

1 J. DAVID HADDEN (CSB No. 176148)
dhadden@fenwick.com
2 SAINA S. SHAMILOV (CSB No. 215636)
sshamilov@fenwick.com
3 TODD R. GREGORIAN (CSB No. 236096)
tgregorian@fenwick.com
4 RAVI R. RANGANATH (CSB No. 272981)
rranganath@fenwick.com
5 CHIEH TUNG (CSB No. 318963)
ctung@fenwick.com
6 FENWICK & WEST LLP
Silicon Valley Center
7 801 California Street
Mountain View, CA 94041
8 Telephone: 650.988.8500
Facsimile: 650.938.5200

9 Counsel for Defendant
10 TWITCH INTERACTIVE, INC.

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION
14

15 IN RE: PERSONAL WEB TECHNOLOGIES,
LLC ET AL., PATENT LITIGATION

Case No.: 5:18-md-02834-BLF

Case No. 5:18-cv-05619-BLF

17 PERSONALWEB TECHNOLOGIES, LLC, a
Texas limited liability company, and LEVEL 3
18 COMMUNICATIONS, LLC, a Delaware limited
liability company,

**REPLY IN SUPPORT OF MOTION OF
TWITCH INTERACTIVE, INC. FOR
SUMMARY JUDGMENT OF NON-IN-
FRINGEMENT AND TO EXCLUDE
THE TESTIMONY OF ERIK DE LA
IGLESIA**

19 Plaintiffs,

20 v.

21 TWITCH INTERACTIVE, INC. a Delaware cor-
22 poration,

Date: November 14, 2019
Time: 9:00 a.m.
Dept: Courtroom 3, 5th Floor
Judge: Hon. Beth L. Freeman
Trial Date: March 16, 2020

23 Defendant.
24
25
26
27
28

FENWICK & WEST LLP
ATTORNEYS AT LAW

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION -----1

II. TWITCH’S TECHNOLOGY DOES NOT INFRINGE FOR SEVERAL REASONS INCLUDING THOSE THAT DO NOT DEPEND ON THE COURT’S CLAIM CONSTRUCTION ORDER -----1

 A. Twitch Servers Do Not “Allow,” “Permit,” or “Not Permit” Access to Content Cached at Web Browsers -----1

 B. Twitch Servers Do Not Determine Whether an ETag Corresponds to a “Plurality of Identifiers” -----5

 C. Twitch Servers Do Not Use ETags to Determine the Presence of a File..... 5

III. PERSONALWEB’S PROPOSED REDACTIONS DO NOT CAPTURE ALL OF MR. DE LA IGLESIA’S IRRELEVANT AND UNRELIABLE TESTIMONY-----6

IV. TWITCH DID NOT “INDUCE” PERSONALWEB TO EXCLUDE THE ’544 PATENT FROM ITS EXPERT REPORT -----7

V. CONCLUSION-----8

FENWICK & WEST LLP
ATTORNEYS AT LAW

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Jarrow Formulas, Inc. v. Now Health Grp., Inc.</i> , No. CV 10-8301 PSG JCX, 2012 WL 3186576 (C.D. Cal. Aug. 2, 2012), <i>aff'd</i> , 579 F. App'x 995 (Fed. Cir. 2014) -----	7
<i>Oracle Am., Inc. v. Hewlett Packard Enter. Co.</i> , No. 16-cv-01393-JST, 2019 WL 468809 (N.D. Cal. Jan. 29, 2019) -----	7
<i>Rovid v. Graco Children's Prods.</i> , No. 17-cv-01506-PJH, 2018 WL 5906075 (N.D. Cal. Nov. 9, 2018) -----	7
Other Authorities:	
Fed. R. Civ. P. 26(e)-----	7
Fed. R. Civ. P. 41(a)(2)-----	1

FENWICK & WEST LLP
ATTORNEYS AT LAW

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **I. INTRODUCTION**

2 PersonalWeb concedes Twitch does not infringe the patents as construed by the Court.
3 Twitch also does not infringe for three other reasons that do not depend on the Court's construc-
4 tions. The Court should include each independent basis for Twitch's non-infringement in its order
5 granting summary judgment. And the Court should enter summary judgment even if it considers
6 the expert report and the supplemental declaration of PersonalWeb's expert, Mr. Erik de la Iglesia.
7 Neither the report nor the supplemental declaration shows that the accused Twitch technology, the
8 operation of which is undisputed, meets every limitation of the claims.

