

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Duration Media LLC
Petitioner,

v.

Rich Media Club LLC
Patent Owner.

Case IPR2023-00953
U.S. Patent 11,443,329

**PATENT OWNER’S OPPOSITION TO
“PETITIONER’S MOTION TO STRIKE OR DISREGARD
UNTIMELY EVIDENCE
IN PATENT OWNER’S SUR-REPLY
UNDER 37 CFR § 42.23(b)”**

In contravention of 35 U.S.C. § 312(a)(3), 37 CFR § 42.104 and the TPG, Petitioner essentially re-wrote its Petition on Reply with volumes of purported new evidence, including a second declaration from Smedley. Among many new opinions, Smedley's 2nd expert declaration opined, EX1027 ¶23: "It is my opinion that the '329 patent does not disclose code for implementing a viewability test. POR, 3 (citing EX1001, cols. 65-66). I reviewed this 'correlator code'; without additional information it is gobbledygook." See also Ex1027 ¶26. This opinion was not, as Petitioner represents, "simply" that the code was "incomplete."

Raising the issue of Petitioner's rules violation, and asking to have the issue of whether this new Reply evidence was going to be allowed decided before its Surreply, Patent Owner asked to file a motion to strike. The Board responded (EX2070): "Patent Owner's request to file a motion to strike is denied. Patent Owner should use its sur-reply to respond to Petitioner's reply, including stating and explaining any objections to the evidence Petitioner relies on in its reply."

As Patent Owner then explained in Surreply and Motion to Exclude, the new Reply opinions must be excluded. Alternatively, if they are permitted, Patent Owner submitted evidence demonstrating they are false: the code from the '329 patent (EX1001), when activated, implements a viewability test. The Board can see the patent's code operating at https://control.realvu.net/proto/patent_code.html. The Tchibirev declaration, EX2064, and its exhibits are not new evidence but

simply explain how Tchibirev cut and paste the code from the patent, and fixed a few typos (e.g. use of smart and non-smart quotes). If Smedley's late, *ipse dixit*, and demonstrably false opinion is allowed, it is only fair to show that the very code always in the record is not "gobbledygook" but actually works.

Petitioner's motion acknowledges that it was allowed the option to file a sur-sur-reply in the 36 days between sur-reply and trial but chose not to. This is presumably because there is no response to the objective facts that the code works; there is no sur-sur-reply that could resuscitate Smedley's credibility. No Tchibirev deposition is necessary given the objective facts, but also none was requested.

Petitioners argue that Patent Owner should be limited to cross-examining Smedley on his Reply opinion that "the '329 patent does not contain comprehensible source code for implementing a viewability test" and is only "gobbledygook." This is not a full and fair opportunity given that the patent's disclosed written code, and an operating environment, were required to expose the untruth. Also, Smedley could continue to deny objective reality at any deposition, as he did in EX1027, given Patent Owner's inability to show the Board the patent's actual functioning code. This would violate the Constitution's Due Process clause. Patent Owner must be afforded an opportunity to present arguments and evidence rebutting testimony first submitted in Reply. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970) (due process requires opportunity to present evidence).

Dated: May 10, 2024

Respectfully submitted,

/Ragnar Olson/
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CERTIFICATE OF SERVICE (37 C.F.R. § 42.6(e)(1))

The undersigned hereby certifies that on May 10, 2024, a complete and correct copy of the foregoing PATENT OWNER’S OPPOSITION TO “PETITIONER’S MOTION TO STRIKE OR DISREGARD UNTIMELY EVIDENCE IN PATENT OWNER’S SUR-REPLY UNDER 37 CFR § 42.23(b)” was served via electronic mail on the following counsel of record for Petitioner:

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