Case No. 16-1123

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PERSONAL AUDIO, LLC

Appellant,

v.

ELECTRONIC FRONTIER FOUNDATION,

Appellee.

Appeal from the United States Patent and Trademark Office,
Patent Trial and Appeal Board, No. IPR2014-0070

Response Brief of Appellee Electronic Frontier Foundation

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for Appellee, Electronic Frontier Foundation certifies that:

1.   The full name of the every party represented by me is:

Electronic Frontier Foundation

2.   The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None.

3.   All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by me are:

None.

4.   The name of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or are expected to appear in this Court are: Richard Pettus, Heath Brigg, Greenberg Traurig; Vera Ranieri, EFF

February 25, 2016   /s/*Nicholas A. Brown*
                                                      Nicholas A. Brown

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STATEMENT OF RELATED CASES

The Electronic Frontier Foundation (EFF) agrees with Personal Audio that no appeal in or from the same proceeding was previously before this or any other appellate court. The patent at issue in this appeal, U.S. Patent No. 8,112,504 ("the '504 patent") is currently asserted in *Personal Audio, LLC v. CBS Corp.*, No. 2:13-cv-270 (E.D. Tex. filed Apr. 11, 2013). However, EFF is not, nor has it ever been, a party to that case or any other litigation brought by Personal Audio. EFF takes no position as to the extent this appeal will affect that case other than as discussed below.

STATEMENT OF THE ISSUES

1. Is Personal Audio entitled to request reversal of the Board's claim constructions after explicitly stating to the Board and EFF that claim construction was "not material" to its positions?

2. Did the Board err in construing "episode" to include a single news story distributed as part of a group of news stories, when the specification explains that an episode can be a single "news story" distributed as part of a group of "world news" stories?

3. Is reversal required by Personal Audio's newly raised argument that the "currently available episodes in said series of episodes" must include episodes that were distributed "at different times"?

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4. Is reversal required by Personal Audio's newly raised argument that the claims require at least two processors, when this interpretation would exclude the preferred embodiment?

5. Is the Board's finding of obviousness erroneous because it did not address in detail an issue rendered moot by its construction of "episode"?

6. Should the Board's finding that Personal Audio waived its Seventh Amendment argument be reversed when Personal Audio did not raise that argument until after the Board's decision on the merits, and in any event this Court has already resolved the same Seventh Amendment issue against Personal Audio?

<div align="center">STATEMENT OF FACTS</div>

I.   Personal Audio's '504 Patent

The '504 patent describes an audio player and a "host computer" that distributes audio content to an audio player. The Board's decision contains an apt summary of the '504 patent as it relates to the claims at issue, independent claim 31 and dependent claims 32-35. A3-A4. Independent claim 31 is reproduced below:

> 31. Apparatus for disseminating a series of episodes represented by media files via the Internet as said episodes become available, said apparatus comprising:
>
> one or more data storage servers,
>
> one or more communication interfaces connected to the Internet for receiving requests received from remotely located client devices, and for responding to each given one of said requests by downloading a

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data file identified by a URL specified by said given one of said requests to the requesting client device,

one or more processors coupled to said one or more data storage servers and to said one or more communications interfaces for:

storing one or more media files representing each episode as said one or more media files become available, each of said one or more media files being stored at a storage location specified by a unique episode URL;

from time to time, as new episodes represented in said series of episodes become available,

storing an updated version of a compilation file in one of said one or more data storage servers at a storage location identified by a predetermined URL,

said updated version of said compilation file containing attribute data describing currently available episodes in said series of episodes,

said attribute data for each given one of said currently available episodes including displayable text describing said given one of said currently available episodes and one or more episode URLs specifying the storage locations of one or more corresponding media files representing said given one of said episodes; and

employing one of said one or more communication interfaces to:

(a) receive a request from a requesting client device for the updated version of said compilation file located at said predetermined URL;

(b) download said updated version of said compilation file to said requesting client device; and

(c) thereafter receive and respond to a request from said requesting client device for one or more media files identified by one or more corresponding episode URLs included in the attribute data contained in said updated version of said compilation files.

A75-76.

Claim 31 describes the operation of an "apparatus for disseminating a series of episodes . . . via the Internet." This apparatus is what the '504 patent refers to as

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the "host computer" that distributes audio content to the audio player.

Two facts about the '504 patent are particularly relevant to this appeal. First, while the specification is 45 columns long, it contains very little description of the "host computer" — which is also referred to as the "host server 101," and "the remote server 101." *See* A52 (at 4:40-41); A53 (at 5:57-59); A53 (at 5:47); A54 (at 7:53-55). The only description of the hardware configuration of the server is in the following passage, and the accompanying illustration in Figure 1 (A44):

> Host File Server
> The host server 101 provides a FTP server interface 125 which provides file transfer protocol services to the player 103, a CGI interface 127 which performs Common Gateway Interface script program execution in response to requests from the player 103, and an HTML interface 129 which provides hypertext transport protocol (HTTP) World Wide Web server functions to the connected player 103. The host server 101 stores and maintains a plurality of data files including a program data library indicated generally at 130 . . .

A53 (at 5:56-65). This passage contains no reference to a "processor" or "CPU." Those terms are never used in the specification in describing the server; the only places where they appear are in descriptions of the "Subscriber Audio Player." *See e.g.* A52 (at 4:44-46), A53 (at 5:5-9), A62 (at 23:28). This passage also establishes that element 125 is "a FTP server <u>interface</u>," and that element 129 is "an HTML <u>interface</u>." *See* A44 (Fig. 1). These two interfaces are both shown in Figure 1 as part of the "host computer indicated generally at 101." A52 (at 4:40-41); A44. Thus, contrary to Personal Audio's argument, neither is described as an

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independent computer. Opening Br. at 5.

A second fact about the '504 patent of particular relevance here is that it describes distributing various types of news content, such as "world news" or "local news," as a part of series of episodes. *See* A65 (at 30:18-28), A60 (at 20:3-12). Generally, the '504 patent describes a mechanism for distributing content in the form of "program segments" to the audio player. A53 (at 5:66-6:2). These segments can be, for example, "compressed audio program segments," "announcement ('glue') segments," or "advertising segments." *Id*. All program segments are "identified by a unique key integer value, ProgramID, which is the primary key value" for the main "Programs Table" in the "program data library." A59 (at 17:50-55), A53 (at 5:65).[1] Each program segment also has a "GroupID" and "Episode" number. A59 (at 17:38).

The '504 patent explains that the "GroupID" and "Episode" numbers are used when a particular program segment represents "an episode in a series." A60 (at 19:42-49). "The Program_Segment record contains a GroupID field which specifies the series as a whole, and an Episode integer field specifies the position of the given program segment within the serialized sequence." *Id*. Thus, "episodes in the same series" are "identified by a common Group ID." A60 (at 20:64-67).

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[1] *See also* A47 (Figure 4, showing relations between tables in the database); A59 (describing tables in the "relational database" shown in Figure 4).

Several uses for this "serialization mechanism" are described. For example, "the serialization mechanism may be used to provide serialized advertisements to a subscriber, insuring that a subscriber does not hear a particular ad twice." A60 (at 19:65-20:1). Additionally, and of particular significance here, the serialization mechanism can be used to present news stories to the user:

> [T]he serialization mechanism may be used to provide sequential presentation relationships between related programs. For example, if a subscriber indicates an interest by selecting and actually playing a program on an evolving topic; for example, a news story about the America's Cup yacht races, further new stories on that topic may be assigned the same Group ID number so that they are automatically routed into the subscriber's catalog or program session if space is available.

A60 (at 20:3-12). The '504 patent then explains that users can subscribe to subjects such as "world news" to obtain a group of "program segments" containing world news stories. A65 (at 30:18-28).

The '504 patent helps users locate and play content by sending a "compilation file" to the audio player. A53-54 (at 6:60-7:22). The host computer transmits the compilation to the audio player upon receiving a request from the player. A53 (at 6:60-63). This compilation file "contains program identifiers of the program segments to be played." A54 (at 7:10-19). The specification explains that the program segments to be played can be customized to exclude content that the user has already listened to. A60 (at 19:60-64). In one embodiment, a "usage log" tracks the content that the user actually listens to. A55 (at 9:14-17). This usage log

enables the host computer to ensure that program segments that have already been played are not included in subsequent sessions. A60 (at 19:60-64).

Returning to claims: the sole independent claim at issue in this appeal, Claim 31 requires use of a "compilation file" that contains "attribute data for each given one of said currently available episodes, including displayable text describing said given one of said currently available episodes and one or more episode URLs specifying the storage locations of one or more corresponding media files representing said given one of said episodes." A73 (46:21-26). Put more simply, the claimed compilation file must contain, for each currently available episode, both a text description ("displayable text describing") and a link ("episode URL") that the user can use to download the media file(s) for that episode. This allows the user to see what the content is available and then listen to specific episodes of interest.[2]

II.   Compton/CNN

Compton/CNN is the first prior art reference that the Board found to invalidate claims 31-35. Compton/CNN is a 1995 M.I.T. masters' thesis that describes distributing the content of the television show "CNN Newsroom" over the Internet. A871-A928.

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[2] More specifically, as shown by the final, lettered steps of the claim, the user (a) requests and then (b) downloads the compilation file, and then (c) requests one or more of the media files that were linked-to in the compilation file.

CNN Newsroom was a "commercial-free video program . . . targeted at primary and secondary school classrooms." A882. It was produced by Turner Broadcasting, and "used in almost 30,000 schools." A882. Each CNN Newsroom broadcast was fifteen minutes long, and generally consisted "of 3-5 segments of 2-5 minutes each." A882; A885 ("A segment corresponds to a single news story."). A "Curriculum Guide" was produced along with each broadcast, and "distributed via Internet email and other on-line services." A882. Traditionally, since the show was "broadcast between 3:45 and 4:00 am each weekday morning," teachers that wished to use the CNN Newsroom broadcast in their classrooms had to arrange to record it. *Id.*

Compton/CNN describes a system that automated the process of recording the CNN Newsroom broadcast and distributing it to those that wished to use it. Every weekday morning, the system described in CNN/Compton recorded the broadcast and automatically generated a file called "contents.html." A888-90. This "contents.html" file served as a "Table of Contents" for that day's CNN Newsroom broadcast, and included descriptions of each news story, as well links to the video segment for each story. A881-A894.

