

WILLKIE FARR & GALLAGHER LLP
2029 CENTURY PARK EAST, SUITE 3400
LOS ANGELES, CA 90067
310.855.3000

**WILLKIE FARR &
GALLAGHER LLP**
Barrington Dyer (SBN 264762)
BDyer@willkie.com
Koren L. Bell (SBN 268614)
KBell@willkie.com
2029 Century Park East, Suite 3400
Los Angeles, CA 90067
Telephone: (310) 855-3000

*[Attorneys/Law Firms Continued
on Next Page]*

Indranil Mukerji (*pro hac vice*)
IMukerji@willkie.com
Stephen Marshall (*pro hac vice*)
SMarshall@willkie.com
Aliza George Carrano (*pro hac vice*)
ACarrano@willkie.com
John Christopher Moulder (*pro hac vice*)
CMoulder@willkie.com
1875 K Street, N.W.
Washington, DC 20006-1238
Telephone: (202) 303-1198

Devon W. Edwards (*pro hac vice*)
DEdwards@willkie.com
Eric L. Saunders (*pro hac vice*)
ESaunders@willkie.com
787 Seventh Avenue
New York, NY 10019-6099
Telephone: (212) 728-8000

Attorneys for Defendant
NETFLIX, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

GOTV STREAMING, LLC,

Plaintiff,

v.

NETFLIX, INC.,

Defendant.

Case No. 2:22-cv-07556-RGK-SHK

Hon. R. Gary Klausner
Courtroom 850 – Roybal

**MEMORANDUM IN OPPOSITION
TO GOTV STREAMING, LLC’S
MOTION FOR JUDGMENT AS A
MATTER OF LAW**

Date: November 27, 2023
Time: 9:00 am
Crtrm: 850

FAC Filed: November 10, 2022
Trial Date: October 17, 2023

Netflix v. GoTV
IPR2023-00758
Netflix Ex. 1024

1 *[Attorneys/Law Firms Continued]*

2 **WILMER CUTLER PICKERING HALE**
3 **AND DORR LLP**

4 Thomas G. Saunders (*pro hac vice*)
5 thomas.saunders@wilmerhale.com
6 2100 Pennsylvania Avenue NW
7 Washington, DC 20037
8 Telephone: (202) 663-6536

9 **WILMER CUTLER PICKERING HALE**
10 **AND DORR LLP**

11 Lauren E. Matlock-Colangelo (*pro hac vice*)
12 lauren.matlock-colangelo@wilmerhale.com
13 7 World Trade Center
14 250 Greenwich Street
15 New York, NY 10007
16 Telephone: (212) 295-6566

17 Attorneys for Defendant
18 NETFLIX, INC.
19
20
21
22
23
24
25
26
27
28

Table of Contents

I.	INTRODUCTION	1
II.	LEGAL STANDARD	1
III.	ARGUMENT	2
A.	The Court Declined To Submit the Issue of Patent Ownership to the Jury	2
B.	The Court Declined To Submit the Issue of Invalidity to the Jury	2
C.	GoTV Is Not Entitled to JMOL of Non-Infringement of Claim 16 of the '245 Patent	3
IV.	CONCLUSION	6

Table of Authorities

Page(s)

Cases

<i>Acco Brands, Inc. v. ABA Locks Mfrs.</i> , 501 F.3d 1307 (Fed. Cir. 2007).....	5
<i>Cuozzo Speed Techs., LLC v. Lee</i> , 579 U.S. 261 (2016)	3
<i>CyberSource Corp. v. Retail Decisions, Inc.</i> , 654 F.3d 1366 (Fed. Cir. 2011).....	6
<i>Finjan, Inc. v. Secure Computing Corp.</i> , 626 F.3d 1197 (Fed. Cir. 2010).....	4
<i>Mirror Worlds, LLC v. Apple Inc.</i> , 692 F.3d 1351 (Fed. Cir. 2012).....	5
<i>MobileMedia Ideas LLC v. Apple Inc.</i> , 780 F.3d 1159 (Fed. Cir. 2015).....	4
<i>Novartis AG v. Noven Pharms., Inc.</i> , 853 F.3d 1289 (Fed. Cir. 2017).....	3
<i>Juhnke v. EIG Corp.</i> , 444 F.2d 1323 (9th Cir. 1971).....	2
<i>United California Bank v. THC Financial Corp.</i> , 557 F.2d 1351 (9th Cir. 1977).....	2
<i>White v. Ford Motor Co.</i> , 312 F.3d 998 (9th Cir. 2002).....	1

