

Nos. 2020-1566, 2020-1568, 2020-1569

**United States Court of Appeals
for the Federal Circuit**

IN RE: PERSONALWEB TECHNOLOGIES, LLC,
AMAZON.COM, INC., AMAZON WEB SERVICES, INC.
Plaintiffs – Appellees

v.

PERSONALWEB TECHNOLOGIES, LLC
Defendant – Appellant
LEVEL 3 COMMUNICATIONS, LLC
Defendant

PERSONALWEB TECHNOLOGIES, LLC
Plaintiff – Appellant
LEVEL 3 COMMUNICATIONS, LLC
Plaintiff

v.

TWITCH INTERACTIVE, INC.,
Defendant – Appellee

On Appeal from the United States District Court
for the Northern District of California
Honorable Beth Labson Freeman
Case Nos. 5:18-cv-00767-BLF, 5:18-cv-05619-BLF, 5:18-md-02834-BLF

**APPELLANT PERSONALWEB TECHNOLOGIES, LLC’S COMBINED
PETITION FOR PANEL REHEARING AND REHEARING *EN BANC***

FORM 9. Certificate of Interest

Form 9 (p. 1)
July 2020

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 2020-1566

Short Case Caption In re: PersonalWeb Technologies, LLC

Filing Party/Entity PersonalWeb Technologies, LLC

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 10/21/2020

Signature: /s/ Stephen Underwood

Name: Stephen Underwood

Form 9 (p. 2)
July 2020

☐ Additional pages attached

FORM 9. Certificate of Interest

Form 9 (p. 3)
July 2020

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable☐ Additional pages attached

Michael A. Sherman (Stubbs Alderton & Markiles LLP)	Jeffrey F. Gersh (Stubbs Alderton & Markiles LLP)	Sandeep Seth (Stubbs Alderton & Markiles LLP)
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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☐ None/Not Applicable☒ Additional pages attached

See Exhibit A		

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☒ None/Not Applicable☐ Additional pages attached

Exhibit A

The following cases pending in this or any other court or agency may directly affect, or be directly affected by, this court's decision in the pending appeal:

Federal Circuit Cases

1. *In re PersonalWeb Techs. LLC*, Case No. 19-1918, docketed on 5/24/2019, and decided on 6/17/2020 (time for filing *en banc* petition has not yet run).

District Court Cases (all pending in the Northern District of California)

1. Amazon.com, Inc. and Amazon Web Services, Inc. v. PersonalWeb Techs., LLC et. al., No. 5:18-cv-00767-BLF;
2. PersonalWeb Techs., LLC v. Twitch Interactive, Inc., No. 3:18-cv-05619-BLF;
3. In re PersonalWeb Techs., LLC No. 5:18-md-02834;
4. PersonalWeb Techs., LLC et al. v. BuzzFeed Inc., No. 5:18-cv-06046;
5. PersonalWeb Techs., LLC et al. v. Dictionary.com, LLC, No. 5:18-cv-05606;
6. PersonalWeb Techs., LLC et al. v. Oath Inc., No. 5:18-cv-06044;
7. PersonalWeb Techs., LLC et al. v. Patreon, Inc., No. 5:18-cv-05599;
8. PersonalWeb Techs., LLC et al. v. Popsugar, Inc., No. 5:18-cv-06612;
9. PersonalWeb Techs., LLC et al. v. Vice Media, LLC, No. 5:18-cv-05970;

10. PersonalWeb Techs., LLC et al. v. Vox Media, Inc., No. 5:18-cv-05969;
11. PersonalWeb Techs., LLC et al. v. Ziff Davis, LLC, No. 5:18-cv-07119;
12. PersonalWeb Techs. LLC v. Airbnb, Inc., No. 5:18-cv-00149-BLF;
13. PersonalWeb Techs. LLC v. Amicus FTV, Inc., No. 5:18-cv-00150-BLF;
14. PersonalWeb Techs. LLC v. Atlas Obscura, Inc., No. 5:18-cv-04037-BLF;
15. PersonalWeb Techs. LLC v. Atlassian, Inc., No. 5:18-cv-00154-BLF;
16. PersonalWeb Techs. LLC v. BDG Media, Inc., No. 5:18-cv-03571-BLF;
17. PersonalWeb Techs. LLC v. Bitly, Inc., No. 5:18-cv-03 572-BLF;
18. PersonalWeb Techs. LLC v. Blue Apron, LLC, No. 5:18-cv-03573-BLF;
19. PersonalWeb Techs. LLC v. Braze Inc., No. 5:18-cv-04624-BLF;
20. PersonalWeb Techs. LLC v. Brooklyn Brewery Corp., No. 5:18-cv-05436-BLF;
21. PersonalWeb Techs. LLC v. Capterra, Inc., No. 5:18-cv-03458-BLF;
22. PersonalWeb Techs. LLC v. Cars.com, Inc., No. 5:18-cv-05195-BLF;
23. PersonalWeb Techs. LLC v. Centaur Media USA, Inc., No. 5:18-cv-03577-BLF;
24. PersonalWeb Techs. LLC v. Cloud Warmer, Inc., No. 5:18-cv-03998-BLF;
25. PersonalWeb Techs. LLC v. Cloud 66, Inc., No.5:18-cv-00155-BLF;
26. PersonalWeb Techs. LLC v. Curebit, Inc., No. 5:18-cv-00156-BLF;
27. PersonalWeb Techs. LLC v. Curious.com, Inc., No. 5:18-cv-05198-BLF;

28. PersonalWeb Techs. LLC v. Dollar Shave Club, Inc., No. 5:18-cv-05373-BLF;
29. PersonalWeb Techs. LLC v. Doximity, Inc., No. 5:18-cv-00157-BLF;
30. PersonalWeb Techs. LLC v. Fab Commerce & Design, Inc., No. 5:18-cv-03578-BLF;
31. PersonalWeb Techs. LLC v. FanDuel, Inc. and FanDuel Limited, No. 5:18-cv-03582-BLF;
32. PersonalWeb Techs. LLC v. Fiverr International Ltd., No. 5:18-cv-03455-BLF;
33. PersonalWeb Techs. LLC v. Food52, Inc., No. 5:18-cv-03579-BLF;
34. PersonalWeb Techs. LLC v. Goldbely, Inc., No. 5:18-cv-00160-BLF;
35. PersonalWeb Techs. LLC v. Goodreads, LLC, No. 5:18-cv-05595-BLF;
36. PersonalWeb Techs. LLC v. GoPro, Inc., No. 5:18-cv-00161-BLF;
37. PersonalWeb Techs. LLC v. Heroku, Inc., 5:18-cv-00162-BLF;
38. PersonalWeb Techs. LLC v. Hootsuite, Inc., No. 5:18-cv-06615-TSH;
39. PersonalWeb Techs. LLC v. Imgur, Inc., No. 5:18-cv-05596-BLF;
40. PersonalWeb Techs. LLC v. Intuit, Inc., No. 5:18-cv-05611-BLF;
41. PersonalWeb Techs. LLC v. Karma Mobility, Inc., No. 5:18-cv-03459-BLF;
42. PersonalWeb Techs. LLC v. Kickstarter, PBC, No. 5:18-cv-03997-BLF;
43. PersonalWeb Techs. LLC v. Kongregate, Inc., No. 5:18-cv-04625-BLF;

