

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE INC., and
SAMSUNG ELECTRONICS CO., LTD.,
Petitioners

v.

SUMMIT 6 LLC,
Patent Owner

Case IPR2015-00806
Patent No. 7,765,482

**PETITIONERS' RESPONSE TO PATENT OWNER'S MOTION FOR
OBSERVATIONS ON CROSS-EXAMINATION**

Petitioner submits the following Response to Patent Owner’s Motion for Observations on the Cross-Examination of Dr. Gary Frazier (“the Observations”), Paper 52. As explained in detail below, the Observations consistently and repeatedly mischaracterize Dr. Frazier’s testimony in an attempt to remedy Patent Owner’s failure to provide any qualified expert testimony to support its alleged secondary considerations of non-obviousness. Dr. Frazier’s actual testimony demonstrates that the “objective” evidence of non-obviousness proffered by Patent Owner fails to identify any relevant market size, is generally unreliable, and fails to actually establish commercial success, industry praise, or a long-felt need by those of skill in the art. Patent Owner’s failure to provide any expert opinion regarding the dozens of exhibits it has submitted cannot be remedied by the Observations’ attempt to recast the scope and content of Dr. Frazier’s cross-examination testimony.

Dr. Frazier opined on the insufficiency of Patent Owner’s evidence to demonstrate either: (1) the existence of secondary considerations of non-obviousness, or (2) that any commercial success was the result of the merits of the invention. Ex. 1018 at ¶¶ 17-18. The Observations should be rejected to the extent that they attempt to remedy Patent Owner’s failure by mischaracterizing Dr. Frazier’s testimony.

I. Patent Owner failed to provide any expert testimony regarding the relevant market, and Dr. Frazier's opinions do not rely upon or require independent research.

1. Patent Owner alleges that Dr. Frazier's testimony in Exhibit 2075 at 37:4-22, impeaches his testimony "regarding the uploading and hosting market from 1995 through 2004 as he stated that he relied on this research and document review." Paper 52 at ¶ 1. This is flat wrong. During his deposition Dr. Frazier clearly testified "[t]hat research *did not form the basis for anything that I opine on* in my declaration -- my opinions." Exhibit 2075 at 37:8-10 (emphasis added). As Dr. Frazier testified in his declaration, he "performed Internet research and document review to confirm [his] recollection of the image uploading and hosting market during the period of around 1995 through 2004." Ex. 1018 at ¶ 7. Indeed, contrary to Patent Owner's assertion, Dr. Frazier did not provide an opinion on the "uploading and hosting market." Rather, Dr. Frazier provided his opinion that (1) "there is insufficient data and information in the exhibits and testimony provided by Summit 6 to support a conclusion that the Rimfire service resolved a long-felt customer need, achieved commercial success, or received industry praise" and (2) "even if one were to assume that the Rimfire service did resolve a long-felt customer need, achieve commercial success, or receive industry praise, the exhibits and testimony establish that these claimed accomplishments were just as likely the

result of factors other than the merits of the Rimfire service.” Exhibit 1018 at ¶¶ 17-18.

II. Patent Owner failed to provide sufficient evidence to establish long-felt need, and Dr. Frazier’s opinion analyzed this evidentiary failure.

2. Dr. Frazier did not testify as to any facts regarding the means by which eBay selected its vendors, eBay’s size in the market, or the methodology employed by the researcher(s) who drafted Exhibit 2015. The only facts Dr. Frazier confirmed were (1) the failure of Patent Owner’s evidence to support any claimed long-felt need existed, and (2) the unreliability and lack of source data of Exhibit 2015. Ex. 2075 at 25:13-16 (“[A]gain, on page 2 they put a disclaimer in and – ‘Use at your own risk.’ Also, secondly, I didn’t have the underlying data. So I really didn’t put too much credence into this report.”); 105:19-23 (“But, again, I did not find this information in this Exhibit 2015 persuasive based on disclaimers; based on it being incomplete; based on not having the survey or the data. It could have been one person’s interpretation.”); 25:19-23 (“I read the report. It didn’t really change my opinion that Summit 6 just didn’t provide enough data and information for me as a marketing expert to conclude that the Rimfire service satisfied a long-felt but unresolved need.”). Further, Patent owner alleges that Dr. Frazier testified in Exhibit 2075, at 27:25 – 28:14, that Exhibit 2015 included its “methodology ... which included a comprehensive questionnaire and interviews

with early adopters of image technology, such as eBay.” Paper 52 at ¶ 2. This is a mischaracterization of Dr. Frazier’s testimony. Dr. Frazier merely acknowledged what was stated on the face of the document. *See, e.g.*, Exhibit 2075 at 27:25 – 28:4 (“Q: But at least taken at face value, it indicates that it followed a comprehensive questionnaire; correct? A: Where does it say that? Q: At the top of page 6. A: **Yes, that’s what it says.**” (emphasis added)). Dr. Frazier did not opine that the questionnaire was comprehensive or reliable. Rather, he testified that as a marketing expert he could not rely on other people’s characterizations of data. *See* Exhibit 2075 at 26:6-13 (“there are more pages eluded to than actually what constitute this, and I didn’t have the underlying data.... I’ve just found that it’s difficult for me as a marketing expert to rely on other people’s characterization of the data if I don’t have the underlying data.”). Patent Owner alleges that Dr. Frazier testified in Exhibit 2075, at 28:18-25, that “[b]ased on size, eBay was the leading online marketplace for the sale of goods and services in 2001.” This is not what Dr. Frazier testified. Rather, Dr. Frazier testified: “[b]ased on size, **I would likely agree**, although I’d like to have more information on what other online services -- auction services were available, but -- yeah, I would not dispute that.” Ex. 2075 at 28:22 – 29:3 (emphasis added). Further, Patent Owner alleges that Dr. Frazier “confirmed that eBay carried out a 4-6 month evaluation to select Rimfire over other market players.” Paper 52 at ¶ 2. This is a further mischaracterization of Dr.

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