UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COX COMMUNICATIONS, INC.

Petitioner

v.

AT&T INTELLECTUAL PROPERTY I, L.P. AND

AT&T INTELLECTUAL PROPERTY II, L.P.

Patent Owners

Cases IPR2015-01187 (Patent 6,993,353)

IPR2015-01227 (Patent 7,907,714)

IPR2015-01273 (Patent 6,487,200)

IPR2015-01536 (Patent 8,855,147)

TELECONFERENCE HEARING

Tuesday, January 5, 2016

A P P E A R A N C E S

(VIA TELEPHONE)

HEARING OFFICERS:

Judge Sheila F. McShane
Judge Michael R. Zecher
Judge Brian P. Murphy

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JUDGE McSHANE: The purpose of this call is to discuss AT&T's request for leave to file a motion for additional discovery related to real parties in interest; that is, alleged real parties in interest.

Mr. O'Brien, would you like to be heard on this issue?

MR. O'BRIEN: I certainly would, Your Honor. So I'm going to address two major thrusts. The first is, as you know, our burden on this call is really under the Garmin factors to show a threshold amount of evidence or reasoning in attempt to show beyond speculation that something useful will be uncovered based on the discovery that we're requesting.

We will be unloading that burden with respect to two thrusts. One of them has to do with indemnitors as real parties in interest; and the second thrust will be one that you are a bit more familiar with, which is the other Cox-related entities as real parties in interest.

So I will start with the indemnitor-related thrust. So we're going to speak to three entities today for which we believe, beyond speculation, we can establish that an opportunity or perhaps indeed actual control exists.

The first of those is ARRIS. And I'll go through a few pertinent facts for you. ARRIS Motorola products were identified in the Delaware litigation in our preliminary infringement contentions for '353, '200, and '147 patents. Also, the public record clearly indicates that ARRIS has a standard set of corporate terms and conditions of sale which include pertinent indemnity provisions.

In pertinent part, those indemnity provisions provide that ARRIS will indemnify defendable customer-harmless against damages, liabilities, and cost. It goes on. They will add ARRIS's expense, defend any Claim or suit or proceeding -- a "capital C" Claim -- brought against a customer insofar as such claim is based on an allegation that a product provided to the customer directly infringes a U.S. patent.

So we have alleged that they -- that -- AT&T has alleged that ARRIS devices do infringe a patent. That indemnity is subject to a "provided that" clause.

The "provided that" clause is -- at least the payment of cost and damages is subject to a "provided that" clause that the customer promptly notifies ARRIS; that the customer gives ARRIS applicable evidence in its possession, custody, or control; and,

importantly, that the customer gives ARRIS reasonable assistance and sole control of the defense; and all negotiations for its settlement are compromised. Very, very important.

From there, we can show that in SEC filings, ARRIS has acknowledged that AT&T has sued Cox for infringement of eight U.S. patents and that Cox has requested that ARRIS provide indemnification.

[redacted]

Moving to Cisco. Again, Cisco products were identified as Delaware litigation in the infringement contentions as infringing '353, '200, and '147 patents. Again, standard terms of sale on -- in the -- in the public domain indicate that Cisco will defend any claim against the customer, that a Cisco-branded product provided under the agreement infringes patents. They will indemnify against the

judgment entered by the court of competent jurisdiction and any settlements arriving out of the "capital C" Claim.

Again, there are provisions that a customer shall promptly notify in writing of the "capital C" Claim and subsequent litigation updates and, B, cooperate with Cisco in defense of the claim and grant Cisco full and exclusive control of defense and settlement of the claim in any subsequent appeal.

In the case of Cisco, we are not able to identify a -- an SEC filing admitting that Cisco has requested. However, in very similar circumstances, we can find in the public record a declaratory judgment complaint by Cisco in which it states that it has agreements with customers in the communications industry and those include, without limitation, Cox; and that those agreements specify conditions under which Cisco must indemnify. Cisco must indemnify those -- those customers, which would include Cox, against claims of patent infringement.

