Filed: November 14, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC, ZTE (USA), INC., SAMSUNG ELECTRONICS CO., LTD., LG ELECTRONICS INC., HUAWEI DEVICE USA, INC., HUAWEI DEVICE CO. LTD., HUAWEI TECHNOLOGIES CO. LTD., HUAWEI DEVICE (DONGGUAN) CO. LTD., HUAWEI INVESTMENT & HOLDING CO. LTD., HUAWEI TECH. INVESTMENT CO. LTD., and HUAWEI DEVICE (HONG KONG) CO. LTD.,
Petitioner

v.

CYWEE GROUP LTD.
Patent Owner

Case IPR2018-01257
Patent No. 8,552,978

PETITIONER GOOGLE LLC'S OBJECTIONS TO PATENT OWNER'S SUPPLEMENTAL SUBMISSION

Pursuant to the Board's Order dated November 6, 2019 (Paper 75), Petitioner Google LLC ("Google") hereby submits its Objections to Patent Owner's Supplemental Submission of Information ("CyWee's Submission"). The citations and statements in CyWee's Submission are being offered well after the Board's Oral Hearing (and after the close of evidence), and shortly before the Board's one-year deadline for issuing a Final Written Decision.

Objection to Paragraphs 1-12 of CyWee's Submission.

Google objects to paragraphs 1-12 of CyWee's Submission because Google has never had the opportunity to respond to the arguments suggested in these paragraphs. Specifically, paragraphs 1-12 appear to posit, for the first time, that Google has direct control over manufacturing of Android devices in some allegedly relevant way (*i.e.* a "control theory"). This control theory argument was not made in the Motion to Terminate, but instead is being made well after the Board's Oral Hearing (and after the close of evidence) and shortly before the Board's one-year deadline for issuing a Final Written Decision.

The introduction of such a control theory, without providing Google adequate notice and opportunity to respond, would violate due process and the Administrative Procedure Act. *See, e.g., Genzyme Therapeutic Prods. L.P. v. Biomarin Pharm. Inc.*, 825 F.3d 1360, 1367 (Fed. Cir. 2016) ("The critical question for compliance with

the APA and due process is whether [a party] received 'adequate notice of the issues that would be considered, and ultimately resolved, at that hearing.'") (citing *Pub. Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004, 1012, 365 U.S. App. D.C. 53 (D.C. Cir. 2005) (Roberts, J.)); *Belden, Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1080 (Fed. Cir. 2015); 5 U.S.C. §§ 554(b)-(c); 557(c).

Furthermore, the introduction of a control theory would violate 37 C.F.R. § 42.23(b)'s requirement that "[a]ll arguments for the relief requested in a motion must be made in the motion," as well as § 42.123(b)'s requirement to limit supplemental information to that which "reasonably could not have been obtained earlier" and is "in the interests-of-justice." CyWee could have argued its control theory, such as it is, when it filed its Motion to Terminate. Notably, throughout the first twelve paragraphs of its Submission, CyWee cross-cites to exhibits *to which it had access* at the time it filed its Motion to Terminate. *See* CyWee's Submission, ¶¶1.f., 2.d., 3.e., 4.h., 5 (entire paragraph citing public documents), 6.d. 9.e., 10.f., 11.e., 12.e. Yet, until now, CyWee had never cited these provisions of the previously-available exhibits. This indicates that CyWee is merely attempting to introduce arguments that it could have raised earlier, but did not. Moreover, even if its theories were bound to the new documents, CyWee could have sought additional

discovery relating to ZTE as early as December 2018, but unreasonably delayed in doing so.

Objection to Paragraphs 13-14 of CyWee's Submission.

Google objects to paragraphs 13-14 of CyWee's Submission because Google has never had the opportunity to respond to the arguments suggested in these paragraphs. Paragraphs 13-14 appear to make arguments regarding indemnity obligations of the parties to the agreement with respect to intellectual property. Paragraph 13 appears to argue that no party is indemnified because each party remains liable for violations of patent rights, while paragraph 14 appears to assert that Google is indemnified as to certain claims. Both of these positions are new.

In its Motion to Terminate, CyWee did not argue that Google was the indemnitee, but rather argued that Google was the indemnitor. CyWee stated that "MADA [sic] contained indemnification provisions for applications running on the Android OS and for Android-based devices. Ex. 2014, §§ 11.1-11.2." CyWee Motion to Terminate, p. 5, SOF ¶6. CyWee then argued that "Google also has a history of including indemnification provisions" in its Android agreements (*id.* at 10, 12), and that "[t]he MADA indemnification clauses are an example of an agreement to be bound in litigation proceedings based on applications developed for the Android OS and for Android-based devices." *Id.* at 12. CyWee, however, did

not argue that each party was liable for violations of intellectual property rights (CyWee's Submission, ¶13), nor that Google was indemnified (CyWee's Submission, ¶13). After Google responded (*see* Opposition, Paper 51) to the limited indemnification-related arguments that CyWee did make in its Motion to Terminate, CyWee never mentioned indemnification again in its Reply in support thereof (*see* Reply, Paper 65).

The introduction of the new theories suggested in paragraphs 13-14, that each party remains solely liable or that Google is an indemnitee under the agreements, at this late stage and without an opportunity to respond, would violate due process, the Administrative Procedure Act, and 37 C.F.R. § 42.123(b) for the same reasons given with respect to ¶¶1-12 of CyWee's Submission.

Objection to Paragraph 15 of CyWee's Submission.

Google objects to paragraph 15 of CyWee's Submission because Google has never had the opportunity to respond to the specific arguments this paragraph suggests. Paragraph 15 expressly argues (in violation of the Board's October 28 Order limiting CyWee to "brief, nonargumentative statements") that the existence of a joint defense agreement demonstrates a coordination between the parties, as well as a state of mind of the parties allegedly bears on the RPI and privity questions. CyWee specifically makes new arguments concerning the timing of the joint defense

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