

Filed on behalf of Intellectual Pixels Limited

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SONY INTERACTIVE ENTERTAINMENT LLC,
Petitioner,

v.

INTELLECTUAL PIXELS LIMITED,
Patent Owner.

Case No. IPR2021-00237
U.S. Patent No. 10,681,109

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

I. PATENT OWNER’S MOTION PROPERLY SEEKS TO EXCLUDE PETITIONER’S IMPROPER NEW REPLY EVIDENCE AND ARGUMENTS

Patent Owner (“PO”) timely objected to Petitioner’s improper new evidence and appropriately filed its Motion to Exclude. Petitioner all but ignores PO’s cited authority, which explained that “motions to exclude [are] a potential remedy to exclude certain evidence or argument that would exceed the proper scope of a reply.” *Sotera Wireless, Inc. v. Masimo Corp.*, IPR2020-00912, 2021 WL 2384365, at *1 (P.T.A.B. June 10, 2021). Indeed, “Federal Circuit case law indicates that a motion to exclude is a proper vehicle for enforcing [the Board’s] rule and trial practice guide regarding the scope of evidence that may be submitted with a reply brief.”¹ *Dexcom, Inc. v. Waveform Techs., Inc.*, IPR2016-01680, 2018 WL 1137089, at *13 (P.T.A.B. Feb. 28, 2018) (citing *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1081 (Fed. Cir. 2015)); see also *CBS Interactive Inc. v. Helferich Patent Licensing, LLC*, IPR2013-

¹ Petitioner cites *Apple Inc. v. Parus Holdings, Inc.*, IPR2020-00686, Paper 37 at 42 (P.T.A.B. Sept. 9, 2021), but that opinion is not binding on the Board. Moreover, the Board may “construe [relevant] aspect[s] of the Motion as a Motion to Strike.” *Intuitive Surgical, Inc. v. Ethicon LLC*, IPR2019-00991, Paper 48 at 41 (P.T.A.B. Jan. 12, 2021) (striking portion of a reply containing argument not raised in the petition).

00033, Paper 79 at 3 (P.T.A.B. Aug. 9, 2013) (“Should there be improper arguments or evidence presented with a reply, the Board, exercising its discretion, may exclude the reply and related evidence in their entirety, or alternatively, decline to consider the improper arguments and/or related evidence.”).

II. EXHIBITS 1029 AND 1030 ARE IMPROPER REPLY EVIDENCE

Petitioner fails to rebut PO’s assertion that Exhibits 1029 and 1030 should be excluded because they are improper new evidence that were not “made of record at the institution stage,” were filed “for the first time with [Petitioner’s] Reply,” and are relied upon by Petitioner “to fill a gap in its prima facie case.” *Dexcom*, 2018 WL 1137089, at *13.

Exhibits 1029 and 1030 are improper new evidence because Petitioner relies on them to fill a gap in its obviousness case. As Petitioner admits, PO argued that “Petitioner’s proposed use of Chen’s ADSL for home installation relies on hindsight and ignores Wiltshire’s description of its system as a gambling system for commercial establishments that is not disclosed or suggested to be installed in homes. Chen only disclosed using ADSL in the residential context” Paper 17 at 53-54, *quoted in* Paper 32 at 3. PO argued that Petitioner failed to show a reason to combine these references. Petitioner now concedes that it “cites these exhibits for one simple point—to rebut the suggestion in Patent Owner’s Response that ADSL was for residential use only, but not for business use.” Paper 32 at 3. PO’s argument,

however, was based on Wiltshire’s and Chen’s teachings. Those references are Petitioner’s own Ground II references presented in the Petition. Petitioner’s reliance on new references not part of Ground II or the Petition to establish a reason to combine concedes that Chen and Wiltshire are insufficient.

Petitioner’s assertion that it “had no way of knowing [what] [PO] would argue,” *id.* at 4, is not credible given the disclosures of Wiltshire and Chen and does not justify its reliance on new evidence to bolster the Petition’s deficient showing. Petitioner’s resort to *two new references* to rebut PO’s argument about what *Chen* taught concedes rather than rebuts PO’s argument. Petitioner’s attempt to close the gap in its Ground II obviousness case by resort to a new theory based on new references is improper. *See* Consol. Trial Practice Guide (Nov. 2019) at 74 (“Examples of indications that a new issue has been raised in a reply include new evidence necessary to make out a *prima facie* case ... such as newly raised rationale to combine the prior art references that was not expressed in the petition.”).

