

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AMAZON.COM, INC., AMAZON.COM SERVICES LLC,
AMAZON WEB SERVICES, INC., and AUDIBLE, INC.,
Petitioner

v.

AUDIO POD IP, LLC,
Patent Owner

Case IPR2025-00757
U.S. Patent No. 10,091,266

**PATENT OWNER PRELIMINARY RESPONSE
UNDER 37 C.F.R. § 42.107(a)**

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

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I. INTRODUCTION

Patent Owner Audio Pod IP, LLC (“Audio Pod”) respectfully requests that Board deny institution of Petitioner Amazon.com, Inc.’s Petition for *Inter Partes* Review (IPR) of U.S. Patent No. 10,091,266 (“the ’266 patent”). Three entrepreneurial brothers and a friend, all with software backgrounds, invented server-based, segmented streaming for use with audio book technology. They did so to make it possible for the brothers’ aging mother to continue to enjoy her passion for reading as her eyesight failed. Realizing their inventions represented fundamental technology breakthroughs, they sought patent protection for their inventions and formed Audio Pod to bring their technology to market. Amazon met with Audio Pod and expressed interest in the technology. But Amazon then incorporated the technology into their products without even speaking with Audio Pod after the meeting. It established and expanded its dominant e-reader Kindle market position. That market presence thwarted all of Audio Pod’s efforts to build its business following its meeting with Amazon. Those realities, and the related IPRs, result from Amazon’s approach to use its nearly unlimited resources to best small, innovative entities.

The merits of the Petition are weak. The proposed invalidity Grounds are premised on claim construction positions that conflict with constructions that Amazon took in the parallel district court proceeding in the Eastern District of

Virginia (EDVA). Amazon does not acknowledge that discrepancy. It does not provide any justification for the inconsistency. Amazon's conclusory assertions regarding motivation to combine and reasonable expectation of success throughout the Petition only exacerbate the weakness of the challenge.

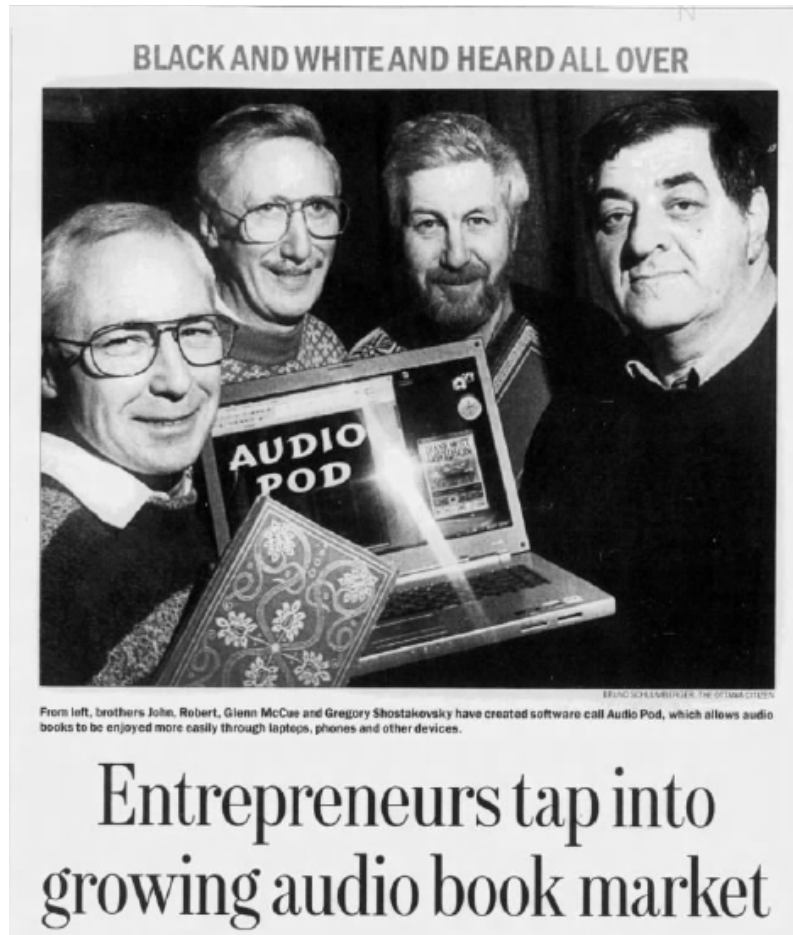
Further still, Amazon unsuccessfully attempts to break the priority chain of the '266 patent, but the failure to do so results in the asserted references not being prior art. For each of the asserted Grounds challenging the independent claims, Amazon has failed to show at least one element of the claims. That is true for many of the dependent claims as well, where Amazon provides only perfunctory discussion, simply referring back to earlier claims with little to no additional explanation for the claim language in the dependent claims.

Finally, given the many deficiencies affecting the asserted Grounds, even if the Board were to agree that Amazon has met its burden for a single claim or ground, the Board should exercise its discretion under the Board's informative *Chevron* and *Deeper* decisions, and deny institution here.

II. BACKGROUND

A. Audio Pod's founders invented key early media streaming technologies, including the inventions claimed in the '266 patent.

Audio Pod's innovative concepts and early technology development was headlined in The Ottawa Citizen newspaper in January 2008.



EX2003, 1.

The news story recounts that, in the late 1990s, “John McCue began looking for a way to help his mother, Monica, continue her lifelong love affair with literature in spite of her failing eyesight.” EX2003, 1; EX2015, ¶6. He teamed up with senior software architect, and co-founder, Gregory Shostakovsky, as well as his brothers, Robert McCue and Glenn McCue. EX2003, 1; EX2015, ¶6. All four had computer science backgrounds. EX2003, 1.

They created a brilliant solution—a server-based, virtual approach to streaming audio across multiple devices:

Say, for example, you are in an airport departure lounge in a WiFi hotspot listening to a podcast or an audio book....

... Then your flight is called and you may lose your wireless Internet service while airborne.

But even without a wireless connection, Audio Pod's technology will allow you to pick up that story again on the plane exactly where you left off.

This is possible because Audio Pod's memory manager retains the content and is able to deliver it to the user seamlessly, even on a different device.

The technology is unique because it utilizes a digital virtual representation of the audio stream. This virtual approach eliminates the delays associated with mass downloads that could easily take eight to 10 hours for larger books, and it also eliminates the network dependence used by streaming technologies

EX2003, 2; *see also* EX2015, ¶6.

According to Mr. McCue's 2008 interview, "[t]he hardest part in developing th[e] technology was devising a way to break up a media stream into a large number of manageable audio chunks that can then be played in perfect sequence."

