

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

BUNGIE, INC.,  
Petitioner

v.

WORLDS INC.,  
Patent Owner

---

Case IPR2015-01319  
Patent 8,082,501

---

**PATENT OWNER'S REPLY IN SUPPORT OF ITS MOTION TO  
EXCLUDE PETITIONER'S EVIDENCE UNDER 37 C.F.R. § 42.64(c)**

Petitioner Bungie characterizes Patent Owner’s Motion to Exclude five of Petitioner’s exhibits from the record as a “sideshow.” Paper 36 at 1. But if correct, then it is a sideshow of Bungie’s own making for having introduced irrelevant evidence for an improper purpose in the first place.

Indeed, in opposing the exclusion of its character attacks, Petitioner Bungie confirms that the evidence identified in Patent Owner’s Motion to Exclude (Paper 33) is not relevant to any issue in this proceeding. And Bungie’s attempt to argue relevance of certain exhibits results in numerous post-hoc factual assertions that lack any support in the record. Petitioner’s Exhibits 1033, 1034, 1037, 1041, and 1042 should be excluded.

Exhibit 1033 – Business Wire Article

As explained in Patent Owner’s Motion (Paper 33), Exhibit 1033 has no probative weight on any “fact that is of consequence to the determination” in this proceeding. *See* Fed. R. Evid. 401. This exhibit is not relevant to content of the claims being challenged, to the content of the prior art, or to any other issue to be decided by the Board. Petitioner’s only use of this evidence is in support of its attack of Patent Owner’s character, which is not relevant to any underlying issue in this proceeding.

In opposition, Petitioner newly argues that Exhibit 1033 “is evidence that contravenes Patent Owner’s contention that Bungie’s motivation for challenging the patents is in acting on behalf of Activision.” Paper 36 at 1-2. Petitioner further argues that “[a]s is apparent in the context it was cited, Exhibit 1033 was submitted as background evidence and *to corroborate Bungie’s state of mind in initiating this proceeding.*” *Id.* at 2 (emphasis added). In effect, Bungie is *newly* arguing that someone at Bungie became aware of Exhibit 1033 prior to March 19, 2015<sup>1</sup>, and as a result of Exhibit 1033, decided to initiate this proceeding. But there is no evidence in the record to establish that a) someone at Bungie became aware of Exhibit 1033 before deciding to initiate this proceeding, b) this same person had decision-making authority to initiate this proceeding, and c) Exhibit 1033 played a part in this person’s decision to initiate this proceeding. Indeed, the sole citation to Exhibit 1033 appears on page 2 of Bungie’s opposition (Paper 10) to Patent Owner’s Motion for Routine or Additional Discovery. There, Petitioner does not argue that Exhibit 1033 played any role in Bungie’s decision to initiate this proceeding. Bungie merely cites to this evidence in support of its castigation of Patent Owner. Despite Bungie’s post-hoc explanation of the relevance of this

---

<sup>1</sup> According to Dr. Zyda, he performed most of his work for Bungie on these IPRs after March 19, 2015. *See* Ex. 2016 at 254:5-8.

exhibit, Bungie submitted and used it in this case purely as character evidence.

This was improper.

What's more, Bungie's new argument on the relevance of Exhibit 1033 flies in the face of Bungie opposition to Patent Owner's motion for discovery in this case. Patent Owner's motion sought production of communications from Activision related to Bungie's initiation of this proceeding. Paper 9 at 5-6. In opposition, Bungie argued that Patent Owner's requests for discovery were not "narrowly tailored to issues relating to these proceedings ... ." Paper 10 at 9. Bungie now asks the Board to consider its state of mind in initiating this proceeding, but on incomplete evidence. Bungie should not be able to have it both ways. Specifically, Bungie should not be able to oppose additional discovery into evidence that led it to file this proceeding, while at the same time arguing to keep in evidence that it now contends is relevant to that very same issue.<sup>2</sup>

---

<sup>2</sup> By asking the Board to consider its state of mind in initiating this proceeding on incomplete evidence, Bungie has opened the door to additional discovery on this issue. Bungie should therefore be required to produce all evidence of its state of mind in instituting this proceeding. Patent Owner is in the process of seeking Board authority to move for additional discovery of this evidence. *See* Ex. 2045 (email correspondence dated July 29, 2016 from Patent Owner to Petitioner on the intended motion).

Second, as is clear from Bungie’s opposition, Bungie does not and cannot cite to anywhere in the record where Exhibit 1033 is connected to Bungie’s state of mind. Rather, Bungie asks the Board to draw a conclusion of relevance based on “the context in [which] it was cited.” Paper 36 at 2. This post-hoc explanation for the relevance of Exhibit 1033 should be rejected by the Board and the evidence should be excluded.

#### Exhibit 1034 – Business Insider

Like Exhibit 1033, Petitioner newly argues in its opposition to the motion to exclude that Exhibit 1034 “is evidence that contravenes Patent Owner’s contention that Bungie is acting on behalf of Activision.” Paper 36 at 5. Just like with Exhibit 1033, this new argument finds no support in the record and cannot overcome Petitioner’s pure use of Exhibit 1034 as character evidence. *See* Paper 10 at 2.

In addition to irrelevance under Fed. R. Evid. 402, Patent Owner moved to exclude Exhibit 1034 as inadmissible hearsay under Fed. R. Evid. 801. In opposition, Petitioner comes forward with the unsubstantiated argument that Exhibit 1034 is “corroborating evidence of a reasonable state of mind in initiating this proceeding ... .” Paper 36 at 6. In effect, Petitioner is arguing that Exhibit 1034 is being offered not for the truth of its contents, but for the effect of Exhibit

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.