

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AYLO FREESITES LTD,

Petitioner

v.

DISH TECHNOLOGIES L.L.C.,

Patent Owner

U.S. Patent 11,991,234

Issue Date: May 21, 2024

Title: APPARATUS, SYSTEM, AND METHOD FOR MULTI-BITRATE
CONTENT STREAMING

Inter Partes Review No. IPR2024-00940

**PETITIONER'S AUTHORIZED RESPONSE
TO PATENT OWNER'S MOTION TO STRIKE**

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I. INTRODUCTION

“[S]triking the entirety or a portion of a party’s brief is an *exceptional remedy* that the Board expects will be granted *rarely*.” Consolidated Trial Practice Guide (“CTPG”) at 80 (emphases added). DISH must show that it is “beyond dispute” that Aylo’s Reply (Paper 45, “Reply”) presents new issues or evidence or that the risk of prejudice to DISH is “so great” that the Board must consider a motion to strike now and cannot wait until after the hearing to evaluate all the evidence. *Id.* at 80-81. DISH cannot satisfy these high standards, and its motion should be denied.

DISH’s primary attack is on Aylo’s alleged failure to address the “continuous presentation” claim language in the Petition. *See* Paper 50 (“Mot.”) at 1. But Aylo did address this language, which should end the inquiry. *E.g.*, Petition (“Pet.”) at 49 (citing the analysis of limitation 1[D], which incorporates the analysis of limitations 1[C][1]-1[C][2] covering the claim language). Moreover, it is bedrock law that Aylo’s Reply is permitted to respond to arguments raised by DISH in its Patent Owner Response (Paper 20, “POR”) or expand on arguments Aylo raised in the Petition. *See infra* Section II. That is at most what Aylo does.

Finally, even if Aylo’s Reply does raise new arguments (it does not), it is well established that if a patent owner raises a new claim interpretation post-institution, the petitioner must be given the opportunity to respond. *Axonics v. Medtronic*, 75 F.4th 1374, 1384 (Fed. Cir. 2023). This is especially so where DISH declined to

make any merits-based arguments in its Patent Owner Preliminary Response (Paper 9, “POPR”) and instead raised its interpretation of “continuous presentation” for the first time in its POR. The Board should be “reluctant” to “permit such gamesmanship.” *Axonics*, 75 F.4th at 1384.

II. LEGAL STANDARD

Striking a portion of a brief is an “exceptional remedy” that the Board “rarely” grants. CTPG at 80. In order to be entitled to any relief, DISH must show it is “beyond dispute” that Aylo has belatedly presented new issues or evidence or that the risk of prejudice to DISH is “so great.” *Id.* at 80-81.

A petitioner is entitled to submit reply arguments that are “responsive to arguments raised in the patent owner’s response” or expand on arguments in the petition. *Apple Inc. v. Andrea Elecs.*, 949 F.3d 697, 705-07 (Fed. Cir. 2020) (“[T]he petitioner . . . may introduce new evidence after the petition stage if the evidence is a legitimate reply to evidence introduced by the patent owner.”); *Rembrandt Diagnostics LP v. Alere, Inc.*, 76 F.4th 1376, 1384 (Fed. Cir. 2023) (“[A] reply may be proper if it is responsive and simply expands on previously raised arguments.”).

In addition, where a patent owner introduces a new claim construction in its POR, “a petitioner *must* be given the opportunity in its reply to argue and present evidence . . . under the new construction.” *Axonics*, 75 F.4th at 1384 (emphasis added); *see also Ericsson Inc. v. Intellectual Ventures I LLC*, 901 F.3d 1374, 1379-

80 (Fed. Cir. 2018). This is true even if petitioner “could have made construction arguments for the term in its IPR petition.” *Axonics*, 75 F.4th at 1381. Moreover, to the extent DISH “suggests that the Board could not reach a counterargument because it was not preemptively addressed by the petition or institution decision, [it] is plainly mistaken.” *Idemitsu Kosan Co. v. SFC Co.*, 870 F.3d 1376, 1381 (Fed. Cir. 2017). Aylo cannot be expected to preemptively address DISH’s arguments. *Id.*

