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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CLEARONE, INC.,
Petitioner,

v.

SHURE ACQUISITION HOLDINGS, INC.,
Patent Owner.

Case No. IPR2019-00683
Patent No. 9,565,493

PETITIONER'S MOTION FOR SANCTIONS

BEFORE JUDGE MICHAEL R. ZECHER

JUDGE JON M. JURGOVAN

Telephonic Hearing

Reported by: Kathryn LLoyd, CSR 5955

Job No. 323035

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Transcript of Conference Call
Conducted on September 29, 2020

3

1 SEPTEMBER 29, 2020

12:06 A.M.

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PROCEEDINGS

4

JUDGE ZECHER: Can I go ahead and start this proceeding by taking roll call to see who is online.

5

6

And we'll start with Petitioner, please.

7

MR. PHILLIPS: Good afternoon, your Honor.

8

This is Matthew Phillips for the Petitioner,

9

ClearOne.

10

And I believe Derek Meeker and Kevin Laurence

11

are also on the line with me.

12

JUDGE ZECHER: Okay.

13

Mr. Phillips, you are going to be speaking on

14

behalf of the Petitioner today?

15

MR. PHILLIPS: Yes, I am.

16

And we have arranged for a court reporter who

17

is present on the call.

18

JUDGE ZECHER: And because you arranged for

19

that court reporter, do you agree to file that

20

transcript promptly as an exhibit?

21

MR. PHILLIPS: Yes, we will.

22

JUDGE ZECHER: Let me get the appearance from

23

the patent owner, please.

24

MR. COOK: Elliot Cook from the law firm,

25

Finnegan, on behalf of patent owner.

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IPR2019-00683
ClearOne v. Shure
ClearOne Ex. 1236

Transcript of Conference Call
Conducted on September 29, 2020

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1 With me on the call, we have Erika Arner and
2 Alex Boyer.

3 JUDGE ZECHER: And Mr. Cook, are you going to
4 be talking on behalf of patent owner today?

5 MR. COOK: Yes, your Honor.

6 JUDGE ZECHER: Okay.

7 Thank you.

8 Is the court reporter here?

9 THE COURT REPORTER: I am on this call.

10 JUDGE ZECHER: This is a call for
11 IPR-2019-00683.

12 As I mentioned earlier, my name is
13 Judge Zecher.

14 I have, on the line with me, Judge Jurgovan.
15 Unfortunately, our third colleague on the
16 panel, Judge Zado, could not be present with this call.

17 I believe the Petitioner requested this call.

18 I understand they want to seek authorization to
19 file motions for sanctions.

20 So with that in mind, let me turn the floor
21 over to Mr. Phillips, and he can explain his position
22 with respect to why these motions for sanctions should
23 be granted.

24 MR. PHILLIPS: Thank you, Judge Zecher.

25 This is Matt Phillips for the Petitioner,

1 ClearOne.

2 As you noted, I'm here to request permission to
3 file a sanctions motion.

4 ClearOne has served the motion.

5 We did so on August 24, and so the 21-day
6 waiting period under Rule 11(b)(2) has expired.

7 We also, on August 24, filed a request for a
8 hearing. And the background for the sanctions motion is
9 set forth in that request.

10 (Break for Court Reporter's connection issue)

11 JUDGE ZECHER: Let's start over.

12 MR. PHILLIPS: This is Matthew Phillips for the
13 Petitioner, ClearOne.

14 I'm here to request permission to file a
15 sanctions motion.

16 The motion was served on August 24, and the
17 21-day waiting period has expired.

18 The background for the motion is set forth in
19 the request for rehearing that we also filed on
20 August 24th.

21 I assume your Honors are familiar with that
22 request for a rehearing, so I will just briefly mention
23 the high points.

24 First, Shure was under duty of disclosure
25 because it filed motions to amend.

1 Second, Shure did not disclose any prior art in
2 this IPR, not Levit, not Gulbrandsen, not Foreign Office
3 Actions, or art in those Foreign Office Actions, but our
4 focus here is on Levit and Gulbrandsen. That's the
5 basis for our motion.

