

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ACTIVISION BLIZZARD, INC., ELECTRONIC ARTS INC.,
TAKE-TWO INTERACTIVE SOFTWARE, INC.,
2K SPORTS, INC. AND ROCKSTAR GAMES, INC.,
Petitioners

v.

ACCELERATION BAY, LLC,
Alleged Patent Owner

Case: IPR2016-00747
Patent No. 6,732,147

OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE

Mail Stop PATENT BOARD
Patent Trial and Appeal Board
United States Patent and Trademark Office
P.O. Box 1450
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Submitted Electronically via the Patent Review Processing System

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I. Introduction

Patent Owner's Motion to Exclude should be denied in its entirety. Instead of carrying its burden to show that exclusion is proper, *see* 37 C.F.R. § 42.20(c), the motion makes sweeping generalizations about the issues and the evidence, with little regard to facts or the legal standards that must be applied. In large part, Patent Owner's arguments are conclusory and unsupported with facts or argument. Patent Owner's underdeveloped contentions cannot carry the day—no matter how much Patent Owner attempts to elaborate on them in reply. As Petitioner shows below, no aspect of the motion has merit and it should be denied.

II. Petitioner's Reply Is Responsive To Patent Owner's Attempts To Argue A Person Of Ordinary Skill In the Art Would Not Combine Rufino And Todd, And Other Arguments Presented In The Patent Owner Response

Patent Owner takes issue with Petitioner's arguments that respond directly to arguments that Patent Owner presented in its Patent Owner Response. Such arguments are plainly appropriate and are the very reason that replies are permitted in the first place. *E.g., Nintendo v. iLife*, IPR2015-00105, Paper 35, p.40 ("The mere fact that a petitioner submits rebuttal testimony that relies on new evidence ... does not suffice to establish its impropriety. The very nature of a reply is to rebut the patent owner's response."); *Liberty Mut. Ins. v. Progressive Cas. Ins.*, CBM2012-00002, Paper 66, pp.66, 68 (petitioner "properly submitted [reply] evidence to rebut [patent owner]'s arguments," including "newly proposed" claim construction).

Even the case Patent Owner cites, *Belden v. Berk-Tek*, 805 F.3d 1064, 1078 (Fed. Cir. 2015), explains that a reply exhibit is proper when it responds to Patent Owner's arguments. *Id.* ("The Board did not abuse its discretion in concluding that, as relevant here, [the reply] declaration fairly responds only to arguments made in ... [Patent Owner's] response.").

Patent Owner primarily takes aim at excerpts of Tanenbaum (Exhibits 1204 and 1205) and the related portion of the reply (p. 15:12-19, pp. 20:20-21:11) that are directly responsive to Patent Owner's reliance on Exhibit 2007, also excerpts of Tanenbaum, for its argument that a person of ordinary skill in the art would not combine Rufino and Todd. Exhibits 2007, 1204, and 1205, are all excerpts from the very same book that Petitioner cited in its Response. Petitioner included the additional portions of Tanenbaum because Patent Owner provided selective and incomplete excerpting of Tanenbaum in its Patent Owner Response. Patent Owner was the one who advanced the argument that a POSITA would not combine Rufino and Todd based on Tanenbaum. POR, Paper 24, pp.28-31, 34, 43, 44, and 48. Petitioner served objections to Tanenbaum under, *inter alia*, F.R.E. 106 because the excerpts were incomplete and "such reference to/reliance on isolated portions as incomplete, misleading, and unfairly prejudicial to Petitioner (F.R.E. 403, 106)." Paper 28, pp.6-7. Patent Owner never served supplemental evidence addressing this objection. Therefore, Petitioner was required to find the missing excerpts on its own.

And these missing excerpts, Exhibits 1204 and 1205, are highly relevant to rebutting Patent Owner’s argument that there would be a disincentive to combine Rufino and Todd because they purportedly use dissimilar technology according to Patent Owner based on a non-representative statement in Tanenbaum. The additional portions of Tanenbaum included in Exhibits 1204 and 1205 state the contrary—that the technologies “use roughly similar technology and get roughly similar performance.” Ex. 1205, p. 5:1-3; *see Randall Mfg. v. Rea*, 733 F.3d 1355, 1362-63 (Fed. Cir. 2013) (“perhaps the most reliable” evidence of a POSITA’s knowledge “is documentary evidence consisting of prior art”). Patent Owner also objects to Exhibits 1204 and 1205 on authentication and hearsay grounds, but Patent Owner never made those objections previously and has therefore waived those objections. *See generally* Paper 24, pp.1-2; *EMC Corp. v. PersonalWeb Techs., LLC*, IPR2013-00083 (Jun. 19, 2013) (motion to exclude “must identify any objections in the record and must explain those objections”). Thus, Exhibits 1204 and 1205, and the discussion of them in the reply, are entirely appropriate.

