

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE, INC.
Petitioner,

v.

EVOLUTIONARY INTELLIGENCE, LLC,
Patent Owner

Case IPR 2014-00086
Patent No. 7,010,536

PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE

Pursuant to 37 C.F.R. § 42.64(c), Patent Owner Evolutionary Intelligence hereby moves to exclude new evidence that Petitioner Apple, Inc. has attempted to introduce in its Reply Brief (Paper 28) and Supplemental Declaration of Henry, Houh, Ph.D.

In particular, Apple has introduced testimonial evidence in the Supplemental Declaration of Dr. Henry Houh stating:

A person of ordinary skill in the art would understand that a “logically defined data enclosure” (or a data enclosure defined by a “software mechanism”) covers more than just a “logical description” of a container. For example, a logical data enclosure would include a system process, an execution stack (the memory allocated to a running software application), contiguous blocks of physical memory, a file structure or file header, various instances of object-oriented programming design concepts (*e.g.*, a class interface, polymorphic object, or object with inheritance), amongst others.

Ex. 1009, ¶ 29. Apple relies on this evidence to argue that Gibbs contains an inherent disclosure of multiple ways of placing multiple objects into a single object, such that the single object would be a “container,” as that term is used by the ‘536 patent, with all the registers required by claims 2 and 16 of the ‘536 patent. *See* Pet. Rep. Br. at 6.

Apple’s submission of new evidence on reply violates 37 C.F.R. 42.123, which requires supplemental information be submitted within one month of institution of an IPR. There was no discussion of execution stack (the memory

allocated to a running software application), contiguous blocks of physical memory, a file structure or file header, [or] various instances of object-oriented programming design concepts (*e.g.*, a class interface, polymorphic object, or object with inheritance)” in Petitioners’ Petitions or Dr. Houh’s original declaration. As such, Patent Owner has been deprived of any opportunity to submit evidence regarding whether these things would constitute “a logical data enclosure as asserted by Dr. Houh.

Additionally, this evidence is inadmissible because it lacks foundation. Dr. Houh provides no definitions of these terms, nor does he provide any reasons why these things are “logical data enclosures.” Moreover, on cross-examination, Dr. Houh was unable to explain in a clear, concise, and consistent manner why he believed the above constituted “logical data enclosures.” *See* Observations on Cross-Examination, ¶¶ 7, 12, 14, 16-17; Ex. 1010 at 244:19-245:22 (Dr. Houh testifying that he was uncertain whether execution stacks were logical data enclosures, then changing his testimony after it was pointed out that he had already said so in his report); 249:4-249:16 (unable to identify the construction of “logical data enclosure” he had applied); 249:17-251:1 (testifying that execution stacks with “out of bounds” memory errors were an example of stacks that were not “logical data enclosures”, but then testifying that he did not know whether properly functioning execution stacks (*i.e.*, ones without errors) would be a “logical data

enclosure”); 253:18-23 (reversing course, and testifying that execution stacks were logical data enclosures if they used allocated (i.e., defined) blocks of memory); 254:13-255:1 (testifying that any running program would be a “logical data enclosure”). Dr. Houh also admitted that he did not reference or submit any materials on object-oriented programming in support of his testimony regarding the above items, which means that his analysis of their relevance can be no stronger than the explanations he provided in his cross-examination. Ex. 1010 at 201:7-203:6; 302:9-306:24.

The evidence is also inadmissible because Dr. Houh applied an incorrect standard of claim construction when applying the phrase “logically defined data enclosure.” Dr. Houh admitted in deposition that he was simply using a layperson’s understanding of nesting or encapsulation as “things within things.” Ex. 1010 at 240:5-243:5 (“ . . . generally people understand [nesting] as things within things”). Dr. Houh should have construed those terms as they would be applied by persons of ordinary skill in the art. Because he did not, his testimony is not relevant.

Finally, the evidence regarding execution stacks is inadmissible because Dr. Houh admitted that Gibbs did not necessarily require or disclose an execution stack that operated in the manner he described. *See* Ex. 1010 at 258:22-259:3 (“It’s very hard to make a statement that says everything in the world . . . has this [i.e., an

execution stack functioning as described by Dr. Houh] because, you know, *there probably could be someone who could come up with a system for supporting function calls without this type of execution stack . . .*”). Because Gibbs does not discuss execution stacks, they can only be relevant to the extent he asserts they are “inherent” within Gibbs’ disclosure. They are only inherent if they are necessarily contained within Gibbs. *See Transclean Corp. v. Bridgewood Servs., Inc.*, 290 F.3d 1364, 1373 (Fed. Cir. 2002). Because Dr. Houh admitted that they were not, there can be no inherent disclosure, and the execution stacks have no relevance to the legal issues before the Board.

Respectfully Submitted,

Dated: December 5, 2014

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