

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEALS BOARD

NFL ENTERPRISES LLC,
Petitioner

v.

OPENTV, INC.
Patent Owner

Case No.: IPR2018-00463
Patent No. 7,055,169

**PATENT OWNER'S PRELIMINARY
RESPONSE**

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I. Introduction

The petition fails to establish a reasonable likelihood that the NFL will prevail on its challenges to claim 22, whether based on *Beri* in combination with *Harrington* under 35 U.S.C. § 103, or based on *Armstrong* in combination with *Harrington* under 35 U.S.C. § 103. For both of these challenges, the petition disregards the technical incompatibility of the proprietary software disclosed in *Beri*, *Armstrong*, and *Harrington*. The petition never addresses how a POSITA could or would have combined *Beri* and *Armstrong*'s Internet Explorer features with *Harrington*'s Netscape Navigator features, despite the fact that Netscape Navigator and Internet Explorer were fierce competitors with notoriously proprietary technologies at the time of the invention. Indeed, the petition does not even assert that a POSITA would have been capable of overcoming the technical incompatibility of the proprietary technologies to somehow combine them. Given these failures, the Board should deny institution of both challenges to claim 22 because there is not a reasonable likelihood that the NFL will prevail on either of them. *See* 35 U.S.C. § 314(a).

II. The Board Should Deny the Proposed Grounds for Claim 22 Because the Petition Never Addresses How a POSITA Could or Would Have Combined the Grounds' Incompatible Systems.

Without a clear explanation or evidence showing how a combination of two references would have worked, the Board cannot find a claim obvious based on the

combination. *Pers. Web Techs., LLC v. Apple, Inc.*, 848 F.3d 987, 993-94 (Fed. Cir. 2017) (reversing obviousness determination because the Board “nowhere clearly explained, or cited evidence showing, *how* the combination of the two references was supposed to work” (emphasis in original)). Here, the petition’s superficial discussions of its proposed grounds for claim 22 do not show how the grounds’ combinations would have worked because they completely disregard the technical incompatibility of the competing systems in the combinations. The NFL’s copy/paste expert declaration does not even assert, much less articulate, how its POSITA, without any graduate level training, Pet. 11, would have been able to overcome the technical incompatibility. The Board should therefore deny institution of both of the grounds. *See* 35 U.S.C. § 314(a).

A. The NFL’s petition and copy/paste expert declaration recognize that *Beri* and *Armstrong* are tied to Microsoft, while *Harrington* is tied to Netscape.

The NFL’s sole explanation for how the combination of *Beri* and *Harrington* would have worked is that “[a] POSITA would have found it straightforward to effectuate the combination because *Harrington* and *Beri* both render web pages on a personal computer, and the software environments are the same. . . . The result would have been software with the same overall purpose (rendering web pages) that would have the combined ability to render animations and to do so while the user was watching television.” Pet. 35. As support for this explanation, the NFL

asserts that *Beri* “discuss[es] Microsoft environment and Microsoft ActiveX tools for use in web browsers,” and that *Harrington* “us[es] Netscape Navigator web browser in Windows environment.” *Id.* (citing the two references and its copy/paste expert declaration that includes no additional explanation); *compare* Pet. 35 with NFLE 1004 ¶ 76.

Similarly, the NFL's sole explanation for how the combination of *Armstrong* and *Harrington* would have worked is that “[a] POSITA would have found it simple to effectuate the combination because *Harrington* and *Armstrong* both render web pages on a personal computer, and thus the software environments are the same. . . . The result would have been software with the same overall purpose (rendering web pages) that would have the combined ability to render web page resources asynchronously and to do so while the user was watching television.” Pet. 47. As support for this explanation, the NFL asserts that *Armstrong* “discuss[es] Microsoft ActiveX tools for use in Microsoft web browsers such as Internet Explorer,” and that *Harrington* “(disclos[es] use of Netscape Navigator web browser in Windows operating system.” *Id.* (citing the two references and its copy/paste expert declaration that includes no additional explanation); *compare* Pet. 47 with NFLE 1004 ¶ 98.

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