Figure 1 of Compton/CNN, reproduced below, shows an example of a table-of-contents webpage that was produced by the system it describes.
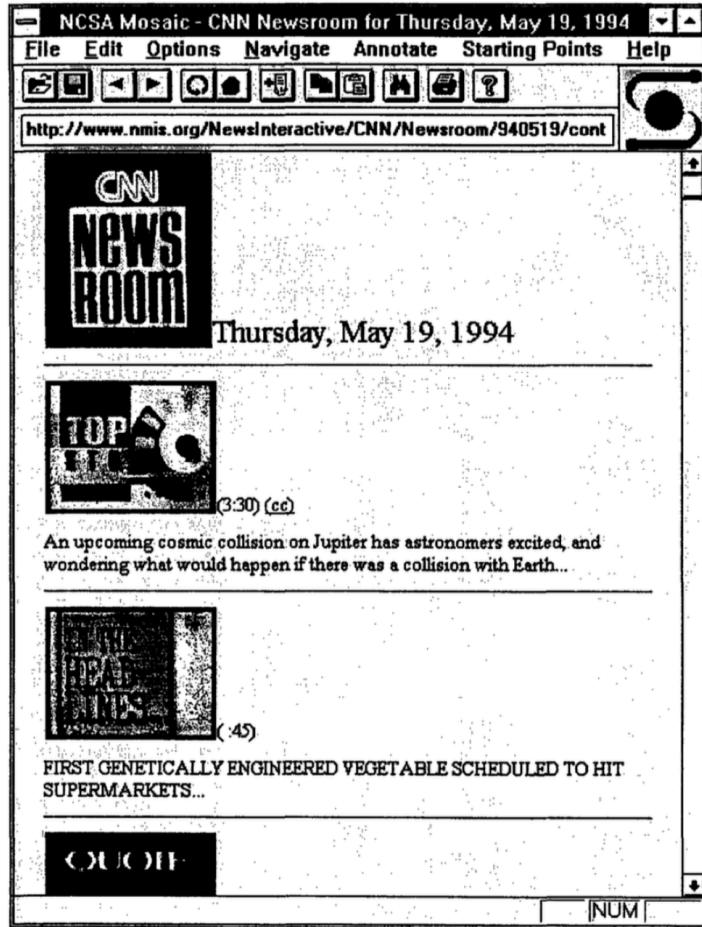
A884. As shown in the figure, the table-of-contents file ("contents.html") was made available at a URL containing the date of the broadcast as a six-digit-code: "http://www.nmis.org/newsinteractive/cnn/newsroom/940519/contents.html". *Id.* The Table of Contents ("contents.html") was generated each day by the program "contents.c" using that day's recorded broadcast, the corresponding Curriculum Guide, and the closed-caption text from the broadcast. A889-890; *see also* A883, A884.

CNN/Compton states that previously published video content remained

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available for "at least six months," and that this content could be located through full-text searching through the close-caption text of each news story. A885-886. It also explains, as mentioned above, that the "contents.c" program ran each weekday to produce a file called "contents.html" (which contains the Table of Contents for that day's broadcast). Personal Audio's expert, Dr. Nelson, agreed that this means that the contents.html file is updated each day to reflect the most recent broadcast of CNN Newsroom:

> Q. The table of contents, in particular the contents.html file, is generated each day for each Newsroom program, correct?
>
> A. Yes.
>
> Q. And in particular there's a program identified here as "contents.c" that is run each day and that generates the HTML file, contents.html, for each Newsroom program, right?
>
> A. Yes, that's what it looks like.
>
> Q. That means that the contents.html file is updated each day to reflect the most recent broadcast of CNN Newsroom, correct?
>
> A. Yes, I believe so.

A1019 (at 91:6-18). EFF's expert, Dr. Schmandt testified the same way. A852-853 (Schmandt Decl. ¶ 78).

The Board found that the "contents.html" file in Compton/CNN met the limitations for the claimed "updated version of a compilation file," including the limitation requiring the compilation file to contain "data describing currently available episodes in said series of episodes." A16-19. The Board also found that

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Compton/CNN disclosed the other limitations of the claims. A14-A22.

III.   Patrick/CBC

Patrick/CBC is the second prior art reference that the Board found to invalidate claims 31-35. Patrick/CBC is similar to Compton/CNN in that it describes a system that automatically converted a conventional media broadcast into digital form and distributed it over the Internet. A863-A870. In Patrick/CBC, the broadcasts that were automatically converted into digital form were Canadian Broadcasting Corporation ("CBC") radio shows, including "Quirks & Quarks," a popular weekly science show. A865.

Patrick/CBC explains that Quirks & Quarks, "was automatically recorded each week" and then broken into "segments." A867. "The content of each segment was described in enough detail so that users could select those portions of the show that interested them and download the appropriate audio file." *Id.* Similar to Compton/CNN, this was accomplished by creating a menu for each broadcast: "Each show has a menu attached to it to describe the contents of the various parts[.]" A869. Patrick/CBC further explained that the shows were available through a server accessible through the Internet at ftp://www.radio.cbc.ca or http://www.radio.cbc.ca. A869.

While the Patrick/CBC article does not contain a picture of the menu for any of the radio shows, it explains that the textual descriptions and menus for the radio

shows were displayed on a "Web page":

> [I]n the previous analysis the WWW traffic may be inflated since each Web page can cause a number of file accesses when "in-line" images are displayed along with the text and menus.

A866. Dr. Schmandt testified that despite the lack of a picture of the "Web page," a person of ordinary skill in the art would have understood from the Patrick/CBC article that an HTML file must have existed containing the menu and the description, and that this satisfied the "compilation file" limitations in the claims. A844-A846. The Board credited this testimony, and found that "a person of ordinary skill would conclude that Patrick/CBC necessarily discloses [the claimed] 'compilation file,'" including the claimed "'displayable text' associated with the 'compilation file.'" A25-A26.

The Board also found that Patrick/CBC's disclosure expressly or inherently includes the other limitations of claims 31-35. A27-A28. Finally, the Board found that Patrick/CBC's disclosure of the claimed subject matter was enabling, despite not containing any source code, noting that Personal Audio's expert had acknowledged that creating and updating an HTML website was within the level of ordinary skill. A27-A28 (*citing* A1005-A1010).

IV.   Procedural History

EFF filed a Petition for Inter Partes Review on October 16, 2013. A37. The Patent Trial And Appeal Board instituted trial on April 18, 2014. A37. The Board

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conducted a hearing on December 17, 2014. A729. The Board issued its final decision on April 10, 2015, finding that claims 31-35 of the '504 patent were unpatentable. A29. Personal Audio filed a request for rehearing on May 8, 2015, which the Board denied on July 17, 2015. A38, A30-A35. Personal Audio filed a notice of appeal on September 16, 2015. A39.

Meanwhile, on September 15, 2014, a jury verdict was rendered in an infringement lawsuit based on the '504 patent that Personal Audio had filed in the Eastern District of Texas. The jury's verdict was that an unrelated party—CBS Corporation—infringed claims 31-34 of the '504 patent, and that CBS had not proved that those claims were invalid. A718-A722.

Personal Audio submitted this jury verdict to the Board on December 10, 2014—one week prior to the hearing, as an attachment to its updated mandatory disclosures. A38, A724. Personal Audio did not submit the transcript of the jury trial in the *CBS* case at that time. Nor did Personal Audio argue at the hearing that the Board was required to follow the jury verdict. A33. It was not until Personal Audio filed its Petition for Rehearing on May 8, 2015 that it submitted the transcript from the *CBS* trial and argued that the Board's decision violated its Seventh Amendment rights. A32-A33. The Board considered Personal Audio's Seventh Amendment argument and rejected it, in part because it "was not made during the trial." A33.

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The Board stated that the transcript of the jury trial in the *CBS* case was "never made of record." A33. Thus, EFF objects to Personal Audio's inclusion of the transcript of the jury trial in the *CBS* case in the Appendix. It was not made of record below, and thus it is not properly part of the record for this appeal.

SUMMARY OF ARGUMENT

The Board's determination that Compton/CNN and Patrick/CBC invalidate the challenged claims should be affirmed for two independent reasons. First, the arguments that Personal Audio presents in this appeal can and should be rejected as waived. Second, the Board's determination of invalidity was substantively correct, and all of Personal Audio's arguments to the contrary are wrong on the merits.

Personal Audio's appeal focuses on claim-construction arguments, *e.g.* "[t]he Board's claims constructions are legally erroneous and should be reversed." Opening Br. at 11. But Personal Audio told the Board that the Board's preliminary claim constructions were "not material" to any of its arguments. A655. Personal Audio also told the Board that the preliminary construction of "episode" was "not determinative of the *inter partes* review issues." A655. Personal Audio cannot now argue that the Board should be reversed on the basis of findings that it told the Board were "not material" and "not determinative."

Even if Personal Audio had not made those statements, the claim-construction arguments it presents on appeal would still be waived, because they

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are fundamentally different from the arguments that it presented below. Personal Audio argues on appeal that the phrase "series of episodes" requires episodes that issued over time, *at different times*, and the Board "improperly reads this temporal limitation out of the claim language." Opening Br. at 18, *see also, e.g. id.* at 15, 16, 17, 20-21. This argument is new on appeal.

The same applies to Personal Audio's "two processors" argument. Personal Audio argues on appeal that the claims require a "back-end configuration" with two processors. Personal Audio then points out that "neither the Board nor the EFF even addressed the absence of [this] back-end configuration." Opening Br. at 13. But the reason the "two processors" issue was not addressed below is that it was never raised. Personal Audio's description of the record below is a *concession* that this issue was waived, not an argument for reversal.

