

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CRS ADVANCED TECHNOLOGIES, INC.
Petitioner

v.

FRONTLINE TECHNOLOGIES, INC.
Patent Owner

Case CBM2012-00005
Patent 6,675,151C1

Before SALLY C. MEDLEY, THOMAS L. GIANNETTI, and JENNIFER
S. BISK, *Administrative Patent Judges*.

MEDLEY, *Administrative Patent Judge*.

ORDER
Conduct of the Proceeding
37 C.F.R. § 42.5

On July 12, 2013, the following individuals participated in a
conference call:

- (1) Mr. Robert Yoches and Mr. Darrel Karl, counsel for CRS;
- (2) Mr. John McGlynn, counsel for Frontline; and

(3) Sally Medley, Thomas Giannetti, and Jennifer Bisk,
Administrative Patent Judges.¹

The purpose of the conference call was to discuss Frontline's motion to exclude, requests for further briefing, the schedule and oral argument.

Frontline's Motion to Exclude

On July 9, 2013, Frontline filed a paper styled "PATENT OWNER'S MOTION TO EXCLUDE PURSUANT TO 37 C.F.R. § 42.64(c)." Paper 51; "Motion." In the Motion, Frontline seeks to exclude a stipulation made by the parties (Ex. 1020) and "the corresponding facts and argument recited in CRS's Reply." Paper 51 at 1. CRS filed an opposition. Paper 53; "Opposition."

The Trial Practice Guide explains in detail what a motion to exclude is and what a party should include in the motion. A motion to exclude is available to a party "wishing to challenge the admissibility of evidence" and to preserve an objection made previously. A motion to exclude must identify where in the record the objection originally was made; identify where in the record the evidence sought to be excluded was relied upon by an opponent; address objections to exhibits in numerical order and explain each objection. The Trial Practice Guide explains that a motion to exclude must explain why the evidence is not admissible, providing the examples of relevance or hearsay, and explains that a motion to exclude may not be used to challenge the sufficiency of the evidence to prove a particular fact. *See Office Patent Trial Practice Guide*, 77 Fed. Reg. 48756, 48767 (Aug. 14, 2012).

¹ A court reporter was present.

A party following these guidelines may file a motion to exclude without prior authorization from the Board. The rule specifies as much and explains that a motion to exclude must identify the objections in the record and must explain the objections. 37 C.F.R. § 42.64(c).

A motion to exclude is not an opportunity for a party to request the Board to not consider, or to strike, portions of an opponent's brief because the portions allegedly raise new issues in violation of 37 C.F.R. § 42.23(b).² However, that is what Frontline has done. Paper 51. In essence, Frontline's "Motion to Exclude" is a motion under 37 C.F.R. § 42.20. Such a motion will not be entered without Board authorization. Here, Frontline did not obtain authorization and thus the paper was filed contrary to the rule.

CRS compounded the problem by responding to the motion and raising additional issues. Such an opportunity is not available to CRS. The time for briefing the issues has passed. This proceeding is coming to an end. As explained during the conference call, the Motion to Exclude and the Opposition are unauthorized papers and will be expunged from the record.

Further Briefing

Frontline seeks authorization for the parties to submit a brief in light of *Ultramercial, Inc. v. Hulu, LLC*, 107 USPQ2d 1193 (Fed. Cir. June 21, 2013). The panel has determined that such briefing is not necessary to decide this case. As discussed, however, the parties may present arguments

² The rule explains that all arguments for the relief requested in a motion must be made in the motion and that a reply may only respond to arguments raised in a corresponding opposition or patent owner response. 37 C.F.R. § 42.23(b).

regarding *Ultramercial* during oral argument.

Oral Argument

Oral argument is scheduled for August 13, 2013. Counsel for CRS requests an earlier date for oral argument. The request is *denied*. The oral argument date has been scheduled since January 23, 2013. Paper 19. The schedules of all involved must be considered in determining whether to alter a scheduled oral argument date. Here, counsel for CRS did not provide a compelling reason to alter the date. Based on the facts of the case, oral argument will be held on August 13, 2013. An order setting forth the procedure for oral argument will be filed in due course.

Miscellaneous

Counsel for CRS confirmed that CRS is not relying on Exhibits 1015 and 1016, currently marked “private” in support of its papers. Nor is there a need for the protective order (Exhibit 1019) or the “private” first CRS reply (Paper 40) entered in the record. Since neither party relies on any of these documents, the Board would not want to maintain such documents. Counsel for the respective parties agreed that it is appropriate to expunge such papers from the record.

Order

For the reasons provided above, it is

ORDERED that Frontline's Motion to Exclude (Paper 51) and CRS's Opposition (Paper 53) are expunged from the record of this proceeding as unauthorized papers; 37 C.F.R. § 42.7(a);

FURTHER ORDERED that Frontline's request for the parties to submit briefing in light of *Ultramercial* is *denied*; however, the parties may, present arguments regarding *Ultramercial* during oral argument;

FURTHER ORDERED that Exhibits 1015, 1016, 1019 and CRS' first reply to patent owner's response, filed under seal (Paper 40), are expunged from the record of this proceeding; and

FURTHER ORDERED that an order setting forth the procedure for oral argument scheduled for August 13, 2013 will be filed in due course.

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