

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC. and AMAZON WEB SERVICES, INC.,¹
Petitioner,

v.

ZIKLAG IP LLC,
Patent Owner.

IPR2025-00700
U.S. Patent No. 6,182,128 B1

**PETITIONER'S MOTION TO STRIKE
A PORTION OF PATENT OWNER'S SUR-REPLY**

¹ Amazon Web Services, Inc., filed a petition and a motion for joinder in IPR2026-00047, and has been joined as a petitioner in this proceeding.

I. INTRODUCTION

Petitioner Apple Inc. (“Petitioner”) submits this Motion to Strike a Portion of Patent Owner’s Sur-Reply (“Sur-Reply,” Paper 15) pursuant to the Board’s e-mail authorization. *See* Ex.1019. As explained below, the Sur-Reply presents, for the first time, a new argument regarding “*substantially real time*” not included in prior briefing—*i.e.*, that the limitation requires “a coordinated operational model.” Sur-Reply, Section II. The Trial Practice Guide prohibits this new argument. *See* Trial Practice Guide (“TPG”), §II.K.² Allowing Patent Owner to rely upon this new theory, during the oral hearing or otherwise, would prejudice Petitioner who had no opportunity to address the new theory with responsive evidence or argument. *See id.*, §II.M. In light of this potential prejudice, Petitioner requests that the Board strike from the record the portions of the Sur-Reply containing the improper new theory (Section I, pages 2 and 3-4³; Section II, 4-11; and Section VI, 19⁴, collectively “Section II” herein) and disregard the arguments therein in their entirety. *See id.*

² Citations to the Trial Practice Guide refer to the online version available at <https://www.uspto.gov/patents/ptab/trial-practice-guide>.

³ Specifically, “[t]he claimed invention ... allows delivery of digital audio files through a coordinated, request-driven system” (p. 2) and “... the claimed system architecture, which requires dynamic, request-driven orchestration across distributed systems with concurrent routing and playback” (pp. 3-4).

⁴ The sentence stating “... ‘substantially real time’ as coordinated system behavior” (p. 19).

II. PATENT OWNER RAISES AN IMPROPER NEW ARGUMENT

A Motion to Strike is appropriate where “a party believes the Board should disregard arguments or late-filed evidence in its entirety.” TPG, §II.K. “[W]here a reply clearly relies on a new theory not included in prior briefing, and where addressing this new theory during oral hearing would prejudice the opposing party, striking the portion of the brief containing that theory may be appropriate.” *Id.* Because Section II of the Sur-Reply meets both of these requirements, the Board should grant the present motion and strike it from the record.

A. Patent Owner impermissibly asserts its new argument regarding “substantially real time” for the first time in its Sur-Reply.

In its Response, Patent Owner argued that “substantially real-time requires playback while transmission is ongoing”—contrasting that understanding with Yurt’s alleged “bulk delivery for later playback.” PO Response, 30. In the Sur-Reply, however, Patent Owner newly alleges that “*substantially real time*” requires *more* than just playback while transmission is ongoing. Sur-Reply, 4-11. Patent Owner now argues that “*substantially real time*” requires “a coordinated operational model ... not satisfied by merely timing playback” and “refers to a system that, in response to a user request, determines where content resides in storage and routes the content across distribution centers while playback is occurring.” Sur-Reply 5, 9-10 (emphasis added). The substantive difference between Patent Owner’s two

constructions of “*substantially real time*” is readily apparent:

PO Response	PO Sur-Reply
“Substantially real-time requires playback while transmission is ongoing. In contrast, Yurt teaches bulk delivery for later playback.” (p. 30)	“‘Substantially real time’ refers to a system that, in response to a user request, determines where content resides in storage and routes the content across distribution centers while playback is occurring,” and that it “requires a coordinated operational model ... not satisfied by merely timing playback.” (pp. 5, 9-10)

In sum, this “coordinated operational model” theory is entirely new. It was not raised previously. Patent Owner’s declarants similarly did not raise this new theory in deposition. Mr. Johnson testified that “*substantially real time*” only deals with being able to consume the content as it’s being delivered. Ex.1018, 38:13-39:20; Reply, 10-11. Dr. McCulloh similarly testified that the term only requires no disruption of playback as the content is downloading. Ex.1017, 113:19-115:8; Reply, 11. The Preliminary Response is likewise devoid of any “coordinated operational model” argument. POPR, 6, 12-14; *contra* Sur-Reply, 9, 10.

