

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICROSOFT CORPORATION
Petitioner

v.

TOUTVIRTUAL, INC.,
Patent Owner

Case IPR2026-00297
Patent 12,079,667

**PETITIONER'S OPPOSITION TO PATENT OWNER'S REQUEST FOR
DISCRETIONARY DENIAL**

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EX1002	Excerpts from the Prosecution History of the ‘667 Patent (“the Prosecution History”)
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EX1004	Complaint, <i>ToutVirtual, Inc. v. Microsoft Corporation</i> , 2-25-cv-00943 (EDTX) filed September 8, 2025
EX1005	U.S. Pub. No. 2006/0174087 to Akiyoshi Hashimoto <i>et al.</i> (“Hashimoto”)
EX1006	U.S. Pub. No. 2003/0084241 to Clark E. Lubbers <i>et al.</i> (“Lubbers”)
EX1007	U.S. Pub. No. 2003/0051021 to Robert A. Hirschfeld <i>et al.</i> (“Hirschfeld”)
EX1008	U.S. Pat. No. 8,799,431 to Vipul Pabari (‘431 Patent).
EX1009	U.S. Appl. No. 11/503,090, Non-Final Office Action dated Sep. 12, 2013
EX1010	Internet Archive Capture of https://en.wikipedia.org/wiki/Middleware from Jul. 29, 2005 (available at https://web.archive.org/web/20050729234922/https://en.wikipedia.org/wiki/Middleware)
EX1011	U.S. Pub. No. 2006/0294519 to Naoya Hattori <i>et al.</i>
EX1012	U.S. Pat. No. 7,577,722 to Dilip Khandekar <i>et al.</i> (“Khandekar”)
EX1013	U.S. Pat. No. 8,335,794 to John Goodson <i>et al.</i> (“Goodson”)
EX1014	U.S. Pub. No. 2006/0136667 to Steven Shultz <i>et al.</i> (“Shultz”)

- EX1015 U.S. Pub. No. 2003/0225801 to Murthy Devarakonda *et al.*
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- EX1016 Petitioner's Stipulation
- EX1017 MPEP Chapter 900: Prior Art, Classification, and Search (Rev.
08.2017) (January 2018), available at
<https://www.uspto.gov/web/offices/pac/mpep/old/e9r082017/mpep-0900.pdf>
- EX1018 [RESERVED]
- EX1019 U.S. Appl. No. 14/450,765, Non-Final Office Action dated Jul.
2, 2015
- EX1020 Office Actions Issued During Prosecution of U.S. Appl. No.
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- EX1021 Office Actions Issued During Prosecution of U.S. Appl. No.
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- EX1022 Docket Navigator webpage, Time to Trial Statistics for the
Eastern District of Texas, dated January 1, 2023 through June
11, 2026
- EX1023 Docket Navigator webpage, Time to Trial Statistics for the
Judge Robert W. Schroeder III, dated January 1, 2023 through
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- EX1024 Microsoft Corporation, "Form 10-Q for the Quarterly Period
Ended March 31, 2026," United States Securities and Exchange
Commission, 29 Apr. 2026, Commission File No. 001-37845
- EX1025 Microsoft Corporation, "Microsoft FY25 Second Quarter
Earnings Conference Call," Microsoft Investor Relations, 29
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- EX1026 General Services Administration, “Multi-Billion Dollar GSA OneGov Agreement with Microsoft Brings Steep Discounts for Microsoft 365, Copilot, and Azure Cloud Services” (Sep. 2, 2025)
- EX1027 Smith, Brad, “The Golden Opportunity for American AI. Microsoft On the Issues,” Microsoft Corporation, 3 Jan. 2025, <https://blogs.microsoft.com/on-the-issues/2025/01/03/the-golden-opportunity-for-american-ai/>
- EX1028 Nielson et al., “Microsoft FY25 Fourth Quarter Earnings Conference Call,” July 30, 2025, <https://www.microsoft.com/en-us/investor/events/fy-2025/earnings-fy-2025-q4>
- EX1029 “What is Azure Government,” Last updated May 18, 2026, <https://learn.microsoft.com/en-us/azure/azure-government/documentation-government-welcome>
- EX1030 “Datacenter Investments Drive Economic Growth in Central Washington,” Microsoft Local, Microsoft, <https://local.microsoft.com/blog/datacenter-investments-drive-economic-growth-in-central-washington/>
- EX1031 “CVE-2009-4849 Detail,” National Vulnerability Database, National Institute of Standards and Technology, 7 May 2010, <https://nvd.nist.gov/vuln/detail/CVE-2009-4849>
- EX1032 “TouTvirtual Virtualiq 3.2 Security Vulnerabilities, CVEs.” CVE Details, SecurityScorecard, https://www.cve-details.com/vulnerability-list/vendor_id-10821/product_id-19348/version_id-451232/TouTvirtual-Virtualiq-3.2.html

