

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.

Cases IPR2015-01951, IPR2015-01953 (Patent 6,714,966 B1)¹²
Cases IPR2015-01964, IPR2015-01996 (Patent 6,829,634 B1)
Cases IPR2015-01970, IPR2015-01972 (Patent 6,701,344 B1)

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

PETTIGREW, *Administrative Patent Judge*.

¹ This Order applies to each of the listed cases. We exercise our discretion to issue one Order to be entered in each case. The parties, however, are not authorized to use this caption for any subsequent papers.

² Bungie, Inc., who filed Petitions in IPR2016-00933, IPR2016-00934, IPR2016-00935, IPR2016-00936, IPR2016-00963, and IPR2016-00964, has been joined as a Petitioner in these proceedings.

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IPR2015-01964, IPR2015-01996 (Patent 6,829,634 B1)
IPR2015-01970, IPR2015-01972 (Patent 6,701,344 B1)

ORDER
Conduct of the Proceeding
37 C.F.R. § 42.5

On November 8, 2016, a conference call was held for these six proceedings. The following individuals were present on the call:

Mr. Baughman and Mr. Davis, counsel for Petitioners Activision Blizzard, Inc., Electronic Arts Inc., Take-Two Interactive Software, Inc., 2K Sports, Inc., and Rockstar Games, Inc.; Mr. Brown, counsel for Petitioner Bungie, Inc. (collectively, “Petitioner”); Mr. Hannah and Ms. Nguyen, counsel for Patent Owner Acceleration Bay, LLC; and Judges Medley, Pettigrew, and Fink.

The parties requested the call to address three separate issues. First, Patent Owner requested permission to submit a surreply in IPR2015-01951, IPR2015-01964, and IPR2015-01970, responsive to arguments in Petitioner’s Reply in those cases regarding Patent Owner’s attempt to antedate the Lin reference. Second, Petitioner requested permission to replace certain papers and exhibits in all six proceedings. Third, Patent Owner requested permission to replace one page of its Motion to Amend filed in IPR2015-01964 and IPR2015-01996. For the reasons stated below, the first two requests are *granted* and the third is *denied*.

A. Patent Owner’s Request for Authorization to File a Surreply

During the conference call, Patent Owner stated that it bears the burden of production for establishing that the date of its claimed invention is prior to the effective date of the Lin reference, which is asserted as prior art

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in IPR2015-01951, IPR2015-01964, and IPR2015-01970. Patent Owner argued that the Board has routinely granted patent owners authorization to file a surreply in this situation, i.e., when the patent owner is attempting to antedate a reference. Among other cases, Patent Owner cited *LG Electronics, Inc. v. ATI Technologies ULC*, Case IPR2015-00325 (PTAB Dec. 15, 2015) (Paper 37); *Sure-Fire Electrical Corp. v. Yongjiang Yin*, Case IPR2014-01448 (PTAB Dec. 10, 2015) (Paper 46); *HTC Corp. v. NFC Technology, LLC*, Case IPR2014-01198 (PTAB Nov. 19, 2015) (Paper 45); and *ABB, Inc. v. Roy-G-Biv Corp.*, Case IPR2013-00063 (Jan. 27, 2014) (Paper 51). Patent Owner also cited a case in which the United States Court of Appeals for the Federal Circuit held that the Board may entertain a patent owner's request to file a surreply responding to arguments raised in the petitioner's reply. *See Belden Inc. v. Berk-Tek, LLC*, 805 F.3d 1064, 1079 (Fed. Cir. 2015).

Petitioner responded that it retains the burden of persuasion on the ultimate issue of unpatentability. Although the Board in other proceedings has authorized surreplies addressing the antedating issue, Petitioner argued that a surreply is not warranted in every case. Petitioner asserted that Patent Owner has been raising the antedating issue in these proceedings since before institution and had ample opportunity to brief the issue in its Patent Owner Responses. Finally, Petitioner noted that these proceedings are in their final stages, and additional briefing at this point is unwarranted.

We have considered both parties' arguments, and, based on the circumstances presented here, we are persuaded it is appropriate to allow Patent Owner to file a short surreply to Petitioner's Reply. *See C.F.R.*

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§ 42.5(a). The surreply shall be limited to three (3) pages and shall be filed no later than November 14, 2016. The surreply shall respond only to the arguments in Petitioner's Reply addressing Patent Owner's arguments and citations to supporting evidence in the Patent Owner Response seeking to antedate Lin. Patent Owner may not introduce new evidence or testimony with its surreply. Petitioner is not authorized to file a responsive paper.

B. Petitioner's Request to Replace Certain Papers and Exhibits

Petitioner's request is twofold. First, Petitioner requests authorization to replace Exhibit 1034 in IPR2015-01951, IPR2015-01964, and IPR2015-01970, and Exhibit 1134 in IPR2015-01953, IPR2015-01972, and IPR2015-01996, each of which is a declaration by Matthew Shapiro attesting that various exhibits submitted by Petitioner are true and correct copies.

Petitioner asserts that paragraph 8 in each declaration mistakenly refers to Exhibit 1030 as the copy of a document referred to in another exhibit (Exhibit 1031/1131), when in fact Exhibit 1049/1149 is the correct copy of the document referred to in Exhibit 1031/1131. Second, Petitioner requests authorization to replace page 5 of its Reply in IPR2015-1951 (Paper 54) and page 4 of its Reply in IPR2015-01970 (Paper 53) to replace a cite to paragraphs 26–28 of Exhibit 1026 with a cite to paragraphs 31–33.

Petitioner asserts that a similar portion of its Reply in IPR2015-01964 correctly cites paragraphs 31–33 of Exhibit 1026.

Petitioner contends that the errors it wishes to correct are typographical errors and that there will be no prejudice to Patent Owner if the corrections are permitted. Patent Owner does not dispute that the errors are typographical in nature, but opposes Petitioner's request because

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Petitioner has not agreed to Patent Owner's request to change its Motion to Amend in IPR2015-01964 and IPR2015-01996. We address Patent Owner's request in the next section.

Regarding Petitioner's request, we have reviewed the record and considered the parties' arguments, and we are persuaded the asserted errors are typographical. Accordingly, we authorize Petitioner to file a replacement for Exhibit 1034 in each of IPR2015-01951, IPR2015-01964, and IPR2015-01970, and a replacement for Exhibit 1134 in each of IPR2015-01953, IPR2015-01972, and IPR2015-01996. The replacement exhibits shall retain their original exhibit numbers and shall correct only the typographical errors addressed above. With respect to Petitioner's request to replace one page in its Reply in each of IPR2015-01951 and IPR2015-01970, we authorize Petitioner to file, as a paper in each proceeding, an errata sheet identifying the correction to be made, including the paper number and page number.

C. Patent Owner's Request to Replace a Page in its Motion to Amend

Patent Owner requests authorization to replace page 29 of its Motion to Amend (Paper 31) in each of IPR2015-01964 and IPR2015-01996 to make two changes to proposed substitute claim 27—changing “supports provides” to “provides,” and removing “which is a part of the overlay network.” Patent Owner argues that the asserted errors are typographical and there would be no prejudice to Petitioner if the corrections are allowed. Patent Owner represents that it discovered the errors approximately one week ago.

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