

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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CBS INTERACTIVE INC., THE NEW YORK TIMES COMPANY,  
G4 MEDIA, LLC, and BRAVO MEDIA LLC  
Petitioners

v.

HELFERICH PATENT LICENSING, LLC. and WIRELESS SCIENCE, LLC.  
Exclusive Licensee and Patent Owner

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Case IPR2013-00033  
Patent 7,155,241

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Before JAMESON LEE, KEVIN F. TURNER, and JONI Y. CHANG,  
*Administrative Patent Judges.*

LEE, *Administrative Patent Judge.*

ORDER  
Conduct of Proceeding  
*37 C.F.R. § 42.5*

### Introduction

A conference call was held on the afternoon of October 22, 2013, at 3:00 PM. The participants of the call were respective counsel for the parties and Judges Lee, Turner, and Chang. Counsel for Patent Owner initiated the call to seek guidance from the Board regarding the appropriate content of demonstrative exhibits at final oral hearing, which is scheduled for 10:00 AM, October 23, 2013. The parties each had filed proposed demonstrative slides, 55 in number for Patent Owner (Ex. 2071), and 38 in number for Petitioner (Ex. 1045). The Patent Owner also filed two exhibits with its demonstrative slides (Ex. 2072 and 2073) without prior authorization.

The Patent Owner provided a court reporter for the conference call, and agreed to provide a copy of the transcript of the call to the Board.

### Discussion

The Board gave parties specific guidance on the appropriate content of demonstrative exhibits at final oral hearing. The main points are summarized below in sections I-III. A copy of the transcript of the conference call will be entered into the record when it has been received by the Board.

#### I.

Unlike trials conducted in district courts, a trial before the Board is conducted on paper. By the time the proceeding reaches final oral hearing, nothing new can be presented, no new evidence, no new arguments. *Patent Trial Practice Guide*, 77 Fed. Reg. 48756, 48768 (Aug. 14, 2012). At that stage, the trial is already completed, and the final oral hearing is not an opportunity to add anything

to a party's case. Whatever a party desires to present, for whatever reason, should have already been presented in the party's petition, response, opposition, motion, reply, declarations, observations on cross-examination, or other exhibits presented at an appropriate time during the trial. It is from that perspective that we read the prohibition in the Board's Patent Trial Practice Guide against presenting new evidence or new arguments in the demonstrative exhibits at final oral hearing.

The key question is—what constitutes a new argument? If a party previously argued that an object was red, and proposes to argue, at final oral hearing, that the object was green, clearly that is a new argument. If the party proposes to argue, at final oral hearing, that the object was pink, it is still a new argument. If the party proposes to argue, at final oral hearing, that red actually covers a range of spectra, that is a new argument unless the contention was previously made in an appropriate paper. It is unfair to the other party to bring a new twist or angle into a party's case at such a late stage of the proceeding. That would include different characterizations of the evidence and different inferences drawn from the evidence. If certain testimony previously was not developed, discussed, or explained in a party's papers, it may not be developed, discussed, explained, or summarized, for the first time, in the form of demonstrative slides at final oral hearing.

## II.

Demonstrative slides are visual aids to a party's oral presentation. For instance, figures, charts and diagrams may serve as visual aids. However, written text setting forth various statements, characterizations, and assertions go beyond

-serving as visual aids, as they constitute additional briefings themselves. What counsel articulates orally diminishes in relative significance. There is no proper basis for presenting such additional “briefings” as demonstrative exhibits, especially if such demonstrative exhibits are to be kept in the official record.

### III.

The burden on showing that a demonstrative slide does not present new argument or new evidence is on the party presenting the slide. Also, it cannot be made overly cumbersome for the Board and the opposing party to determine whether something is new. For instance, if a party cites to 10 to 15 pages of testimony, or a paper, as the basis for a demonstrative slide, that is too vague and cumbersome to understand. A party should be able to point specifically to a sentence or two, or even a paragraph, in an appropriate paper to support a demonstrative slide. If the alleged basis is multiple pages, and if the justification requires a level of indirection or mental conversion of one idea to another, then the alleged justification is likely unsupportable.

### IV.

We have reviewed Patent Owner’s 55 slides and Petitioner’s 38 slides. Based on the guideline we articulated during the conference call and summarized above, more than 30 of Patent Owner’s slides are non-compliant or inappropriate for presentation at final oral hearing. Some of Petitioner’s slides are also inappropriate, although much fewer in number. Counsel for Patent Owner, during the conference call, inquired how, then, would a party expand upon the declaration testimony already presented, by using the cross-examination testimony of the

declarant, if there is no opportunity to file another paper? The Board explained that with regard to a party's own declaration witness, the party's own case should be developed within the paper which presented and relied on the declaration. Absent extraordinary circumstances, there is no provision in the rules for a party to "expand" the development of that testimony, if there is no more responsive paper to be filed under applicable rules.

The final oral hearing is not an opportunity for a party to expand upon its reliance on declaration testimony, in a manner not already previously presented.

In light of the number of the non-compliant slides involved, and the inefficiencies of sorting through all of the slides, one by one, the Board exercised discretion to not allow presentation of any of Patent Owner's 55 slides and Petitioner's 38 slides at final oral hearing. Instead, either party may present, at final oral hearing, as a demonstrative, any page from the current record of the proceeding, so long as that page has been specifically discussed in an appropriate paper. The parties' ability to present any such page from the record as a demonstrative at final oral hearing ensures that neither party is prejudiced.

#### ORDER

It is

ORDERED that the Patent Owner may not, at final oral hearing, use the slides contained in its Exhibit 2071 as demonstrative exhibits, that the Petitioner may not, at final oral hearing, use the slides contained in its Exhibit 1045 as demonstrative exhibits, and that Exhibits 2071, 2072, 2073, and 1045 will be expunged from the record; and

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FURTHER ORDERED that either party may, at final oral hearing, use any page from the record as a demonstrative exhibit, so long as the content of the page has been specifically discussed in an appropriate paper in the proceeding.

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