Statutes and Rules

Fed. R. Civ. P. 50(a)(1).....	1
35 U.S.C. § 101	2
35 U.S.C. § 103	2, 3
35 U.S.C. § 271(a).....	4

Treatises

9B Wright & Miller,
Federal Practice and Procedure § 2535 (3d ed. 2023) 1

Inter Partes Reviews

Netflix, Inc. v. GoTV Streaming, LLC, IPR2023-00757 (PTAB) 2
Netflix, Inc. v. GoTV Streaming, LLC, IPR2023-00758 (PTAB) 2

I. INTRODUCTION

Netflix, Inc. partially opposes GoTV Streaming, LLC’s motion for judgment as a matter of law under Rule 50(a). The Court already decided that it would not submit the issues of ownership and invalidity under 35 U.S.C. § 103 to the jury, and, in the interest of streamlining the disputes between the parties, Netflix does not oppose granting JMOL to GoTV on those two issues. However, GoTV is not entitled to JMOL of infringement of claim 16 of the ’245 patent. Contrary to GoTV’s argument, the ’245 patent presented distinct issues from infringement of the ’715 patent, and Netflix did not concede that the differences between the two patents were immaterial. GoTV’s sole theory of direct infringement on the ’245 patent at trial relied on alleged internal testing by Netflix, and GoTV bore the burden of proving that during such testing, Netflix made or used in the United States a non-transitory computer usable medium with all of the instructions required for a wireless device to execute the claimed steps. But GoTV’s evidence of allegedly infringing testing was vague and incomplete, and GoTV comes nowhere close to showing that the jury was compelled to accept that evidence as proof of infringement. Indeed, for the reasons explained in Netflix’s Rule 50(a) motion, (Dkt. No. 389-1 at 3-5), no rational jury could have relied on GoTV’s evidence to find infringement of the ’245 patent.

II. LEGAL STANDARD

Judgment as a matter of law may be granted where “the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury.” *White v. Ford Motor Co.*, 312 F.3d 998, 1010 (9th Cir. 2002). “[C]ourts often caution that granting a judgment as a matter of law for the party bearing the burden of proof is reserved for extreme cases.” 9B Wright & Miller, *Federal Practice and Procedure* § 2535 (3d ed. 2023). “A directed verdict for the plaintiff presents an exceptional case and is sustainable only if the evidence ‘was such that the court could say that as a matter

1 of law the evidence was capable of only one interpretation and that in favor of
2 liability.” *United California Bank v. THC Financial Corp.*, 557 F.2d 1351, 1356
3 (9th Cir. 1977) (quoting *Juhnke v. EIG Corp.*, 444 F.2d 1323, 1325 (9th Cir. 1971)).

4 **III. ARGUMENT**

5 **A. The Court Declined To Submit the Issue of Patent Ownership to** 6 **the Jury**

7 The Court declined to submit the issue of patent ownership to the jury and
8 stated its intention to rule, as a matter of law, that GoTV Streaming, LLC owns the
9 ’715 and ’245 patents. (Dkt. 404-1 at 3 (Day 3 AM Tr. 57:7-9) (“I can tell you the
10 Court is going to find, as a matter of law, that the issue of ownership is there.”);
11 Ex. A, Day 3 PM Tr. 62:22 (instructing jury “Ownership is not at issue.”).) In the
12 interest of streamlining the disputes between the parties, Netflix does not oppose
13 this ruling on ownership. Specifically, the trial record shows that assignments of
14 the ’715 and ’245 patents to GoTV Streaming, LCC were recorded in the Patent
15 and Trademark Office on October 14, 2022. (Dkt. 404-6 at 2-5 (Tx. 317).)

