

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. and VMware, Inc.
Inventors: David A. Farber and Ronald D. Lachman

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November 27, 2013

PATENT OWNER'S REPLY TO PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE

A. Clark's Statements About Non-Instituted Material

Petitioner has offered no credible response to PO's motion to exclude Dr. Clark's statements concerning Langer on the basis that this IPR was not instituted on Langer and testimony regarding Langer should be excluded. These statements should be excluded for the reasons explained in PO's motion. Petitioner improperly relies on Langer as alleged "prior art" and attempts to shoehorn into the record additional teachings which are not disclosed or suggested in Woodhill.

B. FRE 901(b)(1) and 901(b)(4) are Not Applicable to Langer

Contrary to petitioner's argument, the Moore testimony cannot authenticate Langer under FRE 901(b)(1) and 901(b)(4). Langer was allegedly printed off the Internet in 2003 – see the "7/29/2003" date in the lower-right corner of Langer (Ex. 1003). There is no evidence authenticating Langer as having been in existence prior to the April 11, 1995 effective filing date of the patent.

Regarding FRE 901(b)(1), Moore's testimony makes clear that he has no personal knowledge authenticating Langer. The first time he saw Langer was in 2012/2013. (Moore Dep. 49-50 [Ex. 2020].) No witness has personal knowledge of Langer existing prior to April 11, 1995. FRE 901(b)(1) cannot apply.

Regarding FRE 901(b)(4), there is nothing in the content of Langer (Ex. 1003) that Langer himself would have had unique knowledge of. There are no aspects of Langer's appearance, substance, patterns, or content that alleviate the

likelihood of forgery and require that the document existed prior to April 11, 1995. Anyone could have prepared Langer at any time.

Moreover, under FRE 901(b)(4) “all the circumstances” must be taken into account. Here, Langer’s authenticity is suspicious for numerous reasons, and these suspicions must be taken into account. First, electronic data such as Langer is inherently untrustworthy because it could have been created and manipulated by anyone 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) [Ex. 2018]; *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.”) Second, the “7/29/2003” date in the lower-right corner of Langer calls into question whether Langer existed prior to April 11, 1995. Third, Langer has no signature, was not in a recognized journal such as IEEE, surfaced only after the True Name patents were first asserted in litigation (see Ex. 2001), there is no chain of custody, and no one recalls Langer existing prior to the critical date or prior to the initial litigations involving the True Name patents. Fourth, the fact that Langer

is inexplicably missing the *required* Usenet “path” header further calls its authenticity into question. (Moore Dep. 30, 32-33, 50 [Ex. 2020]; Moore Decl. ¶ 17 [Ex. 1048]; Ex. 2006.) *In re Hall’s Estate*, 328 F.Supp. 1305, 1311-12 (D.D.C. 1971) (finding document suspicious and excluding when portion of document missing). The “path” header field was required under the Usenet standard for Usenet communications at the time, and the fact that Langer does not have the required field raises significant suspicions. *Id.* Fifth, there is no evidence that Mr. Langer himself was not available to testify, and petitioner provided nothing from him. These suspicions further demonstrate that FRE 901(b)(4) is not applicable.

C. FRE 901(b)(8) is Not Applicable to Langer

Petitioner’s “ancient document” argument is also wrong. First, subsection (A) of FRE 901(b)(8) is not met for Langer because there are suspicions about its authenticity for the reasons explained above in Section B.

Second, Petitioner has failed to satisfy subsection (B) of FRE 901(b)(8). For electronic information “the important of appearance diminishes in this situation, and *the importance of custody or place where found increases correspondingly*” (emphasis added). FRE 901 advisory committee’s note, Example (8). Petitioner has provided no evidence of chain of custody regarding Langer prior to 2012. There is no evidence that Langer was found in a place where, if authentic, it would likely be. Petitioner fails to address the unexplained 10+ year gap in chain of custody. *Rio Bravo Oil Co. v. Staley Oil Co.*, 158 S.W.2d 293, 294-95 (Comm’n

App. 1942); *In re Hall 's Estate*, 328 F.Supp. at 1311-12 (ancient document rule not applicable where insufficient chain of custody).

Third, there is insufficient evidence that Langer was at least 20 years old. FRE 901(b)(8)(C). The date in a document itself cannot be used to establish the alleged 20 years – here, petitioner has provided no independent evidence that Langer existed at least 20 years ago. *Rio Bravo*, 158 S.W.2d at 294-95 (excluding because purported date in document cannot be used to prove that it was ancient).

D. FRE 901(b)(3) is Not Applicable to Langer

There is no “authenticated specimen” for comparison purposes as required by FRE 901(b)(3). The Google Groups document (Ex. 1062), dated “6/10/13”, has not been authenticated as having existed prior to April 11, 1995. Authentication as having existed prior to April 11, 1995 is the relevant inquiry here, and petitioner has not authenticated the Google Groups document in this respect. FRE 901(b)(3) cannot apply. Still further, Moore is not an “expert” or trier of fact, and thus cannot be relied upon under FRE 901(b)(3).

E. FRE 902(6) & 902(7) are Not Applicable to Langer

FRE 902(7) is used for connecting something with a particular entity – it is not used to establish existence of a document as of a particular date and is not applicable here. Langer has no trade inscription or the like that was affixed in the course of any business as required by FRE 902(7). And Usenet postings are not newspapers or periodicals under FRE 902(6), and Langer is not part of a series.

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