

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

WAG ACQUISITION, LLC,
Appellant

v.

**WEBPOWER, INC., FRIENDFINDER NETWORKS
INC., STREAMRAY INC., WMM, LLC, WMM
HOLDINGS, LLC, MULTI MEDIA, LLC, DUODECAD
IT SERVICES LUXEMBOURG S.A.R.L., ACCRETIVE
TECHNOLOGY GROUP, INC., ICF TECHNOLOGY,
INC., RISER APPS LLC, STREAMME, INC., FKA
VUBEOLOGY, INC.,**
Appellees

2018-1617

Appeal from the United States Patent and Trademark
Office, Patent Trial and Appeal Board in No. IPR2016-
01238.

Decided: August 26, 2019

RONALD ABRAMSON, Liston Abramson LLP, New York,
NY, argued for appellant. Also represented by ARI JASON
JAFFESS.

JONATHAN L. FALKLER, Venable LLP, Washington, DC, argued for all appellees. Appellees WebPower, Inc., FriendFinder Networks Inc., Streamray Inc., WMM, LLC, WMM Holdings, LLC, Multi Media, LLC also represented by FRANK M. GASPARO, TODD M. NOSHER, New York, NY.

KEVIN MICHAEL O'BRIEN, Baker & McKenzie LLP, Washington, DC, for appellee Duodecad IT Services Luxembourg S.A.R.L.

BRIAN G. BODINE, Lane Powell PC, Seattle, WA, for appellees Accretive Technology Group, Inc., ICF Technology, Inc., Riser Apps LLC, StreamMe, Inc. Also represented by ALAN D. MINSK.

Before NEWMAN, CHEN, and STOLL, *Circuit Judges*.

STOLL, *Circuit Judge*.

WebPower, Inc. sought inter partes review of claims 1–28 of U.S. Patent No. 8,122,141 (the '141 patent) before the U.S. Patent and Trademark Office's Patent Trial and Appeal Board.¹ The Board instituted review of claims 10–23 of the '141 patent and, in its final written decision, found all of these claims unpatentable. WAG Acquisition, LLC, owner of the '141 patent, appeals the Board's decision as to claims 10–18. Because the Board's validity analysis rests on an incorrect claim construction, we vacate the decision

¹ FriendFinder Networks Inc., Steamray Inc., WMM, LLC, WMM Holdings, LLC, Multi Media, LLC, Duodecad IT Services Luxembourg S.A.R.L., Accretive Technology Group, Inc., ICF Technology, Inc., Riser Apps LLC, and StreamMe, Inc. joined as parties to the proceeding on June 5, 2017.

as to the appealed claims and remand for further proceedings consistent with this opinion.

BACKGROUND

I

The '141 patent discloses a buffering system for streaming media, such as audio/video, on the Internet. '141 patent col. 1 ll. 30–33. At the time of the invention, users attempting to stream media over the Internet experienced persistent interruptions in playback due to poor connection quality, degradation of bandwidth, or congestion. *Id.* at col. 2 ll. 10–30. Prior art solutions to this issue incorporated a user buffer, which would store audio and/or video data in the user's computer so that playback could continue in the event of an interruption in the data transmission. *Id.* at col. 2 ll. 35–38. With this prior art buffer, playback would not begin until the buffer was filled to a specified level and, if the buffer became fully depleted, playback would pause until the buffer could be refilled. *Id.* at col. 2 l. 64–col. 3 l. 7. As noted in the specification, “[b]ecause transmission of the data to the user takes place at the rate it is played out, the user's buffer level can never be increased or replenished while it is playing.” *Id.* at col. 2 l. 65–col. 3 l. 1. Users thus experienced both a delayed start to viewing streamed content and a higher likelihood of interruptions as the buffer could not be refilled during playback.

The '141 patent specification describes two solutions to this problem. The first involves maintaining both a server-side buffer and a user-side buffer, with the server-side buffer storing a certain amount of data elements for transmission to the user. *Id.* at col. 4 ll. 58–66. When a user initiates streaming, the server sends the stored data “at the highest rate that the data connection between the server and user computer will support until the predetermined amount of data that had been stored in the server buffer has been transferred to the user's computer.” *Id.* at col. 5

ll. 57–61. The user’s buffer “is built up while the audio is playing, and can be restored if diminished by data transmission interruptions.” *Id.* at col. 9 ll. 47–49. This is because, if a user buffer is not full, “data is transmitted from the server more rapidly than it is played out by the user system,” restoring the buffer to a full state. *Id.* at col. 9 ll. 51–54. The server keeps track of the last data element that has been sent to each user by way of a software “pointer” that alerts the server when a data transmission has been interrupted and identifies the last data element that had been sent to that user when the interruption occurred. *Id.* at col 7 ll. 15–27.

Like the first solution, the second solution incorporates a server-side buffer that stores sequentially numbered media data elements for transmission to a user buffer. *Id.* at col. 8 ll. 35–38. Instead of using a pointer, however, “the user computer, not the server, maintains the record of the highest data element number stored in the user computer buffer.” *Id.* at col. 8 ll. 50–52. Using “standard data communications protocol techniques such as TCP, the user computer transmits a request to the server to send one or more data elements, specifying the serial numbers of the data elements.” *Id.* at col. 8 ll. 42–46. The requested data “will be transmitted to the user computer as fast as the data connection between the user computer and the server will allow.” *Id.* at col. 8 ll. 52–55.

On appeal, WAG focuses on claims 10 and 15, which recite as follows:

10. A server for distributing streaming media via a data communications medium such as the Internet to at least one user system of at least one user, the streaming media comprising a plurality of sequential media data elements for a digitally encoded audio or video program, said user system being assumed to have a media player for receiving and playing the streaming media on said user system,

which is operable to obtain media data elements from said server by transmitting requests to said server to send one or more specified media data elements, said server comprising

at least one data storage device, memory for storing machine-readable executable routines and for providing a working memory area for routines executing on the server, a central processing unit for executing the machine-readable executable routines, an operating system, at least one connection to the communications medium, and a communications system providing a set of communications protocols for communicating through said at least one connection;

a machine-readable, executable routine containing instructions to cause the server to assign serial identifiers to the sequential media data elements comprising the program;

a machine-readable, executable routine containing instructions to cause the server to receive requests from the user system for one or more media data elements specifying the identifiers of the requested data elements; and

a machine-readable, executable routine containing instructions to cause the server *to send media data elements to the user system responsive to said requests, at a rate more rapid than the rate at which said streaming media is played back by a user.*

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