16 **B. The Court Declined To Submit the Issue of Invalidity to the Jury**

17 The Court also declined to submit the issue of invalidity to the jury. Before
18 trial, the Court ruled against Netflix’s argument under 35 U.S.C. § 101 as a matter
19 of law. (Dkt. 355 at 2 (“The Court’s denial of Netflix’s Motion (Dkt. No. 109)
20 constitutes the Court’s judgment as a matter of law that the claims of the Asserted
21 Patents are not invalid under 35 U.S.C. § 101 and conclusively resolves Section
22 101 issues for purposes of this case.”); Dkt. 109 at 2-7.) At trial, each party was
23 allocated no more than four hours to present its case. (Day 1 Tr. 7:13-17.) Netflix
24 did not present invalidity arguments under 35 U.S.C. § 103 to the jury in light of
25 those time constraints and the pendency of Netflix’s petitions for *inter partes*
26 review. (Ex. B, Day 2 Tr. 213:20-25; Ex. A, Day 3 PM Tr. 34:9-11; Ex. C, *Netflix,*
27 *Inc. v. GoTV Streaming, LLC*, IPR2023-00757, Paper 2 (PTAB) (’715 patent); Ex.
28 *D, Netflix, Inc. v. GoTV Streaming, LLC*, IPR2023-00758, Paper 2 (PTAB) (’245

1 patent).) The Court therefore stated on the final day of trial that it would not submit
2 the issue of invalidity to the jury. (Dkt. 404-1 at 3 (Day 3 AM Tr. 57:7) (“Validity
3 is not going to be there.”); Ex. A, Day 3 PM Tr. 62:22-23 (instructing jury “Validity
4 is not at issue.”).)

5 The pretrial conference order listed invalidity under 35 U.S.C. § 103 as an
6 issue to be tried. (Dkt. 253-1 at 50-53). Accordingly, just as Netflix is entitled to
7 JMOL on the six patent claims at issue in the pretrial conference order that GoTV
8 failed to pursue at trial, (*see* Dkt. 389-1 at 7), Netflix concedes that GoTV is entitled
9 to JMOL of no invalidity under 35 U.S.C. § 103.¹

10 **C. GoTV Is Not Entitled to JMOL of Non-Infringement of Claim 16**
11 **of the ’245 Patent**

12 GoTV’s motion seeks JMOL of infringement of the ’245 patent based largely
13 on the jury’s separate finding with respect to the ’715 patent. (Dkt. 403 at 5). But
14 contrary to GoTV’s assertions, the infringement analyses for the ’715 and ’245
15 patents presented distinct issues and cannot be collapsed into a single inquiry.
16 Critically, this Court granted summary judgment of non-infringement of the ’245
17 patent in connection with customer mobile devices. (Dkt. 249 at 14.) At trial,
18 GoTV was therefore required to prove infringement of the ’245 patent based on
19 Netflix’s own internal testing, not the transmissions to customers that formed the
20 basis of its theory with respect to the ’715 patent. In addition, GoTV had to meet
21 additional elements not present in claim 4 of the ’715 patent. The jury’s finding
22 that GoTV did not meet this burden is supported by substantial evidence for at least
23 five reasons.

24 _____
25 ¹ Granting GoTV JMOL of no invalidity under 35 U.S.C. § 103 does not preclude
26 Netflix from continuing to seek to have the same claims declared unpatentable in
27 the IPRs. *See Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 282-83 (2016);
28 *Novartis AG v. Noven Pharms., Inc.*, 853 F.3d 1289, 1294 (Fed. Cir. 2017).

