UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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UNIVERSAL REMOTE CONTROL, INC.
Petitioner

v.

UNIVERSAL ELECTRONICS, INC.
Patent Owner

_____

Case: IPR2013-00127

Patent: 6,587,067

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PETITIONER UNIVERSAL REMOTE CONTROL'S OPPOSITION TO
PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE

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Patent Trial and Appeal Board
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

Patent Owner Universal Electronics, Inc. ("UEI") has moved to exclude certain answers to deposition questions given by Petitioner Universal Remote Control's ("URC") expert Dr. Alan Herr during redirect examination by URC's counsel. UEI's motion should be denied since (a) the questions posed to Dr. Herr were not leading because they did not suggest the desired answer, and (b) UEI's counsel posed the very same types of questions during redirect examination of its own expert, Patrick Hayes. In addition, regardless of whether Dr. Herr's answers are excluded or not, those answers do not and cannot change the fact of what the prior art documents themselves show that were the subject of the objected to questions.

I. THE OBJECTED TO QUESTIONS WERE NOT LEADING

The definition of a leading question is "a question put or framed in such a form as to suggest the answer sought to be obtained by the person interrogating" or one that "puts into a witness' mouth the words that are to be echoed." The Law Dictionary (featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.) http://thelawdictionary.org/leading-question/ The questions objected to by UEI's counsel were not leading since they did not suggest the answer sought to be obtained. The three objected to questions are set forth below:

  #1: Does that indicate to you that it is also possible in Core to have
       preprogrammed remote controller codes?

#2:   So are those examples of what you were referring in response to

counsel's questions about directly identifying?

#3:   All right. And they are typically one number?

None of these questions gave Dr. Herr an indication as to the desired answer.

For example, Dr. Herr's answer to Question #2 was "yes," thereby indicating that

the numbers found on the referenced page were examples of "directly identifying."

But suppose the desired answer was actually the opposite, namely, that the

numbers *were not* examples of "directly identifying." How could the question

have been phrased differently so as to ensure such an answer? A question along

the lines of "The numbers on that page are not examples of 'directly identifying,'

correct?" would have presumably worked since the question clearly seeks to "put

into a witness' mouth the words that are to be echoed." *Id.* That clearly would

have been an impermissible leading question. However, an open-ended question

such as "Are those examples of …?" does not suggest to the witness whether the

desired answer is "yes" or "no" nor does it attempt to place words into the witness'

mouth. Put another way, a negative response by Dr. Herr to the question was just

as likely as a positive response and therefore, by definition, the question was not

leading. The same is true of the other two questions. Therefore, none of the three

questions were impermissibly leading.

II. URC'S QUESTIONS TO ITS EXPERT ON REDIRECT WERE NO DIFFERENT IN FORM TO THOSE POSED BY UEI TO ITS EXPERT ON REDIRECT

That the questions posed to Dr. Herr were permissible and not leading is further underscored by the fact that UEI's counsel posed the very same type of questions to its own expert, Mr. Hayes, without objection by URC. For example, Mr. Hayes (a long-time employee of UEI who recently retired from full-time employment but continues to do consulting for them) purports to be an expert in the design of universal remote controls[1] and submitted a declaration on behalf of UEI in which he opines about various matters relating to the '067 patent and the prior art. After cross examination of Mr. Hayes by URC's counsel, UEI's counsel posed the following questions on redirect examination:

> Q.   Mr. Hayes, I'm going to direct your attention to that same passage in the CORE manual to which Mr. Reynold[s] was referring, specifically the sentence that says, "When you bought your Core, it actually came with pre-stored commands from a few remote controllers." Do you see that?
>
> A.   Yes.
>
> Q.   Even assuming that those few remote controllers were, let's say, five TVs and five VCRs, those prestored commands to which are being referred there, do those refer to a library of codes and data?
>
> A.   No they do not, they're simply waveform information.

(Ex. 1016 at 87:24-88:13)

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[1] *See* Hayes deposition transcript, Ex. 1016 at 21:7-10.

These two questions posed by UEI's counsel to its expert were of the same general form as those posed by URC to its expert to which UEI now disingenuously objects. In both cases counsel first directed the witness to a passage from a document about which they wished to ask a clarifying question. In both cases counsel then asked a question about the referenced passage in the general form of "Does that passage show X?" Here are the actual questions juxtaposed (with emphasis added) to show the similarity:

URC's counsel's question to Dr. Herr:	UEI's counsel's question to Mr. Hayes:
"Does that indicate to you that it is also possible in Core to have preprogrammed remote controller codes?"	"Even assuming that those few remote controllers were, let's say, five TVs and five VCRs, those prestored commands to which are being referred there, ***do those refer to a library of codes and data?***"

In neither case was the answer that counsel desired suggested by the question itself. In fact, the answer given to URC's counsel's question was basically "yes" while the answer to UEI's counsel's question was basically "no." In neither case did counsel attempt to put words into the witness' mouth by posing the question in a way suggestive of the answer such as "Doesn't that passage indicate to you that Core does in fact have preprogrammed remote controller codes?" or "Those prestored commands being referred to there do not constitute a

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