44. PersonalWeb Techs. LLC v. Leap Motion, Inc., No. 5:18-cv-00163-BLF;
45. PersonalWeb Techs. LLC v. Lesson Nine GmbH, No. 5:18-cv-03453-BLF;
46. PersonalWeb Techs. LLC v. Match Group, LLC, No. 5:18-cv-03462-BLF;
47. PersonalWeb Techs. LLC v. Mavenlink, Inc., No. 5:18-cv-05200-BLF;
48. PersonalWeb Techs. LLC v. Melian Labs, Inc., No. 5:18-cv-00165-BLF;
49. PersonalWeb Techs. LLC v. Merkle, Inc., No. 5:18-cv-00409-BLF;
50. PersonalWeb Techs. LLC v. NRT LLC and NRT New York LLC d/b/a Citi Habitats, No. 5:18-cv-05201-BLF;
51. PersonalWeb Techs. LLC v. Optimizely, Inc., No. 3:18-cv-06614-SVK;
52. PersonalWeb Techs. LLC v. Our Film Festival, Inc. d/b/a Fandor, Inc., No. 5:18-cv-00159-BLF;
53. PersonalWeb Techs. LLC v. Panjiva, Inc., No. 5:18-cv-03580-BLF;
54. PersonalWeb Techs. LLC v. PayPal, Inc. formerly sued as Venmo Inc., No. 5:18-cv-00177-BLF;
55. PersonalWeb Techs. LLC v. Peek Travel, Inc., No. 5:18-cv-04628-BLF;
56. PersonalWeb Techs. LLC v. Quotient Technology Inc., No. 5:18-cv-00169-BLF;
57. PersonalWeb Techs. LLC v. Reddit, Inc., No. 5:18-cv-00170-BLF;
58. PersonalWeb Techs. LLC v. RetailMeNot, Inc., No. 5:18-cv-05966-BLF;
59. PersonalWeb Techs. LLC v. Roblox Corporation, No. 5:18-cv-00171-BLF;

60. PersonalWeb Techs. LLC v. Rockethub, Inc and ELEQT Group Ltd., No. 5:18-cv-03583-BLF;
61. PersonalWeb Techs. LLC v. ShareFile, LLC, No. 5:18-cv-05202-BLF;
62. PersonalWeb Techs. LLC v. Shopify (USA) Inc., No. 5:18-cv-04626-BLF;
63. PersonalWeb Techs. LLC v. Slack Techs., Inc., No. 5:18-cv-05600-BLF;
64. PersonalWeb Techs. LLC v. Spokeo, Inc., 5:18-cv-02140-BLF;
65. PersonalWeb Techs. LLC v. Spongecell, Inc., No. 5:18-cv-03564-BLF;
66. PersonalWeb Techs. LLC v. Square, Inc., 5:18-cv-00183-BLF;
67. PersonalWeb Techs. LLC v. Stack Exchange, Inc., No. 5:18-cv-06045-BLF;
68. PersonalWeb Techs. LLC v. StartDate Labs, No. 5:18-cv-05203-BLF;
69. PersonalWeb Techs. LLC v. Stitch Fix, Inc., No. 5:18-cv-00173-BLF;
70. PersonalWeb Techs. LLC v. Strava, Inc., No. 5:18-cv-04627-BLF;
71. PersonalWeb Techs. LLC v. TastyTrade, Inc., No. 5:18-cv-05204-BLF;
72. PersonalWeb Techs. LLC v. Teespring, Inc., No. 5:18-cv-00175-BLF;
73. PersonalWeb Techs. LLC v. Tophatter, Inc., No. 5:18-cv-00176-BLF;
74. PersonalWeb Techs. LLC v. Treehouse Island, Inc., No. 5:18-cv-05205-BLF;
75. PersonalWeb Techs. LLC v. Trello, Inc., No. 5:18-cv-6045-BLF;
76. PersonalWeb Techs. LLC v. TripAdvisor LLC, No. 5:18-cv-05967-BLF;
77. PersonalWeb Techs. LLC v. Under Armour, Inc., MyFitnesspal, Inc., No. 5:18-cv-00166-BLF;

78. PersonalWeb Techs. LLC v. Upwork Global, Inc., No. 5:18-cv-05624-BLF;
79. PersonalWeb Techs. LLC v. Urban Dictionary, LLC, No. 5:18-cv-05968-BLF;
80. PersonalWeb Techs. LLC v. Valassis Communications, No. 5:18-cv-05206-BLF;
81. PersonalWeb Techs. LLC v. Vimeo, Inc., No. 5:18-cv-06042-BLF;
82. PersonalWeb Techs. LLC v. Webflow, Inc., No. 5:18-cv-00178-BLF;
83. PersonalWeb Techs. LLC v. WeddingWire, Inc., No. 5:18-cv-03463-BLF;
84. PersonalWeb Techs. LLC v. Wework Companies, Inc., No. 5:18-cv-05272-BLF;
85. PersonalWeb Techs. LLC v. Yotpo Ltd., No. 5:18-cv-03412-BLF;
86. PersonalWeb Techs. LLC v. Zoom Video Communications, Inc., No. 5:18-cv-05625-BLF.

Companion Cases

This appeal has been deemed a companion case with: (i) *PersonalWeb Techs., LLC v. Google LLC*, Case No. 20-1543; (ii) *PersonalWeb Techs., LLC v. Facebook Inc.*, Case No. 20-1553; and (iii) *PersonalWeb Techs., LLC v. EMC Corp.*, Case No. 20-1554. However, to counsel's knowledge, this Court's decision in the companion cases will not affect its decision in this Case No. 20-1566, and *vice versa*, because the companion cases address validity, while this case addresses infringement.

TABLE OF CONTENTS

STATEMENT OF COUNSEL UPON <i>EN BANC</i> PETITION.....	1
POINTS OF LAW OR FACT OVERLOOKED BY THE PANEL	2
ARGUMENT.....	3
I. INTRODUCTION	3
II. SUMMARY OF FACTS	5
III. THE PANEL VIOLATED LONG-STANDING PRECEDENT BY CONSTRUING, FOR THE FIRST TIME, A DISJUNCTIVE “A OR B” CLAIM TERM TO MEAN “JUST B”.....	8
A. The Panel Violated Precedent by Denying PersonalWeb the Full Scope of its Disjunctive, “A or B” Claims	8
B. The Panel Violated Precedent by Construing “A or B” to Mean “B,” Based on Alleged “Interchangeable Use” in the Specification	11
C. Contrary to Precedent, the Panel Required <i>In Haec Verba</i> Support for the Claims in the Specification.....	13
D. The Panel Never Addressed Claim Differentiation Precedent	14
E. The Panel Elevated Canons of Statutory Construction Over Rules of Claim Construction	16
IV. CONCLUSION	17

TABLE OF AUTHORITIES

Federal Cases

<i>Ariad Pharm., Inc. v. Eli Lilly & Co.</i> , 598 F.3d 1336 (Fed. Cir. 2010).....	1, 13, 14
<i>Bd. of Regents of the Univ. of Texas Sys. v. BENQ Am. Corp.</i> , 533 F.3d 1362 (Fed. Cir. 2008).....	1, 8, 9
<i>Brown v. 3M</i> , 265 F.3d 1349 (Fed. Cir. 2001).....	1
<i>Exxon Chemical Patents, Inc. v. Lubrizol Corp.</i> , 64 F.3d 1553 (Fed. Cir. 1995).....	1, 8
<i>Game & Tech. Co. v. Activision Blizzard Inc.</i> , 926 F.3d 1370 (Fed. Cir. 2019).....	1, 8
<i>Hawaiian Airlines, Inc. v. Norris</i> , 512 U.S. 246 (1994).....	16, 17
<i>Home Diagnostics, Inc. v. LifeScan, Inc.</i> , 381 F.3d 1352 (Fed. Cir. 2004).....	1, 8
<i>Schumer v. Lab. Computer Sys., Inc.</i> , 308 F.3d 1304 (Fed. Cir. 2002).....	1, 4, 8, 9
<i>Thorner v. Sony Computer Ent. Am. LLC</i> , 669 F.3d 1362 (Fed. Cir. 2012).....	passim
<i>Versa Corp. v. Ag-Bag Int'l Ltd.</i> , 392 F.3d 1325 (Fed. Cir. 2004).....	15
<i>Wasica Fin. GmbH v. Cont'l Auto. Sys., Inc.</i> , 853 F.3d 1272 (Fed. Cir. 2017).....	1, 8