Personal Audio's arguments are also wrong on the merits. The Board correctly found that Compton/CNN and Patrick/CBC invalidate the challenged claims for at least four reasons.

First, the Board did not err in construing "episode" to include individual news stories distributed as part of a group of news stories. The specification specifically states that an episode can be a single news story, and there is no dispute that Compton/CNN and Patrick/CBC describe distributing news stories.

Second, the Board did not err in finding that the web pages described in

Compton/CNN and Patrick/CBC for distributing news stories satisfy the claim language requiring an "updated version of a compilation file . . . describing currently available episodes in said series of episodes." Contrary to Personal Audio's newly raised argument, nothing in the claims requires the "currently available episodes" to include episodes that were distributed "at different times." In fact, the specification of the '504 patent explains that normally, past episodes are *not* included in the compilation file.

Third, Personal Audio's two-processor argument is contradicted by the specification and the prior art. In the only embodiment described in the '504 patent, all of the claimed hardware components, including the "data storage server", are described as being part of a single "host computer" and as Personal Audio's expert readily acknowledged, such a configuration was well-known in the prior art.

Fourth, Personal Audio's constitutional arguments are legally incorrect. Personal Audio's constitutional arguments amount to the assertion that a jury verdict on a patent immediately precludes everyone else from challenging the validity of that patent on the basis of any prior art that is related to what was considered by the jury, regardless of whether the prior art is actually the same, regardless of whether final judgment is entered based on the verdict, and regardless of whether the person challenging validity was in privity with any party to the case where the verdict was entered. That assertion is fundamentally inconsistent with

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basic legal principles of preclusion and finality.

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ARGUMENT

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I.   Personal Audio Has Waived All Arguments Material to this Appeal

All of Personal Audio's arguments on appeal are either waived or moot. Personal Audio waived all of the claim construction arguments it seeks to present on appeal. It similarly waived its Seventh Amendment arguments. Any remaining issues, such as Personal Audio's obviousness argument at 35-44 of its brief, only arise if Personal Audio's claim construction arguments are accepted. Thus, there is no argument in support of reversal that is properly before the court and the Board's decision must be affirmed.

By raising waiver, EFF does not suggest that there is any merit to Personal Audio's arguments. EFF addresses the merits in full in Parts II-VI *infra*. Should the Court wish consider the substance of Personal Audio's arguments, it will similarly conclude that the Board's decision must be affirmed.

A.   Personal Audio Waived Its Claim Construction Arguments.

1.   Personal Audio told the board that claim construction was "not material" to the issues presented.

Personal Audio affirmatively waived any claim construction arguments in this proceeding by arguing below that the Board's proposed claim constructions were "not material" to the arguments it was presenting.

The only claim term that Personal Audio told the Board should be construed

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was "episode." A653-655; *see also* A575-576. But immediately after Personal

Audio argued that the Board's preliminary construction of "episode" was incorrect,

Personal Audio explained that its disagreement with the Board's claim

construction was "not determinative" of any issue that the Board was being asked

to decide:

> For purposes of this IPR only, Patent Owner suggests that its disagreement with the Board's claim construction of 'episode' is not determinative of the *inter partes* review issues – rather the fact of missing claim elements / limitations in independent claim 31 is the crux of this proceeding.

A655. Immediately after making this statement, Personal Audio explained that the

Board's claim constructions were "<u>not material</u>" to the arguments it was

presenting:

> Indeed, it is observed that the Board's initial claim constructions is *[sic]* restricted to the particular word or phrase construed and <u>are not material to the arguments in this Response</u> because the construed word or phrase, particularly 'compilation file' are further qualified by the plain and ordinary meaning of other claim language, language which is dispositive of the issues before the Board.

A655 (emphasis added; emphasis in original omitted). *See also* A7 (Board finding

that Personal Audio argued the construction of "episode" was "not determinative").

Now, on appeal, Personal Audio reverses course and argues that the Board

committed reversible error in construing the terms "episode" and "compilation file."

Opening Br. at 22 & 27. Personal Audio also asks this Court to construe "series of

episodes," a term that was never construed by the Board because neither party

asked the Board to construe it, or suggested that it made any difference. *See* A8

("Neither party argued that the limitation 'series of episodes,' as it appears in the

preamble of challenged claim 31, has any different meaning from 'episode'

alone.").

On this alone, the Court should find Personal Audio waived any arguments

relating to claim construction. Personal Audio cannot tell the Board that its

construction of the claims is "not material" and then ask this Court to reverse based

on an argument that the Board's constructions are erroneous and outcome-

determinative. *See, e.g. Checkpoint Sys. v. ITC*, 54 F.3d 756, 760 (Fed. Cir. 1995)

("simple fairness to those who are engaged in the tasks of administration, and to

litigants, requires as a general rule that courts should not topple over administrative

decisions unless the administrative body not only has erred but has erred against

objection made at the time appropriate under its practice.") (citations, quotations,

and brackets omitted).

> 2.   *Personal Audio waived the claim construction arguments*
> *it now seeks to make regarding "episodes" and "series*
> *of episodes."*

Personal Audio's claim construction arguments are also waived because they

are materially different from any construction(s) it advanced below. *See NTP, Inc.*

v. Research in Motion, Ltd., 418 F.3d 1282, 1296 (Fed. Cir. 2005) ("presenting

proposed claim constructions which alter claim scope for the first time on appeal

invokes the doctrine of waiver"); *Singleton v. Wulff,* 428 U.S. 106, 120 (1976).

As stated above, the only claim term that Personal Audio told the Board should be construed was "episode." A653-655; *see also* A575-576. Personal Audio told the Board that "episode" should be construed as a "program, represented by one or more media files, that is part of a series." A654.

While Personal Audio asserts on appeal that this same construction should be adopted, Personal Audio's position about what this proposed construction means is materially different from what it argued to the Board. *See* Opening Br. at 20. Here, Personal Audio argues that the terms "episode" and "series of episodes" refers to media content that is released separately *and at different points in time*. According to Personal Audio, the Board's construction of "episode" "improperly reads this temporal limitation out of the claim language." Opening Br. at 18. For example, Personal Audio argues that "episodes represent distinct, separately issued programs that become available over time, at different points in time." Opening Br. at 15; *see also, e.g. id.* at 16, 17, 20-21.

Personal Audio's assertion that "episode" has a "temporal limitation" is inconsistent with arguments that it made to the Board. For example, Personal Audio told the Board in its brief that the news stories in Compton/CNN's Figure 1 were not episodes because they were "only temporally related":

> The particular cosmic collision on Jupiter or the genetically engineered vegetable 'news story' content segment of the Figure 1

single May 19, 1994 CNN Newsroom is not episodic in a series or a serialized sequences of programs which is selected as a group by a subscriber. Such 'segments' are only temporally related, because they were broadcast as part of the same newscast unit.

A682-683.

Furthermore, at oral argument the Board specifically asked Personal Audio to explain the distinction between the Board's preliminary construction and the construction advocated for by Personal Audio. The Board's preliminary construction of "episode" was:

> [A] program segment, represented by one or more media files, which is part of a series of related segments, e.g. a radio show or a newscast.

A653. Personal Audio argued that this construction improperly used the concept of a "segment." Personal Audio's proposed construction of "episode" was:

> [A] program, represented by one or more media files, that is a part of a series.

A654. At oral argument, the Board asked Personal Audio to explain its position that an "episode" is a "program," not a "segment," and Personal Audio responded by saying that episodes need to be related to one another with "a common theme":

> JUDGE WARD: Can you describe for me the difference between an episode and a segment?
>
> MR. FEMAL: An episode to me is very clear. <u>If something is related to one another, that would be an episode, such as, let's say, currently Seinfeld, a bunch of episodes are all related to one another</u>.
>
> On the other hand, on the segments shown in the CNN/Compton article, you have unrelated matter.

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And as the Court in construction of the claim said, related. There is nothing related between, as we put in our brief, Jupiter and genetic vegetables. At best –

JUDGE WARD: Mr. Femal, under construction then, "relation" would require what? How should we construe relation, thematically related?

MR. FEMAL: Your honor, I would say that it is thematically related, that, in other words, that <u>the episodes are related to one another with a common theme</u>. And clearly it is not in the CBC radio in the Compton.

. . .

JUDGE WARD: Again, the panel, there is difficulty in attempting to determine the proper boundary for terms like this. Give me the proper boundary that you would propose to the panel for "theme." How do I define what is within a theme and outside of a theme?

MR. FEMAL: Okay. Well, <u>I would say in a theme</u>, let's say you have a segment – or not a segment – but an episode of <u>House of Cards</u>. It is all about the Congressional Whip or Head of the House, House Speaker, and every segment or every episode after that is related to that same theme. They are going through the life of the Speaker of the House. That would be episodic. That would be episodes.

A750-A752 (at 22:14-23:7, and 23:16-24:2) (emphasis added). This passage shows

that Personal Audio argued that episodes were "related to one another with a

common theme," and said nothing about episodes needing to be issued at different

times.

Similarly, Personal Audio told the Board that the weekly "Twilight Zone"

TV show would not meet its definition of "episodes" because they were not

sufficiently related to a common theme:

JUDGE WARD: What about a show like The Twilight Zone, where each show is independent?

MR. FEMAL: I think those are totally independent, Your Honor.

JUDGE WARD: <u>Twilight Zone</u>, no episodes in Twilight Zone?

MR. FEMAL: <u>I wouldn't call it necessarily episodic</u>. They are all different, not a single Twilight Zone am I aware of follows another one. One you have people being eaten alive, you know, at a club and another one talking about, you know, some interstellar radiation hitting the earth or something. It is a bunch of unrelated programs.

A768 (at Tr. 40:8-19) (emphasis added). Again, Personal Audio said nothing about

episodes needing to be issued at different times.

The Board, in its Final Decision, noted Personal Audio's proposed claim

construction of "episode," and cited to Personal Audio's "thematically related"

argument: "At the final hearing, Patent Owner argued the difference between

episodes and segments is that episodes must be related to each other, while

segments are not related. Tr. 22:14–21." A7. The Board's Final Decision says

nothing about whether the episodes needed to be released at different times,

because neither party had made any arguments about that question.

