

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Axis Communications AB, Canon Inc., and Canon U.S.A., Inc.,

Petitioners

v.

Avigilon Fortress Corporation,

Patent Owner

Case: IPR2019-00235

U.S. Patent No. 7,868,912
Issue Date: January 11, 2011

Title: Video Surveillance System Employing Video Primitives

**MOTION TO CORRECT THE FLORIO DECLARATION
UNDER 37 C.F.R. § 42.104(c)**

Pursuant to 37 C.F.R. § 42.104(c), Petitioners seek to correct Exhibit 1007 (“the Florio Declaration”). No correction is sought with respect to the Petition or any other exhibit. Due to a clerical error, Ms. Florio’s statements and supporting exhibits for *Flinchbaugh* mistakenly address another reference by the same author, *Flinchbaugh II*. Patent Owner has informed Petitioners that it opposes this motion. The Board granted leave to file this motion on March 28, 2019.

Rule

37 C.F.R. § 42.104(c) permits motions to correct clerical errors. Section 42.104 is “remedial in nature and is therefore entitled to a liberal interpretation.” *ABB Inc. v. Roy-G-BIV Corp.*, IPR2013-00063, Paper 21 at 7 (Jan. 16, 2013).

Relevant Facts and Background

1. On November 12, 2018, Petitioners filed the instant Petition, which includes grounds based on “Autonomous Scene Monitoring System” by Bruce Flinchbaugh et al. (“*Flinchbaugh*” - Ex. 1005). Petitioners also filed the Florio Declaration (Ex. 1007) to submit evidence showing the public availability and publication of the references used in the Petition.

2. Patent Owner’s filed its Preliminary Response on March 6, 2019, stating that the Florio Declaration includes statements regarding *Flinchbaugh* that are not correct, including the title, date, and statements regarding the supporting exhibits. Patent Owner Preliminary Response at 15-18. Before receiving the

Preliminary Response, Petitioners did not realize the identified errors. Ex. 1045 at ¶ 5.

3. The statements identified by Patent Owner in the Florio Declaration relate to another publication, “Autonomous Video Surveillance,” by Bruce Flinchbaugh et al. (“*Flinchbaugh II*”), which was used in a recent proceeding, IPR2018-00138, directed to another patent assigned to Patent Owner. Ex. 1045 at ¶ 4. The statements are correct as to *Flinchbaugh II* and based on similar statements in Ms. Florio’s declaration in IPR2018-00138. Compare IPR2018-00138, Ex. 1007 ¶¶ 18-20, 48-52 with IPR2019-00235, Ex. 1007 ¶¶ 9-11, 27-31.

4. The incorrect statements in the Florio Declaration resulted from a clerical error in which *Flinchbaugh II* was electronically provided to and used by Ms. Florio instead of *Flinchbaugh*. Ex. 1045 at ¶ 3. Due to this inadvertent clerical error, *Flinchbaugh II*, instead of *Flinchbaugh*, is addressed in the Florio Declaration. *Id.* While a correct copy of *Flinchbaugh* was attached as Exhibit D to the Florio Declaration, the declaration includes statements and supporting exhibits (i.e., Exhibits E and F) regarding *Flinchbaugh II* instead of *Flinchbaugh*.

5. A corrected version of the Florio Declaration is attached to this motion in clean form (Exhibit 1043, including the original exhibits and corrected Exhibits E and F) and compare form (Exhibit 1044). The corrected version of the Florio Declaration includes revised statements and updated Exhibits E and F

regarding *Flinchbaugh* in place of what was submitted earlier for *Flinchbaugh II*. Exhibit E contains the MARC record data for *Flinchbaugh* and Exhibit F contains other supporting evidence of publication, all of which are public.

6. Petitioners requested authorization to file this motion on March 15, 2019. A call with the Board was held on March 21, 2019 and the Board issued an order on March 28, 2019 that authorized Petitioners to file the motion.

Discussion

Good cause exists to correct the error. As indicated above, the Florio Declaration incorrectly includes statements and supporting exhibits regarding *Flinchbaugh II* rather than the *Flinchbaugh* reference used in the Petition. During the preparation of the declaration, the wrong file was electronically provided to and used by Ms. Florio (i.e., *Flinchbaugh II* instead of *Flinchbaugh*). As a result, the Florio Declaration includes statements and supporting exhibits regarding *Flinchbaugh II* instead of *Flinchbaugh*.

The error is clerical in nature, resulting from the wrong reference being used to prepare the declaration. *Flinchbaugh II* was used in the recent proceeding, IPR2018-00138 between the parties, and *Flinchbaugh II* and *Flinchbaugh* have many similarities, including, (1) the same principal author, (2) similar titles, (3) similar document sizes, and (4) both were published as part of proceedings for a conference. Due in part to these similarities, the wrong file was electronically

provided to and used by Ms. Florio to prepare her declaration.

The Board has previously allowed similar corrections. In *Netflix, Inc. v. Copy Protection LLC*, two versions of a paper with the same author were used to prepare a petition. IPR2015-00921, Paper 19 at 2-3 (July 30, 2015). The incorrect version of the paper was inadvertently saved to the directory of final exhibits and erroneous citations were added to the petition. *Id.* There, the Board found the error was clerical in nature and allowed the petitioner to correct the petition. *Id.* at 4-5. For similar reasons, the Board should allow the requested corrections here.

Moreover, the inadvertent use of *Flinchbaugh II* instead of *Flinchbaugh* in the Florio Declaration does not affect the substance of Petitioners' arguments, nor prejudice Patent Owner. The Petition's citations to *Flinchbaugh* are correct and Patent Owner's preliminary response fully responds to the presented grounds.

The Board consistently permits corrections where the error causes little or no prejudice. *See, e.g., Nissan N. Am. Inc. v. Hitachi Auto. Sys. Ltd.*, IPR2014-01548, Paper 20 at 3 (Apr. 15, 2015); *Array Biopharma Inc. v. Takeda Pharma Co. Ltd.*, IPR2015-00754, Paper 20 at 4 (Oct. 21, 2015). The Board in *Netflix*, for example, observed that the Patent Owner had "sufficient notice of the grounds and supporting evidence." IPR2015-00921, Paper 19 at 4. The same is true here.¹

¹ To the extent the Board finds prejudice, it should permit correction and afford Patent Owner an additional response. *See Netflix*, IPR2015-00921, Paper 19 at 5.

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