UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ACTIVISION BLIZZARD, INC.,
ELECTRONIC ARTS INC.,
TAKE-TWO INTERACTIVE SOFTWARE, INC.,
2K SPORTS, INC.,
ROCKSTAR GAMES, INC., and
BUNGIE, INC.,
Petitioner,

v.

ACCELERATION BAY, LLC,
Patent Owner.

Case IPR2015-01972[1]
U.S. Patent No. 6,701,344

PATENT OWNER'S REPLY TO PETITIONERS' CONSOLIDATED OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE

[1] Bungie, Inc., who filed a Petition in IPR2016-00934, has been joined as a petitioner in this proceeding.

Patent Owner's Motion to Exclude ("Motion," Paper 81) should be granted.

I. Exhibits 1125-26, 1128, 1130-31, 1136-38, 1144-45 Should Be Excluded

The new evidence Petitioner introduced in its Reply should be excluded. Motion at 1-5. "[T]he expedited nature of IPRs bring with it an obligation for petitioners to make their case in their petition to institute," unlike in district courts where parties have "greater freedom" to revise their arguments. *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369–70 (Fed. Cir. 2016). ***First***, Dr. Karger's Rebuttal Declaration (Ex. 1125) does not "summarize[] POR's and PO's experts' … statements and directly respond[] to them." Paper 88 at 3 ("Opp."). Rather, it introduces *new* positions and evidence outside of the scope of the Reply that also could have been included in the Petition. Motion at 2-3; Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,767 (Aug. 14, 2012) ("[R]eply that raises a new issue or belatedly presents evidence will not be considered….").

Second, the above exhibits are new evidence that Petitioner uses to supplement its *prima facie* invalidity case and to revise its argument regarding the Shoubridge's (Exhibit 1105) public availability. Motion at 2-5. However, Patent Owner has *not* had a fair opportunity to respond to this evidence because Petitioner's belated introduction of the evidence has "denied [Patent Owner] the opportunity to file responsive evidence." *The Scotts Co. LLC v. Encap, LLC*, IPR 2013-00110, Paper 79, 5-6 (June 24, 2014); Opp. at 3-4. Further, even if Exhibits 1128, 1130 and

1144 were "relevant to the Board's obviousness analysis," this simply demonstrates Petitioner's belated attempt to remedy its failure to include this evidence in its Petition. Opp. at 4. Because the foregoing is "new evidence [] to make out a *prima facie* case for … unpatentability" and "could have been presented in a prior filing," it must be excluded. 7 Fed. Reg. at 48,767.

II. The Karger Declarations Should Be Excluded (Exs. 1119, 1124, 1145)

Petitioner disregards Dr. Karger's repeated admission that he did not have an understanding or construe several terms of the challenged claims. *Id.* Dr. Karger could have, but did not, properly interpret the claim language to compare it to the prior art. Petitioner also ignores that Dr. Karger was required to take into account secondary considerations in his obviousness analysis and only intended to include them as an afterthought in his analysis. Motion at 7 (citing ¶ 245); *compare* Opp. at 5-7. Thus, Dr. Karger's declarations should be excluded because his opinions are conclusory, unreliable and fail to disclose any support for his opinions. Motion at 5-7.

III. The Shoubridge Declarations (Exhibits 1120 and 1036) and Bennett Declaration (Exhibit 1026) Should be Excluded

Petitioner ignores that Dr. Shoubridge's Declarations (Exs. 1120, 1036) rely on Exhibit B which is not relied upon in the Petition or Reply. In fact, Petitioner relies on an entirely different exhibit that it refers to as the Shoubridge reference and thus Dr. Shoubridge's opinions are conclusory, unreliable and irrelevant.

Motion at 7-8. Similarly, Dr. Bennett's Declaration (Ex. 1026) purports to "authenticate" the Shoubridge reference but what Dr. Bennett "authenticates" is a *different* version of Shoubridge. For these reasons and as set forth in the Motion, these Declarations should be excluded. Motion at 7-9.

IV. The Grenier Declarations (Exhibits 1141, 1144, and 1132) and the Glenn Little Declaration (Exhibit 1104) Should be Excluded

The Grenier Declarations should be excluded because the declarations fail to authenticate Shoubridge, Gautier and McCanne. Petitioner ignores that (1) Mr. Grenier's IEEE version of Shoubridge is different than the Shoubridge reference Petitioner relies upon; and (2) Mr. Grenier relies on a different version of Gautier, not Exhibit 1030 (Gautier) that Petitioner relies upon. Opp. at 8-9. The Little Declaration should also be excluded. Petitioner's reliance on Mr. Little's "personal knowledge of the CSE's regular business practices and records" is misplaced.[2] Opp. at 9-10. Petitioner cites to the Little Declaration to support when Lin was allegedly publicly available but Mr. Little does not claim any actual knowledge as to whether a POSITA would have been able to locate Lin which is required for public availability. *Kyocera Wireless Corp. v. Int'l Trade Com'n*, 545 F.3d 1340, 1350 (Fed. Cir. 2008). Petitioner also does not dispute that a document

[2] Petitioner misrepresents the Motion in stating that Mr. Little's declaration is regarding Shoubridge when in fact it relates to Lin. Pet. Opp. at 9; Motion at 9-10.

existing on a website cannot establish its public accessibility. *Blue Calypso, LLC v. Groupon*, Inc., 815 F.3d 1331, 1349–50 (Fed. Cir. 2016). Thus, the Grenier and Little Declarations should be excluded. Motion at 9-10.

V. Shoubridge (Exhibit 1105) Should be Excluded

Petitioner fails to address why the Shoubridge Document (Exhibit 1105) is unauthenticated, hearsay and irrelevant. ***First***, as explained *supra* and in the Motion, none of the declarations Petitioner submitted authenticate Shoubridge because they rely on different versions from the exhibit Petitioner cites to. Motion at 10-13. ***Second***, the "IEEE copyright" does not "independently authenticate[] Shoubridge" because a copyright date fails to establish that a document is a printed publication or publicly accessible. *TRW Automotive U.S. LLC v. Magna Elecs. Inc.*, Case IPR2014-01347, Paper 25 at 5–12 (P.T.A.B. Jan. 6, 2016) ("Although [a] copyright notice is probative that IEEE owns a copyright to the article, it is not probative that the article was ever published by IEEE or anyone else."). Thus, Shoubridge should be excluded.

VI. The Stansbury Affidavit (Ex. 1131) and Gautier Document (Ex. 1030) Should be Excluded

The Stansbury Affidavit should be excluded. Petitioner ignores that the affidavit makes reference to *no* exhibit of record. The affidavit's reference to "*Design and Evaluation of MiMaze, a multi-player game on the Internet*" by Gautier (1) does not prove that it is the same as the Gautier reference (Ex. 1130)

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