9 While the Court should grant Twitch's motion in its entirety, the Court should also deny
10 PersonalWeb's cross-motion for summary judgment under Rule 41(a)(2) for the same reasons the
11 Court denied PersonalWeb's similar motion in the Amazon case. (Dkt. 165.) Like Amazon, Twitch
12 also does not infringe the asserted patents for reasons independent from the Court's claim construc-
13 tions. Twitch should not be foreclosed from raising these additional non-infringement bases on
14 appeal, and, as the Court already recognized, proceeding on track with Amazon will result in greater
15 efficiencies. (*Id.* at 3.)

16 **II. TWITCH'S TECHNOLOGY DOES NOT INFRINGE FOR SEVERAL REASONS**
17 **INCLUDING THOSE THAT DO NOT DEPEND ON THE COURT'S CLAIM**
18 **CONSTRUCTION ORDER.**

19 In its opposition, PersonalWeb agrees to the entry of summary judgment of non-infringe-
20 ment because the accused Twitch technology does not meet the limitations of the asserted claims
21 as construed by the Court. (Dkt. 551 ("Opp.") at 1.) And while that is enough for the Court to
22 grant Twitch's motion, Twitch technology cannot infringe the asserted patents for reasons unrelated
23 to the Court's constructions. The Court should enter judgment of non-infringement for those rea-
24 sons as well.

24 **A. Twitch Servers Do Not "Allow," "Permit," or "Not Permit" Access to Content**
25 **Cached at Web Browsers.**

26 The asserted claims require "allowing" or "permitting" access, or "not permitting" access
27 to content. ('310 patent claim 20; '442 patent claim 11; '420 patent claims 25, 166.) These terms
28

1 require no constructions and Twitch is not proposing or relying on any in its motion. “Permitting”
2 (or “allowing”) access and “not permitting” access means exactly that: permitting it or not permit-
3 ting it. The verbs “preventing” or “prohibiting” are mere synonyms of “not permitting” and are
4 used in the Twitch motion to avoid grammatically-prohibited double negatives such as “Twitch’s
5 technology does not ‘not permit’ access to content cached at web browsers.”

6 PersonalWeb argues that by providing a new version of an object, an HTTP server denies
7 the browser permission to access the previously received cached object. (Opp. at 4-5.) This is akin
8 to arguing that by delivering today’s paper, the Wall Street Journal rescinds permission to read the
9 paper delivered yesterday. This is illogical. Nor is there any support for PersonalWeb’s argument
10 in the HTTP specification itself. There is no mechanism in the HTTP protocol, and PersonalWeb
11 points to none, for a server to “revoke” a browser’s ability to access a cached object that the same
12 server has already provided to it. The HTTP specification in fact says just the opposite, that brows-
13 ers should be able to access cached content whether or not it is current. (Dkt. 543 (Shamilov Decl.)
14 Ex. 3 (RFC 2616, HTTP 1.1 standard) at § 13.1.1 (cache that cannot communicate with origin
15 server should forward stale content to a browser for display with an optional warning indication of
16 staleness); § 13.1.4 (at a user’s direction, browsers may override basic mechanisms to validate stale
17 entities in cache); § 13.13 (history mechanisms can redisplay entities showing “exactly what the
18 user saw at the time when the resource was retrieved” and should display an entity in storage “even
19 if the entity has expired”); Shamilov Decl. Ex. 2 (Weissman Rep.) at ¶¶ 54, 97, 152, 179, 189.)
20 PersonalWeb acknowledges that this is the case. (Opp. at 9-10.) PersonalWeb argues, however,
21 that the ability of browsers to freely access cached content whether current or not is “irrelevant”
22 because it requires “no request . . . to the server” and is not one of “the primary purposes of a
23 browser.” (*Id.*) But the claims require the act of “not permitting access.” If access is always
24 permitted, the required act of “not permitting” is not performed by Twitch or anyone else.

25 Indeed, the HTTP protocol, the basis of PersonalWeb’s infringement theories, does not per-
26 mit or not permit access to content using ETags. (Weissman Rep. at ¶¶ 53-56; Shamilov Decl. Ex.
27 1 (de la Iglesia Rep.) at ¶¶ 86-87.) The accused conditional GET requests specified in the HTTP
28

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.