

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.

---

IPR2021-00909<sup>1</sup>  
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)*

---

<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> (“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.

---

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

<sup>3</sup> 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.<sup>4</sup> 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.

---

<sup>4</sup> 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.<sup>5</sup> 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.

---

<sup>5</sup> 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) <sup>6</sup>	Yung <sup>7</sup>
9–13, 19–24, 29–33, 39–44	103(a)	Yung, Copeland <sup>8</sup>
3	103(a)	Yung, Four-Steps Whitepaper <sup>9</sup>

*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

---

<sup>6</sup> 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.

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

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

<sup>9</sup> “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](https://web.archive.org/web/20030317051910/http://packeteer.com/PDF_files/4steps.pdf) (Ex. 1006).

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.