

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

f FUBOTV MEDIA INC., YANKA INDUSTRIES, INC., WEBGROUP
CZECH REPUBLIC, A.S., and NKL ASSOCIATES, S.R.O.,¹

Petitioners,

v.

DISH TECHNOLOGIES L.L.C.,

Patent Owner.

Case IPR2024-00919

Patent 8,868,772 B2

**PATENT OWNER'S REPLY IN SUPPORT OF ITS
MOTION TO STRIKE UNDER 37 C.F.R. § 42.23(b)**

¹ Webgroup Czech Republic, A.S. and NKL Associates, S.R.O. filed a petition in IPR2025-00348 and have been joined as parties to this proceeding. See Paper 57.

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***** Emphasis added throughout unless otherwise noted. *****

Petitioners and their expert, Dr. Houh, attempt to justify their new theories claiming they merely “unpacked the details” (Paper 69, “Opp.”, 10) and “pieced together” (EX2150, 55:16-17) the Leaning disclosures they were purportedly relying on all along. Petitioners’ approach disregards the Federal Circuit’s clear mandate that “the expedited nature of IPRs bring with it an obligation for petitioners to make their case *in their petition to institute.*” *Intelligent Bio-Sys., Inc. v. Illumina Cambridge, Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016). Yet, Petitioners and Dr. Houh waited until the Reply to introduce substantial new analysis and modifications to Leaning—precisely the type of late-stage tactics the Board has repeatedly rejected. *See Wasica Fin. GmbH v. Cont’l Auto. Sys., Inc.*, 853 F.3d 1272, 1286 (Fed. Cir. 2017) (affirming Board’s refusal to consider new modifications and new embodiments of prior art in IPR reply after patent owner “pointed out the flaws”).

I. PETITIONERS’ BELATED INVALIDITY THEORIES ARE NOT EXCUSED BY AN ALLEGED “NEW” CLAIM CONSTRUCTION.

Petitioners assert that the Federal Circuit’s decision in *Axonics* justifies their new arguments. (Opp., 1-2). But unlike *Axonics*, it is Petitioners, not PO, who introduced a new construction here. As PO explained in its Motion to Strike (Paper 61, “Mot.”), Petitioners knew “continuous playback” was limiting when they filed their Petition. Indeed, it was Petitioners who first pointed out “continuous playback” was relied on to overcome prior art during prosecution. *See Mot.*, 3-4. The Petition

also cited the exact pages of the ITC’s prior claim construction ruling that discussed the plain and ordinary meaning of “continuous” as meaning “uninterrupted.” *Id.*, 4-5. Petitioners’ reliance on *Axonics* is therefore pretextual and meritless.

If Petitioners intended to argue that the term “continuous” was merely “aspirational” and therefore non-limiting, or that “continuous” could be satisfied by certain discontinuities, then they were obligated to advance those contentions in the Petition so PO could fairly respond. Petitioners’ attempt to do so in their Reply finds no justification in *Axonics*. Petitioners’ new construction should therefore be struck, as should each of the new modifications of Leaning Petitioners attempt to justify based on this allegedly new claim construction.

II. PETITIONERS’ ARGUMENT THAT LEANING’S “CLEAR BUFFER” COMMAND “CAN BE AVOIDED” IS A NEW LEGAL THEORY.

Petitioners are incorrect that the Petition advances any “modification” of Leaning that “does not require clearing the buffer.” Opp., 5. As an initial matter, the Petition *expressly relies on Leaning performing the step of “determin[ing] (1) if the buffer is empty”* to meet the limitations of claim 1 that require the player to make rate shifting decisions, and it explicitly relies on Leaning’s flow chart showing performance of that rate shifting logic. Paper 3 (“Pet.”), 36. Having expressly relied upon that teaching to meet one claim element (1[C]), Petitioners cannot now change their mapping to a different embodiment to fix a problem with their analysis of the

“continuous playback” element in a different element (1[E]).

