

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TIKTOK INC.,
Petitioner,

v.

NTECH PROPERTIES, INC.,
Patent Owner.

IPR2024-01342
Patent 8,886,753 B2

Before KEN B. BARRETT, TERRENCE W. MCMILLIN, and
SCOTT RAEVSKY, *Administrative Patent Judges*.

RAEVSKY, *Administrative Patent Judge*.

DECISION
Granting Institution of *Inter Partes* Review
35 U.S.C. § 314

I. INTRODUCTION

Petitioner, TikTok Inc., filed a Petition requesting an *inter partes* review challenging claims 1–10 of U.S. Patent No. 8,886,753 B2 (Ex. 1001, “the ’753 patent”). Paper 2 (“Pet.”). Patent Owner, NTECH Properties, Inc., filed a Preliminary Response. Paper 8 (“Prelim. Resp.”).

Based on our review of the preliminary record, Petitioner has demonstrated a reasonable likelihood of prevailing on at least one challenged claim. *See* 35 U.S.C. § 314(a). Accordingly, we institute an *inter partes* review on all challenged claims and all grounds asserted in the Petition. 37 C.F.R. § 42.108(a). However, Patent Owner calls into question some of Petitioner’s challenges.

II. BACKGROUND

A. The ’753 patent

The ’753 patent generally relates to providing media programming. Ex. 1001, 1:17–18. Figure 1, reproduced below, depicts a system for providing media programming:

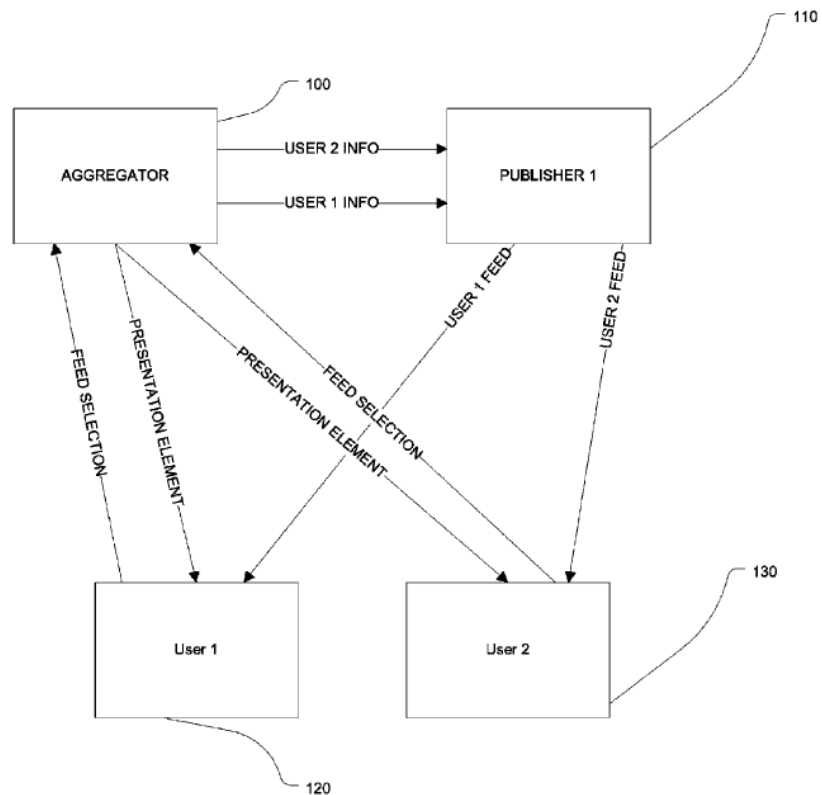


Fig. 1

Id. at 2:48–3:40. In Figure 1, aggregator 100 (which may be a web server) provides a presentation element, including one or more feeds, to user 1 and user 2. *Id.* at 2:49–57, 3:21–22. The users each provide a selection of a feed to aggregator 100. *Id.* at 2:56–58. Aggregator 100 provides information relating to each user to publisher 110. *Id.* at 2:58–59. Based on the selected feed and the user information, publisher 110 provides individual feeds to the users. *Id.* at 2:59–61.

