

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SLING TV, L.L.C., SLING MEDIA, L.L.C.,
DISH NETWORK L.L.C., DISH TECHNOLOGIES L.L.C.,
Petitioners,

v.

REALTIME ADAPTIVE STREAMING, LLC,
Patent Owner.

Case IPR2018-01331
Patent 8,867,610 B2

Before KEVIN W. CHERRY, GARTH D. BAER, and NABEEL U. KHAN,
Administrative Patent Judges.

BAER, *Administrative Patent Judge.*

DECISION
Granting Institution of *Inter Partes* Review
35 U.S.C. § 314

Sling TV, L.L.C., Sling Media, L.L.C., DISH Network L.L.C., DISH Technologies L.L.C. (“Petitioner”) filed a Petition (Paper 1, “Pet.”) requesting *inter partes* review of claims 1, 2, 6, 8–14, 16, and 18 of U.S. Patent No. 8,867,610 B2 (Ex. 1001, “the ’610 patent”). Realtime Adaptive Streaming, LLC (“Patent Owner”) timely filed a Preliminary Response. Paper 6 (“Prelim. Resp.”). At the parties’ request, we authorized additional briefing addressing whether the petition is time barred under 35 U.S.C. § 315(b). Petitioner filed a Reply to the Preliminary Response (Paper 7, “Reply”) and Patent Owner filed a Sur Reply (Paper 8, “Sur Reply”).

Pursuant to 35 U.S.C. § 314(a), an *inter partes* review may not be instituted unless “the information presented in the petition . . . and any response . . . shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” For the reasons set forth below, we conclude that there is a reasonable likelihood that Petitioner would prevail in establishing the unpatentability of at least one of the challenged claims. Therefore, we institute *inter partes* review of the challenged claims.

I. BACKGROUND

A. RELATED PROCEEDINGS

The parties assert the ’610 patent is involved in *Realtime Adaptive Streaming LLC v. EchoStar Technologies, LLC*, Case No. 6-17-cv-00567 (E.D. Tex. Oct. 10, 2017); *Realtime Data LLC d/b/a IXO v. Sling TV LLC.*, Case No. 1-17-cv-02097 (D. Colo. Aug. 31, 2017); *Realtime Data LLC d/b/a IXO v. DISH Network Corp.*, Case No. 6-17-cv-00421 (E.D. Tex. Jul. 19, 2017); *Realtime Adaptive Streaming LLC v. Hulu, LLC.*, Case No. 2-17-cv-07611 (C.D. Cal. Oct. 17, 2017); and *Realtime Data LLC d/b/a IXO v.*

EchoStar Corp., Case No. 6-17-cv-00084 (E.D. Tex. Feb. 14, 2017). The '610 patent is also the subject of IPR2018-01090 (PTAB May 18, 2018) and IPR2018-01195 (PTAB June 6, 2018). Pet. 4–5; Paper 3, 2.

B. THE '610 PATENT

The '610 patent describes “[d]ata compression and decompression methods for compressing and decompressing data based on an actual or expected throughput (bandwidth) of a system.” Ex. 1001, Abstract. The '610 patent’s method uses “suitable compression algorithm[s] that provide[] a desired balance between execution speed (rate of compression) and efficiency (compression ratio)” when available bandwidth and processing power are limited. *Id.* at 8:8–13. “[B]andwidth sensitive” compression is performed by a controller that tracks a “number of pending access requests to [a] memory system” to determine available “throughput (bandwidth)” of “a system employing [the] data compression.” *Id.* at 9:11–15, 10:31–45. Depending on throughput, the controller selects a compression algorithm with faster compression (but a lower compression ratio) or one with an optimal compression ratio (but slower compression time) to optimize storage and minimize bottlenecks. *Id.* at 13:29–51.

