

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NETFLIX, INC.,
Petitioner,

v.

REALTIME ADAPTIVE STREAMING LLC,
Patent Owner.

Case IPR2018-01187
Patent 9,769,477 B2

Before GEORGIANNA W. BRADEN, KEVIN W. CHERRY, and
KAMRAN JIVANI, *Administrative Patent Judges*.

BRADEN, *Administrative Patent Judge*.

SCHEDULING ORDER
37 C.F.R. § 42.5

A. GENERAL INSTRUCTIONS

1. Initial Conference Call

The parties are directed to contact the Board within thirty (30) days of this Order if there is a need to discuss proposed changes to this Scheduling Order or proposed motions that have not been authorized in this Order or other prior Order or Notice. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,765–66 (Aug. 14, 2012) (“Practice Guide”) (guidance in preparing for the initial conference call). A request for an initial conference call shall include a list of proposed motions, if any, to be discussed during the call.

2. Protective Order

No protective order shall apply to this proceeding until the Board enters one. If either party files a motion to seal before entry of a protective order, a jointly proposed protective order shall be filed as an exhibit with the motion. The Board encourages the parties to adopt the Board’s default protective order if they conclude that a protective order is necessary. *See* Practice Guide, App’x B (Default Protective Order). If the parties choose to propose a protective order deviating from the default protective order, they must submit the proposed protective order jointly along with a marked-up comparison of the proposed and default protective orders showing the differences between the two and explain why good cause exists to deviate from the default protective order.

The Board has a strong interest in the public availability of trial proceedings. Redactions to documents filed in this proceeding should be limited to the minimum amount necessary to protect confidential

information, and the thrust of the underlying argument or evidence must be clearly discernible from the redacted versions. We also advise the parties that information subject to a protective order may become public if identified in a final written decision in this proceeding, and that a motion to expunge the information will not necessarily prevail over the public interest in maintaining a complete and understandable file history. *See Practice Guide 48,761.*

3. Discovery Disputes

The Board encourages parties to resolve disputes relating to discovery on their own. To the extent that a dispute arises between the parties relating to discovery, the parties must meet and confer to resolve such a dispute before contacting the Board. If attempts to resolve the dispute fail, a party may request a conference call with the Board.

In any request for a conference call with the Board to resolve a discovery dispute, the requesting party shall: (a) certify that it has conferred with the other party in an effort to resolve the dispute; (b) identify with specificity the issues for which agreement has not been reached; (c) identify the precise relief to be sought; and (d) propose specific dates and times at which both parties are available for the conference call.

4. Testimony

The parties are reminded that the Testimony Guidelines appended to the Trial Practice Guide, Appendix D, apply to this proceeding. The Board may impose an appropriate sanction for failure to adhere to the Testimony Guidelines. 37 C.F.R. § 42.12. For example, reasonable expenses and

attorneys' fees incurred by any party may be levied on a person who impedes, delays, or frustrates the fair examination of a witness.

5. Cross-Examination

Except as the parties might otherwise agree, for each due date: Cross-examination ordinarily takes place after any supplemental evidence is due. 37 C.F.R. § 42.53(d)(2).

Cross-examination ordinarily ends no later than a week before the filing date for any paper in which the cross-examination testimony is expected to be used. *Id.*

6. Oral Argument

Requests for oral argument must comply with 37 C.F.R. § 42.70(a). To permit the Board sufficient time to schedule the oral argument, the parties may not stipulate to an extension of the request for oral argument beyond the date set forth in the Due Date Appendix.

Unless the Board notifies the parties otherwise, oral argument, if requested, will be held at the USPTO headquarters in Alexandria.

The parties may request that the oral argument instead be held at the Detroit, Michigan, USPTO Regional Office or the Dallas, Texas, USPTO Regional Office. The parties should meet and confer, and jointly propose the parties' preference at the initial conference call, if requested. Alternatively, the parties may jointly file a paper stating their preference for the hearing location within one month of this order. Note that the Board may not be able to honor the parties' preference of hearing location due to, among other things, the availability of hearing room resources and the needs

of the panel. The Board will consider the location request and notify the parties accordingly if a request for change in location is granted.

Seating in the Board's hearing rooms may be limited, and will be available on a first-come, first-served basis. If either party anticipates that more than five (5) individuals will attend the argument on its behalf, the party should notify the Board as soon as possible, and no later than the request for oral argument. Parties should note that the earlier a request for accommodation is made, the more likely the Board will be able to accommodate additional individuals.

