UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NETFLIX, INC., Petitioner,	)	
vs.	)	Case No. IPR2020-01582
AVAGO TECHNOLOGIES INTERNATIONAL SALES PTE LIMITED, et al., Patent Owners.	)	Patent No. 8,572,138

PTAB CONFERENCE CALL

Tuesday, November 23, 2021

Reported by:

Stacey L. Daywalt

JOB NO. 203028

Tuesday, November 23, 2021

10:02 a.m.

PTAB Conference Call, held before Administrative Patent Judges Kristen Droesch, Melissa Haapala and Kerry Begley, before Stacey L. Daywalt, a Court Reporter and Notary Public of the District of Columbia.

A P P E A R A N C E S:

(All appearances are telephonic)

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PTAB Conference Call

ADMINISTRATIVE PATENT JUDGE: Good morning. We're here for a conference call for IPR2020-1582.

My name is Judge Droesch. Joining me on the call are my colleagues Vice Chief Judge Haapala and Judge Begley.

First we'll do a roll call.

Who's on the call for Petitioner?

MR. LIANG: Good morning, Your Honor. My name is Jeffrey Liang. I'm on this call for Petitioner.

And also on the line with me is Harper Batts.

ADMINISTRATIVE PATENT JUDGE: Okay. Great.

And who's on the call for Patent Owner?

MR. YOUNG: Yes, Your Honor. This is Dan Young. I'll be speaking on behalf of the Patent Owner, Avago Technologies.

And also with me on the call is Chad King.

ADMINISTRATIVE PATENT JUDGE: Okay. Great. Thank you.

PTAB Conference Call

Did either party arrange for a court reporter?

MR. LIANG: Yes, Your Honor, Petitioner arranged for a court reporter, who I believe is on the line.

THE REPORTER: I am here.

ADMINISTRATIVE PATENT JUDGE: Okay. Thank you.

Whenever you receive the transcript, please file it as an exhibit.

All right. So we'll start. I understand that the parties requested the call to seek authorization to file a motion to strike portions of the sur-reply and then also a responsive motion to strike the reply.

Why don't we start with Petitioner's counsel and you can tell us why a motion to strike portions of the sur-reply would be warranted. And then we'll follow up with allowing Patent Owners' counsel to respond. And we'll do the same for the responsive motion to strike.

So why don't you go ahead, Counsel for Petitioner.

MR. LIANG: Thank you, Your Honor.

So the petition presented two grounds, and the first one is -- ground 1 was based on Khandekar. And the second ground, ground 2, was a combination that applied Le's teachings of remotely imaging physical computers to explain how Khandekar's teachings would be implemented.

The Patent Owner response only spent a single page discussing ground 2 and Le. That's Page -- you know, starting towards the top of Page 64 through the top of Page 65. There's no mention in that page of imaging physical computers.

And the reply pointed out this deficiency and explained that Patent Owner can't attempt to address Le's physical imaging teachings for the first time on sur-reply.

But then that's what Patent Owner tried to do with multiple pages of new argument in the sur-reply about physical images when there was no mention of that before.

So we met and conferred with Patent Owner to see if they would oppose our request

for a motion to strike, and then Patent Owner responded with a tit for tat, saying that if we requested a motion to strike, they would do the same. But that's basically where we are now.

I think this is a pretty straightforward issue of a new argument being raised that was not raised in the Patent Owner response, and so that's why we are requesting a motion to strike.

ADMINISTRATIVE PATENT JUDGE: All right.

Counsel for Patent Owner, would you like to respond?

MR. YOUNG: Yes, Your Honor. Thank you.

And this -- our response with respect to a motion to strike, their portion, I think, is -- these issues are all intertwined, so I'll kind of speak to both of them at the same time because I don't think it makes a whole lot of sense to separate them because they are kind of one and the same argument.

As we set forth in our sur-reply, which is Paper 24 at Page 21, this argument

that Petitioner raises where they say Le teaches deploying a physical image -- and I'm reading from Page 21 of their reply, so it's Page 21 of both briefs, where they say: "Deploying a physical images of a host computer, including a VMM using Le's teachings, booting the host computer and then deploying the virtual image of a VM to the host using Khandekar's teaching," that argument is nowhere to be found in the petition.

In fact, we call out, in our sur-reply on Page 21 of our brief, you can search for the terms "physical image," "booting the host computer." It's nowhere to be found in the petition.

And in Footnote 7 of our sur-reply, we say we extensively questioned Petitioner's expert Dr. Shenoy on where in his declaration, his original declaration, he supports this argument. And it's on the bottom of Page 21, Footnote 7, seven pages of testimony. He provided no support whatsoever from his declaration and ultimately said this is just in his sur-reply.

So we call out, in -- on Page 21 of our sur-reply, that this was a new argument, and we call it out. And so when we got Petitioner's response of saying that, oh, this is -- you're not allowed to argue this, for us, it was kind of an unbelievable request, when they make a new argument, we respond to it saying it's a new argument, pointing out exactly why it's a new argument, and then they say, well, you're not allowed to respond to our new argument.

And when I went back and thought about this a little bit further, I think the easiest way to -- and there's a lot of complication here. There's a lot a disclosure in both Le and Khandekar. But if you look at the petitions, there are three elements that deal with this concept of a virtual machine, and not virtual machine manager, but just a virtual machine.

And if you look at Page 90 of the petition, it lays out the claim elements of 1(a) through 1(g). And these virtual machine limitations come up in three limitations, 1(d),

1(e) and 1(g).

