

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TWITTER, INC.

Petitioner

v.

VIDSTREAM, LLC

Patent Owner

Case IPR2017-01133
U.S. Patent No. 8,601,506
(Claims 1, 4-8, 11, 13-15, 23-26, and 29-30)

**PATENT OWNER VidSTREAM LLC's
MOTION TO EXCLUDE EVIDENCE**

Patent Owner (“PO”) moves to exclude the exhibits and testimony identified below pursuant to Rule 42.64(c).

A. Exhibit 1033 – Fonearena.com Nokia E50

Petitioner identifies Ex. 1033 as a copy of a webpage. Ex. 1052, ¶ 2. Petitioner relies on Ex. 1033 at Paper 50 (“Reply”), page 9 and Ex. 1052, ¶ 12 for its content (that the Nokia E50 had certain capability). PO objected to Ex. 1033 as untimely and lacking authentication when it was introduced in Dr. Olivier’s deposition. Ex. 1051 at 95:3-7, 126:2-15. PO also objected to Ex. 1033 as hearsay and untimely in Paper 51, pages 2-3.

1. Lack of Authentication

Ex. 1033 is inadmissible as lacking authentication. Petitioner does not offer sufficient proof that these exhibits are what Petitioner claims that they are. Petitioner’s expert, Dr. Houh, merely states that this is a true and correct copy of a webpage at a specified URL. Ex. 1052, ¶ 2. That is irrelevant. The Board has required that “[t]o authenticate printouts from a website [where, as here, the proponent is offering the printouts to prove the website’s contents], the party proffering the evidence must produce some statement or affidavit from someone with knowledge of the website . . . for example a web master or someone else with personal knowledge would be sufficient.” *Neste Oil Oyj v. REG Synthetic Fuels, LLC*, IPR2013-00578, slip op. at 4 (March 12, 2015) (Paper 53) (internal quotations

and citations omitted). Petitioner has provided no such evidence. Dr. Houh does not claim to have personal knowledge of the website, and Petitioner does not provide any other testimony by a person with such knowledge. Therefore, Ex. 1033 is not authenticated and is inadmissible. *Neste Oil*, IPR2013-00578, slip op. at 3-4 (granting motion to exclude website printouts offered to prove the website's contents as lacking authentication because petitioner "has not provided the testimony of any witness with personal knowledge of the websites depicted in the printouts").

2. Untimely For Failure to Cure Objection

Petitioner's attempts to authenticate Ex. 1033 are untimely. PO objected to the admissibility of Ex. 1033 when it was introduced during the deposition, as required by 37 C.F.R. § 42.64(a) ("An objection to the admissibility of deposition evidence must be made during the deposition."). However, Petitioner failed to comply with the requirements of this rule. Section 42.64(a) requires that "[e]vidence to cure the objection must be provided during the deposition." *Id.* Petitioner did not provide any evidence during the deposition to cure the lack of authentication, and any further attempts to do so are untimely.

3. Untimely Supplemental Information

Ex. 1033 should be excluded as an untimely submission of supplemental information. Rather than identifying Ex. 1033 for what it is, part of a new or updated obviousness combination, Petitioner instead seeks to disguise Ex. 1033 as showing

purported knowledge of a POSITA. Petitioner and its expert rely upon Ex. 1033 to purportedly demonstrate what a POSITA would have understood about mobile handsets available at the time of Lahti (Ex. 1006). *See* Reply at 7 (citing Ex. 1052 at ¶¶7-20, which includes reference to Ex. 1033). But this is an attempt to supplement Petitioner’s grounds with knowledge that is not disclosed in Lahti. It was incumbent upon Petitioner to proffer its evidence and arguments with particularity—including evidence and arguments relating to the of level of skill in the art and exactly what (and why) Lahti purportedly disclosed to a POSITA—at the time it filed its Petition. *See Intelligent Bio-Systems, Inc. v. Illumina Cambridge, Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016) (“It is of the utmost importance that petitioners in the IPR proceedings adhere to the requirement that the initial petition identify ‘with particularity’ the ‘evidence that supports the grounds for the challenge to each claim.’” (citing 35 U.S.C. § 312(a)(3))); *see also id.* (“[T]he expedited nature of IPRs bring with it an obligation for petitioners to make their case in their petition to institute.”).

As a result, Petitioner’s filing of Ex. 1033 with its Reply amounted to an end-run around the requirements of Rule 123(b) for late-filed supplemental information. That rule requires a party seeking to submit supplemental information more than one month after institution to first request Board authorization to file a motion to submit it. 37 C.F.R. § 42.123(b). Then, if authorized, the party’s motion must show (1)

why the information reasonably could not have been obtained earlier and (2) that consideration of the supplemental information would be in the interests of justice.

Id. Petitioner requested no such authorization prior to filing Ex. 1033 with its Reply, and it did not make either such showing in its Reply. For these reasons, Ex. 1033 is an untimely submission of supplemental information and should be excluded.

4. Hearsay

Ex. 1033 includes out-of-court statements offered to prove the truth of the matter asserted: the properties of the specific phone. Reply at 9 (stating that “the E 50 was capable of recording at multiple resolutions”); Ex. 1052, ¶ 12. Therefore, the statements in Ex. 1033 relied upon are inadmissible hearsay.

B. Exhibit 1036 – Article entitled “Samsung Starts Selling World’s First 10 Megapixel Camera Phone”

Petitioner identifies Ex. 1036 as a copy of a webpage. Ex. 1052, ¶ 2. Petitioner relies on Ex. 1036 at Reply at 11 and Ex. 1052, ¶ 15 for its content (that certain Samsung devices possessed certain functionality). PO objected to Ex. 1036 as untimely and lacking authentication when it was introduced in Dr. Olivier’s deposition. Ex. 1051, 100:19-23, 126:2-15. PO also objected to Ex. 1036 as hearsay and untimely. Paper 51, pages 4-6.

1. Lack of Authentication and No Timely Cure

Ex. 1036 is inadmissible as lacking authentication, which was not timely cured, for the same reasons discussed above for Ex. 1033.

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