

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NINTENDO CO., LTD., and NINTENDO OF AMERICA INC.,
Petitioner,

v.

ANCORA TECHNOLOGIES, INC.,
Patent Owner.

IPR2021-01338
Patent 6,411,941 B1

Before THU A. DANG, KEVIN W. CHERRY, and RYAN H. FLAX,
Administrative Patent Judges.

DANG, *Administrative Patent Judge.*

ORDER
Setting Oral Argument
37 C.F.R. § 42.70

I. ORAL ARGUMENT

We instituted *inter partes* review in the instant proceeding on January 27, 2022. Paper 9. The Scheduling Order for this proceeding sets the date for oral argument as October 3, 2022, if requested by the parties and granted by the Board. Paper 10, 10. On September 2, 2022, Patent Owner and Petitioner respectively filed a request for an in-person oral argument. Papers 40, 41. The requests for oral argument are *granted*.

A. Time and Format

Oral arguments will commence at 12:00 PM Eastern Time on October 3, 2022. The Board will provide a court reporter for the hearing, and the reporter's transcript will constitute the official record of the hearing. Under current policy, the Board does not conduct an in-person hearing unless requested by all parties. As both parties have requested an in-person hearing, the hearing will be held at the USPTO Headquarters in Hearing Room A, located on the ninth floor of Madison Building East, 600 Dulany Street, Alexandria, Virginia.¹

Petitioner will have a total of sixty (60) minutes to present argument in this case and Patent Owner will have a total of sixty (60) minutes to respond. Petitioner will open the hearing by presenting its case regarding the challenged claims for which the Board instituted trial. Thereafter, Patent Owner will respond to Petitioner's argument. Petitioner may reserve

¹ If there are any concerns about disclosing confidential information, the parties must contact the Board at Trials@uspto.gov at least ten (10) business days before the hearing date.

rebuttal time to respond to arguments presented by Patent Owner. In accordance with the Consolidated Trial Practice Guide² (“CTPG”), issued in November 2019, Patent Owner may request to reserve time for a brief sur-rebuttal. *See* CTPG 83.

The parties may request a pre-hearing conference in advance of the hearing. *See id.* at 82. “The purpose of the pre-hearing conference is to afford the parties the opportunity to preview (but not argue) the issues to be discussed at the hearing, and to seek the Board’s guidance as to particular issues that the panel would like addressed by the parties.” *Id.* To request a pre-hearing conference, the parties should jointly contact the Board at Trials@uspto.gov by September 12, 2022. Paper 10, 10. The request should include several dates and times of availability that are generally no later than three (3) business days prior to the oral hearing. Further, any request should state the issues that the parties intend to raise at the conference.

The parties are directed to the Office’s notices regarding COVID-19 and the requirement for all visitors to USPTO facilities to review a health questionnaire and self-certify that they will not pose a health risk at the time of their visit.³ Any attendee at the hearing exhibiting symptoms of illness may be required to wear a mask or leave the facilities.

B. Demonstratives

Notwithstanding 37 C.F.R. § 42.70(b), demonstratives shall be served on opposing counsel at least seven (7) business days before the hearing date and filed at least five (5) days before the hearing date. Like final oral

² Available at <https://www.uspto.gov/TrialPracticeGuideConsolidated>.

³ *See* information provided at <https://www.uspto.gov/coronavirus>.

argument generally, demonstratives are not a mechanism for making new arguments. Demonstratives also are not evidence, and will not be relied upon as evidence. Rather, demonstratives are visual aids to a party's oral presentation regarding arguments and evidence previously presented and discussed in the papers. Accordingly, demonstratives shall be clearly marked with the words "DEMONSTRATIVE EXHIBIT – NOT EVIDENCE" in the footer. *See Dell Inc. v. Acceleron, LLC*, 884 F.3d 1364, 1369 (Fed. Cir. 2018) (holding that the Board is obligated under its own regulations to dismiss untimely argument "raised for the first time during oral argument"). "[N]o new evidence may be presented at the oral argument." CTPG 85; *see also St. Jude Med., Cardiology Div., Inc. v. The Bd. of Regents of the Univ. of Mich.*, IPR2013-00041, Paper 65, 2–3 (PTAB Jan. 27, 2014) (explaining that "new" evidence includes evidence already of record but not previously discussed in any paper of record).

Furthermore, because of the strict prohibition against the presentation of new evidence or arguments at a hearing, it is strongly recommended that each demonstrative include a citation to a paper in the record, which allows the Board to easily ascertain whether a given demonstrative contains "new" argument or evidence or, instead, contains only that which is developed in the existing record.

To the extent that a party objects to the propriety of any demonstrative, the parties shall meet and confer in good faith and are strongly encouraged to resolve any objections to demonstratives prior to filing the objections with the Board. If such objections cannot be resolved, the parties may file any objections to demonstratives with the Board no later than the time of the hearing. The objections shall identify with particularity

which portions of the demonstratives are subject to objection (and should include a copy of the objected-to portions) and include a one (1) sentence statement of the reason for each objection. No argument or further explanation is permitted. The Board will consider any objections, and may reserve ruling on the objections.⁴ Any objection to demonstratives that is not timely presented will be considered forfeited.

Finally, the parties are reminded that each presenter should identify clearly and specifically each paper (e.g., by slide or screen number for a demonstrative) referenced during the hearing to ensure the clarity and accuracy of the court reporter's transcript and for the benefit of all participants appearing electronically.

C. Presenting Counsel

The Board generally expects lead counsel for each party to be present at the hearing. *See* CTPG 11. Any counsel of record may present the party's argument as long as that counsel is present in person.

D. Remote Attendance Requests

Members of the public may request to listen to this hearing. If resources are available, the Board generally expects to grant such requests. If either party objects to the Board granting such requests, for example, because confidential information may be discussed, the party must notify the Board at PTABHearings@uspto.gov at least ten (10) business days prior to the hearing date.

⁴ If time permits, the Board may schedule a conference call with the parties to discuss any filed objections.

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