6 The only question is: Are those two references
7 material?

8 And the answer is they are.

9 Before explaining why, I just want to note that
10 the applicable materiality standard should be as stated
11 in Rule 56 or Rule 555, which are essentially identical.
12 They are the office's only codification of the
13 materiality standard.

14 And they say, quote:

15 Information is material to patentability
16 when it is not cumulative. And one, it establishes
17 by itself or in combination with other information,
18 a prima facie case of unpatentability of a claim,
19 or two, it refutes or is inconsistent with the
20 position the applicant takes.

21 I'll explain why both references are material
22 under that definition, starting with Levit.

23 Levit teaches both a sound-permeable screen on
24 a ceiling tile and the desirability of having such a
25 screen.

1 For example, look at paragraph 5 of Levit.

2 Levit is not cumulative to Graham alone

3 because:

4 First, Levit's teaching of a sound-permeable
5 screen are different and stronger than Graham's.

6 Second, Graham, unlike Levit, does not teach
7 the desirability of such screens.

8 Third, Shure's own statements confirm that
9 Levit is not cumulative to Graham alone.

10 Now in that respect, recall, your Honors, that
11 in this IPR, whether Graham by itself taught a
12 sound-permeable screen on a ceiling tile was a hotly
13 contested issue. Shure argues vehemently that Graham
14 did not teach such a screen on a ceiling tile. They
15 argued that a person in the ordinary skill in the art
16 would not have been motivated to add such a covering.
17 They criticized our argument as being hindsight driven
18 and, quote, ex post reasoning.

19 And that's a quote from Paper 58 at pages 5 and
20 6.

21 But in the PGR petition that they filed, Shure
22 and its same expert, Dr. Vipperman states, quote:

23 It would have been obvious to combine
24 Graham and Levit so that Graham's ceiling tile
25 includes acoustically transparent outer surface.

1 I'm quoting from petition Paper 1 in
2 PGR2020-00079 at page 56.

3 The same quote appears identically in Exhibit
4 1002, paragraph 152.

5 That statement is an admission of noncumulative
6 materiality.

7 And can you imagine what this trial would have
8 been like if Shure and Dr. Vipperman had said that in
9 this trial that it would have been obvious to combine
10 Graham and Levit so that Graham's ceiling tile includes
11 a sound-permeable screen?

12 The whole complexion of the trial would have
13 changed dramatically, and the parties and the Boards
14 would have not wasted so much time on the question of
15 whether Graham alone teaches such a sound-permeable
16 screen on the ceiling tile if Shure had disclosed Levit.

17 And that would have had a ripple effect on all
18 of the other issues in the case.

19 All right. Turning to Gulbrandsen.

20 It is material because it teaches side rails
21 that secure a front face of the ceiling tile.

22 This might be most clearly illustrated in
23 figures 41 through 44 of Gulbrandsen.

24 There you can see side rails 806 and 808.

25 It would have been obvious to use such side

1 rails with Graham's integrated, BMA ceiling tile unit,
2 notably the side rails secure the front face, 804,
3 Gulbrandsen even uses using the same terms "secure" as
4 in the claim, Claim 57, and Gulbrandsen broadly teaches
5 that the securing may be, quote, any suitable securing
6 means or any known mechanical means, end quote.

7 And I'm quoting from paragraph 73 of
8 Gulbrandsen.

9 So Gulbrandsen is material, and it teaches side
10 rails more clearly than Graham or any other reference in
11 the trial.

12 And it, again, would have had a dramatic effect
13 on the complexion of the trial.

14 And I just have a couple other points to note.

15 One is that intent here does not matter.

16 We can assume for purposes of this issue here
17 before the Board that Shure did not intentionally
18 withhold Levit and Gulbrandsen.

19 Now, ClearOne reserves the right for its
20 litigation counsel to explore the intent issue in the
21 related litigation with the benefit of discovery, but we
22 don't have to do that here.

23 All that matters is that:

24 One, Shure possessed these two references
25 during the trial.

1 Two, they are material.

2 Three, Shure did not disclose them during the
3 trial, for whatever reason, it doesn't matter.

4 Four, ClearOne has been prejudiced by Shure's
5 failure to disclose these references.

6 And the prejudice has been severe.

7 It includes the fact that your Honors have
8 decided that Claims 57 through 67 are patentable.

9 I don't believe that would have happened, had
10 the disclosures been made.

11 And secondly, ClearOne has incurred significant
12 unnecessary attorneys fees and expenses to oppose those
13 claims and to prepare its sanctions motion.