Cox has informed, they allege in that declaratory judgment complaint -- they've informed Cisco that Sprint's assertion of Sprint patents in suit relate and that, in that case, Sprint has demanded that Cisco defendant indemnify.

[redacted]

Finally, a third indemnitor in which we are able to provide the board with a threshold level of showing, BroadSoft. On information and belief, we believe that Cox is a client of BroadSoft and that BroadSoft supplies Cox with the software for its phone tools software, which is what has been alleged to infringe the '714 patent in the preliminary infringement contentions advanced in the litigation.

In previous litigation unrelated to Cox, the BroadSoft license agreement -- or a BroadSoft license agreement has been quoted as including an indemnification provision, and it has stated in relevant part in those public documents that BroadSoft agrees to defend at its expense any and all claims made or action brought against a customer based on an allegation that software infringes the patent. This is well known. That's why the patent is pertinent here.

[redacted]

[redacted]

JUDGE McSHANE: Okay. Mr. O'Brien, just a quick question here.

MR. O'BRIEN: Sure.

JUDGE McSHANE: Do any of these indemnity agreements -- you talked about the issue of -- that they agreed to indemnify on infringement claims. What about post-grant proceedings or anything of that nature?

MR. O'BRIEN: Well, I think it's -- I think it's a good question. As you know, indemnity agreements typically refer to the Claim -- I emphasize the "capital C" Claim -- where they typically refer to the defense. And I think we would be prepared to -- to show -- and certainly we would feel that the threshold level has certainly been met -- that, in the context of AIA proceedings, the congressional intent is very clear that these proceedings are an adjunct and an alternative for certain aspects of the defense of the patent litigation, namely those that involve an invalidity contention.

So we would believe that the language of the operative agreements, which is what we will seek in the -- the -- in discovery, in additional discovery, would -- the language that would recite the defense, some of which I quoted to you here, would encompass the

IPRs.

JUDGE McSHANE: Right. Right. Now, just a question on that. All the -- the indemnity provisions that you discussed or all these parties, those were all, if you will, general agreements that were found in the public domain, correct?

MR. O'BRIEN: That is correct.

JUDGE McSHANE: None are more specific to Cox, right?

MR. O'BRIEN: No. [redacted]

So that fact -- and, in fact, that fact that has recently developed for us is, I think, highly, highly probative here that an agreement exists, that the agreement provides the -- these three entities, at least -- ARRIS, Cisco, BroadSoft -- with, at the very, very, very least, an opportunity to control [redacted]

JUDGE McSHANE: Okay.



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MR. O'BRIEN: I do have some issues on the Cox entities, but I do want to pause and be responsive to any further questions you have.

JUDGE McSHANE: Yeah. At this point, I don't have anything else on that.

But, actually, let's do this. Let's go -- we can loop back on the Cox entities issue. But right now, let me hear from Cox on this issue.

MR. BAUER: Thank you. So all of this argument is new to us. None of it's ever been shared before. So some of this, I'm dealing in real time responding.

As you know, they never raised any of these issues in any of their prefilings or petitions for rehearing. This is all brand-new.

Also, in terms of the scope of discovery, let me tell you what they've told us they were going to ask for, and that is every indemnification agreement between ARRIS, Cisco, or any third party and any of the 24 Cox entities that were in the lawsuit.

So this is a pure fishing expedition. To ask for every indemnification agreement between 24 defendants -- and not just these three, but any other indemnitor. So I'll just start. This is fishing. There's absolutely nothing to suggest anything else.

Second, as counsel's conceded, nothing he has relates to any indemnification agreement with Cox. He's pointing -- he says he's talking about standard terms and conditions. I don't know that he's not talking about the slip that's in a box when you buy it. But, as you all can certainly take notice of, when you're dealing with a company like Cox and Cisco and ARRIS, any agreements are -- are not going to be standard. So simply pointing to the standard terms and conditions doesn't have anything to do with this.