Figure 5 below depicts an example display 500 showing a presentation element generated by an aggregator:

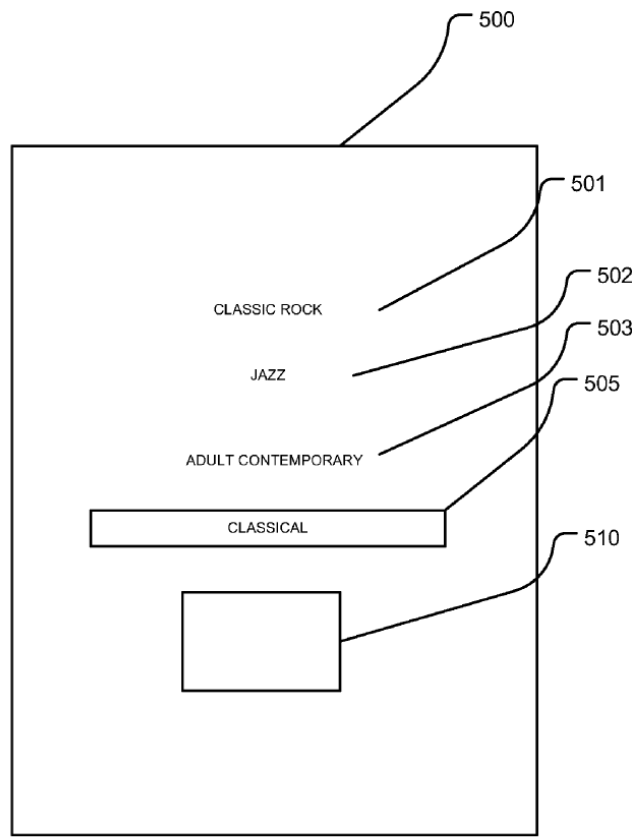


Fig. 5

Id. at 5:63–64. In display 500 of Figure 5, music feeds 501–503, 505 are available, and “classical” feed 505 has been highlighted in response to user selection. *Id.* at 6:1–7.

B. Challenged Claims

Claim 1 is illustrative of the challenged claims:¹

1. A method of generating media programming, comprising:
 - [a] delivering by an aggregator to a client a list of feeds;
 - [b] receiving by the aggregator from the client a selection of one of the feeds;

¹ We use a similar numbering and paragraph style as the Petition. *See* Pet. 3 (Note that after page 4, the Petition starts over at page 1.).

[c] acquiring by a publisher from the aggregator the feed selection;

[d] collecting by the publisher from the aggregator client information, wherein said client information comprises user information; and

[e] providing to the client individual customized media programming based on a publisher-initiated feed responsive to the feed selection and including media elements selected, ordered, and concatenated with the feed that are responsive at least in part to the user information.

Ex. 1001, 14:47–61; Pet. 3.

C. Asserted Challenges to Patentability

Petitioner asserts the following challenges to patentability (Pet. 3–4):

Claim(s) Challenged	35 U.S.C. §	Reference(s)/Basis
1–24	103	Whitehead ²
1–24	103	Whitehead, Marcus '904 ³
1–24	103	Cristofalo, ⁴ Marcus '904

To support these challenges, Petitioner relies on the declaration of Dr. Kevin Almeroth (Ex. 1002). Patent Owner relies on the competing declaration of Dr. Michael T. Goodrich (Ex. 2001).

² US Pat. No. 8,555,318 B2, issued Oct. 8, 2013 (Ex. 1003).

³ US Pub. No. 2006/0015904 A1, published Jan. 19, 2006 (Ex. 1005).

⁴ US Pub. No. 2002/0152117 A1, issued Oct. 17, 2002 (Ex. 1004).