On appeal, Personal Audio's position is materially different. Personal Audio

is now arguing, for the first time, that "episodes" must be released at different

times. Personal Audio's new position on "episodes" would exclude some material

that was previously included (*e.g.* "House of Cards" episodes, thematically related

but released at the same time). It would also include material that was previously

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excluded (*e.g.* "The Twilight Zone" episodes, not thematically related but released over time). By fundamentally changing the scope of what it contends is covered by the term "episodes," Personal Audio is advancing a new construction on appeal—notwithstanding the fact that its brief repeats the words of the construction it proposed below. *See Solvay S.A. v. Honeywell Int'l Inc.*, 742 F.3d 998, 1003 (Fed. Cir. 2014) (quoting *Interactive Gift Express, Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1346 (Fed. Cir. 2001) ("A claim construction argument is considered 'new' if a party 'change[s] the scope of the claim construction.'")).

Thus, Personal Audio's new argument that "episodes" includes a "temporal limitation" is waived. *Solvay*, 742 F.3d at 1004 (patent owner cannot "raise novel arguments to redefine the scope of [a] claim" on appeal); *NTP,* 418 F.3d at 1296 (Fed. Cir. 2005); *see also Golden Bridge Tech., Inc. v. Nokia, Inc.*, 527 F.3d 1318, 1321-1322 (Fed. Cir. 2008); *Forshey v. Principi*, 284 F.3d 1335, 1355-57 (Fed. Cir. 2002).

>   3.   *Personal Audio waived any claim construction argument regarding the term "compilation file"*

Although it is not entirely clear what Personal Audio proposes to this Court as a construction for "compilation file," Personal Audio appears to argue that a "compilation file" is "distinguishable from an ordinary file in that it collects together multiple, previously separate programs or, with respect to claims 31-35, dynamically collects episodes issuing over time at different times." Opening Br. at 26.

However, Personal Audio only "objected to [the Board's] preliminary construction [of 'compilation file'] because it included the term 'episode,' but did not articulate any reason for the objection to the inclusion of episode. Tr. 32:10–14." A9 (citing A760). Specifically, Personal Audio made clear to the Board that its arguments did not relate to the *construction* of the term "compilation file," but rather to the factual question of whether the prior art contained a file with "episode information," and thus more generally whether the prior art contained "episodes":

> JUDGE ANDERSON: Do you have a dispute at this time with the construction we gave to compilation file in the decision instituted, that being that simply a compilation file is a file that contains episode information?
>
> MR. FEMAL: Yes, episode information.
>
> JUDGE ANDERSON: You don't think that should be part of the construction?
>
> MR. FEMAL: You know, the compilation file would contain episode information. Here with either the CNN or CBC references, there is no

compilation file. Also you will not find the word "updating," because it is not updated. Once it is fixed, it is affixed. There is no compilation. They don't compile anything.

Each day is a brand new date in the CNN News. And each day on the radio for the Quirks series, an hour show broken into segments, it is the same show. All of a sudden you take the same show that is an hour show, you break it into segments, now it becomes an episodic show?

JUDGE ANDERSON: So, as I understand it, you don't have – you don't have any dispute with the current construction, with the preliminary construction of "compilation file," you simply are saying that both CNN and the CBC don't contain episode information, they contain segment information; is that right?

MR. FEMAL: They contain segment information, Your Honor, and they also lack any compilation.

JUDGE SNEDDEN: Let me see if I understand. The way I understand your argument, the way I read your response is that you are essentially arguing that the claim requires or references episodes. And what is disclosed in the CNN reference, for example, is not episodes, rather, what is being uploaded or put on the CNN web page are segments of a single episode. And that is done because these files are large. Have I got it straight so far?

MR. FEMAL: He is uploading a two- to three-minute segment of the news broadcast.

A760-A761 (at 32:10-33:20).

Based on these statements, Personal Audio is entitled to dispute on appeal the Board's factual determination that the elements of the claim are met by the prior art, but it cannot do so by couching its argument as a legal error regarding the Board's construction of "compilation file." The claim construction argument has been waived.

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B.   Personal Audio's "Two Processors" Argument Is Entirely New to this Appeal and Is Waived.

On appeal, Personal Audio argues that the claims require a "back-end configuration" with "*two* processors, namely the processor found in the data storage server as well as a second processor coupled to a communications interface." Opening Br. at 31. Personal Audio points out that "neither the Board nor the EFF even addressed the absence of [this] back-end configuration." Opening Br. at 13.

This was not due to the EFF "misleadingly" omitting anything, as Personal Audio argues. Opening Br. at 32. To the contrary, the reason that the "two processors" issue was not addressed is that Personal Audio never argued below that the claim required two processors. Personal Audio's description of the record below is a *concession* that this issue was waived, not an argument for reversal.

Personal Audio's "two processors" argument depends on its assertion that the claimed "data storage server" must have its own processor, *i.e.* a second processor that is separate and distinct from the "at least one processor" that is expressly claimed. But in its briefing below, Personal Audio never argued that the "data storage server" limitation was missing from either Compton/CNN or Patrick/CBC. In its brief below, Personal Audio included a claim chart identifying the limitations it contended were missing from Patrick/CBC. A661-663. "Data storage server" was not identified as a missing limitation. Similarly, Personal

Audio included a claim chart identifying the limitations it contended were missing

from Compton/CNN. A679-681. Again, "data storage server" was not identified as

a missing limitation.

The Board's Final Decision also shows that Personal Audio did not argue

below that the claims required two processors. For example, the Board held:

> Patent Owner does not argue the computer components claimed, *i.e.*,
> servers, communications interfaces, processors, or requesting client
> device, are not disclosed to a person of ordinary skill. *See* Tr. 29:13–
> 30:2; 42:7-44:4. The Schmandt Declaration supports the conclusion
> that the presence of such components would be trivial to the person of
> ordinary skill in the art. Ex. 1002 ¶ 47.

A20. This confirms that Personal Audio never argued below that the claims

required a processor in the claimed "data storage server" that is separate from and

in addition to the "one or more processors" that is expressly claimed. Thus,

Personal Audio's two-processor argument has been waived. *Golden Bridge Tech.,*

527 F.3d at 1321-1322; *NTP, Inc.*, 418 F.3d at 1296.

C.   Personal Audio's Constitutional Arguments Are Waived Because They Were Not Raised Until a Motion for Reconsideration of the Final Decision.

Personal Audio waived its Constitutional arguments by failing to raise any

of them in until after the Board had issued its final written decision invalidating the

challenged claims of the '504 patent. Personal Audio acknowledges that it first

raised its Constitutional arguments in its Request for Rehearing. Opening Br. at 52.

The Board's decision on Personal Audio's request for rehearing properly

rejected this argument as waived. A33; *see* 37 C.F.R. § 42.71(d); *Golden Bridge*

Tech., Inc. v. Apple Inc., 758 F.3d 1362, 1369 (Fed. Cir. 2014) ("An argument

made for the first time in a motion for reconsideration comes too late and is

ordinarily deemed waived.") (internal citations omitted).

The only thing Personal Audio did prior to the final written decision was to

submit the jury verdict from the Eastern District of Texas. It did so prior to oral

argument, as part of mandatory disclosures to the PTAB. *See* Opening Br. at 52.

Nothing about Personal Audio's submission of the jury verdict in a

mandatory notice shows that Personal Audio believed its rights were being ignored.

See Anderson v. City of Boston, 375 F.3d 71, 91 (1st Cir. 2004) ("When a party

includes no developed argumentation on a point . . . we treat the argument as

waived"); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal

'argument' . . . does not preserve a claim. . . . Judges are not like pigs, hunting for

truffles buried in briefs.").

Personal Audio argues that any alleged "Constitutional violation" is

unwaivable. Opening Br. at 53. That is not correct. As the Supreme Court recently

explained: "The entitlement to an Article III adjudicator is a personal right and thus

ordinarily subject to waiver." *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct.

1932, 1944 (2015) (internal citations and quotations omitted). By failing to raise its

constitutional argument in a timely manner, Personal Audio consented to the

Board's jurisdiction.

Furthermore, Personal Audio's delay in raising its Constitutional arguments prejudiced EFF by limiting its ability to respond. Personal Audio submitted voluminous "evidence" after an adverse final decision, under a procedure where the Patent Office Trial Guide specifically states that the "opposing party should not file a response to a request for rehearing absent a request from the Board." 77 Fed. Reg. 48768. Personal Audio now attempts to rely on this factual evidence to imply that the Board's decision was factually incorrect. Opening Br. at 49-50. This is unfair. The Board correctly held this "evidence" was not made of record. A33. Thus, it should not be part of this appeal.

II.   The Claimed "Episodes" and "Series Of Episodes" Are Disclosed in Compton/CNN and Patrick/CBC.

Personal Audio's primary argument on appeal is that the Board's construction of "episodes" and "series of episodes" was incorrect and caused the Board to incorrectly find the claims unpatentable. Opening Br. at 14-24. This argument is substantively wrong: the Board's construction of "episodes" is correct and its related factual findings are supported by substantial evidence.

A.   "Episode" Includes a Single News Story, Such as the Individual Video Segments from a CNN Newsroom Broadcast.

Personal Audio's arguments regarding the claim term "episodes" find no support in either the specification or the prior art. The Board properly found that an

"episode" included a single story that was part of a group of stories. A15-16. Personal Audio urged the Board to find that "an episode is a program, not a segment thereof." A7. The Board rejected this argument because, for example, the specification states that "[a] given program segment may represent an episode in a series." A8 (citing A60 (at 19:36-38)).

Personal Audio argues that the Board erred because it took the specification's statement that a "program segment may represent an episode in a series" out of context. Opening Br. at 19. Personal Audio argues that the specification uses "program segment" interchangeably with "program," and that "program segment" does not mean a subpart of a program. *Id.* at 19-20. Instead, Personal Audio argues, all that "segment" really means is "a type of data" — it does not imply a piece or subpart of something larger. *Id.* at 19-20. Personal Audio concludes that both CNN/Compton and Patrick/CBC fall short of disclosing the "episode<u>s</u>" required by the claims, because they describe web pages that distribute the news stories from a single broadcast, and are thus distributing a single "episode."

