

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

Case IPR2013-00033
Patent 7,155,241

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

CHANG, *Administrative Patent Judge*.

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

On October 5, 2013, a telephone conference call was held between respective counsel for the parties and Judges Turner and Chang.¹ The conference call was initiated by Helferich to seek: (1) the authorization for filing errata sheets for the cross-examination testimony of Dr. Grindon and (2) the Board's guidance on the requirements of a motion for observation and a response to observations. The Board addressed each of the two items in turn.

1. Errata Sheets for Cross-Examination Testimony

On September 23, 2013, CBS conducted a cross-examination of Dr. Grindon. CBS filed a motion for observation (Paper 93) and the cross-examination transcript (Ex. 1042) on September 27, 2013. During the conference call, Helferich alleged that CBS failed to file Dr. Grindon's signature and correction sheets for his cross-examination testimony.

CBS responded that Dr. Grindon's correction sheets allegedly contain substantive changes to the testimony and errata sheets for testimony are not permitted under the rules, citing to *Rules of Practice for Trials Before the Patent Trial and Appeal Board*, 77 Fed. Reg. 48612, 48642 (Aug. 14, 2012). Indeed, the Patent Trial Final Rule notice states:

Comment 144: One comment requested that proposed § 42.53 provide for the submission of errata sheets and provide guidance on what is and is not acceptable in an errata sheet.

¹ A court reporter was present on the call and Helferich indicated that a transcript of the conference call would be filed.

Response: The Board's experience with errata sheets is that parties tend to disagree on what is and is not considered an errata sheet. For example, there have been instances where a party has attempted to change a deponent's answer from "yes" to "no" over the objection of the opponent. Accordingly, *the final rules do not provide for the submission of errata sheets*, however, where a party believes that the submission of an errata sheet is necessary to the proceeding, the party may arrange for a conference call with the Board to discuss the matter.

77 Fed. Reg. at 48642 (emphasis added).

Helferich countered that the errata sheets merely correct typographical errors, rephrase wordings, and provide further clarifications. Helferich also indicated that it did not conduct a redirect examination because of logistic problems. Helferich sought authorization to file errata sheets with its response to CBS's observations.

Upon consideration of the parties' arguments, the Board authorized Helferich to file errata sheets with its response to CBS's observations. The Board, however, explained that the errata sheets cannot be used to serve the purposes of a redirect examination, nor can they make substantive changes. Errata sheets may correct only typographical and minor grammatical errors. The Board may decline to consider a submission of errata sheets containing any substantive change.

2. *Observations and Responses*

Helferich alleged that most of CBS's observations paraphrase or summarize the cross-examination testimony and, thus, fail to reproduce the pertinent

testimony, as required in the order entered in IPR2012-00027, *Idle Free Systems Inc. v. Bergstrom, Inc.*, Paper 46 (hereafter “*Idle Free* order”).² Helferich argued that if CBS had complied with the requirement of reproducing the pertinent testimony, CBS’s motion for observation would have been over the 15-page limit.

At the outset, Helferich’s arguments are based on the incorrect premise that the *Idle Free* order (Paper 46, IPR2012-00027) set forth such a requirement for all observations. The *Idle Free* order merely requires that *the pertinent cross-examination testimony be identified precisely*. That is consistent with the previous order (Paper 85) entered in the instant proceeding which states at pages 3-4 (emphases added):

[A] motion for observation on cross-examination is *a mechanism to draw the Board’s attention to relevant cross-examination testimony* of a reply witness. The observation must be a concise statement of the relevance of *precisely identified testimony* to a precisely identified argument or portion of an exhibit (including another part of the same testimony). Any response to observation must be equally concise and specific.

An observation (or response) is not an opportunity to raise new issues, to re-argue issues, or to pursue objections. Each observation should be in the following form:

In exhibit __, on page __, lines __, the witness testified __.

This testimony is relevant to the __ on page __ of __. The testimony is relevant because __.

The entire observation should not exceed one short paragraph. The Board may decline consideration or entry of excessively long or argumentative observations (or responses).

² Contrary to Helferich’s assertion made during the conference call, the *Idle Free* order (Paper 46) is not a representative order posted on the Board’s web site.

The point is to avoid misidentification. In a situation where the pertinent cross-examination testimony is relatively short, the pertinent cross-examination testimony should be reproduced in the observation directed to that testimony rather than merely referenced by page and line number. However, if the pertinent testimony is relatively long such that the reproduction would cause the entire observation to exceed one short paragraph, a brief summary with the page and line numbers would be acceptable.

As to CBS's allegedly incorrect summaries, the Board explained that the summary of the relevant cross-examination testimony is merely a mechanism to direct the Board's attention to that testimony. The Board will not consider the summary itself as the testimony. Rather, the Board will review the relevant cross-examination testimony when the Board decides the merit of the case.

For the foregoing reasons, the Board was not persuaded by Helferich's arguments that CBS's motion for observation was filed improperly. While Helferich may point out any allegedly incorrect summaries in its response, a response is not an opportunity to raise new issues, to re-argue issues, or pursue objections. The Board may decline consideration or entry of excessively long or argumentative response.

Accordingly, it is

ORDERED that, based on the particular facts of this case, Helferich is authorized to file errata sheets to Dr. Grindon's cross-examination testimony, as an exhibit, with its response to CBS's observations; the errata sheets and response must comply with the guidance set forth above; and

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FURTHER ORDERED that Helferich is authorized to file a transcript of the conference call as an exhibit.

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