

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

WARGAMING GROUP LIMITED,
Petitioner,
v.

GAME AND TECHNOLOGY CO., LTD.,
Patent Owner.

Case IPR 2017-01082
Patent 7,682,243

**PETITIONER'S BRIEF ON THE ISSUE OF WHETHER
THE PETITION IS BARRED UNDER 35 U.S.C. § 315(b)**

Petitioner Wargaming Group Limited respectfully requests that the Board find that the instant petition for *inter partes* review is not barred under 35 U.S.C. § 315(b) because (1) the Patent Owner voluntarily dismissed without prejudice the infringement action against Wargaming.net LLP, which is the real-party-in-interest that Patent Owner claims was served, and (2) there is no credible evidence that the Patent Owner served Wargaming.net LLP with a proper summons and complaint alleging infringement of the '243 Patent.

I. Applicable Law

“An *inter partes* review may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest, or privy of the petitioner is *served with a complaint* alleging infringement of the patent.” 35 U.S.C. § 315(b) (emphasis added). The Board has previously rejected the argument that the “mere receipt of a complaint” is enough to trigger § 315(b), finding that “[w]e do not believe that the Congress intended to have the time period start before a petitioner is officially a defendant in a law suit.” *Motorola Mobility LLC v. Arnouse*, Case IPR2013-00010, Paper 20 at 3-5 (PTAB Jan. 20, 2013). Instead, § 315(b) requires that the petitioner be “served with a summons before the one-year time period for filing an *inter partes* review petition is triggered.” *Id.* at 6.

II. The petition cannot be barred under § 315(b) because the infringement action against Wargaming.net LLP was voluntarily dismissed without prejudice under Fed. R. Civ. P. 41(a).

The Board should find that the instant petition cannot be barred by the alleged service of a complaint on Wargaming.net LLP because the Patent Owner voluntarily dismissed its infringement action against Wargaming.net LLP without prejudice under Federal Rule of Civil Procedure 41(a)(1). *See* Ex. 1013 (parties' stipulated motion that "[p]ursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, Wargaming.net LLP shall be dismissed without prejudice as a party to this action"); Ex. 1026 (order granting dismissal without prejudice).

In a precedential decision interpreting § 315(b), the Board explained that "[t]he Federal Circuit consistently has interpreted the effect of [dismissals under Federal Rule of Civil Procedure 41(a)] as leaving the parties as though the action had never been brought." *Oracle Corp. v. Click-to-Call Techs. LP*, IPR2013-00312, Paper 26 at 17 (PTAB Oct. 30, 2013). The Board held that a voluntary dismissal without prejudice "nullifies the effect of the service of the complaint" and cannot bar a petition under § 315(b). *Id.* Because the Patent Owner voluntarily dismissed without prejudice its infringement action against Wargaming.net LLP, the alleged service of a complaint for that action cannot bar the instant petition § 315(b).

III. Wargaming.net LLP was not properly served with a summons and complaint alleging infringement of the '243 Patent.

The Board should find that there is no credible evidence that the Patent Owner properly served Wargaming.net LLP with a summons and complaint alleging infringement of the '243 Patent for several reasons. *First*, the process server has admitted that the proof of service filed with the Patent Owner's Preliminary Response is not true and accurate. *Second*, the Patent Owner's new and untimely proof of service contains a void summons that was not issued by the district court with the required signature and court seal. *Third*, the Patent Owner's failure to move for entry of default is evidence that the Patent Owner did not believe service was proper. *Finally*, the consistent and credible testimonial evidence indicates that Wargaming.net LLP was not served.

A. Patent Owner's process server admitted that the proof of service submitted with the Preliminary Response is not an accurate copy of the documents that he claims to have served.

The Patent Owner did not file any proof of service in the district court before the instant petition was filed. In its Preliminary Response, Patent Owner claimed that the petition was barred under § 315(b) because, “[a]s attested to in the Witness Statement of Service in Civil Action No. 2:15-cv-01260 by John Frederick Talbot, Mr. Talbot served Mr. Costas A. Joannou, who received service on behalf of Wargaming.net LLP, on December 10, 2015, in London, England.” Paper 8 at 4. Notably, Patent Owner originally filed a version of Mr. Talbot's Witness Statement

that was incomplete because it did not have a copy of Exhibit A, which the statement describes is “a bundle containing a copy of each of the documents so served.” *See* Ex. 2002. At Petitioner’s request, Patent Owner filed another version of Mr. Talbot’s Witness Statement that included Exhibit A as Exhibit 2002 Supplemental. *See* Paper 9.

Petitioner deposed Mr. Talbot in London, England. At the deposition, Mr. Talbot admitted that Exhibit A, although prepared a mere three days after he allegedly served Wargaming, was incorrect and is not an accurate copy of the documents that he allegedly served on Mr. Joannou for Wargaming.net LLP. Mr. Talbot was asked to match the documents in Exhibit A to his witness statement (Ex. 2002 supp.) with the list of documents that he was instructed to serve on page 3 of the Hague Request for Service (Ex. 2007). *See* Ex. 1025 at 18:21–19:8 (identifying Ex. 2007), 21:15–22:14 (explaining the list of documents), 23:21–24:3. Mr. Talbot admitted that there were several problems with the bundle of allegedly served documents. *First*, the bundle did not have a copy of the “Summary” that is listed on the Hague request. *Id.* at 30:24–31:5. Mr. Talbot stated that he would normally serve a copy of a “Summary” listed in a Hague request. *Id.* at 31:6–10. Therefore, the omission of the “Summary” document indicates that Mr. Talbot either failed to serve the documents as he was instructed or that Exhibit A is not a true and accurate copy of the documents that he allegedly served.

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