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Reference	Application No./Patent No.
NPB/P16992EP-2	20216568.4 - 1207 / 3822805
Applicant/Proprietor	
DISH Technologies L.L.C.	

BRIEF COMMUNICATION

Subject:
- ☐ Your letter of
- ☐ Our telephone conversation of
- ☐ Communication of
- ☐

Enclosure(s):
- ☐ Letter from the proprietor of the patent of
- ☑ Letter from the opponent of 10.02.2025
- ☐ Copy (copies)

Communication:

All annexes to the letter as well as the consolidated list of all opposition citations are available for inspection via the European Patent Register at **www.epo.org/register.** Should you wish to receive these documents in paper format, they will be supplied to you free of charge if specifically requested on receipt of this communication (OJ EPO 2022, A28).

☐

For the Opposition Division

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Submission in opposition proceedings

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Opponent/representative's reference	A173739WOEPT2EIN3

The information given below is pertaining to the following patent in opposition proceedings:

Patent No.	EP3822805
Application No.	EP20216568.4
Date of mention of the grant in the European Patent Bulletin (Art. 97(3), Art. 99(1) EPC)	27 December 2023
Title of the invention	APPARATUS, SYSTEM, AND METHOD FOR ADAPTIVE-RATE SHIFTING OF STREAMING CONTENT
Proprietor of the patent	Dish Technologies L.L.C.

Documents attached:

	Description of document	Original file name	Assigned file name
1	Reply from the opponent to submission of proprietor	Submission of the Opponent.pdf	DOBS3.pdf

Payment

1	Method of payment	Not specified
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Place:	Munich
Date:	10 February 2025
Signed by:	/Georg Anetsberger/
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Munich, February 10, 2025

Opposition against EP 3822805 (20216568.4)
Propietor: Dish Technologies L.L.C.
Opponent: Aylo Premium Ltd
Our ref: A173739WOEPT2EIN3 ANE/Hua/hmb

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In response to the Proprietor's submission dated 15 January 2025

1 On behalf of the Opponent, we respond to the Proprietor's submission (hereafter: "Response") dated 15 January 2025. This becomes necessary since the Response comprises several incorrect technical allegations and misleading statements that must be corrected. To not overburden the Opposition Division (hereafter: "OD") given the tight timeframe of the present accelerated proceedings, we focus only on the most critical issues. However, this does not mean waving the right to present additional, or more comprehensive arguments at a later stage (e.g., in response to the preliminary opinion of the OD and/or during the oral proceedings).

2 In **Section A**, we will outline that the Proprietor's arguments cannot change the fact that claim 1 as granted extends beyond the earlier application as filed at least with respect to feature 1.10. This is because the earlier application as filed at most discloses a (dynamic) trigger threshold "*determined*" according to the current read ahead margin. However, feature 1.10 requires a trigger threshold that is "*selected*" according to the current read ahead margin, based on which the Proprietor specifically interprets claim 1 such as to merely require establishing or not-establishing one and the same (static) trigger threshold. This goes beyond the disclosure of the earlier application as filed.

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3 In **Section B**, we will show that the Proprietor's counterarguments regarding the novelty-destroying prior art E12 are technically flawed and ignore the understanding of the skilled person. As will be shown, the disputed features are all disclosed by E12. Furthermore, if feature 1.7 is understood as the Proprietor asserts (to distinguish over E12), it is further inadmissibly amended over the earlier application as filed (section B.III.2).

4 Finally, we request that the OD exercise its discretion (as has been established in T 364/20) and refuse to admit any of the **102** auxiliary requests filed by the Proprietor into proceedings, see **Section C**.

A. Inadmissible amendment of feature 1.10

5 We have already outlined in the Opposition brief (pages 35/36, Section 5.2.6) that feature 1.10 extends beyond the earlier application as filed (E28), particularly under the Proprietor's interpretation of this feature. We have explained that, in the earlier application as filed (E28), the only association between the claimed "*trigger threshold*" and the "*current read-ahead margin*" is disclosed on page 15, line 26 to page 16, line 2.