Federal Rules

Fed. R. App. P. 40(a)(2).....	2
Federal Circuit Rule 35(b)(2).....	1

STATEMENT OF COUNSEL UPON *EN BANC* PETITION

Pursuant to Federal Circuit Rule 35(b)(2), I, Lawrence Hadley, Esq., counsel for Appellant PersonalWeb Technologies, LLC (“PersonalWeb”), certify that:

1. Based on my professional judgment, I believe the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedent(s) of this court: (i) *Thorner v. Sony Computer Ent. Am. LLC*, 669 F.3d 1362 (Fed. Cir. 2012); (ii) *Wasica Fin. GmbH v. Cont'l Auto. Sys., Inc.*, 853 F.3d 1272 (Fed. Cir. 2017); (iii) *Schumer v. Lab. Computer Sys., Inc.*, 308 F.3d 1304 (Fed. Cir. 2002); (iv) *Brown v. 3M*, 265 F.3d 1349 (Fed. Cir. 2001); (v) *Game & Tech. Co. v. Activision Blizzard Inc.*, 926 F.3d 1370 (Fed. Cir. 2019); (vi) *Exxon Chemical Patents, Inc. v. Lubrizol Corp.*, 64 F.3d 1553 (Fed. Cir. 1995); (vii) *Bd. of Regents of the Univ. of Texas Sys. v. BENQ Am. Corp.*, 533 F.3d 1362 (Fed. Cir. 2008); (viii) *Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336 (Fed. Cir. 2010); and (ix) *Home Diagnostics, Inc. v. LifeScan, Inc.*, 381 F.3d 1352 (Fed. Cir. 2004).

2. Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance:

a. In a question of first impression, may a claim term written in the alternative form “[genus] or [species]” be construed to be limited only to the species, even though that denies the patentee the full scope of the claim, and even where the specification contains no express disavowal of scope?

b. May this Court look to Supreme Court precedent applying the canons of statutory state law preemption—in which the presumption is in favor of a narrow reading—to overrule this Court’s precedent on claim construction, in which the presumption is in favor of a broad reading?

Dated: September 27, 2021

/s/ Lawrence Hadley
Lawrence Hadley, Esq.

POINTS OF LAW OR FACT OVERLOOKED BY THE PANEL

Pursuant to Fed. R. App. P. 40(a)(2), PersonalWeb respectfully submits that the panel overlooked the following dispositive points of law or fact:

1. The panel overlooked PersonalWeb’s argument that the panel’s construction denies PersonalWeb the full scope of its claims.
2. The panel overlooked the “exacting” standard for claim scope disavowal under *Thorner*, 669 F.3d at 1366.
3. The panel overlooked the many examples of “authorization” in the specification that do not involve “licensing.”
4. The panel overlooked the many instances of claim differentiation that support PersonalWeb’s construction.
5. The panel overlooked the differences between the Supreme Court’s canon of construing statutes narrowly to avoid state law preemption, and this Court’s canon of construing patent claims broadly to give them their “full scope.”

ARGUMENT

I. INTRODUCTION

This petition presents an issue of first impression on the proper interpretation of “disjunctive” claim language, *i.e.*, claim language in the “A or B” format. The question is this: when a patent recites a claim term in the form “A or B,” in which A is a genus, and B is a species of that genus, may the claim be construed to be limited to the species (B), even though that denies the patentee the full scope of the genus (A)? Under this Court’s long-standing rule that “[t]he patentee . . . obtain[s] the *full scope* of its plain and ordinary meaning *unless* the patentee explicitly redefines the term or disavows its full scope,” *Thorner*, 669 F.3d at 1367, the answer should have been “no.” There was no finding that patentee PersonalWeb “explicitly redefined” or “disavowed” the “full scope” of its claims, and it did not. Accordingly, the “[genus] or [species]” term at issue—“unauthorized or unlicensed”¹—should have been construed to cover the full genus, “unauthorized.” Dkt. 65 at 3-5.

It was not. The panel acknowledged that it could not find a single case “in which this court has held the word ‘or’ in a patent claim to be a connector for synonyms,” *i.e.*, in which it construed an “A or B” term to mean “just B.” *Id.* at 11.

¹ This is a “[genus] or [species]” term because the undisputed plain meaning of “unauthorized” is “not permitted,” while the undisputed plain meaning of “unlicensed” is “not permitted under a license.” Dkt. 29 at 33-34. Thus, “unauthorized” (A) is a genus, and “unlicensed” (B) is a species of that genus.

Yet that is what the panel did. The panel construed “unauthorized or unlicensed” to mean “not complaint with a valid license,” which simply means “unlicensed.” Dkt. 65 at 6-13; Appx3576. Thus, the panel construed the “[genus] or [species]” term “unauthorized or unlicensed” to be limited to the narrower species, “unlicensed,” and read the broader genus term, “unauthorized,” out of the claim.

It did so because it found a “consistent interchangeable use of the two words” in the specification. Dkt. 65 at 11. But, “[s]imply referring to two terms as alternatives . . . *is not sufficient* to redefine a claim term.” *Thorner*, 669 F.3d at 1368. Nothing in the specification “redefined” the broader term, “unauthorized,” to be synonymous with the narrower term, “unlicensed.” Thus, the panel should have construed the claims to cover the broader genus, “unauthorized.”

Unless reversed, the panel’s decision will throw this Court’s precedent on disjunctive claim language into disarray.² Previously, patentees had confidence that—if a claim recited “A or B”—it would be deemed infringed if *either* alternative was satisfied. *See Schumer*, 308 F.3d at 1311 (“We have consistently interpreted the word ‘or’ to mean that the items in the sequence are alternatives to each other.”) The panel’s decision destroys that confidence. Patentees will now have to worry that a

² Although the panel designated its opinion as “non-precedential,” as explained herein, the panel’s decision is the first time this Court has ever interpreted disjunctive, “A or B” claim language to mean simply “B.” Accordingly, it is highly likely that parties and courts will begin citing to the panel opinion—despite its “non-precedential” status—as this Court’s only pronouncement on this issue.

court might construe an “A or B” term to be limited to “just B”—*i.e.*, the narrower option, B—if it concludes that the two words are used “interchangeably” in the specification. This violates decades of this Court’s precedent, and injects massive uncertainty into all patents with disjunctive claim language.

Accordingly, to protect the uniformity of this Court’s case law on disjunctive claim terms, panel or *en banc* rehearing should be granted, and PersonalWeb’s proposed construction of “unauthorized or unlicensed” should be adopted.

