

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD**

Applicant:	Darbee et al.	Universal Remote Control, Inc.
Case No.:	IPR2013-00127	v.
Filing Date:	2/23/2001	Universal Electronics, Inc.
Patent No.:	6,587,067	Trial Paralegal: Andrew Kellog
Title:	Universal Remote Control With Macro Command Capabilities	Attny Doc.: 059489.05US5/IPR

**UEI'S REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE EVIDENCE
UNDER 37 C.F.R. § 42.64(c)**

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Patent Owner's Exhibit List

2001. Claim Construction Order from Universal Electronics, Inc. v. Universal Remote Control, Inc., C.D.Cal. Civ. No. 8:12-cv-00329
2002. Declaration of Paul Darbee from U.S. Ser. No. 07/586,957
2003. U.S. Patent No. 6,587,067 to Darbee, et al. (with Reexamination Certificate)
2004. Scheduling Order from Universal Electronics, Inc. v. Universal Remote Control, Inc., C.D.Cal. Civ. No. 8:12-cv-00329
2005. Declaration of Richard Ellis
2006. Declaration of Patrick Hayes
2007. Transcript of Deposition of Alan Herr

I. INTRODUCTION

The facts relevant to Universal Electronics, Inc.’s (“UEI”) motion are simple: Petitioner Universal Remote Control, Inc. (“URC”) posed leading questions to its proposed expert, Dr. Alan J. Herr, that went to material issues in dispute, and UEI’s counsel timely objected to those questions. As such, the Board should exclude Dr. Herr’s testimony in response to those questions, as well as any subsequent reliance thereon by URC in its briefing and oral arguments.

II. THE BOARD SHOULD EXCLUDE DR. HERR’S TESTIMONY OFFERED IN RESPONSE TO LEADING QUESTIONS.

While URC correctly defined leading questions as those questions that are framed in such a manner as to suggest the answer sought to be obtained, URC’s Opposition exhibits a fundamental misunderstanding in the application of that definition to determine what does and does not constitute a leading question. According to URC, if a negative response to a question is just as likely as a positive response, the question cannot be leading. But this cannot possibly be the case, because a witness always has the ability to answer “yes” or “no” to any question. For example, the question “Isn’t your favorite color blue?” is a leading question that suggests to the witness that his or her favorite color is blue. The fact that a witness *could* respond “no” to the above question does not change the fact that the question is leading as phrased.

Contrary to URC’s narrow view of leading questions, its counsel’s questions to Dr. Herr were in fact leading. The table below illustrates how URC’s counsel’s leading questions suggested answers to Dr. Herr, and then provides examples of how those questions could have been phrased so as not to be leading.

URC’s Leading Question	Suggested Answer	Non-Leading Alternative Phrasing
Does that indicate to you that it is also possible in Core to have preprogramed remote controller codes?” (Ex. 2007 at 86:5-7.)	It is also possible in Core to have preprogramed remote controller codes.	Does that indicate anything to you?
So are those examples of what you were referring in response to counsel’s questions about directly identifying? (<i>Id.</i> at 88:20-22.)	Those are examples of what he was referring to in response to counsel’s questions about directly identifying.	What are those?
And they are typically one number? (<i>Id.</i> at 89:8.)	They are typically one number.	Typically, how many numbers are they?

Not surprisingly, Dr. Herr followed URC’s counsel’s lead in responding to each of the above questions. The above questions are not insignificant. They involve the ultimate conclusion of whether certain prior art references disclose

certain claim limitations—limitations which Dr. Herr, just moments earlier during his cross-examination, conceded were not present. (*See Ex. 2007 at 82:2-83:18.*)

The Board should exclude and disregard URC's attempts to rehab its case by putting words into its expert's mouth, and the Board should likewise exclude and disregard URC's subsequent reliance on that improperly elicited testimony in its briefing and at the Oral Hearing.¹

III. THE BOARD SHOULD DISREGARD AND EXCLUDE SECTION III OF URC'S OPPOSITION

URC's actual arguments in opposition to UEI's Motion to Exclude are found in the first four pages of its brief. However, URC then proceeds to use the next four pages of its brief to re-hash arguments concerning prior art and its invalidity allegations. Indeed, the very title of that section—***REGARDLESS OF WHETHER DR. HERR'S ANSWERS ARE EXCLUDED OR NOT, THE PRIOR ART DOCUMENTS ABOUT WHICH HE WAS ASKED SPEAK FOR THEMSELVES*** (URC's Opposition to UEI's Motion to Exclude Evidence, at 5 (emphasis added))—confirms that its contents do not address the merits of UEI's Motion to Exclude. The Board should therefore disregard and exclude Section III

¹ URC also attempts to justify its leading questions by analogizing them to questions UEI posed to its expert, Pat Hayes. Clearly, the questions UEI's counsel asked at a different deposition have nothing to do whether URC's counsel's questions of Dr. Herr were leading. Further, while UEI disputes that any improper leading questions were asked of Mr. Hayes on redirect, UEI notes that URC neither objected to the subject questions during Mr. Hayes' deposition nor moved to exclude them.

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