

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NETNUT LTD.,

Petitioner

v.

BRIGHT DATA LTD.,

Patent Owner

Case IPR2021-00465

Patent No. 9,742,866

PATENT OWNER'S NON-CONTINGENT MOTION TO AMEND

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Patent Trial and Appeal Board
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

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EX. 2018	Claim Construction Order, <i>Luminati Networks Ltd. v. Code200, UAB, et al.</i> , Case No. 2:19-cv-396, Dkt. 97 (E.D. Tex. Feb. 8, 2021)
EX. 2019	Supplemental Claim Construction Order, <i>Bright Data Ltd. (f/k/a Luminati Networks Ltd.) v. Teso LT, UAB, et al. and v. Code200, UAB, et al.</i> , Case Nos. 2:19-cv-395, Dkt. 453 and 2:19-cv-396, Dkt. 244 (E.D. Tex. Aug. 6, 2021)
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I. INTRODUCTION

Patent Owner Bright Data Ltd. respectfully moves under 35 U.S.C. § 316(d) and 37 C.F.R. § 42.121 to amend U.S. Patent No. 9,742,866 (“the ‘866 patent”)(EX. 1001). As discussed in the Patent Owner Preliminary Response, Patent Owner is not asserting the ‘866 patent against any entity in any pending district court case. Paper 8 at 21. As such, Patent Owner is mindful of the finite resources of the Board and wishes to efficiently reach conclusion of this trial.¹

Patent Owner respectfully submits that this *non-contingent* motion and the proposed, substitute claims discussed herein meet all of the requirements of 37 C.F.R. § 42.121. Patent Owner conferred with the Board on October 29, 2021, prior to filing this motion, as required by 37 C.F.R. § 42.121(a). Paper 16 at 2. Further,

¹ Accordingly, Patent Owner is not concurrently filing a Patent Owner Response in this proceeding. *See, e.g., Intuitive Surgical, Inc. v. Ethicon LLC*, IPR2018-00933, Paper 31 at 3, note 5 (PTAB Dec. 3, 2019)(“Because we grant the Motion to Amend, which is a non-contingent motion, and substitute claims 21–40 for challenged claims 1–20, we need not address the patentability of claims 1–20.”); *NXP USA, Inc. v. Impinj, Inc.*, IPR2020-00514, Paper 37 at 9 (PTAB Aug. 11, 2021)(“As Patent Owner’s non-contingent Revised Motion to Amend cancels all of the challenged claims, we address only Patent Owner’s proposed substitute claims 22–36.”).

consistent with the guidelines set forth in *Lectrosonics, Inc. v. Zaxcom, Inc.*, IPR2018-01129, Paper 15 (PTAB Feb. 25, 2019)(precedential)(“*Lectrosonics*”); in this non-contingent motion, Patent Owner explains (a) there is a reasonable number of proposed, substitute claims, (b) each amendment is responsive to a ground of unpatentability involved in the trial, (c) none of the amendments seeks to enlarge the scope of the claims or introduce new matter, and (d) this motion clearly shows the amendments sought and the support in the originally-filed application(s) for each proposed, substitute claim. *See also* 37 C.F.R § 42.121. Patent Owner has thus met its burden.²

² There has been a large body of cumulative art submitted in other proceedings (e.g., in Requests for Reexamination, *see* Paper 14 at 3) against other patents assigned to Patent Owner; however, Patent Owner is not aware of any prior art that alone, or in combination, anticipates, or renders obvious any of the proposed, substitute claims. *See* 37 C.F.R. § 42.11. As of now, no patent assigned to Patent Owner has been invalidated based on any prior art. For example, on November 5, 2021, a jury issued a verdict finding that none of the asserted claims directed at improving internet communications was invalid over the asserted art in *Bright Data Ltd. (f/k/a Luminati Networks Ltd.) v. Teso LT, UAB, et al.*, Case No. 2:19-cv-395, Dkt. 516 (E.D. Tex.). EX. 2016 at 5.

As explained in further detail herein, Patent Owner respectfully requests the Board grant this motion, cancel claims 15-20, 23-24, and 27-28, and substitute claims 29-38 as set forth in Appendix A-2. Patent Owner further requests non-binding preliminary guidance on the proposed, substitute claims and reserves the right to file a revised motion to amend. *See* Paper 16 at 3; *see also* 84 Fed. Reg. 9497.