I. INTRODUCTION

ToutVirtual's Discretionary Denial Briefing should be denied and the Director should proceed to consider the merits of Microsoft's Petition for *inter partes* review (IPR) of U.S. Patent No. 12,079,667 ("the '667 Patent"). The decision to refer is a multi-factor analysis based on "the totality of the evidence and arguments presented." *Tesla, Inc. v. Bulletproof Property Management, LLC*, IPR2026-00204, Paper 14 at 2-3 (Director Jun. 15, 2026) (informative). Here, similar to *Tesla*, the request to discretionarily deny Microsoft's IPR petition should be rejected because: (1) the petitioner has submitted a broad stipulation thereby allowing the AIA review to function as an alternative to the co-pending litigation; (2) the '667 Patent was allowed as a result of material Examiner error; and (3) the petitioner brought an early challenge to the patent.

Notably, timing considerations and stipulations by petitioner, Microsoft, each mitigate concerns over inconsistent outcomes or duplication of efforts, given the opportunity for an instituted IPR to function as an alternative to co-pending litigation. For instance, the median time to trial statistics demonstrate that trial is likely to occur only after the Board issues the final written decision. The same is evident from statistics for the relevant district court and judge of the pending litigation involving the '667 Patent. Each reveals the likely trial date will be in early October, which is after the final written decision is due to be issued on September 16, 2027. *See*

EX1022; EX1023. More, Microsoft has stipulated that it will not advance in the parallel litigation any ground that reasonably could have been raised in an IPR and any other ground based on a combination of system art with any prior art reference asserted as the basis of a ground. *See* EX1016. As such, the form of stipulation offered by Microsoft is recognized as a “broad stipulation” that supports referral. *Tesla*, Paper 14 at 2-3. Taken together, these facts avoid duplication of efforts between the co-pending litigation and an IPR.

Review is further warranted to address material Examiner errors during original examination of the '667 Patent. *See Magnolia Med. Tech., Inc. v. Kurin*, IPR2026-00097, Paper 17, 8 (Director May 14, 2026) (precedential). The application for the '667 Patent received limited scrutiny during prosecution, and were remarkably allowed based on limitations not recited in one of the challenged independent claims. *See* §III.A.1, *infra*. Further, the Examiner conducted a clearly deficient prior art search before allowing the claims of the '667 Patent, and instead continued a myopic focus on a prior art reference applied during prosecution of all of the '667 Patent's parent applications, despite significantly varying claim scope. *See* §III.A.2, *infra*.

Additionally, ToutVirtual has not established settled expectations, strong or otherwise. The '667 Patent has been in force for a short time, having issued just one

and a half years before the filing of Microsoft's Petition. *Tesla*, Paper 14 at 4. ToutVirtual's attempts to conjure settled expectations based on the existence of older family members with significantly narrower claims also fails. The '667 Patent is issued years later and with broader claims clearly taught in the prior art.

Finally, the involvement of Microsoft in American manufacturing and commerce is beyond dispute. Simply said, Microsoft is one of the most significant contributors to the American economy and the products accused of infringement are said by ToutVirtual to implicate billions of dollars of investments in the American manufacturing operations. *See* EX1004, 8-9; *Tesla*, Paper 14 at 5. Accepting ToutVirtual's request for discretionary denial would create significant uncertainty in the virtual server industry and have a detrimental impact to the American economy.