14 And to make matters worse -- and this is my
15 final point, although I reserve the right for
16 rebuttal -- Shure has not only shielded its own patent
17 from Levit and Gulbrandsen by not disclosing them during
18 the IPR, but it's now attempting to use that very same
19 prior art as a sword to attack ClearOne's continuation
20 of the Graham patent in its PGR position.

21 And we think that that makes this situation
22 especially egregious and that sanctions are especially
23 appropriate.

24 JUDGE ZECHER: I do have some questions for
25 you.

1 Let me get some clarification from you first.

2 I have read your request for rehearing.

3 And my understanding is that request for
4 rehearing is really focusing on proposed substantive
5 Claims 57 through 67, which are the claims that we
6 effectively granted in part in the motion in that.

7 Is that correct?

8 MR. PHILLIPS: That is correct, your Honor.

9 JUDGE ZECHER: Okay.

10 And I also read back through our decision. And
11 my understanding, at least through reading the decision,
12 is that we --

13 Well, let me ask you another question: You do
14 have the burden of persuasion to demonstrate on
15 patentability of proposed substitute claims. Correct?

16 MR. PHILLIPS: I agree, your Honor.

17 JUDGE ZECHER: Okay.

18 So my understanding from reading back through
19 the final written decision, was that we took the
20 position that the art you asserted against proposed
21 substitute Claims 57 through 67, which in some cases was
22 just Graham, but in combination with other references,
23 did not account for the side rail feature that was added
24 to the proposed substitute Claim 57. Correct?

25 MR. PHILLIPS: Yes.

1 That is an accurate characterization of the
2 final written description. Yes.

3 JUDGE ZECHER: Okay.

4 So another few questions, just about Levit and
5 Gulbrandsen themselves.

6 Those are both PG hubs, U.S. Patent application
7 publications.

8 Is that correct?

9 MR. PHILLIPS: I'm going to double check.

10 I believe they are publications, not granted
11 patents.

12 Yes. That is correct.

13 JUDGE ZECHER: Okay.

14 And so is there a reason, maybe, that Levit and
15 Gulbrandsen weren't unearthed during your search for art
16 to use against the proposed substitute claims?

17 Is there something unique about the fact that
18 these two references could not be found in a prior art
19 search?

20 MR. PHILLIPS: Well, two points, your Honor.

21 We don't have a burden to ask the Petitioner to
22 unearth the best prior art.

23 So I just want to make that clear.

24 And the second point is we did multiple
25 parallel prior art searches.

1 Now, I cannot speak to what searching was done
2 when the petition was filed because that was filed by
3 different lawyers at a different law firm, but when the
4 original motion to amend was filed, we commissioned two
5 different searches from two different highly reputable
6 search firms, neither of which found either reference.

7 When the revised motion to amend was filed, we
8 updated both of those searches through both of those
9 search firms, and again, neither reference was found.

10 We found tons of prior art, but, you know, for
11 whatever reason, these references weren't found.

12 But I would submit, your Honor, that that is
13 completely irrelevant because Shure had the prior art
14 and it was their burden to disclose it.

15 JUDGE ZECHER: Okay.

16 Last question I have about Levit and
17 Gulbrandsen.

18 Those are obviously two references that are
19 asserted in this PGR. I want to make sure I have the
20 PGR correct.

21 It's PGR2020-00079.

22 Is that correct?

23 MR. PHILLIPS: That is correct.

24 JUDGE ZECHER: Okay.

25 I note in your request for rehearing, you, at

1 least reproduced one claim from the patent at issue in
2 that PGR, which I believe is U.S. Patent 10,728,653.

3 Is that correct?

4 MR. PHILLIPS: Give me just a moment to verify,
5 your Honor.

6 10,728,653, yes.

7 JUDGE ZECHER: And you have reproduced Claim 1
8 of this '653 Patent on page 5 of your request for
9 rehearing. And I have read, obviously, through the
10 scope of this claim. I don't see any limitation that
11 requires a side rail.