II. REASONABLE NUMBER OF SUBSTITUTE CLAIMS

In this trial, there are 10 challenged claims: 15, 16, 17, 18, 19, 20, 23, 24, 27, 28. *See* Paper 2 at 10. With this non-contingent motion, Patent Owner requests cancellation of 10 claims and substitution of 10 claims, which is a one-to-one substitution presumed to be reasonable. *See Lectrosonics* at 4 (citing 37 C.F.R. § 42.121(a)(3)).

III. RESPOND TO A GROUND OF UNPATENTABILITY INVOLVED IN THE TRIAL

The proposed, substitute claims are responsive to one or more grounds of unpatentability at issue in this trial, in compliance with 37 C.F.R. §42.121(a)(2)(i).

Petitioner asserted 5 Grounds against the challenged claims. *See* Paper 2 at 10. Patent Owner disagrees with Petitioner's assertions given, for example, that the claimed method is performed within a specific, dedicated architecture (client device

– tunnel device – web server); which is distinguished from prior art methods performed within a traditional architecture (client device – proxy server – web server). *See generally*, EX. 2001.

In the Institution Decision, the Board found that Petitioner had demonstrated a reasonable likelihood of success as to Grounds 1-5 in view of two, asserted primary references – E.P. Pub. No. 2,597,869 (EX. 1018)(“Sharp”), and the textbook ‘WEB PROXY SERVERS’ by Ari Luotonen (EX. 1014)(“Luotonen”). *See* Paper 11 at 23-24, 26, 29, 34, and 35. The Board’s analysis shows the scope of the claims has been interpreted more broadly than anticipated.

Patent Owner respectfully traverses the findings in the Institution Decision as to these Grounds and submits the proposed, substitute claims to further narrow the challenged claims commensurate with Patent Owner’s understanding of the proper scope of the invention, specifically reciting that the claimed method uses the novel and nonobvious tunnel device (not a proxy server) to fetch fresh content (not cached content) from a web server; thereby improving content access to avoid blocking or spoofing by the web server, while also providing anonymity.

A. PERSON OF ORDINARY SKILL IN THE ART (“POSA”)

Patent Owner does not dispute the Board's definition of a POSA for the purposes of this trial. *See* Paper 11 at 11-12.³

B. CLAIM CONSTRUCTION

Patent Owner respectfully traverses the claim constructions in the Institution Decision (*see* Paper 11 at 13-15) and, in effort to save resources, submits that the proposed, substitute claims include narrowing limitations such that the meanings of the claims would be easily understood by a POSA. Given the express limitations recited in the proposed, substitute claims, Patent Owner respectfully submits that claim construction is not necessary and that further briefing would be an inefficient use of resources.⁴ For purposes of this trial, the express limitations should moot any claim construction concerns.

C. RESPONSE TO GROUNDS

³ Patent Owner agrees with the Board (*see* Paper 11 at 12) that its expert provided a similar definition of a POSA and Patent Owner submits the differences do not affect the analysis herein.

⁴ There has been a lot of claim construction activity (in addition to the Orders, Exs. 1023, 1033) for patents assigned to Patent Owner. *See, e.g.*, EXS. 2017, 2018, 2019.

The proposed, substitute claims narrow the challenged claims, including one independent claim, to incorporate additional limitations that are not disclosed in the prior art.

First, the proposed, substitute claims specifically recite the use of a tunnel device to fetch fresh content from the second server. The narrowing limitations specify that the claimed tunnel device is a consumer electronic device with a client operating system. The narrowing limitations also recite that requests/responses to/from the tunnel device use a tunneling protocol.

Patent Owner respectfully submits that none of the prior art references teach or suggest the use of a tunnel device as claimed. A tunnel device is not a server or a proxy server. As claimed, a tunnel device is a very specific type of client device that is further configured to be a tunnel device, for example, by using proprietary software. A POSA would understand that, in contrast to a server, a tunnel device is a client device that may be resource limited with lower bandwidth and limited storage. *See, e.g.*, EX. 1001, ‘866 Patent, 150:15-28. In contrast, a proxy server includes *a server operating system* and is configured to store large amounts of information. *See, e.g.*, EX. 1001, ‘866 Patent, 6:24-40; 42:22-25; *see also, e.g.*, EX. 2001 at ¶ 29; at ¶¶ 36 and 38 (citing EX. 2010), ¶ 43 (citing EX. 2012).

Unlike the proposed, substitute claims; for example, Luotonen discloses the use of a traditional proxy server. *See, e.g.*, EX. 1014 at 22; *see also, e.g.*, EX. 2001 at ¶ 35). Luotonen does not disclose the use of a client device as a proxy.

