

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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GOOGLE LLC  
Petitioner

v.

REALTIME ADAPTIVE STREAMING LLC  
Patent Owner

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Case IPR2019-01035  
Patent 9,769,477

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**PETITIONER'S REPLY TO  
PATENT OWNER'S PRELIMINARY RESPONSE**

## I. INTRODUCTION

PO's arguments under 35 U.S.C. § 314(a) based on prior Netflix (IPR2018-01187, -01630) and Sony IPRs (IPR2018-01413) should be rejected. When properly balanced, the *General Plastic* factors favor institution.

## II. ARGUMENT

PO admits that the first *General Plastic* factor favors of institution. So does the second because PO points to no evidence that Google knew or should have known of the prior art asserted in its Petition at the time Netflix's first petition was filed. As PO recognizes, Brooks was only cited in the Sony IPR, but that IPR was terminated before the filing of any POPR. (POPR, 10.)

The third *General Plastic* factor favors institution. PO argues that Google benefited from access to PO's POPRs and the Institution Decisions in the Netflix IPRs because Google's petition was filed later in time.<sup>1</sup> (POPR, 7-8.) Were that the case, a patentee could negate defendants' statutory rights to file an IPR merely by filing a complaint against one party, and waiting until after that party had filed an IPR and obtained an Institution Decision before filing actions against other parties. Therefore, the relevant question is whether Google obtained an **unfair** benefit from

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<sup>1</sup> Due to settlement, PO did not file a POPR in the Sony IPR.

Netflix's POPR and Institution Decision. *Gen. Plastic Indus. Co. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19 at 17-18 (Sept. 6, 2017) (precedential).

First, the fact that Google had access to the POPRs and Institution Decisions in the Netflix IPRs is attributable to PO's decision to sue Google more than five months after Netflix. PO cannot claim unfairness when its own litigation conduct is at least partially to blame. Second, there is no evidence that Google derived an unfair advantage, for example, by changing its prior art positions in view of the Netflix IPRs.<sup>2</sup> Contrary to PO's contention that Google tailored its Petition to address PO's arguments in the Netflix POPRs relating to the "compression rate" limitation (POPR, 8-10), the Petition simply explains how this limitation is disclosed by Brooks. Indeed, Google could **not** have derived such benefit given that the Board instituted the Netflix IPRs rejecting PO's prior art arguments.

The fourth and fifth *General Plastic* factors also favor institution. Google, as a first time Petitioner, was entitled to utilize the full statutorily granted period to file an IPR petition. That Google "may have been able to file the Petition earlier" does

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<sup>2</sup> PO notes that Google's Petition copies paragraphs directly from Sony's petition with respect to Brooks (POPR, 8), but this fact only underscores that Google did not tailor its Petition based on the Netflix IPRs. Instead, Google's Petition is largely a copy of the petition in the Sony IPR, which was terminated before a POPR was filed.

not show that Google gained an unfair advantage by filing at the one year date. *Found. Med. Inc. v. Guardant Health Inc.*, IPR2019-00634, Paper 10 at 39-40 (Aug. 19, 2019); *Ericsson Inc. v. Intellectual Ventures II LLC*, IPR2018-01689, Paper 15 at 58-62 (Apr. 16, 2019) (noting that the petitioner is “free to wait to file” until the statutory bar date **regardless of when Petitioner came to know of the prior art**). Here, any purported delay in the filing of Google’s petition resulted from PO’s strategic staggering of its infringement complaints and its narrowing of the asserted claims against Google as late as January 23, 2019. (Ex. 1020.)

While the Board has faulted a party for waiting until its statutory bar date, those cases are distinguishable. In *Valve*, (i) the two Petitioners (Valve and HTC) were similarly situated because they were sued at the same time and Valve was the licensor of the technology incorporated in HTC’s accused products, and (ii) Valve filed its Petition after the Board **denied** HTC’s petition. *Valve Corp. v. Electronic Scripting Prod., Inc.*, IPR2019-00062, Paper 11 at 13-14 (Apr. 2, 2019) (precedential). In *NetApp*, the Board found that factors four and five weighed against institution because NetApp’s petition was largely duplicative of prior petitions. *NetApp Inc. v. Realtime Data LLC*, IPR2017-01195, Paper 9 at 11-13 (Oct. 12, 2017). No such concerns are implicated here because there is no allegation that Google and Netflix are similarly situated like in *Valve*; Netflix’s IPRs, unlike in

*Valve*, were instituted; the grounds in Google’s petition are different from those at issue in the Netflix IPRs; and the Sony IPR was terminated upon settlement.

The sixth and seventh *General Plastic* factors also favor institution. Unlike *NetApp*, upon which PO heavily relies (POPR, 13-18), the grounds presented in Google’s Petition are very distinct from those in the Netflix IPRs. IPR2017-01195, Paper 9 at 12-13. Hence, the Board’s concern in *NetApp* that it would need to conduct an entirely new proceeding involving numerous issues considered in the previously instituted proceedings is not implicated here. *Id.*

Ultimately, the Board must balance fairness considerations with respect to all parties. Realtime and the Netflix Petitioners controlled the timing of the filing of the district court complaints and the Netflix IPRs, respectively. Accordingly, it would be highly unfair and prejudicial “to impart onto [Google] the consequences of the actions of other, unrelated parties, and without regard to the merits of [Google’s] case.” *Cook, Inc. v. Medtronic Inc.*, IPR2019-00123, Paper 11 at 41-42. Instead, the Board should take into account “the purpose of the availability of *inter partes* review to parties accused of infringement” and the fact that the multiple IPRs are simply the result of PO’s “own litigation activity.” *Samsung Elecs. Am., Inc. v. Uniloc Luxembourg S.A.*, IPR2017-01801, Paper 8 at 26 (Feb. 6, 2018).

### III. CONCLUSION

The Board should grant Google’s Petition to institute IPR of the ’477 patent.

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