II. SUMMARY OF FACTS

PersonalWeb owns a family of patents directed to the “True Name” invention. Dkt. 29 at 8-12. The True Name patents all claim priority to April 11, 1995. *Id.* The True Name invention pioneered the use of substantially unique identifiers, instead of directory paths and file names, to identify files. *Id.* In the invention, substantially unique identifiers are generated from the contents of data files, *e.g.*, by running a cryptographic hash algorithm on a file. *Id.* This identifier is then used to uniquely identify the file wherever it appears. *Id.* The patents describe a number of uses for such identifiers, including use in “caching.” *Id.*

In 1999, four years after the True Name invention, the HTTP 1.1 specification was released. *Id.* at 12-14. HTTP 1.1 introduced a strong, mandatory caching system into the World Wide Web. *Id.* at 18-22. Under HTTP 1.1, browsers or intermediate computers are permitted to store “cached” copies of files, to speed up future re-

retrieval. *Id.* However, the website owner may specify a maximum time after which a cached copy becomes “stale.” *Id.* Once a cached copy becomes stale, if a user tries to retrieve the cached file, the cache **must** check with the origin server to see if the cached copy is still the same as the “live” copy. *Id.* If the “live” copy has changed, the cache may not serve the stale version—it **must** serve the new version. *Id.*

Defendants Amazon and Twitch operate websites using the HTTP 1.1 standard. *Id.* at 22-25. Those websites implement cache control using a validator called an “ETag,” which is optional under the HTTP standard. *Id.* The accused websites generate ETags by running a hash function—the “MD5” function—on the contents of files on the website. *Id.* Those ETags are provided, along with the files, to user caches. *Id.* Once a file becomes stale, if a user tries to retrieve the file, the cache will send the MD5 value (ETag) of the cached file back to the live Amazon/Twitch server. *Id.* If the MD5 values are the same, then the file has not changed, and the cache is **permitted** to (and does) serve the cached copy to the user. *Id.* But if the MD5 values are not the same, the file has changed, and the cache is **not permitted** to serve the cached copy. *Id.* Instead, it must serve the live copy. *Id.*

Under a proper claim construction, Defendants’ accused servers infringe at least three claims of the True Name patents—claim 20 of U.S. Pat. No. 7,802,310 (“the ‘310 patent”), and claims 10-11 of U.S. Pat. No. 6,928,442 (“the ‘442 patent”)—because they use the optional content-based identifiers (the MD5-value

ETags) to determine whether a cache is “authorized” (i.e., permitted) to serve the cached version of a file. *Id.* at 22-25. All three claims recite “determining” whether a file is “unauthorized or unlicensed,” or equivalent language. Dkt. 65 at 3-5. Defendants’ accused servers satisfy the disjunctive “unauthorized” prong, under the plain meaning of the word “unauthorized,” because they determine whether the cache is **authorized** to serve the stale file. However, the district court and panel construed the entire disjunctive phrase “unauthorized or unlicensed” to simply mean “not complaint with a valid license,” i.e., “unlicensed.” *Id.* at 6. The accused servers do not determine whether any computer has a “valid license,” i.e., legal permission to serve a file. *Id.* Thus, the district court and panel’s erroneous construction forced PersonalWeb to concede summary judgment of non-infringement. *Id.*

That judgment threatens serious consequences for PersonalWeb. Even though the district court found that “PersonalWeb’s infringement positions were not objectively baseless and thus, do not support a finding of an exceptional case,” the district court **granted** Defendants’ motion for attorney’s fees, and awarded them **over \$5 million** in fees. N.D. Cal. Case No. 18-md-02834, Dkt. 708. PersonalWeb intends to appeal that award. However, if it is sustained, PersonalWeb will end up owing over \$5 million to the companies that infringed its patents, all because of the erroneous construction of “unauthorized or unlicensed.” To prevent such manifest injustice, and to correct a clear error of law, rehearing should be granted.

III. THE PANEL VIOLATED LONG-STANDING PRECEDENT BY CONSTRUING, FOR THE FIRST TIME, A DISJUNCTIVE “A OR B” CLAIM TERM TO MEAN “JUST B”

A. The Panel Violated Precedent by Denying PersonalWeb the Full Scope of its Disjunctive, “A or B” Claims

This Court has long held that, when a patentee claims in the disjunctive “A or B” format, “A” and “B” are alternatives to each other, and the patentee need only prove one alternative to prove infringement. *See Wasica.*, 853 F.3d at 1280; *Schumer*, 308 F.3d at 1311-12; *Game & Tech.*, 926 F.3d at 1378.

Similarly, this Court has long held that “[t]he patentee is free to choose a broad term and expect to obtain the *full scope* of its *plain and ordinary* meaning unless the patentee explicitly redefines the term or disavows its full scope.” *Thorner*, 669 F.3d at 1367 (emphasis added); *see also Home Diagnostics*, 381 F.3d at 1357 (same).

This Court has also long held that it must, to the fullest extent possible, “give meaning to all the words in [the] claims,” *Exxon*, 64 F.3d at 1557.

Finally, this Court has long held that “[d]ifferent claim terms are presumed to have different meanings.” *Bd. of Regents of the Univ. of Texas Sys. v. BENQ Am. Corp.*, 533 F.3d 1362, 1371 (Fed. Cir. 2008).

Putting these four rules together, the proper construction of “unauthorized or unlicensed” is clear. The claim is in the “A or B” format. Thus, “unauthorized” and “unlicensed” are “alternatives to each other.” *Schumer*, 308 F.3d at 1311. Because “unauthorized” and “unlicensed” are different words, they are also “presumed to

have different meanings.” *Bd. of Regents*, 533 F.3d at 1371. In fact, their different meanings were undisputed: “unauthorized” means “not permitted,” while “unlicensed” means “not permitted under a license.” Dkt. 29 at 33-34; Dkt. 45 at 4-5. Thus, “unlicensed” is a species (subset) of the broader genus, “unauthorized.”

Meanwhile, the genus term, “unauthorized,” fully subsumes the species term, “unlicensed.” Thus, the “full scope” of “unauthorized or unlicensed” is simply “unauthorized.” As alternatives, PersonalWeb only needed to establish *either* “unlicensed” *or* “unauthorized” to prove infringement. *Schumer*, 308 F.3d at 1311-12. Because “unauthorized” is a broader genus term, which fully subsumes “unlicensed,” proving “unauthorized” alone should have sufficed. And under *Thorner*, PersonalWeb was entitled to the “full scope” of the “plain and ordinary meaning” of “unauthorized,” unless the specification “explicitly redefine[d] the term or disavow[ed] its full scope.” 669 F.3d at 1367. The panel made no finding that the specification “explicitly redefined” “unauthorized” to mean the same thing as “unlicensed,” or “disavowed” its full scope—and it did not. Thus, under this Court’s precedents, the panel should have construed “unauthorized or unlicensed” to be coextensive with “unauthorized”—*i.e.*, to mean “not permitted.”³

It did not. Instead, it limited the claims to the narrower species option

³ PersonalWeb’s proposed construction was “not permitted or not permitted under a license.” Dkt. 29 at 33. But “not permitted under a license” is simply a subset of “not permitted.” Thus, PersonalWeb’s proposal reduces to “not permitted.”

(“unlicensed”), even though that *expressly* denied PersonalWeb the full scope of its claims. Dkt. 65 10-12. The panel justified this by relying on a supposed “inconsistency” in PersonalWeb’s position: *i.e.*, that while “a major component of PersonalWeb’s challenge is that the district court read the first two words—‘unauthorized or’—out of the claim term . . . PersonalWeb is essentially urging us to instead read the last two words—‘or unlicensed’—out of the claim term.” Dkt. 65 at 10. But there is no inconsistency. PersonalWeb agrees that its construction effectively reads the “unlicensed” clause out of the claim. But the panel’s construction also undeniably reads the “unauthorized” clause out of the claim. Thus, the *only two* constructions proposed in the case *both* would have read one of the two clauses out of the claim. The only question was *which* clause should be “read out.”