EX2003, 2. Solving that problem unlocked a world of possibilities. "[T]he

successful result provides users with a seamless audio experience for bookmarking and memory management in a way that allows the delivery of ‘many, many media streams through very small devices using limited network resources’” *Id.* That benefit extended to any type of media stream, including, for example, handheld messaging. *Id.*

The patent claims constitute foundational technology that make multi-media, multi-device streaming possible.

B. Audio Pod disclosed their innovative technology to Amazon, but Amazon ignored their subsequent outreach attempting to partner or license, and Amazon instead implemented Audio Pod’s technology on its own.

The inventors formed Audio Pod Inc. in 2005. EX2015, ¶7; EX2001, ¶64; EX2002, ¶56. They had a working product, and in July 2007, the inventors had a lengthy meeting with Amazon and Brilliance Audio (an audiobook publisher acquired by Amazon in May 2007), who had expressed interest in Audio Pod’s technology. EX2015, ¶¶9-10; EX2001, ¶¶68-69; EX2002, ¶¶60-61.

A small group from Amazon and Brilliance agreed to meet with Audio Pod. EX2015, ¶9. The meeting was originally scheduled for one hour; in fact, the Amazon team initially expressed disbelief that the technology would work. EX2015, ¶¶9-11. But, when Audio Pod presented a working product, the meeting extended to the entire day—with more and more Amazon/Brilliance representatives joining as the day went on. EX2015, ¶¶10-11. By the end, there

was acknowledgement from the Amazon team that they had “never thought of using a central server.” EX2015, ¶11.

After the meeting, beyond a brief acknowledgement of a “thank you” email sent by the Audio Pod team, Amazon broke contact with Audio Pod, ignoring repeated attempts by Audio Pod to follow up after the meeting. EX2015, ¶12.

Amazon acquired Audible in 2008, and subsequently released “Whisper Sync for Voice” Kindle technology. *See* EX2013; EX2016. Through 2013, Audio Pod continued its efforts to partner with Amazon.

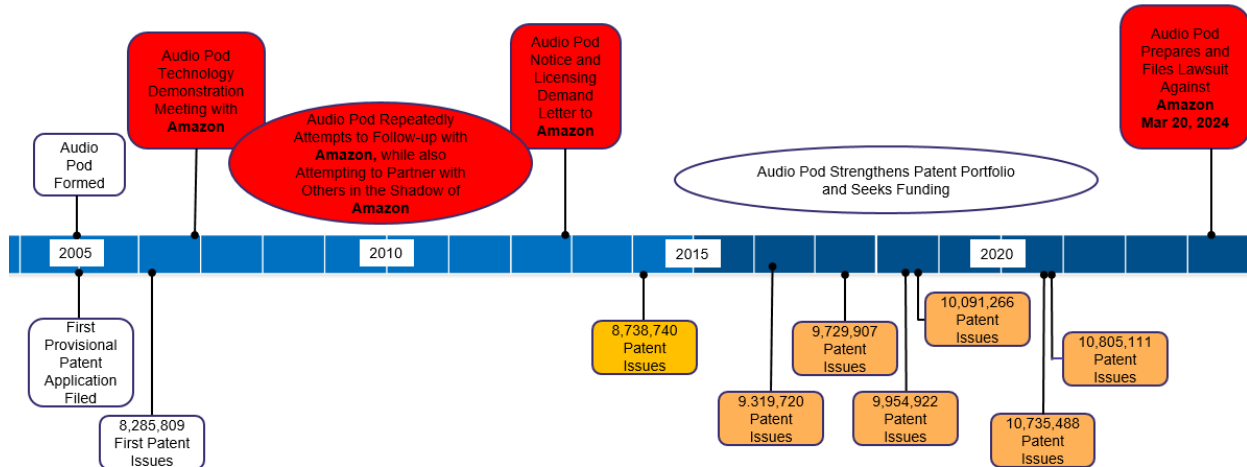
Audio Pod also marketed its technology to other companies in the industry, but Amazon, already a market giant, had cornered the market, limiting Audio Pod’s ability to compete. As Mr. McCue testifies:

It was common for us to present our technology and get the response “Amazon is already doing that” or concerns about having to compete with Amazon as a direct competitor.

EX2015, ¶17.

In sum, Amazon’s disregard for Audio Pod’s intellectual property led to Audio Pod’s infringement suit—a suit Audio Pod tried to avoid. The following timeline portrays the long road taken by Audio Pod to attempt to realize the benefit of its inventions in the face of Amazon’s stonewalling Audio Pod’s attempt to work

together, while bringing Amazon's strikingly similar and infringing audio book products to market. See EX2015, ¶¶6-17.



III. THE PETITION FAILS TO ESTABLISH A REASONABLE LIKELIHOOD OF PREVAILING ON ANY CHALLENGED CLAIM

Amazon cobbles together six references into four alleged Grounds of unpatentability. The Petition is fundamentally flawed, as Amazon improperly advances claim construction positions in this IPR inconsistent with positions taken in the parallel district court proceedings. Further, Amazon's obviousness analysis is fundamentally lacking. Amazon does not present a proper analysis under the *Graham* factors, nor does Amazon provide any reasoned analysis for its alleged motivations to combine the various references or as to reasonable expectation of success in making the combinations.

As to the specific challenges, Amazon fails to show the asserted references are available as prior art due to its failed attempt to break the priority chain of the

'266 patent. Amazon fails to show that the asserted combinations teach or render obvious all elements of the independent claims. Amazon also gives short shrift to the majority of the dependent claims, presenting only cursory analysis, if any at all, in alleging the dependent claims are obvious.

Based on the many deficiencies in the Petition described below, this IPR should be denied.

A. All Grounds: Amazon advances inconsistent claim constructions here and in the District Court.

Claims must be interpreted the same for invalidity and infringement: “It is axiomatic that claims are construed the same way for both invalidity and infringement.” *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1330 (Fed. Cir. 2003) (citing *W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 842 F.2d 1275, 1279 (Fed. Cir. 1988)). “A patent may not, like a ‘nose of wax,’ be twisted one way to avoid anticipation and another to find infringement.” *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1351 (Fed. Cir. 2001) (citing, among others, *White v. Dunbar*, 119 U.S. 47, 51 (1886)). Yet, Amazon attempts to do just that—applying a broader plain and ordinary meaning construction in this and related IPRs, while simultaneously proposing narrower constructions for several terms in the district court.

In particular, in this IPR, filed on March 19, 2025, Amazon asserted that “[n]o claim terms require construction.” Pet., 12. Just one month later, in the

district court, the parties jointly submitted their claim construction positions.

