

2018-1439 (Lead), -1440, -1441, -1444, -1445

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

TECHNOLOGY PROPERTIES LIMITED LLC, PHOENIX DIGITAL
SOLUTIONS LLC, PATRIOT SCIENTIFIC CORPORATION,

Plaintiffs-Appellants,

v.

HUAWEI TECHNOLOGIES CO., LTD., FUTUREWEI TECHNOLOGIES, INC.,
HUAWEI DEVICE CO., LTD., HUAWEI DEVICE USA INC., HUAWEI
TECHNOLOGIES USA INC., ZTE CORPORATION, ZTE USA, INC.,
SAMSUNG ELECTRONIC CO., LTD., SAMSUNG ELECTRONICS
AMERICA, INC., LG ELECTRONICS, INC., LG ELECTRONICS U.S.A., INC.,
NINTENDO CO., LTD. And NINTENDO OF AMERICA, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of
California in Case Nos. 3:12-cv-03865-VC, 3:12-cv-03876-VC, 3:12-cv-03877-
VC, 3:12-cv-03880-VC, and 3:12-cv-03881-VC, Judge Vince Chhabria.

**DEFENDANTS-APPELLEES' RESPONSE TO PLAINTIFFS-
APPELLANTS' MOTION FOR JUDICIAL NOTICE OF
ADDITIONAL MATERIALS FROM THE '336 PATENT FILE HISTORY**

[caption with counsel continues on following pages]

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I. INTRODUCTION

Trying to circumvent its long-ago waiver of arguments made for the first time in this appeal, TPL asks this Court to augment the record with some prosecution history excerpts that TPL never before filed or relied on in this long-running case. TPL's thirteenth-hour maneuver is especially unjustified because this Court already decided claim construction in a prior appeal, and the only issue on remand was a very narrow question of non-infringement. Under well-established rules governing the composition of the record on appeal, TPL's effort comes far too late. This Court therefore should deny TPL's motion in its entirety.

If this Court does not simply deny the motion outright at this stage, then it should be referred to the merits panel. TPL wants these file history excerpts in the record for the sole purpose of making new claim construction arguments on appeal. TPL did not make these arguments in the district court claim construction proceedings, nor in its earlier, largely-unsuccessful appeal on claim construction, nor in the district court in these limited remand proceedings. Accordingly, unless the Court denies the motion now based on the straightforward rules relating to the appellate record, the merits panel will be in the best position to consider the waiver, preclusion, and record issues in tandem.

II. ARGUMENT

A. TPL Fails To Justify The Addition Of These New Documents To The Record On Appeal

Under ordinary rules governing appellate review, the new prosecution history excerpts are outside the record. It is undisputed that, before the present motion, TPL never filed these documents in the case, never presented them to any court, and never made any argument based upon them. As a result, the documents are not part of the record on appeal. *See* Fed. R. App. Proc. 10(a) (“The following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk.”).

TPL never even tries to provide an excuse or justification for failing to make these documents part of the record below. TPL does not invoke Federal Rule of Appellate Procedure 10(e)(1) or 10(e)(2), and for good reason. Rule 10(e)(1) does not apply because there is no question about “whether the record truly discloses what occurred in the district court.” Fed. R. App. Proc. 10(e)(1) (“If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.”). Rule 10(e)(2) does not apply because this is not a situation where “anything material to either party is omitted from or misstated in the record by error or accident.” Fed. R. App. Proc. 10(e)(2).

TPL instead treats Rule 10(e)(3) as a catch-all provision and claims these materials should be added because they are important to the new arguments it wants to make on appeal and Appellees had access to the documents before. (*See* Motion at 2-3.) But none of this speaks to TPL's failure to make the documents part of the district court record or to make arguments based on those file history excerpts below. There is thus no reason for this Court to depart from the usual rule that "[a]n appellate court may consider only the record as it was made before the district court." *Ballard Med. Prod. v. Wright*, 821 F.2d 642, 643 (Fed. Cir. 1987) (citing *Thomas & Betts Corp. v. Litton Sys., Inc.*, 720 F.2d 1572, 1581 n.6 (Fed. Cir. 1984)); *see also Datascope Corp. v. SMEC, Inc.*, 879 F.2d 820, 824 (Fed. Cir. 1989) ("We are confined here to the record in the case before us. It is beyond cavil that a case is decided on and only on the evidence as presented in that case.").

TPL's failure is even more notable here because this Court has already decided an appeal challenging the district court's claim construction. *See Tech. Props. Ltd. LLC v. Huawei Techs. Co.*, 849 F.3d 1349 (Fed. Cir. 2017) (Judges Moore (author), Wallach, and Chen). In that appeal, this Court mostly approved the district court's claim construction. 849 F.3d at 1359. But the appeal arose from a stipulated judgment of non-infringement based on the claim construction. *Id.* at 1352. This Court vacated and remanded for the district court to address whether this Court's minor modification to one aspect of the construction made a

difference to non-infringement. *Id.* at 1359. After further briefing, the district court responded with a thorough decision finding no genuine issue of disputed material fact and entering a complete summary judgment of non-infringement for all Appellees. (*See* Dkt. No. 1 in this appeal.) Claim construction was not an issue before the district court on remand, TPL did not raise it as an issue, and it is not properly before the Court on this second appeal.