Even if the Board were to allow Petitioners to pivot to a new Leaning embodiment in Reply, that new embodiment would, at most, eliminate the “BufferFullness = 0” condition that serves as a predicate for Leaning’s “Stepdown” (downshift) function. EX1004, 15:7-8. But the “Stepdown” function itself still includes a “Clear Buffer” command. *Id.*, 10. So too does Leaning’s “Stepup” (upshift) function. *Id.* Petitioners’ new Reply theory would therefore require further modifying Leaning’s flow-chart logic to remove the two “Clear Buffer” requirements present in both the Stepup and Stepdown processes. To be clear, Leaning **never** describes removing those requirements. Petitioners’ argument that Leaning’s “Clear Buffer” command “can be avoided” by an eliminating the completely separate “BufferFullness = 0” condition is, therefore, an entirely new modification of Leaning that would require a detailed articulation of a motivation to make such a change and a reasonable expectation of success. *See Redline Detection, LLC v. Star Envirotech, Inc.*, 811 F.3d 435, 449 (Fed. Cir. 2015). Such an analysis is nowhere in the Petition.

Also entirely new is Petitioners’ reliance on Leaning’s description of “running the sound card continuously at the highest sampling rate,” which supposedly provides motivation for Petitioners’ further modification of Leaning to remove the “Clear Buffer” command. Reply, 10. This embodiment is discussed nowhere in the

Petition or in Dr. Houh’s initial expert declaration (EX1003, “Houh1”), nor does the Petition cite the passage where Leaning discusses this possibility (EX1009, 14:25-31). Instead, it is a new Leaning embodiment raised in Reply solely to support a new obviousness theory. “Shifting arguments in this fashion is foreclosed by statute, [Federal Circuit] precedent, and Board guidelines.” *Wasica*, 853 F.3d at 1286.

III. PETITIONERS’ OTHER NEW THEORIES ALSO SHOULD BE STRUCK.

A. Loading Only a Single, 4-Second Sub-File

The only specific example of a playout time, T_P , in Leaning is 10 seconds. EX1004, 4:16-18, 5:20-21. It also is the only specific example of T_P mentioned in either the Petition or the initial Houh Declaration. Pet., 31 (“set at 10 seconds”) (quoting EX1004, 5:20-21); Houh1, ¶79 (same). Petitioners therefore must perform new calculations to obtain the 3-second T_P identified for the first time in its Reply, relying on a passage of Leaning (12:27-34) that was, at most, part of a larger passage (12:8-34) cited in the Petition for an entirely different limitation (1[A][2]). *Compare* Pet., 23 with Reply, 15.

The resulting new theory—loading only a **single**, 4-second sub-file in the buffer before playback—is inconsistent with Petitioners’ prior argument that Leaning’s “player program ... requests, receives, decodes and stores [a] **second subfile**” and “**repeats this process** until the contents of the buffer reach or exceed ... T_P .” Pet., 30. Petitioners should not be permitted such an about-face in its Reply.

B. Decoding, as Opposed to Clearing, the Buffer

Petitioners’ reading of the “clear buffer” command to mean *playing out*, rather than *purging*, content is belied by Leaning’s explicit discussion of the “extra delay” that would occur while “excessively large sub-files” are downloaded after the buffer is cleared (EX1004, 12:31-33), and its preference to “*suspend decoding and clear the buffer*” in the case of a user-requested “Jump” to a new video section “so that the new request is sent *immediately*” (*i.e.*, without waiting for the buffer to first drop below T_P). (*Id.* 10, 11:19-20). Regardless, Petitioners make no attempt to show this theory was in the Petition.

C. Previously-Undisclosed Encoding Techniques

Petitioners do not dispute that its attempt to *reverse* Leaning’s process for “encoding ... *then* partition[ing]” sub-files (EX1009, 6:21-26) is new. Reply, 8. Petitioners also go beyond the bounds of Leaning and the Petition by introducing new encoding techniques (*e.g.*, Motion JPEG2000) through new exhibits (*e.g.*, EX1046). *Id.*, 6. Even for the one encoding technique that is at least mentioned in Leaning—encoding with I-Frames—Petitioners pull from *six* new exhibits (EX1049, EX1057, EX1058, EX1061, EX1062, and EX1063) to provide the disclosure missing from Leaning on how this modification might actually work. Houh2, ¶¶64, 99, 120, 122. These new arguments and evidence should have been in the Petition to be considered, and should all be struck.

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Dated: July 28, 2025

/Eliot D. Williams /

Eliot D. Williams (Reg. No. 50,822)

Andrew Wilson (Reg. No. 74,093)

Jamie R. Lynn (Reg. No. 63,666)

BAKER BOTTS L.L.P.