12 I have also looked at some of your explanation.
13 And I think at one point you said: No claims of the
14 '653 Patent recite anything like side rails.

15 So I'm trying to understand how Gulbrandsen and
16 Levit would be material to that particular limitation
17 when the claims at issue in the '653 Patent don't
18 explicitly require a side rail.

19 MR. PHILLIPS: Well, your Honor, the
20 references --

21 I can explain them individually.

22 In general, the references are relevant to the
23 '653 Patent because the PGR petition filed by Shure
24 cites to both references.

25 Now, the citation to Levit is clear, front and

1 center.

2 The PGR petition relies on Levit for its
3 teaching of a sound-permeable screen or an acoustically
4 transparent outer surface of a ceiling tile.

5 And the quotation that I read to you is a
6 quotation from the PGR petition that Shure has taken the
7 position that --

8 (court reporter interruption)

9 MR. PHILLIPS: That Shure filed.

10 They state, quote:

11 It would have been obvious to combine
12 Graham and Levit so the Graham ceiling tile
13 includes an acoustically transparent outer surface.

14 Because in that PGR petition, Shure is relying
15 on Graham as a prior art reference against the '653
16 Patent under a theory that the '653 Patent, even though
17 it's a continuation of Graham, is not entitled to the
18 earlier filing date of Graham because of the alleged new
19 matter.

20 So that's Levit.

21 I hope I have addressed your concern about
22 Levit. That's how Levit has arisen in the PGR.

23 Now as for Gulbrandsen, the PGR petition also
24 cites Gulbrandsen, but it's not relied upon as a
25 reference for any challenged Graham, it is cited more

1 for background teaching.

2 But -- and I think this is the important point,
3 your Honor -- the use that these two references -- the
4 uses that they are put to in the PGR petition really
5 doesn't matter.

6 What matters is the PGR petition is evidence
7 that Shure had possession of these references during the
8 trial, and the references themselves show that -- it
9 should be apparent that they are material, and therefore
10 they should have been disclosed in the IPR.

11 That's all that matters.

12 JUDGE ZECHER: Okay.

13 I do have one specific question about
14 Gulbrandsen itself. And this is just based on some
15 representations you made in your request for rehearing.

16 I haven't had an opportunity to dig into
17 Gulbrandsen as much I would like, but it looks like
18 figures 16 and 19 of Gulbrandsen show a red box that
19 appears to be some sort of square.

20 And I think the position you are taking is that
21 the rails that make up those squares somehow account for
22 a side rail.

23 So I was hoping maybe you could provide some
24 further explanation in that regard.

25 MR. PHILLIPS: Sure. I'm happy to.

1 That is right, your Honor.

2 What is, I believe, colored red in the request
3 for rehearing is the side rail portion of the
4 Gulbrandsen.

5 MR. COOK: Matt, you are muffled again.

6 MR. PHILLIPS: I'm terribly sorry.

7 Is that better?

8 What I was saying is, your Honor, you are
9 correct.

10 The items shown in red in the request for
11 rehearing are the side rail portions of the Gulbrandsen
12 structure, what he calls the frame. And that is a side
13 rail in the language of Shure's Claim 57 in the IPR.

14 And I can explain why it's a side rail.

15 That is one embodiment.

16 I think the clearest depiction of it is side
17 view in figure 20 of Gulbrandsen, you can see side
18 rails, actually two are shown in 406 and 408, they are
19 side rails, they do secure the facing portion of the
20 ceiling tile 424 on the bottom to whatever is on the top
21 of the ceiling tile, and they do so without any
22 fastener.

23 That was significant in the final written
24 decision.

25 And Gulbrandsen disclosed that the connection,

1 the securing may be by any means, any known mechanical
2 means.

3 And I should also note that figures 41 through
4 44 also show another embodiment, which I have actually
5 come to prefer. I think it more clearly teaches the
6 side rail.

7 In figure 43, you see two parts of it, 806 and
8 808. And you can more clearly see that it is attaching
9 to the bottom face of 804 as well as the top second or
10 rear face of the ceiling tile here.

