

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ORACLE CORPORATION,
NETAPP, INC. and
HUAWEI TECHNOLOGIES CO., LTD.

Petitioners,

v.

CROSSROADS SYSTEMS, INC.

Patent Owner.

Case IPR2014-01209

U.S. Patent No. 7,051,147

**OPPOSITION TO PATENT OWNER'S
MOTION TO EXCLUDE**

I. INTRODUCTION

Patent Owner's motion to exclude is directed primarily at the cross-examination testimony of its own witnesses, Dr. Levy and Mr. Middleton. Patent Owner characterizes its motion as a request to exclude based on lack of relevance, though Patent Owner argues the merits of the evidence and disputes Petitioners' interpretation of the testimony. Such arguments go to the weight of the evidence, however, and not the admissibility of it. Because Patent Owner's motion is an improper attempt to challenge the merits of the evidence, it should be denied in its entirety.

The balance of Patent Owner's motion is directed to Patent Owner's own infringement contentions and related materials. It is noteworthy that as to this evidence Patent Owner does not contest the premises for which Petitioners offer this evidence, but complains that the argument is not supported by an expert declaration. Here again, the Board is well-suited to determine for itself what weight to accord the evidence advanced by Petitioner.

II. TESTIMONY OF DR. LEVY

Patent Owner seeks to exclude answers to questions that included the phrase "for routing purposes" on the basis that the questions were vague. Paper 60 at 1-3. However, the deposition transcript reflects an exchange between the attorney and Dr. Levy which clarified the meaning of the phrase. For instance, the witness

explained that “[w]ell, if by ‘[for] routing purposes’ you mean to be sure that the response to a command goes back to the correct host, then responding on this correct interface would be responding to the correct host.” Ex. 1218 at 95:3-6. Dr. Levy explained that, in the context of the asserted combination, the host interface ID is sufficient to uniquely identify the host device:

Q. (BY MR. GARDELLA) But you would agree that the host interface ID is sufficient to ensure in this embodiment that transmissions are sent to the proper hosts?

MR. HALL: Objection; form.

A. Well, as in the CRD-5500 where there is a channel identifier, this interface ID does get the response sent back on the proper interface. And when there's only a single host present, that would be the host that is indicated.

Id. at 95:13-22. The witness did not have any difficulty in responding to the question.

In the end, the issues raised by Patent Owner related to the testimony of Dr. Levy go to the weight of the evidence, and not the admissibility of it. The Board, sitting as a nonjury tribunal with administrative expertise, is well-positioned to determine and assign appropriate weight to the evidence presented. *Gnosis S.P.A. v. S. Ala. Med. Sci. Found.*, IPR2013-00118, slip op. at 43 (PTAB June 20, 2014) (Paper 64); *see also Donnelly Garment Co. v. NLRB*, 123 F.2d 215, 224 (8th Cir. 1941) (“One who is capable of ruling accurately upon the admissibility of evidence

is equally capable of sifting it accurately after it has been received.”). *Nelson Prods v. BAL Seal Engineering*, IPR2014-00572, Paper No. 55 at 25-6.

III. TESTIMONY OF MR. MIDDLETON

Patent Owner objects to Mr. Middleton’s testimony to the effect that he “knew of no technical obstacle that would have prevented development and testing of the access control feature on a testbed during the critical period.” Paper 44 at 4.

Mr. Middleton testified on cross examination as follows:

Q. (BY MR. GARDELLA) So is it fair to conclude that you can't testify here today as to any specific technical reason which may have prevented the Crossroads' access control software from being tested on a testbed?

A. That's correct.

Ex. 1220 at 54:6-10. Patent Owner proffered Mr. Middleton as the witness with knowledge of whether the access controls could have been tested on the Verrazano bridge or router. Paper 29 at 31 (“Because Verrazano was the basic hardware platform that would be used to support access controls, its development was required before that feature could be added and the entire invention could actually be reduced to practice.” (citing excerpts of inventor testimony from an earlier trial and Ex. 2305, the declaration of Mr. Middleton)). Accordingly, Mr. Middleton’s testimony that he was not aware of any technical hurdle to implementing and testing of the access control feature on a testbed during the critical period is relevant to whether Patent Owner has met its burden in proving

diligence. *Naber v. Cricchi*, 567 F.2d 382, 385 (Cust. & Pat. App. 1977). Patent Owner's only other evidence (*i.e.*, Ex. 2301 at 23-24, 27-29, 42-43) does not address whether the access controls could have been tested or prototyped during the critical period.

Patent Owner argues that it could not have tested access controls until Verrazano was completed, citing to Mr. Middleton's testimony that the access controls could not have been simulated **completely** in software. Paper 60 at 7-8. That portion of the testimony is not relevant, however, because the claims are not limited to a particular implementation and Mr. Middleton testified that the access controls, , could have been tested on one of the five functioning prototypes that were in operation during the critical period and not just a testbed:

Q. The bridge software which was under test on the approximately five Verrazano prototypes included certain functionality. Correct?

A. Correct.

Q. And that functionality could have included access control functionality if the software team had chosen to include that functionality in that build of the software.

MR. HALL: Objection –

Q. (BY MR. GARDELLA) Correct?

MR. HALL: -- foundation.

Q. (BY MR. GARDELLA) Is that fair to say?

A. To the best of my knowledge, yes.

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