

**CONFIDENTIAL INFORMATION
SUBJECT TO PROTECTIVE ORDER**

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION**

WHEREVERTV, INC.,

Plaintiff,

CASE NO. 2:18-cv-529-UA-CM

vs.

COMCAST CABLE COMMUNICATIONS,
LLC,

Defendant.

**COMCAST CABLE COMMUNICATIONS, LLC'S INVALIDITY,
UNENFORCEABILITY, AND NON-INFRINGEMENT CONTENTIONS**

Pursuant to the Case Management and Scheduling Order in Patent Case dated January 17, 2019 (Doc. No. 58), Defendant Comcast Cable Communications, LLC ("Comcast") hereby submits the following invalidity, unenforceability, and non-infringement contentions with respect to the asserted claims 1 and 3-9 ("asserted claims") of U.S. Patent No. 8,656,431 ("431 patent").

RESERVATION OF RIGHTS

The Court has not issued a claim construction order, Plaintiff has yet to provide its proposed claim constructions for the asserted claims, and discovery has only recently opened. As such, Comcast's non-infringement and invalidity contentions are based, at least in part, on Comcast's present understanding of the asserted claims, the claim constructions that Plaintiff appears to be asserting based on its amended complaint and infringement contentions, and the discovery that the parties have taken to date. Comcast reserves all rights to further supplement or amend these contentions to the extent permitted by the Court and under the Case Management and Scheduling Order in Patent Case dated January 17, 2019 (Doc. No. 58). Specifically, Comcast reserves the right, to the extent that the Court allows and in accordance with the Case Management and

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allegations that, for example, Comcast's so-called "Xfinity X1 Platform" meets the claim limitations requiring that the accused server be "distinct" from the accused "MSO(s)" and "non-MSO(s)," receiving "only or virtually entirely streaming video programming" from the accused "MSO" or "non-MSO" source via the communications link and the network, and other limitations. Comcast expressly reserves the right to supplement these invalidity contentions to the extent permitted by the Court under the Case Management and Scheduling Order in Patent Case dated January 17, 2019 (Doc. No. 58). Such supplementation may include, without limitation, additional theories of invalidity, supplemental prior art and prior art combinations, and additional invalidity arguments under Section 112.

A. Invalidity Based on Prior Art

The party shall disclose whether each item of prior art anticipates each asserted claim or renders it obvious. If a combination of items of prior art makes a claim obvious, then each such combination and the reason why a person of ordinary skill in the art would combine such items shall be identified. (Doc. No. 58 at 3 ¶ 3)

Comcast contends that each of the asserted claims is invalid as anticipated under Section 102 or obvious under Section 103. Comcast's contentions regarding the prior art² are set forth below.

1. Anticipation

Comcast identifies in the chart below the documentary prior art that it contends, on information and belief, anticipates either expressly or inherently the asserted claims of the '431 patent under 35 U.S.C. § 102:

² Comcast further reserves the right to assert as prior art any prior art cited on the face of the patent or during prosecution of the patent.

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systems/devices, which may also be found to anticipate and/or render obvious one or more of the asserted claims.

Other prior art references	Date of publication/use/offer for sale/sale	Claim(s) anticipated
iMagicTV/Alcatel DTV Manager or related documentation (e.g., CMCST_1486961-97)	<p>The DTV Manager was on sale and in public use in the U.S. by at least Nov. 15, 2000.</p> <p>Documentation related to the DTV Manager was published on, e.g., iMagicTV's website, no later than December 4, 2002.</p>	At least claims 1, 5, 7, and 8
AOL TV system or related documentation (e.g., CMCST_1486622-63)	<p>AOL TV, which was backed by Liberate, was on sale and in public use in the U.S. by at least June 2000.</p> <p>Documentation related to AOL TV was published on, e.g., AOLTV.com, no later than August 7, 2002.</p>	At least claims 1, 5, 7, and 8
WebTV/MSN TV or related documentation (e.g., CMCST_1486353-6366, CMCST_1486376-6419, CMCST_1487399-7410)	<p>WebTV/MSN TV, owned by WebTV Networks, was on sale and in public use in the U.S. by at least September 1996.</p> <p>Documentation related to WebTV/MSN TV was published on, e.g., MSNTV.com, help.webtv.net, and webtv.net no later than January 21, 2002.</p>	At least claims 1, 5, 7, and 8
TiVo system or related documentation (e.g., CMCST_1487469-7574, CMCST_1486375)	<p>Tivo, owned by Tivo, Inc., was on sale and in public use in the U.S. by at least March 31, 1999.</p> <p>Documentation related to Tivo was published on, e.g., Tivo.com, no later than October 9, 2001.</p>	At least claims 1, 5, 7, and 8
Liberate software suite, including Liberate TV Navigator, Mediacast, and	Liberate, owned by Liberate Technologies, was on sale and in public use in the U.S. by at least November 10, 1999.	At least claims 1, 5, 7, and 8