The '610 patent teaches that “another factor that is used to determine the compression algorithm is the type of data to be processed.” *Id.* at 11:30–32. The controller “associates different data types (based on, e.g., a file extension) with preferred one(s) of the compression algorithms.” *Id.* at 11:31–39. Because different data types have different access rates, the '610 patent seeks to improve system performance with a compression algorithm customized according to characteristics of the received data to balance

“execution speed (rate of compression) and efficiency (compression ratio).”

Id. at 8:8–13.

C. ILLUSTRATIVE CLAIM

Petitioner challenges claims 1, 2, 6, 8–14, 16, and 18. Claims 1 and 9 are the only independent claims challenged in the Petition. Independent claim 1 is illustrative of the claimed subject matter and is reproduced below.

1. A method, comprising:

determining, a parameter or an attribute of at least a portion of a data block having video or audio data;

selecting one or more compression algorithms from among a plurality of compression algorithms to apply to the at least the portion of the data block based upon the determined parameter or attribute and a throughput of a communication channel, at least one of the plurality of compression algorithms being asymmetric; and

compressing the at least the portion of the data block with the selected compression algorithm after selecting the one or more, compression algorithms.

Id. at 20:1–13.

D. ASSERTED GROUNDS OF UNPATENTABILITY

Petitioner asserts the following grounds of unpatentability. Pet. 6.

Reference(s)	Basis	Challenged Claim(s)
Vishwanath ¹	§ 102(a)/(e)	1, 6, 9, and 16
Vishwanath	§ 103(a)	1, 6, 9, and 16
Vishwanath and Ishii ²	§ 103(a)	14
Vishwanath and Kalra ³	§ 103(a)	2, 8, 10–13, and 18

¹ U.S. Pat. No. 6,216,157 (issued April 10, 2001) (Ex. 1004, “Vishwanath”).

² U.S. Pat. No. 5,675,789 (issued Oct. 7, 1997) (Ex. 1005, “Ishii”).

³ U.S. Pat. No. 5,953,506 (issued Sept. 14, 1999) (Ex. 1006, “Kalra”).

II. ANALYSIS

In its Preliminary Response, Patent Owner does not challenge Petitioner's substantive patentability arguments. Instead, Patent Owner contends the Petition is time barred under 35 U.S.C § 315(b) and that, in the alternative, we should exercise our discretion to deny the Petition under 35 U.S.C § 325(d).

A. APPLICATION OF § 315(b) TIME BAR

Section 315(b) provides that “an inter partes review may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest or privy of the petitioner is served with a complaint alleging infringement of the patent.” 35 U.S.C. § 315(b) (2018). Patent Owner asserts Petitioner is time barred under § 315(b), because Petitioner was served with a complaint alleging infringement of the '610 patent more than one year before it filed the present petition. *See* Prelim. Resp. 1 (citing *Click-to-Call Techs., LP v. Ingenio, Inc.*, 899 F.3d 1321 (Fed. Cir. 2018) (en banc)). For the reasons that follow, we determine the Petition is not time barred.

On June 6, 2017, Realtime Data LLC (“Realtime Data”) filed and subsequently served an amended complaint in the Eastern District of Texas naming Petitioner and alleging infringement of the '610 patent. Prelim. Resp. 2 (citing *Realtime Data LLC v. EchoStar Corp.*, No. 6:17-cv-00084-RWS-JDL). When Realtime Data filed its complaint, however, it did not own the '610 patent, because it had previously recorded an assignment to Realtime Adaptive Streaming on March 7, 2017. *See* Ex. 1023. Realtime Data thus voluntarily dismissed the complaint without prejudice, and on October 10, 2017, Realtime Adaptive Streaming filed a complaint again

naming Petitioner and alleging infringement of the '610 patent. Reply 2. Less than one year later, on July 3, 2018, Petitioner filed its Petition in this case. *See* Pet. 79.