Second, in addition to the recited use of tunnel device; the proposed, substitute claims specifically recite fetching fresh content, not cached content. Moreover, the narrowing limitations specifically recite receiving the fresh content from a tunnel device *in response to* the second request. The narrowing limitations also specifically recite the first device sends a second request identifying the source of the fresh content as the second server. The narrowing limitations further recite the first and second requests both include the same third identifier, identifying the source of the fresh content as the second server.

These narrowing limitations further distinguish the claimed method from the prior art. For example, in contrast to the proposed, substitute claims; Sharp discloses providing cached content to the requesting client 4. *See* EX. 1018 at [0028]; *see also id.* at Abstract. Sharp teaches the cached content is already received/stored from the web server *before* there is any request from the client. *See, e.g.*, EX. 1018 at [0033]. In contrast, the claimed method teaches receiving the requested content only *after* the second request is made.

Sharp discloses a content delivery network which is a closed-loop design where all of the web traffic is *inside* the network. *See, e.g.*, EX. 1018 at [0006]. The

network of Sharp is designed to “reduce[] an increase in load of the server and a network and for data transmission from the server”. *See id.* Sharp does not teach going *outside* the network in order to obtain fresh content. *See also* EX. 2001 at ¶¶ 41-44. Sharp therefore does not teach the claimed method, which is not directed to reducing the load on the web server and, just the opposite, ensures that all data comes from the web server at the time the content is requested.

Third, in addition to the recited use of a tunnel device for fetching, specifically, fresh content as claimed; the proposed, substitute claims further recite an anonymity limitation. Patent Owner respectfully submits no prior art references teach or suggest the claimed methods, including the anonymity limitation to prevent blocking or spoofing from the web server. For example, in contrast to the proposed, substitute claims, in every embodiment of Sharp, the client 4 directly contacts the server 2 (*see, e.g.,* EX. 1018 at [0043]) and therefore, for example, there is no anonymity of client 4 with respect to server 2.

For at least these reasons, the proposed, substitute claims are responsive to one or more grounds of unpatentability at issue in this trial.

IV. SCOPE OF THE CLAIMS

“A substitute claim will meet the requirements of § 42.121(a)(2)(i) and (ii) if it narrows the scope of at least one claim of the patent, for example, the challenged

claim it replaces, in a way that is responsive to a ground of unpatentability involved in the trial.” *Lectrosonics* at 6-7.

As discussed above, the proposed, substitute independent claim 29 adds only narrowing limitations that are responsive to one or more grounds of unpatentability involved in the trial.

The proposed, substitute dependent claims are amended to recite their dependency on proposed, substitute independent claim 29, as well as to clarify the use of one or more tunnel devices. For the same reasons discussed above with respect to independent claim 29, the dependent claims thus include only narrowing limitations that are responsive to a ground of unpatentability involved in the trial.

“[T]he Board requires that a motion to amend set forth written description support in the originally filed disclosure of the subject patent for each proposed substitute claim[.]” *Lectrosonics* at 7 (citing *See* 37 C.F.R. §§ 42.121(b)(1), 42.121(b)(2)).

The ‘866 Patent issued from Nonprovisional Application No. 14/930,894 filed November 3, 2015, which is a divisional⁵ of Nonprovisional Application No.

⁵ As a divisional, Nonprovisional Application No. 14/930,894 has the same specification as Nonprovisional Application No. 14/468,836 with no new matter added. *See* 37 C.F.R. § 1.78.

14/468,836 (EXS. 2024-2027) filed August 26, 2014, which claims priority from Provisional Application No. 61/870,815 (EXS. 2022-2023) filed August 28, 2013. *See, e.g.*, EX. 1001, '866 patent, codes (21), (22), (62). Patent Owner respectfully submits that the proposed, substitute claims are entitled to the earlier priority date, August 28, 2013. Supporting citations to both applications are provided below. For ease of review, Patent Owner also prepared Appendix A-1 attached hereto, with quoted language showing written description support in both applications. EX. 2020.

Claim I.D.	Exemplary Support in Provisional App. No. 61/870,815 (EXS. 2022-2023)⁶	Exemplary Support in Nonprovisional App. No. 14/468,863 (EXS. 2024-2027)⁷
29 pre, pt. 1	See, e.g., Fig. 58; Fig. 55; Fig. 50; Fig. 69; Fig. 70 E.g., Page 2; 1; 7-8	See, e.g., original claim 134 See, e.g., Figs. 5, 5a, and 5b; see also Figs. 11, 11a, 11b; Abstract E.g., Pages 81; 82; 118; 114; see also, e.g., Page 73
29 pre, pt. 2	E.g., Pages 2; 23; 7; see also, e.g., Pages 21, 33-34 See, e.g., Fig. 69; Fig. 136; Fig. 73	See, e.g., original claim 134 See, e.g., Fig. 10, 11, 11a, 11b and 21 E.g., Pages 81; 125; 138

⁶ Page citations herein refer to the page of the specification (EX. 2022).