IV. ANALYSIS⁵

A. Level of Ordinary Skill in the Art

Relying on the testimony of Dr. Almeroth, Petitioner argues the following:

[a] person of ordinary skill in the art at the time of the '753 patent ("POSITA") had at least a Bachelor of Science in electrical engineering, computer engineering, or similar fields and at least two years of practical experience in the field of media processing and/or transmission. More education can supplement for less practical experience, and vice versa.

Pet. 8 (citing Ex. 1002 ¶¶ 48–50).

Patent Owner offers a very similar assessment of the level of skill in the art as Petitioner, arguing the following:

[a] person of ordinary skill in the art ("POSITA") at the relevant time period between 2006 and 2007 would be one having a bachelor's degree in computer science, computer engineering, or an equivalent, or two years of professional experience in the field of distributed computing. More education can supplement for less professional experience, and vice versa.

Prelim. Resp. 6 (citing Ex. 2001 ¶ 17).

The parties' definitions are similar, although we observe that Patent Owner proposes that the person of ordinary skill would have a bachelor's degree *or* professional experience, whereas Petitioner proposes that such a person would have both a degree and experience. *See also* Ex. 2001 ¶ 17 (Patent Owner's declarant, Dr. Goodrich, stating that "I note that my definition of a POSITA is similar to that of Dr. Almeroth.").

⁵ This decision omits overviews of legal standards for obviousness and claim construction. These standards are repeated in many other Board decisions.

We adopt Petitioner’s assessment at this stage. Petitioner’s assessment is supported by the testimony of Dr. Almeroth and is consistent with the ’753 patent and the asserted prior art. However, our obviousness analysis would have been the same under either party’s assessment. *See id.* (“My opinions in this declaration would not change were I to adopt the definition of a POSITA offered by Dr. Almeroth.”).

B. Claim Construction

Petitioner asserts that “[n]o express constructions are required.” Pet. 9. Patent Owner also proposes no express constructions. We agree that no claim terms require construction at this stage.

*C. Alleged Obviousness over Whitehead*⁶

Petitioner contends that claims 1–10 are unpatentable as obvious over Whitehead.⁷ *See* Pet. 10–32. At this stage, Petitioner has shown a reasonable likelihood that at least independent claim 1 would have been unpatentable over Whitehead.

We first address limitations 1[b] and 1[e], which Patent Owner argues together. Prelim. Resp. 17–22. We then address the parties’ arguments for limitation 1[d]. Finally, we address the remaining limitations.

