

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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NETFLIX, INC. and ROKU INC.,  
Petitioner,

v.

CONVERGENT MEDIA SOLUTIONS LLC,  
Patent Owner.

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Case IPR2016-01761  
Patent 8,850,507 B2

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Before JAMESON LEE, KEN B. BARRETT, and JOHN F. HORVATH,  
*Administrative Patent Judges.*

LEE, *Administrative Patent Judge.*

SCHEDULING ORDER

## A. DUE DATES

This order sets due dates for the parties to take action after institution of the proceeding. The parties may stipulate to different dates for DUE DATES 1 through 5 (earlier or later, but no later than DUE DATE 6). A notice of the stipulation, specifically identifying the changed due dates, must be promptly filed. The parties may not stipulate to an extension of DUE DATES 6 and 7.

In stipulating to different times, the parties should consider the effect of the stipulation on times to object to evidence (37 C.F.R. § 42.64(b)(1)), to supplement evidence (37 C.F.R. § 42.64(b)(2)), to conduct cross-examination (37 C.F.R. § 42.53(d)(2)), and to draft papers depending on the evidence and cross-examination testimony (*see* section B, below).

The parties are reminded that the Testimony Guidelines appended to the Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,772 (Aug. 14, 2012) (Appendix D), apply to this proceeding. The Board may impose an appropriate sanction for failure to adhere to the Testimony Guidelines. 37 C.F.R. § 42.12. For example, reasonable expenses and attorneys' fees incurred by any party may be levied on a person who impedes, delays, or frustrates the fair examination of a witness.

### 1. INITIAL CONFERENCE CALL

The parties are directed to the Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,765–66, for guidance in preparing for the initial conference call, and should be prepared to discuss any proposed changes to this Scheduling Order and any motions the parties anticipate filing during the trial.

## 2. DUE DATE 1

The patent owner may file—

- a. A response to the petition (37 C.F.R. § 42.120), and
- b. A motion to amend the patent (37 C.F.R. § 42.121).

The patent owner must file any such response or motion to amend by DUE DATE 1. If the patent owner elects not to file anything, the patent owner must arrange a conference call with the parties and the Board. The patent owner is cautioned that any arguments for patentability not raised in the response will be deemed waived.

## 3. DUE DATE 2

The petitioner must file any reply to the patent owner's response and opposition to the motion to amend by DUE DATE 2.

## 4. DUE DATE 3

The patent owner must file any reply to the petitioner's opposition to patent owner's motion to amend by DUE DATE 3.

## 5. DUE DATE 4

- a. Each party must file any motion for an observation on the cross-examination testimony of a reply witness (*see* section C, below) by DUE DATE 4.
- b. Each party must file any motion to exclude evidence (37 C.F.R. § 42.64(c)) and any request for oral argument (37 C.F.R. § 42.70(a)) by DUE DATE 4.

6. DUE DATE 5

a. Each party must file any response to an observation on cross-examination testimony by DUE DATE 5.

b. Each party must file any opposition to a motion to exclude evidence by DUE DATE 5.

7. DUE DATE 6

Each party must file any reply for a motion to exclude evidence by DUE DATE 6.

8. DUE DATE 7

The oral argument (if requested by either party) is set for DUE DATE 7.

B. CROSS-EXAMINATION

Except as the parties might otherwise agree, for each due date—

1. Cross-examination begins after any supplemental evidence is due. 37 C.F.R. § 42.53(d)(2).

2. Cross-examination ends no later than a week before the filing date for any paper in which the cross-examination testimony is expected to be used. *Id.*

C. MOTION FOR OBSERVATION ON CROSS-EXAMINATION

A motion for observation on cross-examination provides the parties with a mechanism to draw the Board's attention to relevant cross-examination testimony of a reply witness because no further substantive paper is permitted after the reply. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,768. The observation must be a concise statement of the

relevance of precisely identified testimony to a precisely identified argument or portion of an exhibit. Each observation should not exceed a single, short paragraph. The opposing party may respond to the observation. Any response must be equally concise and specific.

#### D. MOTION TO AMEND

The parties are reminded that 37 C.F.R. § 42.24 was amended effective May 19, 2015, and that the page limits that pertain to motions to amend are as follows: any motion to amend is limited to 25 pages; Petitioner's opposition to any motion to amend is limited to 25 pages; and Patent Owner's reply to the opposition to any motion to amend is limited to 12 pages. 37 C.F.R. §§ 42.24(a)–(c). The claim listing does not count towards the page limit for a motion to amend. 37 C.F.R. § 42.24(a)(1).

#### E. PATENT OWNER RESPONSE AND PETITIONER'S REPLY

Effective May 2, 2016, 37 C.F.R. § 42.24 was amended to provide that the patent owner response for a post-grant review is limited to 18,700 words, and that Petitioner's reply to the patent owner response is limited to 5,600 words. *See* 37 C.F.R. §§ 42.24(b)(2), 42.24(c)(1); Amendments to the Rules of Practice for Trials Before the Patent and Trial Appeal Board, Final Rule, 81 Fed. Reg. 18,750, 18,765 (April 1, 2016).

#### F. FORMAT AND FILING OF DOCUMENTS

The parties are reminded that 37 C.F.R. § 42.6 was amended effective May 19, 2015, and now requires the use of 14-point, Times New Roman proportional font, with normal spacing. The parties should familiarize themselves with the requirements of 37 C.F.R. § 42.6. Any filing that does not comply with 37 C.F.R. § 42.6 may be expunged.

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