

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner,

v.

OPENTV, INC.,
Patent Owner.

Case IPR2015-00969
Patent 5,884,033

Before JAMES B. ARPIN, DAVID C. McKONE, and
SCOTT C. MOORE, *Administrative Patent Judges*.

McKONE, *Administrative Patent Judge*.

SCHEDULING ORDER

I. DUE DATES

This Order sets due dates for the parties to take action after institution of the proceeding. The parties may stipulate to different dates for DUE DATES 1 through 5 (earlier or later, but no later than DUE DATE 6). A notice of the stipulation, specifically identifying the changed due dates, must be promptly filed. The parties may not stipulate to an extension of DUE DATES 6 and 7.

In stipulating to different times, the parties should consider the effect of the stipulation on times to object to evidence (37 C.F.R. § 42.64(b)(1)), to supplement evidence (37 C.F.R. § 42.64(b)(2)), to conduct cross-examination (37 C.F.R. § 42.53(d)(2)), and to draft papers depending on the evidence and cross-examination testimony (*see* section B, below).

The parties are reminded that the Testimony Guidelines appended to the Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,772 (Aug. 14, 2012) (Appendix D), apply to this proceeding. The Board may impose an appropriate sanction for failure to adhere to the Testimony Guidelines. *See* 37 C.F.R. § 42.12. For example, reasonable expenses and attorneys' fees incurred by any party may be levied on a person who impedes, delays, or frustrates the fair examination of a witness.

A. INITIAL CONFERENCE CALL

The parties are directed to contact the Board via e-mail at Trials@uspto.gov within a month of this decision if there is a no need to discuss proposed changes to this Scheduling Order or proposed motions. If

no discussion is needed, the initial conference call will be cancelled. The parties are directed to the Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,765–66 (Aug. 14, 2012), for guidance in preparing for the initial conference call, and should be prepared to discuss any proposed changes to this Scheduling Order (i.e., DUE DATES 6 and 7) and any motions that are not authorized already by our Rules or by this Scheduling Order, which the parties anticipate filing during the trial.

B. DUE DATE 1

The patent owner may file—

- a. A response to the petition (37 C.F.R. § 42.120), and
- b. A motion to amend the patent (37 C.F.R. § 42.121).

The patent owner must file any such response or motion to amend by DUE DATE 1. If the patent owner elects not to file anything, the patent owner must arrange a conference call with the parties and the Board prior to DUE DATE 1. The patent owner is cautioned that any arguments for patentability not raised in the response are deemed waived.

C. DUE DATE 2

The petitioner must file any reply to the patent owner's response and opposition to the motion to amend by DUE DATE 2.

D. DUE DATE 3

The patent owner must file any reply to the petitioner's opposition to patent owner's motion to amend by DUE DATE 3.

E. DUE DATE 4

1. Each party must file any motion for an observation on the cross-examination testimony of a reply witness (*see* section III, below) by DUE DATE 4.

2. Each party must file any motion to exclude evidence (37 C.F.R. § 42.64(c)) and any request for oral argument (37 C.F.R. § 42.70(a)) by DUE DATE 4.

F. DUE DATE 5

1. Each party must file any reply to an observation on cross-examination testimony by DUE DATE 5.

2. Each party must file any opposition to a motion to exclude evidence by DUE DATE 5.

G. DUE DATE 6

Each party must file any reply for a motion to exclude evidence by DUE DATE 6.

H. DUE DATE 7

The oral argument (if requested by either party) is set for DUE DATE 7.

II. CROSS-EXAMINATION

Except as the parties might otherwise agree, for each due date—

1. Cross-examination begins after any supplemental evidence is due. *See* 37 C.F.R. § 42.53(d)(2).

2. Cross-examination ends no later than a week before the filing date for any paper in which the cross-examination testimony is expected to be used. *See id.*

III. MOTION FOR OBSERVATION ON CROSS-EXAMINATION

A motion for observation on cross-examination provides the parties with a mechanism to draw the Board's attention to relevant cross-examination testimony of a reply witness because no further substantive paper is permitted after the reply. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,768. The observation must be a concise statement of the relevance of precisely identified testimony to a precisely identified argument or portion of an exhibit. Each observation should not exceed a single, short paragraph. The opposing party may respond to the observation. Any response must be equally concise and specific.

IV. MOTION TO AMEND

Although the filing of a Motion to Amend is authorized under our Rules, Patent Owner must confer with us before filing any Motion to Amend. We strongly encourage the parties to arrange for a conference call with us no less than ten (10) business days prior to DUE DATE 1.

DUE DATE APPENDIX

INITIAL CONFERENCE CALL 2:00 PM ET on October 26, 2015

DUE DATE 1 December 23, 2015

Patent owner's response to the petition
Patent owner's motion to amend the patent

DUE DATE 2 March 23, 2016

Petitioner's reply to patent owner's response to petition
Petitioner's opposition to motion to amend

DUE DATE 3 April 26, 2016

Patent owner's reply to petitioner's opposition to motion to amend

DUE DATE 4 May 17, 2016

Motion for observation regarding cross-examination of reply witness
Motion to exclude evidence
Request for oral argument

DUE DATE 5 June 1, 2016

Response to observation
Opposition to motion to exclude

DUE DATE 6 June 7, 2016

Reply to opposition to motion to exclude

DUE DATE 7 June 21, 2016

Oral argument (if requested)

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