DISH’s cited cases are consistent with the above legal authority and support Aylo. For example, in *Wasica Fin. v. Cont’l Auto. Sys.*, the reply only exceeded its scope because the petition relied on anticipation and “waived any obviousness argument,” and the reply advanced a “new theory” combining a POSITA’s knowledge with an entirely new reference. 853 F.3d 1272, 1284-86 (Fed. Cir. 2017). Aylo does not raise any new theories or combinations of references. Similarly, in *Intelligent Bio-Systems Inc. v. Illumina Cambridge Ltd.*, the reply was improper because it “relied on an entirely new rationale.” 821 F.3d 1359, 1370 (Fed. Cir. 2016). Again, that is not what Aylo does here. In fact, consistent with Aylo’s Reply, *Illumina* makes clear that a “reply may . . . respond to arguments raised in the corresponding opposition or patent owner response.” *Id.* at 1369.

III. ARGUMENT

A. Aylo’s Arguments Directly Respond to Arguments Raised by DISH or Expand on Arguments in the Petition

Aylo’s purportedly “new” arguments are directly responsive to DISH’s POR

or simply expand on arguments in the Petition. *See Apple*, 949 F.3d at 705-07.

1. That Clearing Leaning's Buffer Is Optional Is Not a New Argument and also Directly Responds to DISH's POR

Leaning teaches streaming without clearing the buffer. This fact is not a new argument and at most expands on arguments made in the Petition. *See Ericsson Inc.*, 901 F.3d at 1379-81. For example, the Petition argued that Leaning prefers “to employ a criterion which anticipates underflow and avoids it . . . by omitting the first determination (whether the buffer is completely empty).” Pet. at 31 (citing EX1004 at 15:3-8). Aylo's Reply cites the same embodiment to argue that DISH's POR makes an “erroneous argument that Leaning requires clearing the buffer” as evidenced by Leaning “describ[ing] the rate-shifting embodiment relied upon in the Petition that seeks to remedy buffer underflow.” Reply at 7-9 (citing EX1004 at 15:3-6). Furthermore, Aylo's arguments (*see* Reply at 3-5) also directly respond to DISH's arguments that Leaning always clears the buffer on every rate switch, which results in playback discontinuities (POR at 12-17, 19-20). Aylo is entitled to respond to such erroneous arguments. *Apple Inc.*, 949 F.3d at 705-07. Moreover, DISH mischaracterizes Aylo's arguments. Aylo never “reli[ed] on Leaning's . . . mandate that a playback-disrupting ‘Clear Buffer’ command be executed.” Mot. at 4.

In addition, DISH failed to substantiate its arguments with anything beyond the *ipse dixit* of its declarants, while Aylo's expert Dr. Houh thoroughly disproved DISH's claims by citing directly to Leaning. *Compare* Reply at 3-5 and EX1022 at

8-9 (citing EX1004 at 11:19-20) (clearing the buffer “is not actually essential”) *with* Pet. at 31-33 (citing EX1004 at 9-11). That is exactly the proper role of reply evidence, especially where Dr. Houh relies on the same or substantially similar portions of Leaning for both the Petition and the Reply.

2. That Leaning Discloses Decoding in Software and Encoding With I-Frames Are Not New Arguments and Directly Respond to DISH’s POR

Aylo’s Reply at 5-6 and EX1022 at §IV.B are directly responsive to DISH’s arguments that applying Leaning to video would require resetting video cards (EX2141 ¶¶ 89-90) and that encoding in Leaning must lead to discontinuities (POR at 12-18). As DISH concedes, the Reply relies on the same portions of Leaning that discuss decoding in software without the need to re-set the video card as the Petition. *Compare* Reply at 5 (citing EX1004 at 16:6-10) *with* Pet. at 20 (same). Moreover, Aylo’s argument directly responds to DISH’s argument that Leaning requires resetting video cards. EX2141 ¶¶ 89-90. In fact, Dr. Houh’s testimony disproves DISH’s claim by relying on this same portion of Leaning as in the Petition explaining that “it would not make sense to clear the buffer because there would be no video card that required re-setting.” EX1022 at 9-10 (citing to EX1004 at 16:6-10).

