312(a)(2). The panel noted that the Board's denial of CyWee's post-institution motion to terminate the proceedings, in view of newly discovered evidence, was "nothing more than a request for the Board to reconsider its institution decision. The Board's decision on such a request is 'final and nonappealable' under § 314(d)." Opinion, Doc. 96, at 4. (citations omitted).

This panel decision contradicts the Supreme Court's analysis of the role and requirements of the Petition under § 312 in an IPR proceeding. The Supreme Court has clearly held that § 312 establishes not only requirements that must be met to obtain institution, but also claims and elements to be proven by petitioner at trial

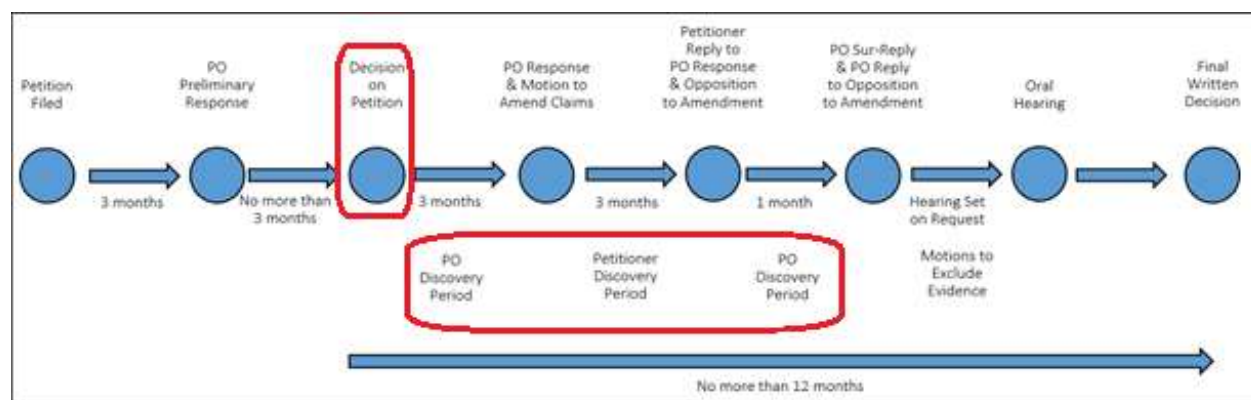
after institution. Discovery is a post-institution process much like the joinder provision under the current PTAB rules which has been found to be reviewable upon appeal. Consequently, discovery that is related to ensuring compliance with the RPI disclosure requirement does not fall within the prohibition of § 314(d) and should be reviewable upon appeal.

Accordingly, rehearing is warranted to correct the panel’s misapplication of controlling Supreme Court precedent. Appellant respectfully requests that the panel or the full Court *en banc* review the panel opinion.

II. ARGUMENT

A. The Panel Decision Cannot Stand Because, In An IPR Proceeding, Discovery Is Entirely Unrelated To Institution, Based On The Timelines and Procedures Set Forth By The PTAB

The PTAB Consolidated Trial Practice Guide sets forth the following timeline for an IPR:



PTAB, Consolidated Trial Practice Guide, p. 7 (emphasis added). In the timeline shown above, all discovery by the Patent Owner and Petitioner commences only *after* the institution decision in an IPR.

It is now well-established by the Supreme Court and this Court that the institution decision based on the petition standards of § 312 is “final and nonappealable” under § 314(d). This Court has, however, drawn a bright line between challenges to IPR institution and the manner in which review proceeds *once the IPR is instituted*. *Facebook, Inc. v. Windy City Innovations, LLC*, 973 F.3d 1321, 1331 (Fed. Cir. 2020). In so doing, the Court relied on and cited to the same bright line drawn by the Supreme Court in distinguishing and reaffirming the validity of its precedent regarding the conduct of IPR proceedings. *Id.* (discussing and applying *Thryv, Inc. v. Click-to-Call Technologies, LP*, 140 S. Ct. 1367, 1376 (2020).)

In *Facebook*, the Court, following *Thryv*, found that the Board’s post-institution decision to allow joinder was reviewable. *Id.* at 1332. Like the joinder decision which occurs after institution, discovery issues are also raised after institution, and the same logic that permits appellate review of joinder decisions should apply to discovery rulings.

The panel, however, concludes that since the RPI disclosure issue is related to the statutory provision in § 312(a)(2), discovery decisions related to RPI are unreviewable on appeal, even if they occur post-institution. This decision contradicts

the Supreme Court’s analysis of the role and requirements of § 312 in an IPR proceeding. The Supreme Court clearly held that § 312 establishes not only requirements that must be met to obtain institution, but also claims and elements to be proven by petitioner at trial *after institution*. *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (stating that “[t]he statutory provisions before us deliver unmistakable commands. The statute hinges inter partes review on the filing of a petition challenging specific patent claims; it makes the petition the centerpiece of the proceeding *both before and after institution*.”) (emphasis added).

