

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LG ELECTRONICS, INC., TOSHIBA CORP.,
VIZIO, INC., HULU, LLC,
CISCO SYSTEMS, INC., and AVAYA INC.,
Petitioner,

v.

STRAIGHT PATH IP GROUP, INC.
Patent Owner.

Case IPR2015-00198¹
Patent No. 6,009,469 C1

**PETITIONER'S MOTION TO EXCLUDE EVIDENCE
FOR INTER PARTES REVIEW OF U.S. PATENT 6,009,469**

¹ IPR2015-01400 has been joined with this proceeding.

Pursuant to 37 C.F.R. 42.64(c), the Federal Rules of Evidence, and the Scheduling Order entered on May 15, 2015 (Paper No. 25), Petitioner moves to exclude the following exhibits submitted by Patent Owner. These exhibits are inadmissible because they are irrelevant and/or contain unauthenticated evidence or inadmissible hearsay:²

Patent Owner's Exhibit	Objection
Exhibit 2021	Irrelevance under Federal Rule of Evidence 401
Exhibit 2028	Irrelevance under Federal Rule of Evidence 401 Authentication under Federal Rule of Evidence 901 Hearsay under Federal Rule of Evidence 802
Exhibit 2031	Irrelevance under Federal Rule of Evidence 401
Exhibit 2033	Irrelevance under Federal Rule of Evidence 401 Authentication under Federal Rule of Evidence 901 Hearsay under Federal Rule of Evidence 802
Exhibit 2034	Irrelevance under Federal Rule of Evidence 401
Exhibit 2035	Irrelevance under Federal Rule of Evidence 401
Exhibit 2036	Irrelevance under Federal Rule of Evidence 401
Exhibit 2039	Hearsay under Federal Rule of Evidence 802

² In the remainder of this motion, the arguments for these objections have been consolidated where those objections are identical across certain exhibits.

Exhibit 2028 and **Exhibit 2033** are documents titled “Modifying WINS server defaults.” While both exhibits appear to have been updated on January 21, 2005, Exhibit 2028 appears to have been printed from the internet on July 29, 2015, and Exhibit 2033 was apparently printed from the internet on May 25, 2015. Patent Owner contends in its Response (Paper No. 34) that these exhibits demonstrate the functionality of the prior art WINS system. However, Exhibit 2028 and Exhibit 2033 must be excluded for three independent reasons.

First, Exhibit 2028 and Exhibit 2033 are irrelevant under Federal Rule of Evidence 401. That is because their apparent publication dates of January 21, 2005 and their apparent printout dates of July 29, 2015 and May 25, 2015 all post-date the September 1994 publication date of the WINS prior art (as well as the ’469 patent’s claimed priority date of September 25, 1995). *See Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1299 (Fed. Cir. 2003) (ignoring several references for claim-construction purposes because the references post-dated the patent at issue and therefore did not reflect the meanings that would have been attributed to the disputed words as of the patent’s grant); *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed Cir. 2005) (ordinary and customary meaning of a claim term is construed as of the effective filing date of the patent application).

Second, Patent Owner has not authenticated Exhibit 2028 or Exhibit 2033, as no fact witness has testified that either exhibit “is what it is claimed to be.” *See* Fed. R. Evid. 901(b)(1). *See Standard Innovation Corporation v. Lelo, Inc.*, Case IPR2014-00148, slip op. at 19–21 (PTAB Apr. 23, 2015) (Paper 41) (web print-outs were improperly authenticated and therefore excluded in part because there was no witness who testified about the print-outs’ accuracy); *Haines v. Home Depot U.S.A., Inc.*, No. 1:10-CV-01763-SKO, 2012 WL 1143648, at *7 (E.D. Cal.

Apr. 4, 2012) (web print-out was improperly authenticated because there was no person to attest to the accuracy of the print-out). Indeed, Professor Bruce Maggs casted serious doubt on the authenticity of Exhibit 2028 and testified that Exhibit 2028 is inaccurate. *See* Exhibit 2037 (Maggs Depo. Tr. 150:10–152:3).

Third, Exhibit 2028 and Exhibit 2033 contain inadmissible hearsay barred by Federal Rule of Evidence 802, because these exhibits are being admitted for the truth of the matter asserted. *See Driver v. Alexander*, No. 3:13-CV-364, 2013 WL 4719024, at *5 (M.D. Tenn. Sept. 3, 2013) (web print-outs were excluded as inadmissible hearsay). Petitioner has therefore made all of the above objections in the record (Paper No. 35) and hereby moves to exclude Exhibit 2028 and Exhibit 2033 now.

Exhibit 2039 was also submitted in support of Patent Owner’s Response (Paper No. 34), but that exhibit is inadmissible hearsay barred by Federal Rule of Evidence 802. As Patent Owner noted in its Response (Paper No. 34), Exhibit 2039 is a transcript of Dr. Henry Houh’s deposition testimony from a separate *inter partes* review. Accordingly, to admit Dr. Houh’s deposition testimony against Petitioner in the present investigation, Patent Owner carries the burden to show that (1) Dr. Houh is “unavailable” as a witness; and (2) Petitioner had “an opportunity and similar motive” to cross-examine Dr. Houh at his deposition. *See* Fed. R. Evid. 804(b)(1); *see also Rivera-Davila v. Asset Conservation, Inc.*, 230 F.3d 1378 n.5 (Fed. Cir. 2000); *and Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014, 1020 (5th Cir. 1993). Patent Owner has made no attempt to meet either requirement here. Patent Owner has not shown any evidence to satisfy Federal Rule of Evidence 804(b)(1) or any other rule that provides an exception for inadmissible hearsay. Petitioner accordingly objected to Exhibit 2039 in the record

(Paper No. 35) and hereby moves to exclude that exhibit under Federal Rule of Evidence 802.

In addition, Patent Owner has submitted the following five exhibits, all of which contain irrelevant dictionary excerpts that were published after the '469 patent's claimed priority date and therefore fail to inform the proper construction of the challenged claims. *See Brookhill-Wilk 1, LLC.*, 334 F.3d at 1299; *Phillips*, 415 F.3d at 1313.

- **Exhibit 2021** appears to be excerpts from the Fourth Edition of the Microsoft Computer Dictionary, published in 1999. Patent Owner cited Exhibit 2021 in support of its Preliminary Response (Paper No. 19) and Response (Paper No. 34). However, Exhibit 2021 is irrelevant to the proper claim construction here because its publication date of 1999 post-dates the '469 patent's claimed priority date of September 25, 1995. Accordingly, Petitioner objected to (Paper No. 29) and hereby moves to exclude Exhibit 2021 under Federal Rule of Evidence 401.
- **Exhibit 2031** appears to be excerpts from the Fifth Edition of Barron's Dictionary of Computer and Internet Terms. Patent Owner cites to that exhibit in its Response (Paper No. 34). But Exhibit 2031 is likewise irrelevant because its publication date of 1996 post-dates the '469 patent's claimed priority date of September 25, 1995. Petitioner thus objected to Exhibit 2031 (Paper No. 35) and hereby moves to exclude that exhibit under Federal Rule of Evidence 401.
- **Exhibit 2034** appears to be a dictionary definition of the word "status," printed from the internet on June 8, 2015. Patent Owner cited Exhibit 2034 in support of its Response (Paper No. 34), but that exhibit is

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