7. ADR Statement

The parties are encouraged to discuss promptly alternative means for resolving their disputes regarding the subject matter of this proceeding. To advance the opportunities for early disposition, petitioner is encouraged to notify the Board, by the due date identified in the Appendix to this Order, that the parties have conferred regarding alternative dispute resolution and whether the parties have reached any agreements.

B. DUE DATES

This order sets due dates for the parties to take action after institution of the proceeding. The parties may stipulate different dates for DUE DATES 1 through 5 (earlier or later, but no later than DUE DATE 6). A notice of the stipulation, specifically identifying the changed due dates, must be promptly filed. The parties may not stipulate an extension of DUE DATES 6 and 7, or to the requests for oral hearing.

In stipulating different times, the parties should consider the effect of the stipulation on times to object to evidence (37 C.F.R. § 42.64(b)(1)), to

supplement evidence (§ 42.64(b)(2)), to conduct cross-examination (§ 42.53(d)(2)), and to draft papers depending on the evidence and cross-examination testimony.

1. DUE DATE 1

Patent Owner may file—

a. A response to the petition (37 C.F.R. § 42.120). If Patent Owner elects not to file a response, Patent Owner must arrange a conference call with the parties and the Board. Patent Owner is cautioned that any arguments for patentability not raised in the response may be deemed waived.

b. A motion to amend the patent (37 C.F.R. § 42.121). Patent Owner may file a motion to amend without prior authorization from the Board. Nevertheless, Patent Owner must confer with the Board before filing such a motion. 37 C.F.R. § 42.121(a). To satisfy this requirement, Patent Owner should request a conference call with the Board no later than two weeks prior to DUE DATE 1. The parties are directed to the Board's Guidance on Motions to Amend in view of *Aqua Products* (<https://go.usa.gov/xU6YV>), and *Western Digital Corp. v. SPEX Techs., Inc.*, Case IPR2018-00082 (PTAB April 25, 2018) (Paper 13) (providing information and guidance on motions to amend).

2. DUE DATE 2

Petitioner may file a reply to the Patent Owner's response.

Petitioner may file an opposition to the motion to amend.

3. DUE DATE 3

Patent Owner may file a sur-reply to Petitioner's reply.

Patent Owner may file a reply to the opposition to the motion to amend.

4. DUE DATE 4

Petitioner may file a sur-reply to Patent Owner's reply to the opposition to the motion to amend.

Either party may file a motion to exclude evidence (37 C.F.R. § 42.64(c)).

5. DUE DATE 5

Either party may file an opposition to a motion to exclude evidence.

6. DUE DATE 6

Either party may file a reply to an opposition to a motion to exclude evidence.

Either party may request that the Board hold a pre-hearing conference.

7. DUE DATE 7

The oral argument (if requested by either party) shall be held on this date. Approximately one month prior to the argument, the Board will issue an order setting the start time of the hearing and the procedures that will govern the parties' arguments.

DUE DATE APPENDIX

INITIAL CONFERENCE CALL UPON REQUEST

ADR STATEMENT DUE 15 business days after institution

DUE DATE 1 April 23, 2019

Patent owner's response to the petition

Patent owner's motion to amend the patent

DUE DATE 2 July 10, 2019

Petitioner's reply to patent owner's response to petition

Petitioner's opposition to motion to amend

DUE DATE 3 August 13, 2019

Patent owner's sur-reply to reply

Patent owner's reply to opposition to motion to amend

DUE DATE 4 September 10, 2019

Petitioner's sur-reply to reply to opposition to motion to amend

Motion to exclude evidence

Request for oral argument (may not be extended by stipulation)

DUE DATE 5 September 24, 2019

Opposition to motion to exclude

DUE DATE 6 October 1, 2019

Reply to opposition to motion to exclude

Request for prehearing conference

DUE DATE 7 October 15, 2019

Oral argument (if requested)

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PETITIONER:

Harper Batts
hbatts@sheppardmullin.com

Christopher Ponder
cponder@sheppardmullin.com

PATENT OWNER:

Joel Stonedale
joel@noroozipc.com

William Rothwell
william@noroozipc.com

Kayvan Noroozi
kayvan@noroozipc.com

Neil Rubin
nrubin@raklaw.com

Kent Shum
kshum@raklaw.com