

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CLOUDFLARE, INC. and
SPLUNK INC.
Petitioner,

v.

SABLE NETWORKS, INC.,
Patent Owner.

IPR2021-00909¹
Patent 8,243,593 B2

Before STACEY G. WHITE, GARTH D. BAER, and
JULIET MITCHELL DIRBA, *Administrative Patent Judges*.

DIRBA, *Administrative Patent Judge*.

JUDGMENT
Final Written Decision
Determining Some Non-Disclaimed Challenged Claims Unpatentable
35 U.S.C. § 318(a)

¹ Splunk, Inc., which filed a petition in IPR2022-00228, has been joined as a petitioner in this proceeding.

On November 19, 2021, we instituted an *inter partes* review of claims 1–44 of U.S. Patent No. 8,243,593 B2 (Ex. 1001, “the ’593 patent”). Paper 16 (“Inst. Dec.”). After institution, claims 1, 2, 4–8, 14–16, 25–28, and 34–36 of the ’593 patent were statutorily disclaimed (*see* Ex. 2006), so this Decision does not address the patentability of those claims. Having considered the full record at trial, we determine that Petitioner has shown that claims 3, 9–13, 19–24, 29–33, and 39–44 of the ’593 patent are unpatentable under 35 U.S.C. § 103(a), and we determine that Petitioner has not shown that claims 17, 18, 37, and 38 of the ’593 patent are unpatentable.

I. BACKGROUND

A. History of this Proceeding

On May 7, 2021, Cloudflare, Inc. and SonicWall Inc.² filed a Petition requesting *inter partes* review of claims 1–44 of the ’593 patent. Paper 1 (“Pet.”). Petitioner submitted a declaration from Dr. Kevin Jeffay in support. *See* Ex. 1003. Sable Networks, Inc.³ (“Patent Owner”) filed a Preliminary Response. Paper 8. The parties also filed an authorized pre-institution reply and sur-reply to address discretionary denial under 35 U.S.C. § 314. Papers 9, 11. After reviewing the preliminary record, we determined that Cloudflare had demonstrated a reasonable likelihood that it would prevail in establishing the unpatentability of at least one challenged claim, and we instituted an *inter partes* review of all challenged claims on all grounds asserted in the Petition. Inst. Dec. 57.

² SonicWall Inc. was subsequently terminated from this proceeding following a settlement with Patent Owner. Paper 15 (Termination Order).

³ Patent Owner also identifies Sable IP, LLC as a real party in interest. Paper 5, 1.

After institution, Patent Owner filed a statutory disclaimer under 35 U.S.C. § 253(a) of claims 1, 2, 4–8, 14–16, 25–28, and 34–36 of the '593 patent. Ex. 2006; *see also* Paper 29 (Updated Mandatory Notice); *accord* Paper 32, 4 (determining that the identified claims have been disclaimed). This disclaimer effectively eliminates these claims from the '593 patent, leaving the patent as if those claims never existed. *See Sanofi-Aventis U.S., LLC v. Dr. Reddy's Labs., Inc.*, 933 F.3d 1367, 1373 (Fed. Cir. 2019). As a result, we determine (and the parties agree) that claims 1, 2, 4–8, 14–16, 25–28, and 34–36 are no longer part of this proceeding. *See* PO Resp. 11–12; Pet. Reply 1.

Meanwhile, Splunk Inc.⁴ filed a petition for *inter partes* review and a motion for joinder in IPR2022-00228, requesting that Splunk be joined as a petitioner in this proceeding. Paper 32 (Joinder Order), 1. After considering the parties' papers, we instituted trial in IPR2022-00228, granted Splunk's motion, and added Splunk as a petitioner to this proceeding. *Id.* at 5–8. As a result, this Decision uses "Petitioner" to refer to Cloudflare and Splunk.

During the trial, Patent Owner filed a Response (Paper 30, "PO Resp."), Petitioner filed a Reply (Paper 33, "Pet. Reply"), and Patent Owner filed a Sur-reply (Paper 36, "PO Sur-reply").