Personal Audio's argument is contradicted by the specification for at least three reasons. First, the specification uses the term "segment" the same way that the word "tracks" is used in connection with a CD: to refer to individually selectable pieces of audio content. For example, the specification explains:

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> [T]he player 103 includes controls which enable the user to easily
> move from program segment to program segment, skipping segments
> in a forward or reverse direction, or to jump to a particular segment . . .
> Thus, although the segments are stored in randomly addressable
> locations in the local mass storage unit, they are nonetheless played at
> step 212 in the sequence established initially by the server and
> (optionally) modified by the subscriber, with the player providing the
> ability to dynamically switch to any position in this sequence under
> the listeners control.

A54-A55 (at 8:65-9:12). As this passage shows, the term "segment" is not being

used to refer to a "type of data." To the contrary, it is being used to refer to an

individually selectable chunk of content. *See also*, *e.g.* A56 (at 12:62-64)[3]; A58 (at

15:22-25)[4]; A59 (at 17:4-6)[5]. Sometimes, these individually selectable pieces of

content will contain different types of data, *e.g.* "compressed audio program

segments," vs. "advertising segments." A53 (at 5:66-6:2). But the term "segment"

connotes the individually selectable nature of the content, not that it is a "type of

data."

Second, the specification's statement that a "program segment may represent

an episode in a series" is not an isolated occurrence that the Board took out of

context. The specification says in multiple places that "episodes" are "program

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[3] "Each time the playback begins a new programming, advertising or
announcement segment, the segment start time is recorded in the usage log file."
[4] "[T]he SKIP command indicated at 275 in FIG. 3, causes the player to advance to
the beginning of the next program segment . . ."
[5] "The program, advertising and announcement segments to be made available to
an individual subscriber include those program selections which the subscriber
chooses . . ."

segments." For example, the specification explains that in the preferred embodiment, the episodes in a series are "program segments" that share a common "GroupID" but have different "Episode" numbers:

> "The Program_Segment record contains a GroupID field which specifies the series as a whole, and <u>an Episode integer field specifies the position of the given program segment within the serialized sequence</u>. When a serialized sequence is requested, the host may download the entire series in one download for playback at requested intervals, or less than all of the episodes when all are not yet available or when it is desirable to limit the total download content."

A60 (at 19:42-49) (emphasis added). Similarly, the specification explains that "episode segments" are "serialized groups of program segments," where each episode can be downloaded separately:

> The invention further supports the construction of serialized groups of program segments in which the sequential episode segments may be downloaded at one time or separately when necessary to conserve space or to handle sequential presentations which evolve in real time.

A70 (at 39:36-40); *see also* A60 (at 19:34-53).

Third, the specification repeatedly shows that a "program segment" or "episode" can be a single news story that is part of a group of related news stories. For example, the specification explains that a user's selection of a single news story in a series can be used as a basis for automatically providing the user with subsequent episodes in that series of news stories. A60 (at 20:3-12). Similarly, the specification explains that users can subscribe to subjects such as "world news" to obtain a group of "program segments" containing world-news stories:

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> By way of example, a program compilation for a given subscriber might illustratively consist of seven subjects: world news, national news, local news, computer trade news, email and voice mail messages, country music, classical music, and the listener may skip from subject announcement to subject announcement to readily locate the beginning of any one of the six subjects. The four "news" subjects each consist of a collection of structured program segments, each of which begins with a subject announcement, again allowing the user to skip from subject to subject, listening to only those which are found to be of interest.

A65 (at 30:18-28) (emphasis added). This again confirms that the Board properly construed "episode" to include individually selectable news stories that are part of a larger series of stories, such as "world news."

Having properly construed "episodes" in light of the specification, the Board then correctly found that both Compton/CNN and Patrick/CBC disclosed "episodes." *See* A15-17, A25. The Board found that Figure 1 of Compton/CNN discloses "episodes." A15-17 (citing Compton/CNN at A884). The Board noted that even Personal Audio's own expert conceded that Compton/CNN disclosed "episodes" under the Board's construction. A15 (citing A1016). Similarly, the Board found that the set of science news stories distributed through the menu webpage described in Patrick/CBC were "episodes." A25 (citing Patrick/CBC at A867).

Aside from its incorrect claim-construction argument, Personal Audio provides no reason to disturb these factual findings. There is no dispute that the news stories distributed through the web pages in Compton/CNN and Patrick/CBC

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are individually selectable, just like the "program segments" in the specification.

See, e.g., A884 (Compton/CNN) & A867 (Patrick/CBC).

> **B.   The "Series of Episodes" Need Not Include Episodes Issued "At Different Times."**

Personal Audio argues that even if the Board correctly construed "episode,"

the claimed "series of episodes" must include episodes that are "issued at different

times." Personal Audio argues that this requirement is not met by something that

distributes "the subdivided parts of a single program," because those parts "would

necessarily be made available at one time." Opening Br. at 17-18; *see generally id.*

at 15-19. The portions of the claim relevant to Personal Audio's argument are as

follows:

> 31. Apparatus for disseminating a series of episodes represented by media files via the Internet as said episodes become available, said apparatus comprising:
>
> . . . one or more processors . . . for:
>
> . . . <u>from time to time, as new episodes represented in said series of episodes become available</u>, storing an updated version of a compilation file . . . said updated version of said compilation file containing attribute data describing <u>currently available episodes in said series of episodes</u> . . .

A75 (emphasis added). Personal Audio argues that in context, the "currently

available episodes in said series of episodes" must refer to "multiple episodes that

come out over time at different times, <u>including at least one previously issued and</u>

<u>a newly available episode</u>." Opening Br. at 16 (emphasis added).

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Personal Audio is wrong. There is no doubt that claim 31 requires a "series of episodes" where some of the episodes in the series become available at different times. But that does not imply that the "currently available episodes in said series of episodes" must have come out at different times. Personal Audio's argument depends on parsing the claim language incorrectly. The claim requires "an updated version of a compilation file" that is stored "from time to time, as new episodes represented in said series of episodes become available." This limitation shows that at least some episodes "become available" after other episodes. The claim then goes on to require that the "compilation file" that is stored contain "attribute data describing currently available episodes in said series of episodes."

These two limitations are about different things — one is about *when* the updated version of the compilation file is stored (as new episodes become available), and the other is about *what* the updated version of the compilation file describes (currently available episodes). Read together, these limitations could be understood to imply that the "new episodes" are included in the "currently available episodes" described in the updated version of the compilation file.[6] But

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[6] The question of whether the "new episodes" must be included in the "currently available" episodes is irrelevant to Personal Audio's arguments on appeal because there is no dispute that both Compton/CNN and Patrick/CBC include the "new" (most-recently broadcast) stories. Nonetheless, EFF respectfully disagrees with the sentence in the Board's Final Decision saying that "Claim 31 states that . . . an 'updated version of the compilation file' is created including the new

these limitations cannot be read to imply that the "currently available episodes" must include previously available episodes. Indeed, the claims do not even require that the compilation file include all of the currently available episodes.

Put another way, whether an episode is "currently available" is logically independent from whether it was previously available. Personal Audio's argument ignores that simple distinction. What the claim requires is what it says: a compilation file describing "currently available episodes" that are part of a larger series. "Currently available" episodes may include previously available episodes, and may not. What is required is that they are currently available.

This point is also demonstrated by the fact that nothing in the claim language is inconsistent with what is described in Compton/CNN. In Compton/CNN, a compilation file (contents.html) is updated daily, after each day's broadcast of CNN Newsroom. This means that it always contains a table of contents for the current day's news stories — but not the previous day's news stories. Each of the current day's news stories are "currently available" episodes. Each of the news stories for the current day is also part of a larger series of episodes: there are daily broadcasts of CNN Newsroom, each containing of 3-5 stories of 2-5 minutes each,

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episodes." A18. The grammar of the claim makes clear that the phrases "new episodes" and "current episodes" modify different things that are not necessarily related: *when* the updated compilation file is stored is different from *what* the compilation file describes.

all of which are part of the CNN Newsroom series. The fact that the contents.html

file generated on May 20 describes the May 20 news stories, and does not include

anything about the news stories from May 19, does not mean that it is not

describing "currently available episodes." Nor does it mean that those episodes are

not part of a "series" (whether that series be considered that day's broadcast or the

larger series of all days' broadcasts).

Similarly, nothing in the claim language is inconsistent with what is

described in Patrick/CBC. Even assuming Personal Audio is correct when it states

that the Canadian Broadcasting Corporation only left one episode of Quirks &

Quarks on the server at any given time,[7] see Opening Br. at 10 & 23, that means

that the system created an updated version of a compilation file that contained

"currently available" episodes (i.e. the segments of that week's show) in the Quirks

& Quarks series of episodes.

The specification of the '504 patent confirms that the "currently available

episodes" described in the "compilation file" need not include past episodes. The

specification describes an audio player, and describes how audio program

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[7] Personal Audio points to statements in Patrick/CBC that note that because of data storage restrictions, files were "regularly" removed from the server. Opening Br. at 10 (quoting A869). Nothing in this statement can be read to mean that "just" the current day's program was available. Instead, the natural reading of this statement is that some, but not all, past episodes were "currently available" (because some some past episodes were removed due to space considerations).

segments can be distributed to the audio player. *See* A3, *citing* A42 (at Abstract),

A51 (at 2:21-56). The specification explains that the "compilation file" contains

"identifiers of the program segments to be played during an upcoming session."

A54 (at 7:10-19). By describing a compilation file that is updated so that it

identifies content to be played *in the future*, the specification shows that the

"compilation file" need not include past episodes. In fact, in the preferred

embodiment, past episodes would *not* be included in the compilation file unless the

user had skipped them:

> The usage log may be employed to insure that the subscriber has an opportunity to hear episodes that may have been skipped. By monitoring the usage log, if an episode included in any given proposed session was not in fact played, the host may include it in the next proposed session as well.