Patent Owner asks us to read § 315(b)'s language broadly such that the June 6, 2017 complaint filed and served by non-patent owner Realtime Data triggered the one-year time bar. To this end, Patent Owner quotes *Bennett Regulator Guards, Inc. v. Atlanta Gas Light Co.*, where the Federal Circuit reaffirmed its holding in *Click-to-Call*, 899 F.3d 1321, noting that “[t]he statute endorses *no exceptions* for dismissed complaints.” Sur-Reply 1 (quoting *Bennett Regulator Guards, Inc. v. Atlanta Gas Light Co.*, 905 F.3d 1311 (Fed. Cir. 2018)) (emphasis in original). Petitioner responds that “*Click-to-Call* is not controlling and readily distinguishable because the entity that filed the June 2017 complaint, Realtime Data, LLC . . . did not own the patent and thus did not have standing to file the complaint in the first place.” Reply 1. Petitioner argues further that both § 315(b)'s title and its legislative history demonstrate “that the deadline would be triggered [only] after the *patent owner* filed a complaint.” *Id.* at 6.

We agree with Petitioner that *Click-to-Call* does not control on the current facts. *Click-to-Call* established that a complaint's later dismissal has no bearing on the one-year time bar. 899 F.3d at 1336. But, in *Hamilton Beach Brands, Inc. v. f'real Foods, LLC*, the Federal Circuit explained that the issue in this case—i.e., whether a complaint filed without standing

triggers § 315(b)'s time bar—was “not present, or considered, in *Click-to-Call*.” 908 F.3d 1328, 1337 (Fed. Cir. Nov. 16, 2018).⁴

We further agree with Petitioner that only a patent owner's action triggers § 315(b)'s time bar. Section 315(b) specifies that the time bar is triggered when “the petitioner is served with a complaint alleging infringement of the patent.” Although the statute's text is not explicit as to who must file and serve the complaint, § 315(b) is titled “Patent Owner's Action,” thus suggesting that only service of a patent owner's complaint triggers the one-year time bar. *See Yanko v. United States*, 869 F.3d 1328, 1333–34 (Fed. Cir. 2017) (quoting parenthetically *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008)) (explaining that “statutory titles and section headings are tools available for the resolution of doubt about the meaning of a statute”). Section 315(b)'s legislative history suggests Congress envisioned that only a patent owner's complaint would trigger the time bar:

The House bill also extends the deadline for allowing an accused infringer to seek inter partes review after he has been sued for infringement. The Senate bill imposed a 6-month deadline on seeking IPR **after the patent owner has filed an action for infringement**. The final bill extends this deadline, at proposed section 315(b), to 1 year.

157 Cong. Rec. S5429 (daily ed. Sept. 8, 2011) (statement of Sen. Kyl) emphasis added). In light of the statute's ambiguity, the title's clarity, and the legislative history, we read § 315(b) as requiring the Petitioner to be served with a *patent owner's* complaint to trigger the one-year time bar.

⁴ Despite holding *Click-to-Call* not controlling, the Federal Circuit did not resolve the time-bar issue in *Hamilton Beach Brands* for procedural reasons. 908 F.3d at 1337.

B. DISCRETION TO DENY INSTITUTION UNDER § 325(d)

35 U.S.C. § 325(d) provides that “[i]n determining whether to institute or order a proceeding . . . the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office.” Patent Owner asserts that we should exercise our § 325(d) discretion to decline institution because “[t]he Petition’s sole primary reference—Vishwanath—was expressly analyzed and considered by the Office during prosecution of the ’610 patent.” Prelim. Resp. 7.

We decline to exercise our discretion to deny the Petition under § 325(d). During prosecution, after the applicant added a limitation requiring an asymmetric compression algorithm, the Examiner, without any relevant discussion, allowed the challenged claims over Vishwanath. *See* Ex. 1002, 247, 416, 438–46. The Examiner did so even though Vishwanath explicitly describes using Lempel-Ziv compression, which the ’610 patent explicitly characterizes as “asymmetric.” *See* Ex. 1004, 6:62–67; Ex. 1001, 10:1–5. Notably absent from the prosecution history is any discussion or argument addressing whether Vishwanath teaches an asymmetric compression algorithm. Instead, as Petitioner notes, the Examiner appears “to have allowed the challenged claims over Vishwanath based on an improper assumption that Vishwanath does not disclose an ‘asymmetric’ compression algorithm.” Pet. 24. Given the prosecution history’s cursory analysis of the asymmetric compression issue and the ’610 patent’s clear concession that Lempel-Ziv compression is asymmetric, and in light of the discretionary nature of § 325(d), we do not apply our discretion to decline to institute *inter partes* review.