6 Therein, the "*trigger threshold*" is "*determined by a combination of factors relating to the current read ahead margin ... , and a minimum safety margin*" (E28, page 15, lines 26-29). Further, this mechanism of determining the "*trigger threshold*" is expressly disclosed to provide a <u>variable</u> "*trigger threshold*": "*The smaller the read ahead margin, the larger θ_{up} is to discourage upshifting until a larger read ahead margin may be established to withstand network disruptions.*" (E28, p. 15, l. 30 to p. 16, l. 2).

7 The Proprietor is unable to explain how the subject matter of feature 1.10 can be derived from this passage of E28, let alone directly and unambiguously. Instead, the Proprietor, in the Response, refers to claim 6 and various other claims of E28 concerning the disclosure of a "*threshold*". However, all these claims generically refer to a "*threshold*" but do not disclose any relation between the "*threshold*" and the "*current read ahead margin*"

as claimed, let alone that the "*threshold*" is "*selected according to the current read ahead margin*".

8 The Proprietor further argues that its understanding of feature 1.10 – a static trigger threshold that is "*established*" (or not) depending on the current read ahead margin – can be derived from par. [0063] of the patent-in-suit (which is identical to the aforementioned passage on page 15/16 of E28) such that essentially the claimed subject matter is identical to that of the embodiment disclosed on pages 15/16 of E28. This is not correct. Paragraph [0063] – just as the corresponding passage of E28 – expressly refers to a variable "*trigger threshold*" ("*The smaller the read ahead margin, the larger* θ_{up} *is …*"), and a "*trigger threshold*" that is calculated ("*determined*") based on the "*current read ahead margin*".

9 Only based on the omission of reciting a variable "*trigger threshold*" in feature 1.10 and based on the replacement of the wording "*determined*" by "*selected*" (compared to E28, or par. [0063] of the patent) can the Proprietor argue, in the Response (as well as in the parallel infringement proceedings) that feature 1.10 could be interpreted as a mere binary selecting or non-selecting of one and the same static "*trigger threshold*" that neither needs to be calculated nor dynamic. However, these changes go beyond what was disclosed in the earlier application as filed.

10 Hence, par. [0063]/the corresponding passage of the earlier application as filed does not serve as basis for feature 1.10 according to the Proprietor's interpretation.

B. Lack of novelty over E12

11 The Proprietor brings forward various incorrect statements on the overall disclosure of E12 and the understanding of the skilled person which are then incorrectly used against the disclosure of the teaching of E12 for "*video*" in general (see following section I). Moreover, the Proprietor paints

a distorted picture of E12 to incorrectly argue against the disclosure of features 1.2, 1.7, and 1.10 (cf. following sections II, III, and IV).

I. Application of the teaching of E12 to video

12 The Proprietor asserts that our submissions rely on disclosure of E12 limited to audio which is not transferable to video files (cf. Response, pages 42-48, sections 1.a) and 1.c)) and page 49, section (1)). However, their arguments are not convincing, and they neglect the commonly accepted standard that the teaching of a document is to be interpreted when reading the document as a whole, instead of singling out certain isolated passages.

13 When considering E12 as a whole, the skilled person recognizes, directly and unambiguously, that the disclosure of E12 regarding rate-adaptive streaming is disclosed for audio as well as video:

14 Already the title and abstract of E12 outline that its entire teaching relates to <u>video</u> (emphasis added):

> **(54) Title:** TRANSMISSION AND RECEPTION OF AUDIO AND/OR VIDEO MATERIAL
>
> **(57) Abstract:** Delivery of recorded audio or video material over a telecommunications link (2) from a server (1) to a terminal (3) is accomplished by dividing the material into a sequence of sub-files each of which is independently requested by the terminal, which thereby has control of the rate of delivery. Provision may be made for switching between alternative sub-file sets representing alternative delivery modes of data rates.

