

BEFORE THE PATENT TRIAL AND APPEAL BOARD IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Trial No.: IPR 2013-00083
In re: U.S. Patent No. 6,415,280
Patent Owners: PersonalWeb Technologies, LLC & Level 3 Communications
Petitioner: EMC Corp. & VMware, Inc.
Inventors: David A. Farber and Ronald D. Lachman

* * * * *

November 7, 2013

PATENT OWNER'S MOTION TO EXCLUDE

A. CLARK'S REPLY DECLARATION STATEMENTS ABOUT LANGER, AND LANGER ITSELF, SHOULD BE EXCLUDED

The statements in the Reply Declaration of Douglas W. Clark (Ex. 1078) at paragraph 10 that rely upon and/or cite to Langer are objected to and should be excluded as irrelevant, prejudicial, confusing, lacking foundation, and beyond the scope of this IPR. *See e.g.*, Federal Rules of Evidence (FRE) 401, 402, 403. *See* paragraph 10 of the Clark Reply Declaration, at page 8 last four lines and at page 9 first six lines. (Ex. 1078.) Petitioner's Reply relies on this paragraph of the Clark Reply Declaration. (Pet. Reply 2-4, 7.) PO filed and served timely objections to these statements. *See* section 2 of PO's objections filed/served October 8, 2013 (Paper 54).

This IPR was instituted based on Woodhill – not on Langer. Reliance on Langer on reply is outside the scope of this IPR and impermissible. This is also improper because petitioner's reply may only respond to arguments raised in Patent Owner's Response (PO did not mention Langer in its Response), and new evidence such as these documents is improper. *See e.g.*, 37 CFR § 42.23(b) (petitioner's reply may only respond to arguments raised in PO's response); 37 C.F.R. § 42.123(b) (late submission of supplemental information requires motion/explanation of why not submitted earlier); and Office Patent Trial Practice Guide, Vol. 77, No. 157, pg. 48767 at I (Aug. 14, 2012).

Additionally, Langer (Ex. 1003) itself should be excluded as not properly authenticated and as inadmissible hearsay. Despite no ground based on Langer

being instituted, Petitioner's Reply relied on Langer as explained above.

Paragraph 10 of the Reply Declaration of Douglas W. Clark (Ex. 1078) relies upon Langer and alleges that Langer existed as of the time of Woodhill, and Petitioner's Reply relies upon that paragraph. (Pet. Reply 2-4, 7.) PO properly objected to Langer (Ex. 1003) as unauthenticated and as inadmissible hearsay, in a timely manner, via its objections that were filed and served on May 30, 2013 (Paper 22, sections 1-4).

FRE 901 requires parties to authenticate documents. Langer was allegedly printed off the Internet in 2003 based on the "7/29/2003" date in the lower-right corner of the document. There is no evidence authenticating Langer as having been in existence prior to the April 11, 1995 effective filing date of the patent. No witness of record has personal knowledge of Langer existing prior to April 11, 1995, and electronic data such as Langer is inherently untrustworthy because it can be manipulated from virtually any location at any time. *Novak v. Tucows, Inc.*, No. 06-CV-1909 (JFB) (ARL), 2007 U.S. Dist. LEXIS 21269, *17-18 (E.D.N.Y. Mar. 26, 2007) [attached as Ex. 2018]; *St. Luke's Cataract and Laser Institute v. Sanderson*, 2006 WL 1320242, *2 (M.D. Fla. 2006) (excluding documents obtained via the Internet and explaining that "web-sites are not self-authenticating" [attached as Ex. 2019]; *Wady v. Provident Life and Accident Insur. Co. of Am.*, 216 F.Supp.2d 1060, 1064-65 (C.D. Calif. 2002) (excluding computer documents as unauthenticated - "anyone can put anything on the Internet . . . any evidence

procured off the Internet is adequate for almost nothing”); and *St. Clair v. Johnny’s Oyster & Shrimp, Inc.*, 76 F.Supp.2d 773, 774-75 (S.D. Tex. 1999) (the “Web provides no way of verifying the authenticity . . .”, that there is a “presumption that the information he discovered on the Internet is inherently untrustworthy.”) And Langer is not self-authenticating.

Petitioner’s witnesses regarding Langer testified that the first time they saw Langer was in 2012 or 2013. (Moore Dep. 49-50 [Ex. 2020]; Clark Dep. 180 [Ex. 2008].) The fact that Langer is mysteriously missing the required Usenet “path” header further calls its authenticity into question. (Moore Dep. 30, 32-33, 50 [Ex. 2020]; Moore Decl. ¶ 17 [Ex. 1052].) Petitioner has not established that Langer existed prior to April 11, 1995 or at the time of Woodhill. No witness has personal knowledge of Langer’s alleged existence prior to April 11, 1995 or at the time of Woodhill. There is no declaration from any author of Langer as to when it was created. And there is no testimony from any witness having personal knowledge of having reviewed or received Langer prior to April 11, 1995. Petitioner provides attorney argument to support its allegations. It is well established that attorney argument is neither evidence nor a substitute for evidence.

FRE 801 defines hearsay, and FRE 802 makes hearsay inadmissible. Dates in Langer, or any other information that purports to date Langer, are inadmissible hearsay not subject to any hearsay exception. *Tucows*, 2007 U.S. Dist. LEXIS 21269, *14-16 (excluding printouts from the Internet as inadmissible hearsay) [Ex.

2018]; *Hilgraeve, Inc. v. Symantec Corp.*, 271 F.Supp.2d 964, 974-75 (E.D. Mich. 2003) (explaining that copyright dates and other dates imprinted on a document *are hearsay* when offered to prove the truth of the matter asserted, such as that the document was publicly accessible as of that date); and *St. Clair*, 76 F.Supp.2d at 774-75 (“any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules found in F.R.E. 807.”) Furthermore, the entirety of Langer is inadmissible hearsay to the extent that petitioner contends that any statements therein were made prior to the critical date.

Petitioner has failed to meet its burden of properly authenticating Langer under the FRE, and has failed to establish that Langer represented state of the art at the time of the invention. 37 C.F.R. §42.1(d). Langer should be excluded at least for failing to be properly authenticated under FRE 901-902, and/or because dates and any other information thereon purporting to date them are inadmissible hearsay not subject to any hearsay exception.

**B. STATEMENTS IN CLARK’S REPLY DECLARATION
RELYING ON CLAIM LANGUAGE OF WOODHILL SHOULD
BE EXCLUDED BECAUSE THAT SUBJECT MATTER IN
WOODHILL IS NOT “PRIOR ART”**

The statements in the Reply Declaration of Douglas W. Clark (Ex. 1078), at paragraphs 7 and 13, that rely upon and/or cite to the claims of Woodhill (Ex. 1005) are objected to and should be excluded as irrelevant, prejudicial, confusing, lacking foundation, and beyond the scope of this IPR. See paragraph 7, last

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.