Request for Director Review

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

Patent 11,677,798 B2[1]

PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW

[1] fuboTV Media Inc., which filed a petition in IPR2024-00901, has been joined as a petitioner in this proceeding.

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I. INTRODUCTION

The Board abused its discretion and committed legal error in finding that Ogdon (EX1004)—a slide-show display patent—renders obvious the innovative "streamlets" recited by the challenged claims, which form the basis for modern day television and movie streaming. The Board was required to purge any hindsight bias from its analysis in view of the overwhelming evidence of nonobviousness, including (1) PO DISH's objective evidence of nonobviousness, which the International Trade Commission ("ITC") found persuasive, and (2) extensive disclosures in Petitioner's secondary reference, Allen (EX1006), which teach away from the proposed combination. Instead, the Board improperly dismissed the ITC's findings and ignored DISH's arguments and relevant legal standards.

The Challenged Patent discloses adaptive bitrate streaming ("ABR") technology that transformed video streaming and remains critical to DISH's Emmy-winning "Sling TV" and "DISH Anywhere" platforms. The claims cover a key aspect of this technology called a "streamlet," which is an innovative data structure that divides digital content (*e.g.*, video) into small time-aligned video portions encoded at a "plurality of different bitrates" to "creat[e] a plurality of streams" at different quality levels. Storing video as "streamlets" in this way allowed streaming logic to be transferred to client devices, permitting them to leverage standard servers and network infrastructure without using complex streaming-media servers.

The Board erred in finding that Ogdon teaches the key concept of "streamlets." Ogdon discloses a "presentation" system where a human presenter creates a set of segments having visual materials, *i.e.,* a "single image" or a "subcollection" of "images, audio, animation and video," that will accompany the presenter's live audio and be displayed at remote client devices. EX1004, 2:67-3:10, 4:1-17, 4:48-59. While the Board correctly noted that Ogdon's segments can include video and that they are "typically … ordered according to their presentation sequence" (Paper 59 ("FWD"), 34), it improperly inferred a teaching of "streamlets" from those disclosures.

The Board's tenuous obviousness determination should have been outweighed by the overwhelming evidence of nonobviousness. The objective evidence in this case establishes that, through use of the claimed "streamlets," the MOVE Player[2] achieved commercial success and widespread critical acclaim as early as 2008. Indeed, a prior trial before the Chief ALJ of the ITC considered the same objective evidence of nonobviousness presented to the Board in this case and found it to be persuasive.[3] In a shocking lack of comity, the Board dismissed the entirety of the ITC's extensive findings regarding the objective evidence in a

[2] DISH's parent EchoStar Corp. acquired original applicant, MOVE Networks Inc.

[3] *See Certain Fitness Devs., Streaming Comps. Thereof, & Sys. Containing Same*, 337-TA-1265, Initial Determination, 101-114, 129-135 (Sep. 9, 2022) (EX1009).

footnote. FWD, 42 n.9. This was error. Nothing in the ITC's analysis indicates that its finding of nexus was "premised" on "[ITC] Respondents' concessions about an invalidating public use," which was the Board's sole basis for ignoring the ITC's findings. *See id.*; EX1009, 211-213. Regardless, ***Petitioner never contested DISH's evidence*** demonstrating that the MOVE Player practiced the claims of the Challenged Patent. The Board also relied upon allegedly "critical" unclaimed features. But in doing so, the Board completely ignored DISH's argument and evidence that those purportedly critical features were tied to, and only possible because of, the claimed "streamlets," which unlocked the ability to use those features.

The Board also failed to address DISH's argument that the Allen reference teaches away from the claimed invention and proposed combination—including Allen's extensive disparagement of the multi-bitrate features on which Petitioner relied in its obviousness combination. The Director should therefore reverse the Board's decision that found unpatentable claims 1, 9, 11-19, and 21 or, at a minimum, vacate the FWD and remand.

II. ARGUMENT

A. The Board erred when it found that Ogdon discloses "streamlets."

All claims require "streamlets" each of which "correspond[] to a portion of" digital content (*e.g.*, a video), with a "group of streamlets" collectively constituting a version of that larger video encoded at a particular bitrate. The Board erred in

finding "Ogdon's presentation segments teach the recited 'streamlets.'" FWD, 35.

