

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TIKTOK INC.,
Petitioner,

v.

NTECH PROPERTIES, INC.,
Patent Owner.

Case No. IPR2024-01340
U.S. Patent No. 8,145,704

**PATENT OWNER'S OPPOSITION TO
PETITIONER'S MOTION TO STRIKE**

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TikTok's Motion to Strike raises baseless attempts to (1) suppress NTECH's permissible and necessary responses to the new argument raised in TikTok's Reply, (2) replace its expert's testimonial concessions with inconsistent attorney argument, and (3) introduce ambiguity into the proper construction of the term "media stream" where none exists.

I. CONTENT SOURCES ARE NOT MEDIA STREAMS, AND THE PETITION DID NOT CONTEND THAT THEY ARE

The Board must reject TikTok's attempt to use the procedural mechanism of a Motion to Strike to suppress NTECH's argument that content sources are not media streams because it is built on a false premise, and NTECH's arguments were undisputedly responsive under 37 C.F.R. § 42.23(b).

TikTok's new theory that Whitehead's content sources are media streams did not appear until its Reply, so there was no reason or opportunity for NTECH to "contest" this issue in the POR. *Cf.* Mot., 1-2 (claiming that the Petition argued that "the corresponding 'content source 135' **is** the 'media stream'") (emphasis added). The Petition did not assert that each content source 135 **is** a media stream, it argued that "each content source 135 **provides** a 'media stream.'" Pet., 14 (emphasis altered); *see also id.*, 13 (arguing that "each custom media channel 170 generated by mixing server 130 corresponds to a 'media stream' **from a** different content source 135") (emphasis altered). In the POR, NTECH rebutted TikTok's obviousness case

assuming its theory that content sources 135 “provide” media streams. *See* POR, 19-20.

TikTok did not assert that each content source 135 *is* a “media stream” until the Reply, when it faulted NTECH for not disputing this new theory in advance. Reply, 8 (“Regarding Media Stream Mapping 2, PO does not dispute that Whitehead’s content sources 135 are ‘media streams.’”). Even then, TikTok did not attempt to prove that Whitehead’s content sources 135 are media streams under any reasonable construction of the term. *Id.* Instead of owning up to shifting theories, or even supporting its new theory with evidence and reasoning, TikTok pretended that this was its argument all along, accused NTECH of not disputing its new argument in advance, and then filed this Motion to Strike when the Sur-Reply explained why its new argument was meritless. TikTok’s chicanery should not be rewarded with the “exceptional remedy” of striking the response. CTPG, 80.

Putting aside TikTok’s gamesmanship, the Motion should be denied because it does not facially allege a violation of 37 C.F.R. § 42.23(b), which permits a sur-reply to “respond to arguments raised in the corresponding reply.” 37 C.F.R. § 42.23(b). The crux of TikTok’s Motion to Strike is not that the Sur-Reply was unresponsive, it was that the Sur-Reply advanced an argument not present in the POR. Mot., 2. Under 37 C.F.R. § 42.23(b), the Sur-Reply’s arguments are responsive because they (1) observe that TikTok has not met its burden to establish

that content sources are media streams and (2) rebut the notion that content sources are media streams with recourse only to record evidence. POR, 19-20.

The Sur-Reply argument also merely elaborates on arguments raised in the POR. *Id.*; *Chamberlain Grp., Inc. v. One World Techs., Inc.*, 944 F.3d 919, 925 (Fed. Cir. 2019) (A party is “not barred from elaborating on their arguments on issues previously raised.”). In the POR, NTECH argued that “there is no sense in which the user’s selection of a custom media channel selects a Content Source’s ‘media stream’” because “the user still selects the custom media channel 170 from the menu.” POR, 19-20. The Sur-Reply elaborates on this argument, noting that the same argument extends to TikTok’s new conflation of the selected custom media channel 170 with a content source 135. Sur-Reply, 10-11; Mot., 2.

Thus, the Motion to Strike should be rejected as an improper attempt to insulate TikTok’s unsupported new unpatentability theory from scrutiny. Mot., 2.

