

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PLR WORLDWIDE SALES LIMITED,

Petitioner,

v.

FLIP PHONE GAMES INC.,

PO.

Case No. IPR2023-00132

U.S. Patent No. 9,731,202

**PETITIONER'S RESPONSE TO PATENT OWNER'S REQUEST FOR
DIRECTOR REVIEW**

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Dissatisfied with the result below, PO now asks the Director to accept arguments the Board rejected twice, without any showing of error. The Board correctly gave the term “for use” its plain and ordinary meaning, refusing to import unsupported limitations, and gave Dr. Zagal’s testimony due weight.

I. THE BOARD PROPERLY GAVE “FOR USE” ITS PLAIN MEANING

Although *the parties agreed the term need not be* construed, PO’s arguments nonetheless “implicate[d] a claim construction dispute,” specifically that “for use” requires alteration of game functionality, which the Board rejected. FWD at 9-16.

First, the Board held that “[t]he claim language itself suggests no such restriction,” since it does not limit “who or what must use the content or how it must be used.” *Id.* at 12. Next, the specification “directly refutes PO’s position,” as it discloses non-interactive content, such as ads on a “shirt” or a “poster.” FWD 12-14. The Board declined PO’s invitation to ignore this “preferred embodiment.” FWD at 13-14. The Board also rejected PO’s prosecution history argument, as the prosecution art was distinguished because “promotional content did not appear in the email that the Examiner alleged was a video game.” FWD at 15.

Second, PO argues that the Board “does not require updated video-game content to be ‘inserted into an existing game,’” which contradicts the claim language. Paper 30 (“Request”) at 4. The claim language only requires that

content be “uploaded,” but “does not specify who or what must use the content or how it must be used.” FWD at 4-5. Regardless, PO did not dispute that Hays’s advertisements are uploaded to the device for insertion into the existing game. FWD at 24 (quoting Ex. 1005, ¶43 (“[t]he selected advertisements are ... transmitted back to the advertisement recipient client for display”).

Third, PO incorrectly argues that the Board’s failure to require alteration of game functionality is inconsistent with plain meaning, Request at 5, yet PO never offered a plain meaning for “use.” The plain meaning supports the Board’s conclusion that “presenting” ads makes them “usable,” “by the video game itself and also by the player.” FWD at 25-26; Ex. 1005, ¶18 (“items *used* by game characters (e.g., a brand name soft drink or energy bar)” (emphasis in original)).

PO acknowledges that the specification provides numerous examples of updated content which do not alter game functionality, such as a “shirt” or “poster,” that nevertheless should be ignored because they do not use the verb “use.” Request at 5-6. But the Board correctly concluded that it could not construe the term to “exclude the ’202 patent’s preferred embodiment,” which “is rarely, if ever, correct.” FWD 12-13 (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1583 (Fed. Cir. 1996)); *see also Aspex Eyewear, Inc. v. Marchon Eyewear, Inc.*, 673 F.3d 1335, 1348 (Fed. Cir. 2012) (contruing “rearwardly directed free end” in view of specification’s embodiments even though

“the specification does not use the term ‘free’ in reference to the rearwardly directed end portion”).

PO's Request focuses on different language from the Patent that it failed to properly disclose and raised only at the oral argument, accusing the Board of taking that passage out of context. Request at 6-7; FWD at 13-14. As the Board found, it is PO who takes the passage out of context, because it clearly includes usable “content ... such as the shape, design coloring of dartboard 210 or the texture or coloring of background 215,” none of which affects the game's functionality. FWD at 13-14. In addition, “other items” are usable, which plainly includes the shirt, poster, and chalkboard from the preferred embodiment.

Fourth, PO argues that the Board “[i]gnores the prosecution history.” Request at 7-8. Not so. The Board correctly found that in distinguishing Gatto, the applicant argued Gatto's linked content is not “usable” because the content itself “did not appear in the email” but was instead accessible via a hyperlink. FWD at 14-16; Ex. 1002, 166. Nothing in the applicant's statements indicate that “usable” content must alter the functionality of the video game.