Consequently, the Supreme Court’s mandate establishes that the RPI disclosure requirements of § 312(a)(2) are dispositive even after institution, such as in the discovery phase in an IPR. Post-institution compliance with this statutory provision, as determined through discovery, is entirely unrelated to the institution decision and, therefore, does not fall within the prohibition of § 314(d), as outlined in *Cuozzo* and *Thryv*. *Cuozzo Speed Tech., LLC v. Lee*, 136 S. Ct. 2131 (2016); *Thryv, Inc v. Click-To-Call Techs., LP*, 140 S. Ct. 1367 (2020). It follows that post-institution RPI-related discovery should be reviewable upon appeal.

B. The Panel Decision Promotes Arbitrary and Capricious Decision Making By the Board On RPI Issues And Sets A Poor Policy Course

The Supreme Court in *Cuozzo* noted that reviewing courts may set aside agency action that is arbitrary and capricious. *Cuozzo*, 136 S. Ct. at 1240-1241. The Board’s decisions on RPI issues are nothing short of arbitrary and capricious.

While the IPR that is the subject of this appeal was proceeding below, the Board designated as precedential an opinion that set out the parameters of procedures that all panels were required to follow from that point forward regarding RPI issues raised after institution. *See Ventex Co., Ltd. v. Columbia Sportswear N.A., Inc.*, IPR2017-00651, Paper 152 (PTAB Jan. 24, 2019). Those procedures include allowing discovery after institution and extending the deadline for the final written decision to allow discovery to take place. *Id.* at 2, 14. The Board then followed the procedures it established in a post-*Thryv* decision regarding the issue of RPI raised post institution. *See RPX Corp. v. Applications in Internet Time, LLC*, IPR2015-01750, -01751, -01752, Paper 128 (PTAB Oct. 2, 2020).

Ventex and *AIT* represent the “law of the land” at the PTAB as to what petitioners and patent owners alike are to expect regarding the treatment of RPI issues. Notably, just like the case at bar, both of those decisions involved discovery that was allowed after institution. However, in this case, the Board did not follow the precedential procedures it established in *Ventex* and *AIT*.

In this case, after denying CyWee discovery from Google, the Board granted discovery from ZTE in a related IPR against the same ’438 Patent, one of two patents that are at issue in this appeal, when there was no principled reason not to allow the same discovery from Google. The Board should be required to follow its own post-institution rules and practices and treat CyWee in the same manner as other like-

situated parties. The importance of reviewing post-institution, RPI-related decisions is further underscored by the fact that the Board has subsequently reconsidered its position on RPI issues when it terminated the IPRs on remand from this Court in *Applications in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336 (Fed. Cir. 2018) . See Final Decision on Remand Terminating Institution 35 U.S.C. §§ 314, 315, RPX Corp. v. Applications in Internet Time, LLC, IPR2015-01750, Paper 128, -01751, Paper 128, -01752, Paper 126 (PTAB Oct. 2, 2020). In the absence of appellate review of these post-institution Board decisions related to RPIs, the requirement to disclose RPIs in an IPR will be rendered into a nullity.

As a policy matter, the panel decision insulates petitioners from any repercussions for not disclosing RPIs in an IPR proceeding. In fact, this panel decision creates a strong disincentive for petitioners to disclose any RPIs, without concern for any consequence arising from their conduct.

The net result is the panel decision makes intentional non-disclosures of RPIs – a fraud upon both the PTAB and the Patent Owner -- unreviewable, unchallengable, and available without risk of any consequences. If the panel decision is allowed to stand as a precedent, it is unimaginable how the Board will be able to police and Patent Owners protect themselves against the “shenanigans” that the Supreme Court has expressly stated are to remain subject to judicial oversight. *Cuozzo*, 136 S. Ct. at 2141-2142.

III. CONCLUSION

For the foregoing reasons, panel rehearing and/or rehearing *en banc* is necessary and appropriate to address points of fact and law overlooked or misapprehended by the panel, to answer the precedent-setting questions of exceptional importance regarding the appellate review of the Board's post-institution, discovery decisions when Appellant sought to ensure compliance with the RPI disclosure requirements in an IPR.

May 3, 2021

Respectfully submitted,

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ADDENDUM

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

CYWEE GROUP LTD.,
Appellant

v.

