

Filed on behalf of: Software Rights Archive, LLC

Paper _____

By: Martin M. Zoltick, Lead Counsel
Nancy J. Linck, Back-up Counsel
Soumya P. Panda, Back-up Counsel
Rothwell, Figg, Ernst & Manbeck, P.C.
607 14th St., N.W., Suite 800
Washington, DC 20005
Telephone: 202-783-6040
Facsimile: 202-783-6031
E-mail: mzoltick@rfem.com
nlinck@rfem.com
spanda@rfem.com

Filed: October 17, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FACEBOOK, INC., LINKEDIN CORP., and TWITTER, INC.
Petitioners

v.

SOFTWARE RIGHTS ARCHIVE, LLC
Patent Owner

Case IPR2013-00480
Patent 5,832,494

**PATENT OWNER'S REPLY TO PETITIONER'S OPPOSITION TO
PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. CROSS-EXAMINATION INADEQUATE1

II. PATENT OWNER’S MOTION TO EXCLUDE IS
PROCEDURALLY PROPER.....2

III. PATENT OWNER HAS MET REQUIRED BURDEN OF PROOF ..3

IV. DR. FOX’S TESTIMONY PRESENTS NEW ARGUMENTS.....4

1. New argument on “selecting a node for analysis” (claim 1)....4

2. New argument on “generating candidate cluster links”4

3. New argument on “number of candidate cluster links are
limited” (claim 5).....5

4. New argument on “selecting the destination” (claim 14).....5

TABLE OF AUTHORITIES

Cases

Scotts Co., LLC v. Encap LLC,
IPR2013-00110 (PTAB June 24, 2014)..... 2, 3, 4

Regulations

37 C.F.R. § 42.23(b) 2, 3, 5

Office Patent Trial Practice Guide,
77 Fed. Reg. 48756 (August 14, 2012).....4

I. Cross-Examination Inadequate

Petitioners contend that Patent Owner had the opportunity to cross-examine Dr. Fox regarding his testimony in the Fox Reply Declaration (Ex. 1028) (hereinafter “Reply Dec.”). However, Petitioners’ strategy of presenting expert testimony that changes positions, or explains its reasoning for its position for the first time on the reply brief, is highly prejudicial and clearly circumvents the rules set up for Patent Owner to adequately cross-examine Petitioners’ declarant.

Primarily, as noted in Patent Owner’s Motion to Exclude (Paper 44), Petitioners have changed their position regarding the claimed feature of “selecting a node,” and presented for the first time, expert testimony regarding why similarity values and other information constitute a candidate cluster link and otherwise meets the elements of the claim. Paper 45 at 4-7. Now, after Patent Owner has submitted its response with no further opportunity to submit additional evidence, let alone expert testimony, Petitioners have, to their own benefit, submitted expert testimony changing their positions and explaining their positions for the first time. Patent Owner submits that cross examination of Dr. Fox is insufficient since Patent Owner is merely limited to single paragraph observations without any recourse to submit any rebuttal expert testimony.

Such tactics are highly prejudicial to Patent Owner and would encourage future petitioners to follow the same tactics if Patent Owner is not granted the requested relief. In other words, Petitioner’s tactics present the worst possible

scenario where any petitioner can (i) file a petition with a complete absence of expert testimony on a particular position, and after filing of the patent owner response, (ii) submit voluminous expert testimony with new positions and new explanations that Patent Owner is unable to countervail with its own expert. If exclusion or a Reply brief is not appropriate under the circumstances where new arguments are presented, it would essentially create a procedural vehicle that allows Petitioners to completely shield their experts from any expert scrutiny of their opinions. Such tactics must be discouraged.¹

II. Patent Owner's Motion to Exclude is Procedurally Proper

The Petitioner's contend that (i) "[t]he Board has repeatedly "denied motions to exclude where the patent owner alleged that reply evidence or a reply argument was 'new,'" and (ii) the Board warned the Patent Owner not to file a motion to exclude alleging new evidence. (Paper No. 45 at 2, 3). It is respectfully submitted that Patent Owner is entitled to submit a motion to exclude the Reply Dec. In a response to Petitioner's email, the Board noted that "[a] motion to exclude seeking to **strike a reply** for violating 37 C.F.R. § 42.23(b) ... would be improper." IPR2013-00481, Paper 41, at 2 n.1 (PTAB Sept. 12, 2014)(emphasis added). Consistent with the Board's guidance, Patent Owner's Motion to Exclude does not request to strike any portion of Petitioners' reply.

¹ Due to these egregious violations, Patent Owner submits that it should be granted relief to submit its own reply declaration in response to Dr. Fox's Reply Dec.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.