A60 (at 19:60-64).

In sum, neither the claim language nor the specification supports Personal

Audio's argument that "currently available episodes in said series of episodes"

must include episodes that came out at different times.

III.   The Claimed "Compilation File" Does Not Necessarily Include Episodes that Issued "At Different Times," and Is Disclosed in Both Compton/CNN and Patrick/CBC.

Personal Audio argues that the Board's construction of "compilation file"

was incorrect and that this construction "caused" the Board to make an incorrect

determination of unpatentability. Opening Br. at 24-30. Personal Audio's argument

provides no reason to disturb the Board's construction or its factual finding that a "compilation file" is found in both Compton/CNN and Patrick/CBC.

The Board properly found that that the claimed "compilation file" includes a web page that distributes a group of stories that were broadcast together, even if it does not include episodes that issued "at different times." A16-18. The claim requires "storing an updated version of a compilation file." The Board rejected Personal Audio's argument that this claim language requires the compilation file to be created by amending a previously existing compilation file. The Board found that Compton/CNN's disclosure of automatically generating and storing a new version of the "contents.html" file each day satisfies the claim language. A18. The Board explained that there is "no claim language limiting how the updating of the compilation file occurs," and that "the claim language does not include a limitation that would prohibit creating a new file on a daily basis from being an update." A18.

On appeal, Personal Audio's "compilation file" argument combines the "episodes" and "series of episodes" arguments that are addressed above with an argument about the term "updated." Personal Audio argues that it was "legally erroneous" for the Board to find that the "claim language does not specify how the compilation file is updated." Opening Br. at 26. Personal Audio argues that because the claim requires the "updated version of [the] compilation file to contain attribute data for "currently available episodes **in said series of episodes,**" the

compilation file must describe "episodes issuing over time at different times." *Id.* at 25, 26 (emphasis in original).

This argument is wrong for the same reasons that are discussed above: the "currently available" episodes that are described in the claimed "compilation file" are not required to include previously distributed episodes. In fact, as explained above, the specification explains that in the preferred embodiment, previously distributed episodes typically should <u>not</u> be included in the compilation file.

Personal Audio frames its argument in Part V.B.2 of its opening brief as being about the meaning of "compilation file." *See* Opening Br. at 24. Nevertheless, part of Personal Audio's discussion in that section relates to the meaning of the term "updated," and whether the prior art teaches an "updated" compilation file. *See id.* at 26-28.[8] Personal Audio provides no reason to disturb the Board's conclusion that Compton/CNN and Patrick/CBC disclose an "updated" compilation file.

With respect to Compton/CNN, Personal Audio's *own expert* admitted that

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[8] Personal Audio never proposed a construction for "updated" before the Board. Importantly, to the extent Personal Audio raises a factual question about whether the prior art discloses an updated version of a compilation file, the Board's determination is upheld unless the Board's factual findings are unsupported by substantial evidence. *In re Gartside*, 203 F.3d 1305, 1316 (Fed. Cir. 2000). Personal Audio cannot avoid review under this standard by misrepresenting factual questions as claim construction issues – especially where it stated that the Board's claim construction was not material to any of its arguments below.

the contents.html file in is "updated each day":

> Q. The table of contents, in particular the contents.html file, is generated each day for each Newsroom program, correct?
>
> A. Yes.
>
> Q. And in particular there's a program identified here as "contents.c" that is run each day and that generates the HTML file, contents.html, for each Newsroom program, right?
>
> A. Yes, that's what it looks like.
>
> Q. That means that the contents.html file is updated each day to reflect the most recent broadcast of CNN Newsroom, correct?
>
> A. Yes, I believe so.

A1019 (at 91:6-18). In light of this testimony, it cannot have been clearly erroneous for the Board to find that the "contents.html" file in Compton/CNN is an "updated version of a compilation file" as required by claim 31. *See* A18 (citing Dr. Nelson's deposition testimony). As the Board explained, "Compton/CNN teaches an updated compilation file" because the "episodes listed in one compilation file for one day which are updated for the next day are related segments concerning the news" and the "new episode is thus listed in the updated compilation file, as required by claim 31." A18.

With respect to Patrick/CBC, Personal Audio's argument fails for similar reasons. As the Board noted, Patrick/CBC disclosed that "the Quirks & Quarks science magazine show was recorded each week, broken down into its component parts, and made available on the server." *See* A25 (citing to Patrick/CBC at A869).

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Even if Patrick/CBC only discloses that the CBC made one "episode" of Quirks &

Quarks available every week on its server, claim 31 is anticipated. *See* A25-27.

Nothing in the claim required CBC to make *all* previous "episodes" available if

CBC decided that only certain episodes (i.e. that week's episode) was all that was

going to be made "currently available." The Board correctly found that

Patrick/CBC discloses an updated compilation file.

## IV.   Personal Audio's "Two Processors" Argument Should Be Rejected.

Personal Audio argues that the claims require a "back-end configuration"

with "*two* processors, namely the processor found in the data storage server as well

as a second processor coupled to a communications interface." Opening Br. at 31.

This argument should be rejected because it misreads the claim language, would

exclude the preferred embodiment, and would not distinguish the prior art even if it

were a correct reading of the claim.

A.   Construing the Claims to Require Two Processors Would Improperly Exclude the Preferred Embodiment.

To begin with, the claims expressly require "one or more processors," not

two processors. Personal Audio's argument depends on its assumption that the

"data storage server" required must have its own separate hardware, including a

separate processor. Other than attorney argument presented for the first time on

appeal, Personal Audio offers no support for this assumption, which is

unreasonable even in the abstract. The broadest reasonable construction of claim

31 does not require two processors.

Moreover, the specification of the '504 patent contradicts Personal Audio's two-processor argument because it shows that in the only embodiment described, a single processor is used. Figure 1 of the '504 patent (partially reproduced below) shows the only embodiment of a server that is provided in the specification: "a host computer indicated generally at 101." A52 (at 4:40-41).
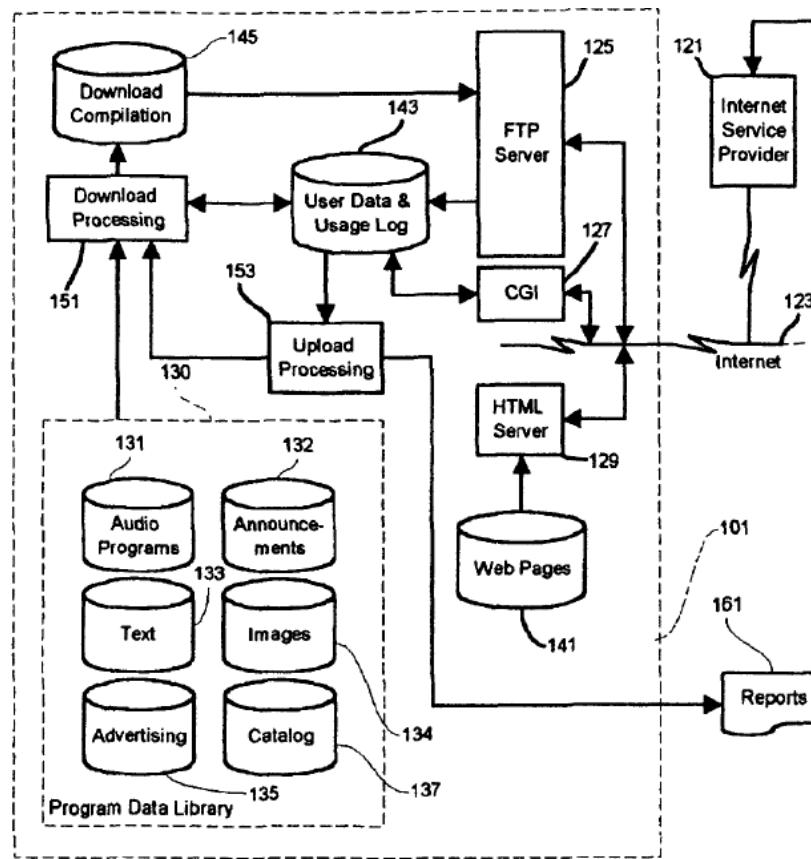
A44. This figure shows that a single processor is used because it shows that all of the claimed components, including the "data storage server," are part of a single "host computer" or "host server": the large dotted box labeled 101. A52 (at 4:40-41); A53 (at 5:57-59). The host computer contains all of the communications

interfaces shown: "FTP server interface 125," "CGI interface 127," and "HTML interface 129." A53 (at 5:57, 5:59, 5:61). In addition, "the host server 101 stores and maintains a plurality of data files including a program data library indicated generally at 130 consisting of a collection of compressed audio program segments." A53 (at 5:63-66). Though the term "data storage server" does not appear in the specification, the specification shows that the "host server 101" performs the functions that claim 31 assigns to the "data storage server."[9] In particular, claim 31 requires that the data storage server stores the "updated version of a compilation file," and Figure 1 shows that the "compilation file 145" is stored in the "host computer." A53-A54 (at 6:60-7:9).[10] Finally, though the specification does not refer to the "host computer" as containing a processor, it must have contained one.[11]

Thus, the only embodiment of a "server" in the specification depicts the claimed hardware components — "one or more data storage servers," "one or more communication interfaces," and "one or more processors" — as all being part of a

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[9] The term "data storage" appears only twice, and both times refers to data storage in the "Subscriber Audio Player," not in the server. A52 (at 4:47, 4:49).

[10] Furthermore, though claim 31 does not require the media files are stored in the data storage server, the specification shows that the media files (audio segments) are stored in the host server in "the program library," where they are "available for downloading to subscribers." A70 (at 40:38-40).