15 E12, on page 2, starts with an audio data embodiment, but already there outlines that "*as will be discussed in more detail below, the system may be used to convey video signals instead of, or in addition to, audio signals*" (E12, page 2, lines 7-9). E12 then describes, with exemplary reference to MP3 files, the concept of dividing a file into smaller files or sub-files (E12, page 3, line 1-7, and 20-22) and streaming based thereon (E12, pages 4-6).

Subsequently, E12, describes a "*second, more sophisticated embodiment*" in which several copies of a file are stored with different data rates and the player program is able to switch between them (E12, page 6, lines 11-15, 21-26 as well as pages 7-15).

16 E12 then clearly outlines that "[t]*he same principle may be applied to the delivery of video recordings*". Both, the simple embodiment, and the more sophisticated rate-adaptive streaming embodiment are expressly disclosed for video (E12, page 16, lines 6-12):

> The same principle may be applied to the delivery of video recordings, or of course, video recordings with an accompanying sound track. In the simpler version, where there is only one recording, the system differs from the audio version only in that the file is a video file (e.g. in H.261 or MPEG format) and the player program incorporates a video decoder. The manner of partitioning the file into sub-files is unchanged.
>
> As in the audio case, there may be two or more recordings corresponding to different data rates, selected by the control mechanism already described. Also one can provide additional

II. Disclosure of feature 1.2

17 The proprietor argues that feature 1.2 is not disclosed in an enabling manner. Allegedly, E12 does not describe a technique for generating sub-files. Specifically, the skilled person was allegedly unable to implement the teaching of E12 using MPEG by starting each sub-file with an intra-frame, such that E12 merely discloses "*bridging sub-files*" in an enabling manner.

18 Setting aside that, in themselves, "*bridging sub-files*" also anticipate feature 1.2, the Proprietor's statements are incorrect and neglect the common general knowledge of the skilled person that was already referred to in the Opposition based on E26 and E27 (Opposition, page 14, second paragraph). It is undisputed that E12 discloses feature 1.2, and we will outline below that the skilled person could easily implement this teaching in at least three ways, and without the need for "*bridging sub-files*".

19 First, E12 discloses that the issue of intra-frames can be avoided "[i]*n the case of recordings where each frame of a picture is coded independently*" (E12, page 16, lines 18-20).

20 Second, for the case that the encoding involves inter-frame techniques such that interdependencies between frames exist, E12 expressly teaches with reference to "*MPEG*" that, then, "*each sub-file should preferably begin with an intra-frame*" (E12, page 16, lines 22-23). The skilled person would necessarily implement this by assigning a number of groups of pictures (a structure of the MPEG standard) to a sub-file (each group of pictures starts *per se* with an intra-frame), such that each sub-file would begin with an intra-frame.

21 Third, even if this was – incorrectly – assumed to be too difficult for the skilled person, the skilled person would realize that, with reference to interdependencies between audio sub-files (due to the "*bit reservoir*" scheme used for MP3), E12 teaches that this problem is "*easily solved by encoding each sub-file separately, as if it were a single recording*" (E12, page 14, lines 20-24). Specifically, this teaching makes it clear that it would have been another way to implement the teaching of E12 with regard to video by the same technique, namely dividing a video into sub-files by first partitioning the video and then encoding each sub-file separately.

22 As a result, the mere allegation that the teaching of E12 is not enabling which is not backed by any substantive argument is plainly wrong. The skilled person could, without further ado, implement the teaching of E12.

23 To the extent that E12 does not enable the skilled person to put its teaching into effect due to the alleged absence of any "*concrete technical implementation teaching*" (cf. Response, p. 47/48, section (3)(b)), this would apply likewise to the patent-in-suit, and the skilled person would therefore not be able to generate streams of content, divide those into streamlet files, and so on as required by claim 1. Just as E12, the patent would not provide any "*concrete technical implementation teaching*" for these aspects which, according to the Proprietor, is required for an enabling teaching.

III. Disclosure of feature 1.7

24 The Proprietor asserts that E12 teaches that the buffer *must* be cleared when upshifting (cf. Response, page 45, section (3)). Hence, it alleges there is no "*continuous playback*" as required by feature 1.7.