For each of the reasons described herein, the Petition should be referred.

II. THE ACCUSED AZURE CLOUD COMPUTING PRODUCTS ARE RELATED TO SIGNIFICANT INVESTMENTS IN AMERICAN MANUFACTURING OPERATIONS

The Challenged Claims are alleged by ToutVirtual to implicate "Microsoft's Azure Cloud Computing products." EX1004, 7-9. These products are part of the "Intelligent Cloud segment," which consists of "public, private, and hybrid server products and cloud services..." EX1024, 27. Azure Cloud Computing products reflect a prominent portion of this segment given that recent increases in Intelligent

Cloud revenue is “driven by Azure,” and Microsoft’s overall revenue increase between June 2024 and March 2025 was “\$36.5 billion” (18% increase), which was “driven by growth in Microsoft Cloud.” *Id.*, 35; *see id.*, 31 (“Azure and other cloud services revenue increased 40%”); *see* EX1025, 6 (“Revenue will continue to be driven by Azure...”).

Microsoft has also invested significant capital into U.S. datacenter buildout to support its Intelligent Cloud segment. For example, in FY2025, Microsoft was on track to “invest approximately \$80 billion to build out AI-enabled datacenters,” and “[m]ore than half of this total investment will be in the United States, reflecting our commitment to this country and our confidence in the American economy.” EX1027, 2. Indeed, “Azure is the infrastructure layer for AI[,]” and Microsoft representatives confirm these commitments “continue to expand our data center capacity in line with both near-term and long-term demand signals.” EX1025, 2. Microsoft has therefore committed at least \$40 billion of investment to U.S. AI-enabled datacenter build out, and public materials suggest a direct relationship between this investment and the Azure Cloud Computing products identified by ToutVirtual in its complaint.

The size and scale of these operations is economically significant within the United States, with “Azure surpass[ing] \$75 billion in annual revenue” and Microsoft standing “up more than two gigawatts of new capacity” in a twelve-month

period. EX1028. Microsoft has also partnered with the U.S. General Services Administration (GSA) to provide federal agencies access to “Azure Cloud Services” as part of a OneGov agreement projected to generate “potential savings in \$3.1 billion in the first year.” EX1026, 1.

Microsoft also maintains specific types of Azure operations for sensitive domestic workloads, with “physically isolated datacenters and networks located in the US only” and uses the “same underlying technologies as global Azure.” *See* EX1029. In Central Washington alone, datacenter construction activity between 2019 and 2024 “generated \$1.2 billion in economic impact” and “operations added another \$269 million” in 2024. EX1030. By contrast, ToutVirtual’s VirtualIQ platform achieved some recognition in 2009, but known security concerns relating to the technology arguably explain its lack of industry adoption after 2010, and thus, lack of industry impact during the ’050 patent time in force since 2016. *See* EX1031; 1032.

III. MULTIPLE COMPELLING REASONS SUPPORT MERITS REVIEW AND INSTITUTION OF MICROSOFT’S IPR PETITION

A. The ’667 Patent is the Product of Material Examination Errors

The ’667 Patent stands in a long line of continuations. But the substantive examination of the particular claims of the ’667 Patent was limited. The only prior art rejections issued against the claims before allowance were based on the same prior art on which the Examiner had been myopically focused through a decade of

examining the family of patents from which the '667 Patent claims priority. More troubling is that the Examiner's reasons for allowance include limitations not recited in one of the issued independent claims. *See* EX1002, 17, 76-79. The '667 Patent was effectively rubber stamped to issuance. *See* EX1002, 12-20, 83-96.

As discussed further below, the '667 Patent's quick allowance was the result of material examination errors that merit further review and correction by the Office through IPR. *Padagis US LLC v. Neurelis Inc.*, IPR2025-00464, Paper 12, 3 (PTAB Jul. 16, 2025) (referral warranted where "Petitioner appears to show a material error by the Office").