TPL thus lacks a good reason to justify or excuse its failure to properly make these documents part of the case record. Accordingly, TPL should not be given a do-over at this very late stage of the proceedings.

B. Judicial Notice Does Not Cure TPL’s Lateness

TPL’s reliance on the general proposition that a file history may be the subject of judicial notice is beside the point here. The issue is not whether file history excerpts are proper subjects of judicial notice in general. Rather, the question is whether these new materials should be added so late in the game to the record on appeal. For the reasons discussed above, the answer to that question is “no.” *See* Introduction & Section A, *supra*; *see also Am. Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 746 (Fed. Cir. 1987) (“Because no part of the file history of the ’123 patent was before the district court, submission of excerpts to this court was improper.”).

C. If The Motion Is Not Denied Now, Then The Merits Panel Should Consider It

The principles and authorities discussed above are enough for this Court to deny TPL's motion at this pre-merits stage. If the Court does not simply deny the motion now, then a ruling should be deferred to the merits panel. As noted above, TPL wants to make these new materials part of the record on appeal for the sole purpose of trying to support the new arguments it is making for the first time on appeal. The foreclosure of these new arguments under principles of waiver and law of the case would be an issue even if TPL were not trying to wedge new materials into the record to support them. Appellees will be arguing waiver and law of the case with respect to these new arguments in their forthcoming merits brief on appeal. If this Court views a decision on TPL's current motion as bound up in this foreclosure-of-arguments issue, as opposed to a decision that can be issued based on the rules of the appellate record alone, then deferring to the merits panel would be appropriate. The fact that a merits panel of this Court already has conclusively decided the claim construction issues in this case on the first appeal gives even more reason to defer the motion unless it is simply denied outright.

III. CONCLUSION

TPL's attempt to add new file history excerpts to the record comes at least three stages too late. TPL did not present or rely upon these excerpts (1) in the district court claim construction proceedings, (2) in the claim construction appeal

to this Court, or (3) in the district court on remand. Accordingly, this Court should deny TPL's motion now, or in the alternative should defer it to the merits panel to consider alongside the foreclosure of TPL's new claim construction arguments on appeal.

Dated: May 3, 2018

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Technology Properties Limited LLC, et al. v. Huawei Technologies Co., Ltd. et al.

18-1439, -1440, -1441,
Case No. -1444, -1445

CERTIFICATE OF INTEREST

Counsel for the:

(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

Samsung Electronics Co., Ltd. & Samsung Electronics America, Inc.

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10 % or more of stock in the party
Samsung Electronics Co., Ltd.	None	None
Samsung Electronics America, Inc.	None	Samsung Electronics Co., Ltd.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

DLA Piper LLP (US): Ryan Cobb (no longer with firm)

FORM 9. Certificate of Interest

Form 9
Rev. 10/17

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir.R. 47.4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).
The only such cases of which counsel is aware are the cases that already are part of these consolidated appeals: 18-1439, 18-1440, 18-1444, and 18-1445.

February 5, 2018
Date

/s/ Aaron Wainscoat
Signature of counsel

Please Note: All questions must be answered

Aaron Wainscoat
Printed name of counsel

cc: All Counsel of Record

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
Technology Properties Limited v. Huawei Technologies Co., Ltd.

Case No. 18-1439 (LEAD), 18-1440

CERTIFICATE OF INTEREST

Counsel for the:

(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
ZTE (USA) Inc.	ZTE (USA) Inc.	Shenzhen Zhongxingxin Telecommunications Equipment Company Limited.
ZTE Corporation	ZTE Corporation	

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

McDermott Will & Emery LLP: Charles M. McMahon, Jay H. Reiziss, Hersh H. Mehta, Kieran L. Kieckhefer; Polsinelli: Fabio Marino; Brinks Gilson & Lione: William H. Frankel, Robert S. Mallin; Sheppard, Mullin, Richter & Hampton LLP: Scott R. Miller; Davis Wright Tremaine LLP: Martin L. Fineman.

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Technology Properties Limited LLC, et al. v. ZTE Corporation, et al., Case No. 3:12-cv-03876-VC, Technology Properties Limited LLC, et al. v. Huawei Technologies Co., Ltd, et al. Case No. 2016-1306, 2016-1307, 2016-1309, 2016-1310, 2016-1311

2/5/2018

Date

/s/ Charles M. McMahon

Signature of counsel

Charles M. McMahon

Printed name of counsel

Please Note: All questions must be answered

cc: Counsel of Record

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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by:

- U.S. Mail
- Fax
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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Technology Properties Limited LLC, et al. v. Huawei Technologies Co., Ltd. et al.