[redacted] That shouldn't even be being discussed. [redacted]

[redacted]

[redacted]

So at the end of the day, you know, the idea here is supposed to be limited fact discovery that's not speculation, that they have some reasonable belief or can convince you that there's a high likelihood that the document is helpful and not just fishing. [redacted].

And that's really what I have to say. There's nothing here to suggest that this isn't fishing when they want to see every indemnification written with 24 defendants to see what they say. And that's not what we're here to find out, what they say. They need to make a good-faith basis that these guys are controlling this process. And there's no evidence to suggest that.

JUDGE McSHANE: Okay. Thank you.

All right. Let's go back, if you would, Mr. O'Brien. Let's go back to the issue of Cox entities, please.

MR. O'BRIEN: Would you entertain -- I would like to reply to some of the issues that Mr. Bauer raised. Would you like me to do that at the end or would you --

JUDGE McSHANE: No. Actually, let's do

that now briefly, please. Thank you.

MR. O'BRIEN: Yeah. Sorry. There's a number of things to respond to.

First, the implication that meet and confer was not -- we'd be happy to go through with what we shared. I don't think that's the major issue here, though. I believe Mr. Bauer has, in effect, admitted that indemnity agreements exist. And I said it exactly that way, but I think that's the implication.

[redacted]

Now, Cox is entirely capable of describing to you for itself those -- what -- what happened. And in some sense, they have attempted to explain away, while recognizing that in this dynamic, AT&T's arm is tied behind its back because it cannot discuss those -- those things.

We would be happy to rebut the implications that Mr. Bauer has -- has, I guess, made [redacted]

[redacted] We believe it would be appropriate to do so in the motion practice.

And then, finally, I think the -- it is not as if the -- the ARRIS agreement in particular has not been before other panels of this -- of the PTAB before. And, in fact, discovery has been authorized with respect to this very set of agreements or this very set of indemnity circumstances involving ARRIS in the past. But what Mr. Bauer advocates is, in essence, what the -- this board has very clearly indicated is improper.

The board is not at this juncture to weigh the facts of whether or not ARRIS or Cisco or -- or BroadSoft is an unnamed real party in interest as a threshold inquiry to whether AT&T can discover the very document that establishes that.

So Mr. Bauer is conflating the standard that -- that is downstream of where we are today and indeed downstream of the motion practice which should follow the authorization that we requested.

JUDGE McSHANE: Yeah. Okay. Well, thank you, Mr. O'Brien.

The point on that, though, is that I think that, you know, requesting, you know, every

indemnification agreement may be a little bit overbroad. So, but in any event, let's turn to the other issue, please, which is the Cox entities.

MR. O'BRIEN: Absolutely. And we will be happy to deal with the other Garmin factors. We're focusing really on the first Garmin factor, but in terms of tailoring our request, we are jumping to the Cox entities.

And, in some sense, the smoke screen that Mr. Bauer presents in terms of the multitude of Cox entities is a smoke screen of Cox's own making by having a multitude of regional entities with whom interactions can -- can occur.

We in the -- the Cox entity discussion, though, are focusing at this point on the Coxcom, LLC, entity. And there's a couple facts that I -- I want to -- to drive home there.

As you know, we briefed the issue of Coxcom, LLC, and the regional Cox entity, the RPIs. And on the present record, this panel, while troubled with some of the facts that we presented, has not found that there has been an RPI failure on this present record.

They have -- you have presumed the correctness of Cox Communications, Inc.'s statement that it is the sole RPI, and that's where we are. The

juncture we are at is requesting additional discovery to augment that record. In doing so, we are going forward with the threshold showing, that we are required to do. And there are several things which I think you should consider.

In -- in our preliminary response in the present record, we've established facts that Coxcom, LLC, appears to have some measure of control in these IPR proceedings. Indeed, we have -- we have pointed out -- we'd be happy to point out again; I'm pointing out now, you know -- that a draft stipulation circulated by the petitioner indicated that Coxcom, LLC -- not the petitioner, but Coxcom, LLC, directed the actions of both CCI, petitioner, and the other regional operating companies. So there -- we have in the record evidence that they directed.