And so 1(d) states that -- I won't read the whole thing, but basically when executed on the application nodes, the images to the virtual machine manager provide, (a), plurality of virtual machine. That's the first time "virtual machine" is defined in the claims.

And if you go to that limitation in their petition -- and counsel for Petitioner is right, there are two grounds, ground 1 and ground 2. But ground 2 for that limitation starts on Page 40, and it starts with a sentence that says: "To the extent Patent Owner contends each image instances of a VMM must provide a plurality of virtual machines, the combination of Khandekar and Le rendered as obvious."

We don't make that argument. So this whole section -- it's only a page -- is not applicable to our argument. So for the purposes of element 1(e) -- I'm sorry -- 1(d), the only reference they rely on is Khandekar.

And then the next limitation where

virtual machine managers show up is 1(e), where it says: "Executable on the plurality of virtual machines," referring back to the element of 1(d).

And if you go to the --

ADMINISTRATIVE PATENT JUDGE: Counsel?

MR. YOUNG: Yes, Your Honor.

ADMINISTRATIVE PATENT JUDGE: Counsel, I'm not sure that this at this point is, I don't know, applicable to why a motion --

MR. YOUNG: Well, yes, Your Honor. I'm sorry.

ADMINISTRATIVE PATENT JUDGE: I think we understand that there's a dispute about what's a new argument versus a responsive argument at this point, so --

MR. YOUNG: Yes, Your Honor.

My only point was those three elements that deal with virtual machine, Le is not mentioned.

And so in our petition, in our response, we didn't have to provide extensive rebuttal on Le with ground 2, because the

arguments all overlap with ground 1 and ground 2. That's my point.

ADMINISTRATIVE PATENT JUDGE: Okay.

MR. YOUNG: And then lastly I would just say that we didn't initially ask for a motion to strike, because as the Board knows, the practice guide refers to a motion to strike as an exceptional remedy. And in most cases the Board is more than capable of distinguishing new argument as part of the oral argument in ultimately its decision, so we didn't think that a motion to strike was necessary.

But to the extent that they're going to ask for a motion to strike our response to their new argument, well then we asked for a motion to strike as well.

ADMINISTRATIVE PATENT JUDGE: Okay. All right. Great.

Counsel for Petitioner, do you have anything to respond?

MR. LIANG: Yes, Your Honor.

I believe that this is in fact an exceptional circumstance because as -- because

the sur-reply contains numerous misrepresentations, and many of which have just been repeated on this call.

You know, I point out that the petition actually has pictures of a physical computer being imaged. And their argument about how physical image isn't mentioned in the opening papers is just simply wrong, because the -- for example, Dr. Shenoy, Paragraph 58 of his declaration says "image of physical computers." And that's actually the explanation. There's significant discussion throughout the opening papers. That's the explanation of how Le is being combined into the combination.

So while it may not say "physical image," it says "image of a physical computer." And so when Dr. Shenoy explained this at his deposition, which I note he cites -- he points out this paragraph, and so it's just a straight misrepresentation that he was unable -- he only pointed to his reply declaration, because he actually pointed to his opening declaration which was omitted from the sur-reply.

And so I do think that in that sense this is an exceptional case because of their mischaracterizations of the record, and that's why we are asking for a motion to strike.

ADMINISTRATIVE PATENT JUDGE: Okay.

Counsel for Patent Owner, did you have any response?

MR. YOUNG: Yes, Your Honor.

I mean, with respect to Paragraph 58 of Dr. Shenoy's declaration, that's not even part of his grounds. That's the motion to -- that's the motivation to combine the two references, but it has nothing to do with why the combination of Le and Khandekar teach any individual specific elements of the challenged claims.

And that's why I went through elements 1(d), 1(e) and 1(g), because they're part of the virtual machine which they claim is now created in the Le teaching when it reboots the computer. That's nowhere to be found in the petition or in Dr. Shenoy's original declaration.

ADMINISTRATIVE PATENT JUDGE: All

right. Thank you.

We'll take a couple of moments to confer, and we'll be back on the line in a few moments. Thank you.

(Recess was held from 10:13 a.m. to 10:14 a.m.)

ADMINISTRATIVE PATENT JUDGE: Thank you, Counsel. We're back after conferring.

At this point in time, we are unable to authorize Petitioner to file a motion to strike.

At this point in time, it seems that the briefing has pointed out the various disputes about the arguments, and between that and the transcript that will be filed, I think that the panel will be able to discern which arguments might be new or not, and at this point in time, we will not be authorizing a motion to strike.

Do either parties have any questions?

MR. LIANG: No, Your Honor.

MR. YOUNG: No, Your Honor.

ADMINISTRATIVE PATENT JUDGE: All

right. Thank you very much.

We'll be adjourned then. Thank you.

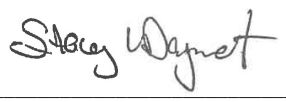
(Time Noted: 10:15 a.m.)

District of Columbia, to wit:

I, Stacey L. Daywalt, a Notary Public of the District of Columbia, do hereby certify that the proceedings were recorded stenographically by me and this transcript is a true record of the proceedings.

I further certify that I am not of counsel to any of the parties, nor an employee of counsel, nor related to any of the parties, nor in any way interested in the outcome of this action.

As witness my hand and Notarial Seal this 7th day of December, 2021.



Stacey L. Daywalt, Notary Public

My Commission Expires: 4/14/2026