

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NINTENDO CO., LTD., and NINTENDO OF AMERICA INC.,
Petitioners,

v.

ANCORA TECHNOLOGIES, INC.,
Patent Owner.

Case IPR2021-01338
U.S. Patent No. 6,411,941 B1

PATENT OWNER'S OPENING BRIEF ON REMAND

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EXHIBIT NO.	TITLE
1001	U.S. Patent No. 6,411,941 to Mullor et al. (“’941 Patent”)
1002	Image File Wrapper of U.S. Patent No. 6,411,941 (“File History”)
1003	Declaration of Andrew Wolfe, Ph.D. (“Wolfe Decl.”)
1004	U.S. Patent No. 4,658,093 (“Hellman”)
1005	U.S. Patent No. 5,892,906 (“Chou”)
1006	U.S. Patent No. 5,933,498 (“Schneck”)
1007	Reserved
1008	Reserved
1009	Reserved
1010	Reserved
1011	Claim Construction Order, <i>Ancora Techs., Inc. v. Apple Inc.</i> , No. 4:11-cv-06357 (N.D. Cal. Dec. 31, 2012) (ECF No. 107).
1012	Final Claim Constructions of the Court, <i>Ancora Techs., Inc. v. LG Elecs., Inc.</i> , No. 1:20-cv-00034 (W.D. Tex. June 2, 2020) (ECF No. 69).
1013	Supplemental Claim Construction Order, <i>Ancora Techs., Inc. v. LG Elecs., Inc.</i> , No. 1:20-cv-00034 (W.D. Tex. Aug. 19, 2020) (ECF No. 93).
1014	Civil Minutes re Telephonic Markman Hearing, <i>Ancora Techs., Inc. v. TCT Mobile (US), Inc.</i> , No. 8:19-cv-02192 (C.D. Cal. Nov. 12, 2020) (ECF No. 66) (attaching “The Court’s Final Ruling on Claim Construction (<i>Markman</i>) Hearing,” but also ordering further meet and confer on subject).
1015	Civil Minutes re Telephonic Markman Hearing, <i>Ancora Techs., Inc. v. TCT Mobile (US), Inc.</i> , No. 8:19-cv-02192 (C.D. Cal. Nov. 19, 2020) (ECF No. 69) (confirming no change to “The Court’s Final Ruling on Claim Construction (<i>Markman</i>) Hearing”).
1016	Decision Granting Institution of Inter Partes Review, <i>TCT Mobile (US) Inc. v. Ancora Technologies, Inc.</i> , No. IPR2020-01609 (Feb. 16, 2021) (Paper No. 7) (“TCL Institution Decision”).
1017	Decision Granting Institution of Inter Partes Review, <i>Sony Mobile Commc’ns AB v. Ancora Technologies, Inc.</i> , No.

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1034	Transcript of the Deposition of Miki Mullor, July 12, 2022 (Confidential)
1035	Transcript of the Deposition of David Martin, Ph.D., July 14, 2022
1036	RESERVED
1037	Denon DP-35F/DP-45F Instruction Manual, Nippon Columbia Co., Ltd.
1038	Excerpts from <i>Dictionary of Computing</i> , 4 th ed., Oxford University Press, 1996
1039	U.S. Patent No. 5,568,552 to Davis
1040	Guttman, B., et al., <i>Computer Security</i> , National Institute of Standards and Technology, 1995)
1041	Kaliski, B., “PKCS #1: RSA Encryption,” RFC 2313, The Internet Society, Network Working Group, March 1998
1042	U.S. Patent No. 5,724,425 to Chang et al.
1043	U.S. Patent No. 5,935,246 to Benson
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1070	Opening Claim Construction Brief, <i>Ancora Techs., Inc. v. LG Electronics Inc. et al.</i> , No. 1:20-cv-00034 (W.D. Tex. April 9, 2020) (ECF No. 47)
1071	Responsive Claim Construction Brief, <i>Ancora Techs., Inc. v. LG Electronics Inc. et al.</i> , No. 1:20-cv-00034 (W.D. Tex. April 10, 2020) (ECF No. 50)

