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Paper 45
Date: December 5, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AYLO FREESITES LTD and FUBOTV MEDIA INC.,
Petitioner,

v.

DISH TECHNOLOGIES L.L.C.,
Patent Owner.

IPR2024-00043[1] (Patent 11,677,798 B2)
IPR2024-00044 (Patent 11,470,138 B2)
IPR2024-00045 (Patent 10,469,554 B2)
IPR2024-00046 (Patent 10,951,680 B2)
IPR2024-00146 (Patent 10,469,555 B2)[2]

Before THU A. DANG, JOHN A. HUDALLA, and
JULIET MITCHELL DIRBA, *Administrative Patent Judges*.

DANG, *Administrative Patent Judge*.

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[1] fuboTV Media Inc., which filed petitions in IPR2024-00901, IPR2024-00902, IPR2024-00903, IPR2024-00904, and IPR2024-00905, has been joined as a petitioner in IPR2024-00043, IPR2024-00044, IPR2024-00045, IPR2024-00046, and IPR2024-00146, respectively.
[2] This Order applies to each of the above-identified proceedings. The parties must obtain prior Board authorization to employ this heading style and grouping of issues across the cases.

ORDER
Granting Requests for Oral Hearing
37 C.F.R. § 42.70

We instituted *inter partes* review in the instant proceedings on April 16, 2024 and April 25, 2024. Paper 8.[3] The Scheduling Order for these proceedings set the date for oral argument as January 16, 2025, if requested by the parties and granted by the Board. Paper 9, 13. On December 3, 2024, Petitioner and Patent Owner each filed a request for consolidated oral argument in these proceedings. Papers 42, 43. Patent Owner requests that the oral argument be conducted remotely via video conference. Paper 43, 1. The requests for consolidated oral argument are granted.

A. Time and Format

The consolidated oral argument for these proceedings will commence at 10:00 AM Eastern Time on January 16, 2025, by video.[4] The Board will provide a court reporter for the hearing, and the reporter's transcript will constitute the official record of the hearing.

Each party will have a total of sixty (60) minutes to present consolidated arguments. *See* Paper 42, 2; Paper 43, 1. Petitioner will proceed first to present its case with regard to the challenged claims and

[3] We refer to papers filed in IPR2023-00043 for convenience.
[4] If there are any concerns about disclosing confidential information, the parties must contact the Board at Trials@uspto.gov at least five (5) business days before the hearing date and file a notice of confidential information at least five (5) business days before the hearing date.

grounds set forth in the petitions. Petitioner may reserve time for rebuttal. Thereafter, Patent Owner may respond to Petitioner's argument and may reserve time for sur-rebuttal. Petitioner may then present its rebuttal followed by Patent Owner's sur-rebuttal. *See* Consolidated Trial Practice Guide 83 ("CTPG").[5] The parties are reminded that arguments made in rebuttal and sur-rebuttal must be responsive to arguments the opposing party made in its immediately preceding presentation.

The parties may only rely upon evidence that has been previously submitted in the proceeding and may only present arguments that have been previously made in the submitted papers. No new evidence or arguments may be presented at the hearing. The parties have not requested to present live testimony during the hearing; thus, live testimony will not be permitted.

The parties may request a pre-hearing conference in advance of the hearing. *See id.* at 82. "The purpose of the pre-hearing conference is to afford the parties the opportunity to preview (but not argue) the issues to be discussed at the hearing, and to seek the Board's guidance as to particular issues that the panel would like addressed by the parties." *Id.* To request a pre-hearing conference, the parties should jointly contact the Board at Trials@uspto.gov by December 30, 2024. Paper 9, 12. The request should include several dates and times of availability that are generally no later than three (3) business days prior to the oral hearing. Further, any request should state the issues that the parties intend to raise at the conference.

[5] Available at https://www.uspto.gov/TrialPracticeGuideConsolidated.