1. The Examiner Erroneously Allowed the '667 Patent Even Though Two of the Three Independent Claims Lacked the Limitations that the Examiner Identified as the Basis for Allowance

Office guidelines require examiners to "conduct a thorough search of the prior art." EX1017 (MPEP Chapter 900, Rev. 08.2017, Jan. 2018), 41; *see also id.*, 45 ("comprehensive search"); 37 C.F.R. § 1.104 ("the examiner shall ... make a thorough investigation of the available prior art"). An examiner's duty to thoroughly search the art is not optional, but "must" be performed. *Id.* It requires that the examiner "obtain a thorough understanding of the invention," carefully noting "what the claims do not call for, as well as what they do require." EX1017, 47. Here, the Examiner's reasons for allowance make clear that his consideration of what the claims do and do not call for was clearly deficient.

Where the examiner during original prosecution identifies reasons for allowance not actually recited in the Challenged Claims, there exists material error. *See Skullcandy, Inc. v. Earin AB*, IPR2025-00690, Paper 9, (PTAB Jul. 31, 2025) (“*Skullcandy*”); *Activision Blizzard, Inc. v. Milestone Entertainment, LLC*, IPR2025-00708, Paper 11, (PTAB Aug. 14, 2025). For example, in *Skullcandy*, the “patent examiner identified a ‘wherein’ clause listing various structural features of an earbud housing as the reason for allowance of the challenged claims.” *Skullcandy*, 2. “The challenged claims (claims 20 and 21), however, do not recite those features.” *Id.* As a result of this fact alone, the “Decision Referring the Petition to the Board” found a material error. *Id.*

The Examiner of the application leading to the ’667 Patent made the same material error. Specifically, the Notice of Allowance concluded that:

There is no teaching or suggestion in the prior art of the claimed limitations, as presented in the independent claims, specifically a virtualization system with a control center application, physical resources, and virtual assets on each of the physical resources, the virtual assets are managed by virtualization layer instances running on each of the physical resources, at least two of the virtual assets on one or more of the physical resources include virtual storage, ***selecting one or more of the virtual assets for storage of the set of data based on an allocation of data on the virtual storage to store the set of data at the selected virtual storage on any of the physical resources*** as detailed in the dependent claims for such limitations.

EX1002, 17. However, challenged independent claim 9 does not recite all of these limitations. *See* EX1001, 24:55-25:3. Specifically, independent claim 9 does not recite “selecting one or more of the virtual assets for storage of the set of data based on an allocation of data on the virtual storage to store the set of data at the selected virtual storage on any of the physical resources.” *Id.*, 24:55-25:3. For the same reasons that were present in *Skullcandy*, “it is an appropriate use of Board resources to review the potential error.” *Skullcandy*, 2.

2. The Examiner Applied the Same Prior Art Throughout a Decade of Examining Numerous Related Patents Despite Significant Changes in Claim Scope

In the only Office Action issued during prosecution of the application that issued as the '667 Patent, the Examiner rejected claims 1-20 under pre-AIA § 103 as obvious over U.S. Pub. No. 2005/0044301 to Vasilevsky et al. *See* EX1002, 89-94. This is the same Vasilevsky reference that the Examiner applied in the last Office Action issued before allowance of U.S. Application No. 11/503,090, the first non-provisional parent application to which the '667 Patent claims priority. *See* EX1009, 5. Through prosecution of the three subsequent applications to which the '667 Patent claims priority¹, every single rejection issued by the Examiner relied upon the same Vasasilevsky reference, despite widely varying claim scope across

¹ U.S. Application Nos. 14/450,765; 15/201,087; and 17/074,500.

these applications. *See generally* EX1019; EX1020; EX1021. For example, the allowed claims in both the '090 and '765 applications recite reception of “Knowledge Block” parameters and their use in reallocation of virtual assets, which is entirely absent from the claims of the '667 Patent. EX2008, 23:26-39; EX2009, 23:65-24:4.