EX2007. Unlike in the Petition which argues no construction is necessary,¹ in the District Court, Amazon proposed constructions for several claim terms and argued that others are indefinite. EX2007. In fact, the EDVA court set a longer time-to-trial schedule based on Amazon's representation that it would conduct extensive claim construction proceedings, including introducing expert testimony.² EX2019; EX2010.

¹ Across all of the IPRs filed against Audio Pod's patents, Amazon has not proposed construction for a single claim term. *See* IPR2025-00765 Pet., 7-8; IPR2025-00768 Pet., 6; IPR2025-00769 Pet., 6; IPR2025-00774 Pet., 5; IPR2025-00777 Pet., 5; IPR2025-01003 Pet., 4; IPR2025-01041 Pet., 6. In the district court proceedings on the other hand, Amazon contends many terms require construction. *See, e.g.*, EX2007. Notably, some of these petitions were filed *after* Amazon's claim construction positions were submitted in the district court.

² The parties initially negotiated a schedule around an August 2025 *Markman* hearing and early 2026 trial. That schedule was pushed out when the Court could not schedule a *Markman* hearing until October 2025, and then a medical issue with Audio Pod's expert necessitated an additional extension to November 2025.

Amazon provides no explanation to justify the different positions taken in the two forums. That is improper. *Cf. Cambridge Mobile Telematics, Inc. v. Sfara, Inc.*, IPR2024-00952, Paper 12 (PTAB Dec. 13, 2024) (informative) (denying institution where petitioner argued for a means-plus-function construction in district court and a plain and ordinary meaning construction in the petition, but failed to explain the difference in claim construction positions).

Amazon puts Audio Pod and the Board in the untenable position of assessing Amazon's asserted Grounds without an understanding of Amazon's true position as to the scope of the challenged claims. Amazon's approach is fundamentally unfair, and results in a certainty of inconsistent results between the Board and the district court. *See Kiosoft Techs., LLC v. PayRange, Inc.*, IPR2021-00086, Paper 12 at 16 (PTAB Mar. 22, 2021) (petitioner and its expert advocated for different constructions at the district court and the PTAB).

Amazon's inconsistent claim construction positions is likely one of the reasons Amazon relies on a different expert for the IPRs (Ketan Mayer-Patel, Ph.D.) than it does in the underlying litigation (Dan Schonfeld, Ph.D.). Audio Pod's expert (Kevin Almeroth, Ph.D.) provided an expert declaration addressing claim construction in the underlying litigation. He was deposed for the better part of a day on those issues on July 9, 2025. And Dr. Schonfeld already provided two declarations related to claim construction. He will be deposed on July 22, 2025. All

that testimony arose from Amazon's positions on claim construction. Amazon neither identified nor addressed any of those positions in its various petitions.

B. All Grounds: Amazon's obviousness analysis is fundamentally lacking due to conclusory assertions regarding reasonable expectation of success and motivation to combine.

In addition to specific reasons discussed below (Sections III.D-F), Amazon's asserted Grounds are deficient for failing to establish a *prima facie* case of obviousness for the combination of references it presents. To show obviousness, Amazon must "demonstrate *both* that a skilled artisan would have been *motivated to combine* the teachings of the prior art references to achieve the claimed invention, and that the skilled artisan would have had a *reasonable expectation of success* in doing so." *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1367–68 (Fed. Cir. 2016) (internal citations omitted, emphasis added). To satisfy its burden, a petitioner must "articulate specific reasoning, based on evidence of record, to support the legal conclusion of obviousness"—"mere conclusory statements" will not suffice. *In re Magnum Oil Tools Int'l, Ltd.*, 829 F.3d 1364, 1380 (Fed. Cir. 2016). Here, Amazon's allegations both for motivation to combine and reasonable expectation of success are conclusory and insufficient.

1. Amazon's contentions regarding reasonable expectation of success are insufficient.

Amazon's contentions regarding reasonable expectation of success are insufficient. For example, as to claim 1, Amazon asserts:

A POSITA would have had a reasonable expectation of success when making this combination because Abecassis already discloses using an identifier at two devices and Drieu teaches how to transmit this identifier from one device to another. (EX-1002 ¶80.)

Pet., 21 (discussing Element 1[d][i]). And similarly for Element 1[f], the sole basis for an expectation of success provided is that “Abecassis already discloses synchronizing via servers and Drieu provides details about how that could be accomplished.” Pet., 25.

These allegations of reasonable expectation are legally insufficient. “Mere compatibility of the references is ... not sufficient” to support obviousness. *Johns Manville Corp. v. Knauf Insulation, Inc.*, IPR2018-00827, Paper 9 at 17 (PTAB Oct. 16, 2018) (citing *Personal Web Techs., LLC v. Apple, Inc.*, 848 F.3d 987, 994 (Fed. Cir. 2017) (denying institution based on lack of showing of expectation of success). Likewise, “[i]t does not suffice to simply be known. A reason for combining must exist.” *Virtek Vision Int’l ULC v. Assembly Guidance Sys., Inc.*, 97 F.4th 882, 888 (Fed. Cir. 2024) (reversing the Board’s obviousness determination).

Amazon’s contentions regarding reasonable expectation of success are similarly conclusory and deficient throughout the Petition’s four asserted Grounds. *See, e.g.*, Pet., 25 (Ground 1A, Element 1[d][ii]: “A POSITA would have had a reasonable expectation of success when making this combination because Abecassis already discloses synchronizing via servers and Drieu provides details

about how that could be accomplished.”), 33 (Ground 1A, Element 1[g]: “A POSITA would have had a reasonable expectation of success when making this combination because both Abecassis teaches a system for streaming media content and Barton teaches a method for storing media content in such a system.”), 50 (Ground 1B, claim 10: “A POSITA would have had a reasonable expectation of success when making this combination because both Abecassis and Walker disclose similar devices for displaying video content.”), 59 (Ground 2A, Element 1[f][iii]: “A POSITA would have reasonably expected success when combining McCue and Sharma because both systems render content across multiple devices.”), 69 (Ground 2B, claims 10-12: “A POSITA would have reasonably expected success because McCue and Walker disclose similar devices.”).

Amazon’s conclusory statements regarding a reasonable expectation of success are insufficient for institution. *See, e.g., NJOY, LLC v. JUUL Labs, Inc.*, IPR2024-00536, Paper 17 (PTAB Aug. 12, 2024) (denying institution where petitioner did not show a reasonable expectation of success in combining the asserted references); *Honeywell Int’l Inc. v. DSM IP Assets, B.V.*, IPR2024-00493, Paper 7 (PTAB Aug. 21, 2024) (same).