11 And it would have been quite obvious to use
12 rails like that around Graham's ceiling tile in which
13 there is an integrative beam forming microphone array.

14 And while you have everything recited in
15 Claim 57, with the possible exception of a
16 sound-permeable screen, but you get that very easily
17 from Levit by substituting his acoustically transparent
18 cover in place of the facing 804. And it fits Claim 57
19 like a glove.

20 JUDGE ZECHER: Thank you, Mr. Phillips.

21 Let me turn the floor over to the patent owner
22 now, and I'd like to hear their response to your
23 position.

24 Mr. Cook?

25 MR. COOK: Thank you.

1 This is Elliot Cook. I'm the patent owner.

2 Your Honor, threats of sanctions are not
3 something that our team takes lightly.

4 ClearOne apparently feels differently, treating
5 sanctions as just another part of its case strategy.

6 This is the second time in this proceeding that
7 ClearOne has threatened sanctions against us, both times
8 without any merit.

9 These are disturbing allegations. And as we
10 will discuss, they don't have any factual support.

11 But what I'd like to focus on, your Honor, is
12 cumulateness. This is something that Petitioner has
13 not shown.

14 We think it's really overwhelming in this case.

15 But before I talk about cumulateness, just
16 one correction on the law.

17 Intent is required.

18 And we respectfully disagree with Petitioner on
19 that point.

20 Intent is required.

21 And clear and convincing evidence is also
22 required to show a violation of Rule 56, your Honor, at
23 the PTAB level.

24 We would cite for your reference the case of
25 Ginter versus Benson.

1 And it's available at 2005 West Law, 312, 1470
2 at page 27.

3 But, really, your Honor, the point that we
4 wanted to focus on the most during this teleconference,
5 and really why briefing on this particular issue is not
6 warranted, is cumulativeness.

7 Starting first with the Levit reference, your
8 Honor.

9 Levit is cited in the PGR petition to show that
10 an outer surface of the ceiling tile can be acoustically
11 transparent.

12 ClearOne is taking the position now that Levit
13 for the first time, has never seen this before,
14 discloses a sound-permeable screen.

15 And ClearOne is basically taking the position
16 that this teaching and a reference of a sound-permeable
17 screen was completely absent from the IPR record, and
18 therefore it's not cumulative.

19 Your Honor, that misstates the history of this
20 proceeding.

21 The patent owner, Shure, argued in this
22 proceeding that Graham itself does not disclose a
23 sound-permeable screen. The Board disagreed with that,
24 your Honors.

25 There was never a dispute in this proceeding,

1 your Honors, that other references did have screens,
2 including ceiling tile references.

3 I would point your Honors to the Berry
4 reference, this is Exhibit 1012, which had, quote,
5 perforations in the face of the ceiling tile.

6 That's at column 7, lines 12 to 14.

7 I would also point your Honors to the Stewart
8 reference. This is Exhibit 1126.

9 It was cited by Petitioner.

10 It's also in the original file history of the
11 '493 Patent.

12 And this discusses a grill, explicitly at
13 paragraphs 49 and 62.

14 And again, that's a ceiling tile reference.

15 These were available to Petitioner. And there
16 is nothing that Levit teaches that is not taught by
17 these references and others.

18 Another example is the Armstrong Soft Look
19 ceiling tile.

20 This is Exhibit 1080.

21 And this discloses, quote, wet-formed mineral
22 fiber covered with nonwoven fabric.

23 That's page 2 of Exhibit 1080.

24 This was a reference asserted by Petitioner
25 itself.

1 And there is no explanation from Petitioner in
2 terms of its requested relief of how Levit is not
3 cumulative over references like this.

4 And the Petitioner does not make that showing,
5 and we respectfully submit that it cannot be made.

6 And finally, your Honors, with respect to
7 Levit, we would also point out that the Board disagreed
8 with Shure and found that Graham itself discloses the
9 sound-permeable screen.

10 It's hard to imagine that Levit could be
11 noncumulative in that context when the Board found that
12 Graham itself did have a sound-permeable screen.

13 JUDGE ZECHER: Mr. Cook, can I interject?

14 MR. COOK: Yes.

15 JUDGE ZECHER: Once again, I understood the
16 focus of the request for a rehearing to be on proposed
17 subsequent Claims 57 through 67.