The answer was clear. Because PersonalWeb is entitled to the “full scope” of its claims, and because the genus “unauthorized” is broader than, and encompasses, the species “unlicensed,” the only way to give the claims their “full scope” was to effectively read the *narrower* term out of the claims, and construe “unauthorized or unlicensed” to mean “unauthorized” (*i.e.*, “not permitted”). But the panel did the opposite. It read the *broad* term “unauthorized” out of the claims, and limited the claims to the narrower species, “unlicensed.” Dkt. 65 at 9-13.

Because the panel’s construction directly violates decades of this Court’s precedent, and creates substantial uncertainty on the construction of disjunctive

claim terms, rehearing should be granted, and PersonalWeb’s construction adopted.

B. The Panel Violated Precedent by Construing “A or B” to Mean “B,” Based on Alleged “Interchangeable Use” in the Specification

The panel further violated precedent by relying on the specification’s alleged “interchangeable use” of terms to deny the claims their full scope.

The panel’s construction interpreted the broader term, “unauthorized,” to mean the same thing as the narrower term, “unlicensed.” The panel acknowledged this, but justified its construction by the “consistent interchangeable use of the two words ‘unauthorized’ and ‘unlicensed’ in the” specification. Dkt. 65 at 11. But this Court’s precedents teach the opposite. In *Thorner*, this Court held: “[s]imply referring to two terms as alternatives or disclosing embodiments that all use the term the same way [in the specification] *is not sufficient* to redefine a claim term” to be narrower than its “full scope.” 669 F.3d at 1368. That is exactly what the panel did. The panel relied on the alleged “interchangeable use” of “unauthorized” and “unlicensed” in the specification to redefine “unauthorized” to mean “unlicensed.” Dkt. 65 at 9-11. That directly violates *Thorner*. Thus, even if the panel’s finding of “interchangeable use” were correct, its construction was wrong, as a matter of law.

But its finding was not correct. The panel relied on a few brief passages in the specification to find “interchangeable use.” *Id.* First, the panel pointed to the Abstract, which states: “Access to and delivery of *licensed* content is controlled. . . Access to the data item is *authorized* based at least in part on the name.” Dkt. 65 at

9. But this does not use the words interchangeably. It uses “licensed” to mean “licensed *content*,” *i.e.*, content subject to licensing restrictions (such as copyright restrictions). It separately uses “authorized” to mean *permission* to “access” a data item. Thus, this passage actually supports PersonalWeb’s construction that “authorized” means “permitted,” and “licensed” means “permitted under a license.”

The panel then cited col. 11:33-44 of the ‘310 patent, which states:

Each record **150** of the **license** table **136** records a relationship between a **licensable** data item and the user **licensed** to have access to it. Each license table record **150** includes the information summarized in the following table, with reference to FIG. 9:

Field	Description
True Name	True Name of a data item subject to license validation .
licensee	identity of a user authorized to have access to this object.

Dkt. 65 at 9-10; Appx368. But again, this does not use the words “interchangeably.” It uses the word “license” to refer to “a data item subject to *license validation*,” *i.e.*, a data item subject to legal licensing restrictions. *Id.* And it uses “authorized” to refer to whether a *user* has *permission* to access a data item. *Id.* Thus, this passage supports PersonalWeb’s construction.

Finally, the panel relied on col. 31:4-32 of the ‘310 patent, which the panel says “us[es] both terms [‘unauthorized’ and ‘unlicensed’] to describe license enforcement and validation.” Dkt. 65 at 9-10.. But like the other passages, this again uses “licensed” to refer to “licensed material,” *i.e.*, files subject to licensing

restrictions. Appx378, 31:5-6. It then uses “authorization” to refer to whether a user has “access to a file,” *i.e.*, **permission** to access the file. *Id.*, 31:8-12. Thus, this passage further supports PersonalWeb’s construction.

Accordingly, even if “interchangeable use” could justify construing “A or B” to mean “just B”—which it cannot—there was no such “interchangeable use” here. Rehearing should be granted to correct this clear error of law.

C. Contrary to Precedent, the Panel Required *In Haec Verba* Support for the Claims in the Specification

The panel based its construction on the lack of an *in haec verba* recitation of the word “authorization” in the specification. Dkt. 65 at 12. But this Court’s precedents require no such recitation. To the contrary, “[t]he description requirement does **not** demand . . . that the specification recite the claimed invention *in haec verba*.” *Ariad*, 598 F.3d at 1352 (emphasis added).

In briefing and at oral argument, PersonalWeb emphasized that its construction of “authorized” to mean “permitted,” rather than “permitted under a license,” was supported by the specification, because the specification discloses numerous instances of “authorization” that have nothing to do with “licensing.” Dkt. 29 at 42-45; Dkt. 45 at 7-9. The panel **agreed** that the specification discloses multiple “examples of actions that may or may not be **permitted** in the patented system . . . [and which do not have] anything to do with controlling access to **licensed** . . . content.” Dkt. 65 at 12. Nonetheless, the panel held that those disclosures did not

count, because none of them used the exact word “authorization.” *Id.*

Ariad holds the opposite. 598 F.3d at 1352. For decades, this Court has held that the written description need not use the precise language of the claims to provide adequate support. *Id.* All that is required is that the *substance* of the disclosure supports the claims. *Id.* Here, the panel correctly *agreed* that the substance of the disclosure supports PersonalWeb’s construction. Dkt. 65 at 12. Among others, the specification discloses a “region table (RT 128)” which “defines the rules for *access to . . . files 120.*” Appx366, 8:43-48. The specification discloses that, when a user attempts to “Open [a] File,” the system “inspect[s] the region table” to “determin[e] . . . [whether] that file is in a cached region.” Appx372, 20:23-27. If the file is in a cached region, and “the file is already locked” for caching operations, then the system will “*prohibit the opening*” of the file. *Id.* This clearly discloses controlling “authorization”—*i.e.*, permission—to access a file, in the same “caching” context as the accused products, and it has nothing to do with “licensing.” *Id.* This, along with the many other disclosures cited in Dkt. 29 at 42-45 and Dkt. 45 at 7-9, confirms that the specification supports PersonalWeb’s construction of “authorization.”

The panel’s demand for *in haec verba* support runs counter to precedent. Rehearing should be granted to correct this error.

D. The Panel Never Addressed Claim Differentiation Precedent

Under the doctrine of claim differentiation, “the difference in meaning and

scope between claims is presumed to be significant.” *Versa Corp. v. Ag-Bag Int’l Ltd.*, 392 F.3d 1325, 1330 (Fed. Cir. 2004). Thus, when claim differentiation is present, the court must consider it in construing the claims. *Id.*

Here, PersonalWeb argued that claim differentiation between the issued claims in the True Name family shows that “unauthorized or unlicensed” means something broader than “unlicensed.” Dkt. 29 at 34-35; Dkt. 45 at 9. For instance, PersonalWeb noted that: (i) claim 1 of the ‘442 patent recites “licensing,” but not authorization; (ii) claim 1 of the ‘310 patent recites “authorization,” but not licensing; and (iii) other claims, including the claims at issue in the appeal, recite the disjunctive phrase “unauthorized or unlicensed.” Dkt. 29 at 34-35. PersonalWeb argued that these differences between the issued claims support the conclusion that “unauthorized or unlicensed” is broader than “unlicensed.” *Id.*

The panel never addressed this argument. Instead of addressing PersonalWeb’s argument based on the *issued* claims, the panel only addressed PersonalWeb’s argument regarding an amendment it made to an *unissued* claim during prosecution. Dkt. 65 at 12-13. The panel stated that it would “not prioritize unclear portions of the *prosecution history* over the clarity with which the terms . . . are used interchangeably in the written description.” *Id.* But it never addressed the clear claim differentiation present in the *issued* claims. *Id.* Rehearing or *en banc* review should be granted so that claim differentiation can be properly considered.