Further, Patent Owner’s new argument is not responsive or tied to any relevant portion of the prior briefing. A sur-reply “may only respond to arguments raised in the preceding brief” and may not raise new issues or present arguments that should have been raised earlier. TPG, §II.I. In its Reply, Petitioner rebutted Patent Owner’s *original* theory about “*substantially real time*”—*i.e.*, playback while transmission is ongoing. Reply, 9-11, 14-19. The Reply demonstrated why the prior art plainly

discloses playback while transmission is ongoing. *Id.* Instead of addressing this issue in the Sur-Reply, Patent Owner introduces an entirely new construction of “*substantially real time*” requiring a “coordinated operational model” with “rout[ing] the content across distribution centers” “while playback is occurring.” Sur-Reply, 5, 9-10.

B. Presentation of Patent Owner's new argument during oral hearing would prejudice Petitioner.

Patent Owner's new theory does not have merit. However, because the “*substantially real time*” theory in the Sur-Reply is new and the written record has closed, Petitioner had no opportunity to introduce responsive briefing or evidence. The Board thus cannot properly weigh the new argument. Moreover, oral hearing is limited to “arguments relied upon in the papers previously submitted.” TPG, §II.M. If Patent Owner presents the new theory during the hearing, Petitioner cannot properly present counterarguments under the rules. Striking the portion of the Sur-Reply containing the theory is therefore appropriate. *See* TPG, §II.K.

III. CONCLUSION

Because the Sur-Reply “clearly relies on a new theory not included in prior briefing,” and “addressing this new theory during oral hearing would prejudice” Petitioner, the Board should grant this Motion and strike the portion of the Sur-Reply containing the new theory (“Section II” as referenced above).

Respectfully submitted,

Dated: May 8, 2026
HAYNES AND BOONE, LLP
2801 N. Harwood Ave, Ste 2300
Dallas, Texas 75201
Customer No. 27683

/ Scott Jarratt /
Scott T. Jarratt
Lead Counsel for Petitioner
Registration No. 70,297

PETITIONER'S EXHIBIT LIST

Ex.1001	U.S. Patent No. 6,182,128
Ex.1002	Prosecution History of U.S. Patent No. 6,182,128
Ex.1003	Declaration of Dr. Andrew Lippman under 37 C.F.R. § 1.68
Ex.1004	<i>Curriculum Vitae</i> of Dr. Andrew Lippman
Ex.1005	U.S. Patent No. 5,132,992 (Yurt)
Ex.1006	U.S. Patent No. 5,732,216 (Logan)
Ex.1007	U.S. Patent No. 5,790,935 (Payton)
Ex.1008	U.S. Patent No. 5,999,970 (Krisbergh)
Ex.1009	WO96/41285 (Kenner)
Ex.1010	U.S. District Courts Statistics (Updated December 2024)
Ex.1011	Complaint; Dkt. 20, <i>Ziklag IP LLC v. Apple Inc.</i> , Case No. 1:24-cv-1787 (NDIL)
Ex.1012	Copy of Full Docket of related District Court Case as of March 5, 2025 (Case No. 1:24-cv-1787 (NDIL))
Ex.1013	Karker et al., "Consistent Hashing and Random Trees: Distributed Caching Protocols for Relieving Hot Spots on the World Wide Web," Proc. Of the 29 th Annual ACM Symposium on Theory of Computing, 1997, 654-663 (Karger)
Ex.1014	"Radio Frequency Interface Specification," Data Over Cable Interface Specifications, SP-RFI01-970326, March 26, 1997 (DOCSIS)
Ex.1015	Sager, G., "Time Warner Cable Full Service Network – Silicon Graphics Technology and Architecture Overview, In: Brenner, W., Kolbe, L. (eds) The Information Superhighway and Private Households. Physica-Verlag HD (1996) (Sager)

Ex.1016	Joint Motion to Stay Discovery Deadlines; Dkt. 22, <i>Ziklag IP LLC v. Apple Inc.</i> , Case No. 1:24-cv-1787 (NDIL)
Ex.1017	Deposition Transcript of Ian McCulloh, Ph.D., March 10, 2026
Ex.1018	Deposition Transcript of Mr. Loren Johnson, March 11, 2026
Ex.1019 (NEW)	Board email authorizing Motion to Strike (May 5, 2026)

CERTIFICATE OF SERVICE

The undersigned certifies that, in accordance with 37 C.F.R. §42.6(e) service was made on Patent Owner as detailed below.

Date of service May 8, 2026

Manner of service aedowell@dowellcomlit.com;
richard@mccauleylawgroup.com

Documents served **Petitioner's Motion to Strike a Portion of Patent Owner's Sur-reply; Petitioner's Updated Exhibit List; Exhibit Ex.1019.**

Persons served Anthony Dowell
DOWELL COMMERCIAL LITIGATION
101 Foundry Drive, Suite 1200
West Lafayette, Indiana 47906

Richard T. McCauley, Jr.
MCCAULLEY LAW GROUP
180 N. Wabash Avenue, Suite 601
Chicago, Illinois 60601

/Scott Jarratt /
Scott T. Jarratt
Lead Counsel for Petitioner
Registration No. 70,297