UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AYLO FREESITES LTD and FUBOTV MEDIA INC.,[1]
Petitioners
v.

DISH TECHNOLOGIES L.L.C.,
Patent Owner

U.S. Patent 11,470,138
Issue Date: October 11, 2022
Title: APPARATUS, SYSTEM, AND METHOD FOR MULTI-BITRATE CONTENT STREAMING

Inter Partes Review No. IPR2024-00044

PETITIONER AYLO FREESITES LTD'S AUTHORIZED RESPONSE TO PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW

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[1] fuboTV Media Inc., which filed a petition in IPR2024-00902, has been joined as a petitioner in this proceeding.

Patent Owner DISH's Request for Director Review ("Request") should be denied. ***First***, the Board correctly found that Ogdon's "segments" are "streamlets." Indeed, DISH's own expert and the named inventor both equated "streamlets" with "segments." ***Second***, the Board fully considered DISH's secondary considerations evidence, including the non-binding ITC decision relating to different patents, and rejected DISH's arguments with 18 pages of analysis. ***Third***, the Board correctly found motivation to combine and explained why Allen does not teach away.

I. THE BOARD CORRECTLY FOUND OGDON'S "SEGMENTS" SATISFY THE CLAIMED "STREAMLETS"

DISH falsely labels Ogdon "a slide-show display patent" to argue against the Board's conclusion that Ogdon discloses "streamlets." Request, 1, 4. But the Board rejected this argument and correctly found that Ogdon discloses video streaming over the Internet (e.g. TCP/IP). FWD, 19-23. DISH does not contest this finding that Ogdon teaches video streaming.

Critically, DISH admits that "Ogdon's presentations include 'segments,'" yet tries to argue that streaming "segments" of a video presentation is not the same as streaming "streamlets." Request, 4. Fatal to its argument, however, is that its own exert Dr. Kevin Jeffay admitted that Ogdon "describes dividing a ***presentation*** into different '***segments***'" (Reply, 13 (quoting EX2006, ¶35) (emphases added)) and equated "***segments***" of "a larger media ***presentation***" to the claimed "***streamlets***" (Reply, 13 (quoting EX2006, ¶46) (emphases added)). Even the named inventor

testified that "'streamlets' are 'segments.'" Reply, 12-13 (quoting EX1021, 50:11-17; 53:7-11). Needless to say, the Board did not abuse its discretion.[2]

II. THE BOARD CORRECTLY FOUND NO NEXUS

A. The Board Properly Considered the ITC Decision

DISH concedes, as it must, that the ITC decision has "no preclusive effect." Request, 5. Its complaint here is that the Board was not persuaded by it, even though the challenged patent was not even at issue in the ITC. DISH falsely claims that the ITC record was the "same" as the record here (Request, 5), but DISH's counsel admitted at the hearing this was not the case (Tr., 85:5-11). DISH's claim that "[n]othing in the ITC's finding of nexus suggests that it was premised on ITC Respondents' concessions about an invalidating public use" (Request, 5) is also false. The ITC decision states, "I find that the Move Media Player embodies the claimed invention." EX1009, 212. This conclusion comes immediately after noting that "DISH argues that respondents and the Staff have conceded that the Move Media Player embodies the claimed invention because those parties argued that public use of the Move Media Player in 2005 was an invalidating use." *Id.*

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[2] DISH also quotes language from Ogdon stating that each segment is treated as a unique multimedia element (Request, 4) but fails to disclose that it is undisputed that Ogdon's elements could just be "video" (POR, 15).

Finally, DISH makes a new argument that since Petitioner allegedly "never contest[ed]" DISH's evidence that the MOVE Player practiced the challenged claims, this somehow equates to the ITC Respondents' argument that the MOVE player was an invalidating public use and therefore the Board erred in not deferring to the ITC. Request, 5-6. First, DISH's argument is untimely and should be dismissed on that basis alone. Second, DISH's logic is flawed. Petitioner had no reason to address whether MOVE practiced the challenge claims and made clear that it is not making "any claims that prior use of the Move Media Player was an invalidating public use." Petition, 61. Third, the Board is not bound by the ITC's decision anyway. That the Board was not persuaded by the ITC's decision relating to different patents on a different record is not surprising nor an abuse of discretion.