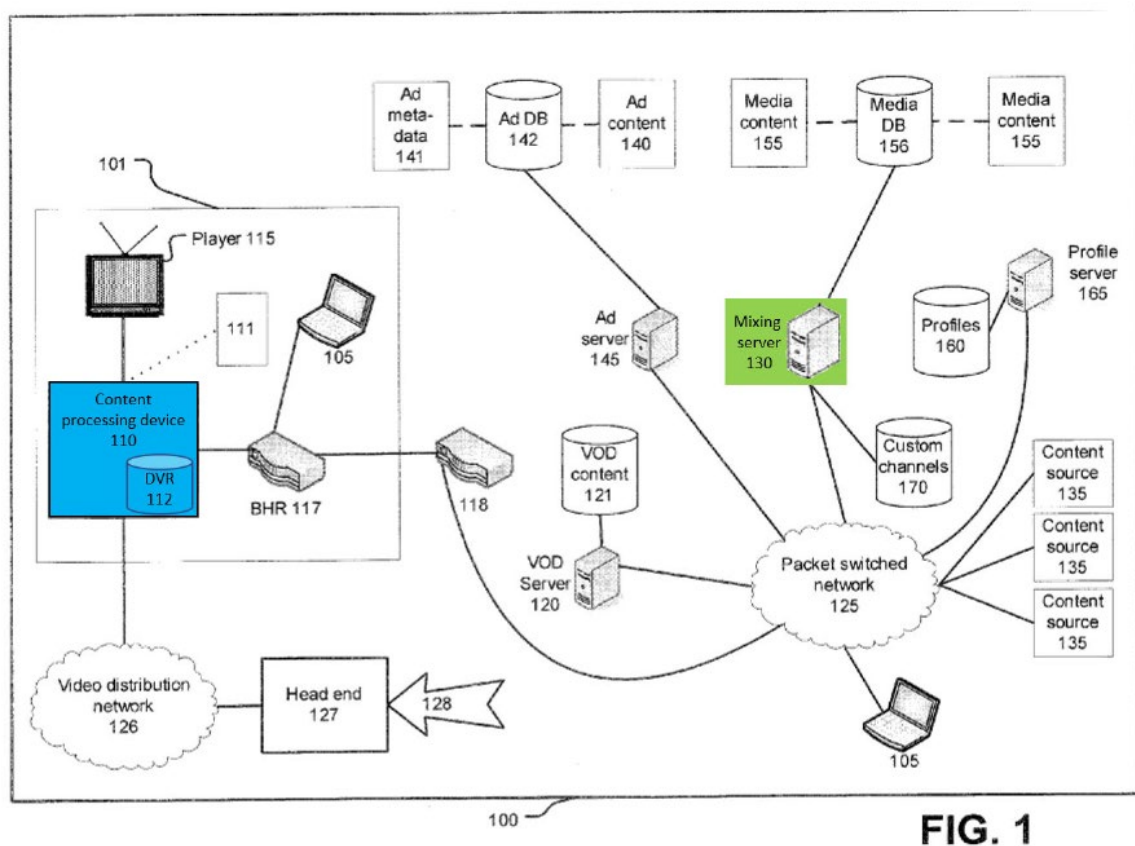
⁶ We remove text coloring and bold highlighting when quoting the Petition without noting “emphasis omitted” throughout.

⁷ Instead of providing an overview of Whitehead here, we describe Whitehead below in the context of the parties’ arguments.

1. Independent Claim 1

- a. [b] receiving by the aggregator from the client a selection of one of the feeds; [and]
[e] providing to the client individual customized media programming based on a publisher-initiated feed responsive to the feed selection

For claim 1 in general, including these limitations, Petitioner relies on Figure 1 of Whitehead, which Petitioner annotates as follows:



Pet. 10–11 (discussing limitation 1[a]). Whitehead Figure 1 depicts an example system for delivering video. Ex. 1003, 1:53–54. In Figure 1, Petitioner highlights content processing device 110 in blue, arguing that it is

the claimed aggregator. Pet. 10–11. Petitioner also highlights mixing server 130 in green, which Petitioner argues is the claimed publisher.⁸ *Id.*

Petitioner presents two mappings for the claimed “media feeds”: the feeds are either (1) custom media channels 170 made available by mixing server 130 to content processing device 110 (“Media Feed Mapping 1”), or (2) media content transmitted by content sources 135 to mixing server 130 (“Media Feed Mapping 2”). *Id.* at 12 (citing Ex. 1002 ¶¶ 73–74).

For limitation 1[b], “*receiving by the aggregator from the client a selection of one of the feeds,*” Petitioner asserts that content processing device 110 (“aggregator”) receives a user selection of a custom media channel 170 (Media Feed Mapping 1) and selection of the content source 135 corresponding to that channel (Media Feed Mapping 2). *Id.* at 16 (citing, e.g., Ex. 1003, 4:45–52; Ex. 1002 ¶ 82).

For limitation 1[e], “*providing to the client individual customized media programming based on a publisher-initiated feed responsive to the feed selection . . . ,*” Petitioner asserts that Whitehead’s mixing server 130 (“publisher”) instantiates custom media channel 170 consisting of media content 155 (“publisher-initiated feed”) and then inserts advertising content 140 (“media elements”). *Id.* at 23 (citing, e.g., Ex. 1003, 4:53–5:3; Ex. 1002 ¶ 90).