Although Ogdon's presentations include "segments," "each segment of a presentation is treated as a ***unique*** (multi)media element," like a single slide of a slide show presentation. EX1004, 6:1-5. Ogdon does not disclose any relationship between "unique" segments other than that they may be displayed during the same presentation; although, even then, Ogdon specifies the presenter may omit or "***rearrange*** portions of a presentation performance" on the fly in response to "user feedback." Paper 18 ("POR"), 16-18 (citing EX1004, 2:14-23, 25:59-62); EX2009, 173:6-174:12; EX2006, ¶¶[91]-[92]. This does not map to the claimed "streamlets," which must collectively constitute portions of a contiguous digital content piece (*e.g.*, a video). Ogdon's "segments" are just slides of a slide-show presentation. *Id.*, 16.

The only way for the Board to reach its erroneous conclusion from Ogdon's disclosures is by allowing today's ubiquitous use of video streaming to shape the Board's interpretation of Ogdon. "That represents an improper reliance on hindsight." *Merck Sharp & Dohme B.V. v. Warner Chilcott Co., LLC*, 711 F. App'x 633, 637 (Fed. Cir. 2017). This hindsight-fueled analysis is doubly improper here because it was "used to supply a limitation missing from the prior art," i.e., contiguous streamlet portions of a single video, that "goes to the heart of [the] invention." *Arendi S.A.R.L. v. Apple Inc.*, 832 F.3d 1355, 1362-63 (Fed. Cir. 2016).

DISH's objective evidence is "insurance against the insidious attraction of the

siren hindsight[.]" *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1553 (Fed. Cir. 1983). Yet the Board erred by failing to properly weigh that evidence and in failing to address DISH's arguments regarding that evidence.

B. The Board erred when it found no nexus between DISH's objective evidence of nonobviousness and the claimed invention.

1. The Board erred in dismissing ITC's nexus determination.

After a four-day evidentiary hearing, ITC Chief ALJ Cheney found that "the objective indicia support a determination of non-obviousness" with respect to substantively similar claims of related patents. EX1009 at 211-217. Judge Cheney found that DISH was "entitled to a presumption" of nexus and found direct nexus as to "long-felt but unresolved need and failure of others," "surprising results," and "praise by others." *Id*. (also finding "commercial success").

While the ITC's determinations have no preclusive effect, they are persuasive authority to which the PTAB often defers as a matter of efficiency and comity. *See* "Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation" (Mar. 24, 2025). But despite having the very same evidentiary record here, the Board dismissed Judge Cheney's determination because it was allegedly "premised" on "[ITC] Respondents' concession about an invalidating public use of the MOVE Media Player." FWD, 42 n.9. That was error. Nothing in the ITC's finding of nexus suggests that it was premised on uncontested issues. Instead, the ITC determination properly reflects that Respondents there did

dispute the presumption of nexus, an argument which Judge Cheney expressly analyzed and rejected. EX1009, 211-213. Additionally, the ITC Respondents' concession regarding the MOVE Player practicing similar claims is no different than Petitioner never contesting that the MOVE Player practices the claims challenged here. *See* Paper 36 ("Reply"), 22-26. The Board's basis for dismissing the ITC's determination was therefore both factually and logically flawed.

2. The Board erred in finding that DISH is not entitled to a presumption of nexus.

DISH proved the MOVE Player embodies the claimed invention. POR, 52-54; EX2006, ¶¶164-197; EX2062. Petitioner made no contrary argument. Reply, 22-24. The Board, nonetheless, found no presumption of nexus due to alleged critical unclaimed features, namely (a) multiple TCP connections and (b) HTTP-based video delivery. FWD, 47. In reaching this conclusion, the Board acknowledged but wholly failed to address DISH's argument that "it was precisely the claimed 'streamlets' that enabled clients to request the video portions via simple HTTP request over multiple TCP connections rather than from specialized media servers." Paper 41 ("Sur-Reply"), 23; FWD, 46; *see also* EX2011, 3 ("The ***use of streamlets*** combined with our other innovative concepts ***makes possible***" the variety of benefits); Paper 58 ("Tr."), 7:20-8:2 (Petitioner's counsel arguing that "the heart of the invention" is "adaptive-rate content streaming with streamlets of varying quality levels[.]"), 76:6-8 ("There was no way to do this before because you didn't have the streamlet."). The

Board's failure to address this argument, standing alone, was error.