This consistent reapplication of the prior art is also reflected in the search history that was provided with the Notice of Allowance for the '667 Patent, which shows that the vast majority of the searches occurred before the application that led to the '667 Patent was even filed. *See* EX1002, 37-64. Of the 250 searches included in the search history, only 17 were performed after the application was filed, and all of those searches were clearly focused on double patenting, as they were searches for the inventor's name and specific claim language. *See id.* (showing the vast majority of search happened before April 14, 2023). Such a limited review of the prior art and reapplication of the exact same prior art for over a decade of prosecution of different applications is clear error.

B. Institution Will Narrow the Parallel Litigation and Promote Efficient Use of Resources

Multiple sets of statistics show that the final written decision will issue in the same month as the trial, if not earlier. Furthermore, the co-pending litigation is in its infancy and will remain so through institution. When coupled with Microsoft's broad stipulation with respect to the prior art it will not use in parallel litigation,

duplication of efforts is avoided. For at least these reasons, the *Fintiv* factors do not counsel for discretionary denial.

1. The Final Written Decision Will Issue Contemporaneous with the Beginning of Trial, If Not Sooner

While the current trial schedule date is set for June 21, 2027, other dates have already been amended. *See* EX2001, 3-5 (showing numerous dates have been amended, including, *e.g.*, the deadline to complete expert discovery). Indeed, statistics for the Eastern District of Texas (EDTX) show that, since January 1, 2023, the median time to jury trial² is 24.8 months, and Judge Schroeder’s specific median time to jury trial is 25.1 months. *See* EX1022; EX1023. With the complaint having been filed September 8, 2025, these statistics would have the likely trial date falling in early October, 2027 or later. The final written decision is due no later than September 16, 2027. Thus, the statistically likely trial date will fall *after* the final written decision is issued.

Even if applying the median time to trial statistics cited by ToutVirtual, the trial would begin contemporaneously with the issuance of the final written decision,

² The parallel litigation involving the ’667 Patent will be a jury trial. *See* EX2001, 1 (noting “current date” of jury selection).

in September, 2027. *See* EX2004 (showing a median time to trial of 24 months)³, EX2005 (showing same). Under similar facts, the Board has found that discretionary denial is not warranted. For example, in *Geotab Inc. et al v. Fractus, SA*, IPR2025-01027, trial in EDTX was scheduled nearly four months before the final written decision was due to issue “in January 2027,” but “the parties offer[ed] time-to-trial statistics that suggest trial could begin between October 2026 and January 2027.” IPR2025-01027, Paper 15, 2. Deputy Director Stewart found that “these considerations neither favor nor counsel against discretionary denial.” *Id.*

2. The Early Stage of Litigation Coupled with Microsoft’s Broad *Sotera+* Stipulation Avoid Wasteful, Duplicative Efforts

Co-pending litigation is largely dormant, and it will remain so through institution and much of the IPR proceeding, if instituted. *See* EX2001. Opening claim

³ The Docket Navigator statistics cited by ToutVirtual are artificially narrowed.

ToutVirtual limited their statistics to the narrow window of cases filed on or after January 1, 2024, meaning many of the cases are only recently reaching trial. *See* EX2004. Moreover, ToutVirtual’s statistics encompass both jury *and* bench trials, even though the trial involving the ’667 Patent will be a jury trial. *See id.*; EX2001, 1. And ToutVirtual’s statistics inexplicably exclude “outliers,” even though there is no way to know at this early stage whether the co-pending litigation involving the ’667 Patent would itself qualify as an outlier.

construction briefing is not due until November 6, 2026, nearly two months after institution. EX2001, 4. The claim construction hearing is scheduled for December 18, 2026, three months after institution. *Id.* And expert discovery does not complete until March 10, 2027, which is six months into the proceeding—after nearly all of the substantive briefing will be complete in this IPR. *Id.*, 3. The litigation is and will remain in its infancy through much of any instituted IPR proceeding. These facts weigh strongly against discretionary denial, especially as IPRs can inform ongoing litigation. *See, e.g., CrowdStrike Inc. v. Webroot, Inc.*, IPR2023-00126, Pap. 9, at 10 (PTAB May 5, 2023) (early-stage investment weighs against denial).