⁸ Whitehead explains that “[c]ontent processing device 110 provides video or other multimedia to a user on a media player 115,” which may be a TV. Ex. 1003, 2:9–11, 52. Content processing device 110 may be a set top box. *Id.* at 2:11–12. Mixing server 130 assembles and delivers custom media channels 170 to content processing device 110. *Id.* at 4:27–30.

At this stage, after considering Patent Owner’s arguments, which we address below, we determine that Petitioner has sufficiently shown that Whitehead discloses limitations 1[b] and 1[e].

For Petitioner’s Media Feed Mapping 1, Patent Owner argues that the user’s selection of a custom media channel in Whitehead “does not *cause* the ‘providing . . . customized media programming based on a publisher-initiated feed responsive to the feed selection’” recited in limitation 1[e]. Prelim. Resp. 9 (emphasis added); *see also id.* at 9–11 (raising similar arguments). This argument is not commensurate with the scope of the claims. *See In re Hiniker Co.*, 150 F.3d 1362, 1369 (Fed. Cir. 1998) (“[The] proffered facts . . . are not commensurate with the claim scope and are therefore unpersuasive. . . . [T]he name of the game is the claim.”). Claim 1 does not require the received client selection of a feed to *cause* providing to the client individual customized media programming. Limitation 1[e] merely requires the “providing” to be “responsive to the feed selection,” which, on this record, does not require causation.⁹

Turning to Petitioner’s Media Feed Mapping 2, Patent Owner argues, for example, that “the content chosen for any custom media channel is unrelated to the user’s ***selection*** of a custom media channel.” Prelim. Resp. 12. That is, Patent Owner argues, the user’s selection of a custom media channel is not a selection of any particular content source 135 (the alleged “feed”) that may later become associated with the channel. *Id.* The

⁹ To the extent Patent Owner wishes to articulate a claim construction position, Patent Owner should make its claim construction analysis explicit during trial.

content is “based on profile 160,” Patent Owner argues, not on the user’s selection of a particular feed. *Id.* (citing Pet. 23).

At this stage, we find this argument unavailing because the claim broadly requires “providing to the client individual customized media programming *based on* a publisher-initiated feed *responsive to* the feed selection,” and user profiles in Whitehead “provide criteria for selecting media content 155.” *See* Ex. 1003, 5:56–59, *cited in, e.g.*, Pet. 14. Patent Owner’s argument is based on a claim construction position that would exclude all user information (such as Whitehead’s user profiles) from the client’s selection of a feed, based on the separate claim recitations of “user information” and “selection of a feed.” Prelim. Resp. 13. Although claim 1 recites these terms separately, the claim’s broad recitation of user information collection and feed selection does not appear to us at this stage to preclude the feed selection being based on user information. Regardless, even if Patent Owner were correct that Petitioner’s Media Feed Mapping 2 is somehow deficient, Petitioner has sufficiently articulated a position under Media Feed Mapping 1 at this stage to support institution.

We therefore determine, on this preliminary record, that Petitioner adequately asserts that Whitehead discloses limitations 1[b] and 1[e].

b. 1[d] collecting by the publisher from the aggregator client information, wherein said client information comprises user information

We now turn to the parties’ arguments addressing limitation 1[d]. In general, Petitioner argues that Whitehead’s mixing server 130 receives a profile 160 from profile server 165. Pet. 20–21 (citing, e.g., Ex. 1003, 6:35–46, 5:56–6:9, 13:47–61; Ex. 1002 ¶¶ 88). Whitehead’s content processing device 110 creates or edits a profile 160 at profile server 165, and then

profile server transmits that profile to mixing server 130. *Id.* Thus, Petitioner contends, Whitehead’s mixing server 130 (alleged publisher) collects client information from content processing device 110 (alleged aggregator). *Id.* at 21. Petitioner adds that to the extent it may be argued that the claimed publisher must receive the client information *directly* from the aggregator, it would have been obvious to modify mixing server 130 to implement profile server 165. *Id.* at 22. Doing so “would simplify processing and communications,” Petitioner argues. *Id.* at 22–23 (citing Ex. 1002 ¶ 89).

