

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TWITTER, INC.,
Petitioner,

v.

VIDSTREAM LLC,
Patent Owner.

Case IPR2017-01131
Patent 8,464,304

PETITIONER'S MOTION TO EXCLUDE EVIDENCE

I. INTRODUCTION

Pursuant to 37.C.F.R. § 42.64 and the Federal Rules of Evidence, Petitioner Twitter, Inc. (“Twitter”) respectfully moves to exclude certain evidence presented by Patent Owner VidStream LLC (“PO”) in this proceeding. Petitioner respectfully moves to exclude Exhibits 2003 - 2007 as containing inadmissible hearsay, not subject to any exception.

Petitioner’s motion is based on timely filed objections (Paper No. 51), the Federal Rules of Evidence (“FRE”), relevant case law, and the PTAB’s Rules.

II. APPLICABLE LAW

The FRE apply to proceedings relating to a petition for *inter partes* review (“IPR”). 37 C.F.R. § 42.62. Hearsay is defined as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) the party offers in evidence to prove the truth of the matter asserted in the statement.” FRE 801(c). Hearsay is not admissible unless other rules or statutes provide otherwise. FRE 802.

III. EXS. 2003 - 2007 SHOULD BE EXCLUDED

Patent Owner submitted five exhibits in an attempt to show that mobile phones available around the time of the publication of one of Petitioner’s prior art references had uniform native recording capabilities and that setting recording parameters via a server-provided application would therefore be illogical. The exhibits appear to be

items found on the internet, which Patent Owner has submitted to support its argument. Each exhibit is hearsay for the reasons set forth below.

A. Ex. 2003: “Review GSM Phone Nokia 6270”

Patent Owner filed Exhibit 2003 in support of Patent Owner’s Response Under 37 C.F.R. § 42.120. Paper 50 (Patent Owner’s Response) (“POR”). Petitioner objected to Exhibit 2003 under Rule 802 for containing inadmissible hearsay. Paper 51. Specifically, PO relies on Exhibit 2003 as evidencing certain characteristics of the Nokia 6270 device. In so doing, PO is offering Exhibit 2003 for the truth of the matter asserted, namely that “the Nokia 6270 captured video data in a ‘3GP [file] format’ at a ‘clip resolution of 176x144 pixels’ and a frame rate of ‘15 fps’ (*i.e.* ‘frames per second’).” POR, p. 16. This is classic hearsay and should be excluded. Because Patent Owner cannot establish any exceptions to the hearsay rule, Exhibit 2003 is inadmissible. FRE 801-803, 805, 807; *see Microsoft Corp. v. Bradium Techs. LLC*, IPR2016-00449, Paper 65 at 2-7 (P.T.A.B. July 26, 2017) (excluding out of court statements offered for the truth of the matter asserted); *Google Inc. v. Meiresonne*, IPR2014-01188, Paper 38 at 10 (P.T.A.B. January 20, 2016) (same).

B. Ex. 2004: “Nokia E50 Hands-On Preview”

Patent Owner filed Exhibit 2004 in support of Patent Owner’s Response Under 37 C.F.R. § 42.120. Petitioner objected to Exhibit 2004 under Rule 802 for containing inadmissible hearsay. Paper 51. Specifically, Patent Owner relies upon

Exhibit 2004 as evidencing certain characteristics of the Nokia E50 device. In so doing, PO is offering Exhibit 2004 for the truth of the matter asserted, namely that the Nokia E50 “captured video at a resolution of ‘176x144 [pixels]’ and a frame rate of ‘15 fps.’” POR, p. 17. This is classic hearsay and should be excluded. Because Patent Owner cannot establish any exceptions to the hearsay rule, Exhibit 2004 is inadmissible. FRE 801-803, 805, 807; *see Microsoft Corp. v. Bradium Techs. LLC*, IPR2016-00449, Paper 65 at 2-7 (P.T.A.B. July 26, 2017) (excluding out of court statements offered for the truth of the matter asserted); *Google Inc. v. Meiresonne*, IPR2014-01188, Paper 38 at 10 (P.T.A.B. January 20, 2016) (same).

C. Ex. 2005: “Nokia – Phone Features Nokia 6630”

Patent Owner filed Exhibit 2005 in support of Patent Owner’s Response Under 37 C.F.R. § 42.120. Petitioner objected to Exhibit 2005 under Rule 802 for containing inadmissible hearsay. Paper 51. Specifically, PO relies on Exhibit 2005 as evidencing certain characteristics of the Nokia 6630 device. In so doing, PO is offering Exhibit 2005 for the truth of the matter asserted, namely that “the Nokia 6630’s native video capture parameters, including: ‘.3gp file format, H.263 video and AMR radio [audio]’ at a resolution of “174 x 144 pixels or 128 x 96 pixels.”” POR, p. 19. This is classic hearsay and should be excluded. Because Patent Owner cannot establish any exceptions to the hearsay rule, Exhibit 2005 is inadmissible FRE 801-803, 805, 807; *see Microsoft Corp. v. Bradium Techs. LLC*, IPR2016-

00449, Paper 65 at 2-7 (P.T.A.B. July 26, 2017) (excluding out of court statements offered for the truth of the matter asserted); *Google Inc. v. Meiresonne*, IPR2014-01188, Paper 38 at 10 (P.T.A.B. January 20, 2016) (same).

D. Ex. 2006: “Nokia 6630 (Nokia Charlie) Detailed Tech Specs”

Patent Owner filed Exhibit 2006 in support of Patent Owner’s Response Under 37 C.F.R. § 42.120. Petitioner objected to Exhibit 2006 under Rule 802 for containing inadmissible hearsay. Paper 51. Specifically, PO relies on Exhibit 2006 as evidencing certain characteristics of the Nokia 6630 device. In so doing, PO is offering Exhibit 2006 for the truth of the matter asserted, namely that “the Nokia 6630 captured video in ‘3GP’ format, with a resolution of ‘176x144 pixel[s],’ at a frame rate of ‘15 [frames per second]’”:

Camcorder Resolution ⓘ	176x144 pixel
	15 fps ⓘ
Recordable Video Formats ⓘ	3GP

POR, p. 19. This is classic hearsay and should be excluded. Because Patent Owner cannot establish any exceptions to the hearsay rule, Exhibit 2006 is inadmissible. FRE 801-803, 805, 807; *see Microsoft Corp. v. Bradium Techs. LLC*, IPR2016-00449, Paper 65 at 2-7 (P.T.A.B. July 26, 2017) (excluding out of court statements offered for the truth of the matter asserted); *Google Inc. v. Meiresonne*, IPR2014-01188, Paper 38 at 10 (P.T.A.B. January 20, 2016) (same).

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