

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RIOT GAMES, INC.,
Petitioner,

v.

PALTALK HOLDINGS, INC.,
Patent Owner.

Case No. IPR2018-00131
U.S. Patent No. 6,226,686

PETITIONER'S PRELIMINARY REPLY

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I. INTRODUCTION

Patent Owner's proposed constructions for "aggregated message," "payload portion," and "aggregated payload" are far narrower than past litigation constructions it successfully urged various courts to adopt. Paper 6 ("POPR"), 5-13; *see* II.A below. Those constructions are shown below, with its newly added requirements underlined:

"aggregated message" — One or more messages containing a single transport layer message header, destination data, and data items from an aggregated payload.

"payload portion" — A portion of the original network message (that contains data item(s) conveying information) sent to the group messaging server remaining after the transport layer header is removed.

"aggregated payload" — A collection of two or more data items that does not include transport layer headers.

Patent Owner seeks to import these "transport layer header" requirements in an obvious attempt to sidestep Petitioner's challenge. But Patent Owner cannot amend its expired patent through claim construction, nor can it twist its claims like "a nose of wax ... by merely referring to the specification." *White v. Dunbar*, 119 U.S. 47, 51 (1886). Patent Owner's proposed "transport layer header" requirements have no support in the plain and ordinary meaning of the claims. The Board should reject Patent Owner's constructions for these reasons and those explained below.

II. ANALYSIS

A. Patent Owner's "Transport Layer Header" Requirements Are Inconsistent With Its Positions in Prior and Current Litigations

Patent Owner's "transport layer header" requirements are found nowhere in its prior constructions of these terms. For example, in *PalTalk Holdings, Inc. v. Sony Computer Entertainment America Inc.*, No. 2:09-cv-274 (E.D. Tex.), Patent Owner agreed to a construction of "payload portion," Ex. 1032, 2, and proposed constructions that were adopted by the court for "aggregated payload" and "aggregated message." *Id.*, Ex. A at 14-15, 17-18. None of these constructions contained the "transport layer header" requirements highlighted above or, indeed, any "header" requirement at all. Patent Owner also asserted these prior constructions when it initiated litigation against Petitioner. *See* Ex. 1016, 93 (quoting "aggregated message" from *Sony* litigation); *id.*, 121-122 (quoting construction of "aggregating said payload portions" without any variation of the "transport layer header" requirements). Those prior positions eviscerate Patent Owner's claim that its new, overly narrow constructions are the "ordinary and accustomed meaning as understood by one of ordinary skill in the art." *See* POPR, 2. Only after it had reviewed the patentability challenge in the present Petition did Patent Owner discover this new "ordinary and accustomed meaning."

Further, Patent Owner should be judicially estopped "from deliberately changing positions according to the exigencies of the moment." *U.S. v. McCaskey*,

9. F.3d 368, 378 (5th Cir. 1993). By its own admission, Patent Owner has advanced clearly inconsistent positions, Ex. 1036, 10:19-11:13, and has persuaded a court to accept those positions, *PalTalk Holdings, Inc. v. Sony Computer Entm't Am., Inc.*, No. 2:09-CV-274, 2011 WL 1326963, at *15 (E.D. Tex. Apr. 5, 2011) (adopting construction for “aggregated message”); *PalTalk Holdings, Inc. v. Microsoft Corp.*, No. 2:06-CV-367, 2008 WL 4830571, at *8 (E.D. Tex. July 29, 2008) (same for “payload portion”); *id.*, *9-13 (adopting, in effect, construction for “aggregated payload”). Patent Owner also seeks to derive an unfair advantage: to preserve the patentability of its patent via a narrower construction than it accused defendants of infringing for decades. Such actions present a clear case for judicial estoppel. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001).

B. Patent Owner's “Transport Layer Header” Requirements Conflict With the Plain and Ordinary Meaning of the Claims

Even putting aside Patent Owner's inconsistent positions, it would be improper to incorporate the extra “transport layer header” limitations into these claim terms. Patent Owner proposes, in effect, that the “payload portion” exclude all “transport layer headers,” the “aggregated payload” likewise exclude them, and the “aggregated message” include at most a single “transport layer message header.” POPR, 5-13. But there is no basis for importing such limitations.

Claim 1, for example, recites “messages contain[ing] a payload portion,” and the specification uses “payload” in a conventional sense. Ex. 1002, 3:64-66.

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