18 Did you at all understood the Board to say that
19 a sound-permeable screen wasn't present in the prior
20 art?

21 I thought the focus of the feature that wasn't
22 present was the side rails.

23 MR. COOK: You are absolutely right, your
24 Honor.

25 With respect to Amended Claims 57 through 67,

1 the feature that the Board addressed and found missing
2 in the art is the side rail feature, not the
3 sound-permeable screen feature.

4 Your Honor is right.

5 The reason we were addressing that is because
6 it was addressed in the Petitioner's request for
7 re-hearing, which is essentially identical to a
8 sanctions motion that is served but was not filed.

9 JUDGE ZECHER: Thank you.

10 Please go ahead and proceed.

11 MR. COOK: Turning to the point that your Honor
12 just raised, really, I think this is the point that also
13 addresses the Gulbrandsen reference.

14 Gulbrandsen is also overwhelmingly cumulative
15 in view of the existing record in the IPR, including the
16 many references that ClearOne itself cited.

17 I think the first place to look is the
18 Petitioner's own trial demonstrative slides in this
19 case. This is Exhibit 1235.

20 Looking at page 33 through 36, the Petitioner
21 had the same title or four consecutive slides.

22 The title is, quote, side rails abounds in the
23 prior art, end quote.

24 And in these four different slides, the
25 Petitioner cited various references, seven references

1 specifically, disclosing what the Petitioner viewed as
2 having side rails.

3 And again, if your Honors look at the specific
4 references that were of record in this case, many
5 disclosed exactly what the Petitioner is pointing to as
6 side rails.

7 There is nothing new about the Gulbrandsen
8 reference in that regard.

9 One example is Berry, this is Exhibit 1012,
10 which has a, quote, tray region on all four sides of the
11 ceiling tile unit. And the tray is used to secure the
12 items within the ceiling tile.

13 That's at pages 38 and 41 of Berry.

14 And another is the Stewart reference, which is
15 Exhibit 1126, which was cited by Petitioner in this
16 proceeding in their Opposition to our Motion to Amend.

17 And Stewart is also in the original file
18 history of the '493 Patent. And Stewart has the side
19 portions 109, 111, 118.

20 And again, this is ceiling tile reference that,
21 as we talked about above, also has what the Petitioner
22 is referring to as an alleged sound-permeable screen.

23 This was all read in front of the Petitioner,
24 your Honors. And it's incorrect to say that now for the
25 first time, all of a sudden we are seeing in these two

1 references, a sound-permeable screen and side rails.

2 This was in the record itself.

3 And I think that the placement of the final
4 written decision, your Honors, that we point to to make
5 this clear is page 113.

6 And in the final written decision, the Board
7 was characterizing Petitioner's arguments.

8 And on page 113 of the final written decision,
9 the Board found that: The Petitioner and Dr. Begault
10 argue nonetheless that the frame size of housing that
11 secure a front and a back were well known as described
12 in various other references.

13 But they were well known.

14 It's really surprising, your Honor, to hear
15 now, after we have the final written decision, that even
16 though these were allegedly well known teachings in the
17 art, that ClearOne is taking the position that they were
18 missing from the record, and they could somehow be
19 viewed as noncumulative.

20 Patent owner very strongly disagrees with that
21 position.

22 And, your Honor, that's all I wanted to cover.
23 I am more than happy to answer any questions that you
24 have. But again, we strongly disagree with ClearOne's
25 approach, and also the position that it's taking in

1 terms of cumulateness and also in terms of intent.

2 JUDGE ZECHER: I do have a few questions for
3 you, Mr. Cook, just to kind of turn the focus on the
4 claims at issue in the PGR, which is the claims in the
5 '653 Patent.

6 Do any of those claims actually specifically
7 recite a side rail?

8 MR. COOK: No, your Honor, they do not.

9 JUDGE ZECHER: Okay.

10 Thank you.

11 As far as --

12 And maybe you would be willing to engage with
13 me on this.

14 As far as Levit and Gulbrandsen being used in
15 the PGR, is there kind of a time period of when you guys
16 made an assessment as to why that art was prevalent to
17 those claims?