2. Amazon fails to perform a proper motivation to combine analysis under *Graham* for many dependent claims.

Likewise, for many of the dependent claims, Amazon fails to explain how or why a POSITA would have been motivated to implement the teachings of the

additional references into the *combination* asserted against claim 1. Instead, the Petition only addresses the combination with only a single reference of the combination asserted against the independent claims. *See, e.g.*, Pet., 48-50 (claim 10, discussing only how to combine Walker with Abecassis), 51 (claim 11, discussing only how to combine Walker with Abecassis), 51 (claim 12, discussing only how to combine Walker with Abecassis), and 68-69 (claims 10-12, discussing only how to combine Walker with McCue).

As such, Amazon has failed to perform a proper motivation to combine analysis under *Graham*. *See Graham v. John Deere Co.*, 383 U.S. 1 (1966) (“*Graham*”). The three key factual inquiries set forth in *Graham* for establishing obviousness under 35 U.S.C. § 103(a) are: (1) determining the scope and content of the prior art, (2) ascertaining the differences between the prior art and the claims at issue, and (3) resolving the level of ordinary skill in the pertinent art. *Graham* at 17–18. These factual inquiries must be tied together by “some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (quoting *In re Kahn*, 441 F.3d 977 at 988 (Fed. Cir. 2006)).

Here, Amazon’s motivation to combine arguments—or lack thereof—run afoul of the bedrock principles set forth in *Graham*. They fail to set forth the differences between the art and the claims, as required by the second factual

inquiry under *Graham*. The second *Graham* factor necessarily involves an analysis of what the references and claims teach, and what is missing, and “requires a comparison of the properly construed claim to the prior art.” *Enzo Biochem, Inc. v. Applera Corp.*, 599 F.3d 1325, 1332 (Fed. Cir. 2010). When a petitioner seeks to rely on a three-reference combination (References A, B, and C, for example), the second *Graham* factor requires an analysis of what is missing from the combination of References A and B compared to the claims before determining whether a motivation exists to add Reference C to that existing combination. *See, e.g., Palo Alto Networks, Inc. v. Centripetal Networks, LLC*, 122 F.4th 1378, 1386 (Fed. Cir. 2024) (*citing Randall Mfg. v. Rea*, 733 F.3d 1355, 1362 (Fed. Cir. 2013)) (holding that when analyzing a proposed combination of references, the references sought to be combined “must be read together, not in isolation”). Those differences are necessary to articulate which portions of the references a POSITA would have sought to combine or modify. For example, the motivation to use a different memory storage device in reference B with reference A would be far different than the motivation to use a transmission protocol in reference B with reference A.

If a proposed ground of invalidity fails to identify the differences between the existing combination of prior-art references (e.g., combination of References A and B) and the claimed invention, then such a ground has necessarily failed to establish a *prima facie* case of obviousness, and the petition should be denied. *Palo*

Alto Networks, 122 F.4th at 1386; *see also Apple, Inc. v. ContentGuard Holdings, Inc.*, IPR2015-00355, Paper 9 at 9 (PTAB June 26, 2015) (finding no reasonable likelihood of prevailing because “the Petition does not identify sufficiently the differences between the claimed invention and the prior art, or how the prior art teachings are to be modified or combined, if at all”). Therefore, the Board should deny institution because the Petition fails to satisfy at least the second factual inquiry under *Graham. Enzo Biochem*, 599 F.3d at 1332.

3. Other alleged motivations are purely conclusory.

Unpatentability determinations on obviousness grounds “cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *TQ Delta, LLC v. Cisco Sys., Inc.*, 942 F.3d 1352, 1359 (Fed. Cir. 2019) (citing *KSR*, 550 U.S. at 418). “This requirement is as much rooted in the Administrative Procedure Act, which ensures due process and non-arbitrary decisionmaking, as it is in § 103.” *TQ Delta*, 942 F.3d at 1359 (citing *Kahn*, 441 F.3d at 988).

Accordingly, “a conclusory assertion with no explanation is inadequate to support a finding that there would have been a motivation to combine’ because ‘[t]his type of finding, without more, tracks the *ex post* reasoning *KSR* warned of and fails to identify any actual *reason* why a skilled artisan would have combined the elements

in the manner claimed.” *TQ Delta*, 942 F.3d at 1359 (citing *In re Van Os*, 844 F.3d 1359, 1361–62 (Fed. Cir. 2017)).

Amazon’s motivations for many of the dependent claims reduce to an assertion that the additional feature “was known in the art.” A non-exhaustive list of examples of the Petition’s perfunctory analysis is provided below:

- Claim 13, Ground 1A, the entire motivation to combine analysis alleges: “Even if Abecassis did not disclose [the missing elements], Drieu discloses such a system because it discloses multiple client devices accessing a server acting as a network library. (*Supra* §VII.A.7). And, it would have been obvious to include these features in Abecassis.” Pet., 47-48.
- Claim 10, Ground 1B, the entire motivation to motivation to combine analysis alleges: “A POSITA would have understood in view of Walker that different platforms can have different rendering capabilities, such that some may not be able to render certain types of content. (EX-1002 ¶181; EX-1023 ¶[0061].) Incorporating the capability-dependent content selection of Walker would avoid presenting users with content their devices cannot render. (EX-1002 ¶181.)” Pet., 49.
- Claim 11, Ground 1B, Amazon provides no motivation to combine analysis, it simply concludes as follows: “Claim 11 merely combines

- limitations recited in claims 7-10, and is therefore obvious for the same reasons as claims 7-10. Thus, Abecassis alone, or in combination with Walker, discloses the additional limitations of claim 11, and Abecassis, Drieu, Barton, and Walker render obvious claim 11. (EX-1002 ¶¶186-87.)” Pet., 51.
- Claim 12, Ground 1B, Amazon provides no motivation to combine analysis, it simple concludes as follows: “Thus, Abecassis and Walker teach two client devices having different rendering capabilities, thereby disclosing the additional limitation of claim 12. (EX-1002 ¶¶188-91.) Accordingly, Abecassis, Drieu, Barton, and Walker render obvious claim 12. (*Id.*)” Pet., 51.
 - Claim 9, Ground 2A, the entire motivation to combine analysis alleges: “It would have been obvious in view of Sharma to render the different types of digital content on the second client device for the reasons discussed for claim 1. (*Supra* §IX.A.10.)” Pet., 67.
 - Claims 10-12, Ground 2A, the entire motivation to combine analysis lumps three dependent claims together and merely states: “Thus, sending content only to devices that can display that content as taught by Walker would avoid presenting users with content their devices cannot render.