[11] The terms "processor" and "CPU" only appear in the specification in descriptions of the "Subscriber Audio Player"; they do not appear in the description of the server. *See e.g.* A52 (at 4:44-46), A53(at 5:5-9), A62 (at 23:28).

single "host computer." This contradicts Personal Audio's argument that the "data storage server" must have its own processor that is separate from the claimed processor. *Kaneka Corp. v. Xiamen Kingdomway Group Co.*, 790 F. 3d 1298, 1304 (Fed. Cir. 2015) ("[a] claim construction that excludes a preferred embodiment is rarely, if ever, correct," and "[a] construction that excludes all disclosed embodiments . . . is especially disfavored").

B.   Even if the Claims Required a "Two Processor" Configuration, that Configuration Is Disclosed by Both Compton/CNN and Patrick/CBC, and Was Well-Known in the Art.

Even if the claims did require two processors, one in the "data storage server" and another that is expressly claimed, this would not distinguish the prior art, and EFF would have easily made that proof to the Board.[12]

Compton/CNN discloses using a separate "Encoding Station" that is connected to the "Internet Server" that hosts the Newsroom website. As shown in Figure 4 of Compton/CNN, which is reproduced below, "MPEG-1 Video Encoding" is performed in a computer that is physically separate from the "Internet Server," and the encoded MPEG files are then "transferred to [the] Internet Server" over an Ethernet connection.

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[12] As it stands, EFF was prevented from presenting this evidence to the Board by Personal Audio's failure to timely raise this argument. Personal Audio should not be afforded the benefit of a remand to determine any factual disputes given its prejudicial behavior in failing to raise this argument at the Board.
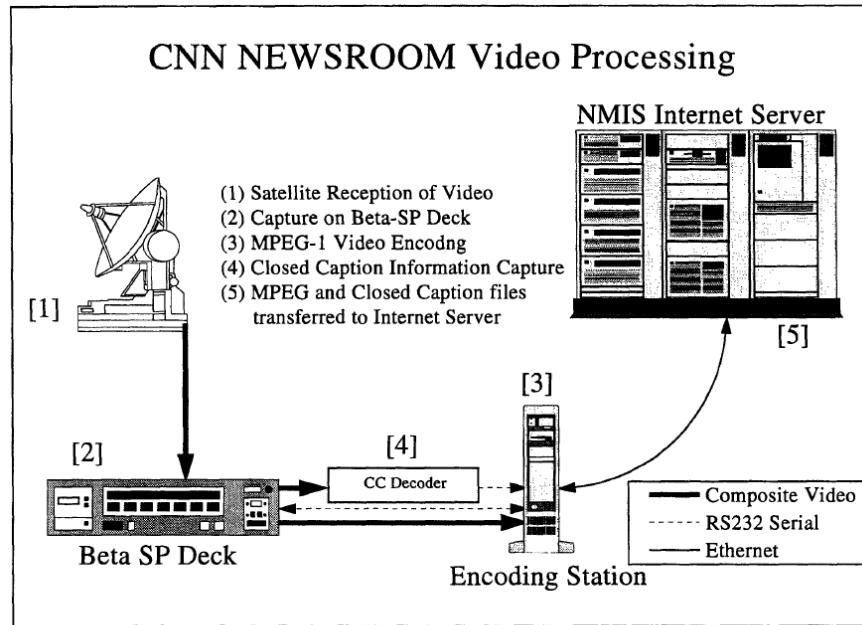
Figure 4 Video Processing for Internet NEWSROOM

A891. The "Encoding Station" computer must have a processor that is separate and distinct from the processor in the "Internet Server" computer, because they are physically separate computers. Confirming this, Compton/CNN explains that when the video has been encoded in MPEG form, "the encoding server" uses the FTP protocol to deliver the MPEG files "to our server." A893.

Thus, even if Personal Audio were correct that the claims required two processors, that could not save the claims, because a two-processor configuration is disclosed by Compton/CNN. The "Encoding Station" computer is a "data storage server" that has a separate processor. It stores the encoded video files before passing them on to the "Internet Server" computer, which has its own processor that is "coupled to said one or more communications interfaces" and that performs

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the other steps of the claims.

With respect to Patrick/CBC, the article explicitly discloses users accessing content via an Internet server. A864-A865. It *also* discloses that as the system became popular, the system was expanded. A865. This included offering "'[m]irror' sites that would offer a copy of the news programs . . . and users were encouraged to select the sites closest to them." *Id.*; *cf.* A1162-1163. Thus content was also available from a *different* "mirror" server that would have its own processor.

Furthermore, the testimony of Personal Audio's expert shows that the "two-processor" hardware configuration was well-known in the art. During his deposition, Dr. Nelson testified that that a person of ordinary skill knew how to set up a web server (A1005); that a web server that is accessible through the world wide web has a communication interface for connecting to the Internet (A1045-A1046); and that a web server has data storage for the content it makes available (A1043). In so testifying, Dr. Nelson explained that while a web server's data storage was "typically part of the same computer," it "could also be part of a different computer that was accessible to the Web server":

> Q. Is it correct that a person of ordinary skill in the art would understand in 1996 that a Web server typically included data storage for the content that it was going to serve?
>
> A. Yeah, I think probably so, especially for small sets of information.

Q. Now, you have alternatives in mind. Can you describe what those were in '96 to the Web server including -- I'm sorry -- the server with the Web server including the data storage?

A. Well, I'm just thinking that some of that content may be on another machine. So . . .

Q. Another computer, you mean?

A. Yeah.

Q. And it would still be accessible to the Web server somehow?

A. Yeah.

Q. Through a network perhaps?

A. Right.

Q. So in other words, <u>there would be data storage for the content</u> and <u>it would typically be part of the same computer, but it could also be</u> <u>part of a different computer</u> that was accessible to the Web server?

A. <u>Yeah, I think that's fair to say</u>.

A1043-1044 (at 115:11-116:11) (emphasis added). This testimony from Dr. Nelson shows that the "two processor" configuration — one where the data storage server was provided by a separate computer — was known to a person of ordinary skill in the art in 1996.

Finally, Personal Audio mischaracterizes the testimony of EFF's expert, Dr. Schmandt, when it asserts that he was "forced to admit" that "neither Compton/CNN not Patrick/CBC discloses the hardware configuration required by the claims." Opening Br. at 32. In fact, the portion of the record cited by Personal Audio shows that Dr. Schmandt testified that the Patrick/CBC article *did* disclose

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hardware, and moreover, that the hardware "arrangement" of the claims was

disclosed because "it's known to one of ordinary skill in the art that . . . that's how

the web server works":

> Q. Okay. Turning now to Exhibit 1, and to claim 31, column 50, spilling over to column 51. In the preamble, it calls for an "Apparatus for disseminating a series of episodes represented by media files." What is the apparatus in the Exhibit 4?[13]
>
> A. It's the web server and the associated hardware, hardware associated with that web server. . . .
>
> . . .
>
> Q. So as we sit here today, referring back to that, you're just assuming it has this arrangement?
>
> MR. BROWN: Objection.
>
> A. I think it's known to one of skill in the art that that's how it works. That's how the Internet works. That's how the web server works.

A1162-1163 (at 50:17-51:16). Similarly, in the other portion of the record cited by

Personal Audio, Dr. Schmandt did not "admit" that the hardware configuration of

the claims was not disclosed. To the contrary, Dr. Schmandt testified that the

Patrick/CBC shows that a data storage server must have been present because the

article explains that users could click on links to get the audio or HTML files:

> Q. Well, for example, a number of things in this, for example, where you say, "one or more data storage servers at a storage location," there's nothing mentioned in structure in the article about data storage

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[13] Exhibit 4 is the Patrick/CBC reference. A1115. While Personal Audio cites this passage as referring to Compton/CNN, as can be seen it refers to Patrick/CBC.

servers or storage location. The article, is this your assumption that they have these?

MR. BROWN: Objection.

A. Okay. So you're talking about data storage server? Okay. So the data storage server is a place where files are stored. <u>Since users could click and get the contents of these files, either HTML or audio, those files were stored someplace. That's a data storage server</u>.

A1130-31 (at 19:2-13) (emphasis added). Moreover, Personal Audio never asked

Dr. Schmandt anything about whether two processors were required by the claim,

or whether two processors were disclosed in the prior art.

In sum, the Board correctly found that the prior art disclosed the computer

components claimed, *i.e.* the servers, communications interfaces, and processors.

Even if the two-processor argument were accepted despite Personal Audio's

waiver, it would not justify reversal.

V.   The Board Correctly Found That, Even Accepting Personal Audio's Arguments About Claim Scope, Claim 31 Is Obvious in Light of Compton/CNN.

The Board correctly found that Compton/CNN discloses an updated

compilation file at a predetermined URL. *See* A16-20. Having reached that

conclusion, the Board considered whether, even accepting Personal Audio's view

of the limitations in Claim 31, it would *still* be obvious in light of Compton/CNN.

See A18-19. The Board found that even in the alternative that it had accepted

Personal Audio's view of the claim in light of the limitations "updated compilation

file" and "predetermined URL," the necessary changes to the system described in

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Compton/CNN would have been obvious — indeed "trivial" — to a person of skill in the art. *Id.* at 19.

On appeal, Personal Audio argues that this obviousness conclusion was incorrect. Opening Br. at 35-44. Personal Audio's argument should be rejected for two reasons. First, the argument is only relevant at all if Personal Audio's analysis of the claim — which imports limitations not found in the claim language — is accepted. Second, substantial evidence supports the Board's conclusion that, even accepting Personal Audio's analysis, Compton/CNN renders Claim 31 obvious.[14]

The errors in Personal Audio's analysis of the claim language have for the most part been discussed above. Personal Audio contends that the updated version of the compilation file cannot encompass "just the current, newly available episode." Opening Br. at 28; *see also* A681-687.[15] This is incorrect. There is no requirement in claim 31 that the compilation file include historical episodes in addition to the current episode. *See* Section II.B, *supra*. Personal Audio also contends that the compilation file must be updated at a *single, consistent*

_____

[14] Personal Audio did not present any arguments to the Board specific to dependent claims 32-35. *See* A21-22. Nor does it present any arguments in this appeal that are specific to the dependent claims. Thus, these claims all fail together with independent claim. *See In re Geisler*, 116 F.3d 1465, 1471 (Fed. Cir. 1997).