III. PARAGRAPH 79 OF EXHIBIT 1033 CONTAINS IMPROPER NEW ARGUMENTS

Petitioner fails to rebut PO’s assertion that paragraph 79 of Exhibit 1033 should be excluded because it contains improper new arguments.

First, Petitioner entirely misses the point when it asserts that “the fact that Wiltshire shows multiple client devices in certain figures (such as Figure 1D), or refers to multiple clients in certain sections (such as the bottom of column 3), does

not mean Petitioner’s invalidity theories are limited to the use of multiple clients.” Paper 32 at 7. Petitioner never addresses PO’s actual point in its moving paper that Dr. Fuchs opines for the first time in reply that “Wiltshire discloses a system with only one client” and that “[t]hus, it is immaterial whether ADSL could support more than one concurrent MPEG video stream.” EX1033 ¶ 79; Paper 31 at 4.

It is undisputed that the Petition never relied on any disclosures *in Wiltshire* of an embodiment with only one client computer. That is because Wiltshire disclosed a “system, with ‘server/host computer 110 connected to a plurality of remote client/terminal computers 120.” Paper 13 at 16 (citing EX1004, 3:62-66). Petitioner’s reliance (*see* Paper 32 at 5) on the Petition’s reproduction of Wiltshire’s Figure 2 is misplaced because Figure 2 is “a flow diagram of the operation of computer gaming system of FIG. 1” (EX1004 at 3:15-16) and Figure 1 of Wiltshire specifically disclosed a plurality of client/terminal computers 120. *See* EX1004 at Figs. 1A and 1D; *see also* Paper 31 at 4 (explaining that Petitioner relies on Wiltshire’s Fig. 1A). The fact remains that, in reply, Dr. Fuchs relies for the first time on Wiltshire’s claim 1, which recites “one or more client/terminal computers.” EX1033 ¶ 79; Paper 31 at 5. That is an improper new invalidity theory that relies on an aspect of Wiltshire not cited in the Petition.

Second, Petitioner incorrectly asserts that “Dr. Fuch’s [sic] opinions in paragraph 79 of Exhibit 1033 are not inconsistent with his opinion in Exhibit 1002

and are not a new invalidity argument.” Paper 32 at 9. Dr. Fuchs never opined in his original declaration that a “given application in Wiltshire need not consume the entire 1.3 Mbps bandwidth.” EX1033 ¶ 79; Paper 31 at 5. Instead, Dr. Fuchs opined that an MPEG stream requires rates of “*at least* 1.3 megabits per second” (EX1002 ¶ 200 (emphasis added)) to justify use of asymmetric bandwidth. *See* Paper 13 at 44-45 (“Dr. Fuchs further testifies that ... sending compressed updated images from Wiltshire’s server to the client *requires higher bandwidth of at least 1.3 Megabits per second* when an MPEG stream is used.” (emphasis added)). Petitioner cannot now refute its own showing relied upon for institution. *See Broad Ocean Techs., LLC v. Nidec Motor Corp.*, IPR2015-01617, Paper 33 at 7-8 (P.T.A.B. Feb. 22, 2017) (observing the Board’s “duty to guard against the improper presentation of shifting arguments that may unfairly disadvantage an opposing party”).

IV. PETITIONER ADMITS EXHIBIT 1024 SHOULD BE EXCLUDED

Petitioner admits Exhibit 1024 is inadmissible and should be excluded. *See* Paper 32 at 10 (“Petitioner does not refer to Exhibit 1024 in its briefing. ... Petitioner has no objection to excluding Exhibit 1024 from the record.”).

V. CONCLUSION

PO respectfully requests that the Board exclude Exhibits 1024, 1029, and 1030 and portions of Exhibit 1033.

Sony Interactive v. Intellectual Pixels
Patent No. 10,681,109 – IPR2021-00237

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Dated: March 3, 2022

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CERTIFICATE OF SERVICE

The undersigned certifies that pursuant to 37 C.F.R. § 42.6(e), a true copy of the foregoing **PATENT OWNER’S REPLY IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE** is being served electronically on March 3, 2022 to the following lead and back-up counsel for Petitioner to the following email addresses:

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