700 K Street, N.W.

Washington, D.C. 20001

202.639.1334

202.639.1312

202.639.7786

G. Hopkins Guy III (Reg. No. 35,886)

BAKER BOTTS L.L.P.

1001 Page Mill Road, Bldg. 1, Suite 200

Palo Alto, California 94304-1007

650.739.7500

Ali Dhanani (Reg. No. 66,233)

Thomas B. Carter Jr. (Reg. No. 76,040)

BAKER BOTTS L.L.P.

910 Louisiana St.

Houston, TX 77002

713.229.1108

*Attorneys for Patent Owner, DISH
Technologies L.L.C.*

PATENT OWNER’S EXHIBIT LIST

Ex. No.	Description of Document
2001	U.S. Patent App. Pub. No. 2004/0030547 by Leaning et al. (“Leaning US”)
2002	Redline Comparison of Leaning and Leaning US
2003	Reserved
2004	Reserved
2005	Information Disclosure Statement entered in prosecution of U.S. Patent App. No. 18/069,450
2006	Notice of Allowance entered in prosecution of U.S. Patent App. No. 18/069,450
2007	337-TA-1265 ITC Investigation Commission Opinion
2008	Reserved
2009	<i>DISH Techs. L.L.C. v. MG Premium Ltd</i> , 2:23-cv-00552, Dkt. 114 (D. Utah Aug. 15, 2024)
2010	USPTO Reexamination Operational Statistics (Updated June 2024)
2011	Dave Marshall, <i>Compression: Video Compression (MPEG and others)</i> , Cardiff University, http://users.cs.cf.ac.uk/Dave.Marshall/Multimedia_CM0340/PDF/11_CM0340_MPEG_Video.pdf
2012	ITU-T Recommendation H.261 1993
2013	ISO/IEC 11172-2:1993(en), Information technology — Coding of moving pictures and associated audio for digital storage media at up to about 1,5 Mbit/s — Part 2: Video
2014	U.S. Patent No. 6,002,440 (’440 Patent)
2015	ISO/IEC 11172-3:1993(en), Information technology — Coding of moving pictures and associated audio for digital storage media at up to about 1,5 Mbit/s — Part 3: Audio
2016	NPB-P16992EP-O1-Letter from opponent
2017	US6806909
2018	Peloton ABR.mp4
2019	HTTP The Definitive Guide - Chapter 4
2020	Declaration of Inventor Robert Drew Major
2021	MOVE Networks Streaming Media Technology
2022	MOVE Networks Technology Overview
2023	Sling TV Emmy Award (CX-1084)
2024	MOVE Awarded Fundamental Patent (CX-1122)

2025	MOVE Networks Article (CX-0013)
2026	OnHollywood 100 (CX-1078)
2027	OnHollywood 100 Winner (CX-1079)
2028	OnMedia 100 Winner (CX-1080)
2029	Red Herring Global 100 (CX-1081)
2030	MOVE Networks TechCrunchies Finalist (CX-1082)
2031	MOVE Networks Makes Web TV Watchable (CX-0046)
2032	ABC.com Makes Watching TV at Work Better (CX-1106)
2033	MOVE Networks, a next-gen content distribution platform (CX1134)
2034	Better than YouTube (CX-0045)
2035	Long-Form Video Gaining Viewers (CX-1115)
2036	Move Over Joost (CX-1125)
2037	Coming Faster Than You Think (CX-1110)
2038	WSJ Pushing to Bring TV to the Internet (CX-1128)
2039	CNN Level 3 Collaborates with MOVE (CX-1113)
2040	The Sport Page ESPN 360 (CX-1132)
2041	E-Mail 5/15/2007 (CX-1047C)
2042	E-Mail 6/16/2007 (CX-1049C)
2043	E-Mail 11/26/2007 (CX-1050C)
2044	ABC Big Move Away from Flash (CX-1116)
2045	Disney ABC Throws Down (CX-1130)
2046	The Lowdown on Apple (CX-1131)
2047	AOL and CBS Put Online HD (CX-1109)
2048	MOVE Quality Solution (CX-1121)
2049	ABC Becomes First Network HD Streamer (CX-1112)
2050	ABC.com to Stream HD Video (CX-1108)
2051	ABC Adds Full Screen Mode to Online Shows (CX-1104)
2052	MOVE Networks Releases Live Streaming (CX-1123)
2053	ABC Offering Full Screen Streaming HD (CX-1105)
2054	Level 3 Streams and Other News from SMW (CX-1114)
2055	Microsoft Unlocks Power of the Web (CX-1092)
2056	Reserved
2057	Disney Backs Video Start-Up (CX-1111)
2058	Here Comes More HD Video (CX-1077)
2059	E-Mail 1/20/2009 (CX-1146C)
2060	MOVE and Microsoft Term Sheet (CX-1051C)

