IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

In re Patent of: Darbee	Universal Remote Control, Inc.
Patent No.: 5,414,761	v.
Filed: Oct. 8, 1993	Universal Electronics, Inc.
Issued: May 9, 1995	Case No. IPR2014-01104
Assignee: Universal Electronics Inc.	Trial Paralegal: Cathy Underwood
Title: REMOTE CONTROL SYSTEM	

PETITIONER'S MOTION TO EXCLUDE CERTAIN INADMISSIBLE TESTIMONY OF PATENT OWNER'S WITNESS ALEX COOK

Certificate of Filing: I hereby certify that this correspondence is being electronically filed with the USPTO on this 20th day of July, 2015.

By: / Jeannie Ngai /
Jeannie Ngai

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Regulations

Rules

I. Introduction

Inadmissible testimony should not be part of this trial record. Petitioner moves for exclusion of certain inadmissible deposition testimony provided by Patent Owner's technical expert, Mr. Alex Cook. *See* Paper 28 at 2 (providing deadline for motion to exclude). First, during Mr. Cook's cross examination, he offered a new basis for distinguishing the Ciarcia reference. *See* Ex. 1053 at 418:18–423:6. But Mr. Cook admitted that he provided no analysis to support this new basis and that it was not included in his direct testimony. Thus, the testimony should be excluded because it is unreliable and is outside the scope of the direct testimony. Specifically, Petitioner requests exclusion of Ex. 1053 at 419:1–:2, 419:14–:15, 420:5–:21, 421:8–422:2, and 422:9–:13.

Second, Patent Owner engaged in a redirect examination of Mr. Cook during which Patent Owner asked improper and leading questions aimed at retroactively curing an erroneous opinion offered by Mr. Cook. *See* Ex. 1054 at 727:9–751:5. This testimony should be excluded because it was provided in response to leading, yes-or-no questions that were essentially attorney argument parading as expert testimony, and because the procured testimony is unreliable in that it lacked foundation and was speculative. Specifically, Petitioner requests exclusion of Ex. 1054 at 745:4–:8, 745:15–746:1, 746:13–747:4, 747:11–:16, 747:22, 748:2, 749:10–:11, 749:17–:21, and 750:23–751:3.

II. Legal Authority

In general, the Federal Rules of Evidence apply in this proceeding. 37 C.F.R. 42.62(a). Federal Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> **(b)** the testimony is based on sufficient facts or data;
>
> **(c)** the testimony is the product of reliable principles and methods; and
>
> **(d)** the expert has reliably applied the principles and methods to the facts of the case.

Federal Rule of Evidence 611(b) provides: "Cross examination should not go beyond the subject matter of the direct examination . . . ."

"Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. . . ." Fed. R. Evid. 611(c); *SkinMedica, Inc. v. Histogen Inc.*, 727 F.3d 1187, 1209–10 (Fed. Cir. 2013) (finding an expert's brief responses to leading questions unhelpful); *Waddington North Am., Inc. v. Sabert Corp.*, No. 09-4883, 2011 U.S. Dist. LEXIS 86632, at *46–*50 (D. N.J. Aug. 5, 2011) (explaining that if "a witness cannot recall the events and has difficulty answering an open-ended question, a [trier of fact] is entitled to find that testimony not credible. Leading questions rob the [trier of fact] of the ability to make that determination. Repeated leading questions cause

DOCKET ALARM

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.