E. The Panel Elevated Canons of Statutory Construction Over Rules of Claim Construction

Acknowledging that it could not find a single case in which a *patent* claim in the “A or B” format was construed to mean “B,” the panel turned to a Supreme Court case on *statutory* construction, *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994). Dkt. 65 at 11. The panel noted that, there, “the Supreme Court . . . held [that] in the context of statutory construction . . . ‘or’ can be used to connect synonyms.” *Id.* The panel used that to justify its construction, in which the broader “unauthorized” term was deemed a synonym of the narrower “unlicensed.” *Id.*

But *Hawaiian Airlines* applied a completely different canon of construction than the one that governs patent claims. There, the Supreme Court construed a provision of the Railway Labor Act (“RLA”) that defined “minor disputes” to be “disputes ... growing out of grievances, or out of the interpretation or application of CBA’s.” *Id.* at 253. The Petitioner argued that this “disjunctive language” meant that “‘grievances’ [must] mean[] something other than labor-contract [CBA] disputes,” specifically, “all employment-related disputes, including those based on statutory or common law.” *Id.* But if that interpretation were correct, the RLA would preempt *all* state law regarding employment-related disputes. *Id.* at 255-256. The Supreme Court noted that, under its law, “[p]re-emption of [matters] within the traditional police power of the State” is disfavored, and will not be found unless it is “the clear and manifest purpose of Congress.” Applying that canon, which favors a *narrow*

construction, the Supreme Court held that “no proposed interpretation demonstrates a clear and manifest congressional purpose to create a regime that broadly pre-empts [all] substantive” state law. *Id.* Accordingly, the Supreme Court construed “grievances” to mean the same thing as “the interpretation or application of CBA’s,” despite the “or” conjunction in the statutory language. *Id.*

Here, by contrast, the operative canon is that “the patentee . . . obtain[s] the full scope of [the claim’s] plain and ordinary meaning,” absent express redefinition or disavowal (which the panel did not find). *Thorner*, 669 F.3d at 1367. That canon urges a broad construction of “A or B” language. Thus, *Hawaiian Airlines*’s canon of construing statutes narrowly to avoid preemption simply has no application to patent claim construction, and no precedent of this Court has ever held otherwise.

Under the claim construction canons, “unauthorized or unlicensed” should have been construed to cover its full scope, *i.e.*, “not permitted.” Rehearing should be granted to confirm that the claim construction canons retain their primacy over unrelated canons of statutory construction.

IV. CONCLUSION

For the foregoing reasons, panel or *en banc* rehearing should be granted.

Dated: September 27, 2021

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ADDENDUM

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

IN RE: PERSONALWEB TECHNOLOGIES LLC,

**AMAZON.COM, INC., AMAZON WEB SERVICES,
INC.,**
Plaintiffs-Appellees

v.

PERSONALWEB TECHNOLOGIES LLC,
Defendant-Appellant

LEVEL 3 COMMUNICATIONS, LLC,
Defendant

PERSONALWEB TECHNOLOGIES LLC,
Plaintiff-Appellant

LEVEL 3 COMMUNICATIONS, LLC,
Plaintiff

v.

TWITCH INTERACTIVE, INC.,
Defendant-Appellee

2020-1566, 2020-1568, 2020-1569

Appeals from the United States District Court for the Northern District of California in Nos. 5:18-cv-00767-BLF, 5:18-cv-05619-BLF, 5:18-md-02834-BLF, Judge Beth Labson Freeman.

Decided: August 12, 2021

STEPHEN UNDERWOOD, Glaser Weil Fink Howard Avchen & Shapiro LLP, Los Angeles, CA, argued for PersonalWeb Technologies LLC. Also represented by LAWRENCE MILTON HADLEY; WESLEY WARREN MONROE, Stubbs Alderton & Markiles LLP, Sherman Oaks, CA.

J. DAVID HADDEN, Fenwick & West LLP, Mountain View, CA, argued for Amazon.com, Inc., Amazon Web Services, Inc., Twitch Interactive, Inc. Also represented by THOMAS FOX, RAVI RAGAVENDRA RANGANATH, SAINA S. SHAMILOV; TODD RICHARD GREGORIAN, San Francisco, CA.

Before LOURIE, PROST*, and REYNA, *Circuit Judges*.

LOURIE, *Circuit Judge*.

PersonalWeb Technologies LLC (“PersonalWeb”) appeals from a decision of the District Court for the Northern District of California granting summary judgment of non-infringement in favor of Amazon.com, Inc., Amazon Web Services, Inc., and Twitch Interactive, Inc. (collectively, “Amazon”). *See In re PersonalWeb Techs., LLC*, No. 18-md-02834, 2020 WL 6821074 (N.D. Cal. Feb. 3, 2020)

* Circuit Judge Sharon Prost vacated the position of Chief Judge on May 21, 2021.

(“*Summary Judgment Decision*”). For the reasons described below, we *affirm*.

BACKGROUND

This is the second appeal in this case involving a multidistrict litigation consolidating cases that PersonalWeb brought against more than eighty Amazon customers. Because we previously discussed the background of the technology at issue and the history of the case, *see In re PersonalWeb Techs. LLC*, 961 F.3d 1365 (Fed. Cir. 2020), we provide only the following brief summary.

In January 2018, PersonalWeb filed a series of lawsuits asserting that Amazon customers infringe five patents that share a common specification and claim priority from the same abandoned patent application, which was filed on April 11, 1995. *See id.* at 1369. The patents are generally directed to uses of what the inventors termed “True Names” for data items. According to the patents, a “True Name” is a “‘substantially unique’ identifier for each data item that depend[s] only on the content of the data itself,” as opposed to “other purportedly less reliable means of identifying data items, such as user-provided file names.” *Id.* (citing U.S. Patent 6,928,442).

In the current appeal, only three claims are at issue: claim 20 of U.S. Patent 7,802,310 (the “310 patent”); and claims 10–11 of U.S. Patent 6,928,442 (the “442 patent”). Claim 20 of the ’310 patent recites:

20. A computer-implemented method operable in a system which includes a plurality of computers, the method comprising:
controlling distribution of content from a first computer to at least one other computer, in response to a request obtained by a first device in the system from a second device in the system, the first device comprising hardware including at least one processor,

the request including at least a content-dependent name of a particular data item, the content-dependent name being based at least in part on a function of at least some of the data comprising the particular data item, wherein the function comprises a message digest function or a hash function, and wherein two identical data items will have the same content-dependent name, based at least in part on said content-dependent name of said particular data item, the first device (A) permitting the content to be provided to or accessed by the at least one other computer if it is not determined that the content is ***unauthorized or unlicensed***, otherwise, (B) if it is determined that the content is unauthorized or unlicensed, not permitting the content to be provided to or accessed by the at least one other computer.

'310 patent col. 39 ll. 8–31 (emphasis added). Claims 10 and 11 of the '442 patent recite:

10. A method, in a system in which a plurality of files are distributed across a plurality of computers, the method comprising:
 obtaining a name for a data file, the name being based at least in part on a given function of the data, wherein the data used by the function comprises the contents of the particular file;
 determining, using at least the name, whether a copy of the data file is present on at least one of said computers; and
 determining whether a copy of the data file that is present on a at least one of said computers ***is an unauthorized copy or an unlicensed copy*** of the data file.