**GOOGLE LLC, SAMSUNG ELECTRONICS CO.,
LTD., LG ELECTRONICS INC., HUAWEI DEVICE
USA, INC., HUAWEI DEVICE CO., LTD., HUAWEI
TECHNOLOGIES CO., LTD., HUAWEI DEVICE
(DONGGUAN) CO., LTD., HUAWEI INVESTMENT &
HOLDING CO. LTD, HUAWEI TECH. INVESTMENT
CO. LTD., HUAWEI DEVICE (HONG KONG) CO.
LTD.,**
Appellees

**ANDREW HIRSHFELD, PERFORMING THE
FUNCTIONS AND DUTIES OF THE UNDER
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OFFICE,**
Intervenor

2020-1565, 2020-1567

Appeals from the United States Patent and Trademark
Office, Patent Trial and Appeal Board in Nos. IPR2018-
01257, IPR2018-01258.

Decided: March 16, 2021

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KRAUSE, FARHEENA YASMEEN RASHEED, MEREDITH HOPE
SCHOENFELD.

Before PROST, *Chief Judge*, TARANTO and CHEN, *Circuit
Judges*.

PROST, *Chief Judge*.

Google LLC (“Google”) petitioned for inter partes review (“IPR”) of claims 1 and 3–5 of U.S. Patent No. 8,441,438 (“the ’438 patent”) and claims 10 and 12 of U.S. Patent No. 8,552,978 (“the ’978 patent”), asserting that the challenged claims are unpatentable as obvious. Each of Google’s prior art combinations relied on Bachmann.¹ The Patent Trial and Appeal Board (“Board”) instituted IPR and agreed with Google that the challenged claims would have been obvious. *Google LLC v. CyWee Grp. Ltd.*, No. IPR2018–01257, Paper 87 (P.T.A.B. Jan. 9, 2020) (“’978 Decision”); *Google LLC v. CyWee Grp. Ltd.*, No. IPR2018–01258, Paper 86 (P.T.A.B. Jan. 9, 2020) (“’438 Decision”). CyWee Group Ltd. (“CyWee”) appeals.

We have jurisdiction under 28 U.S.C. § 1295(a)(4)(A). We affirm.

DISCUSSION

CyWee raises three challenges on appeal. First, CyWee argues that the Board erred in concluding that Google disclosed all real parties in interest as required by 35 U.S.C. § 312(a)(2). Second, CyWee contends that the IPR proceedings should be terminated because all the rulings were made by administrative patent judges (“APJs”) who were unconstitutionally appointed in violation of the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2. And third, CyWee argues that the Board erred in concluding

¹ U.S. Patent No. 7,089,148.

that Bachmann is analogous prior art with respect to the challenged patents. We address these arguments in turn.

I

First, CyWee contends that the Board erred in concluding that Google met the real-party-in-interest disclosure obligations of § 312(a)(2).

We are precluded from reviewing this challenge. In *ESIP Series 2, LLC v. Puzhen Life USA, LLC*, 958 F.3d 1378, 1386 (Fed. Cir. 2020), we concluded that “the Board’s § 312(a)(2) real-party-in-interest determination is final and non-appealable” under 35 U.S.C. § 314(d) because it “raises an ordinary dispute about the application of an institution-related statute.” *Id.* (internal quotation marks omitted); see also *Thryv, Inc. v. Click-to-Call Techs., LP*, 140 S. Ct. 1367, 1373–74 (2020); *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2139 (2016).

CyWee attempts to distinguish this case from *ESIP* on the basis that here, CyWee does not specifically challenge the Board’s decision on institution but rather the Board’s denial of CyWee’s post-institution motion to terminate the proceedings in view of newly discovered evidence. But that motion amounted to nothing more than a request for the Board to reconsider its institution decision. The Board’s decision on such a request is “final and nonappealable” under § 314(d). See, e.g., *Medtronic, Inc. v. Robert Bosch Healthcare Sys., Inc.*, 839 F.3d 1382, 1384–85 (Fed. Cir. 2016); *GTNX, Inc. v. INTTRA, Inc.*, 789 F.3d 1309, 1312 (Fed. Cir. 2015).

CyWee also argues that the Board erroneously denied CyWee additional discovery, but the additional discovery CyWee seeks relates solely to whether Google met its obligations under § 312(a)(2). CyWee makes no argument for reviewability of the Board’s discovery ruling if the Board’s ruling that Google met its § 312(a)(2) burden is unreviewable. Under these circumstances, CyWee’s challenge to the

Board's discovery ruling is a subcomponent of its broader challenge to the Board's § 312(a)(2) determination and is therefore similarly unreviewable.

II

Next, CyWee argues that we should terminate and dismiss the IPR proceedings with prejudice because the APJs who handled the IPR were appointed in violation of the Appointments Clause.