1 *First*, GoTV points to a single, unsupported statement by its expert, Dr.
2 Malek, that Netflix “practices” claim 16 “when they perform internal testing of
3 Netflix’s application.” Dkt. 403 at 9 (citing Dkt. 404-9 at 55:9-11). But Dr. Malek
4 also admitted that he didn’t “know the specifics of how [Netflix is] performing the
5 testing.” (Ex. B, Day 2 Tr. 83:6-84:23.) Dr. Malek’s conclusory testimony cannot
6 “sustain a jury’s verdict,” *MobileMedia Ideas LLC v. Apple Inc.*, 780 F.3d 1159,
7 1172 (Fed. Cir. 2015), let alone compel a finding of infringement.

8 *Second*, a reasonable jury could find that GoTV did not prove that any of the
9 accused Netflix testing took place in the United States, as required to prove direct
10 infringement under 35 U.S.C. § 271(a). GoTV’s sole cited support for the location
11 of testing was testimony from Steve Johnson, the Vice President of Design at
12 Netflix. (Dkt. 403 at 9). But Mr. Johnson stated that he was familiar only with
13 “AB testing” (Ex. B, Day 2 Tr. 12:4-13:13), which GoTV admits is “*not* an activity
14 giving rise to infringement or damages” (Dkt. 336 at 4 (emphasis in original)). Mr.
15 Johnson also repeatedly disclaimed knowledge of the location of any other type of
16 testing. (Ex. B, Day 2 Tr. 12:17-13:15 (“Again, I do not know about the
17 engineering testing centers, only the AB testing centers of which I operate from.”)).
18 Because GoTV relies solely on evidence regarding unaccused testing, the jury
19 could have reasonably determined that GoTV did not meet its burden to prove that
20 the accused testing took place in the United States. The jury’s finding of non-
21 infringement is supported on this basis alone. *See, e.g., Finjan, Inc. v. Secure*
22 *Computing Corp.*, 626 F.3d 1197, 1206 (Fed. Cir. 2010) (reversing denial of JMOL
23 of noninfringement because patentee identified no instances of testing in the United
24 States).

25 *Third*, a reasonable jury could find that GoTV failed to prove that the accused
26 testing took place on wireless devices as required by claim 16. GoTV’s cited
27 testimony (Dkt. 403 at 9-10) is not to the contrary. Mr. Eichacker’s testimony on
28 testing of “TVUI devices” (Dkt. 404-11 at 148:25-149:05) is insufficient to show

1 the televisions being tested were connected wirelessly, as opposed to using a wired
2 connection. (*Cf.* Ex. B, Day 2 Tr. 174:16-18 (discussing televisions with a wired
3 connection)). Similarly, neither Mr. Castro nor Mr. Boudrant discussed the specific
4 devices used in the accused testing, let alone whether those devices were wireless
5 or wired. (Dkt. 404-14 (134:21-23, 135:10-15, 135:19-23); Dkt. 404-16 (125:10-
6 12, 125:17-19, 125:22-24, 126:4-6).) Ms. Kwok’s testimony on “mobile
7 automation test labs” also discussed testing generally, but did not specifically
8 address the features of the accused testing, including which devices were used in
9 the accused testing. (Dkt. 404-12 at 23:18; *cf.* Dkt. 336 at 4 (A/B testing not
10 accused).) Finally, Dr. Malek conceded that he did not know the “specifics” of the
11 “wireless devices” used in the accused Netflix testing or the standard used to
12 “communicate between the back end and the client device” in the alleged testing.
13 (Ex. B, Day 2 Tr. 84:1-4, 12-15; *see also id.* at 84:21-23.) The jury was therefore
14 entitled to find that GoTV did not prove that Netflix performs the accused testing
15 with wireless devices.