11. A method as in claim 10 further comprising:
allowing the file to be provided from one of the
computers having an ***authorized or li-
censed*** copy of the file.

'442 patent col. 41 ll. 13–27 (emphases added).

Broadly speaking, PersonalWeb's infringement allegations targeted Amazon's S3 web host servers and Amazon's CloudFront service. Amazon intervened in the actions against its customers and filed a declaratory judgment action against PersonalWeb. *See PersonalWeb*, 961 F.3d at 1372. The Judicial Panel on Multidistrict Litigation consolidated the cases in the United States District Court for the Northern District of California for pretrial proceedings. *Id.* The court decided to first proceed with Amazon's declaratory judgment action and PersonalWeb's case against one representative Amazon customer, Twitch Interactive, Inc. ("Twitch").¹ *Id.* The court stayed all other customer cases on the basis of PersonalWeb's representation that it would not be able to proceed in the other customer cases if it lost its case against Twitch. *Id.*

Because of a prior lawsuit in 2011 by PersonalWeb alleging infringement by Amazon's S3 web host servers, the district court granted partial summary judgment in favor of Amazon based on claim preclusion and the *Kessler* doctrine, which this court later affirmed. *Id.* at 1373. The litigation continued in the district court with respect to PersonalWeb's infringement allegations against Amazon's CloudFront servers. Those allegations centered on the

¹ Twitch is an Amazon subsidiary. Although the case against Twitch in the district court appears to have proceeded in parallel with the case against Amazon, for purposes of this appeal the noninfringement issues are identical. Therefore, unless otherwise noted, we refer to the appellees collectively as "Amazon."

servers' communication over the Internet using the Hyper-Text Transfer Protocol ("HTTP"), and specifically the cache-control functionality in the HTTP 1.1 standard. PersonalWeb alleged that "entity tags" or "ETags" in the headers of HTTP requests and responses are an embodiment of the patented True Names. According to PersonalWeb, the CloudFront servers infringe the patent claims by using ETags to validate whether cached copies of previously served data items are still usable or whether the data items have instead become stale and must be served again by the server.

In August 2019, the district court issued a claim construction order, construing ten disputed claim terms. *See In re PersonalWeb Techs., LLC Patent Litig.*, N. 18-md-02834, 2019 WL 3859023 (N.D. Cal. Aug. 16, 2019) ("*Claim Construction Opinion*"). Most relevant to this appeal, the court construed the term "unauthorized or unlicensed" to mean "not compliant with a valid license." *Id.* at *18. Relatedly, the court construed the term "authorization" to mean "a valid license." *Id.* The court subsequently denied PersonalWeb's motion to clarify the claim construction order. *In re PersonalWeb Techs., LLC*, No. 18-md-02834, 2019 WL 4837185 (N.D. Cal. Oct. 1, 2019).

Based on the district court's construction of the terms "unauthorized or unlicensed" and "authorization," PersonalWeb conceded that it could not meet its burden of proving infringement of any of the patent claims. *See In re PersonalWeb Techs., LLC*, No. 18-md-02834, 2019 WL 7212318, at *1 (N.D. Cal. Oct. 31, 2019). PersonalWeb then moved for entry of final judgment of noninfringement based on the court's claim constructions. *Id.* In view of a pending summary judgment motion that Amazon had already filed, which relied on additional noninfringement grounds beyond the court's claim constructions, the court denied PersonalWeb's motion. *Id.* at *2.

On February 3, 2020, the district court granted Amazon's motion for summary judgment. *Summary Judgment Decision*, 2020 WL 6821074. The court considered four separate grounds of noninfringement. First the court granted Amazon's motion on the unopposed ground that Amazon's CloudFront servers do not infringe the asserted claims under the court's constructions of "unauthorized or unlicensed" and "authorization." *Id.* at *7. The court also granted Amazon's motion for summary judgment of noninfringement because the CloudFront servers do not meet limitations directed to "permitting" content to be provided or accessed, determining whether a copy of a data file "is present," or "comparing" to a plurality of identifiers. *Id.* at *7–14.

PersonalWeb appeals from the district court's grant of summary judgment. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

DISCUSSION

We review a district court's grant of summary judgment according to the law of the regional circuit. *Kaneka Corp. v. Xiamen Kingdomway Grp. Co.*, 790 F.3d 1298, 1303 (Fed. Cir. 2015) (citing *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 769 F.3d 1371, 1377 (Fed. Cir. 2014)). In the Ninth Circuit, summary judgment is reviewed de novo, and we thus apply the standard applied by the district court. *Id.* (citing *Bos. Scientific Corp. v. Johnson & Johnson*, 647 F.3d 1353, 1361 (Fed. Cir. 2011)). "[S]ummary judgment is appropriate when, drawing reasonable inferences in favor of the non-moving party, there is no genuine issue of material fact." *Id.* (citing *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 942 (9th Cir. 2011)); *see also* Fed. R. Civ. P. 56(a).

In this case, PersonalWeb raises four challenges to the district court's grant of summary judgment. The parties agree, however, that an affirmance of the district court's construction of the claim term "unauthorized or

unlicensed,” would dispose of the appeal in its entirety. See Oral Argument at 0:34–1:08; 23:48–24:20, http://oralarguments.cafc.uscourts.gov/default.aspx?fl=20-1566_03012021.mp3. We therefore begin with that issue.

Claim construction is an issue of law that we review de novo. *Neuro Corp. v. Bos. Sci. Corp.*, 955 F.3d 35, 43 (Fed. Cir. 2020) (citing *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318 (2015)). “The words of a claim are generally given their ordinary and customary meaning as understood by a person of ordinary skill in the art when read in the context of the specification and prosecution history.” *Thorner v. Sony Computer Entm’t Am. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012). It is well established that a patent’s written description is “the single best guide to the meaning of a disputed term.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005) (en banc).

The district court construed “unauthorized or unlicensed” to mean “not complying with a valid license.” The court reached that conclusion because, despite the use of the disjunctive connector “or” in the claim term, “the intrinsic record reveals that the patentee used the words ‘authorized’ and ‘licensed’ interchangeably” in the patents. *Claim Construction Opinion*, 2019 WL 3859023, at *5. The court concluded that “the specification explicitly equates holding a ‘**valid license**’ with ‘**authorization**.’” *Id.* (emphases in original).

PersonalWeb’s primary argument on appeal is the same as its primary argument before the district court, namely, that the court’s construction fails to give meaning all of the words in the claim. According to PersonalWeb, the court’s construction ignores the disjunctive “or” and reads the word “unauthorized” out of the claim. PersonalWeb further argues that the words “unauthorized” and “unlicensed” are used differently in the written description and the prosecution history, that the patents contain examples of data items that are “unauthorized” but not

necessarily “unlicensed,” and that the term “unlicensed” is one species of the broader genus “unauthorized.”

Amazon responds that the district court correctly found that the patents treat “unauthorized or unlicensed” as a single concept that relates to the purpose of the claimed invention, which is controlling access to licensed content. Amazon points to the mechanism described in the patents for prohibiting unauthorized parties from accessing licensed data files, which includes a “license table” that stores the name of a “licensee,” defined as the “identity of a user authorized to have access” to a data file. *See* ’310 patent col. 11 ll. 33–44; col. 31 ll. 3–32. Amazon contends that, although PersonalWeb has identified some examples in the written description involving permitted actions in the patented system, the patents do not use the word “authorized” in relation to any of those examples. Additionally, Amazon argues, none of those examples has anything to do with whether or not a user is authorized or licensed to access content.

