

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

THE WALT DISNEY COMPANY, DISNEY STREAMING
SERVICES LLC, HULU LLC, and NETFLIX INC.,
Petitioner,

v.

WAG ACQUISITION, L.L.C.,
Patent Owner.

IPR2022-01227 (Patent 9,762,636 B2)
IPR2022-01228 (Patent 9,742,824 B2)

Before HUBERT C. LORIN, JOHN A. HUDALLA, and
STEVEN M. AMUNDSON, *Administrative Patent Judges*.¹

AMUNDSON, *Administrative Patent Judge*.

ORDER
Granting Requests for Oral Argument
37 C.F.R. § 42.70

¹ This Order addresses the same issues in each proceeding. We exercise our discretion to issue one Order to be filed in each proceeding. The proceedings have not been consolidated, and the parties are not permitted to use this caption.

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I. ORAL ARGUMENT

The Scheduling Orders for these proceedings provide that an oral argument would be conducted if requested by either party and granted by the Board. Under 37 C.F.R. § 42.70, each party requested an oral argument in each proceeding. Paper 21, 2; Paper 22, 2.² Additionally, a September 25, 2023, email to the Board states, “Petitioner and Patent Owner jointly request to consolidate to a single hearing on November 13, 2023.” Ex. 3002; *see* Paper 22, 2–3. The requests for oral argument and a consolidated hearing are granted subject to the conditions set forth in this Order.

A. Time and Format

Please note the time and format of the oral argument. The oral argument will commence at **10:00 AM (Eastern) on Monday, November 13, 2023, at the USPTO headquarters in Alexandria, Virginia.** The Board will provide a court reporter for the hearing, and the reporter’s transcript will constitute the official record of the hearing. The Board will enter the transcript into the record in each proceeding. The parties are directed to contact the Board at least ten (10) business days before the hearing if there are any concerns about disclosing confidential information.

Each party will have sixty (60) minutes of total argument time at the hearing.

Petitioner bears the ultimate burden of proof that Patent Owner’s claims at issue in these proceedings are unpatentable by a preponderance of

² Unless otherwise indicated, this Order cites to papers filed in IPR2022-01227. The parties filed substantially the same papers in IPR2022-00202 and IPR2022-01228.

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the evidence. 35 U.S.C. § 316(e) (2018). Hence, Petitioner will open the hearing by presenting its case regarding the challenged claims. After Petitioner's presentation, Patent Owner will respond to Petitioner's arguments and present the issues for which it bears the ultimate burden. Petitioner may reserve rebuttal time to respond to arguments presented by Patent Owner. Likewise, Patent Owner may reserve sur-rebuttal time; however, Patent Owner's sur-rebuttal must be limited in scope to the issues Petitioner raises during its rebuttal. The parties may also address any pending motions during their respective presentations.

According to the Board's Trial Practice Guide and the Scheduling Orders for these proceedings, either party may request a pre-hearing conference. Consolidated Trial Practice Guide at 82.³ "The purpose of the pre-hearing conference is to afford the parties the opportunity to preview (but not argue) the issues to be discussed at the hearing, and to seek the Board's guidance as to particular issues that the panel would like addressed by the parties." *Id.*

Requests for a pre-hearing conference must be made by October 24, 2023. Paper 12, 11. To request a pre-hearing conference, an email should be sent to Trials@uspto.gov providing several dates and times of availability for the parties that are generally no later than three (3) business days before the hearing. Please refer to the Trial Practice Guide for more information about a pre-hearing conference. *See* Consolidated Trial Practice Guide § II.M.

³ Available at <https://www.uspto.gov/TrialPracticeGuideConsolidated>.

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B. Demonstrative Exhibits

Under 37 C.F.R. § 42.70(b), the parties must serve their respective demonstrative exhibits on opposing counsel at least seven (7) business days before the hearing.⁴ Also, the parties must file their respective demonstrative exhibits with the Board at least three (3) business days before the hearing.

Demonstrative exhibits used at the hearing are visual aids to oral argument and not evidence, and should be clearly marked as such. For example, each slide of a demonstrative exhibit may be marked with the words “DEMONSTRATIVE EXHIBIT – NOT EVIDENCE” in the footer. Demonstrative exhibits cannot be used to advance arguments or introduce evidence not previously presented in the record. *See Dell Inc. v. Accelaron, LLC*, 884 F.3d 1364, 1369 (Fed. Cir. 2018) (noting that the “Board was obligated to dismiss [a party’s] untimely argument . . . raised for the first time during oral argument”). “[N]o new evidence may be presented at the oral argument.” Consolidated Trial Practice Guide at 85. Accordingly, each demonstrative exhibit must include a citation to the page number(s) of the paper(s) where the argument or evidence that is the subject of the demonstrative exhibit was advanced by a party.

The parties are directed to *St. Jude Medical, Cardiology Division, Inc. v. The Board of Regents of the University of Michigan*, IPR2013-00041, Paper 65 (PTAB Jan. 27, 2014), regarding the appropriate content of demonstrative exhibits.

⁴ The parties may stipulate to an alternative schedule for serving their respective demonstrative exhibits that is no later than three (3) business days before the hearing.

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Due to the nature of the Board's consideration of demonstrative exhibits and the opportunity afforded for the parties to reach an agreement without involving the Board, the Board does not anticipate that objections to demonstrative exhibits are likely to be sustained. Nevertheless, to the extent that a party objects to the propriety of any demonstrative exhibit, the parties must meet and confer in good faith to resolve any objections. If such objections cannot be resolved, the parties may jointly file any objections to demonstrative exhibits with the Board at least three (3) business days before the hearing. The objections must identify with particularity which portions of the demonstrative exhibits are subject to objection and include a one-sentence statement of the reason for each objection. No argument or further explanation is permitted. The Board will consider any objections and schedule a conference call if deemed necessary. Otherwise, the Board will reserve ruling on the objections. Any objection to demonstrative exhibits that is not timely presented will be considered waived.

During the hearing, a presenter must identify clearly and specifically each item referenced (e.g., by slide number for a demonstrative exhibit) to ensure the clarity and accuracy of the court reporter's transcript and for the benefit of all participants.

A presenter may use a computer and presentation software to permit the electronic presentation of demonstrative exhibits or use a projector and screen to permit the display of demonstrative exhibits. Additionally, as requested by Petitioner, counsel may use other computers at the hearing "to avoid the need for the parties to bring entire paper copies of the record into the hearing room and to facilitate efficient answering of panel questions."

See Paper 22, 3.

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