1072	Reply Claim Construction Brief, <i>Ancora Techs., Inc. v. LG Electronics Inc. et al.</i> , No. 1:20-cv-00034 (W.D. Tex. April 27, 2020) (ECF No. 53)
1073	Opening <i>Markman</i> Brief, <i>Ancora Techs., Inc. v. HTC America, Inc. et al.</i> , No. 2:16-cv-01919-RAJ (W.D. Washington September 23, 2019) (ECF No. 59)
1074	Ancora Technologies, Inc.’ Responsive <i>Markman</i> Brief, <i>Ancora Techs., Inc. v. HTC America, Inc. et al.</i> , No. 2:16-cv-01919-RAJ (W.D. Washington October 7, 2019) (ECF No. 62)
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2001	Microsoft Corporation’s Request for <i>Ex Parte</i> Reexamination Image File Wrapper, Control No. 90010560
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2004	Declaration of Ian Jestice, <i>Ancora Techs., Inc. v. HTC America, Inc.</i> , Case No. 2:16-cv-01919 (W.D. Wa. Aug. 26, 2019)
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2007	Terplan, Kornel, Morreale, Patricia, THE TELECOMMUNICATIONS HANDBOOK, CRC Press, 2000
2008	COMPUTER USER’S DICTIONARY, Microsoft Press, 1998
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2010	PC MAGAZINE ENCYCLOPEDIA, available at https://www.pcmag.com/encyclopedia (excerpt, definition of “Agent”)
2011	U.S. Patent No. 6,411,941 File History with Beeble White Paper
2012	Joint Claim Construction Chart, <i>Ancora Techs., Inc. v. TCT Mobile (US) Inc., Huizhou TCL Mobile Commc’n Co., Ltd., and Shenzhen TCL Creative Cloud Tech. Co., Ltd.</i> , Case No. 8:19-cv-02192 (Dkt. #49, 49-1, 49-2)
2013	Declaration of Dr. David Martin, Ph.D., <i>Sony Mobile Commc’ns AB, Sony Mobile Commc’ns, Inc., Sony Elecs. Inc., and Sony Corp. v. Ancora Techs., Inc.</i> , IPR2021-00663, Ex. 2015 (PTAB Apr. 23, 2021)
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2015	U.S. Patent No. 5,479,639 (Ewertz)
2016	Decision Denying Institution of Inter Partes Review, <i>Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. v. Ancora Technologies, Inc.</i> , IPR2020-01184
2017	Declaration of Ian Jestice, <i>Ancora Technologies Inc. v. LG Electronics Inc., LG Electronics U.S.A. Inc., Samsung Electronics Co., Ltd., and Samsung Electronics America, Inc.</i> , Case No. 1:20-cv-00034 (Dkt. # 44-8)
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2019	U.S. Patent No. 5,892,900 (Ginter)
2020	U.S. Patent No. 5,734,819 (Lewis)
2021	U.S. Patent No. 6,153,835 (Schwartz)
2022	<i>Ancora Techs. Inc. v. Apple, inc.</i> , Case No. 4:11-cv-06357 (Dkt. # 171-3) [Apple Inc.’s N.D. Cal. L.R. 3-3 (Invalidity) Disclosures]
2023	Petition, <i>HTC Corp. v. Ancora Techs. Inc.</i> , Case No. CBM2017-00054, Paper 1 (PTAB May 26, 2017)
2024	Institution Decision, <i>HTC Corp. v. Ancora Techs. Inc.</i> , Case No. CBM2017-00054, Paper 7 (PTAB Dec. 1, 2017)
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2029	[REDACTED] (Confidential)
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2031	[REDACTED] (Confidential)
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2038	Proposed Protective Order
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2045	U.S. Patent No. 5,684,951 (Goldman)
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2048	[REDACTED] (Confidential)
2049	[REDACTED] (Confidential)
2050	[REDACTED] (Confidential)
2051	[REDACTED] (Confidential)
2052	Patent Owner's Oral Hearing Demonstratives

3001	Order Granting Request for Ex Parte Reexamination, U.S. Patent No. 6,411,941 (11/17/2021)
3002	Office Action in Ex Parte Reexamination, U.S. Patent No. 6,411,941 (3/11/2022)

The Federal Circuit vacated the Board’s prior Final Written Decision and remanded for the Board to reconsider its legal determination of obviousness in view of the evidence of licenses “taken by substantial parties paying substantial royalties to secure the right to practice the ’941 patent.” *Ancora Techs., Inc. v. Roku, Inc.*, 140 F.4th 1351, 1364 (Fed. Cir. 2025). Further, the Federal Circuit shared its view on the outcome of that analysis—explaining that Ancora’s licenses “**should have been given more, if not controlling, weight** in the Board’s obviousness determination.” *Id.* (emphasis added)

The Federal Circuit was correct. As it has explained in prior cases, “Objective indicia” of non-obviousness through licensing “must be considered and given ‘fair weight’ before a legal conclusion on obviousness is drawn.” *Intercontinental Great Brands LLC v. Kellogg N. Am. Co.*, 869 F.3d 1336, 1346 (Fed. Cir. 2017). Indeed, the Federal Circuit has explained that such evidence not only may be “the most probative and cogent evidence in the record,” but “may often establish that an invention appearing to have been obvious in light of the prior art was not.” *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538-39 (Fed. Cir. 1983). In other words, its effect is such that any “holding of prima facie obviousness, being but a legal inference from previously uncontradicted evidence, is dissipated.” *Applied Materials, Inc. v. Advanced Semiconductor Materials Am., Inc.*, 98 F.3d 1563, 1570 (Fed. Cir. 1996) (citation omitted)).