Microsoft’s broad stipulation ensures this remains true through the final written decision and after. If the Director institutes IPR, the stipulation ensures that Microsoft will not pursue in the parallel litigation any invalidity ground based on prior art patents or printed publications that were raised or reasonably could have been raised in the IPR. EX1016. But Microsoft’s stipulation does not stop there. The stipulation extends ***beyond Sotera*** to further waive “combinations of prior art asserted in this proceeding ... with any other type of prior art, including unpublished system prior art, nor will it pursue any unpublished system art corresponding to the prior art asserted in this proceeding,” thereby avoiding duplicative effort and inefficiencies even if the litigation is not stayed upon institution. *Id.*; *Motorola Solutions, Inc. v. Stellar, LLC*, IPR2024-01205, Pap. 19, at 4 (PTAB Mar. 28, 2025).

ToutVirtual's reference to Microsoft's invalidity contentions in the counter-part litigation involving the '667 Patent also mischaracterizes Microsoft's stipulation. *See* Req., 5-7 (citing EX2007). Microsoft's conditional stipulation is triggered "if the PTAB institutes review in this proceeding, and said institution is not later vacated, reversed, or otherwise withdrawn by rehearing or Director Review." MS-1053. Because the Director has not yet issued a decision regarding institution, this proceeding has not been instituted and there is no basis for ToutVirtual to suggest Microsoft acted contrary to its stipulations or its representations to the Office. And if IPR institution is granted, Microsoft will formally withdraw in the litigation any invalidity grounds implicated by the stipulation.

3. Holistic Consideration of the Fintiv Factors Favors Referral

As discussed below, a holistic weighing of the *Fintiv* factors favors referral. *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Pap. 11 (Mar. 20, 2020) (precedential).

Factor 1 (Stay)—Because no motion to stay has been filed, the outcome of such a motion cannot be inferred, nor the existence of stay known. *Sand Revolution II, LLC v. Continental Intermodal Group – Trucking LLC*, IPR2019-01393, Pap. 24, at 7 (June 16, 2020) (informative). Factor 1 is therefore *neutral*.

Factor 2 (Trial Date)—As described above, recent median time to trial statistics for both the Eastern District of Texas and Judge Schroeder indicate the trial is likely to start shortly *after* the final written decision must be issued. Yet, even the

statistics cited by ToutVirtual show the trial and issuance of a final written decision will occur contemporaneously in September, 2024. Thus, Factor 2 favors referral or at worst, is *neutral*.

Factor 3 (Investment)—As noted above, investment in the district court proceeding remains low. Claim construction briefing will not be begin to be filed until nearly two months *after* institution is due, and expert discovery will not complete until *six months after* institution. EX2001, 4-5. Indeed, document production will not even be complete until after institution. *Id.*, 4. Factor 3 therefore *favors referral*.

Factor 4 (Overlap)—As discussed above, Microsoft’s broad stipulation eliminates overlap between the IPR and the parallel litigation. Factor 4 *favors referral*.

Factor 5 (Parties)—While the parties in the parallel litigation are the same (Factor 5), this factor alone does not favor denial, particularly where, as here, the Petition demonstrates strong merits of unpatentability. Factor 5 is *neutral*.

Factor 6 (Merits and Other Considerations)— The merits of the petition are compelling. As set forth in the Petition, the ’667 Patent claims are plainly unpatentable over the prior art. As discussed in §II.A, *supra*, the Examiner concluded, after an inappropriately brief examination effort, that Limitations [1.1] and [1.3] of independent claim 1 were not taught in the prior art. *See* EX1002, 17. However, as explained in the Petition, the prior art clearly and unequivocally teaches Limitations

[1.1] and [1.3]. *See* Paper 2 (Petition), 23-31, 32-38. Factor 6 therefore *favours referral*.

As discussed above, each *Fintiv* factor is either neutral or favors referral, and thus, all *Fintiv* factors weigh against denial on discretion.