An oral hearing in this proceeding was held on September 7, 2022, and a transcript of the hearing is included in the record. Paper 41 ("Tr."). Petitioner objects to Patent Owner's demonstratives (Paper 40), and for the reasons explained below, that objection is dismissed as moot.

⁴ Splunk also identifies Critical Start Inc. as a real party in interest. IPR2022-00228, Paper 2 (Petition), 76.

B. Related Matters

The parties indicate that the '593 patent has been asserted in several district court lawsuits, including *Sable Networks, Inc. v. Splunk Inc.*, 5:21-cv-00040 (E.D. Tex.), *Sable Networks, Inc. v. Cloudflare, Inc.*, 6:21-cv-00261 (W.D. Tex.), *Sable Networks, Inc. v. SonicWall Inc.*, 6:21-cv-00190 (W.D. Tex.). Pet. xii–xiii; Paper 5, 1–3.

C. Non-Disclaimed Challenged Claims

Claims 3, 9–13, 17–24, 29–33, and 37–44 are the claims currently challenged in this proceeding.⁵ Of these, claims 3, 9, and 29 are independent. Claim 9 is illustrative of the claimed subject matter:

9. A machine implemented method for processing a flow, the flow comprising a series of information packets, the method comprising:

maintaining a set of behavioral statistics for the flow, wherein the set of behavioral statistics is updated based on each information packet belonging to the flow, as each information packet belonging to the flow is processed, regardless of the presence or absence of congestion; and

computing, based at least partially upon the set of behavioral statistics, a badness factor for the flow, wherein the badness factor provides an indication of whether the flow is exhibiting undesirable behavior.

Ex. 1001, 11:63–12:8.

⁵ The Petition challenged all 44 claims of the '593 patent (*see* Pet.); however, during the trial, Patent Owner filed a statutory disclaimer (Ex. 2006), which eliminated claims 1, 2, 4–8, 14–16, 25–28, and 34–36 from the scope of this proceeding (*see supra* § I.A),

D. The Grounds

Petitioner asserts the following challenges to the patentability of claims 3, 9–13, 17–24, 29–33, and 37–44 (Pet. 1; *see also infra* § II.F):

Claim(s) Challenged	35 U.S.C. §	Reference(s)/Basis
17, 18, 37, 38	103(a) ⁶	Yung ⁷
9–13, 19–24, 29–33, 39–44	103(a)	Yung, Copeland ⁸
3	103(a)	Yung, Four-Steps Whitepaper ⁹

E. Summary of the '593 Patent

The '593 patent is titled “Mechanism for Identifying and Penalizing Misbehaving Flows in a Network,” and the application that led to this patent was filed on December 22, 2004. Ex. 1001, codes (54), (22).

The Specification begins by explaining that “peer-to-peer (P2P) traffic on the Internet has grown immensely in recent years . . . despite the fact that the number of P2P users is quite small.” Ex. 1001, 1:7–13. As a result, this traffic uses a disproportionate amount of bandwidth, so it is viewed by Internet service providers as “abusive/misbehaving traffic that should be controlled and penalized.” *Id.* at 1:14–18. Previously, P2P traffic could be

⁶ The Leahy-Smith America Invents Act (“AIA”), Pub. L. No. 112-29, 125 Stat. 284, 285–88 (2011), revised 35 U.S.C. § 103 effective March 16, 2013. Because the challenged patent was filed before March 16, 2013, we refer to the pre-AIA version of § 103.

⁷ US 7,664,048 B1, filed Nov. 24, 2003, issued Feb. 16, 2010 (Ex. 1005).

⁸ US 7,185,368 B2, filed Nov. 30, 2001, issued Feb. 27, 2007 (Ex. 1007).

⁹ “Four Steps to Application Performance Across the Network with Packeteer’s PacketShaper®,” *retrieved from* https://web.archive.org/web/20030317051910/http://packeteer.com/PDF_files/4steps.pdf (Ex. 1006).

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