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.,
Petitioners,

v.

ACCELERATION BAY, LLC,
Patent Owner.

Case IPR2015-01996[1]
Patent No. 6,829,634 B1

Before the Honorable SALLY C. MEDLEY, LYNNE E. PETTIGREW, and WILLIAM M. FINK, *Administrative Patent Judges*.

PETITIONERS' CONSOLIDATED OPPOSITION TO PATENT OWNER'S CONTINGENT MOTION TO AMEND

[1] Bungie, Inc., who filed a Petition in IPR2016-00964, has been joined as a petitioner in this proceeding.

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Patent Owner's ("PO") Motion (Pap.31, "Mot.") fails to satisfy PO's burden of establishing proposed cls. 25-27 ("Claims") are patentable, and should be denied. §42.20(c)[2]; *Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309, 1323 (Fed. Cir. 2016). PO fails to (1) establish written description support for the Claims, as interpreted by PO, or propose proper constructions, (2) provide sufficient information regarding the state of the art for newly added features, (3) establish patentability over the prior art, and (4) establish § 112, ¶2 patentability.[3]

I. PO INTRODUCES NEW MATTER THROUGH CONSTRUCTIONS

Rather than expressly amend, PO argues "*application layer*" limitations by construction (Mot.5-6)—presumably recognizing *the term lacks written description support* and is new matter violating §112, ¶1, §316(d)(3), §42.121(a)(2)(ii). PO's "overlay computer network that overlays an underlying network" and "dynamic, overlay…network" constructions require "application layer" operation and PO limits "connection" and "broadcast channel" to the context of game application programs (lacking written description) and a logical broadcast channel that overlays an underlying network, respectively, and for both requires "application layer"

[2] Section cites are to 35 U.S.C. or 37 C.F.R., and all emphases added.

[3] Karger's second declarations (Exs1124, 25) oppose Goodrich's (Ex2022, IPR2015-01964 Ex2022 originally; re-filed as Motion Exs2099 and 98).

operation. Mot.5-7. But PO can't show "support in the original disclosure.." §42.121(b)(1). '634 gives no indication that the disclosed overlay network is at the application layer (*cf.* Mot.7). Ex1125 ¶255.'634 lacks discussion of network layers, the OSI layer construct, or "application layer" operation. Ex1125 ¶255; *see Ariad. v. Eli Lilly.*, 598 F.3d 1336, 1352 (Fed. Cir. 2010).[4] PO cannot circumvent §42.121(a)(2)(ii) by reading in this limitation.

PO has not shown the inventors acted as lexicographers or disavowed scope. *Info-Hold v. Applied Media*, 783 F.3d 1262, 1266 (Fed. Cir. 2015). PO's constructions, which duplicate existing limitations wrongly "render other limitations superfluous." *Baby Trend v. Wonderland*, IPR2015-00842, Pap.81, 72-75. Failing to reasonably construe new limitations, PO does not adequately provide information for determining patentability. *Id.* Alternatively, terms not construed at Institution (Pap.8, 6-8) should receive plain meaning, *e.g.*: "*connection*" (connection between participants); "*overlay computer network that overlays an underlying network*" (computer network that overlays an underlying network); "*dynamic, overlay computer network*" (overlay computer network that is dynamic); "*broadcast channel*" (channel on the network through which messages are broadcast). Ex1125 ¶257.

[4] Named-inventors' declarations (Exs2024-2025) and the alleged invention disclosure form (Ex2028) are devoid of any discussion of an "application layer."

II. PO FAILS TO PROPERLY ADDRESS THE STATE OF THE ART

PO's Motion also fails to provide *any* information about whether added features were known, alone or in combination with other elements, and, if known, why adapting them or use with the rest of each claim would not have been obvious. *Toyota*, IPR2013-00422, Pap.25, 4. PO, *e.g.*, provides no information on whether new "dynamic, overlay network" and "join[ing] and leav[ing] [a] network using the broadcast channel" features were known, alone or in combination. PO also requires the network operate at the application layer (Mot.15-16), but gives no indication whether PO's interpretation was known. PO's conclusory statement "the closest material art is already of record" (Mot.22) is "not meaningful" for establishing the "technical knowledge" of feature added. *Toyota* at 4-5.

III. PO FAILS TO ESTABLISH PATENTABILITY OVER THE ART

PO has also not established the Claims are patentable over the material record art. *Masterimage* at 2; *Microsoft v. Proxyconn*, 789 F.3d 1292, 1307-08 (Fed. Cir. 2015). PO does not even attempt to address all material record art, ignoring Petitioner's 10 references in "Overview of the Technical Field" (Pet.10-12), *see Masterimage* at 2, both alone and in combination with other record art. Mot.17-22; *Prolitec v. ScentAir Techs.*, 807 F.3d 1353, 1364 (Fed. Cir. 2015) (denying motion failing to show patentability over combination of record art). PO's amendments recite, *e.g.*, an *m*-regular network formed by applications that communicate using

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