Moreover, DISH claims Aylo is modifying Leaning’s sub-files to include I-frames, but the Reply merely expands on the same prior argument to explain that “each video sub-file should begin with an I-frame to avoid decoding errors when

rate-switching.” *Compare* Pet. at 20 (citing EX1004 at 16:6-10 (“the file is a video file (e.g. in H.261 or MPEG format)”)) *with* Reply at 5 (citing EX1004 at 16:6-10, 16:17-23 (when using “the MPEG standards . . . each sub-file should preferably begin with an intra-frame”)). Aylo is not proposing any modifications of Leaning but instead relies on its express teachings that disclose using I-frames.

3. The Playout Time and “Playing Out” the Buffer Arguments Are Not New and Directly Respond to DISH’s POR

Aylo’s T_P arguments (Reply at 7-9; EX1022 at §IV.C) directly respond to DISH’s argument that T_P in Leaning must be set to 10 seconds (POR at 12). Aylo must be allowed to correct DISH’s mischaracterization of Leaning, which teaches that T_P can be set to ~3 seconds for 4-second sub-files and is “user-selectable.” *See* Reply at 8. Moreover, Aylo’s arguments clearly just expand on arguments made in the Petition. The Petition argued that Leaning’s player will increment and request sub-files until Buffer Fullness > T_P seconds (Pet. at 46-47), and the Reply explains (in direct response to DISH’s POR arguments) that if T_P is ~3 seconds, the player will request and immediately playout each sub-file (Reply at 8). The Reply and the Petition rely on the same portion of Leaning disclosing that sub-file size could be “between 30% and 130% of the playout time.”¹ *Compare id.* (citing EX1004 at

¹ Moreover, the Petition consistently emphasizes that sub-file sizes are exemplary. Pet. at 24 (quoting Leaning’s disclosure of “*perhaps* four seconds.”), 26 (same), 39 (“*e.g.*, four seconds”), 40 (same as p. 24), 41 (same as p. 39).

12:33-34) *with* Pet. at 24-25 (citing EX1004 at 12:8-34).

DISH's mathematical showmanship that 4 seconds is 133.33% of 3 seconds, not 130%, is irrelevant. Mot. at 8. Aylo's Reply used T_P of *around* 3 seconds (" $T_P \sim 3$ seconds") as its example to avoid the insignificant variance DISH complains of. Reply at 8. And whether this argument is purportedly inconsistent with the Petition (it is not) does not change that it is simply responsive to DISH's argument.

Similarly, Aylo's argument that "Clear Buffer" can include playing out the buffer contents first before switching rates (Reply at 9; EX1022 at 12-13) directly responds to DISH's argument that "Clear Buffer" means "purg[ing] from the buffer" (POR at 15). Specifically, DISH argues that upon every rate switch, Leaning purges all of the contents in the buffer immediately and switches to the new rate. *Id.* Aylo is permitted to respond that this interpretation makes no technical sense and that a person of skill in the art would understand that "Clear Buffer" could include clearing the buffer by playing out its contents before switching rates. Reply at 9; EX1022 at 12-13, 13 n.1.

4. "Arranging" Sub-files by Play Time is not a New Argument and Directly Responds to DISH's POR

Aylo's argument that sub-files are arranged based on "play time" (Reply at 10-11; EX1022 at §V) directly responds to DISH's assertion that "Leaning only disclos[es] its sub-files being stored and played back in the order in which they are received" (POR at 24). Similar to its argument that T_P in Leaning must be set to 10

seconds, DISH cannot misrepresent Leaning and then attempt to prevent Aylo from correcting those misrepresentations. Aylo's Reply properly points out that Leaning discloses that "it may be arranged that the player program *checks each sub-file it receives* to ascertain whether it is marked with a later time than the previous one: if not the sub-file is discarded." Reply at 11.