Patent Owner also alleges other portions of the Reply are outside the scope *without any explanation* for why that is the case. This is plainly insufficient for Patent Owner to meet its burden of showing entitlement to relief. *See* 37 C.F.R. §§ 42.20(c), 42.22(a)(2) (requiring motions to contain “[a] full statement of the reasons

for the relief requested” and “a detailed explanation of the significance of the evidence including material facts”).

In any case, Patent Owner is wrong. Pages 10:11-17, 14:6-15:4, as the text explains, responds to Patent Owner’s concocted argument about application layers (*e.g.*, POR, Paper 26, p.13). Pages 11:1-12:9 explain that Rufino and Todd disclosed a “broadcast channel” as set forth in Petitioner’s opening papers (*e.g.*, Petition, Paper 2, pp. 23-25, 32-36, 59-60), and respond to Patent Owner’s arguments that Petitioner only relies on Shoubridge for the “broadcast channel” limitation and that Rufino does not teach a “broadcast channel” (*e.g.*, POR, Paper 26, pp. 25-31). Page 21:16-18 is a reiteration of an argument made in the Petition (*e.g.*, Petition, Paper 2, pp. 18, 32, 34, 36-37).

Patent Owner’s cries of prejudice ring hollow. Everything Patent Owner complains about was responding to the Patent Owner Response, and, in many cases, was originally in the Petition. Patent Owner cannot be prejudiced by Petitioner’s response to arguments that were presented in the Patent Owner Response. Indeed, if Petitioner was precluded from responding to such arguments, it would defeat the purpose of having replies in the first place. To adopt the Patent Owner’s position is to allow the Patent Owner the *only* opportunity to be heard on its novel positions. That’s not what the Board’s rules contemplate and it is not consistent with the Administrative Procedures Act, which gives parties the opportunity to be heard.

III. The Declaration Of Dr. David Karger (Ex. 1003) Should Not Be Excluded

Patent Owner seeks to exclude Dr. Karger's testimony because, in Patent Owner's view, Dr. Karger (1) didn't have an understanding of the scope of the challenged claims, and (2) didn't consider secondary considerations in performing his obviousness analysis. Mot., Paper 44, pp.4-5. Patent Owner's argument is wrong for several reasons.

Patent Owner's assertions that Dr. Karger's testimony should be excluded because he "was required to interpret and consider the claim language to compare the claims to the alleged prior art" confirm that Patent Owner's challenges are improperly directed to the sufficiency of his opinions rather than their admissibility. *See* 77 Fed. Reg. at 48,767. In any event, contrary to Patent Owner's assertion, Dr. Karger testified that for terms not expressly construed in the Petition he applied their "plain and ordinary meaning and give them their broadest reasonable interpretation when considered in view of the text included in the specification (which includes the claims)." Ex. 1003, ¶ 89. Throughout Dr. Karger's declaration and cross-examination, he testified that Shoubridge disclosed a "broadcast channel." *E.g.*, Ex.1003, ¶¶ 130, 162 ("Shoubridge also discloses networks in which each computer is connected to four (i.e., at least three) neighbors in the broadcast channel."); *see also id.*, ¶¶ 103-105, 122, 124, 168; *see also* Ex.2010, 16:6-27:16, 42:3-46:15, 47:25-49:19. It is not necessary for Dr. Karger to determine the outer limits of the term

“broadcast channel” in order to opine that Shoubridge disclosed it. *Vivid Techs. v. Am. Sci. & Eng’g*, 200 F.3d 795, 803 (Fed. Cir. 1999) (“[O]nly those terms need [to] be construed that are in controversy, and only to the extent necessary to resolve the controversy.”). Indeed, the Board has already determined that Shoubridge discloses this limitation. *E.g.*, IPR2015-01972, Paper 108, p.61 (“Petitioner contends the grid network of Shoubridge is ‘a broadcast channel.’ We agree.”) (citations omitted).