25 This argument cannot be followed. E12 expressly discloses not clearing the buffer when upshifting, e.g., to avoid a freezing of the playback (section 1).

26 Moreover, if the Proprietor wants to interpret the indication of purpose "*to achieve continuous playback*" to be more than the purpose to be achieved "*by requesting the streamlets of the highest quality one of the copies determined sustainable at that time*", e.g. such as to exclude a buffer clearing when shifting playback quality, feature 1.7 is further inadmissibly amended, since the earlier application as filed nowhere discloses the claimed purpose "*to achieve continuous playback*" (section 2).

1. E12 discloses to refrain from buffer clearing

27 First of all, E12 comprises a generic teaching, e.g., in claim 18, of an upshift to a higher data rate that leaves open whether or not there is a buffer clearance when shifting playback quality.

28 It is correct that, with respect to the specific audio embodiment described on pages 9-11, E12 teaches a "*Clear Buffer*" command. This is what the Proprietor focuses on. However, E12 is precisely not limited to this disclosure. Instead, specifically for video, E12 expressly teaches to refrain from clearing the buffer since this can lead to an inacceptable freezing of the picture (E12, page 18, lines 19-23; emphasis added):

> files are required in both directions). However, it will be observed that, as described, the bridging
> 20 sub-file results in a freezing of the picture for a period of four frames – i.e. (at 25 frames per second) 160ms. In switching from fast to normal play this is acceptable – indeed one would probably choose to clear the buffer at this point. It may or may not be subjectively acceptable on rate-switching. An alternative therefore would be to construct a four-second bridging sequence.

29 In view of the above disclosure, it is crystal clear that the skilled person derives from E12, directly and unambiguously, the option to not clear the buffer when "*rate-switching*" for video since otherwise an unacceptable "*freezing of the picture*" (i.e., non-continuous playback) would occur.

30 This becomes further evident when looking at the passages of E12 cited in the Response, at which E12 also teaches a solution for audio that avoids buffer clearance when shifting (cf. Response, pages 56-58 with reference to E12, page 14, line 26 to page 15, line 8). There, E12 teaches a solution which allows to run a sound card continuously, with which an issue that "*causes interruption in its audio output*" can be resolved, and "*interruptions in the output ... can be avoided*" (E12, page 15, lines 4-5). As understood by the skilled person, this necessarily implies not clearing the buffer when shifting, as otherwise interruptions could not be avoided.

31 The Proprietor themselves state that the sound card issue would not have been applicable to video at the priority date, confirming that the above idea that avoids "*interruptions in the output*" could have been implemented for video even more easily.

32 Also, when looking at a further embodiment of E12 it becomes even clearer that clearing the buffer would not even have made any technical sense at all: As outlined in the Opposition, E12 teaches the option to upshift only if the "*measured rate*" is higher than the "*next higher rate*" for at least 120 seconds (Opposition, page 50-51 with reference to E12, page 8, lines 24-26). In this example, the available data rates are 8 kbit/s, 16 kbit/s, 18 kbit/s, 24 kbit/s, and 32 kbit/s respectively (Opposition, page 41, with reference to E12, page 7).

33 That means, when upshifting from the lowest quality to the next higher quality, the buffer will have been filled for 120 seconds with a rate higher than 16 kbit/s ("*next higher rate*") and at the same time been drained with a rate of 8 kbit/s ("*current rate*"). That means, when upshifting, the buffer will be filled by at least "120 seconds x (16 kbit/s – 8 kbit/s) = 960 kbit".

This corresponds to at least 120 seconds of playing time[1]. Since the upshift simply relates to the next sub-file being requested from the directory in which the higher quality copy is stored (E12, page 9, top), clearing the buffer would mean that for each upshift, there is a jump in the file by at least 120 seconds or 2 minutes. This would not make any technical sense at all. Hence, already from the upshift criterion disclosed on page 8, lines 24-26, the skilled person gathers that the buffer shall precisely not be cleared when upshifting to avoid such jumps.