Case No. 18-1439, -1440, -1441, -1444, -1445

CERTIFICATE OF INTEREST

Counsel for the:

(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

Huawei Technologies Co., Ltd.; Futurewei Technologies, Inc.; Huawei Device Co., Ltd.; Huawei Device USA Inc.; Huawei Technologies USA, Inc.

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Huawei Technologies Co., Ltd.	n/a	see attached Page 3
Futurewei Technologies, Inc.	n/a	see attached Page 3
Huawei Device Co., Ltd.	n/a	see attached Page 3
Huawei Device USA Inc.	n/a	see attached Page 3
Huawei Technologies USA, Inc	n/a	see attached Page 3

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Steptoe & Johnson LLP: Timothy C. Bickham, William F. Abrams, Michael Flynn-O'Brien, Huan-Yi Lin (no longer with firm), Morgan Linscott Hector (no longer with firm)

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The only such cases of which counsel is aware are the cases that already are part of these consolidated appeals: 18-1440, 18-1441, 18-1444, and 18-1445.

2/7/2018

Date

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Please Note: All questions must be answered

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Technology Properties Limited v. Huawei Technologies Co., Ltd.

Case No. 18-1439, -1440, -1441, -1444, -1445

**CERTIFICATE OF INTEREST
(Attached Page 3)**

Counsel for the Appellee Huawei Technologies Co., Ltd.; Futurewei Technologies, Inc.; Huawei Device Co., Ltd.; Huawei Device USA Inc.; and Huawei Technologies USA, Inc. certifies the following:

-
3. Parent corporations and publicly held companies that own 10% or more of stock in the party

Huawei Technologies Co., Ltd. is a wholly owned subsidiary of Huawei Investment & Holding Co., Ltd. and no publicly held company owns 10% or more of its stock.

Huawei Device Co., Ltd. is jointly owned by Huawei Technologies Co., Ltd. and Huawei Tech. Investment Co., Ltd. and no publicly held company owns 10% or more of its stock.

Huawei Device USA Inc. is a wholly owned subsidiary of Huawei Device (Hong Kong) Co., Ltd. and no publicly held company owns 10% or more of its stock.

Futurewei Technologies, Inc. is a wholly-owned subsidiary of Huawei Technologies Coöperatief U.A. and that no publicly held company owns 10% or more of its stock.

Huawei Technologies USA, Inc. is a wholly owned subsidiary of Huawei Technologies Coöperatief U.A. and no publicly held company owns 10% or more of its stock.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Timothy C. Bickham

/s/ Timothy C. Bickham

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Signature of Counsel

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Technology Properties Limited v. Huawei Technologies Co., Ltd.

Case No. 18-1439; -1440, -1441, -1444, -1445

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Counsel for the:

(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
LG Electronics, Inc.	LG Electronics, Inc.	LG Corporation
LG Electronics U.S.A., Inc.	LG Electronics U.S.A., Inc.	LG Electronics, Inc.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Fish & Richardson, P.C., Michael J. McKeon, Christian A. Chu, Leeron Kalay, Olga I. May, Shelley K. Mack (no longer with firm), Wasif H. Qureshi (no longer with firm), Scott A. Elengold (no longer with firm)

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5/2/2018

Date

/s/ Christian A. Chu

Signature of counsel

Please Note: All questions must be answered

Christian A. Chu

Printed name of counsel

cc: All Counsel of record via CM-ECF

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Technology Properties Limited, LLC, et al. v. Huawei Technologies Co., Ltd., et al.

Case No. 18-1439

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Counsel for the:

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Nintendo of America Inc. & Nintendo Co., Ltd.

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Nintendo of America Inc.	N/A	Nintendo Co., Ltd., is publicly traded in Japan, and owns 100% of Nintendo of America Inc. Stock
Nintendo Co., Ltd.	N/A	Nintendo Co., Ltd., is publicly traded in Japan, and owns 100% of Nintendo of America Inc. stock

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Cooley LLP: Thomas J. Friel, Jr.; Stephen R. Smith; Matthew J. Brigham
 Nixon & Vanderhye, P.C.: Updeep S. Gill

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N/A

2/5/2018

Date

/s/ Stephen R. Smith

Signature of counsel

Please Note: All questions must be answered

Stephen R. Smith

Printed name of counsel

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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I hereby certify that on May 3, 2018, I electronically filed the foregoing DEFENDANTS-APPELLEES' RESPONSE TO PLAINTIFFS-APPELLANTS' MOTION FOR JUDICIAL NOTICE OF ADDITIONAL MATERIALS FROM THE '336 PATENT FILE HISTORY with the Court's CM/ECF filing system, which constitutes service, pursuant to Fed. R. App. P. 25(c), Fed. Cir. R. 25(a), and the Court's Administrative Order Regarding Electronic Case Filing 6(A) (May 17, 2012).

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Inc.*

CERTIFICATE OF COMPLIANCE

This response to a motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(1)(E) and the word limitation of Federal Rule of Appellate Procedure 27(d)(2)(A). This response contains 1,294 words, excluding the portions of the brief exempted by the rules. This response has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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