

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AVOCENT HUNTSVILLE CORPORATION, and
LIEBERT CORPORATION,
Petitioner,

v.

CYBER SWITCHING PATENTS LLC,
Patent Owner.

Case IPR2015-00690
Case IPR2015-00725¹

Patent 7,550,870 B2

Before MICHAEL R. ZECHER, GLENN J. PERRY, and
NEIL T. POWELL, *Administrative Patent Judges*.

PERRY, *Administrative Patent Judge*.

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

¹ This Order addresses issues that are identical in these two cases. We, therefore, exercise our discretion to issue one Order to be filed in each case. The parties are not authorized to use a multiple case caption. They must file individual papers in each case to which they pertain.

I. DISCUSSION

We held an initial conference call in the captioned cases on September 9, 2015. A court reporter was present and we request that the parties file a transcript of the conference as an exhibit.

Patent Owner, Cyber Switching Patents LLC (“Cyber”), was represented by Jing Hong Cherng and William H. Stewart. Petitioner, Avocent Huntsville Corporation and Liebert Corporation, (“Avocent”), was represented by Donald L. Jackson and Wayne Helge. Both Cyber and Avocent seek authorization to file Motions.

Cyber seeks authorization to move for additional discovery from Avocent regarding evidence of objective indicia of non-obviousness pursuant to 37 C.F.R. § 42.51 (b)(2). This request is premature in that Cyber is not currently in possession of evidence that supports a targeted request for specific documents. We will entertain a renewed request in the event that Cyber can provide support for a specific and targeted discovery request. Cyber should be able to articulate how a nexus would be established between the claims at issue and the specific evidence sought. Cyber referred us to Case IPR2015-00149 to support its position. Case IPR2015-00149 is distinguishable from the present circumstances because it contains a more focused and targeted request for discovery—something that has not been articulated thus far in our record. No allegation was made regarding copying.

Cyber seeks authorization to move for discovery from a third party, namely – a company that was a party to a “servicing agreement” related to the development of a product for Cyber—pursuant to 37 C.F.R. § 42.51

(b)(2). This request specifically relates to the Ewing '543 reference in Case IPR2015-00725. This request also appears to be premature. Cyber is encouraged to exhaust other avenues for obtaining the desired documentation. Should the circumstances change, Cyber is welcome to renew its request.

Avocent seeks authorization to move for additional discovery from a third party, namely – to take the deposition of an employee of Server Technology, Inc. (“Server”) in order to authenticate and establish a publication date of the “Sentry” reference—pursuant to 37 C.F.R. § 42.51 (b)(2). Avocent indicated that it was aware of Server’s refusal to comply with a request that occurred prior to filing the Petitions. Upon further inquiry from the panel, Avocent indicated that it had not yet exhausted all remedies in seeking the deposition of an employee at Server. The record, therefore, does not yet reflect an adequate basis for such authorization.

Avocent seeks authorization to move for the submission of supplemental information regarding the authentication and other information related to the Sentry reference pursuant to 37 C.F.R. § 42.123(a). In particular, Avocent makes reference to a “wayback” archive that is now being sought. The request appears to be responsive to Cyber’s objection to evidence (IPR2015-00690, Paper 19). Avocent is authorized to submit a motion in this regard and in accordance with our rules. Cyber is authorized to file an opposition, also in accordance with our rules.

II. ORDER

It is, therefore,

ORDERED that Avocent is authorized to move for the submission of supplemental information regarding authentication and other information related to the Sentry reference. Avocent's motion is due by September 17, 2015;

FURTHER ORDERED that Cyber is authorized to file an opposition to Avocent's motion for submission of supplemental information. Cyber's Opposition is due by September 24, 2015; and

FURTHER ORDERED that no other authorizations are granted at this time.

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