(EX-1002 ¶284.)” Pet., 68-69; *see also* EX1002, ¶284 (mirroring petition).

None of these statements is sufficient to meet Amazon’s burden regarding motivation to combine. *TQ Delta*, 942 F.3d at 1359. “It does not suffice to simply be known. A reason for combining must exist.” *Virtek*, 97 F.4th at 888 (reversing the Board’s obviousness determination).

Accordingly, Amazon has not met its burden to show a motivation to combine the references in any of these Grounds. *Magnum Oil*, 829 F.3d at 1380.

C. All Grounds: Amazon’s contentions that the ’266 patent is not entitled to an earlier priority date fail.

Amazon’s primary references do not pre-date the ’266 patent’s priority chain. Rather, all of the asserted Grounds are premised on Amazon’s contention that the ’266 patent is not entitled to the priority date of its parent application. *See* Pet., 8-11. But these contentions fail. And without breaking the priority chain, neither of Amazon’s primary references (Abecassis and McCue) are available as prior art and the asserted Grounds fail.

Amazon contends “the [parent] ’756 application lacks written description support for the claim limitation that recites rendering content across different devices ‘simultaneously and in synchronization.’” Pet., 9-10. But, as the Examiner already correctly determined during prosecution, there is sufficient support in the specification for the “simultaneously and in synchronization” language Amazon

alleges is not supported. Thus, Amazon's contentions that the '266 patent is not entitled to priority fail. Consequently, at least Abecassis and McCue are not available as prior art.

1. The Examiner determined that the claim language Amazon challenges is supported by the specification.

During prosecution, Applicant amended independent claims 1 and 14 during prosecution to add, *inter alia*, the following, including the challenged "simultaneously and in synchronization" language:

wherein the secondary digital content is ancillary to the primary digital content, and wherein the secondary digital content is rendered on the second client device *simultaneously and in synchronization* with the rendering of the primary digital content on the first client device.

See EX1095, 111-120 (Oct. 17, 2017 Amendment) (emphasis added). Applicant cited to paragraphs [045] and [093]-[097] as examples of support in the specification: "Support for these amendments is found at paragraphs [045] and [093]-[097] of the original specification, for example." EX1095, 116. After further prosecution, the Examiner allowed the claims, as amended. EX1095, 23-27.

2. Amazon's argument against priority is incomplete and conclusory.

Amazon asserts that "the '765 application contains no disclosure of rendering primary and secondary content on devices 'simultaneously and in synchronization,' as claimed." Pet., 10-11. But the Petition discusses only six

paragraphs in the specification: “Paragraph 45” and “Paragraphs 93-97”

Pet., 10. Amazon does not address the remainder of the specification or make any assertion about whether it supports this claim language. The entire specification must be considered in assessing whether there is support. “[F]ailure to consider the totality of the record in assessing written description constitutes legal error.” *In re Tropp*, 748 F. App’x 1022, 1023 (Fed. Cir. 2018). Amazon’s analysis is thus fundamentally flawed.

And regarding the six paragraphs Amazon does discuss, Amazon provides only conclusory arguments. For example, the Petition quotes paragraph 45 and then simply concludes, without explanation, that “[n]othing in that paragraph relates to presenting content on two different devices ‘simultaneously and in synchronization’ as recited in each challenged claim.” Pet., 10. Even more conclusory, the Petition addresses the other five paragraphs together. The only non-conclusory statement is an ancillary summary that “[t]he [cited] paragraphs correspond to rows on the table discussing illustrations, ancillary content, and advertisements.” Pet., 10. Amazon then concludes, again without explanation, that “[t]he rows contain no disclosure of how those types of information would be presented at all, let alone any disclosure of presenting content across two different devices ‘simultaneously and in synchronization.’” Pet., 10-11. The Petition contains no reasoned analysis. Nor does the supporting declaration, which merely

repeats what is in the Petition. Pet., 11 (citing EX1002 ¶47); *Xerox Corp. v. Bytemark, Inc.*, IPR2022-00624, Paper 9 at 15 (PTAB Aug. 24, 2022) (repeating “verbatim” conclusory assertions from the Petition in a declaration is conclusory and unsupported, and therefore entitled to little weight).

At most, the Petition establishes that the exact phrase “simultaneously and in synchronization” does not appear in the cited disclosures. But the Federal Circuit has recognized that “the prior application need not describe the claimed subject matter in exactly the same terms as used in the claims” *Eiselstein v. Frank*, 52 F.3d 1035, 1038 (Fed. Cir. 1995). “[T]he exact terms need not be used *in haec verba*” *Lockwood v. Am. Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997). Instead, “the specification must contain an equivalent description of the claimed subject matter.” *Id.* It can do that by “such descriptive means as words, structures, figures, diagrams, formulas, etc., that fully set forth the claimed invention.” *Id.* The Petition contains no analysis in this regard and is therefore deficient.

Thus, the Petition fails to sufficiently establish that the specification does not support the claimed subject matter.

3. The claims are supported by the disclosure in the parent '756 application.

Amazon admits that the paragraphs applicant referenced during prosecution (i.e., ¶¶45, 93-97) disclose a “virtual audio stream descriptor” that “includes descriptive details used to describe the content of [an] audio stream,” and “internal

media marks, illustrations related to the audio stream, and/or internal advertising.”

Pet., 10. Amazon further acknowledges that applicant pointed the Examiner to specific portions of Table 1. *Id.* Table 1 from the as-filed parent ’756 application is reproduced below.

