

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NETFLIX, INC.,
Petitioner,

v.

AFFINITY LABS OF TEXAS, LLC,
Patent Owner.

Case IPR2016-01701
Patent 9,094,802 B2

Before KEVIN F. TURNER, LYNNE E. PETTIGREW,
and JON B. TORNQUIST, *Administrative Patent Judges*.

TORNQUIST, *Administrative Patent Judge*.

DECISION
Denying Petitioner's Request for Rehearing
37 C.F.R. § 42.71(d)

I. INTRODUCTION

On March 2, 2017, we instituted *inter partes* review of claims 1, 3–5, 9, 11, 13–18, and 20 of U.S. Patent No. 9,094,802 B2 (“the ’802 patent”). Paper 9 (“Inst. Dec.” or “Institution Decision”). We did not, however, institute review with respect to claim 10 of the ’802 patent. *Id.* at 16–17. Netflix, Inc. (“Petitioner”) now requests rehearing of our decision declining to institute review of claim 10. Paper 11 (Req. Reh’g or Rehearing Request).

II. STANDARD OF REVIEW

A party who requests rehearing bears the burden of showing that a decision should be modified. 37 C.F.R. § 42.71(d). The moving party must identify all matters the party believes we misapprehended or overlooked, and the place where each matter was addressed previously in a motion, an opposition, or a reply. *Id.*

III. ANALYSIS

Independent claim 9 of the ’802 patent requires, *inter alia*, “sending a message comprising a plurality of network locations for different segments of the available media.” Ex. 1001, 19:26–27. Claim 10 depends from claim 9 and further requires “wherein the available media is a video.” *Id.* at 19:34–36.

In the Institution Decision, we determined that Petitioner demonstrated sufficiently that Treyz discloses providing a user with a message comprising a plurality of network locations for different *audio* segments of an available media. Inst. Dec. 12, 14 n.6, 15–16. With respect to claim 10, however, we determined that Petitioner had not demonstrated sufficiently that Treyz or Fuller disclose providing a user with a message

comprising a plurality of network locations for different segments of “a video.” *Id.* at 16–17.

In its Rehearing Request, Petitioner contends we erred in declining to institute on claim 10 because: (1) having instituted on claim 9, “no issue remains as to whether Petitioner has shown that Treyz, Fuller, and Glaser disclose the ‘plurality of network locations for different segments’ limitation”; and (2) Petitioner showed in its analysis of claim 4, review of which was instituted by the Board, that Treyz and Fuller disclose a “plurality of network locations for different segments” of “a video.” Req. Reh’g 3, 7. We address these arguments in turn.

a plurality of network locations for different segments

In the Institution Decision, we determined that Petitioner explained sufficiently where Treyz discloses providing a message comprising a plurality of network locations for different segments of audio content, including Internet radio stations. Inst. Dec. 8, 12, 16. According to Petitioner, because we instituted review of claim 9 no issue remains as to whether Petitioner has shown that Treyz, Fuller, and Glaser disclose the “plurality of network locations for different segments of an available media” limitation of claim 9. Therefore, no “further analysis into Petitioner’s reliance on claim 4” is necessary with respect to claim 10. Req. Reh’g 3–6. We disagree.

As noted above, claim 10 depends from claim 9 and recites the “method of claim 10” wherein “the available media is a video.” Substituting the terms “a video” or “the video” for “an available media” and “the available media” in claim 9, it is evident that dependent claim 10 requires a message comprising “a plurality of network locations for different

segments” of “the video.” To demonstrate that this limitation is taught or suggested in Treyz and Fuller, it is not enough to identify where Treyz discloses a plurality of network locations for different segments of *audio*, such as songs or Internet radio stations on a playlist. Thus, we do not find Petitioner’s argument persuasive.

a video

As noted above, Petitioner also contends that in declining to institute review of claim 10 we misapprehended that claim 4—review of which was instituted based on Treyz and Fuller—“contains the same limitations” that we concluded were not disclosed in the claim 10 analysis. Req. Reh’g 3, 6–7; Inst. Dec. 12–13. We disagree.

As we noted in footnote six of the Institution Decision, claim 1 requires a list containing “an address” for each of the plurality of independent segment files, but does not require that the address for each of these segment files be different. Dec. Inst. 14 n.6; Ex. 1001, 19:12–13. In contrast, claim 9 requires a message containing a “plurality of network locations for different segment files,” i.e., at least two different network locations. *Id.* at 19:26–27. Thus, claims 4 and 10 do not contain “the same limitations.”

In instituting review of claim 4 over Treyz and Fuller, we determined that Petitioner demonstrated sufficiently that *Fuller* may format a video file into segments and that a list provided to a user would contain “an address,” albeit the same address, for each of these segment files. Inst. Dec. 13–14 n.6. We did not, however, determine that Petitioner had demonstrated sufficiently that either Treyz or Fuller discloses providing a list or message comprising “different” addresses for segments of “a video.” Nor does

Petitioner provide a cogent argument in the Petition explaining where either Treyz, Fuller, or Glaser disclose this limitation. *See* Pet. 23, 37. The analysis provided for claim 4 merely indicates that the Treyz device may output video on a display, without analyzing where Treyz discloses providing multiple addresses for “a video” to a user. *Id.* at 28. Thus, we are not persuaded that our institution decision with respect to claim 4 is inconsistent with our determination that Petitioner had not demonstrated sufficiently that the subject matter of claim 10 is disclosed in Treyz, Fuller, or Glaser.

In view of the foregoing, we deny Petitioner’s Request for Rehearing.

IV. IPR2017-00122

In IPR2017-00122, Petitioner requested institution of *inter partes* review with respect to related U.S. Patent No. 9,444,868 B2 (“the ’868 patent”). *See Netflix, Inc. v. Affinity Labs of Texas, Inc.*, IPR2017-00122, Paper 1, 1. The petition submitted in IPR2017-00122 provides additional explanations as to where Petitioner contends Treyz discloses providing different Internet addresses for segments of “a video.” We may not, however, rely upon Petitioner’s arguments and supporting citations provided in a later-filed proceeding to support or supplement Petitioner’s arguments in this proceeding. *See* 37 C.F.R. § 42.6(a)(3) (noting that “[a]rguments must not be incorporated by reference from one document into another document”).

V. ORDER

It is hereby

ORDERED that Petitioner’s Request for Rehearing is *denied*.

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