IV. TOUTVIRTUAL FAILS TO ESTABLISH SETTLED EXPECTATIONS

A. The '667 Patent is Young, Having Issued Just One and a Half Years Before Microsoft's Petition

ToutVirtual fails to show that it has settled expectations in the '667 Patent. It does not. The '667 Patent issued in September, 2024, just about 1.5 years before Microsoft's Petition was filed in March, 2026. ToutVirtual presumptively lacks strong settled expectations on a young patent like the '667 Patent. *Samsung Electronics Co., Ltd., v. Wilus Institute of Standards*, IPR2025-00935, Paper 12 at 2-3 (Sept. 26, 2025) (finding that patent issued in 2021 "has not been in force for a significant period of time" and thus "Patent Owner has not developed strong settled expectations that favor discretionary denial").

B. ToutVirtual's Contentions of Commercial Success and of Prior Relationship with Microsoft Lack Relevance as They Fail to Demonstrate a Relationship Between Their Prior Offerings and the '667 Patent

Each of the events referenced in ToutVirtual's Request predate the issuance of the '667 Patent by more than a decade, and ToutVirtual fails to demonstrate any nexus with the Challenged Claims that warrants vastly expanding the time frame for

the settled expectations inquiry beyond the patent's time in force. Absent such nexus, none of the events identified in the Request bear any relevance to any settled expectations that ToutVirtual claims to have developed even before the '667 Patent was filed.

ToutVirtual's cited authority is also inapposite. *Amgen* recognized that a newer patent may support settled expectations where the patent owner explains how an extraordinary investment of time, resources, research, development, trials, or regulatory approval correlates to those expectations. *Amgen Inc. v. Bristol-Myers Squibb Co.*, IPR2025-00601, Paper 9, 2 (Acting Director July 24, 2025). ToutVirtual fails to even allege similar types of investment here. *Amazon* and *NVIDIA* likewise involved more particularized notice of patents or patent families, including issued ancestor patents or actual notice through commercial relationships. *Amazon.com, Inc. v. Audio Pod IP, LLC*, IPR2025-00768, Paper 15, 2-3 (Acting Director Aug. 14, 2025); *NVIDIA*, Pap. 16, 2-3. Here, generalized references to unmarked patents and the Earlier Patents in prosecution are neither particularized nor uniquely tied to the subject matter recited in the Challenged Claims.

Even if the events identified in ToutVirtual's Request were relevant to the settled expectations inquiry (they are not), gaps in nexus with the Challenged Claims ultimately diminish their significance. These events include: (1) issuance of two earlier-issued patents in the same family (Earlier Patents), (2) alleged prominence of

its VirtualIQ technology, and (3) interactions with Microsoft in relation to the VirtualIQ technology.

Each event occurred between 2006 and 2009—*a decade and a half* before the '667 Patent's application was filed on April 14, 2023 and before the Challenged Claims issued on September 3, 2024. These events therefore occurred outside the time in force of the '667 Patent. Moreover, ToutVirtual fails to demonstrate any nexus between these events and the Challenged Claims of the '667 Patent.

Indeed, ToutVirtual's cited authority reinforces the importance of nexus. In *NVIDIA*, the Acting Director recognized that a later reissued patent had “not been in force for a significant period of time,” even though the original patent issued years earlier, because the reissued patent contained “different claims from the original patent.” *NVIDIA Corp. v. Neural AI, LLC*, IPR2025-00606, Pap. 16, 2-3 (Acting Director July 31, 2025). This makes sense because the mere existence of an earlier-issued patent in the same family, without some closer relationship to that earlier-issued patent, should not bar Office review of an early challenge to a later-filed continuation application within its first six years in force.

The subject matter recited in the Earlier Patents and the Challenged Claims are also significantly different. For instance, the Earlier Patents include independent claims that each recite a “Knowledge Block” used in connection with parameters for

alerting or reallocating assets. EX2008, Cl. 1; EX2009, Cl. 1. The Challenged Claims make no mention of receiving or using a “Knowledge Block.”