2061	To the Ends of the Earth (CX-1074)
2062	MOVE Gets Streaming Patent; Are Adobe & Apple Hosed? (CX1120)
2063	DISH's Motion for Preliminary Injunction, <i>DISH Techs. v. MG Premium Ltd et al.</i> , No. 2:23-cv-552-HCN-DAO, D.I. 19.
2064	Official Report of the One Hundred Seventy-fifth Semiannual General Conference, The Church of Jesus Christ of Latter-day Saints (Oct. 1, 2, 2005).
2065	Apple and MOVE NDA Agreement 11/15/2006 (CX-1137C)
2066	Apple and MOVE NDA Agreement (CX-1085C)
2067	E-Mail on 2/23/2009 (CX-1219C)
2068	Microsoft Invests in Net Video (CX-1087)
2069	MOVE Networks Publishing System (CX-1247C)
2070	Silverlight Shines (CX-1090)
2071	Exemplary Claim Chart Illustrating MOVE Networks' Use of Invention
2072	Reserved
2073	Excerpt of Deposition of David Ericson in <i>In re Certain Fitness Devices, Streaming Components Thereof, and Systems Containing Same</i> , Inv. No. 337-TA-1265 (taken Jan. 6, 2022)
2074	MOVE Crosses the Hour Threshold
2075	Readies Online HD Shows as Streamlettes (CX-1107)
2076	Delivering a Better Viewing Experience
2077	MOVE Adaptive Stream
2078	Utah Valley Entrepreneurial Forum Hall of Fame 2013
2079	Utah Technology Hall of Fame 2005
2080	ABC TV New Player Rocks
2081	E-Mail 1/23/2008 (CX-1052C)
2082	ABC.com Streamlettes (CX-1133)
2083	MOVE Networks Newsroom (CX-1124)
2084	ABC.com Readies Online HD (CX-1135)
2085	Metrics Point to Maturation of Online (CX-1117)
2086	More Money Pouring Into Rich Media (CX-1118)
2087	MOVE Put Mass Back Into Mass Media (CX-1126)
2088	E-mail 2/25/2008 (CX-1053C)
2089	E-mail 5/14/2008 (CX-1055C)
2090	2010 EchoStar 10-K (CX-0052)

2091	E-Mail 8/26/2008 (CX-1059C)
2092	Microsoft Extends Vision (CX-1148)
2093	DISH's Motion to Terminate Against Peloton
2094	Joint Motion to Partially Terminate Against Mirror
2095	DISH Petition to Rescind Limited Exclusion Order Against iFit
2096	MOVE Networks Awarded Fundamental Patent (CX-1091)
2097	Reserved
2098	Default Protective Order
2099	Declaration of Gregory Smith
2100	Declaration of David Ericson
2101	Supplemental Declaration of David Ericson in <i>Aylo Freesites Ltd v. DISH Technologies L.L.C.</i> , IPR Nos. 2024-00043, -00044, -00045, -00046, -00146.
2102	Transcript of Deposition of David Ericson in <i>Aylo Freesites Ltd v. DISH Technologies L.L.C.</i> , IPR Nos. 2024-00043, -00044, -00045, -00046, -00146 (taken Sept. 19, 2024)
2103	Baseball Tests Online Broadcasts, NY Times (CX-1151)
2104	E-Mail 5/12/2007 (CX-1218C)
2105	E-Mail 5/25/2007 (CX-1198C)
2106	Reserved
2107	E-Mail 7/25/2008 (CX-1101C)
2108	E-Mail 6/2/2008 (CX-1056C)
2109	E-Mail 2/22/2008 (CX-1054C)
2110	E-Mail 7/22/2008 (CX-1057C)
2111	Reserved
2112	Video Support (CX-0103)
2113	Microsoft Announces New Support for Silverlight (CX-1093)
2114	Move Networks Powers Seven of Top Ten Online Broadcast TV Networks (CX-1201C)
2115	Reserved
2116	E-Mail 2/2/2009 (CX-1196C)
2117	E-Mail 2/13/2009 (CX-1197C)
2118	E-Mail 6/14/2007 (CX-1199C)
2119	E-Mail 4/21/2008 (CX-1200C)
2120	Display Commemorating BYU.tv Launch Using Move ABR Technology
2121	Fox Switches (Ericson Dep. Exhibit 1)