16 *Fourth*, GoTV incorrectly asserts that Netflix “does not dispute” that its
17 testing met the limitation requiring instructions “rendering said renderable content
18 on said wireless device.” (Dkt. 403 at 8.) But as explained in Netflix’s JMOL
19 motion, GoTV’s sole evidence regarding this limitation was Dr. Malek *own* testing.
20 (Dkt. 249 at 15; Ex. B, Day 2 Tr. 57:1-4; Dkt. 389-1 at 4-5.) Dr. Malek’s testing
21 cannot meet GoTV’s burden to prove direct infringement by “actual users.” *See*,
22 *e.g., Acco Brands, Inc. v. ABA Locks Mfrs.*, 501 F.3d 1307, 1313 (Fed. Cir. 2007)
23 (patentee “failed to point to specific instances of direct infringement” where “sole
24 witness at trial who testified to having used [the accused product] in an infringing
25 manner was [patentee’s] expert”); *see also Mirror Worlds, LLC v. Apple Inc.*, 692
26 F.3d 1351, 1359 (Fed. Cir. 2012) (“But demonstration to a jury during trial does
27 not constitute evidence of infringement on which a claim of infringement can be
28 based.”). Separately, Dr. Malek’s testing also failed to establish that the rendering

1 functionality came from Netflix’s software, rather than third-party software. *See*
2 Ex. B, Day 2 Tr. 56: 18-25. In fact, Dr. Malek did not even know what platform
3 was used in Netflix’s alleged testing. Ex. B, Day 2 Tr. 84:16-20.

4 *Sixth*, GoTV’s argument that an apparatus claim is not limited to a particular
5 “method or use” (Dkt. 403 at 9) makes no sense in the context of the claim at issue.
6 Claim 16 is a “Beauregard claim,” *i.e.*, “a claim to a computer readable medium
7 (e.g., a disk, hard drive, or other data storage device) containing program
8 instructions for a computer to perform *a particular process*.” *CyberSource Corp.*
9 *v. Retail Decisions, Inc.*, 654 F.3d 1366, 1373 (Fed. Cir. 2011) (emphasis added).
10 Specifically, the “non-transitory computer usable medium” required by claim 16
11 must contain “instructions” that “when executed ... implement a method of
12 rendering content on a wireless device” that meets all the specified claim
13 limitations. (Ex. E, Tx. 14 at 21:42-45; *see also id.* at 21: 46-67, 22:17-19.) But
14 GoTV did not establish that *all* of the relevant “instructions,” including rendering
15 instructions, were present in the same “non-transitory computer usable medium” of
16 a Netflix-owned device used in the accused testing.

17 In short, a reasonable jury could have relied on any one of multiple holes in
18 GoTV’s case to conclude that GoTV failed to carry its burden of proof on claim 16
19 of the ’245 patent. GoTV has not established that this is an exceptional case
20 warranting JMOL on an issue on which GoTV bore the burden of proof.

21 **IV. CONCLUSION**

22 For the reasons set forth above, Netflix requests that the Court deny GoTV’s
23 request for JMOL of infringement of claim 16 of the ’245 patent.

1 Dated: October 26, 2023

WILLKIE FARR & GALLAGHER LLP

2 By: /s/ Barrington Dyer

3 Barrington Dyer

4 Koren L. Bell

5 Indranil Mukerji

6 Stephen Marshall

7 Aliza George Carrano

8 John Christopher Moulder

9 Devon W. Edwards

10 Eric L. Saunders

11 Steven J. Ballew

12 WILMER CUTLER PICKERING HALE
13 AND DORR LLP

14 Thomas G. Saunders

15 Lauren E. Matlock-Colangelo

16 Attorneys for Defendant
17 NETFLIX, INC.

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Netflix, Inc., certifies that this brief contains 2,054 words, which complies with the word limit of L.R. 11-6.1 and the May 2023 Standing Order Regarding Newly Assigned Cases.

Dated: October 26, 2023

By: /s/ Barrington Dyer

Barrington Dyer

Attorney for Defendant
NETFLIX, INC.