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Other prior art references	Date of publication/use/offer for sale/sale	Claim(s) anticipated
Connect, or related documentation (e.g., CMCST_1487259-7292, CMCST_1486367-74, CMCST_2128358-CMCST 2128455)	Documentation related to Liberate TV was published on, e.g., Liberate.com, no later than June 2, 2004.	

2. Obviousness

a. Exemplary prior art combinations

Comcast identifies in the chart below the exemplary prior art combinations that render obvious each of the asserted claims of the '431 patent under 35 U.S.C. § 103. In addition to the documentary and other prior art mentioned below, Comcast also intends to, and reserves its right to rely upon, the admitted prior art (including portions of the passages referenced from column 1, line 15 to column 7, line 7 in the '431 patent as well as in the prosecution history, for example, at 2011-10-11 Response at p. 11 and 2012-4-2 Response at 12) to demonstrate obviousness of the asserted claims when combined with the identified prior art or prior art combinations. In addition, Comcast further contends that each of the claims identified as anticipated above are also invalid as obvious over each anticipatory reference, either alone or in addition to the common sense possessed and applied by those of ordinary skill in the art. Indeed, “[i]t is well settled that ‘anticipation is the epitome of obviousness.’” *In re McDaniel*, 293 F.3d 1379, 1385 (Fed. Cir. 2002) (quoting *In re Fracalossi*, 681 F.2d 792, 794 (C.C.P.A. 1982)). As such, prior art disclosures that anticipate a patent also generally render it invalid for obviousness. *See, e.g., Johns Hopkins Univ. v. CellPro, Inc.*, 152 F.3d 1342, 1357 n.21 (Fed. Cir. 1998). Because the above references anticipate certain asserted claims, they also generally render those same claims obvious. To the extent one or more of the anticipating references is found not to anticipate, Comcast reserves the

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Dated: May 6, 2019

/s/ Jeffrey W. Lesovitz

Michael S. Vitale

Florida Bar No. 17136

BAKER & HOSTETLER LLP

SunTrust Center, Suite 2300

200 South Orange Avenue

Orlando, FL 32801-3432

Telephone: 407-649-4000

Facsimile: 407-841-0168

Of Counsel:

Daniel J. Goettle

dgoettle@bakerlaw.com

Jeffrey W. Lesovitz

jlesovitz@bakerlaw.com

BAKER & HOSTETLER LLP

2929 Arch Street

Cira Centre, 12th Floor

Philadelphia, PA 19104-2891

Telephone: 215.568.3100

Facsimile: 215.568.3439

Counsel for Defendant

Comcast Cable Communications, LLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 6, 2019, I electronically served the foregoing
COMCAST CABLE COMMUNICATIONS, LLC'S INVALIDITY,
UNENFORCEABILITY, AND NON-INFRINGEMENT CONTENTIONS by email to:

Robert N. Harrison
Robert N Harrison, PA
304 West Venice Avenue, Suite 201
Venice, FL 34285
robert@harrisonlawoffice.com
(941) 485-8551 (telephone)
(941) 584-8376 (facsimile)

Adam Sanderson (pending special admission)
REESE MARKETOS LLP
750 N. St. Paul, St. Ste. 610
Dallas, Texas 75201
(214) 382-9810 (telephone)
(214) 501-0731 (facsimile)
adam.sanderson@rgmfirm.com

Counsel for Plaintiff WhereverTV, Inc.

/s/ Jeffrey W. Lesovitz
Jeffrey W. Lesovitz