B. Conducting the Hearing by Video

As mentioned above, the oral hearing will be conducted by video. The Board generally expects lead counsel for each party to be present at the hearing via video. *See* CTPG 11. If either party expects that its lead counsel will not be attending the oral argument, the parties should initiate a joint telephone conference with the Board no later than **three (3) business days** prior to the oral hearing to discuss the matter. Any counsel of record may present the party's argument as long as that counsel is also present by video. During the hearing, if counsel encounters technical or other difficulties that fundamentally undermine counsel's ability to adequately represent its client, please let the panel know immediately, and adjustments will be made.[6]

To facilitate planning, each party must contact the Board at PTABHearings@uspto.gov at least **five (5) business days** prior to the hearing date to receive video set-up information. As a reminder, all arrangements and the expenses involved with appearing by video, such as the selection of the facility from which a party will attend by video, must be borne by that party. If a video connection cannot be established, the parties will be provided with dial-in connection information, and the hearing will be conducted telephonically.

If one or both parties would prefer to participate in the hearing telephonically, they must contact the Board at PTABHearings@uspto.gov at

[6] For example, if a party is experiencing poor video quality, the Board may provide alternate dial-in information.

least **five (5) business days** prior to the hearing date to receive dial-in connection information.

Counsel should unmute only when speaking. The panel will have access to all papers filed with the Board, including demonstratives. During the hearing, the parties are reminded to identify clearly and specifically each paper referenced (e.g., by slide or screen number for a demonstrative) to ensure the clarity and accuracy of the court reporter's transcript and for the benefit of all participants appearing electronically. In addition, the parties are advised to identify themselves each time they speak. Furthermore, the remote nature of the hearing may also result in an audio lag, and thus the parties are advised to observe a pause prior to speaking, so as to avoid speaking over others.

Members of the public may request to listen and/or view to this hearing. If resources are available, the Board generally expects to grant such requests. If either party objects to the Board granting such requests, for example, because confidential information may be discussed, the party must notify the Board at PTABHearings@uspto.gov at least **five (5) business days** prior to the hearing date and a file a notice of confidential information at least **five (5) business days** prior to the hearing date.

C. Demonstrative Exhibits

At least **five (5) business days** prior to the hearing, each party shall serve on the other party any demonstrative exhibit(s) it intends to use during the hearing. *See* 37 C.F.R. § 42.70(b). At least **three (3) business days**

prior to the hearing, the parties shall file any demonstrative exhibits in this case.

Demonstratives are not a mechanism for making new arguments. Demonstrative exhibits used at the hearing are not evidence, nor will they be relied upon as evidence. Rather, demonstratives are visual aids to a party's oral presentation regarding arguments and evidence previously presented and discussed in the papers. Accordingly, demonstratives shall be clearly marked with the words "DEMONSTRATIVE EXHIBIT – NOT EVIDENCE" in the footer. *See Dell Inc. v. Acceleron, LLC*, 884 F.3d 1364, 1369 (Fed. Cir. 2018) (holding that the Board is obligated under its own regulations to dismiss untimely argument "raised for the first time during oral argument"). "[N]o new evidence may be presented at the oral argument." CTPG 85; *see also St. Jude Med., Cardiology Div., Inc. v. Bd. of Regents of the Univ. of Mich.*, IPR2013-00041, Paper 65 at 2–3 (PTAB Jan. 27, 2014) (explaining that "new" evidence includes evidence already of record but not previously discussed in any paper of record).

Furthermore, because of the strict prohibition against the presentation of new evidence or arguments at a hearing, it is strongly recommended that each demonstrative include a citation to the record, which allows the Board to easily ascertain whether a given demonstrative contains "new" argument or evidence.

Due to the nature of the Board's consideration of demonstratives and the opportunity afforded for the parties to reach an agreement without involving the Board, the Board does not anticipate that objections to

demonstratives are likely to be sustained. Nevertheless, to the extent that a party objects to the propriety of any demonstrative, the Board expects the parties will meet and confer in good faith to resolve any objections prior to raising the objections with the Board. For any objection to a demonstrative that cannot be resolved after conferring with the opposing party, the parties may email jointly to Trials@uspto.gov a one-page list of objections at least **three (3) business days** prior to the hearing. The list should identify with particularity which demonstrative exhibits are subject to objection and include a short statement (no more than one short sentence) of the reason for each objection. No argument or further explanation is permitted. The Board will consider any objections, and may reserve ruling on the objections until at or after the hearing.[7] Any objection to demonstratives that is not timely presented will be considered waived.

