

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICROSOFT CORPORATION,

Petitioner,

v.

BRADIUM TECHNOLOGIES LLC,

Patent Owner.

CASE: IPR2016-00448

Patent No. 7,908,343 B2

PETITIONER'S MOTION TO EXCLUDE EVIDENCE

Paper No. 45

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I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(c) and the Federal Rules of Evidence, Petitioner Microsoft Corporation (“Microsoft” or “Petitioner”) hereby submits its Motion to Exclude inadmissible evidence proffered by Patent Owner Bradium Technologies, LLC (“Bradium”) (Exhibits 2016-2018, 2021, 2030, 2032, 2035-2036, 2039, 2044-2049, 2051-2053, 2059, and 2063). Microsoft filed timely objections to these exhibits on November 15, 2016 (Paper 22). Bradium’s arguments for secondary indicia of non-obviousness, instead of presenting legally competent evidence, attempt to corroborate the interested testimony of Bradium’s co-owner Isaac Levanon (Ex. 2004) with inadmissible hearsay, including several press releases or reports generated at the direction of Mr. Levanon himself.

II. ARGUMENT

A. **Bradium’s Exhibits 2016-2018, 2021, 2030, 2032, 2035-2036, 2039, 2044-2049, 2051-2053, and 2063 Should be Excluded**

The contents of Exhibits 2016-2018, 2021, 2030, 2032, 2035-2036, 2039, 2044-2049, 2051-2053, 2059, and 2063 are inadmissible as hearsay. Federal Rule of Evidence (FRE) 802. The challenged exhibits meet FRE 801’s definition of hearsay as each is being offered by Bradium for the truth of the matter asserted therein. Many of the challenged exhibits are not only hearsay, but hearsay within hearsay. FRE 801, 805. Because Bradium cannot establish any exceptions to the hearsay rule for the challenged exhibits, they are inadmissible. FRE 801-03, 805.

1. *The Challenged Exhibits*

a. Third-Party Statistics Webpages (Exhibits 2016-2018)

Exhibits 2016 and 2017 are simply printouts of third-party webpages purporting to contain statistics about Microsoft Research and Development expenses, without any disclosure of the underlying sources. Paper 22, ¶¶ 1-2. For example, Ex. 2017 contains a disclaimer reading “source information for logged in users only,” but Bradium failed to provide any such source information.

Bradium's expert does not rely on these webpage printouts, nor does Bradium itself even provide any explanation of what they are other than an attorney declaration stating that the exhibits were retrieved from a particular internet location on a particular date. Bradium cites these exhibits as evidence of the truth of the matter asserted (i.e. Microsoft's R&D spending patterns). Paper 20 at 56.

As for Exhibit 2018, it is not even clear from either the exhibit itself or the Patent Owner Response what this exhibit is, but it appears to simply be a fragmentary excerpt of an internet search result, again without an accompanying copy of the actual linked document, without which the short excerpt makes no sense. Paper 22, ¶ 3. Nevertheless, Bradium cites the short excerpt as evidence of the truth of the matter asserted, specifically that Frost and Sullivan allegedly offered “praise” for 3DVU. Paper 20 at 57. The hyperlink contained in Bradium's

attorney declaration (Ex. 2060, ¶ 7) shows that the page is simply a search result linking to a report which Bradium chose not to submit.

b. 3DVU Press Releases (Exhibits 2021, 2030, 2032, 2039, 2044-2049, and 2063)

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Bradium also cites various press releases (and website reprints of press releases) in support of its arguments for secondary indicia of non-obviousness. *See generally* Paper 20 at 5, 55-60. For example, Bradium cites 3DVU's own press releases, rather than independent evidence, as evidence that 3DVU received certain awards (Paper 20 at 5, citing Ex. 2021), as evidence that 3DVU licensed "the technology of the '343 patent" (Paper 20 at 5, citing Ex. 2030, 2032), and in support of its assertions (supported by no other evidence) that 3DVU's Navi2Go navigation product became a "bestseller." Paper 20 at 59, citing Ex. 2048.

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Microsoft objected to these exhibits in Paper 22, ¶¶ 4-5, 10-16, and 21.

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c. C.E. Unterberg Towbin Reports (Exs. 2035, 2036)

Mr. Levanon's declaration (Ex. 2004)- but not the petition itself- cites Exs. 2035 and 2036, which are purportedly unsworn third-party analyses prepared at Mr. Levanon's request by an investment banker hired by Mr. Levanon. Paper 22, ¶¶ 8-9. The purported relevance of these documents is not explained in either Paper 20 or Ex. 2004, but these documents appear to have been prepared in order to promote Mr. Levanon's desire to be acquired by Microsoft. Bradium has not offered sworn testimony from the authors of these documents.

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