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Subject: IPR2023-00923 || Patent Owner's Request for Rehearing by the Director
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Attachments: [2023-12-20 IPR2023-00923 PO Request for Director Review.pdf](#)

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Dear Director Vidal,

Pursuant to the USPTO's Interim Process for Director Review, this email serves to notify the USPTO and all parties to the *inter partes* review proceedings of *Meta Platforms, Inc. v. VL Collective IP LLC*, IPR2023-00923, that Patent Owner VL Collective IP LLC has filed a Request for Rehearing by the Director via PTAB E2E. A copy of the Request is attached.

First, since the PTAB offered guidance on the standard for establishing that a reference is a printed publication in *Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29 (PTAB Dec. 20, 2019) ("*Hulu*"), Board decisions have been divided as to under what circumstances and to what extent a Petitioner may later present (and the Board may rely on) evidence and theories as to why a reference is a printed publication that were not included in its Petition. The present proceeding exemplifies the issue. When Patent Owner pointed out that the Petition failed to properly identify nearly any evidence of public accessibility for its references, Petitioner requested (and was permitted to file) a reply to address Patent Owner's arguments. In the reply, the Petitioner made new printed publication arguments and introduced new evidence, which the Board relied on in granting institution. This is contrary to *Hulu* and the statutory requirements that petitions identify arguments and evidence "with particularity."

Second, since the informative decision *Cisco Systems, Inc. v. C-Cation Techs., LLC*, IPR2014-00454, Paper 12 (PTAB Aug. 29, 2014), panels are divided over what constitutes an improper incorporation by reference or arguments and evidence into a Petition and what relief to grant when there is an improper

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incorporation by reference. The result is that many papers effectively exceed the statutory wordcount limits, and arguments and evidence not identified “with particularity” *in the petition* are credited. Such was the case here. The Board’s institution decision relied on arguments and evidence that would not pass muster under *Cisco*.

Third, the Institution Decision adopts an extreme view of what showing needs to be made to establish that a journal is an “established periodical,” which supports a finding that a reference is a printed publication. Under the Board’s reasoning, a journal is an established periodical merely because other panels found other articles by that journal to be printed publications, *even when the issue was uncontested* in those prior cases. If this reasoning is to be accepted, that means references may be presumed “established periodicals” with no fact-finding having taken place. That surely cannot be the law.

These three issues, individually and collectively, involve substantial issues of law and policy that Patent Owner respectfully submits should be taken up and clarified by the Director. As shown in this proceeding, there is ambiguity in these areas that create inefficiencies and uncertainty for all parties before the Board.

Counsel for all parties is copied on this email.

With best regards,

Philip Eklem
(for Christine Lehman)

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