As the Federal Circuit has intimated, that is exactly the case here. Looking at Ancora's licenses with [REDACTED], the Federal Circuit unanimously (and unambiguously) directed that such "licenses, taken by substantial parties paying substantial royalties to secure the right to practice the '941 patent, should have been given more, if not controlling, weight in the Board's obviousness determination." *Ancora*, 140 F.4th at 1364. In short, such licenses "establish" the invention the Board thought to be "obvious in light of the prior art was not." *Stratoflex*, 713 F.2d at 1538-39. Given such direction—and the absence of any evidence to countermand it—the Board thus should hold that Petitioner has not established the obviousness of the challenged claims of the '941 Patent.

I. The "Big Three" Licenses Establish Non-Obviousness

As explained, the Federal Circuit vacated the Board's obviousness decision for reconsideration in view of Ancora's licensing evidence—directing not only that Ancora's licenses with [REDACTED] must be considered, but that they should be given "controlling" effect, stating:

These licenses, taken by substantial parties paying substantial royalties to secure the right to practice the '941 patent, **should have been given more, if not controlling, weight** in the Board's obviousness determination.

Ancora, 140 F.4th at 1364 (emphasis added). Further, this was not a one-off or isolated comment. Instead, the Federal Circuit repeatedly referred to Ancora's

licenses to [REDACTED]—called the “first,” “second,” and “third” licenses in the Opinion¹—as “substantial” evidence of non-obviousness, explaining:

Suffice it to say that **the licensees are very substantial companies and the royalties they paid were also very substantial.** [*Ancora*, 140 F.4th at 1364 n.5.]

But, when it comes to licenses, clear evidence that substantial license fees were paid for licenses to a specific patent late in a litigation should be given the significance that their magnitude deserves. And while “it is often cheaper to take licenses than to defend infringement suits,” *Iron Grip Barbell Co. v. USA Sports, Inc.*, 392 F.3d 1317, 1324 (Fed. Cir. 2004) (quotations omitted), **that is certainly not the case here.** [*Ancora*, 140 F.4th at 1363.]

Further, there is nothing that Petitioner can cite in response to negate the Federal Circuit’s conclusion that Ancora’s licenses to [REDACTED] are “clear” and “substantial” evidence of non-obviousness that should have been given

¹ Despite the Board’s decision to disregard the [REDACTED], the Federal Circuit considered it. *See Ancora*, 140 F.4th at 1362 (“The same can be said for the Board’s treatment of the second and third licenses . . .”); *id.* at 1363 (“[T]he settlements resulting in licenses were reached, in the respective cases, after four years of litigation, within a month of trial, and one day before trial.”). The Federal Circuit’s consideration of the [REDACTED] confirms it must be included in the Board’s analysis.

“more, if not controlling, weight in the Board’s obviousness determination.” *Id.* at 1364. For example, Petitioner may argue “the mere existence of . . . licenses is insufficient to overcome the conclusion of obviousness” when there is a strong *prima facie* case of obviousness. *SIBIA Neurosciences, Inc. v. Cadus Pharm. Corp.*, 225 F.3d 1349, 1358 (Fed. Cir. 2000). But this is wrong for several reasons.

First, in *SIBIA*, the patentee failed to “establish[] a nexus between the licensing activity and the merits of the claimed screening method” because the licenses were part of larger licensing packages. *Id.* Here, the Federal Circuit already has held that Ancora established the nexus between Ancora’s single-patent licenses to [REDACTED] and the claims at issue. *See Ancora*, 140 F.4th at 1362-63.

Second, the evidence here also constitutes much more than just the “mere existence of . . . licenses.” *SIBIA*, 225 F.3d at 1358. Again, the Federal Circuit held that the “license payments [by [REDACTED]] also far exceeded the cost of litigation.” *Ancora*, 140 F.4th at 1363. Moreover, it held that these three very sophisticated and well-funded companies “who were fully aware of the relevant prior art” paid their respective substantial sums late in their respective litigations. *Id.* These facts indicate that these well-represented and well-resourced companies did not consider the ’941 Patent to be obvious. If they did, these companies would have pursued much (much) less costly patent challenges instead of paying the substantial

sums paid under the license agreements. It is hard to imagine stronger licensing evidence in support of nonobviousness than what has been presented here.

