

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.,
Petitioner,

v.

ACCELERATION BAY, LLC,
Patent Owner.

Case IPR2016-00747
Patent No. 6,732,147 B1

**PATENT OWNER'S REPLY IN SUPPORT OF MOTION TO EXCLUDE
EVIDENCE**

The Board should grant Patent Owner's Motion to Exclude ("Motion," Paper 44) for the reasons set forth below and in the Motion.

I. Petitioner's Improper Reply Arguments and Exhibits Should be Excluded.

The new arguments and evidence Petitioner introduced in its Reply should be excluded. Motion at 1-4. The "expedited nature of IPRs bring with it an obligation for petitioners to *make their case in their petition to institute*," unlike in district courts where "parties have greater freedom to revise and develop their arguments over time." *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369-70 (Fed. Cir. 2016)(emphasis added).

First, the newly filed Exhibits 1204 and 1205 should be excluded. Motion at 2-3. While Petitioner contends that both exhibits are "relevant to rebutting Patent Owner's argument that there would be a disincentive to combine Rufino and Todd," this is contrasted by the Reply itself. Petitioner's Opposition to Motion to Exclude ("Pet. Opp.," Paper 45) at 3. Specifically, and notwithstanding Petitioner's failure to cite Exhibit 1204 in its Reply (which it does not address in its Opposition here), Petitioner solely cites to Exhibit 1205 in its Reply in connection with its allegation that Exhibit 1205 represents "the most relevant portions of the Tanenbaum reference." Petitioner's Reply ("Reply," Paper 40) at 20-21. There is *no* mention or discussion of the motivation to combine (or lack thereof) Rufino and Todd in the Reply where Exhibit 1205 is cited. Reply at 20-21; Pet. Opp. at 2-3.

Even more tellingly, the portion of Exhibit 1205 that Petitioner cites in its Opposition is not even cited or relied upon in the Reply. *Compare* Pet. Opp. at 3 (citing Ex. 1205 at 5:1-3) *with* Reply at 21 (citing Ex. 1205 at 2). Petitioner's position now only further demonstrates that its introduction of Exhibits 1204 and 1205 in its Reply is an attempt to sandbag Patent Owner with new references and arguments that Patent Owner has prejudicially no opportunity to respond to.

Second, the new arguments set forth in the Reply, at 10:11-17, 11:1-12:9, 14:6-15:4, 15:12-19, 20:20-21:11, and 21:16-18, should also be excluded as outside of the proper scope of the Reply. Motion at 3-4. Specifically, Petitioner belatedly introduces new arguments and evidence in its Reply as demonstrated by (1) its new contention that Shoubridge discloses a “logical channel (user traffic) that overlays an underlying point-to-point communications network” (Reply at 10:11-17); (2) its new position that “[t]he idea that token rings and buses share common methods of managing their topologies should be well-known to Dr. Goodrich” (*id.* at 15:12-19); and (3) its baseless introduction of arguments and evidence pertaining to Tanenbaum as discussed *supra* (*id.* at 20:20-21:11).

Moreover, Petitioner also relies on positions differing from those set forth in its Petition. In particular, at pages 11:1-12:9, Petitioner raises for the *first time* that the Todd reference discloses a broadcast channel and also states that “[i]nstead of focusing on the logical channel formed by the path a token travels over the

underlying network, PO incorrectly focuses on other messages.” However, Petitioner referred to these “other messages” as demonstrating the existence of a “broadcast channel” in its Petition thus rendering its argument in the Reply a belated attempt to remedy its Petition’s insufficiencies. Similarly, at 21:16-18, Petitioner argues that “POSITA would thus understand that the Rufino messaging technique can be performed at least that many number of times to return a graph to m-regular, as taught by Denes” yet in the Petition, Petitioner argued that “Denes discloses a general method of maintaining an m-regular graph when a node is removed.” Petition at 20. Thus, Petitioner never previously raised that Rufino’s messaging technique could or would be performed multiple times or that Denes’ technique would be compatible with such iterations. These new arguments, which Patent Owner has no opportunity to adequately address, should be excluded.

