

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ARRIS GROUP, INC.
AND
COX COMMUNICATIONS, INC.
Petitioners

v.

C-CATION TECHNOLOGIES, LLC
Patent Owner

Case: IPR2015-00635
U.S. PATENT NO. 5,563,883

**PETITIONERS' REPLY IN SUPPORT
OF THEIR MOTION TO EXCLUDE**

TABLE OF ABBREVIATIONS

Abbreviation	Meaning
'883 patent	U.S. Patent No. 5,563,883
Pets' Mot.	Petitioners' Motion to Exclude
Reply	Petitioners' Reply to Patent Owner's Response
Resp.	Patent Owner Response

I. THE LIPOFF REPORT IS INADMISSIBLE HEARSAY

A. Patent Owner Relies on the Lipoff Report for the Truth of What It Says

Patent Owner relies on the Lipoff Report “to convince the Board to read a requirement that the ‘central controller’ must perform the step received in claim limitation 1(c).” *Pets’ Mot.* at 6-7 (citing *Resp.* at 36-37). Patent Owner does not attempt to justify its reliance on the Lipoff Report as extrinsic evidence about the meaning of the claims. Instead, Patent Owner recharacterizes what its Patent Owner Response says. *See Opp.* at 1-2. The Patent Owner Response states that “Mr. Lipoff’s prior opinion necessarily rules out step (c) being performed by a remote terminal.” *Resp.* at 37. In this regard, Patent Owner’s argument relies on the Lipoff Report for its truth. The Lipoff Report should not be admitted as extrinsic evidence justifying a departure from the plain language of claim 1.

B. The Lipoff Report Is Not Admissible as Impeachment Evidence Because It Does Not Impeach Mr. Lipoff

It is axiomatic that to be admissible for purposes of impeachment, the alleged inconsistent statement must actually impeach the witness. As Patent Owner says, when a witness testifies to “X” in one proceeding an otherwise hearsay statement may be offered to show that the witness previously said “not X.” *See Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 651 n.8 (10th Cir. 2008). Patent Owner’s argument thus depends on the Lipoff Report saying “not X.” Not only

does the Lipoff Report not impeach because it does not say what Patent Owner quotes it as saying, *compare* Resp. at 21 *with* Ex. 2028, ¶ 365, but Patent Owner has not explained how the actual text of the Lipoff Report impeaches Mr. Lipoff. It doesn't. Instead, Mr. Lipoff's opinion that "[t]he claimed method is initiated and carried out by an apparatus—the central controller," Ex. 2028, ¶ 365, does not mean that all steps of claim 1 are performed by a central controller. The Lipoff Report is inadmissible for impeachment because it does not impeach a thing.

C. The Lipoff Report Is Hearsay and Is Not Admissible for All Purposes Even if It Did Impeach Mr. Lipoff

Even if the Lipoff Report is admissible for impeachment purposes, it is still hearsay and is not admissible for all purposes. As explained in the Motion to Exclude, under Federal Rule of Evidence 801(d)(1) some statements by declarants used for impeachment may be generally admissible since they are not hearsay. *See* Pets' Mot. at 7-8. Patent Owner has not even tried to show that the Lipoff Report meets these requirements. It plainly does not. Thus, even if the Lipoff Report were proper fodder for impeachment, and even if Patent Owner had followed the proper rules for impeaching a witness, it is not admissible for all purposes.

II. PATENT OWNER HAS NOT PROPERLY IMPEACHED MR. LIPOFF

Patent Owner had the Lipoff Report at least *two years* before Mr. Lipoff's October 2015 deposition, *see* Ex. 2030 (Sept. 6, 2013 email), and strategically

chose only to make vague references to it during that deposition. Instead of showing where Mr. Lipoff was “given an opportunity to explain . . . the statement and an adverse party [was] given an opportunity to examine the witness about it” while Mr. Lipoff was called as a witness, Fed. R. Evid. 613(b), Patent Owner says that Petitioners “could have submitted another declaration of Mr. Lipoff in which Mr. Lipoff could have attempted to explain the inconsistency,” *see* Opp. at 4.

There are two problems with Patent Owner’s position. *First*, Patent Owner presumes its Response showed that Mr. Lipoff’s prior opinion was inconsistent. Because Patent Owner misquoted the Lipoff Report, and has not explained how any of the actual text of the Lipoff Report is inconsistent with Mr. Lipoff’s testimony, there was nothing for Mr. Lipoff to explain. That what Patent Owner argues the Lipoff Report says is not what it actually says is self-explanatory.

Second, Patent Owner’s attempt to impeach a witness for the first time in a Patent Owner Response after the witness had been discharged is inconsistent with the Board’s rules. A fundamental rule of construction for all of the Board’s rules is that all rules be “construed to secure the just, speedy, and inexpensive resolution of every proceeding.” *See* 37 C.F.R. § 42.1(b). Patent Owner’s position that another declaration should have been presented with Petitioners’ Reply cannot be reconciled with this rule. Petitioners could have re-engaged with Mr. Lipoff, spent money to prepare and file another declaration, thereby precipitating another

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