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

Trial No.:   IPR 2014-00059

In re: U.S. Patent No. 6,415,280

Patent Owners: PersonalWeb Technologies, LLC & Level 3 Communications

Petitioner: Rackspace US, Inc. and Rackspace Hosting, Inc.

Inventors: David A. Farber and Ronald D. Lachman

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October 22, 2014

PATENT OWNER'S MOTION TO EXCLUDE

The parties have filed a joint motion to terminate this proceeding in its entirety as to all parties. Because that motion has not yet been ruled upon, PO has filed this motion to exclude on this due date for doing so. If the Board grants the parties' joint motion to terminate this proceeding in its entirety as to all parties, this motion should be moot.

A. LANGER (EX. 1004) AND OTHER DOCUMENTS RELIED UPON BY PETITIONER SHOULD BE EXCLUDED AS UNAUTHENTICED AND/OR INADMISSIBLE HEARSAY

Petitioner relies on Langer. Petitioner contends that Langer is a printed publication that published prior to the April 11, 1995 effective filing date of the patent at issue. PO properly objected to Langer and the other documents identified herein as unauthenticated and as inadmissible hearsay, in a timely manner, via its objections that were filed and served on April 29, 2014 (Paper 12). The Federal Rules of Evidence (FRE) apply to the current proceedings. 37 C.F.R. § 42.62. Section XV in patent owner's response is incorporated herein by reference.

FRE 901 requires parties to authenticate documents. Langer was allegedly first printed off the Internet in 2003 based on the "7/29/2003" date in the lower-right corner of the Langer document filed by EMC (Ex. 2008 [Reddy Dep. Ex. 1]; and Reddy Dep. 20-23 [Ex. 2019]). There is no evidence authenticating Langer (Ex. 1004 or Ex. 2008) 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); *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); *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 has not authenticated Langer as having existed prior to the critical date (April 11, 1995). When Langer was printed off the internet in 2003, it was obtained from the Google Groups site which did not even come into existence until the early 2000s (well after the critical date). (Reddy Dep. 18 [Ex. 2019].) The first time petitioner's witness saw Langer was 2013, and he has no personal knowledge of Langer prior to that. (Reddy Dep. 18-20, 32-33 [Ex. 2019].) There is no

evidence of Langer having been in existence or being publicly accessible prior to the April 11, 1995 effective filing date of the patent. There is no evidence of anyone seeing or receiving Langer prior to its apparent printing on July 29, 2003 from "groups.google.com . . ." The July 29, 2003 date is well after the critical date. Whether a document could have been accessed and printed some seven or more years after the critical date is of no moment. The fact that Langer was inexplicably missing the Usenet "path" header (required by the standard) in the EMC IPR raises further suspicions about the document, especially where the path header mysteriously showed up somehow between 2003 and 2013 as evidenced by its existence on Ex. 1007 which was printed off the Internet in 2013. (Reddy Dep. 21, 24-29 [Ex. 2019]) If a Usenet document lacks a path header (the earliest known version of Langer from 2003 lacks a path header; Ex. 2008), this indicates that the document was never sent. (Reddy Dep. 27, 29 [Ex. 2019].) Moreover, even if Langer was provided to "alt.sources.d" or "comp.archives" (there is no evidence that it was), this does not mean it qualifies as a "printed publication" for the reasons described by the Federal Circuit. In *SRI Int'l*, the court explained that a document posted on an open site was not a "printed publication" because it was not catalogued or indexed in a meaningful way and there was no evidence that a customary search would have uncovered it prior to the critical date. *SRI Int'l,* 511 F.3d at 1195-98.

Petitioner has not established that Langer existed prior to April 11, 1995. No witness has personal knowledge of Langer's alleged existence prior to April 11, 1995. 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.

Similarly, Exs. 1009 (Reid) and 1010 (Reid) should be excluded because they have not been authenticated as required by Federal Rule of Evidence (FRE) 901. And these documents are not self-authenticating. See also the reasons regarding non-authentication discussed above and in *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).

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); *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

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