

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SLING TV L.L.C., SLING MEDIA, L.L.C.,
DISH NETWORK L.L.C., DISH TECHNOLOGIES L.L.C.
Petitioners

v.

REALTIME ADAPTIVE STREAMING LLC,
Patent Owner.

Case IPR2018-01342¹
Patent 8,867,535

**PATENT OWNER'S REPLY TO MOTION TO
TERMINATE IPR AS TIME-BARRED UNDER § 315(b)**

¹ An identical version of this reply was filed in IPR2018-1342 on October 7, 2019 (Paper 33). On September 26, 2019, Google filed its opposition to the motion in both IPR2018-1342 and this terminated IPR, IPR2019-00748. For completeness, Realtime also files this reply in IPR2019-00748.

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For the reasons in Patent Owner's Motion to Terminate (Paper 30) and this Reply (Paper 33), IPR2018-01342 should be terminated in its entirety.

I. Sling Seeks to Overrule the PTAB's Precedents, Policies, and Positions

Sling's opposition (Paper 30) is full of arguments that contradict the PTO and PTAB's established precedents, policies, and positions. Incredibly, Sling asks the Board to find that *GoPro* was wrongly decided (*id.* at 8–9); that the entire POP system is unconstitutional (*id.* at 6–7); and that § 315(b) is purely optional (*id.* at 5). The Board should decline Sling's unlawful invitations.

A. *GoPro* is binding authority under SOP 2.

Sling argues that *GoPro* "cannot" apply to this case because its petition was filed and instituted before *GoPro* issued. The Federal Circuit's *GTNX* decision suggests otherwise. There, the precedential *SecureBuy* decision was designated precedential after the petition was filed, and it was brought to the Board's attention two months after the institution decision. *GTNX, Inc. v. INTTRA, Inc.*, CBM2014-00072, Paper 20 at 2. The only difference from this case is that in *GTNX*, the *SecureBuy* became precedent between the preliminary response and institution decision but here, *GoPro* became precedent between institution and completion of discovery.

This is not a meaningful difference that would justify maintaining this IPR and ignoring precedent. That the Board has already taken an action contrary to the PTO's interpretation of § 315(b) does not justify taking a final agency action (issuing a FWD

or IPR certificate) that is outside the Board's statutory power under *GoPro*. The Board's decision of this motion and any FWD will be actions "subsequent" to the decision in *GoPro* and must follow that binding precedent.

Indeed, patent owners may raise standing challenges in the POR or at trial. *See* 77 FR 48679, 48695, col. 2 ("After institution, standing issues may still be raised during the trial."); *Synopsys, Inc. v. Mentor Graphics Corp.*, IPR2012-00042, Paper 27 at 4 (June 21, 2013) (Board does not find rule "as precluding a patent owner response from including issues of standing."). Under Sling's argument, even though patent owners can raise standing challenges after institution, those challenges must be decided under overruled authority from before institution. That cannot be right.

Sling's reliance on *General Plastic* (Paper 30 at 2–3) is misplaced. *General Plastic* merely set forth seven "non-exhaustive" factors the Board "may consider" in exercising discretion to deny institution. It did not interpret any statutory provision, nor mandate the consideration of any specific factors. Nothing in *General Plastic* suggested that any earlier institution decision was improper. *General Plastic* itself was a codification of existing Board practice. Its list of factors was taken from the Board's *Nvidia* decision, which was issued more than 17 months before *General Plastic* was designed precedential. A precedential opinion that a non-exhaustive list of factors the Board "may" consider in exercising discretion is far different from a precedential opinion that sets forth a binding interpretation of statute.

Far more relevant is how the Board handled institution decisions in pending cases after *SAS*. In most cases, the Board revised the institution decision to institute on all challenged claims. In some cases, the Board *reversed* its decision to institute issued way before *SAS* and *denied* institution. See *BioDelivery Sci. Int'l, Inc. v. Aquestive Therapeutics, Inc.*, IPR2015-00165, Paper 91 (Feb. 7, 2019) (reconsidering institution decision after FWD and remand from Federal Circuit). Consistent with that handling, the Board has full authority to revisit institution here.

B. § 315(b) is jurisdictional and mandatory.

Sling argues that § 315(b) is not jurisdictional. The Federal Circuit *en banc* says it is. *Click-To-Call Techs., LP v. Ingenio, Inc., Yellow-Pages.com, LLC*, 899 F.3d 1321, 1325 (Fed. Cir. 2018) (“Because the subject petition was time-barred, the Board *lacked jurisdiction* to institute the IPR proceedings.”) (emphasis added).

Further, both § 315(b) and § 325(a)(1) have the identical phrase “may not be instituted” and the Federal Circuit approved the PTAB’s treatment of that language in § 325(a)(1) as a “jurisdictional limit.” *GTNX, Inc. v. INTTRA, Inc.*, 789 F.3d 1309, 1313 (Fed. Cir. 2015). There is no logical reason to treat § 315(b) differently.

Sling argues that § 315(b) cannot be jurisdictional because “the Board held that it may ‘toll’ the § 315(b) time bar in certain instances.” Paper 30 at 4. This is a misrepresentation. *GoPro* merely says in *dicta* that it “may revisit the question of the availability of an equitable tolling” in a future case. *GoPro*, Paper 38 at 23 n.7.

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