

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 IPR2015-01996¹
U.S. Patent No. 6,829,634

PATENT OWNER'S MOTION TO EXCLUDE

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

I. Introduction

Pursuant to 37 C.F.R. 42.64, Patent Owner Acceleration Bay, LLC (“Patent Owner”), through this Motion to Exclude, moves to exclude certain evidence, discussed below, that Petitioner submitted in this proceeding. The Board should grant Patent Owner’s Motion to Exclude for the reasons set forth below.

Patent Owner timely raised the objections set forth herein. On April 7, 2016, Patent Owner timely served Petitioner with objections to the exhibits in its Petition. Paper 10. On October 21, 2016, Patent Owner timely served Petitioner with objections to the exhibits its Reply brief. Paper 58.

II. The Board Should Exclude Exhibits Outside the Proper Scope of Reply (Exs. 1125, 1126, 1128, 1130, 1136, 1137, 1138, 1131, 1144, 1145).

Petitioner’s Reply improperly introduced new evidence and arguments that are inadmissible under 37 C.F.R. § 42.61, and are properly subject to exclusion. *Belden Inc. v. Berk-Tek LLC*, 803 F.3d 1064, 1081 (Fed. Cir. 2015) (“a party may move to exclude evidence, whether as improper under the response-only regulation, under the Trial Practice Guide’s advice, or on other grounds.”) (citation omitted). These belated submissions should be excluded because it is improper for Petitioner to introduce new evidence and arguments in its Reply in order to resolve the deficient arguments and evidentiary shortcomings of its Petition. *See, e.g., Toshiba Corp. v. Optical Devices, LLC*, Case IPR2014-01447, Paper 34 at 44–47 (P.T.A.B. Mar. 9, 2016) (“[Section 42.23(b)], however, does not authorize or

otherwise provide a means for supplementing the evidence of record.”); *Toyota Motor Corp. v. Am. Vehicular Scis. LLC*, Case IPR2013-00424, Paper 50 at 21 (P.T.A.B. Jan. 12, 2015).

Specifically, Petitioner introduced for the first time in its Reply, 23 new exhibits, including a 142-page rebuttal declaration from Dr. Karger, additional prior art references, and additional support to attempt to establish the public accessibility of the Shoubridge Document (Ex. 1105). All of these exhibits contain information that was available at the time Petitioner filed its Petition.

First, Petitioner could have submitted the (1) Karger Rebuttal Declaration (Ex. 1125), (2) Leap Frog (Ex. 1128), (3) Gautier Document (Ex. 1130), and (4) Grenier Declaration with McCanne (Ex. 1144). Instead, Petitioner introduced them, for the first time, in its Reply to supplement its *prima facie* invalidity case. Accordingly, Exs. 1125, 1128, 1130, and 1144 should be excluded as improper new evidence belatedly introduced in a Reply. Office Patent Trial Practice Guide, 77 Fed. Reg. 48,156, 48,767 (Aug. 14, 2012) (“[A] reply that raises a new issue or belatedly presents evidence will not be considered and may be returned.”).

Petitioner improperly offers the (1) Bennett Decl. (Ex. 1126), (2) Second Shoubridge Decl. (Ex. 1136), (3) IEEE Policy and Procedures Manual (Ex. 1138), and (4) Grenier Decl. with Shoubridge (Ex. 1141) in its Reply as a belated attempt to revise and supplement its argument that the Shoubridge Document (Exhibit

1105) was publicly available prior art. The Board should not consider this evidence because it was available at the time that Petitioner filed its Petition.

Further, Exhibit 1138 was last accessed on October 7, 2016, which has no bearing on the policies and procedure during the relevant time frame at issue.

Second, in its Reply, Petitioner improperly attempts to introduce new references to supplement its grounds for invalidity of the '634 Patent. Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,767 (“[I]ndications that a new issue has been raised in a reply include new evidence necessary to make out a *prima facie* case for ... patentability or unpatentability ... and new evidence that could have been presented in a prior filing.”). Specifically, Petitioner relies on Exhibits 1128, 1130, and 1144 to support its assertion that “[i]t would have been an obvious implementation choice for an application running at each node (and sending the ‘user traffic’) to form the network using an application layer overlay.” *See, e.g.*, Paper 56 at 7, 21; Ex. 1128; Ex. 1130; Ex. 1144; Ex. 1125, *see, e.g.*, ¶¶ 25, 125, 142, 208 (relying on Exs. 1130 and 1144 to support its arguments as to what would have been obvious to a person having ordinary skill in the art (PHOSITA)); *see, e.g.*, ¶¶ 19, 25, 29, 128 (mischaracterizing Ex. 1128 as demonstrating what a PHOSITA would have known during the relevant time frame, even though Ex.

1128 is from well after the relevant time frame for the '634 Patent²). This is improper because the Board instituted IPR of the '634 Patent based on Shoubridge (Ex. 1105) alone, thus these additional references are irrelevant. Further, the earliest these documents can be considered publicly available is early 2000, as discussed more fully below. This is after the relevant time frame at issue here. Therefore, these new exhibits should be excluded under FRE 401–403 because they are not part of the instituted grounds in this IPR.

Third, Petitioner's Reply should be excluded as unfairly prejudicial to Patent Owner as it belatedly raises new arguments and evidence that could have been included in the Petition. *See generally* Fed. R. Evid. 403 (evidence may be excluded "if its probative value is substantially outweighed by a danger of ... unfair prejudice"). Here, Patent Owner did not have an opportunity to substantively respond to Petitioner's untimely new evidence and arguments. It would thus be highly prejudicial for the Board to allow Petitioner to sandbag the Patent Owner with these belated materials, especially ones that support new arguments by permitting Petitioner's untimely Exhibits to remain in the record and by considering such Exhibits. Therefore, under FRE 403, the Board should

² This is apparent from the list of citations, which includes references to documents as late as 2003. *See* Ex. 1128, p. 12 at [34] and [35].

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