

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICROSOFT CORPORATION,
Petitioner,

v.

SANDPIPER CDN, LLC,
Patent Owner.

IPR2026-00174

Patent No. 9,762,692

**PETITIONER'S AUTHORIZED SUR-REPLY
TO PATENT OWNER'S REPLY IN SUPPORT OF ITS
REQUEST FOR DISCRETIONARY DENIAL**

This IPR is an important use of Office resources for multiple reasons. *See* Paper 8 (“DD Opp.”). Rather than address relevant issues, PO’s discretionary denial reply (Paper 10, “DD Reply”) cobbles together a self-serving narrative about its co-founder Andrew Swart. But Mr. Swart is not an inventor of the ’692 patent, and PO provides no evidence connecting him—or so-called “Footprint” software he was allegedly involved in developing—to the subject matter of the challenged claims. PO’s strained arguments only show the lengths PO is willing to go to prevent the Office from considering the merits of this IPR.

I. NEITHER PO NOR ANDREW SWART HAS A CONNECTION TO THE TECHNOLOGY OF THE ’692 PATENT

The ’692 patent was filed in 2010 and purports to claim priority to a provisional application filed in 2008. EX1001, Cover, p.2. The patent names three inventors—**none of whom is Andrew Swart**—and was issued in 2017. *Id.*, Cover. The original assignee was Level 3 Communications, LLC. *Id.*

(12) United States Patent Fullagar et al.		(10) Patent No.: US 9,762,692 B2
		(45) Date of Patent: *Sep. 12, 2017
(75) Inventors: David Fullagar , Boulder, CO (US); Christopher Newton , Thousand Oaks, CA (US); Laurence Lipstone , Calabasas, CA (US)		(22) Filed: Sep. 13, 2010
(73) Assignee: Level 3 Communications, LLC , Broomfield, CO (US)		Related U.S. Application Data (63) Continuation-in-part of application No. 12/408,681, filed on Mar. 21, 2009, now Pat. No. 8,930,538. (Continued)
		Related U.S. Application Data (60) Provisional application No. 61/042,412, filed on Apr. 4, 2008.

EX1001, Cover, p.2.

PO Sandpiper CDN, LLC did not exist until 2024 (DD Opp., 1), and thus PO’s only connection to the ’692 patent is the fact that it acquired it. Despite this—and despite failing to mention Andrew Swart in its discretionary denial request (Paper

7)—PO now argues there is a connection between Mr. Swart (and therefore PO) and the '692 patent. DD Reply, 1-3. PO's arguments fail.

PO argues Mr. Swart developed “pioneering CDN technology that led directly to” the patent. *Id.*, 1; *see also id.*, 2 (arguing the “patent is an improvement on the core CDN technology that Mr. Swart developed” and that Mr. Swart was a “leading inventor of this trailblazing technology”). Yet, PO provides no evidence connecting Mr. Swart to the '692 patent claimed subject matter. Instead, PO alleges that Mr. Swart is an inventor on a patent incorporated by reference (U.S. 6,185,598). *Id.*, 2. The '692 patent incorporates this document for all purposes, but it merely refers to it as describing how server selector 106 may include a best or optimal server selector. EX1001, 5:5-12. The challenged claims are directed to something else—tiers of servers that serve popular and unpopular resources. *See generally* Paper 1.

PO's remaining arguments fare no better. PO argues that Mr. Swart co-founded Sandpiper Networks Inc., which allegedly developed technology and received accolades. DD Reply, 2. But the provisional the '692 patent claims priority to was filed in 2008, and the '692 application itself was filed in 2010. This was years after Sandpiper Networks Inc. ceased to exist. EX2005, ¶¶23-30 (alleging that: Sandpiper Networks was founded in 1996 and merged with Digital Island in Dec. 1999; Savvis Inc. purchased Digital Island's assets/Sandpiper Networks patents on or about 2004; and Level 3 acquired Savvis' CDN service assets in January 2007).

Mr. Swart’s subsequent work history is likewise irrelevant. DD Reply, 2-3. Even if Mr. Swart continued to work at Digital Island, Savvis, and Level 3, that says nothing about his involvement with developing technology related to the subject matter of the ’692 patent claims. Similarly, PO’s assertion that Mr. Swart worked on “Footprint” CDN software is also irrelevant absent any evidence that the software relates to the claimed subject matter. For the same reasons, PO’s uncorroborated assertion that PO acquired that software and Mr. Swart is attempting to continue to develop and commercialize it—including through an alleged evaluation agreement with a U.S. company—is also irrelevant. DD Reply, 3.

Finally, PO’s claim that Petitioner “bid” against Level 3 (*id.*, 2) is beyond the scope of the authorized reply. EX3103. It is also irrelevant because Level 3’s acquisition was in January 2007 (EX2005, ¶¶29-30), which was more than a year before the filing of the provisional to which the ’692 patent claims priority.

II. CONCLUSION

PO’s arguments reduce to the assertion that this IPR should be discretionarily denied because its co-founder previously worked at Level 3, has worked in the same field as the ’692 patent inventors, and has since co-founded an entity that acquired Level 3’s patents. That is not a proper basis for discretionary denial.

Dated: April 20, 2026

Respectfully submitted,
/ Jessica Kaiser /

Jessica Kaiser
Reg. No. 58,937
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Petitioner's Sur-Reply to Patent Owner's Reply in Support of Its Request for Discretionary Denial was served upon the below listed counsel by electronic mail:

Jason D. Eisenberg - jasone-PTAB@sternekessler.com
Daniel S. Block - dblock-PTAB@sternekessler.com
Kristina Caggiano Kelly - kckelly-PTAB@sternekessler.com
Wenhao Xiong - wxiong-PTAB@sternekessler.com
PTAB@sternekessler.com

Dated: April 20, 2026

Respectfully submitted,
/ Jessica Kaiser /

Jessica Kaiser
Reg. No. 58,937
Attorney for Petitioner