II. The Declaration of Dr. Karger Should be Excluded as Conclusory and Unreliable (Ex. 1003).

Petitioner does not address Dr. Karger’s failure to consider the claim language *to compare the claims to the alleged prior art*. Specifically, Dr. Karger provides *no* discussion or opinion about Shoubridge teaching or disclosing the requisite broadcast channel of the challenged claims. Motion at 5. Petitioner dedicates its Opposition to focusing on Dr. Karger’s alleged “plain and ordinary meaning” of the term “broadcast channel.” Pet. Opp. at 5-6. However, Petitioner’s disregard for Dr. Karger’s failure to address how Shoubridge allegedly

teaches a broadcast channel is only further evidenced by the fact that each citation Petitioner provides to Dr. Karger's declaration does not discuss or identify any portion of Shoubridge that Dr. Karger alleges to disclose a broadcast channel. In fact, several of the cited portions do not even use or reference the term "broadcast channel." Ex. 1003 at ¶¶ 103-105, 122, 124, 168; Ex. 2010 at 42:3-46:15, 47:25-49:19 (solely referencing a broadcast channel in stating that "flooding, a well-known technique for using a network as a broadcast channel"); *see also* Pet. Opp. at 5 (citing the foregoing). The remaining portions that Petitioner cites do not even pertain to the Shoubridge reference. Ex. 2010 at 16:6-27:16.

Petitioner also ignores that in an obviousness analysis, secondary considerations serve as an important check on hindsight bias and thus "must always when present be considered." *In re Cyclobenzaprine Pat. Litig.*, 676 F.3d 1063, 1075-79 (Fed. Cir. 2012). Dr. Karger failed to consider the requisite secondary considerations in forming his obviousness analysis requiring that his declaration be excluded. Motion at 5. Tellingly, in discussing the "Federal Circuit precedent" that Petitioner relies upon in its Opposition, Petitioner notes that it pertains to "rejecting an argument that an *accused infringer* needed to provide evidence" whereas here, it is *Petitioner* who sought *inter partes* review and it is the *Petitioner* the bears the burden of demonstrating obviousness. Pet. Opp. at 6 (emphasis added). Dr. Karger's failure to take into account secondary

considerations – and admission that he only intended to include any such analysis as an afterthought – require that his declaration be excluded as improper. Motion at 4-5.

III. The Board Should Exclude Exhibits 1203 and 1206.

Exhibits 1203 and 1206– drawings that Petitioner's counsel created during the deposition of Patent Owner's expert Dr. Goodrich should be excluded. Motion at 6. Petitioner fails to provide any reason otherwise.

First, the portions of Dr. Goodrich's testimony cited in Petitioner's Opposition demonstrate that Dr. Goodrich made clear that his discussion pertaining to the exhibits was “just an example.” Ex. 1202 at 80:10. Thus, these exhibits were not simply “part of a discussion . . . in an effort to document [Dr. Goodrich's] understanding of the scope of the claims as he interpreted them.” Pet. Opp. at 7.

Second, contrary to Petitioner's contention, Patent Owner's counsel repeatedly raised objections during the discussions pertaining to both exhibits and thus preserved its right to seek their exclusion. *See, e.g.*, Ex. 1202 at 79:1-6, 83:2, 84:3, 193:7; Pet. Opp. at 7-8.

Third, Petitioner's failure to cite to both exhibits in its Reply is grounds for their exclusion. The Board has granted motions to exclude exhibits that were not cited. *SK Innovation Co. v. Celgard, LLC*, Case IPR2014-00679, Paper 58 at 49 (P.T.A.B. Sept. 25, 2015) (granting motion to exclude because the exhibits were not cited); *see also* Motion at 6 (citing *SK Innovation*).

IV. Conclusion

For the foregoing reasons, and those set forth in the Motion, the Motion should be granted.

Respectfully submitted,

Dated: May 1, 2017

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that a true and correct copy of the foregoing Patent Owner's Reply in Support of Motion to Exclude Evidence was served on May 1, 2017, by filing this document through the Patent Review Processing System as well as delivering via electronic mail upon the following counsel of record for Petitioner:

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