ToutVirtual’s reliance on the VirtualIQ technology is also insufficient. The only reference to patent coverage of this technology is a general statement within presentation materials provided to Microsoft representatives on 2006 (i.e., nearly ten years before the ’050 Patent’s filing date). EX2019, 6 (noting that the VirtualIQ technology is a “patent-pending technology platform”). But the Request fails to identify any feature within the Challenged Claims that was present in the VirtualIQ technology and that this feature is what contributed to the proclaimed industry success. *See* Req. 9-11. ToutVirtual also fails to identify any evidence of marking through identification of specific patents, or any evidence of enforcement prior to the Petition filing. Absent these indications, ToutVirtual’s reference to the VirtualIQ technology as reflecting any commercialization or application of the Challenged Claims is speculative at best.

Several of ToutVirtual’s exhibits that it claims represent a “recognized industry need and received praise and recognition” are ToutVirtual’s own press releases regarding its products, which should be given no weight. *See, e.g.*, EX2012; EX2014; EX2018; Req., 9-12 (citing same). And while ToutVirtual identifies some third-party evaluations, it fails to tie the recognized aspects of VirtualIQ technology to the specific limitations of the Challenged Claims. *See* Req., 9-12 (citing EX2015,

EX2016). Nor could it have, as no nexus exists. Instead, aspects of the VirtualIQ technology ToutVirtual proclaims as receiving “praise and recognition” relate, if at all, to elements—such as Knowledge Block parameters governing reallocation of virtual assets and automatic metric-driven reallocation of virtual assets—that were deliberately omitted from the Challenged Claims. Req., 2; *see* EX2008, Cl. 1; EX2009, Cl. 1.

C. To the Contrary, Contemporaneous Evidence Demonstrates the Industry Found Significant Flaws in ToutVirtual’s VirtualIQ Technology

ToutVirtual also fails to identify any praise or recognition for the VirtualIQ technology after 2009. To the contrary, after 2009, industry sources publicly reported security vulnerabilities for the VirtualIQ technology. For example, the National Vulnerability Database reported that VirtualIQ contained “[m]ultiple cross-site request forgery (CSRF) vulnerabilities” that allowed remote attackers to “hijack the authentication of administrators” to create users, shut down, start, or restart virtual machines, and schedule activity. EX1031. Another report states that VirtualIQ “contains cleartext SSH credentials,” allowing remote attackers to obtain sensitive information by reading username and password fields. EX1032. Unsurprisingly, ToutVirtual fails to mention, much less address, these vulnerabilities, which undercut any suggestion that the cited pre-2010 marketing statements and third-party comments establish durable industry praise for the VirtualIQ technology.

D. Absent Unique Circumstances, Prosecution Citations To Earlier Patents With Different Claims Also Do Not Establish Settled Expectations

ToutVirtual's assertion that Microsoft had "continued awareness of ToutVirtual's portfolio" is neither particularized nor tied to the Challenged Claims to inform the settled expectations inquiry relating to the '667 Patent. The citations concern the Earlier Patents, not the '667 Patent. *See* EX2003, ¶8. And, as explained above, given the differences in claim language, any awareness created by Microsoft's later encounter with the Earlier Patents is offset by differences in claim scope. EX2002, ¶¶10-12; EX2019, 6; EX2020, 1; EX2003, ¶8.

Further, each of the identified citations to the Earlier Patents in ongoing prosecution occurred before the '667 Patent application was filed. *See* EX2003, ¶8. The latest prosecution event identified by ToutVirtual involved a non-final rejection citing the '431 patent publication on 8/13/2020. *Id.* Microsoft therefore could not have become aware of the '667 Patent through a reasonable inquiry.

V. CONCLUSION

Petitioner respectfully requests that the Director proceed to consider the Petition on the merits.

Respectfully submitted,

Dated: June 16, 2026

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CERTIFICATE OF SERVICE

Pursuant to 37 CFR § 42.6(e)(4), the undersigned certifies that on June 16, 2026, a complete and entire copy of this Petitioner's Opposition to Patent Owner's Request for Discretionary Denial and Accompanying Exhibits were provided by email to the Patent Owner by serving the correspondence email address of record as follows:

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