We agree with Amazon that the district court’s construction is correct. Beginning in the initial sentences of the abstract, the ’310 patent makes clear that an object of the patented system is to use content-based identifiers for the purpose of controlling access to “licensed” content such that only “authorized” users may access it. ’310 patent at Abstract (“Access to and delivery of **licensed** content is controlled using content names that were determined based on the content. . . . Access to the data item is **authorized** based at least in part on the name.” (emphases added)). The patents’ written description proceeds to describe the invention, interchangeably using the terms “licensed” and “authorized” to refer to the same concept.

For example, in describing a “Track for Licensing Purposes” mechanism, the patents state that “[t]his mechanism ensures that **licensed** files are not used by **unauthorized** parties.” *Id.* at col. 31 ll. 4–6 (emphases

added); *see also id.* at col. 31 ll. 9–32 (using both terms to describe license enforcement and validation). Additionally, when describing the license table that stores information about files and the users licensed to access them, the patent first states:

Each record 150 of the license table 136 records a relationship between a licensable data item and the user ***licensed*** to have access to it.

Id. at col. 11 ll. 33–35 (emphasis added). Immediately thereafter, the patent provides a “description” for the field in the license table that contains the “licensee”:

identity of a user ***authorized*** to have access to this object.

Id. at col. 11 ll. 42–43 (emphasis added). These two sentences describe precisely the same concept, using the phrase “licensed to have access” the first time and “authorized to have access” the second time.

PersonalWeb acknowledges that the two words “unauthorized” and “unlicensed” are not mutually exclusive, arguing that “unlicensed” is a subset of the broader term “unauthorized.” Under PersonalWeb’s argument, however, the scope of the claim term as written—“unauthorized or unlicensed”—is exactly the same as the scope would have been if the claim term instead said “unauthorized.” Because a major component of PersonalWeb’s challenge is that the district court read the first two words—“unauthorized or”—out of the claim term, it must be pointed out that PersonalWeb is essentially urging us to instead read the last two words—“or unlicensed”—out of the claim term. Of course, a claim construction should generally attempt to “give meaning to all the words in [the] claims,” *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 64 F.3d 1553, 1557 (Fed. Cir. 1995), and avoid “reading out” words from the claim. *See Apple Computer, Inc. v. Articulate Sys., Inc.*, 234

F.3d 14, 24–25 (Fed. Cir. 2000). “The preference for giving meaning to all terms, however, is not an inflexible rule that supersedes all other principles of claim construction.” *SimpleAir, Inc. v. Sony Ericsson Mobile Commc’ns AB*, 820 F.3d 419, 429 (Fed. Cir. 2016) (citing *Power Mosfet Techs., L.L.C. v. Siemens AG*, 378 F.3d 1396, 1410 (Fed. Cir. 2005)). Here, as the parties appear to agree that there is significant overlap between the words “unauthorized” and “unlicensed” as used in the patents, we agree with the district court’s analysis which focused on the patentee’s consistent interchangeable use of the two words “unauthorized” and “unlicensed” in the intrinsic record. *See Baran v. Medical Device Techs., Inc.*, 616 F.3d 1309, 1316 (Fed. Cir. 2010) (holding that although the use of different terms usually implies that they have different meanings, “that implication is overcome where . . . the evidence indicates that the patentee used the two terms interchangeably”).

For similar reasons, we do not agree with PersonalWeb’s argument regarding the claim’s use of the disjunctive connector “or.” If, as PersonalWeb argues, the word “unlicensed” were a species of the genus “unauthorized,” then the word “or” between those two words in the claim term would be nonsensical. We thus agree with Amazon that the disjunctive “or” in the claim is being used to connect two words that are synonyms or equivalents of each other in the patent. To be sure, neither party cites a case in which this court has held the word “or” in a patent claim to be a connector for synonyms. But the Supreme Court has held in the context of statutory construction that “or” can be used to connect synonyms, *see Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 255 (1994), and we have recognized that “many of the canons of statutory construction apply equally when interpreting patent claims.” *PPC Broadband, Inc. v. Corning Optical Commc’ns RF, LLC*, 815 F.3d 747, 752–53 (Fed. Cir. 2016).

We also find, as the district court did, that PersonalWeb lacks support in the intrinsic evidence for its argument that the patents contemplate other types of “authorization” that are unrelated to license status. *See Claim Construction Opinion*, 2019 WL 3859023, at *6. Amazon correctly points out that, although PersonalWeb has identified individual examples of actions that may or may not be permitted in the patented system based on settings associated with data items (e.g., read-only, lock flag), none of those examples has anything to do with controlling access to licensed or authorized content. And contrary to PersonalWeb’s assertion that it “does not matter” that the “specification does not use the exact word ‘authorization’ to describe those examples,” *see* Appellant’s Br. 43, the absence of the word “authorization” from those examples matters a great deal because the entire issue in dispute is the construction of a term that includes the word “unauthorized” based on the repeated use of the exact word “authorized” in the context of licensed content. If we were to infer, as PersonalWeb asks us to do, that the patent implicitly sets forth other types of authorization without using that word, we would simply be rewriting the patent specification.

Finally, we are not persuaded by PersonalWeb’s argument about claim differentiation and the prosecution history. PersonalWeb suggests that because some claims in the True Name patent family use the term “unauthorized or unlicensed,” others use the term “unauthorized,” and others use the term “unlicensed,” we should interpret those phrases to have different meanings. PersonalWeb points to an example in the prosecution history in which the patentee amended a claim from “unauthorized or unlicensed” to “unauthorized” as evidence that the patentee understood the two terms to have different scope. *See* J.A. 3409–10. But, again, according to the genus/species argument that PersonalWeb is advancing in this appeal, a claim that recites “unauthorized or unlicensed” would actually have the

same scope—*i.e.*, not different scope—as a claim that merely says “unauthorized.” Moreover, under PersonalWeb’s argument, the identified claim amendment would have had no substantive effect on the scope of the amended claim. Thus, PersonalWeb’s selectively applied claim differentiation argument is self-defeating, and we will not prioritize unclear portions of the prosecution history over the clarity with which the terms “authorized” and “licensed” are used interchangeably in the written description. See *Phillips*, 414 F.3d at 1317 (“[B]ecause the prosecution history represents an ongoing negotiation between the PTO and the applicant, rather than the final product of that negotiation, it often lacks the clarity of the specification and thus is less useful for claim construction purposes.”).

For the foregoing reasons, we conclude that the district court correctly construed the term “unauthorized or unlicensed” to mean “not complying with a valid license.” Under that claim construction, PersonalWeb has conceded that it cannot meet its burden of proving that Amazon infringes any patent claims in the True Name patent family. Because the claim construction issue is dispositive of the entire appeal, we need not reach any of the other issues in this case. Accordingly, we hold that the district court correctly granted summary judgment in favor of Amazon.

CONCLUSION

We have considered PersonalWeb’s remaining arguments but we find them unpersuasive. The judgment of the district court is *affirmed*.

AFFIRMED

PROOF OF SERVICE

I hereby certify that the foregoing APPELLANT PERSONALWEB TECHNOLOGIES, LLC'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC was served on all counsel of record on this 27th day of September 2021, by operation of the Court's CM/ECF system.

/s/ Lawrence M. Hadley
Lawrence M. Hadley

CERTIFICATE OF COMPLIANCE

I, Lawrence M. Hadley, hereby certify that:

1. This motion complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,860 words, excluding the portions authorized to be excluded by the Federal Rules of Appellate Procedure and the Rules of the Federal Circuit.

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: September 27, 2021

By: /s/ Lawrence M. Hadley
Lawrence M. Hadley