Moreover, the Board applied the incorrect legal standard. It is well-established the nexus presumption applies "even when the product has additional, unclaimed features," especially where the unclaimed features are related to those claimed. *PPC Broadband, Inc. v. Corning Optical Commc'ns RF, LLC*, 815 F.3d 734, 747 (Fed. Cir. 2016); *see also Quanergy Sys., Inc. v. Velodyne Lidar USA, Inc.*, 24 F.4th 1406, 1418-19 (Fed. Cir. 2022) (finding "each alleged unclaimed feature results directly from claim limitations—such that [patentee's] products are essentially the claimed invention"). Indeed, there is no "bright-line rule that the presumption of nexus does not apply if any unclaimed feature materially affects the functioning of a product that is alleged to be coextensive" because "virtually every innovative product inevitably has some unclaimed feature that materially affects its functionality." *Teva Pharms. Int'l GmbH v. Eli Lilly & Co.*, 8 F.4th 1349, 1361 (Fed. Cir. 2021).

Thus, even if multiple TCP connections is an unclaimed feature, DISH was still entitled to a presumption of nexus and the Board was required to contend with and weigh the evidence showing that the claimed "streamlets" were an instrumental contributor to the objective evidence of nonobviousness and enabled transport using multiple TCP connections. *See Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538-39 (Fed. Cir. 1983) ("[A] court must not stop until all pieces of evidence … have been fully considered ….").

There is no question that DISH presented such evidence. Indeed, the very evidence the Board purported to rely on shows that the streamlets were inextricably tied to the invention's success, and were key to unlocking the other benefits. The Board relied, in particular, on Exhibits 2011 and 2059. *See* FWD, 46 (citing EX2011, 6; EX2059, 11). In Exhibit 2011, the sentence directly preceding the portion relied on by the Board states that, "[w]ith a single innovation, Quantum streaming solves or alleviates [the prior art's problems]." EX2011, 6. After stating "Quantum streaming" is the invention's name, EX2011 specifies the "core aspect of" the invention is "***streamlets***," which "makes possible" all of its benefits. *Id*., 3.

As to Exhibit 2059, the Board relied on part of a sentence stating that the "secret lies in the use of multiple TCP connections between the client and the origin Web server." Yet the Board ignored the rest of the sentence, which continues: "***and*** the use of client-side decision-making ***to retrieve the streamlets*** with the optimum bit rate." EX2059, 11. The Board also ignored that this sentence, which describes TCP delivery advantages, is immediately preceded by a description of the importance of the streamlet encoding process to enable those benefits. Specifically, the prior page explains how MOVE's system "ingests and outputs a video file as a collection of streamlet files…allowing the ingestion process to perform certain advanced encoding operations that are not possible with traditional systems." EX2059, 10. It states: "[w]ith this [streamlet approach] in mind the delivery

advantages associated with Move Adaptive Stream are discussed next," with the next section including the single partial sentence relied upon by the Board. EX2059, 11.

By disregarding DISH's evidence and argument that streamlets were both critical to the overall success of the invention, and a key to enabling the purportedly important unclaimed features, the Board committed precisely the same error at issue in *Oren Technologies, LLC v. Proppant Express Investments, LLC*, 2021 WL 3120819 (Fed. Cir. July 23, 2021). There, the patentee mapped its commercialized SandBox container to the claimed container. *Id.* at *6. The Board found no nexus, concluding aspects of the system other than the claimed container were responsible for its success. *Id.* The Federal Circuit found the Board erred because it "did not contend with and weigh any of the evidence potentially showing that the Sandbox container itself is *also* an important contributor to the commercial success and praise of the system" and "should have addressed this evidence." *Id.* at *6-7 (emphasis in original). Similarly here, instead of summarily concluding that "any alleged success is due to more than just the streamlets," FWD, 46, the Board was required (a) to consider the evidence that the use of streamlets is *also* an important contributor to the success and praise of the system, and (b) to explain how it could nevertheless conclude only unclaimed features, not the critical streamlets, entirely explained the existence of the objective evidence of nonobviousness.

