UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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NETFLIX, INC.,
Petitioner

v.

REALTIME ADAPTIVE STREAMING LLC,
Patent Owner

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Case IPR2018-01169
Patent 8,934,535

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PATENT OWNER'S SUR-REPLY

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I. Petitioner's combination theory rests on a single, unsupported point: that a POSITA would use frequency of access of the entire digital signal to select encoders for individual pieces cut from the signal.

Although Petitioner's Imai and Ishii obviousness combination fails for several reasons, the lynchpin of its theory depends on a single point. In granting institution, the Board preliminarily found under the reasonable likelihood standard that:

> Ishii's teaching of using access frequency as a factor in selecting an encoder would suggest to a person of ordinary skill that the frequency that a particular audio signal is requested (i.e. accessed) could be used as a factor in selecting the appropriate compression algorithm for the frames created from the audio signals.

Inst. Dec. (Paper 20) at 18. Now, under the full record and the heightened evidentiary standard of trial, the Board should determine that this preliminary finding has not been proven by a preponderance of the evidence.

On this critical point—whether a POSITA would have modified Imai to track frequency of access of the entire digital signal, cut the signal into myriad units of frame, and then use the access frequency of the entire signal to individually select an encoder for each unit of frame—Petitioner offers no reasoned analysis or evidentiary support. For example, Petitioner fails to discuss: (1) the relationship between Imai's digital signals and units of frame and how the frequency of access of one may correspond to the other; (2) *why* tracking and using the frequency of

access of the entire signal would be beneficial for selecting encoders for individual units of frame; and (3) *how* Imai's system would account for the access frequency of the entire signal in its decision to select encoders for each unit of frame. In sum, Petitioner fails to show why and how a POSITA would track access frequency for one thing (the entire digital signal) and use that information to select an encoder for a different thing (the individual units of frame created from the signal).

In contrast, Patent Owner and its expert, Dr. Zeger, provide detailed opinions and evidence rebutting this exact point. In Imai, the frequency of access of digital signals is different from the frequency of access of units of frame. POR (Paper 26) at 21–22; Zeger Decl. (Ex. 2001) ¶¶ 68–71. Ishii only teaches tracking access frequency of the same data block to be compressed. POR at 22–23; Zeger Decl. ¶¶ 74–80. Thus, a POSITA would not know based on Ishii how to design a system that tracks frequency of access of Imai's entire digital signal (not a data block as Ishii is directed to) and use that information to select encoders to individually compress data blocks created from cutting the signal. POR at 23–25; Zeger Decl. ¶¶ 71–72.

Neither Imai nor Ishii teach anything about the relationship between the frequency of access of a digital signal and units of frame that result from cutting the signal. POR at 24; Zeger Decl. ¶ 71. And any such relationship would be unknown and not obvious to a POSITA. *Id.* Thus, a POSITA would not be motivated to design a system that chooses a compressor for each unit of frame based on the access

frequency of the original signal. POR at 25; Zeger Decl. ¶ 72. Such a system would go beyond the teachings of Imai or Ishii, and certainly not be obvious. *See id.*

II. Petitioner's arguments in reply do not show otherwise: there is still insufficient evidence that Ishii's frequency of access would be applied Imai's system that cuts digital signals into units of frame.

Petitioner makes several arguments in reply (Reply, Paper 31, at 11–17), but none save its theory. Petitioner does not dispute Dr. Zeger's detailed opinions that a POSITA would *not* use access frequency of the entire digital signal to select encoders for each unit of frame. Instead, Petitioner asserts that the "access frequency [of the digital signal] is used to select the compression algorithm applied to a given data block, e.g., a faster algorithm for data blocks for data blocks from files with higher access frequency." Reply at 13. But Petitioner offers no evidence that such a system would be desirable or actually work. Dr. Zeger explains that it would not. Thus, the evidence remains one-sided in favor of Patent Owner.

A. Petitioner's "simple example" is attorney argument and regardless does not show why and how POSITA would do it.

Petitioner offers a "simple example" involving two digital signals: The Star Spangled Banner and Bohemian Rhapsody. Reply at 13–14. As an initial matter, this example is new attorney argument. Neither the Petition nor its expert Dr. Storer give any examples of a digital signal cut into data blocks or show it would be beneficial to associate the frequency of the digital signal with individual blocks. This highlights

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