18 Was it shortly before you filed the petition,
19 or was it months earlier, or is that not something you
20 are willing to disclose at this time?

21 MR. COOK: I think what we would say, your
22 Honor, which is the truth, is that nobody considered
23 these references as being material to the claim
24 limitations that ClearOne is now discussing in the IPR.

25 In terms of timing, there was never any time

1 that anybody on the PGR team or the IPR team viewed
2 these references as material.

3 We heard an argument from the Petitioner
4 earlier that there is allegedly an inconsistency, that
5 the patent owner is taking an inconsistent position in
6 this IPR versus the PGR.

7 That's not true.

8 The claim language at issue in the PGR is an
9 outer surface of a ceiling tile is acoustically
10 transparent.

11 And the language that we are dealing with here
12 in the IPR is, in the terms of original claims, as your
13 Honor noted, a sound-permeable screen, but more
14 importantly in terms of the Motion to Amend in Claims 57
15 through 67, the side rails feature, your Honor.

16 JUDGE ZECHER: Just to get some clarification:
17 When you say "limitations material to the IPR," are we
18 focusing on just any limitation involved in the original
19 claims, or should the focus actually be, as the request
20 for rehearing suggests, on proposed Claims 57 through 67
21 and the limitations on those claims?

22 MR. COOK: Yes, your Honor, it's the latter.
23 The duty to disclose in an IPR is triggered by a motion
24 to amend, and it's limited to the motion to amend, and
25 the duty to disclose does not apply to the original

1 claims that patent owner is claiming.

2 And that is reflected in the Lectrosonic case
3 and also in the Trial Practice Guide.

4 JUDGE ZECHER: And that's what I was getting
5 at.

6 I feel like duty of disclosure is really
7 applicable to the MTA, Motion to Amend.

8 So I think the focus here should be on those
9 proposed substitute claims and not the original
10 limitations of the claim.

11 That's all the questions I have for you at the
12 moment.

13 I know Mr. Phillips wanted a quick opportunity
14 to respond.

15 Mr. Phillips, go ahead.

16 Are you there?

17 MR. PHILLIPS: A few points I want to address.

18 First of all, I do want to say something about
19 this characterization that we throw around sanction
20 threats willy-nilly.

21 We do not.

22 We have never before threatened sanctions in
23 this case.

24 I can explain that, and I can tell you in well
25 over 100 AIA trials, I have never before filed a

1 sanctions motion.

2 I served one once, and it led to the complete
3 settlement of that case, that set of cases, and that is
4 it.

5 We chose not to pursue sanctions for
6 nondisclosure of foreign office actions, and the art
7 cited in those foreign office actions in this case that
8 is pointed out under the rubric of an inequitable
9 conduct in the related litigation.

10 And I believe that Mr. Cook was referring to a
11 reference to sanctions in one of the early papers in our
12 case.

13 If you recall there was an issue about whether
14 one of the references qualified as a printed
15 publication.

16 And to be perfectly clear, we never ever
17 accused Shure of making a sanctionable or frivolous
18 argument, but we were making the point that they were
19 just trying to put us to our burden of proof to prove
20 publication status, but they could not, and they were
21 not arguing that the underlying document was not a
22 printed publication. And we simply noted that it would
23 have been frivolous for you to even suggest or argue
24 that it's not a printed publication, so how silly is
25 this that you are trying to hold us to our burden of

1 proof on this fact that should not be controversial at
2 all.

3 I just wanted to clarify that.

4 Now, turning to the more important point.

5 Intent is not required for a duty of disclosure
6 violation.

7 The Ginter case, which I never have seen before
8 Mr. Cook mentioned that is not applicable, it is
9 adjudicating inequitable conduct allegation.

10 Now, it is in the context of an interference,
11 but it is very clear that that issue that they were
12 addressing was inequitable conduct.

13 Inequitable conduct is different from and
14 distinct from a duty of disclosure violation. Now it
15 may be that, just as a quick review, inequitable conduct
16 requires a bad act coupled with intent to deceive.

17 The bad act may be an affirmative
18 misrepresentation, or more commonly, it's a failure to
19 disclose a material reference.

