

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,

Petitioner,

v.

SIGHTSOUND TECHNOLOGIES, LLC,

Patent Owner.

Case CBM2013-00023

Patent 5,966,440

**PATENT OWNER SIGHTSOUND TECHNOLOGIES, LLC'S FIRST SET
OF OBJECTIONS TO PETITIONER APPLE INC'S EXHIBITS
SUBMITTED IN SUPPORT OF REPLY**

Pursuant to 37 C.F.R. § 42.64(b)(1), the undersigned, on behalf of and acting in a representative capacity for SightSound Technologies, LLC (“Patent Owner”), hereby submits the following objections to Petitioner Apple Inc.’s (“Petitioner”) Exhibits 4358-4466 and any reference to/reliance on the foregoing, including, without limitation, citations thereto in Petitioner’s Reply. Petitioner’s objections below apply the Federal Rules of Evidence (“F.R.E.”) as required by 37 C.F.R. § 42.62, as well as pursuant to 37 C.F.R. §§ 42.23(b), 42.53, 42.61, and 42.65, as stated below.

I. Objections to Exhibit 4414 and Exhibits 4379, 4395-4396, 4398-4399, 4400-4408, 4412, 4417-4418, 4460, and 4466 cited therein, Any Reference to/Reliance Thereon, and Improper Incorporation Thereof into Reply

Evidence objected to: Exhibit 4414, titled “Declaration of Lawrence Kenswil,” and exhibits 4379, 4395-4396, 4398-99, 4400-4408, 4412, 4417-4418, 4460, and 4466 cited therein.

Grounds for objection: F.R.E. 402 (“General Admissibility of Relevant Evidence”); F.R.E. 403 (“Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons”); 37 C.F.R. § 42.61 (“Admissibility”); F.R.E. 601 (“Competency to Testify in General”); F.R.E. 602 (“Need for Personal Knowledge”); F.R.E. 701 (“Opinion Testimony by Lay Witness”); F.R.E. 702

(“Testimony by Expert Witnesses”); F.R.E. 703-705 (“Witness Not Qualified to Provide Expert Testimony”); F.R.E. 801, 802 (“Impermissible Hearsay”); 37 C.F.R. § 42.65 (“Expert testimony; tests and data”); 37 C.F.R. § 42.23(b) (“Oppositions and replies”).

There has been no showing that Mr. Kenswil is qualified to provide expert opinions on any technical matter, including bandwidth, compression, hard drives, memory size, storage systems, hard disks, data transmission, DRM, the iTunes user interface, the prevalence of computers and access to data-enabled telecommunications lines in consumers’ homes, and encryption and purported technical problems solved or not solved by the patents (*see, e.g.*, Ex. 4414, Sections VII-VIII), rendering his opinions on these matters improper and inadmissible under at least F.R.E. 702 and F.R.E. 703-705. There has further been no showing that Mr. Kenswil is qualified to provide any expert opinion on whether the iTunes Music Store (“ITMS”) practices or is coextensive with the patented claims (*see, e.g.*, Ex 4414 ¶¶ 29-31), rendering his opinions on these matters improper and inadmissible under at least F.R.E. 702 and F.R.E. 703-705. There has further been no showing that Mr. Kenswil is qualified to provide any expert opinion on any consumer-related issue, including branding, consumer behavior, consumer purchasing patterns, and consumer demand for the ITMS or for any particular feature of the ITMS (*see, e.g.*, Ex. 4414, Section VIII), rendering his

opinions on these matters improper and inadmissible under at least F.R.E. 702 and F.R.E. 703-705. Further, Mr. Kenswil has not demonstrated that he possesses first-hand knowledge, experience, or perceptions regarding the above-identified opinions, rendering any lay testimony or lay opinions on these matters improper and inadmissible under at least F.R.E. 601, F.R.E. 602 and F.R.E. 701.

Mr. Kenswil's testimony regarding SightSound's business strategies, its operations, and the reasons for its purported failure (Ex. 4414, Section VI, ¶¶ 34-50, 77-79, 82-83) are similarly not based upon any established expertise or first-hand experience or knowledge in violation of F.R.E. 602, F.R.E. 701, F.R.E. 702 and F.R.E. 703-705. Instead, Mr. Kenswil's testimony recites and misconstrues internal SightSound documents, many of which are incomplete drafts, and thus not appropriate facts or data upon which to base expert testimony under F.R.E. 702. Mr. Kenswil's opinions regarding the failure of other digital download companies (*see, e.g.*, Ex. 4414 ¶ 32) are similarly unsupported by expertise or first-hand knowledge in violation of F.R.E. 602, F.R.E. 701, F.R.E. 702 and F.R.E. 703-705, and the documents upon which he bases his opinion regarding the failure of other digital download companies are impermissible hearsay documents in violation of F.R.E. 801 and 802.

Mr. Kenswil's statements in paragraphs 90-92 and 95-96 of Exhibit 4414 provide neither expert opinion nor facts or data upon which any testimony is based.

These paragraphs recite what SightSound's expert, Mr. Snell, testified to in deposition, and are not relied upon or commented on by Mr. Kenswil in any fashion whatsoever, and thus violate F.R.E. 402, 403 and 702.

Mr. Kenswil's opinions regarding the reasons for the commercial success of the ITMS, including that such commercial success is attributable to features or attributes other than the claimed invention or that such features are important to the success of the ITMS, are not based upon reliable facts, data, or empirical or scientific evidence (including survey evidence), and thus such testimony is improper and inadmissible. Specifically, Mr. Kenswil's opinions on the reasons for the commercial success of the ITMS appear to be based either: (1) on no evidence or data, or undisclosed evidence and data, in violation of F.R.E. 702 and 37 C.F.R. § 42.65 (*see, e.g.*, Ex. 4414 ¶¶ 67 (no data disclosed to support opinion that the ITMS success is based upon "its experience, its credibility, its established brand name . . . its user-friendly features, the existing iPod and iTunes music management software. . ."), 68 (no data disclosed to support opinion that consumers demand for content has driven the success of the ITMS), 92-94 (no data disclosed to support opinion that success of ITMS was driven by the identified features)); or (2) on impermissible hearsay documents as discussed below in violation of F.R.E. 801 and 802 (*see* Ex. 4414, Section VIII).

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