II. TIKTOK WAIVED RELIANCE ON WHITEHEAD’S REAL-TIME EMBODIMENTS

The Board should not strike NTECH’s observation that “Petitioner confined its theory to Whitehead’s pre-generated embodiment” because TikTok waived reliance on Whitehead’s real-time embodiments. Mot., 2-4.

Relying on new testimony from Dr. Almeroth, TikTok’s Reply expressly limited its theories to Whitehead’s pre-generated embodiments. Reply, 9 (“Petitioner *never mapped* creating profile 160 and corresponding custom media

channel in the first instance to the claimed 'user data.' TikTok's theory is based on *selecting a previously-created custom media channel . . .*") (emphasis added); Ex. 1023, ¶ 28. When asked about this argument during cross-examination, Dr. Almeroth confirmed he used the term "previously-created custom media channel" in his declaration to refer to embodiments in Whitehead that would allegedly satisfy NTECH's argument that the selected media stream must have "media elements" at the time it was selected. Ex. 2032, 23:25-24:15, 25:2-26:2, 26:14-27:8.

TikTok now attempts to rewrite Dr. Almeroth's direct testimony and strike NTECH's arguments relying on his direct and cross-examination testimony in service of creating a "dispute" that it believes will "warrant significant discussion at oral arguments." Mot., 3. The issue should not warrant any discussion during oral argument because Whitehead's real-time embodiments, by definition, cannot satisfy the requirement that the media stream is populated with media data at the time it is selected. POR, 18-20; Sur-Reply, 10. Dr. Almeroth understood this, which is why he disclaimed reliance on Whitehead's real-time embodiments in his second declaration and confirmed the same on cross-examination. Ex. 1023, ¶¶ 4, 28; Ex. 2032, 23:25-24:15, 25:2-26:2, 26:14-27:8. To the extent this issue warrants any discussion at oral argument, it would be improper and prejudicial to strike NTECH's Sur-Reply arguments, which are plainly responsive under 37 C.F.R. § 42.23(b). Mot., 2-4.

III. NTECH DID NOT SHIFT CLAIM CONSTRUCTION POSITIONS

There is no basis for the Board to strike NTECH's allegedly "new construction of 'media stream'" because NTECH did not advance a new construction in the Sur-Reply. *Cf.* Mot., 4-5 ("Until the sur-reply, PO and its expert did not contend that a 'media stream' must comprise multiple media elements."). TikTok misread NTECH's Sur-Reply, and Dr. Goodrich's testimony, which explained that the word "continuous" in NTECH's construction concerns a sequence of **data** elements, not a sequence of **media** elements. Sur-Reply, 16-17; Ex. 1028, 29:22-30:7. There was no shift in claim construction, and there is no basis to strike NTECH's Sur-Reply.

Consistent with the plain meaning construction advocated in the POR, NTECH's Sur-Reply argued that a single media element is not a media stream unless it is "being sent as a continuous sequence of data." Sur-Reply, 16; *see also* Pet., 14 (referring to "media streams" as "continuous streams"). Individual media elements that are stored in a database (as disclosed in Whitehead) are not "media streams" unless and until they are "sent as a continuous sequence of data." Sur-Reply, 16-17; Pet., 14 (distinguishing between streams and media content "stored in a media database"). NTECH's plain meaning construction is also consistent with the construction that NTECH advanced before institution because if a media stream includes multiple media elements, those media elements must be concatenated to be sent as a "continuous sequence of media data." Ex. 1028, 29:22-30:7; POPR, 8.

Patent Owner's Opposition to Petitioner's Motion to Strike
IPR2024-01340 (U.S. Patent No. 8,145,704)

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CERTIFICATE OF SERVICE

The undersigned certifies, in accordance with 37 C.F.R. § 42.6(e), and pursuant to agreement by the parties that filing with the Board through the Patent Trial and Appeal Case Tracking System (P-TACTS) and e-mailing an electronic copy to counsel of record for Petitioner constitutes electronic service, service was made on Petitioner as detailed below.

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