34 Auxiliary, we outline that implementing E12 for video files without clearing the buffer would in any case be most obvious for the skilled person when confronted with the task of putting the teaching of E12 into practice and considering E12 as a whole, such as to avoid freezing images.

35 To the extent that the Proprietor wants to argue that the skilled person does not know how to configure a player such that clearing the buffer could be omitted during rate shifting (cf. Response, pages 56-57, section (ii)), the same arguments would apply to the patent-in-suit such that the patent-in-suit has to be revoked for insufficiency of disclosure.

2. Reading further implications into indication of purpose "*to achieve continuous playback*" leads to inadmissible amendment

36 In the Opposition we had outlined that the indication of purpose "*to achieve continuous playback*" is merely tied to requesting the right streamlets, namely those that are "*of the highest quality … determined sustainable at that time*", as recited in feature 1.7. This purpose is still achieved even if the buffer is cleared when rate shifting, since the purpose is tied to requesting the "*streamlets*" of the "*highest quality determined sustainable*", which would not depend on whether a subsequent event takes place that allegedly might temporarily disrupt playback.

[1] For upshifting from the further available qualities 16 kbit/s, 18 kbit/s, 24 kbit/s similarly long playing times of at least 15 and 40 seconds are obtained, respectively.

37 Based on that claim construction, E12 would disclose feature 1.7 even if it were incorrectly assumed that it always teaches to clear the buffer when upshifting.

38 The Proprietor now argues that the indication of purpose in feature 1.7 "*to achieve continuous playback*" not only refers to the subsequently requested streamlets but implies further limitations, specifically it expressly requires that the buffer is not cleared during shifting (Response, page 14, section 8.b)).

39 However, if this understanding of feature 1.7 is followed, this is another reason why claim 1 must be revoked for inadmissible amendments. In fact, the entire earlier application as filed is silent on the alleged requirement that the buffer must not be cleared during rate shifting. Specifically, also the indication of purpose "*to achieve continuous playback*" from which the Proprietor tries to derive this, is not disclosed anywhere.

IV. Disclosure of feature 1.10

40 As outlined in the Opposition (Opposition, page 50/51) and in mn. 33, the upshift criterion of E12 ensures that an upshift occurs only if the buffer is sufficiently filled.

41 More specifically, as outlined in the Opposition, E12 indisputably teaches upshifting, "*if the measured rate exceeds not only the current rate but also the next higher rate for a given period of time (e.g. 120 seconds; ...) ...* " (cf. E12, page 8, lines 24-26). This condition inherently necessitates that a certain minimum read-ahead margin is present when upshifting. The data is received at a rate higher than "*the next higher rate*" for, e.g., 120 seconds, such that data is added to the buffer with a rate higher than "*the next higher rate*". At the same time, data is consumed from the buffer (or displayed) at the "*current rate*". That means, for the entire period of time, e.g., 120 seconds, the read-ahead margin in the buffer grows at a rate equal to at least the difference between "*next higher rate*" and "*current rate*".

42 As a result, in E12, the condition for upshifting necessitates a predetermined and quantifiable minimum read-ahead margin, given by the product of the given time period (e.g., 120 seconds) and the difference between the "*next* higher rate" and the "*current rate*". Based on the specific numbers disclosed by E12, the following values are necessarily implied (and thus implicitly disclosed; cf. Case Law of the Boards of Appeal of the EPO, July 2022, Section II-E.1.3.3):

- from 8 kBit/s to 16 kBit/s: 960 kBit, 120 s playing time
- from 16 kBit/s to 18 kBit/s: 240 kBit, 15 s playing time
- from 18 kBit/s to 24 kBit/s: 720 kBit, 40 s playing time
- from 24 kBit/s to 32 kBit/s: 960 kBit, 40 s playing time.

43 Hence, E12 teaches, directly and unambiguously, that there may only be an upshift, if the current read ahead margin exceeds the abovementioned values. In the interpretation by the Proprietor, only then the static "*trigger threshold*" ("*next higher rate*") is "established" and compared to the "*performance factor*" ("*measured rate*"). As a result, under the Proprietor's interpretation, the "*trigger threshold*" is selected "*according to the current read-ahead margin*", as claimed, namely only if the "*current read-ahead margin*" exceeds a predetermined threshold.