[15] Personal Audio never proposed a construction of the claim term "updated." Perhaps this is why, in this appeal, Personal Audio confusingly presents its argument regarding the term "updated" as being founded on the construction of "compilation file." *See* Opening Br. at 24-30 (suggesting that the Board's error was "caused" by an incorrect construction of "compilation file").

predetermined URL. *See* Opening Br. at 35 (stating that the "Board identified no reason why one of ordinary skill in the art would modify Compton from disseminating just the current day's episode at a ***different*** URL") (emphasis added). This is also incorrect. As the Board found, "the claim language does not include a limitation that would prohibit creating a new file on a daily basis from being an update." A18. This is consistent with the specification, which explains that the compilation file contains the new content that the subscriber has not yet listened to, and not old content that the subscriber has already heard. A60 (at 19:60-64). It is also consistent with the specification's statement that the "compilation file" can be "one or more files." *See* A9 (Board noting that the construction of "compilation file" is "supported by, among other things, the Specification, which describes the compilation file as 'one or more subscriber and session specific files which contain the identification of separately stored sharable files.'") (citing A54 (at 7:10-13). In addition, both experts agreed that the URL disclosed by Compton/CNN was a "predetermined URL." A1021 (Nelson Dep. at 93:11-21); A852-A854 (Schmandt Decl. at ¶ 78); *see also* A1020-A1021 (Nelson Dep. at 92:4-93:10); A53 (at 6:60-64); *cf.* A54, A57 (at 7:23-26, 13:30-33).

Even if it were proper to read in the unclaimed limitations, the Board's obviousness finding was correct. Personal Audio argues that there was no "evidence offered by the EFF indicating that including previous episodes together

with the current episode at a single html file would have been a known, obvious, conventional technique within the art or within the common knowledge of a skilled artisan." Opening Br. at 39. In fact, the record shows that this modification would have been well within the realm of ordinary skill: Personal Audio's expert Dr. Nelson confirmed that a person of ordinary skill knew how to create a "Table of Contents" web page, and how to update a Table of Contents web page by adding new content to it. A1008 (Nelson Dep. at 80:3-23); *see also* A852-A855 (Schmandt Decl. at ¶¶ 78-79). Furthermore, the Board agreed with the testimony of EFF's expert that such a modification was trivial and well within the skill of the ordinary artisan. *See* A19 (citing and agreeing with A854-A855 (Schmandt Decl. ¶ 79) and A886 (Compton/CNN). This was entirely proper: "the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ." *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 418 (2007).

Finally, Personal Audio is mistaken when it argues, for the first time on appeal, that there is "teaching away" in the prior art. Opening Br. at 40. Personal Audio argues that "the teachings of Compton/CNN and Patrick/CBC indicate that one of ordinary skill in the art would *not* have thought to include previous episodes with a newly available episode at the Table of Contents file." Opening Br. at 40.

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Yet as Personal Audio recognizes, Opening Br. at 42, EFF's expert testified that "mechanisms described in Internet CNN Newsroom could also be straightforwardly used to automatically generate and update the table of contents HTML file at a unique URL (e.g. 'soapopera.html') in order to distribute a serialized show, such as a soap opera, as the article expressly suggests." A854-855 (Schmandt Decl. at ¶ 79). Furthermore, Compton/CNN explicitly states that "Students and teachers, with appropriate hardware and software, can easily incorporate Internet NEWSROOM content into other presentations. Material can also be linked together in new ways, for example a teacher might create a page with links to stories about a certain topic, or students could create pages for use by other students with stories relating to a topics [sic] they are studying." A898 (internal citation omitted).

Personal Audio's attempts to make its "invention" appear to be something other than what was well known in the art fail.

VI.   Personal Audio's Seventh Amendment Argument Is Legally Incorrect.

Personal Audio argues the Board's decision violates its Seventh Amendment

rights because a jury in the Eastern District of Texas had previously returned a

verdict finding the '504 patent infringed and not invalid — even though no final

judgment has been entered in that case. *See Personal Audio v. CBS Corp.*, Case No.

2:13-cv-00270-JRG, Joint Motion to Stay (E.D. Tex. Apr. 30, 2015) (ECF No.

117).

This argument is meritless. To begin with, Personal Audio acknowledges

that this court's decision in *MCM Portfolio LLC v. Hewlett-Packard Co.*, 2015 WL

7755665 (Fed. Cir. Dec. 2, 2015), which rejected a Seventh Amendment challenge

to an *inter partes* review proceeding, is both controlling and inconsistent with its

position. Opening Br. at 44. Indeed, Personal Audio concedes that its main Seventh

Amendment argument could only succeed if *MCM Portfolio* were reversed. *Id.*

Personal Audio attempts to distinguish this case from *MCM Portfolio* by

arguing that a jury verdict "in the related district court proceeding" precludes the

Board's decision that invalidated the '504 patent based on the Reexamination

Clause. Personal Audio's argument must be rejected, both because the jury verdict

here was rendered against a wholly unrelated entity, and because it involved

different prior art considered under a different standard.

Personal Audio's argument implies that any verdict wherein an unrelated

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defendant fails to prove a fact (invalidity) to a jury conclusively establishes that

fact doesn't exist. EFF is not aware of any cases, in any area of the law, that

suggest that the Seventh Amendment operates to bind someone not privy to a

previous litigation or to the jury verdict in that litigation. Indeed, if the Court were

to accept Personal Audio's argument, it is *EFF's* rights that would be violated. As

the Supreme Court explained:

> Some litigants—those who never appeared in a prior action—may not
> be collaterally estopped without litigating the issue. They have never
> had a chance to present their evidence and arguments on the claim.
> Due process prohibits estopping them despite one or more existing
> adjudications of the identical issue which stand squarely against their
> position.

Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found., 402 U.S. 313, 329 (1971).

Unsurprisingly, then, Federal Circuit case law is also directly contrary to Personal

Audio's sweeping proposition. *See Shelcore, Inc. v. Durham Industries, Inc.,* 745

F.2d 621, 627 (Fed. Cir. 1984) ("A patent is not held valid for all purposes but,

rather, not invalid on the record before the court").

To be clear: EFF is not now nor was it ever a party to the case in Texas. *See,*

e.g., A1236-A1241 (identifying the defendant in Texas as CBS Corporation). As a

non-party to the Texas case, EFF is free to challenge Personal Audio's patent,

regardless of whether a jury considering a *different* party's arguments found the

patent not invalid under a different standard. *See id.*; *see also Ethicon, Inc. v.*

Quigg, 849 F.2d 1422, 1429 n.3 (Fed. Cir. 1988) ("a court's decision upholding a

patent's validity is not ordinarily binding on another challenge to the patent's validity" (internal citation omitted)); *id.* at 1428-29.[16]

Second, Personal Audio's suggestion that the district court case involved "precisely the same prior art," Opening Br. at 51, is simply false. The Patrick/CBC art that the Board determined anticipates the asserted claims of the '504 patent was never considered by the jury in Texas. Opening Br. at 47-48; A28. With respect to Compton/CNN, the Board considered *different*, albeit related, prior art than the art at issue in the district court case. Personal Audio is certainly aware of this fact, as its counsel at the jury trial characterized the Compton "article" as "a six-page disclosure of the CNN Newsroom." A2360 (Personal Audio's counsel characterizing the Compton reference). By contrast, the Compton/CNN reference at issue here is an MIT Master's Thesis that totaled nearly 60 pages. A871-928.

Finally, even if EFF had been a party to the case in Texas, and even if the prior art considered by the jury in the case was the same as the prior art at issue here, Personal Audio's argument would be foreclosed by this Court's controlling opinion in *Fresenius USA, Inc. v. Baxter Int'l, Inc*. 721 F.3d 1330 (Fed. Cir. 2013). In *Fresenius*, this Court determined that a judgment based on a jury verdict of infringement and no invalidity that had been entered, appealed, and affirmed

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[16] As even Personal Audio recognizes, on page 51, n. 5 of its Opening Brief, at most such an argument regarding the Seventh Amendment applies to the *defendant* in that case, not an unrelated third party.

pending remand regarding damages was "*not sufficiently final* to preclude application of the intervening final judgment" in reexamination proceedings. *Id.* at 1341. This case presents even less of a "final" judgment than this Court found "not sufficiently final" in *Fresenius*. The jury verdict upon which Personal Audio relies is not a final judgment: post-trial motions remain pending, and no appeal has been filed. Indeed, that case has been stayed pursuant to a *joint motion* filed by Personal Audio and CBS, the defendant in that case, requesting that that case be stayed pending the outcome of this appeal. *See Personal Audio v. CBS Corp.*, Case No. 2:13-cv-00270-JRG, Order (E.D. Tex. Apr. 30, 2015) (ECF No. 118). Contrary to Personal Audio's argument, the *Fresenius* case stands for the proposition that it is the verdict in *the district court case* that will need to be vacated if this Court affirms the Board's decision.

CONCLUSION

For the reasons stated herein, the Board's determination that claims 31-35 are invalidated by Compton/CNN and Patrick/CBC should be affirmed.

Dated: February 25, 2016   /s/ *Nicholas A. Brown*

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

I hereby certify as follows:

1.   The foregoing Responsive Brief of Appellee Electronic Frontier Foundation complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief is printed in proportionally spaced 14-point type, and there are 13,866 words in the brief according to the word count of the word-processing system used to prepare the brief (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), that is, the tables of contents and citations, and certificates of counsel, and by Fed. Cir. R. 32(b), that is, the certificate of interest, the statement of related cases, and the addendum in an initial brief of an appellant).

2.   The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and with the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft® Word for Mac 2011 in 14-point Times New Roman font.

February 25, 2016   /s/ *Nicholas A. Brown*

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2016, I caused copies of the foregoing Responsive Brief of Appellee Electronic Frontier Foundation to be served by electronic means via the Court's CM/ECF system on all counsel registered to receive electronic notices.

/s/ *Nicholas A. Brown*