Third, the Board did not find that the evidence of obviousness was “strong.” At most, the Board found that the “value that Patent Owner’s objective evidence possesses in establishing nonobviousness is weak in comparison to the evidence regarding the prior art under the first three Graham factors.” Paper 49 at 51. Tellingly, the Federal Circuit vacated, even though the Court routinely affirms obviousness determinations on harmless-error grounds when the tribunal under review erred in evaluating objective indicia of non-obviousness. *See, e.g., S. Alabama Med. Sci. Found. v. Gnosis S.P.A.*, 808 F.3d 823, 828 (Fed. Cir. 2015); *In re Huai-Hung Kao*, 639 F.3d 1057, 1073 (Fed. Cir. 2011). The reason is simple. Respectfully, the Board’s error was not harmless. Rather, “[t]hese licenses, taken by substantial parties paying substantial royalties to secure the right to practice the ’941 patent, should have been given more, if not controlling, weight in the Board’s obviousness determination.” *Ancora*, 140 F.4th at 1364.

II. The “Low Value Agreements” Lack a Nexus to Patent Strength

The Federal Circuit also provided direction on the slim reed that kept it from simply finding *Ancora*’s licenses controlling—explaining that the Board could “consider the nexus issue and the probative value” of *Ancora*’s other agreements “and weigh th[em] against the licenses produced by *Ancora* in support of its

argument of commercial success as objective indicia of nonobviousness.” *Id.* In the abstract, that is correct. Depending on the evidence in the record, the Board *could* (in theory) weigh such agreements, provided that Petitioner can **both** establish a nexus between these lower-value agreements and the ’941 patent’s strength **and** further show that such agreements somehow countermand the commercial success shown by the higher value agreements. But here, there is simply no evidence to which Petitioner can point to support either point.

To be clear, here Petitioner bears the burden to establish that its evidence has a nexus to the patent’s strength. Certainly, “Defendants have the burden of proof with respect to all of the obviousness factors, including, where relevant, objective evidence of non-obviousness.” *Alcon Research, Ltd. v. Apotex Inc.*, 790 F. Supp. 2d 868, 925 (S.D. Ind. 2011), *aff’d in part and rev’d in part*, 687 F.3d 1362 (Fed. Cir. 2012); *see also Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 291-92 (Fed. Cir. 1985). Moreover, where (like here) “the patentee has presented a prima facie case of nexus, the burden of coming forward with evidence in rebuttal shifts to the challenger, as in any civil litigation.” *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387, 1394 (Fed. Cir. 1988).

The Federal Circuit already has found that Ancora’s high-value, single patent licenses “support[] a nexus finding” indicative of the licensees’ acquiescence to the ’941 patent’s strength. *Ancora*, 140 F.4th at 1363; *see id.* at 1364 (“These licenses,

taken by substantial parties paying substantial royalties to secure the right to practice the '941 patent, should have been given more, if not controlling, weight in the Board's obviousness determination."); *id.* at 1363 ("But, when it comes to licenses, clear evidence that substantial license fees were paid for licenses to a specific patent late in a litigation should be given the significance that their magnitude deserves."); *see Transocean Offshore Deepwater Drilling, Inc. v. Maersk Drilling United States, Inc.*, 699 F.3d 1340, 1353 (Fed. Cir. 2012) (crediting the value of the licenses relative to litigation costs as sufficient to find licensing evidence to support nonobviousness).

Given such a finding, Petitioner bears the burden to (1) establish any nexus between the lower-value agreements and any alleged weakness of the '941 patent, and (2) demonstrate that such licenses, even with a nexus, overcome Ancora's showing of nonobviousness. Further, to do so, Petitioner must come forward with actual evidence and cannot rely on "argument alone." *Quanergy Sys., Inc. v. Velodyne Lidar USA, Inc.*, 24 F.4th 1406, 1418 (Fed. Cir. 2022). It cannot do so.

Certainly, there is no similar finding—and no similar evidence—showing that Ancora's lower-value agreements evidence the patent's weakness. In particular, Petitioner adduced "no evidence showing that" these agreements have any relationship to "the merits of the claimed invention" rather than arising from "business decisions to avoid litigation . . . or for other economic reasons." *In re Antor Media*, 689 F.3d 1282, 1294 (Fed. Cir. 2012). As such, those licenses are

insufficient to “rebut[] the prima facie case of nexus between the . . . patented invention and its [licensing] success.” *Demaco*, 851 F.2d at 1394.