B. The Board Correctly Found No Presumption of Nexus

The Board correctly found that the MOVE player contained critical unclaimed features. Request, 6-10. It is undisputed that the '138 Patent does not claim multiple TCP connections—or even "TCP" at all. It is also undisputed that DISH's own cited MOVE documents describe the use of multiple TCP connections as "***[t]he*** secret" to "mitigat[ing] the reliability, efficiency, and latency issues of traditional streaming." EX2059, 11; FWD, 40. And despite DISH's assertion to the contrary, the Board considered DISH's argument that MOVE's success was attributable to more than just multiple TCP connections and ordinary HTTP web servers. FWD, 41. Indeed,

the Board found "the very evidence Patent Owner cites for this proposition suggests that any alleged success is due to more than just the streamlets." *Id.*

DISH also claims that the Board applied an incorrect legal standard. Request, 7. This is wrong. The Board acknowledged that unclaimed features standing alone is not sufficient—***critical*** unclaimed features are required. FWD, 40-42 (citing *Fox Factory*, 944 F.3d at 1375). But DISH fatally fails to address the *Fox Factory* case and ignores the fact that DISH has other related patents that claim critical unclaimed features of the MOVE player, including use of multiple TCP connections. Request, 7-9; FWD, 42. The Board did not err in finding no presumption of nexus.

C. The Board Appropriately Considered and Rejected Direct Nexus

DISH's direct nexus arguments also fail. Request, 10-13. The Board correctly found that DISH's arguments amounted to improper incorporation by reference of 29 paragraphs of Dr. Jeffay's testimony, which is "a separate, independent reason for according such arguments little to no weight." FWD, 44-45. DISH has no response to this. Instead, it ironically accuses Petitioner of improper incorporation by citing to a few paragraphs and a claim chart from its expert showing that every claim limitation of the challenged patent, including streamlets encoded at different bitrates, was already in the prior art. Request, 12. In any event, it is readily apparent from the Board's detailed decision that it substantively considered and addressed DISH's evidence and arguments and properly rejected them. FWD, 42-55.

III. THE BOARD CORRECTLY FOUND MOTIVATION TO COMBINE AND DETERMINED THAT ALLEN DID NOT TEACH AWAY

DISH claims that the Board did not explain why Allen does not teach away. Again, DISH is wrong. The Board explained its reasoning in detail. FWD, 24-27. The Board explained "Ogdon teaches video streaming" and teaches "adaptively switching between presentation versions, including versions of streamed video." FWD, 25. The Board correctly noted that it "must consider Allen 'for everything it *teaches* by way of technology,' which is 'not limited to the particular *invention* it is describing or attempting to protect." FWD, 26 (quoting *EWP Corp. v. Reliance Universal Inc.*, 755 F.2d 898, 907 (Fed. Cir. 1985)) (emphasis in original); *In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994) ("A known or obvious composition does not become patentable simply because it has been described as somewhat inferior."). The Board then correctly concluded that Allen's Background description of the well-known and "sophisticated" solution of encoding the same video into three different bitrate versions (i.e., 600 kbps, 300 kbps, 56 kbps) (Petition, 22-26; Reply, 17; EX1005, 8-12) does not teach away. FWD, 26. DISH's handful of out-of-context quotations from Allen's 143-page disclosure does not satisfy the high bar of teaching away or address that Allen teaches that the encoding techniques at issue were "the most efficient way to deliver streaming media today." EX1005, 1-2.

IV. CONCLUSION

Patent Owner's Request for Director Review should be denied.

DATED: May 22, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2025 I caused a true and correct copy of the foregoing Petitioner's Authorized Response to Patent Owner's Request for Director Review to be served via email to the counsel of record:

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