Paper No. 37

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAMSUNG ELECTRONICS CO., LTD., MICRON TECHNOLOGY, INC., MICRON SEMICONDUCTOR PRODUCTS, INC., and MICRON TECHNOLOGY TEXAS LLC,[†]

Petitioner,

v.

NETLIST, INC.,

Patent Owner

IPR2022-00996
Patent 11,016,918 B2

PETITIONER'S REPLY IN SUPPORT OF PETITIONER'S MOTION TO EXCLUDE EVIDENCE

[†] Micron Technology, Inc., Micron Semiconductor Products, Inc., and Micron Technology Texas LLC filed a motion for joinder and a petition in IPR2023-00406 and have been joined as petitioners in this proceeding.

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I. INTRODUCTION

Patent Owner's opposition does not dispute that the URL-supported materials in its Sur-Reply violate 37 C.F.R. §§ 42.63(a) and 42.23(b), which Patent Owner does not even bother to cite. Instead, Patent Owner inappropriately reiterates its claim construction arguments on the merits, under the premise of arguing that the URL-supported materials are relevant. Paper 34 ("Opp'n") at 1–4. But alleged relevance does not excuse Patent Owner from following the proper rules for submitting evidence in this proceeding. And the fact that Patent Owner is so desperate to inject random extrinsic evidence into the record at this late date merely highlights the weakness of Patent Owner's claim construction positions.

II. ARGUMENT

A. Patent Owner's hyperlink to PC Magazine is improper

Patent Owner's arguments about the PC Magazine webpage focus on the alleged ***relevance*** of that extrinsic evidence to Patent Owner's claim construction arguments. Opp'n at 1–3. But relevance has nothing to do with this Motion: this Motion is about Patent Owner failing to follow well-established rules for submitting evidence in an IPR. If Patent Owner genuinely needed to present new evidence "to clarify a potential term of confusion that Netlist could not foresee as it first arose in the Reply," *id*. at 3, then Patent Owner should have sought permission to submit new evidence as exhibits. Having failed to do so, Patent Owner cannot now complain that its belated evidence is necessary to its arguments. *See, e.g.*,

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Intel Corp. v. Parkervision, Inc., IPR2020-01265, Paper 44, at 74–75 (PTAB Jan. 21, 2022) (excluding evidence submitted with sur-reply).

To the extent the Board considers relevancy in resolving this Motion, Petitioner disagrees with Patent Owner's assertion of relevancy. The cited statement from PC Magazine is irrelevant to the construction of "memory module," which is the actual claim term at issue. The phrase "***main*** memory module" does not appear in the specification or the claims—it comes only from Patent Owner's incorrect attempts to narrow the claims. As previously explained by Petitioner, neither the District Court's construction nor Dr. Wolfe's prior testimony limit a "memory module" to a "***main*** memory module." *See* Paper 25 (Reply) at 1–2. Patent Owner's citation to PC Magazine is a textbook example of why the Federal Circuit has held that such extrinsic evidence is unreliable: "[T]here is a virtually unbounded universe of potential extrinsic evidence of some marginal relevance that could be brought to bear on any claim construction question. In the course of litigation, each party will naturally choose the pieces of extrinsic evidence most favorable to its cause, leaving the court with the considerable task of filtering the useful extrinsic evidence from the fluff. . . . [U]ndue reliance on extrinsic evidence poses the risk that it will be used to change the meaning of claims in derogation of the 'indisputable public records consisting of the claims, the specification and the prosecution history,' thereby undermining

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the public notice function of patents." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1318–19 (Fed. Cir. 2005) (en banc).

Patent Owner mischaracterizes *Applied Materials* by arguing that "the ruling is in connection with a motion to strike a new argument." Opp'n at 3. To the contrary, the Board's decision in *Applied Materials* was to "grant Petitioner's motion to exclude the URL…[and] ***not*** strike the argument that the URL is cited as supporting." *Applied Materials v. Ocean Semiconductor LLC*, IPR2021-01340, Paper 52, at 62 (PTAB Feb. 7, 2022) (emphasis added). There was no need to move to strike the argument in *Applied Materials* because "absent citation to the stricken URL, such argument lacks evidentiary support." *Id.* The same is true here.

B. Patent Owner's hyperlinks to images are improper, as are the images themselves

Contrary to Patent Owner's suggestion that "Petitioners do not seem to object to the images themselves," Opp'n at 5, this Motion is ***not*** limited to the literal URLs and also seeks to exclude the "materials referenced with [the] URLs," Paper 33 at 1. The images related to the URLs are specifically identified and reprinted in the first two pages of Petitioner's Motion. *Id*. at 1–2. Those images (as well as the underlying URLs) cannot be considered as evidence in this proceeding because they do not comply with 37 C.F.R. §§ 42.63(a) and 42.23(b).

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