⁷ Page citations herein refer to the page of the specification (EX. 2025).

29a	E.g., Pages 2; 7; 5	See, e.g., original claim 134 See, e.g., Figs. 5, 5a, 5b, and 6 E.g., Pages 81; 113; 76; see also, e.g., Pages 118; 112
29b	See, e.g., Fig. 70; Fig. 58; Fig. 69; Figs. 136 and 138; Fig. 226 See, e.g., Pages 7-8; 2; 7; 1; 23; 44	See, e.g., original claim 134 See, e.g., Figs. 5, 5a, 5b, and 7 E.g., Pages 81; 114; 117-118; 145; 34-35; 85; 99
29c	See, e.g., Fig. 70; Fig. 58; Fig. 62; Fig. 69 See, e.g., Pages 7-8; 2; 4; 7	See, e.g., original claim 134 See Figs. 5 and 5b; see also Fig. 7 E.g., Pages 81; 114; 118
29d	See Fig. 70; Fig. 58; Fig. 62; Fig. 69 See, e.g., Pages 7-8; 2; 4; 7	See, e.g., Figs. 5, 5a, 5b, and 7 E.g., Pages 81; 114; 118
29e	See, e.g., Fig. 70; Fig. 62; Fig. 69; see also, e.g., Fig. 73 E.g., Pages 21; 33; 7-8; 4; 7; see also, e.g., Pages 13; 33-34	See, e.g., original claim 134 See, e.g., Figs. 5 and 5b; Fig. 21 E.g., Pages 81; 139; 126
29f	E.g., Pages 1; 47-48; 46 See, e.g., Fig. 234	E.g., Pages 56; 100; 167 E.g., Abstract
29g	See, e.g., Fig. 124; Fig. 130 E.g., Pages 20-21; 18-19; 68; see also Page 22	E.g., Pages 72-73; 145; 115; 169; 131 See, e.g., Fig. 21; Fig. 15a
29h	See, e.g., Fig. 58; Figs. 61 and 62; Fig. 69; Figs. 234 and 236	E.g., Pages 117; 128 See, e.g., Fig. 13

	E.g., Page 2-3; 7; 46-47	
30	E.g., Pages 68; 2; 18-19; 13; 7-8 See, e.g., Fig. 70; Fig. 73	See, e.g., original claim 135 E.g., Pages 82; 138 See also, e.g., Fig. 21
31	E.g., Pages 18-19; 23; 7 See, e.g., Fig. 73; Fig. 69	See, e.g., original claim 136 E.g., Pages 82; 138 See also, e.g., Fig. 21
32	E.g., Pages 80; 18-19; 23; 7 See, e.g., Fig. 73; Fig. 69	See, e.g., original claim 137 E.g., Pages 82; 138 See also, e.g., Fig. 21
33	E.g., Pages 7-8; 50; 23 See, e.g., Fig. 70; Fig. 136	See, e.g., original claim 138 E.g., Pages 82; 84; 126; 139
34	E.g., Pages 13; 33; 7 See, e.g., Fig. 69	See, e.g., original claim 139 E.g., Pages 82; 84; 126; 139
35	E.g., Pages 2; 7; 13; 33	See, e.g., original claim 142 E.g., Pages 76; 224; 120; 82; 101; 139
36	E.g., Pages 13; 7	See, e.g., original claim 143 E.g., Pages 76; 101; 120; 82; 139

37	E.g., Pages 33; 13; 23; 7-8; see also, e.g., Pages 33-34 See also, e.g., Fig. 136; Fig. 70	See, e.g., original claim 146 E.g., Pages 82; 84; 126 See also, e.g., Fig. 21
38	E.g., Pages 7; 50; 33; 23; see also, e.g., Pages 33-34 See also, e.g., Fig. 136	See, e.g., original claim 147 E.g., Page 82; 84; 126 See also, e.g., Fig. 21

V. CLAIM LISTING

“A motion to amend must include a claim listing reproducing each proposed substitute claim. *See* 37 C.F.R. § 42.121(b) ... The claim listing may be filed as an appendix to the motion to amend, and shall not count toward the page limit for the motion.” *Lectrosonics* at 8.