C. CLAIM CONSTRUCTION

Petitioner proposes that we construe “data packet” to include “at least a single unit of data, which may range in size from individual bits through complete files or collection of multiple files.” *Id.* at 14. Petitioner further proposes that we construe “parameter” to include “any recognizable data token or descriptor,” and “compression algorithms being asymmetric” to include “an algorithm where compression of data and decompression of that compressed data take different amounts of time.” *Id.* at 15–16. Patent Owner does not address Petitioner’s proposed constructions. Based on the current record, we find that no express claim construction is necessary to determine whether to institute *inter partes* review of the challenged claims. *See Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999) (“[O]nly those terms need be construed that are in controversy, and only to the extent necessary to resolve the controversy.”).

D. ASSERTED PRIOR ART

1. *Vishwanath (Ex. 1004)*

Vishwanath teaches a “[m]ethod and apparatus to deliver an application to a client through a transmission medium.” Ex. 1004, Abstract. Vishwanath describes “automatically modify[ing]” the application in view of the type of application and the transmission medium delivering the application, among other things. *Id.* at 2:8–35. Particularly relevant to this case, Vishwanath teaches “automatically select[ing] [a] compression algorithm in view of the application, the transmission medium and the client.” *Id.* at 6:33–35. Vishwanath further describes that “the parameters used to choose the compression algorithm include” such parameters as “[i]nput data type, whether it is text, graphics, natural images, audio or

video,” as well as “[t]he transmission medium . . . , which affects the bandwidth, error rate and latency.” *Id.* at 6:50–59.

2. *Ishii (Ex. 1005)*

Relevant to this case, Ishii teaches “select[ing] [a] data compression method suitable for [a] file considering the data attribute (whether it is text data or binary data such as programs and image data) and access frequency, included among the control information concerning the file.” Ex. 1005, 6:1–5.

3. *Kalra (Ex. 1006)*

Kalra is directed to “an apparatus and method for encoding, storing, transmitting and decoding multimedia information.” Ex. 1006, Abstract. Petitioner relies on Kalra for teaching (1) storing compressed data, *see* Pet. 66 (citing Ex. 1006, 4:9–15); (2) retrieving compressed data based on central processing unit (CPU) utilization, *see id.* at 67 (citing Ex. 1006, Abstract, 16:49–67, 19:56–62); and (3) retrieving compressed data based on communication channel throughput, *see id.* at 71 (citing Ex. 1006, 15:33–45, 19:46–64).

E. ASSERTED GROUNDS

1. *Ground 1: Anticipation of Claims 1, 6, 9, and 16 based on Vishwanath*

Petitioner contends Vishwanath anticipates claims 1, 6, 9 and 19. *Id.* at 26–41. Patent Owner does not address Petitioner’s anticipation contention in its Preliminary Response. On the current record, we determine that Petitioner has set forth a reasonable likelihood of succeeding on this challenge, as outlined below.

a. Claim 1

Claim 1 recites a “method comprising: determining, a parameter or an attribute of at least a portion of a data block having video or audio data.” Petitioner asserts Vishwanath teaches this limitation because it describes “receiving, at a server, a ‘client request’ for an application,” and explicitly discloses that the requested application can be “audio or video.” Pet. 26 (citing Ex. 1004, 4:13–37, 6:50–67). In addition, Vishwanath teaches that “parameters [are] used to choose the compression algorithm,” for the application. Ex. 1004, 6:50–51. As Petitioner notes, “A POSITA . . . would have understood that in order to consider the particular ‘parameters used to choose the compression algorithm,’ these parameters must be determined by the system.” Pet. 29.