B. Aylo Is Allowed to Respond to DISH's New Claim Construction

Even if any of Aylo's arguments concerning "continuous presentation" are found to be new (they are not), they are permissible because Aylo must be allowed to respond to DISH's post-institution interpretation that "continuous presentation" does not allow for any disruption in playback. *Axonics*, 75 F.4th at 1384. Indeed, DISH specifically stated in its POPR that "[t]he petition does not seek construction of any terms in the '234 Patent" and that "[f]or purposes of this filing, Patent Owner does not propose that the Board construe any claims." POPR at 4. Then, DISH argued for the first time in its POR that the "continuous presentation" limitation prohibits any disruption during playback. *E.g.*, POR at 10, 21.

DISH pretends that its claim interpretation is not new by first misrepresenting the Petition's reference to the ITC's constructions and then, worse, misrepresenting the ITC's actual constructions. Specifically, DISH takes the Petition's statement that "no constructions are necessary" completely out of context. *See* Mot. at 2. DISH completely ignores the surrounding text, which states "*for purposes of institution*,

no constructions are necessary,” and acknowledges that terms later “***may require construction.***” Pet. at 12-13 (emphases added). Moreover, the Petition expressly notes that Aylo is “not conceding that [the ITC’s] constructions are correct and reserves its rights to challenge those constructions in any future proceeding.” *Id.*

After mischaracterizing the Petition’s reliance on the ITC’s constructions, DISH distorts the ITC record and falsely suggests that the ITC construed “continuous playback” to be consistent with DISH’s proposed construction. *See* Mot. at 3-4. This is far from the truth. The ITC never construed this term. Rather, as DISH admits, the respondents in the ITC “concede[d], ***at least in concept,*** [that] a person of skill ***may*** have understood what it means to ‘achieve continuous playback’ (uninterrupted viewing of the content).” Mot. at 3 (quoting EX1009 at 63) (emphases added). This was a concession by respondents as to what it “may” mean and not a construction by the ITC. Moreover, the “at least in concept” language is fatal to DISH’s position. It is precisely what Aylo argues here: achieving uninterrupted, continuous playback is conceptual. It is an aspirational goal. Actually achieving it is not required.

Even more fatal to DISH’s argument is the ITC’s statement that the “phrase ‘continuous playback of the video’ ***is the goal sought*** through the ‘determinations to shift’ playback quality.” *Id.* at 3-4 (quoting EX1009 at 59) (emphasis added). The ITC made explicitly clear that “continuous playback” is the patent’s sought-after

“goal,” which eviscerates DISH’s argument that the ITC construed “continuous presentation” to be consistent with DISH’s new interpretation that the term must exclude “disruptions, interruptions, and delays.” *Id.* at 3. There is simply no support for DISH’s argument that the ITC made a “clear interpretation of the plain and ordinary meaning” of the “continuous presentation” term. *Id.*

IV. DISH’S HIGHLIGHTED VERSIONS OF THE REPLY AND HOUH DECLARATION EXPOSE ITS UNREASONABLE REQUESTS

DISH seeks to strike the highlighted portions of the exhibits DISH filed along with its motion. *Id.* at 10. These exhibits demonstrate DISH’s spurious requests. For example, DISH repeatedly highlights portions of the Supplemental Declaration where Dr. Houh recounts opinions from his original declaration. *See, e.g.*, EX2149 at 19 (highlighting: “For limitation 12[D] in my First Declaration . . .”). Similarly, DISH repeatedly highlights portions of the Reply that simply recount arguments in the Petition (*see, e.g.*, EX2148 at 13-17) and portions of the Reply that simply summarize arguments in the POR (*see, e.g., id.* at 10, 16). Even worse, DISH highlights portions of the Reply and Supplemental Declaration DISH never even argues should be struck in its motion. *See id.*, 1, 12-14, 16-17; EX2149, 16-20.²

V. CONCLUSION

For the reasons above, DISH’s motion to strike should be denied.

² To the extent DISH seeks to strike these portions of the Reply and Supplemental Declaration without any proper basis or argument, its request should be denied.

DATED: July 21, 2025

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CERTIFICATE OF SERVICE

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