Because the APJs were constitutionally appointed as of the date this court issued *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), and because *Arthrex* issued before the final written decisions in this case, those decisions were not rendered by unconstitutional panels. See, e.g., *Caterpillar Paving Prods. Inc. v. Wirtgen Am., Inc.*, 957 F.3d 1342, 1342–43 (Fed. Cir. 2020); *Document Sec. Sys., Inc. v. Nichia Corp.*, 813 F. App'x 599, 600 (Fed. Cir. 2020); see also *Arthrex*, 941 F.3d at 1340 (explaining that its holding extended to “cases where final written decisions were issued”). We therefore reject CyWee's Appointments Clause challenge.

III

Finally, CyWee contends that substantial evidence does not support the Board's conclusion that Bachmann is analogous art with respect to the '978 and '438 patents. We disagree.

The Board's conclusion stems from two key findings, both of which are supported by substantial evidence. First, the Board determined that “improving error compensation with an enhanced comparison method” was of “central importance” to the inventors. *'978 Decision*, at 58; *'438 Decision*, at 29. This finding is supported by substantial evidence, including the patents' specifications, CyWee's own characterization of the patents, and expert testimony. See, e.g., *'978 Decision*, at 56–58; *'438 Decision*, at 28–29. Second, the Board found that Bachmann was reasonably

pertinent to this problem, as Bachmann “illustrates collection of data from the same kinds of sensors” and “correct[s] for the same kinds of errors that were of concern to the inventor[s].” *'978 Decision*, at 59; *'438 Decision*, at 31. This finding is also supported by substantial evidence. *See, e.g., '978 Decision*, at 59–60; *'438 Decision*, at 31. Accordingly, substantial evidence supports the Board’s conclusion that Bachmann is analogous art as it is “reasonably pertinent to the particular problem with which the inventor is involved.” *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004).

CyWee counters that the Board’s determination is inconsistent with its finding that the “field of 3D Pointing Devices presents distinct problems that technology such as that disclosed in [Bachmann] cannot address.” Appellant’s Br. 64–65 (quoting *'978 Decision*, at 54–55). But the Board made no such finding. Rather, the Board acknowledged that CyWee contended as much; the Board did not opine on whether that contention was correct. *'978 Decision*, at 54–55; *'438 Decision*, at 26. In any event, a reference need not be reasonably pertinent to every problem facing a field to be analogous prior art, but rather need only be “reasonably pertinent to one or more of the particular problems to which the claimed inventions relate.” *Donner Tech., LLC v. Pro Stage Gear, LLC*, 979 F.3d 1353, 1361 (Fed. Cir. 2020).

CyWee also argues that Bachmann “does not even address . . . the [essential] problem of ‘mapping’ the orientation and movement of the 3D pointing device to a movement pattern on a 2D display.” Appellant’s Br. 72. But, as just stated, a reference need only be reasonably pertinent to “one or more of the particular problems to which the inventions relate,” not to each and every problem facing the inventors. *See Donner*, 979 F.3d at 1359, 1361. Even if mapping is a “part of the relevant problem with which the inventors were involved,” substantial evidence supports the Board’s analogous art determination that error compensation was of “central importance” to the inventors,

and that Bachmann—which relates to error compensation—therefore “logically would have commended itself to the inventor’s attention.” See *'978 Decision*, at 59; *'438 Decision*, at 31. In fact, the Board went so far as to say that even if mapping was a part of the relevant problem, it was at most “a relatively *minor* part” of that problem. See *'978 Decision*, at 59; see also *'438 Decision*, at 30–31 (explaining that “mapping is not an essential part of the problem with which the inventors were involved”).

Furthermore, CyWee identifies a number of purported differences between Bachmann and the challenged patents in an attempt to undermine the Board’s analogous art determination. But “a reference can be analogous art with respect to a patent even if there are significant differences between the two references.” *Donner*, 979 F.3d at 1361. “Indeed, there will frequently be significant differences between a patent and a reference from a different field of endeavor.” *Id.* What matters is whether these differences support a determination that the reference is not reasonably pertinent to a problem to which the claimed inventions relate. *Id.* We have considered CyWee’s arguments, and none of them disturbs our determination that substantial evidence supports the Board’s conclusion that Bachmann is analogous art with respect to the challenged patents.

CONCLUSION

We have considered CyWee’s remaining arguments but find them unpersuasive. For the foregoing reasons, we affirm the Board’s determination that the challenged claims would have been obvious.

AFFIRMED

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 2020-1565, 2020-1567

Short Case Caption: CyWee Group Ltd. v. Google LLC

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Date: 05/03/2021

Signature: /s/ Jay P. Kesan

Name: Jay P. Kesan