2122	Delivering a Better Viewing Experience (CX-1102)
2123	Declaration of MOVE President and CEO John Edwards
2124	Deposition Testimony of John Edwards in <i>In re Certain Fitness Devices, Streaming Components Thereof, and Systems Containing Same</i> , Inv. No. 337-TA-1265 (taken Nov. 12, 2021)
2125	Declaration of E. Flaucher of Microsoft in <i>In re Certain Fitness Devices, Streaming Components Thereof, and Systems Containing Same</i> , Inv. No. 337-TA-1265
2126	Declaration of Peter Ratcliffe
2127	Declaration of Mark Mitchell
2128	Deposition Testimony of Mark Mitchell in <i>In re Certain Fitness Devices, Streaming Components Thereof, and Systems Containing Same</i> , Inv. No. 337-TA-1265 (taken December 02, 2021)
2129	Transcript of Deposition of Dr. Houh (February 6, 2025)
2130	Level 3 and Move 6.22.07 (CX-1071C)
2131	Request for Comments 8216, “HTTP Live Streaming,” Pantos & May (2017 ed.)
2132	Deposition Testimony of Greg Smith in <i>In re Certain Fitness Devices, Streaming Components Thereof, and Systems Containing Same</i> , Inv. No. 337-TA-1265 (taken Nov. 09, 2021)
2133	Leaning Demonstrative.mp4
2134	<i>Aylo Freesites Ltd v. DISH Technologies L.L.C.</i> , IPR2024-00940, Paper 1 (Petition 1 of 2).
2135	segment_cif_001.h261.mp4
2136	akiyo_cif_full.y4m.mp4
2137	Request for Comments 2068, “Hypertext Transfer Protocol – HTTP/1.1,” Fielding et al. (Jan. 1997)
2138	Request for Comments 2616, “Hypertext Transfer Protocol – HTTP/1.1,” Fielding et al. (June 1999)
2139	U.S. Patent No. 6,678,332 (Gardere et al.)
2140	BT turns on to TV, The Register (Nov. 2, 2001).
2141	Declaration of Dr. Kevin Jeffay
2142	Echostar Acquires MOVE Networks
2143	Declaration of Peter Ratcliffe Esq
2144	CX-1170C -Deposition of Ericson
2145	[Reserved]
2146	[Expunged]
2147	[Expunged]

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2148	Petitioner's Reply (Paper 51) with Highlighting
2149	Supplemental Declaration of Dr. Henry Houh (EX1026) with Highlighting
2150	Deposition Transcript of Dr. Henry Houh, July 16, 2025

CERTIFICATE OF SERVICE

Pursuant to 37 CFR § 42.6(e)(4), the undersigned certifies that on July 28, 2025, a complete and entire copy of the **PATENT OWNER'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE UNDER 37 C.F.R. § 42.23(b)** was provided via email to the Petitioners by serving the correspondence email addresses of record as follows:

James M. Glass (Reg. No. 46,729)
jimglass@quinnemanuel.com

Quincy Lu (Reg. No. 76954)
quincylu@quinnemanuel.com

Christopher Mathews (Reg. No. 35944)
chrismathews@quinnemanuel.com

Brian Mack (Reg. No. 57189)
brianmack@quinnemanuel.com

Fubotv_masterclassiprs.lwteam@lw.com
Inge A. Osman (Reg. No. 74,480)
Inge.osman@lw.com

Tara D. Elliott (Reg. No. 52,859)
Tara.elliott@lw.com

Richard G. Frenkel (Reg. No. 47,578)
Rick.frenkel@lw.com

Rebecca L. Rabenstein (Reg. No. 69,005)
Rebecca.rabenstein@lw.com

Clement Naples (Reg. No. 50,663)
Cnaples@cgsh.com

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Date: July 28, 2025

/Eliot D. Williams/
Eliot D. Williams (Reg. No. 50,822)