The board itself, frankly, on the record found it troubling the fact that Coxcom, LLC, is the named petitioner, or is identified as a real party of interest in one case, in nine other -- the nine other PTAB proceedings -- that are proceedings before the PTAB.

In every other case, these AT&T proceedings are the only proceedings in which Cox is taking and maintaining the -- its position that CCI is

the sole -- is the petitioner and sole real party in interest.

In every other proceeding, Cox acknowledges that Coxcom, LLC, is petitioner in nine of the ten. And in the tenth, they acknowledge that Coxcom, LLC, is a real party in interest. So they name it a real party in interest while identifying CCI as petitioner. Additionally --

JUDGE McSHANE: Mr. O'Brien, can I just ask what -- what -- we -- we are ultimately one to toe the issues here because we've seen some of the briefing in the past.

MR. O'BRIEN: Yep.

JUDGE McSHANE: So let's sort of cut to the chase a little bit and go to what is disputed here and, in particular, what exactly you're asking for from Coxcom, LLC, related to Coxcom. Thank you.

MR. O'BRIEN: Certainly. It's our position that, you know, Coxcom, LLC, is at least one on the real party in interest. And there's some representation facts that I'll circle back to in a moment.

But in the interest of the chase-cutting-to, we believe that, in the interest of justice, discovery should be granted into which entity

or entities have been engaged or on behalf of which entity or entities Proskauer, Mr. Bauer's firm, has been engaged relative to the IPRs; who has been invoiced for services in furtherance of the IPRs; who has paid those invoices; and who, internal to the Cox family of companies, those costs have been allocated to, whether by intercompany agreement or specific one-off agreement related to these IPRs.

So our focus is on the agreement. It would identify who's represented -- and I'll get back to what we have in the factual records as to -- as a threshold on that; who has been invoiced; who's paid the invoice; who costs under the invoices have been allocated to. So money is what we're -- what we're going after there.

In terms of the threshold-showing, in the record, counsel for petitioner has indicated that it represents CCI, the named petitioner, that it represents Coxcom, LLC, and that it represents the regional Cox entities.

Given that it represents all of those and given that Coxcom's interest is acknowledged in the public record and given counsel's own assertions which it has made in a capacity as representing CCI, Coxcom, and the regional operating companies that Coxcom, LLC,

directs the activities of the others, we believe that we have made the threshold showing necessary for you to authorize us to file a motion for additional discovery.

JUDGE McSHANE: All right. But just to be clear, the request is for the -- basically the billing and the like. And that's -- it's limited to that.

MR. O'BRIEN: Yeah. I think it would be pertinent in a representation agreement under which those billings are made, but yes.

JUDGE McSHANE: Right. Yeah. Understood. Okay. And then as to the regional entities.

MR. O'BRIEN: At this point, based on the threshold showings that we have, we are focusing on Coxcom, LLC. We believe there are some special circumstances here in the way that Cox has organized its family of companies that trace to the local franchise nature of the business. But as a dispositive issue, we are focusing in this request for additional discovery on Coxcom, LLC.

JUDGE McSHANE: Okay. Thank you.

In the interest of time, I'm going to move to Mr. Bauer now and hear from him, please.

MR. BAUER: Thank you. So the question

before the Court is, is there more than a mere possibility that something's going to be useful? Have they made any record that there's more than some possibility?

They're asking for my engagement letter with the client and their e-mail to me, all invoices, payments, and date details for related invoices related to cost of services. And then they told us that they're seeking all intercompany agreements between Cox Communications, Coxcom, and any of the other 24 which govern any reimbursement for any legal fees relating to these IPRs.

Again, this is a massive fishing to ask for all intercompany agreements justifying all intercompany transfers of payment. What they concede and what's clear is that Cox Communications is the parent. And they concede that all these guys are wholly owned by Cox Communications. To see anything more than that is now fishing.

Basically, they're asking to verify -- asking us to provide evidence to prove that the chart that they've shown the board, the corporate structure which has Cox Communications at the top, they're asking us now to present evidence showing how all those companies are connected together and to verify what

we've already certified, that Cox Communications, Inc., is the parent controlling these activities.

