UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NETFLIX, INC.
Petitioner,

v.

AFFINITY LABS OF TEXAS, LLC
Patent Owner.

Case IPR 2016-01701 (Patent 9,094,802 B2)
Case IPR 2017-00122 (Patent 9,444,868 B2)

Record of Oral Hearing
Held: December 21, 2017

Before KEVIN F. TURNER, LYNNE E. PETTIGREW, and JON B. TORNQUIST, *Administrative Patent Judges.*

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The above-entitled matter came on for hearing on Thursday, December 21, 2017, commencing at 1:00 p.m., at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

P R O C E E D I N G S

JUDGE TORNQUIST: You may be seated. Okay. We are here on IPR2016-1701, and IPR2017-122, Netflix v. Affinity Lab in Texas. Who do we have from Petitioner?

MR. HOLMES: Good afternoon, Your Honors. Andrew Holmes on behalf of Petitioner, Netflix. With me today is my associate John McCauley also with the same law firm of Quinn Emanuel. And then from Netflix we've got Mr. Ed Bailey here today.

JUDGE TORNQUIST: Welcome. patent owner?

MR. SCHULTZ: Ryan Schultz from Robins Kaplan on behalf of patent owner, (indiscernible).

JUDGE TORNQUIST: Welcome. Okay. Pursuant to our order of November 17th, each side will have 60 minutes to present argument here today. Petitioner, bearing the burden of proof, you'll go first. You can reserve time for rebuttal if you wish. And then we'll hear from patent owner, and anything else you have.

MR. HOLMES: Thank you, Your Honor.

JUDGE TORNQUIST: And so when you're ready.

MR. HOLMES: Thank you. May it please the Board, Andrew Holmes on behalf of the petitioner. At the outset, Your Honor, if you will, I'd like to reserve 20 minutes for rebuttal.

JUDGE TORNQUIST: Sure.

MR. HOLMES: Okay. And just so the Board is aware, my colleague and associate here with me is going to be presenting on the '868 patent, the second petition that's at issue here today.

JUDGE TORNQUIST: Okay.

MR. HOLMES: Okay. So what I'd like to start out by doing is, I know there's a long slide presentation that we submitted, and we're not going to have time to run through every single slide, and I don't intend to do that here today. But the goal for us really is to focus on what are the disputes, what matters. And so the opening part of my presentation will be to focus on claim construction in the '802 patent, and then Mr. McCauley will focus on some of the main disputes that we feel are at issue in the '868 patent as well. And then I'm happy to answer any questions as we go and then we'll reserve our time for rebuttal.

So just a beginning, a quick overview, the 2016-1701 petition relates to the '802 patent, there were five grounds instituted by the Board. The second IPR that we're here for is the 2017-122 petition, that's the '868 patent that we'll be referring to, there were two grounds instituted for that one. And I know the Board may be familiar with these -- the patent, (indiscernible) as well, but just as a brief background, these two patents share a common specification, a lot of the same terminology is used across the claims, the claims are, in many ways, similar. And so we're trying -- we're going to try to streamline a lot of our presentations today by focusing on some of the common issues that have come up in the patent owner's response in challenging our petition.

So another piece of background that I think is relevant because it came up in our -- in the briefing is the history of this family of patents. And, you know, as you can see on the screen, the Board has invalidated a number of claims from five different patents. The one we bolded here at the top is a notable because it relates to, (a), Treyz and Fuller combination that's at issue here today. And then, (b), very similar claim

language and also a claim term as construed by the Board previously, and we feel that that's binding and is the right construction here.

So we just wanted to note that that's been, (a), already determined in prior IPRs, and also notably upheld by the Federal Circuit. In every instance, actually, where the claims were found invalid, the Federal Circuit's affirmed those. And so I just note that as background because it'll become relevant as we get into some of the disputes.

Sort of covered this overview already. The first thing I just want to touch on is the one term that was actually construed by the Board, which is the term available media. And the Board, in its' institution decisions in both of the IPRs at issue today, followed its prior construction of that term and we thinks it's the right one. We think that an available media, as the Board found in the '407 IPR and then in both institution decisions here, includes parts of content accessible from a source of audio, video, and our textual information. And the Board went on to note that the term is not limited to a single file, song, or video, and may encompass, at a minimum, a collection of audio/video files.

We feel like that construction that came from a prior proceeding that's been affirmed by the Federal Circuit for patents with the same specification is the right one here. And, frankly, the patent owner has not offered an alternative, they've waived that. And for a lot of the arguments that we're not addressing here today specifically given the time constraints, that's because there's been no argument from the patent owner, and, therefore, those have been waived. And so we're relying on our papers for many of those arguments.

So moving on then to the rationale for the Board applying its prior

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