Patent Owner respectfully refers the Board to Appendix A-2 attached hereto. EX. 2021.

VI. PATENTABILITY OF SUBSTITUTE CLAIMS

“[A] patent owner does not bear the burden of persuasion to demonstrate the patentability of substitute claims presented in a motion to amend. Rather, as a result of the current state of the law and USPTO rules and guidance, the burden of

persuasion ordinarily will lie with the petitioner to show that any proposed substitute claims are unpatentable by a preponderance of the evidence.” *Lectrosonics* at 4.

Regarding 35 U.S.C. § 102 and § 103, Patent Owner respectfully submits that no prior art of record or known to it, discloses, teaches or suggests the subject matter of the proposed, substitute claims.

Moreover, the proposed, substitute claims provide only narrowing limitations to the challenged claims and Patent Owner maintains the challenged claims are valid over the prior art, particularly in light of Petitioner’s reliance on expert testimony. On October 29, 2021, Patent Owner cross-examined Petitioner’s expert, Mr. Teruya, regarding Petitioner’s analysis of the Grounds. In accordance with 37 CFR § 42.53(f)(7), the Teruya deposition transcript is hereby submitted as Exhibit 2015.^{8,9}

During that deposition, Mr. Teruya revealed his backwards analysis of the asserted references, replete with hindsight bias. Mr. Teruya expressly admitted that he started with the claim elements and then went to a reference to see if there was

⁸ The Notice of Deposition (Paper 15) was used as an exhibit during the deposition and is hereby submitted as Exhibit 2014. All other exhibits used during the deposition are already of record and were already in possession of the deponent.

⁹ Patent Owner notes that the subject matter for both this proceeding and the related proceeding (IPR2021-00458) were covered during the same deposition.

an exact or analogous disclosure. *See, e.g.*, EX. 2015 at 39:9-17 (reproduced below)(discussing analysis of Shribman) and 155:1-19 (discussing analysis of Prince).

9 Q Okay. And just to help me
10 understand, then, the way you did that
11 was you would start with a claim, read
12 the elements of the claim, and then go
13 back to look at Shribman to see if you
14 could find either the exact disclosure or
15 something you felt was analogous; is that
16 fair?
17 A Yes.

Indeed, Mr. Teruya expressly admitted he did not review the references in their entirety and therefore, did not consider any teaching away. *See, e.g.*, EX. 2015 at 155:16-19 (reproduced below)(discussing Prince); *see also* 51:16-22 (discussing Shribman) 93:1-5 (discussing Sharp); 105:6-8 (discussing Sharp).

16 Q Well, when you reviewed the
17 Prince reference did you read all of the
18 reference?
19 A Not in its entirety.

“This form of hindsight reasoning, using the invention as a roadmap to find its prior art components, would discount the value of combining various existing features or

principles in a new way to achieve a new result - often the very definition of invention.” *Ruiz v. A.B. Chance Co.*, 357 F.3d 1270, 1275 (Fed. Cir. 2004).

Moreover, Mr. Teruya expressly admitted he performed his analysis based on his knowledge/experience at the time the declaration was drafted (i.e., 2020, approximately 7-8 years after the time of invention), rather than at the time of invention. *See* EX. 2015 at 133:18-134:3 and 135:10-19. "It is difficult but necessary that the decisionmaker forget what he or she has been taught . . . about the claimed invention and cast the mind back to the time the invention was made (often as here many years), to occupy the mind of one skilled in the art. ..." MPEP § 2141 (citing *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1553 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984).)

Accordingly, Patent Owner respectfully submits that Mr. Teruya’s analysis is improper and Petitioner’s reliance thereon is misplaced. Thus, Petitioner’s analysis of the Grounds as to the challenged claims should be given little weight. Even so, Patent Owner has added narrowing limitations in the proposed, substitute claims in an effort to expedite this trial.

VII. CONCLUSION

In view of the foregoing, Patent Owner respectfully requests the Board grant this motion, cancel claims 15-20, 23-24, and 27-28, and substitute claims 29-38 as

set forth in Appendix A-2. Patent Owner further requests non-binding preliminary guidance on the proposed, substitute claims.

Respectfully submitted,

Date: November 8, 2021

By: /s/ Thomas M. Dunham

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that PATENT OWNER'S NON-CONTINGENT MOTION TO AMEND is within the 25 page-limit, in compliance with 37 C.F.R. §§ 42.24(a)(1)(vi).

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned hereby certifies PATENT OWNER'S NON-CONTINGENT MOTION TO AMEND was served on the undersigned date via email, as authorized by Petitioner, at the following email addresses:

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