20 So you can have a violation of the duty of
21 disclosure, but if it is not with intent to deceive, it
22 is not inequitable conduct.

23 And all we are talking about here is the duty
24 of disclosure.

25 That is what applies by the Lectrosonic case

1 and the Board's rules.

2 And if there is a violation of just the duty of
3 disclosure, whether intentionally or not, it needs to be
4 dealt with.

5 And finally, I do want to address the points
6 about Levit and Gulbrandsen allegedly being cumulative.

7 And I would say an overarching principle
8 applicable to both documents is that materiality and
9 cumulateness needs to be assessed at the time when the
10 disclosure should have been made during the trial, not
11 after the final written decision, otherwise the duty of
12 disclosure is meaningless.

13 And Levit is just not material -- I'm sorry --
14 not cumulative, because, according to Shure, it teaches
15 putting a sound-permeable screen on Graham where,
16 according to Shure, Graham does not teach that by
17 itself.

18 And so we could have made a prima facie case to
19 combine Graham with Levit, just as they are doing in the
20 PGR petition, but because of their unilateral choice not
21 to disclose Levit, we were denied that opportunity and
22 we had to fight this fierce battle about whether it
23 would have been obvious to put such a screen on Graham.

24 And that, as I mentioned, has a huge
25 repercussion on the entire case.

1 And I will note that Gulbrandsen teaches side
2 rails on the ceiling tile without fasteners, and it does
3 so more clearly than any of the other references that
4 were cited as allegedly showing side rails abounding in
5 the prior art.

6 Stewart, Berry, Armstrong, et cetera. None of
7 those are nearly as good a reference as Gulbrandsen in
8 teaching side rails that secure a front face of a
9 ceiling tile without fasteners.

10 Gulbrandsen is unique and noncumulative in that
11 respect.

12 And unless your Honors have further questions,
13 that's all I wanted to address on rebuttal.

14 JUDGE ZECHER: I don't have any further
15 questions for Mr. Phillips.

16 I do have one for Mr. Cook.

17 Mr. Cook, I know you are counsel of record in
18 this proceeding.

19 Obviously, you have Ms. Arner with you and
20 Mr. Boyer.

21 Are you also counsel on the PGR?

22 MR. COOK: Yes, your Honor.

23 JUDGE ZECHER: Is it the same backup counsel or
24 different backup counsel?

25 MR. COOK: It's different.

1 It's two different members of my law firm.

2 JUDGE ZECHER: Okay.

3 That was the only other question I had.

4 I'm going to go offline for just a few minutes
5 to consult with my colleague.

6 If you can be patient with us, we will come
7 back online and let you know how we want to proceed
8 going forward.

9 (Brief break)

10 This is Judge Zecher. I'm back online.

11 I wanted to confirm the parties are still
12 there.

13 Mr. Phillips, are you still there for
14 Petitioner?

15 MR. PHILLIPS: Yes.

16 JUDGE ZECHER: Mr. Cook, are you still there
17 for the patent owner?

18 MR. COOK: Yes, your Honor.

19 Thank you.

20 JUDGE ZECHER: So this is a pretty hairy issue.

21 I think the panel is going to need a little
22 more time to work its way through the record and take a
23 look at the transcript once Mr. Phillips has that filed
24 separately as an exhibit.

25 We are going to take this under advisement and

1 we'll issue an order in due course.

2 Mr. Phillips, if you can get that transcript to
3 us as soon as possible we can issue an order shortly
4 thereafter.

5 MR. PHILLIPS: Okay.

6 JUDGE ZECHER: Thank you for your time today.
7 And this call is adjourned.

8 MR. PHILLIPS: Thank you.

9 MR. COOK: Thank you.

10

11 (Proceedings concluded at 12:45 p.m.)

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CERTIFICATE OF REPORTER

I, KATHRYN LLOYD, a Certified Shorthand Reporter, hereby certify that said proceedings were taken down in shorthand by me, a disinterested person, at the time and place therein stated, and that the proceedings were thereafter reduced to typewriting, by computer, under my direction and supervision;

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DATED: OCTOBER 13, 2020

Kathryn Lloyd

Kathryn LLOYD, CSR #5955

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