Patent Owner argues that Whitehead fails to disclose this limitation because Whitehead’s content processing device 110 at best provides client information to profile server 165, not mixing server 130. Prelim. Resp. 14–15. We find this argument less persuasive than Petitioner’s argument at this stage. Patent Owner appears to rely on an overly restrictive interpretation of “collecting by the publisher from the aggregator client information,” which would require the publisher to directly collect client information from the aggregator. But as written, the claim does not appear to require direct collection without any intermediary devices. As the aggregator in the ’753 patent can be a web server, Ex. 1001, 3:21–22, we presume Patent Owner would not disagree that communications between the aggregator and the publisher at least would be transmitted through intermediary devices such as routers or other network equipment. Thus, we see no error with Petitioner’s analysis at this stage.

Patent Owner also argues that Petitioner’s obviousness position is based on hindsight and conclusory declarant testimony. Prelim. Resp. 16–20. This may be true, but we tend to agree with Petitioner’s position that

Whitehead expressly discloses this limitation, so we do not reach the parties' arguments on obviousness at this stage.

We therefore determine, on this preliminary record, that Petitioner adequately asserts that Whitehead discloses limitation 1[d].

c. Undisputed Limitations

Petitioner asserts that Whitehead discloses the preamble and the remaining limitations of claim 1. Pet. 10–20. Petitioner identifies where Whitehead teaches these limitations, supported with testimony from Dr. Almeroth, which Patent Owner does not specifically rebut at this stage. *Id.*

We determine that, on this record, Whitehead discloses the preamble (whether or not limiting) and the remaining undisputed limitations of claim 1. *See LG Elecs., Inc. v. Conversant Wireless Licensing S.A.R.L.*, 759 F. App'x 917, 925 (Fed. Cir. 2019) (nonprecedential) (“The Board is ‘not required to address undisputed matters’ or arguments about limitations with which it was never presented.”) (quoting *In re NuVasive, Inc.*, 841 F.3d 966, 974 (Fed. Cir. 2016)).

d. Summary as to Claim 1

For the above reasons, Petitioner has established a reasonable likelihood that claim 1 would have been obvious over Whitehead.

2. Dependent Claims 2–10

Petitioner also contends that claims 2–10 would have been obvious over Whitehead. Pet. 25–32. Patent Owner does not dispute these dependent claims at this stage. We leave for trial the issue of whether Petitioner has met its burden on these claims.