Fifth, PO argues that the Board improperly defined the scope of the claims “using terms found only in Hays.” Request at 8. The Board had to use Hays's terms as it was the only basis **PO** relied on to limit the scope of “for use,” and the

Board had to respond to such arguments. POR at 15 (“Hays never describes that any of its ‘ad units’ alter the functionality of the game”).

II. HAYS DISCLOSES INTERACTIVE, UPLOADED AD UNITS

As the Board correctly concluded, even under PO's improper construction, Hays describes uploaded advertisements that alter game functionality. FWD at 25-26; Ex. 1005, ¶79 (“a game character may move around a screen holding a can of Pepsi and ask player if they would like a drink”), ¶18 (“items used by game characters (e.g., a brand name soft drink or energy bar”), ¶19 (“a game character eating a brand name energy bar to boost her power in the game”).

PO concedes these are examples of game-altering content, but argues that the ad units on which these advertisements appear are “already in the game” instead of being uploaded. Request at 9-11. But the Board correctly found that Hays's ad units can be “sent” into the game, including an ad unit in the form of a character holding a Pepsi can. FWD at 27-28 (quoting Ex. 1005, ¶79 (“[T]he advertisement management service system may *send* bots or electronic games into the game as *advertising units* or real characters in the game.”) (emphasis added)). Based on this, the Board concluded that Hays also describes “sending the brand name energy bar” into the game. FWD at 26 (citing Ex. 1005, ¶¶18, 19, 79); FWD at 18 (“In addition to undermining PO's credibility, PO's about-face is tantamount to a new argument, not presented in the PO Response, that has been forfeited.”).

Despite Hays's express disclosure of the server "send[ing] ... *into* the game ... advertising units" (Ex. 1005, ¶79), PO nevertheless argues that such ad units are not uploaded. Request at 11-13. This is a new argument never raised below, but in any case, it is contradicted by Hays's express disclosure, which the Board properly relied on. FWD at 26-28. And PO relies on Hays, ¶58, which is an entirely different embodiment than the Pepsi can of Hays, ¶79. Request at 12-13.

III. DR. ZAGAL'S TESTIMONY WAS PROPERLY GIVEN DUE WEIGHT

PO argues that Dr. Zagal's testimony was entitled to no weight because it is "largely, and in some sections entirely, a word-for-word copy of the original Petition." Request at 13-14. PO cites to *Xerox*, but as the Board correctly found in the other FWD's involving the parties, where they rejected this same argument "Xerox stands for the proposition that a declaration is entitled to little weight when it restates a petition's unsupported, conclusory assertions without any additional supporting evidence or reasoning." IPR2024-00200, Paper 30 at 47-48; *Xerox*, at 15. *TQ Delta* is similarly distinguishable because it involved "conclusory" expert testimony. 942 F.3d at 1361. The Board rejected the challenge. See, e.g., FWD at 48 ("We credit Dr. Zagal's testimony"). Zagal's testimony was well-supported by citations to the prior art and well-described reasoning and PO does not argue otherwise. See, e.g., Ex. 1003, ¶¶97-98, 105-06.

Date: June 3, 2025

Respectfully submitted,

By: /s/ James M. Glass
James M. Glass

Counsel for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 3, 2025, true and correct copies of the foregoing document and supporting materials were served in its entirety on the PO at the following email addresses:

mmorlock@kilpatricktownsend.com
jlee@kilpatricktownsend.com
arinehart@kilpatricktownsend.com
kkoballa@kilpatricktownsend.com
FPG1367020@kilpatricktownsend.com

Date: June 3, 2025

By: /s/ James M. Glass
James Glass
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Tel: (212) 849-7000
Fax: (212) 849-7100

Counsel for Petitioner