Thus, even if multiple TCP connections contributed to the success of the

MOVE Player, the Board erred by ignoring evidence that the success was also due to the claimed streamlets. Petitioner never disproved that the streamlets contributed to the product's success (and other evidence of nonobviousness). *See Ecolochem, Inc. v. Southern Cali. Edison Co.*, 227 F.3d 1361, 1377 (Fed. Cir. 2000). The record amply supports the importance of streamlets to the MOVE Player. *See, e.g.,* EX2011, 7 ("It is made possible only with a combination of streamlets and parallel connections."). Thus, the Board clearly erred in finding that Petitioner rebutted the presumption of nexus based on unclaimed features.

3. The Board erred in rejecting DISH's arguments regarding direct nexus.

DISH argued that its objective evidence is tied to "the invention in the challenged patent." POR, 52. Its arguments regarding the objective evidence were based on the ABR "technology ***of the challenged claims***," and DISH explained how real-world benefits of the MOVE Player "are a direct result of the unique characteristics ***of the claimed invention***." POR, 52-54. These "unique characteristics" include using streamlets having particular characteristics as recited in the claims. EX2011, 3 ("The use of streamlets combined with our other innovative concepts makes [MOVE's system] possible."). Indeed, the Board acknowledged that the streamlets contributed to the success of the MOVE Player. FWD, 46 ("success is due to more than just the streamlets"), 57 (DISH's "evidence tout[s] the ability of the MOVE Media player to create streamlets"). A "patent owner can show that it is the

claimed combination as a whole that serves as a nexus for the objective evidence[.]" *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1330 (Fed. Cir. 2016). Unquestionably, DISH's "objective evidence of nonobviousness pertained to [DISH's] overall [system] architecture" and the Board erred by dismissing "evidence that touted [the MOVE Player's] patented design as a whole." *Rambus Inc. v. Rea*, 731 F.3d 1248, 1258 (Fed. Cir. 2013).

The Board also erred when it found no direct nexus based on individual elements allegedly being known in the prior art. The Board agreed with Petitioner that actively adjusting video quality to the bandwidth available and delivering pieces of content progressively were taught by the prior art and dismissed DISH's objective evidence based on those findings. FWD, 48. But the test is whether the evidence relates to a ***claimed feature*** in the prior art. *Rambus*, 731 F.3d at 1257. None of the prior art describes streamlets being used for adaptive bitrate streaming, as claimed.

Rather, the Board cobbled together pieces of Ogdon and Allen to purportedly arrive at elements 1[B]-1[E]. FWD, 26-39. These elements detail how the video is encoded ***at different bitrates*** to create a plurality of streams of different quality levels each comprising a group of ***streamlets***. These features enabled the MOVE Player to actively adjust video quality to available bandwidth in a way that solved a long-felt need, achieved unexpected results and commercial success, and was praised by the industry. POR, 54-65. The Board had to rely on Allen to supply the different bitrate

aspects of the claimed streamlets because they were ***missing*** from Ogdon.

Thus, in finding that adaptive bitrate streaming and the claimed streamlets were taught by Ogdon, the Board not only made an erroneous finding of a material fact; it ignored a fundamental tenet of the obviousness analysis. The entire point of considering objective evidence is to determine whether it would have been obvious ***to combine*** Ogdon with Allen's bitrate teachings in the first place. Objective evidence serves to prevent "slipping into use of hindsight" and "read[ing] into the prior art the teachings of the invention in issue," which is what happened here with the claimed streamlets. *Graham v. John Deere Co.*, 383 U.S. 1, 35-36 (1966).

Compounding this error, the Board relied on a different document, Leaning, to make entirely unsubstantiated findings. Leaning is not part of any IPR ground and was not raised until Petitioner's Reply. Without citing to any particular passages of Leaning, the Reply summarily concludes that Leaning "discloses essentially all limitations in each of the '798 Patent's independent claims." Reply, 24. The FWD does not explain how Leaning teaches ***any claim element***, let alone the streamlets. FWD, 48-49 (citing, without explanation, two Leaning excerpts and four paragraphs of expert testimony wholly and improperly incorporated by reference in the Reply). Thus, the Board erred in finding no nexus based on unsubstantiated findings about Leaning which is not prior art in any obviousness ground.