D. Alleged Obviousness over Whitehead and Marcus '904

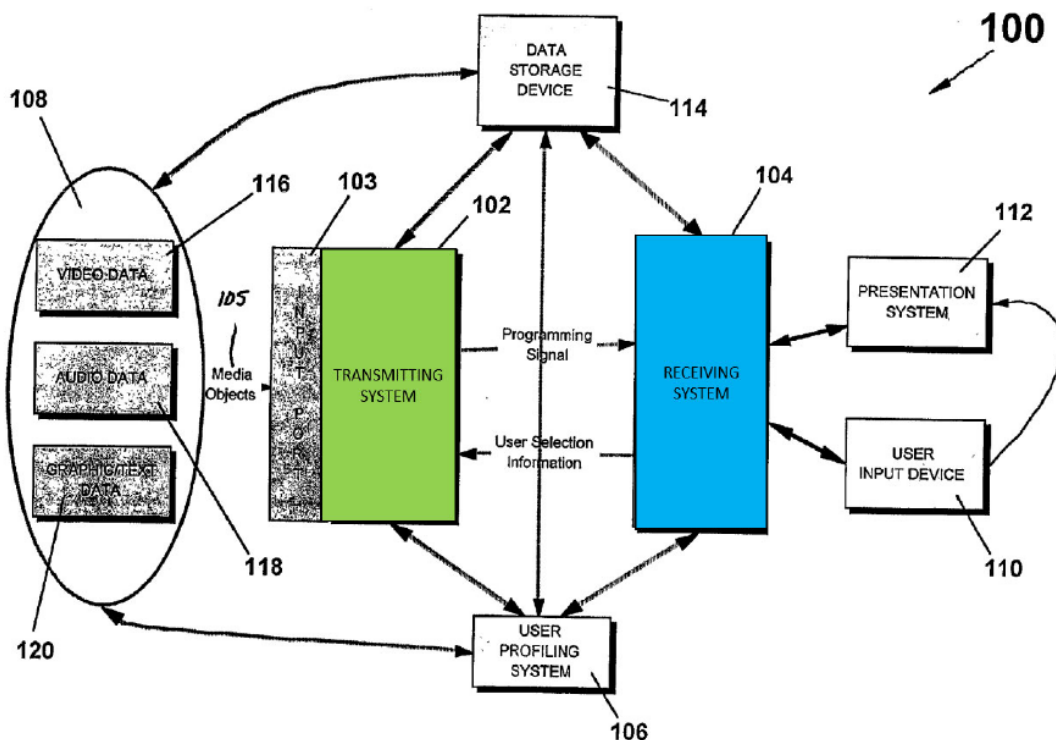
Petitioner also contends that claims 1–10 are unpatentable over Whitehead and Marcus '904. Pet. 51–55. Patent Owner raises no specific arguments against this ground at this stage. Prelim. Resp. 22–23. Because Petitioner has established a reasonable likelihood of prevailing on its challenge over Whitehead alone, we leave this ground for trial.

E. Alleged Obviousness over Cristofalo and Marcus '904

Petitioner also contends that claims 1–10 are unpatentable over Cristofalo and Marcus '904. *See* Pet. 37–54. At this stage, we have concerns with this challenge.

1. *Independent Claim 1*

We summarize Petitioner’s reliance on Cristofalo and Marcus ’904 for claim 1 as follows. Petitioner relies on the following annotated Figure 1 of Cristofalo:



Pet. 40–41. As shown in annotated Figure 1, Cristofalo’s system 100 includes a transmitting system 102 (green), which Petitioner relies on for the claimed publisher, and a receiving system 104 (blue), which Petitioner relies on for the claimed aggregator. *Id.*

Petitioner argues that Cristofalo’s receiving system 104 allows a user to select programming (1[a]–[b]; *id.* at 41–43) and that Cristofalo’s transmitting system 102 receives the user’s choice of programming as well as information on programs selected by the user (1[c]–[d]; *id.* at 44–47). Petitioner also argues that Cristofalo’s transmitting system 102 generates media programming consisting of media objects based on the user’s choice and user profile information (1[e]; *id.* at 47). Moreover, Petitioner relies on Marcus ’904 for addressing “the lack of detail in Cristofalo regarding targeting by transmitting system 102,” arguing that Marcus ’904 describes a receiver that collects media and assembles a program from the collected media (1[e]; *id.* at 48–49). Petitioner provides a rationale for combining Marcus ’904 with Cristofalo, which we discuss in more detail below. *Id.* at 37–40.

Patent Owner challenges Petitioner’s arguments on limitations 1[d] and 1[e] and the rationale to combine. Prelim. Resp. 23–29. At this stage, we have concerns with the proposed rationale to combine and limitation 1[e]. *See id.* at 26. We first address Petitioner’s rationale to combine and then turn to Patent Owner’s other arguments.

a. Rationale to Combine

Petitioner raises several reasons to combine Marcus ’904 with Cristofalo, but these arguments appear underdeveloped at this stage. We have the following concerns.