Petitioner contends Vishwanath further teaches claim 1’s “selecting one or more compression algorithms from among a plurality of compression algorithms to apply to the at least the portion of the data block” because “Vishwanath’s adaptive-transmission transducer selects an ‘appropriate compression algorithm’ to compress the requested data from among ‘[a] number of compression algorithms[] applicable.’” Pet. 30 (citing Ex. 1004, 6:7–15, 6:32–67, Fig. 7).

For claim 1’s requirement that the recited selection must be “based upon the determined parameter or attribute and a throughput of a communication channel,” Petitioner explains that “Vishwanath’s adaptive-transmission transducer includes a ‘multimode compressor’ that ‘automatically selects the compression algorithm in view of the application, the transmission medium 154 and the client.’” *Id.* at 31 (quoting Ex. 1004, 6:33–35). Moreover, as Petitioner notes, Vishwanath teaches that its

“compression selection is based on ‘the bandwidth, acceptable error rates, and the latency of the transmission medium.’” *Id.* (citing Ex. 1004, 2:62–64, 6:50–67).

For the limitation requiring “at least one of the plurality of compression algorithms being asymmetric,” Petitioner explains Vishwanath teaches choosing a compression algorithm from among several algorithms, including “Lempel-Ziv (LZ),” which the ’610 patent explicitly recognizes is asymmetric. Pet. 32–34; *see* Ex. 1004, 6:62–67; Ex. 1001, 10:2–4.

For claim 1’s final limitation requiring “compressing the at least the portion of the data block with the selected compression algorithm after selecting the one or more compression algorithms,” Petitioner relies on Vishwanath’s teaching that “the multimode compressor ‘perform[s] the compression’” using the selected compression algorithm. Pet. 34 (quoting Ex. 1004, 7:1–12).

Based on its contentions, at this stage of the proceeding, we are persuaded that Petitioner has established sufficiently that Vishwanath discloses each limitation, and therefore anticipates, claim 1.

b. Remaining Claims and Grounds

In addition to claim 1, Petitioner asserts Vishwanath anticipates claims 6, 9, and 16. *Id.* at 35–41. In its Preliminary Response, Patent Owner does not challenge Petitioner’s substantive anticipation arguments. We have reviewed Petitioner’s contentions with respect to claims 6, 9, and 16, and determine that the Petition provides the requisite showing, at this stage of the proceeding, that Vishwanath discloses the subject matter of these claims. *See id.* Petitioner further asserts claims 1, 6, 9, and 16 would have been obvious over Vishwanath, *id.* at 41–44; claim 14 would have been

obvious over Vishwanath and Ishii, *id.* at 44–53; and claims 2, 8, 10–13, and 18 would have been obvious over Vishwanath and Kalra, *id.* at 53–78. Patent Owner does not challenge Petitioner’s substantive obviousness arguments in its Preliminary Response. We have reviewed Petitioner’s contentions with respect to its obviousness grounds and determine that, based on the current record, the Petition shows a reasonable likelihood that it would prevail with respect to its obviousness contentions. *See id.* at 41–78.

III. CONCLUSION

For the foregoing reasons, we institute trial on all of the challenged claims and grounds identified in the Petition. Any discussion of facts in this Decision is only for the purposes of institution and is not dispositive of any issue related to any ground on which we institute review. We note again that Patent Owner has not, at this stage of the proceeding, addressed Petitioner’s substantive patentability analysis and supporting evidence. The Board’s final determination will be based on the record as fully developed during trial.

IV. ORDER

Accordingly, it is:

ORDERED that pursuant to 35 U.S.C. § 314(a), an *inter partes* review of claims 1, 2, 6, 8–14, 16, and 18 of the ’610 patent is instituted, commencing on the entry date of this Decision; and

FURTHER ORDERED that pursuant to 35 U.S.C. § 314(c) and 37 C.F.R. § 42.4, notice is hereby given of the institution of a trial.

Case IPR2018-01331
Patent 8,867,610 B2

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