

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICROSOFT CORPORATION,

Petitioner,

v.

BRADIUM TECHNOLOGIES LLC,

Patent Owner.

Case IPR2016-00449

Patent No. 8,924,506 B2

**PETITIONER'S REPLY TO PATENT OWNER'S OPPOSITION TO
PETITIONER'S MOTION TO EXCLUDE EVIDENCE**

Paper No. 52

Patent Owner Bradium's Opposition to Petitioner Microsoft's Motion to Exclude Evidence fails to rebut Microsoft's showing that Bradium's secondary indicia of non-obviousness arguments depend on inadmissible hearsay. Bradium repeatedly attempts to obfuscate hearsay statements with attorney argument that the statements are simply being offered "for the fact that [the statements were] made" or words to that effect. These arguments do not change the fact that challenged exhibits are hearsay and relied on by Bradium as hearsay.

By its own admission, Bradium relies on Exhibits 2051-2053 (Kenwood car navigation system brochures) as evidence that "DENSO licensed the patented technology that is claimed in the '343 and '506 patents and included the technology in the Kenwood car navigation systems that are reflected in Exhibits 2051-2053" (Paper 49 at 1-2) because "the brochures state that FlyOver's proprietary technology is included in the products." (*Id.* at 2.) This is, by definition, an out of court statement offered to prove the truth of the matter asserted and therefore hearsay. The only portions of these documents that Bradium's counsel translated are boilerplate intellectual property notices apparently added to the document by FlyOver (which became 3DVU before its eventual failure and closure), not DENSO (*see, e.g.* Ex. 2051 at 40-41). Therefore, Bradium's arguments that these statements are "verbal acts that are admissible to show the state of mind of DENSO" (Paper 49 at 4) are nonsensical. Likewise, the

dates on the exhibits are indisputably offered by Bradium for the truth of the matter asserted, *i.e.* that the systems were released around those dates. Bradium's attempt to rely on the FRE 803(6) "business records" exception (Paper 49 at 2) also fails because Bradium provides no foundational evidence that the exception applies, as
5 required by FRE 803(6)(D), beyond attorney argument.

Bradium's defense of its failure to translate the exhibit also fails because Bradium's attorney translation did not include all relevant portions of the exhibit. Mr. Levanon asserts repeatedly that certain pages of Exs. 2051-2053 are "devoted to 3DVU technology and its benefits" and that these brochures "show the 'Sky
10 Cruise View' ... feature that 3DVU developed for the products" (Ex. 2004, ¶¶ 53-56), yet provides no translation of any of the Japanese text on the cited pages discussing these features, relying instead on Mr. Levanon's self-serving account of what the pages describe. Under such circumstances, a waiver of the requirements of 37 C.F.R. 42.63(b), which Bradium admits is necessary, is unwarranted.

15 Bradium's arguments regarding the various hearsay press releases, news articles, and websites that it relies on (*e.g.* Exs. 2018, 2021, 2030, 2032, 2039, 2045-2049, and 2063) fail for similar reasons. Bradium repeatedly argues that it only relies on such press releases to show "that the statement was made, and the timing of the statement," that "a particular author said that [Navi2Go] sold well"
20 and other rationalizations to that effect. (*See generally* Paper 49 at 6-10, 12.)

However, other than such conclusory assertions, Bradium provides no explanation why the utterance of any of these statements, or their timing, carries any significance beyond the truth of the content of the statements.

Moreover, Bradium cites the majority of these exhibits in a section of its Patent Owner Response entitled "commercial success," showing that Bradium does in fact rely on these exhibits for their content, *i.e.* the purported success of Bradium's products. For example, Bradium's Patent Owner Response cites Ex. 2048, which Mr. Levanon admitted was a 3DVU press release appearing in Directions Magazine (Ex. 1019 at 64:16-65:4) as evidence that "Navi2Go reportedly became the bestseller in marketplaces with thousands of users" (Paper 16 at 60), not "that the statement was made and the date of the statement," as Bradium now argues. Likewise, Bradium's argument that it does not rely on its own press releases regarding purported awards (Exs. 2021, 2063) for the truth of the matter asserted therein (*i.e.*, that Bradium received such awards) is not credible when these exhibits are cited by Mr. Levanon solely to show "industry awards." (Ex. 2004, ¶¶ 36-37.)

Bradium argues a similar non-distinction in regard to the two Unterberg Towbin reports (Exs. 2035 and 2036) prepared at Mr. Levanon's request. In the space of a single sentence, Bradium denies that it "rel[ies] on these valuation summaries for the truth of what they state, *i.e.* that the technology was worth X

dollars at *Y* date,” then restates the *same purpose* as its purported non-hearsay reason for introducing the exhibit, *i.e.* “to show what a reputable company... said the technology was worth.” (Paper 49 at 11.) Such arguments are self-refuting.

Bradium's attempts to justify Exs. 2016 and 2017 (third party reports
5 discussing purported Microsoft R&D spending) as statements of a party-opponent under FRE 801(d)(2) also fail. (Paper 49 at 13.) First, Bradium's statement that the documents are “based on Microsoft's own reported data” is pure attorney
10 argument, unsupported by any evidence or even the exhibits themselves, neither of which cite their sources. Second, neither exhibit is a statement by Microsoft, and
15 Bradium fails to identify any hearsay exception or exclusion applicable to Exs. 2016 and 2017, as opposed to their unnamed sources. Without such an exception or exclusion, the exhibits must be excluded. *See* FRE 805 (hearsay within hearsay).

Finally, Bradium's repeated attempts to use its Opposition to shoehorn in
15 additional substantive argument and deposition testimony from Mr. Levanon should not be considered by the Board on the merits of this proceeding.

Because Bradium has failed to rebut Microsoft's showing in Microsoft's Motion to Exclude (Paper 42) that numerous exhibits relied upon by Bradium in its Patent Owner Response are inadmissible hearsay, Microsoft respectfully requests
20 that the Board exclude these exhibits.

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