[0067] Information Type	[0068] Content
[0069] Administrative	[0070] Contains information, structures and files that are used to facilitate access to media contained within the library and maintain the operational environment status of the client software.
[0071] Announcements	[0072] Contains announcements that could be used in a number of ways, typically to inform users and keep them up to date on current or upcoming events or news.
[0073] Server List	[0074] Contains the primary server site and a list of library mirror sites capable of maintaining audio stream continuity for the consumer in the event of degraded or interrupted service.
[0075] Performance History	[0076] Contains a list of historical throughput performance and failure rate metrics for the library primary and mirror sites. Present only on the client platform.
[0077] Updates	[0078] Contains the actual files and information needed to perform network-based updates while online using automated routines provided.
[0079] Catalog Index	[0080] Contains the cross-reference information needed to access subordinate catalog indexes and to access virtual audio stream descriptors.
[0081] Virtual Reference	[0082] Contains information, structures and files used to provide access to and delivery of specific audio streams.
[0083] Bookmark	[0084] Contains the information needed to restart a specific audio stream at a specific point.
[0085] Virtual Audio Stream	[0086] Contains the information that describes all aspects of an audio stream and the information needed to access and use

Descriptor		the actual audio stream.
[0087] Cover Art Image		[0088] Contains a graphic or image that is used to represent the entire audio stream to the user in their own mind similar to the task accomplished by the cover art graphics on a printed book.
[0089] Actual audio		[0090] Contains the actual media content and supportive graphics and/or audio/video content
[0091] Actual audio Stream		[0092] Contains one or more small audio files that comprise the entire audio stream and that when played in order form a seamless audio experience.
[0093] Illustrations		[0094] If present, contains one or more graphic, image, video or audio/video portions of multimedia content intended for use with and in support of the actual audio stream.
[0095] Ancillary		[0096] Contains other information, structures and files used in the delivery of content not considered actual content within audio streams.
[0097] Advertisements		[0098] If present, contains one or more graphic, image, video or audio/video portions of multimedia content intended to be used before, during and after presentation of any audio stream subject to the requirements described in the virtual audio stream descriptor.

Table 1. Various types of information, structures, and files

EX1050, ¶¶67-98.

The information in Table 1 teaches rendering multiple different streams (synchronized with one another) at the same time (simultaneously). For example, paragraph 98 states that “one *or more* graphic, image, video or audio/video portions of multimedia content” are used “during” the audio stream based upon use of the virtual audio stream descriptor. EX1050, ¶98 (emphasis added). Table 1 also includes the “Virtual Audio Stream Descriptor” that is instrumental to simultaneous synchronization. EX1050, ¶¶85-86. Moreover, Table 1 describes how the system indexes various content (cover art, audio, supportive graphics, audio/video content, illustrations, other ancillary content, advertisements, and so on). EX1050, ¶¶87-98.

The specification also describes how the virtual audio stream descriptor ties those things together:

Optionally, the virtual audio stream descriptor 124 also includes internal media marks, illustrations related to the audio stream, and/or internal advertising. Internal media marks are used to identify a *specific point in time* in the audio stream that is offset from the beginning of the audio stream. More specifically, they generally point to a *time offset associated* with some user readable tag such as a table of contents, an index, a list of tables, a list of figures, footnotes, quotations, a list of illustrations, etc. Illustrations related to the audio stream and/or internal advertising may include graphics, static images, moving images, and/or other audiovisual content that is displayed for a fixed duration.

EX1050, ¶45 (emphasis added). And Figures 5a–6 illustrate how the content are linked for rendering via the virtual stream descriptor file. These figures illustrate the Virtual Audio Stream Descriptor, as well as, for example, audio stream, illustrations, and advertisements. EX1001, FIG. 6:

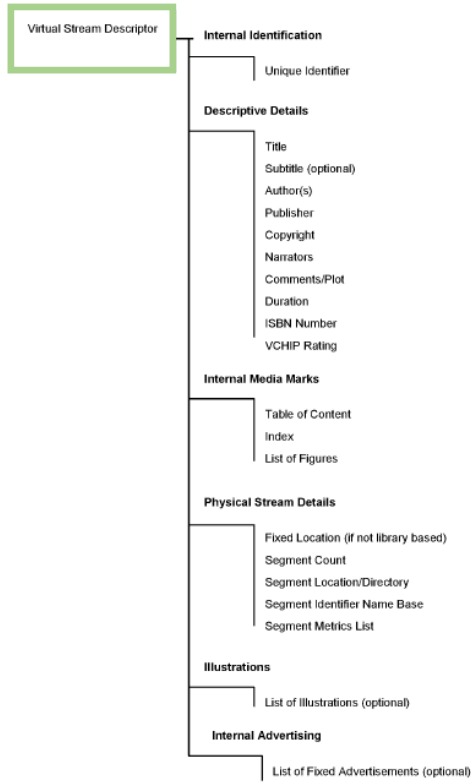


Fig. 5c

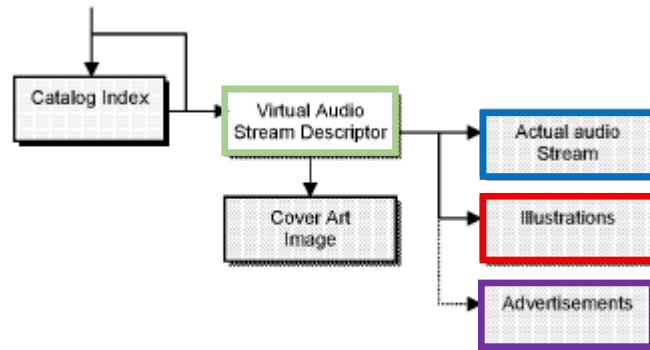


Fig. 6

EX1050, FIGs. 5c, 6 (annotated).

As described in the parent '756 specification, the streams are rendered simultaneously and in synchronization using time information:

The desired position within the actual audio stream is then ascertained. The default position is assumed to correspond a time offset of zero. If the method of selection was a bookmark, or an internal media mark, then the offset position is obtained from that structure. The offset is validated to be in the range from zero to the maximum duration of the audio stream, a value obtained from the virtual audio stream descriptor. The time offset is compared against the list of small audio file metrics stored in the virtual audio stream descriptor. When the time offset falls between the start and end times of a specific small audio file, that small audio file is identified as the

target small audio file. A local time offset is calculated by subtracting the start time of that small audio file from the time offset that was the subject of the search. This local offset is retained for use when positioning the target small audio file.

EX1050, ¶149.

Confirming the understanding that streams can be rendered simultaneously and in synchronization, the parent '756 specification describes that the inventions solve problems associated with *three* different use cases (indicated by “and/or”): “Tracking problems also develop if the users audio player automatically changes files, if the user is listening to multiple audio streams and/or if the user listens to audio streams on more than one client device ...” EX1050, ¶10. In short, it allows a user to listen to multiple audio streams *and* audio streams on more than one client device. *Id.*

* * *

Accordingly, the Petition is deficient because 1) Amazon’s conclusory arguments fail to demonstrate that the '266 patent is not entitled to the priority date of its parent application, so Amazon has not shown the asserted art is prior art to the '266 patent; and 2) the parent '756 specification does, in fact, support the disputed claim element. The Petition should be denied.