The Board also erred by ignoring the claim elements (individually and in

combination) in favor of broad generalizations of the technology, and then relying on those generalizations to discount DISH's objective evidence. *See, e.g.*, FWD, 50-52 (long-felt need), 55-56 (copying), 56-58 (industry praise). But the challenged claims do not recite in the abstract the general concepts of actively adjusting video quality to the available bandwidth available or delivering pieces of content progressively, as characterized by the Board. Rather, the claim recites a specific "system for adaptive-rate content streaming of digital content." EX1001, 18:27-28. It is this system, with ***all of its constituent limitations***, that is responsible for the industry praise, commercial success, and other objective indicia related to the MOVE Player. Said differently, the novel claim elements enabled the benefits of the MOVE Player (e.g., actively adjusting quality through progressive retrieval).

C. The Board erred in finding a motivation to combine without addressing DISH's argument that Allen teaches away.

Regardless of the Board's errors regarding objective evidence of nonobviousness, the Board independently erred in its analysis of Allen. "Evidence suggesting reasons to combine cannot be viewed in a vacuum apart from evidence suggesting reasons not to combine." *Artic Cat Inc. v. Bombardier Recreational Prods. Inc.*, 876 F.3d 1350, 1363 (Fed. Cir. 2017). DISH identified ample evidence that Allen teaches away from the invention—and Petitioner's combination—including Allen's statement that the technique Petitioner sought to combine with Ogdon "places ***insurmountable burdens*** on everyone" and requires "an ***impossible***

number of streams" to accommodate clients with "wildly varying bit rates." POR, 28-31; Sur-Reply, 17-19; EX1005, 13:5-8, 4:8-25, 9:12-10:8, 116:13, 6:3-20, 5:1-3; EX2006, ¶¶105-108. The Board erred by not explaining why it rejected DISH's argument that Allen teaches away and by not considering Allen's disparaging statements in its motivation to combine analysis.

Although the Board acknowledged DISH's argument (FWD, 39-40), the Board erred by summarily rejecting it, stating only that "[w]e find that neither Ogdon nor Allen teaches away from the proposed combination." FWD, 40. The Board was obligated to analyze whether Allen "teaches away" by determining whether a POSITA, "upon reading [Allen], would be discouraged from following the path set out in [Allen], or would be led in a direction divergent from the path that was taken by the applicant." *In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004). The Board's failure to explain its reasoning is error. *See In re Nuvasive, Inc.*, 842 F.3d 1376, 1383 (Fed. Cir. 2016) ("[I]t is not adequate to summarize and reject arguments without explaining why the PTAB accepts the prevailing argument."); *Polaris Indus., Inc. v. Arctic Cat, Inc.*, 882 F.3d 1056, 1068 (Fed. Cir. 2018) (finding error on similar facts).

Rather than address DISH's argument, the Board justified its reliance on Allen's background section, noting that consideration of Allen is "not limited to the particular *invention* it is describing and attempting to protect." FWD, 40 (emphasis in original). But the issue is not that Allen's disclosed invention never encodes

videos at different bitrates. Rather, the issue is Allen's background section ***repeatedly disparages*** the encoding technique that Petitioner proposed combining with Ogdon. POR, 28-31; Sur-Reply, 17-19. A reference must "[be] considered for all it taught," ***including*** "disclosures that diverged and taught away from the invention at hand[.]" *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 296 (Fed. Cir. 1985). The Board erred by disregarding Allen's statements and, in doing so, "invited the 'distortion caused by hindsight bias' into the fold." *Polaris Indus.*, 882 F.3d at 1068.

Furthermore, even if a reference does not teach away, its statements are "relevant to a finding regarding whether a skilled artisan would be motivated to combine that reference with another reference." *Id.* at 1069; *see also Apple Inc. v. Samsung Elecs. Co.*, 839 F.3d 1034, 1051 n.15 (Fed. Cir. 2016) (en banc). The Board erred by failing to consider Allen's disparaging disclosures in determining whether a POSITA would have combined Ogdon and Allen. *See Polaris*, 882 F.3d at 1070.

III. CONCLUSION

For the reasons herein, DISH requests Director Review.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

In accordance with 37 C.F.R. § 42.6(e), the undersigned certifies that on May 14, 2025, a complete and entire copy of the **PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW** was served on Petitioner at the correspondence addresses below:

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