44 Hence, E12 also discloses feature 1.10.

45 Auxiliary, we refer to our Opposition in which we outlined that it was at least obvious in view of E12, and in particular a combination of E12 and E15 to also implement a dynamic "*trigger threshold*" such as to ensure that streaming can be sustained until the end of the respective file (Opposition, pages 58-62). Proprietor argues again incorrectly that E12 requires clearing of the buffer and points to irrelevant features of E15 to argue that a combination of E12 and E15 would not result in features 1.2 and 1.3, already disclosed by E12 (Response, 67-69).

46 But Proprietor is wrong. As explained in the preceding section, E12 does not require clearing of the buffer. Proprietor does not and cannot dispute

that both E12 and E15 relate to adaptive rate streaming. That E15 may have insubstantial differences, such as server-side control and an estimation of buffer fullness, is irrelevant to the asserted combination of E12 and E15 that renders obvious feature 1.10. No substantive counterargument is provided by the Proprietor against E15 rendering obvious feature 1.10.

47 Apart from that, the arguments of the Proprietor that E12 allegedly only looks into the past (Response, p. 54, section (e)) cannot be followed. First, that it is incorrect that E12 requires to always clear the buffer was already outlined in the preceding section. Second, any supposed buffer clearing after a switch would anyway be irrelevant for the disclosure of feature 1.10. It is unclear how any consideration of the "*current read ahead margin*" would not "*look into the past*" according to Proprietor, as the "*current read ahead margin*" is defined as "*the amount of contiguously available streamlets stored in the staging module*" (emphasis added).

C. Auxiliary requests

48 The Proprietor requests that the patent be upheld as granted. In the auxiliary, it requests the patent be upheld in 102 different versions.

49 As the OD will appreciate, in the context of any Opposition proceedings this number of requests is unreasonably high. The unreasonableness is, however, only further emphasized by the relatively straightforward fact matrix of the current Opposition proceedings (e.g., including only a single Opponent, having only two primary pieces of prior art, etc.) which in no way justifies the number of requests presented by the Proprietor.

50 Further, there is no convergence in the high number of auxiliary requests submitted. Instead, the individual requests are agglomerations of different feature combinations, many of them taken from the description, without becoming evident where the Proprietor sees an invention. For example, auxiliary requests 1 and 2 relate to compression / MPEG-4. In auxiliary re-

quest 3, these features are omitted and instead claim 1 is limited to the feature of dependent claim 6. Auxiliary requests 4 and 5 again start out from the claims as granted and include yet another set of features. After various permutations of the amended features in the auxiliary requests up to auxiliary request 15, the Proprietor again starts anew: Auxiliary request 16 limits claim 1 as granted to yet another feature taken from the description. Also auxiliary request 17 is again non-convergent: It starts from claim 1 as granted and amends it with dependent claim 2. This scheme continues without convergence up until auxiliary request 102.

51 Moreover, the majority of auxiliary requests are unsubstantiated. The Proprietor dedicates no more than two sentences (Response, page 104, section XI) in support of 67 of its auxiliary requests and provides no comments on the need for these requests with reference to the grounds of opposition raised nor in support of the basis for the amendments made therein.

52 The high number of auxiliary requests, their lack of convergence and the fact that the majority are unsubstantiated evidently demonstrates an abuse of proceedings by the Proprietor. What has been filed clearly exceeds what would be considered "*necessary*" and "*appropriate*" (Rule 81(3) EPC and Rule 79(1) EPC; T 364/20, reasons, 7.1.3). Rather, the high number of auxiliary requests, their lack of convergence and (in the most part) their lack of substantiation puts an undue burden on the Opponent as well as the OD.

53 <u>We therefore request the OD exercises its discretion to dismiss all of the auxiliary requests as inadmissible</u>, in accordance with T 364/20 (reasons, 7.1.3) that expressly confirms the OD's discretion in such circumstances.

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