D. Claims 1-13, Grounds 1A and 1B.

Independent claim 1 recites “determining on the first client device *an identifier* corresponding to the primary digital content, wherein *the identifier identifies a descriptor* of the primary content.” EX1001, 16:32-34 (emphasis added). Independent claim 1 further recites “rendering on the second client device at least a portion of secondary other digital content associated with the primary digital content by *using the descriptor* and the first position.” EX1001, 16:43-46 (emphasis added). Independent claim 13 recites similar features. *See* EX1001, 18:5-43; *see also* Pet., 46-47 (for claim 13, referring back to Amazon’s analysis of claim 1).

Amazon fails to sufficiently show that the combination of Abecassis, Drieu, and Barton teaches or renders obvious either of these claim elements.

First, Amazon fails to demonstrate that Abecassis teaches or suggests “determining an *identifier* corresponding to primary content, wherein the *identifier identifies a descriptor of the primary content*.” Amazon contends that Abecassis’s “video ID” and “video map” are the claimed “identifier” and “descriptor,” respectively. Pet., 16-17.

Amazon contends “Abecassis’s ‘video map’ is a descriptor of the primary content.” Pet., 16. Abecassis discloses a “video map” that is distinct from the “descriptor.” EX1020, ¶67 (“A video map’s data may comprise, for example: (i) a

descriptor; ...” (emphasis added)). In other words, the descriptor in Abecassis is (only sometimes) part of the video map. But the Petition is inconsistent in the discussion of Abecassis’s “video map” vis-à-vis the claimed “descriptor.” Rather, the discussion ties them together at some points. Pet., 2, 15, 16 (“Abecassis’s ‘video map’ is a descriptor” (emphasis added)), 17, 19, 25-26, 28, 30, 37-38, 40-41. And acknowledges that they are distinct at others: “The video map comprises a ‘descriptor’ and a ‘linkage among segments.’” Pet., 16 (emphasis added); *see also id.*, 26. The lack of clarity in the Petition is insufficient to meet Amazon’s burden. *Intelligent Bio-Sys.*, 821 F.3d at 1369 (“It is of the utmost importance that petitioners in the IPR proceedings adhere to the requirement that the initial petition identify ‘with particularity’ the ‘evidence that supports the grounds for the challenge to each claim.’”).

And Amazon never explains where the alleged “identifier” (i.e., Abecassis’s “video ID”) fits in. Rather, Amazon concludes, without explanation, that “Abecassis discloses an identifier (video ID) identifies a descriptor (map) of the primary content (video).” Pet., 17. But, Abecassis’s video ID (the alleged identifier) identifies a particular video (the alleged primary content) as opposed to the video map (the alleged descriptor). EX1020, ¶¶86 (“Upon a playing of a video, the control program causes the reading of the video’s identifier from the video source”), 261 (“Following user selection of a video or a plurality of videos, the

video ID(s) are obtained 1202 to determine if a map and other data is available for the video(s) 1203.”). Abecassis’s video map and video are distinct: “A video map may be provided with, or separate from the video’s video and audio data.”

EX1020, ¶86. The Petition does not address that distinction. Thus, there is no basis on which to conclude that the video ID of Abecassis *identifies* a video map.

Relatedly, Amazon further fails to demonstrate that Abecassis teaches or suggests “rendering ... secondary other digital content associated with the primary digital content by *using the descriptor* and the first position.” The Petition asserts that “Abecassis’s video map contains the same information as the ‘descriptor’ in the ’266 patent” and lists a number of examples. Pet., 17. But it fails to describe how the video map is *used*, let alone how it is used to “render[] ... secondary other digital content” as recited in the claims. Amazon provides a string cite that crosses many different embodiments. Pet., 27-28 (citing EX1020, ¶¶105, 114, 115, 129, 141-142, 193-194). The only mention of rendering *using* the video map is contained in a conclusory parenthetical in the middle of that string-cite: “¶[0105] (secondary video content rendered using video map).” Pet., 28. This is insufficient. *In re Stepan Co.*, 868 F.3d 1342, 1346 n.1 (Fed. Cir. 2017) (“Whether a rejection is based on combining disclosures from multiple references, combining multiple embodiments from a single reference, or selecting from large lists of elements in a single reference, there must be a motivation to make the combination and a

reasonable expectation that such a combination would be successful, otherwise a skilled artisan would not arrive at the claimed combination.”); *Intelligent Bio-Sys.*, 821 F.3d at 1369 (the Petition must identify the evidence supporting the grounds “with particularity”).

Accordingly, Amazon has not demonstrated that Abecassis teaches or suggests the claimed “identifier [that] identifies a descriptor of the primary content” or “rendering ... secondary other digital content associated with the primary digital content by *using the descriptor* and the first position” recited in independent claims 1 and 13. Therefore, Grounds 1A-1B fail to demonstrate that the claims are unpatentable for at least this reason.

E. Claims 1-13, Grounds 2A and 2B.

Amazon asserts that “McCue does not disclose rendering secondary content on the second device ‘simultaneously and in synchronization with the rendering of the primary digital content on the first client device.’” Pet., 57. Instead, Amazon relies exclusively on Sharma as teaching this limitation of claims 1 and 13.

Amazon relies on Sharma to disclose the fact of a second device and rendering content on the second device. Pet., 57-60. But the claims require much more than simply a second device. Amazon relies on a “synchronization manager” from Sharma, but does not describe what it is, how it works, or why a POSITA

would have used it instead of McCue's simultaneous display functionality. Pet.,
57-58.

Further, the Petition provides no argument or explanation related at least to
the underlined portions of the claim below:

- [1[d]] transferring the identifier and the first position from the first client
device to a *second client device* via a network accessible library;
- [1[e]] downloading the descriptor from the network accessible library to the
second client device by using the identifier;
- [1[f]] rendering on the *second client device* at least a portion of secondary
other digital content associated with the primary digital content by using
the descriptor and the first position, wherein the secondary digital content
is ancillary to the primary digital content, and wherein the secondary
digital content is rendered on the *second client device* simultaneously and
in synchronization with the rendering of the primary digital content on
the first client device;
- ...
- [1[i]] identifying content in the secondary digital content that is related to
the range of content surrounding the first position in the primary digital
content as content to be retained; and
- [1[j]] releasing storage resources allocated to all content of the secondary
digital content that is not identified as content to be retained on the
second client device.

EX1001, Cl. 1.

For Element 1[e], the discussion focuses solely on McCue's disclosure,
which is inconsistent with the Petition's theory that Sharma teaches the claimed

second device. *See* Pet., 55. And for Elements 1[f], 1[i], and 1[j], the Petition quickly glosses over the limitations addressing identifying, retaining, and releasing content on a second device, based upon recited similar functions in the first device. It addresses, for example, limitations 1[i] and 1[j] in a single paragraph. Here, the Petition points to McCue's memory management of first and second content (implemented on the same device, Pet., 57), and contends it would have been obvious to do so using Sharma's second device, Pet., 61-62.