Patent Owner’s sole basis for arguing for the exclusion of Dr. Karger’s testimony would have petitioners in *inter partes* review put the cart before the horse in a way that does not comport with Federal Circuit precedent. Petitioner was not required to guess at Patent Owner’s arguments regarding secondary considerations and rebut such arguments before they were even presented here. *Petroleum Geo-Services v. Westerngeco*, IPR2014-01475, Paper 18, p.28. As the Federal Circuit has explained when rejecting an argument that an accused infringer needed to provide evidence to explain why alleged secondary considerations lacked a nexus to the claimed invention, the patentee “has the standard backwards.” *MRC Innovations, Inc. v. Hunter Mfg., LLP*, 747 F.3d 1326, 1336 (Fed. Cir. 2014). Instead, it is the Patent Owner that bears the “burden of production to demonstrate a nexus” to support any secondary considerations. Only after Patent Owner presents viable evidence of commercial success and properly establishes nexus for the alleged commercial success does a Petitioner need to address that evidence. *MRC*

Innovations, 747 F.3d at 1336. That has not happened here. Thus, there's no basis to exclude the testimony of Dr. Karger.

Moreover, even assuming for the sake of argument that Patent Owner had established even a sliver of relevant evidence of secondary considerations tied to one or more of the claims of the '497 patent, it has not shown that such "evidence" requires the outright exclusion of all of Dr. Karger's opinions. It doesn't; and thus the Motion to Exclude can be denied for this additional reason.

IV. The Drawings (Exs. 1203 and 1206) Should Not Be Excluded

Patent Owner attacks Exhibits 1203 and 1206 as being "manufactured evidence," "plainly irrelevant," "based on an incomplete hypothetical," and "fabricated." Patent Owner also says that these drawings are "unfairly prejudicial."

Exhibits 1203 and 1206 were created as part of a discussion with Dr. Goodrich in an effort to document his understanding of the scope of the claims as he interpreted them. Ex.1202, 78:22-85:10, 188:20-195:6. They were made with his assistance and refined with his input. *Id.* There was nothing "incomplete" about the questions posed and even if there were, Patent Owner has not shown in its motion where it preserved such objections to the questions and answers on the record during the deposition. *See* 37 C.F.R. § 42.53(f)(8) ("[a]ny objection to the content" of the deposition "is waived unless made on the record during the deposition"); *EMC Corp. v. PersonalWeb Techs., LLC*, IPR2013-00083 (Jun. 19, 2013) (motion to exclude

“must identify any objections in the record and must explain those objections”). Patent Owner has not shown where in the record it preserved its objections regarding any alleged “incomplete hypotheticals” asked during Dr. Goodrich’s testimony.

Moreover, these exhibits are far from irrelevant. They illustrate how Dr. Goodrich viewed the claims in rendering his opinions. And, while Patent Owner has claimed prejudice, it has done nothing to explain how it is prejudiced. Patent Owner was represented by counsel at the deposition of Dr. Goodrich. It had the ability to ask Dr. Goodrich questions to clarify those exhibits as needed. It declined to do so. Even if Patent Owner was prejudiced (something Patent Owner has not shown), it has only its counsel to blame for failing to address those exhibits during the deposition.

Finally, with respect to Patent Owner’s allegation that one of the two exhibits is irrelevant because it was not cited in the Reply, “there is no requirement that Petitioner must cite evidence in its Reply or Opposition to be relevant,” IPR2015-01972, Paper 108, p.72. The exhibit is referred to in Dr. Goodrich’s testimony, and it is needed for a complete understanding of that testimony. Therefore, that the Exhibit is not discussed in the Reply is no reason to exclude Exhibits 1203 and 1206 from the record.

V. Conclusion

For the reasons set forth above, Patent Owner's Motion to Exclude should be denied in its entirety.

Dated: April 24, 2017

Respectfully submitted,
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CERTIFICATION UNDER 37 C.F.R. § 42.24(D)

Pursuant to 37 C.F.R. § 42.24(d), the undersigned certifies that this opposition complies with the type-volume limitation of 37 C.F.R. § 42.24(c). The opposition is less than 15 pages, excluding the parts of the brief exempted by 37 C.F.R. § 42.24(c).

Dated: April 24, 2017

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §§ 42.6(e) and 42.105(a), this is to certify that on April 24, 2017, I caused to be served a true and correct copy of the foregoing OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE, by e-mail pursuant to the parties' agreement, to the following attorneys of record:

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