Indeed, the Federal Circuit has repeatedly held that settlements for less than the cost of litigation—accompanied (like here) by no other evidence of nexus—simply cannot inform the obviousness analysis. See *Iron Grip Barbell Co. v. USA Sports, Inc.*, 392 F.3d 1317, 1324 (Fed. Cir. 2004); *Cole Kepto Int’l, LLC v. VSR Inds., Inc.*, 695 Fed. Appx. 566, 572 (Fed. Cir. 2017) (distinguishing “business decisions to avoid litigation, [] prior business relationships, or [] other economic reasons”). For example, the court in *Iron Grip Barbell* explained that “[o]ur cases specifically require affirmative evidence of nexus where the evidence of commercial success presented is a license, because it is often ‘cheaper to take licenses than to defend infringement suits.’” *Iron Grip Barbell*, 392 F.3d at 1324 (quoting *EWP Corp. v. Reliance Universal Inc.*, 755 F.2d 898, 908 (Fed. Cir. 1985)).

That is exactly the situation here. See *Demaco*, 851 F.2d at 1394. Petitioner has adduced no evidence establishing any link between the lower-value agreements at issue and the ’941 patent’s strength; nor has Petitioner adduced any evidence that could rule out the many reasons why the parties to these agreements could have entered them that have no relationship to the strength of the patent at all.

For example, Petitioner presents no evidence regarding the potential economic value of the litigations to Ancora (such as [REDACTED] sales) to rule

out other economic explanations for the agreements, exactly the evidence that Federal Circuit case law requires to establish nexus in low value agreements. Further, there is a reason Petitioner has not done so: each of these agreements resulted from Ancora making the economic choice to end each litigation because the damages available—even if validity and infringement were proven—were less than the litigation costs. *See Ancora*, 140 F.4th at 1363 (“damages figures are a function of an infringer’s *usage*, not a patent’s strength” (emphasis added)).

Given such realities, it is not surprising that every Federal Circuit case addressing lower-value license agreements has held that such licensing evidence either (1) had no bearing on the obviousness inquiry (*i.e.*, no nexus) (*Iron Grip Barbell*, 392 F.3d at 1324) or (2) was entitled to limited weight *in favor of non-obviousness* (*Cole Kepron*, 695 Fed. Appx. at 572; *EWP*, 755 F.2d at 908). The Federal Circuit has ***never*** concluded that lower-value licenses weigh in favor of an *obviousness* finding or undercut the *non-obviousness* conclusion to be drawn from higher-value licenses.

Petitioner may argue (as it did previously) that the fact that Ancora settled with [REDACTED] shortly after the Board instituted their respective IPRs suggests that Ancora feared invalidation under the Hellman-Chou combination. No such inference can be drawn here. [REDACTED] settled for large sums even after the Board instituted TCL’s and Sony’s IPRs on the Hellman-Chou combination in

February and June 2021: [REDACTED], two months after the Board instituted trial in TCT's IPR2020-01609, Paper 7 (Feb. 16, 2021), and [REDACTED], four days after the Board instituted trial in Sony's IPR2021-00663, Paper 17 (June 10, 2021). Likewise, Ancora obtained a [REDACTED] [REDACTED] [REDACTED].

In short, here Petitioner has nothing but speculation to rely on to support its argument. And speculation is not substantial evidence that can support any findings in Petitioner's favor. *Rambus Inc. v. Rea*, 731 F.3d 1248, 1257 (Fed. Cir. 2013). Accordingly, because Petitioner fails to establish a nexus between the low value agreements and the '914 patent's strength, these agreements provide little to no bearing on the ultimate question of obviousness.

III. The '941 Patent Is Not Obvious

In sum, the evidence here is unanimous: as the Federal Circuit found, Ancora's high-value licenses have a clear nexus to the '941 patent. In contrast, Petitioner has no evidence to show Ancora's lower-value agreements have any nexus to obviousness, much less somehow counter the weight of the high value agreements. Accordingly, the strong high-value license agreement evidence is in fact "controlling" and conclusively demonstrates the non-obviousness of the '941 patent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies in accordance with 37 C.F.R. § 42.6(e) that on August 29, 2025, a copy of the foregoing **PATENT OWNER'S OPENING BRIEF ON REMAND** was served via electronic mail to the attorneys listed below at PerkinsService-Nintendo-Ancora-IPR@perkinscoie.com:

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