The Petition, however, provides no argument or reasoned basis for interrelating the two devices and content as recited in the emphasized portions below:

First device and primary digital content:

identifying a range of content surrounding the first position in the primary digital content as content to be retained;
releasing storage resources allocated to all content of the primary digital content that is not identified as content to be retained on the first client device;

Second device and secondary digital content:

identifying content in the secondary digital content *that is related to the range of content surrounding the first position in the primary digital content* as content to be retained; and
releasing storage resources allocated to all content of the secondary digital content *that is not identified as content to be retained* on the second client device.

EX1001, Cl. 1.

In other words, the claim language specifically requires identifying content to be retained in a particular way, i.e., as “content in the secondary digital content *that is related to the range of content surrounding the first position in the primary digital content.*” Amazon’s contentions simply alleged that it would have been obvious to repeat the retaining and releasing process from the first device in McCue on a second device. Pet., 61. But nothing in the discussion connects the retained/released content of the secondary digital content to the retained/released content of the primary digital content in any way, let alone in the manner required by the claims.

Amazon’s conclusory arguments simply ignore limitations of the claims and are insufficient to meet its burden for institution. *Magnum Oil Tools*, 829 F.3d at 1380; *Intelligent Bio-Sys.*, 821 F.3d at 1369.

F. Amazon gives the dependent claims short shrift.

Amazon’s analysis for many of the dependent claims is completely lacking, providing only perfunctory discussion. Audio Pod provides a non-exhaustive list of examples here.

For example, for several dependent claims, the Petition provides little to no independent analysis, simply referring back to prior discussion provided in connection with the earlier claims. *See* Pet., 40-42 (ground 1A, claim 5), 51 (ground 1A, claim 11), 65 (ground 2A, claim 5), 65 (ground 2A, claim 6), 66

(ground 2A, claim 7), 67 (ground 2A, claim 11). “[T]he presence of a dependent claim that adds a particular limitation raises a presumption that the limitation in question is not found in the independent claim.” *Acumed LLC v. Stryker Corp.*, 483 F.3d 800, 806 (Fed. Cir. 2007) (quoting *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 910 (Fed. Cir. 2004)). But Amazon provides little to no additional explanation for these dependent claims.

IV. CONSERVATION OF RESOURCES

If the Board finds that Amazon fails to meet its burden for less than all of the Challenged Claims and/or proposed Grounds, the Board should deny institution to conserve resources.

Audio Pod identifies numerous deficiencies in Amazon’s arguments in the discussion above. Should the Board determine that Amazon met its burden for some claims or Grounds, but failed to meet its burden for other claims or Grounds, the Board should still deny institution to conserve the Board’s valuable resources. *See* Interim Processes for PTAB Workload Management Memorandum (March 26, 2025) (“March 26, 2025 Memo”), 3; *Chevron Oronite Co. LLC v. Infineum USA L.P.*, IPR2018-00923, Paper 9 at 10–11 (PTAB Nov. 7, 2018) (informative); *Deeper, UAB v. Vexilar, Inc.*, IPR2018-01310, Paper 7 (PTAB Jan. 24, 2019) (informative); *see also* EX2008, FAQ9 (Board panel may address discretionary considerations “where the petition presents an insufficient number of challenges

that meet the reasonable likelihood standard indicating that institution is an inefficient use of resources, as explained in” *Chevron and Deeper*), FAQ11.

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.” But even when a petitioner demonstrates a reasonable likelihood of prevailing with respect to one or more claims, institution of review remains discretionary. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1356 (2018) (“[Section] 314(a) invests the Director with discretion on the question whether to institute review” (emphasis omitted)); *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1367 (Fed. Cir. 2016) (“[T]he PTO is permitted, but never compelled, to institute an IPR proceeding.”). 35 U.S.C. § 316(b) also provides that, when determining whether to exercise its discretion, the Board should consider the effect of any regulations on “the efficient administration of the Office [and] the ability of the Office to timely complete proceedings.”

Additionally, 37 C.F.R. § 42.1(b) provides that the Board should also take into account the requirement to construe the rules to “secure the just, speedy, and inexpensive resolution of every proceeding.” The Trial Practice Guide also explains that the Board may consider the number of claims and grounds that meet and do not meet the reasonable likelihood standard when deciding whether to

institute *inter partes* review under 35 U.S.C. § 314(a). Patent Trial and Appeal Board Consolidated Trial Practice Guide November 2019, p. 64 (Nov. 20, 2019), available at <https://www.uspto.gov/TrialPracticeGuideConsolidated> (“CTPG”) (“[T]he panel will evaluate all the challenges and determine whether, in the interests of efficient administration of the Office and integrity of the patent system, the entire petition should be denied.”).

Here, should the Board determine that Amazon failed to meet its burden of establishing unpatentability for some but fewer than all of the challenged claims of the '266 patent as discussed in Section III, the Petition should still be denied in order to conserve the Board's valuable time and resources. March 26, 2025 Memo, 3; *Deeper*, IPR2018-01310, Paper 7 at 43 (finding that because petitioner only demonstrated a reasonable likelihood of prevailing with respect to a subset of the 23 challenged claims, “instituting a trial with respect to all twenty-three claims ... would not be an efficient use of the Board's time and resources”). Similarly, should the Board determine that Amazon has failed to meet its burden of establishing unpatentability for some but not all Grounds, the Petition should again be denied in order to conserve the Board's valuable time and resources. March 26, 2025 Memo, 3; CTPG, 64; 35 U.S.C. § 316(b); 37 C.F.R. § 42.1(b).

V. CONCLUSION

The Petition fails to show a reasonable likelihood that any of the challenged claims is unpatentable as obvious in view of the cited art and, therefore, the Board should deny institution.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT (37 C.F.R. § 42.24(d))

1. This Patent Owner Preliminary Response complies with the type-volume limitation of 14,000 words, comprising 7,585 words, excluding the parts exempted by 37 C.F.R. § 42.24(a)(1).

2. This Patent Owner Preliminary Response complies with the general format requirements of 37 C.F.R. § 42.6(a) and has been prepared using Microsoft® Word 2016 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE (37 C.F.R. § 42.6(e))

I certify that the above-captioned **PATENT OWNER PRELIMINARY RESPONSE UNDER 37 C.F.R. § 42.107(a)** was served in its entirety on July 16, 2025, upon the following parties via electronic mail:

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