D. Special Equipment or Needs

Any special requests for audio-visual equipment should be directed to PTABHearings@uspto.gov. A party may also indicate any special requests related to appearing at a video hearing, such as a request to accommodate visual or hearing impairments, and indicate how the PTAB may accommodate the special request. Any special requests must be presented in a separate communication at least **five (5) business days** before the hearing date.

[7] If time permits, the Board may schedule a conference call with the parties to discuss any objections raised prior to the hearing.

E. Legal Experience and Advancement Program

The Board has established the "Legal Experience and Advancement Program," or "LEAP," to encourage advocates before the Board to develop their skills and to aid in succession planning for the next generation. The Board defines a LEAP practitioner as a patent agent or attorney having three (3) or fewer substantive oral arguments in any federal tribunal, including the PTAB.[8]

The parties are encouraged to participate in the Board's LEAP program. Either party may request that a LEAP practitioner participate in the program and conduct at least a portion of the party's oral argument. In exchange, the Board will grant up to fifteen (15) minutes of additional argument time to that party, depending on the length of the proceeding and the PTAB's hearing schedule. A party should submit a request no later than at least **five (5) business days** before the hearing, by email to the Board at PTABHearings@uspto.gov.[9]

The LEAP practitioner may conduct the entire oral argument or may share time with other counsel, provided that the LEAP practitioner is offered

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[8] Whether an argument is "substantive" for purposes of determining whether an advocate qualifies as a LEAP practitioner will be made on a case-by-case basis with considerations to include, for example, the amount of time that the practitioner argued, the circumstances of the argument, and whether the argument concerned the merits or ancillary issues.

[9] Additionally, a LEAP Verification Form shall be submitted by the LEAP practitioner, confirming eligibility for the program. A combined LEAP Practitioner Request for Oral Hearing Participation and Verification Form is available on the LEAP website, www.uspto.gov/leap.

a meaningful and substantive opportunity to argue before the Board. The party has the discretion as to the type and quantity of oral argument that will be conducted by the LEAP practitioner.[10] Moreover, whether the LEAP practitioner conducts the argument in whole or in part, the Board will permit more experienced counsel to provide some assistance to the LEAP practitioner, if necessary, during oral argument, and to clarify any statements on the record before the conclusion of the oral argument. Importantly, the Board does not draw any inference about the importance of a particular issue or issues, or the merits of the party's arguments regarding the issue(s), from a party's decision to have (or not to have) a LEAP practitioner argue.

In instances where an advocate does not meet the LEAP eligibility requirements, either due to the years of experience as a licensed attorney/patent agent or the number of "substantive" oral hearing arguments, but nonetheless has a basis for considering themselves to be in the category of advocates that this program is intended to assist, the Board encourages argument by such advocates during oral hearings. Even though additional argument time will not be provided in such circumstances, as with the LEAP, a party may share argument time among counsel and the Board will permit more experienced counsel to provide some assistance, if necessary,

[10] Examples of the issues that a LEAP practitioner may argue include claim construction argument(s), motion(s) to exclude evidence, or patentability argument(s) including, e.g., analysis of prior art or objective indicia of non-obviousness.

during oral argument, and to clarify any statements on the record before the conclusion of the oral argument.

All practitioners appearing before the Board shall demonstrate the highest professional standards. All practitioners are expected to have a command of the factual record, the applicable law, and Board procedures, as well as the authority to commit the party they represent.

ORDER

Accordingly, it is

ORDERED that a consolidated oral hearing, conducted in accordance with the procedures set forth above, shall commence at 10:00 AM Eastern Time on January 16, 2025.

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