Petitioner contends that one motivation for combining would have been that Marcus '904 includes additional disclosure of targeting media programming to specific users, which would lead to better customization of media programming by Cristofalo. Pet. 38 (citing Ex. 1002 ¶ 122). This assertion is vague and unexplained. Petitioner also asserts that Marcus '904 provides “additional implementation details” on how final media programming is generated and formatted for display. *Id.* at 38–39 (citing Ex. 1002 ¶ 123). We fail to see, at this stage, how merely disclosing additional details would motivate a skilled artisan to combine references. If we were to agree with a proposed combination merely because one reference includes details another does not, this could “swallow all of patent law.” *Cf. Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 217 (2014) (addressing patent eligibility).

Finally, Petitioner contends that combining Marcus '904's advertising sources would unlock new revenue sources for Cristofalo. Pet. 39 (citing Ex. 1002 ¶ 124). Patent Owner argues that this rationale appears to be superfluous, since Cristofalo already discloses targeting advertising to users. Prelim. Resp. 26 (“Cristofalo's receiving system ‘already’ assembles the programming with advertisements.”); *see* Pet. 38 (referring to Cristofalo's “targeted advertising”). We tend to agree at this stage.

Thus, we question Petitioner's rationale to combine Cristofalo with Marcus '904.

b. Limitations 1[d] and 1[e]

Given that we have concerns with Petitioner's rationale to combine, we provide only brief guidance to the parties at this stage on Patent Owner's arguments for limitations 1[d] and 1[e].

Patent Owner contends that Petitioner fails to show that Cristofalo and Marcus '904 disclose a publisher collecting “from the aggregator information . . . compris[ing] user information” of limitation 1[d]. Prelim. Resp. 28–29. Patent Owner raises a similar argument as with the Whitehead ground, namely, that “feed selection” and “client information” are distinct elements and cannot be taught by the same prior art structure. *Id.* at 28. We find this argument unavailing at this stage for similar reasons as we articulate above for the Whitehead ground.

Patent Owner also argues that limitation 1[e]’s recitation, “providing to the client individual customized media programming based on a publisher-initiated feed . . . including media elements selected, ordered, and concatenated with the feed,” must be implemented by the publisher, even though the publisher is not explicitly recited in this limitation. *Id.* at 23–24. Patent Owner’s argument is based on an interpretation from the prosecution history of a related application. *Id.* (citing Ex. 1019, 121). We find this interpretation tenuous at this stage, but ultimately, it may not matter as Petitioner appears to rely on Cristofalo’s transmitting system 102 (the alleged publisher) for this limitation. Pet. 47. Yet Petitioner’s argument relies on a long string citation to Cristofalo. *See id.* Petitioner’s lengthy string cite is not an adequate substitute for an explanation in the Petition, and we decline to study all the cited portions to try to discern whether Petitioner might have a viable explanation as to how Cristofalo teaches limitation 1[e]. Thus, Petitioner’s arguments for limitation 1[e] appear insufficient at this stage, regardless of Patent Owner’s claim construction position.

c. Summary as to Claim 1

Given our concerns with Petitioner's rationale to combine and limitation 1[e], we question whether Petitioner has met its burden for this ground.

2. Dependent Claims 2–10

Petitioner also contends that claims 2–10 would have been obvious over Cristofalo and Marcus '904. Pet. 49–54. Our concerns regarding independent claim 1 also extends to each of these dependent claims, by virtue of their dependence on the independent claims.

V. CONCLUSION

Petitioner has demonstrated a reasonable likelihood of prevailing on at least one challenge to at least one claim. But Patent Owner has raised arguments that call into question some of Petitioner's positions, which the parties should further address during trial.¹⁰ We have not made a final patentability determination of the challenged claims or any underlying factual and legal issues.

VI. ORDER

We ORDER that:

Inter partes review of all challenged claims of the '753 patent is instituted; and

¹⁰ We caution Patent Owner that merely relying on this Decision's preliminary findings without further supporting its arguments may result in Petitioner persuading us that our initial impressions were incorrect.

Trial commences on the entry date of this Decision.

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