The fact that our law firm represents all of the defendants would have no relevance to the fact that Cox Communications, Inc., controls this. And, by the way, they also agree in their pleadings that Cox Communications is the entity responsible for legal services.

So once they concede Cox Communications is the wholly owned -- is the parent and responsible for all legal services, to then go into a fishing expedition to see how they share legal fees amongst themselves would have no relevance at all, no relevance at all to whether the parent is controlling this proceeding.

And the board's already found that they didn't offer enough evidence twice. Counsel tried to reargue it. Nothing's different. And now they say, Okay. They don't have any evidence to suggest it's anything other than the corporate structure. Please let them get into the money and how all these entities are sharing expenses so that they can verify what has already been certified.

That's fishing. There's no evidence here that what they're looking for will provide anything to support their cases. And, in fact, I'll tell you, it's

going to support our case. But they need to show that there's some likelihood, some real likelihood, it will support their case, not a mere possibility. And that's where we're at right now.

And I've just got to add one last thing, going back to the indemnitors. Even if there's indemnity agreements between the parties, that says nothing about who's actually doing anything here. And so simply to see if there is a written indemnification agreement between the parties would -- would just open up another whole round of discovery to see how that's being applied and who's paying for what and who's contributing, another whole round of discovery to get inside counsel's operations to see how we're working with these suppliers.

And that's really, again, my position. This is just fishing, asking for an enormous amount of stuff that they don't show any likelihood will help them.

JUDGE McSHANE: All right. Thank you, Mr. Bauer.

Now, just a quick question. [redacted] [redacted] And whether that was right or wrong, I don't know. But we're not going

to stress that today.

[redacted]

[redacted]

MR. BAUER: [redacted]

[redacted]

[redacted]

JUDGE McSHANE: All right. Just wanted to confirm that. Thank you.

All right. I think we've all heard enough. And so what we're going to do here is we are going to grant the motion, AT&T's motion, to file -- rather, the request to file a motion. And what we're going to do here is set -- you'll see an order come out on this in the next few days, and it will -- it's going to be what's limited to 10 -- let's make it 12 pages. Let's limit it to 12 pages in opening and then opposition.

And then also, given -- it sounds like, some of the scope on this discovery is at issue here. So in the -- in the motion itself, could you please attach the proposed discovery request?

And then, Cox, if you have opposition, if you could please attach any alternative proposals, if you will -- you can do it by redline or however you

choose to do it -- that would be alternative discovery requests that you might agree to, for instance.

And so let's set the schedule, this briefing, on a one-week interval from today. So that would be January the 12th for the motion and the -- actually, there's a holiday in there. Let's set it for the 20th for the opposition.

Now, also, there -- it appears that there was confidential information, confidential information discussed on this call and perhaps there will be some as far as briefing. So I don't know if you, Counsel, have already discussed a protective order, but we need to have a protective order in the case. So if you would please file a motion related to the protective order.

And then for the motion to seal, you don't have to seek leave for the motion to seal. Please -- but file a motion to seal. And we'd also like to see an unredacted version as well as the redacted -- a redacted version. And provide basis for the redaction in the motion.

And that's about it, I believe. Is there anything else you may have?

MR. O'BRIEN: No. That sounds -- that sounds perfectly reasonable, Your Honor.

In terms of the protective order, our

intent has been to operate under the -- the board's standard protective order.

And I suppose, unless there's an objection from you, Steve, that will be what we would promptly file a motion for.

MR. BAUER: That's fine with me.

MR. O'BRIEN: Okay.

JUDGE McSHANE: All right. Thank you all.

(Proceedings adjourned.)

STATE OF TEXAS )

COUNTY OF TRAVIS)

I, Heidi Morrison, CSR, RPR, Certified Shorthand Reporter in and for the State of Texas, certify that the foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in telephonic hearing and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

SUBSCRIBED AND SWORN TO under my hand and seal of office on this the 7th day of January, 2016.

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