UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

INTEL CORP., CAVIUM, INC.,
WISTRON CORPORATION, and DELL INC.
Petitioners,

v.

ALACRITECH, INC.,
Patent Owner

Case IPR2017-01406[1]
U.S. Patent No. 7,673,072

PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE

[1] Cavium, Inc., which filed a Petition in Case IPR2017-01718, Wistron Corporation, which filed a Petition in Case IPR2018-00327, and Dell Inc., which filed a Petition in Case IPR2018-00371, have been joined as petitioners in this proceeding.

Pursuant to 37 C.F.R. § 42.64(c), Patent Owner requests exclusion of Exhibits 1006 and 1011 proffered by Petitioner, and all Petitioner's arguments based thereon according to the Federal Rules of Evidence. These objections were timely made in IPR2017-01391 (Paper 10), IPR2017-01392 (Paper 15), IPR2017-01393 (Paper 11), and IPR2017-01406 (Paper 14).

I. Ex. 1006 (Tanenbaum96)

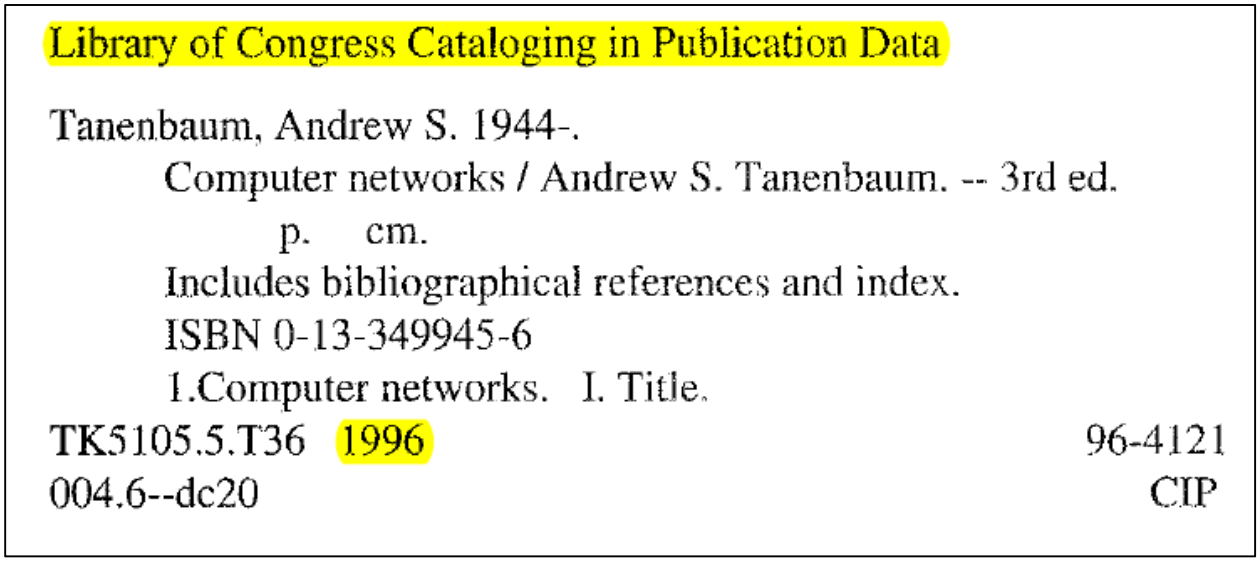
Exhibit 1006 should be excluded because it is irrelevant, as Petitioner has failed to establish that Ex. 1006 is prior art under 35 U.S.C. §§102 and 103. Patent Owner also moves to exclude Ex. 1011, Declaration of Rice Majors regarding Tanenbaum, Andrew S., Computer Network ("Majors Declaration"), as it is inadmissible hearsay and inadmissible layman opinion.

Petitioner has failed to prove that Tanenbaum96 was publicly available before the priority date of the patent at issue. Public availability requires a showing ***by the Petitioner*** that the document had been disseminated before the date such "that persons of ordinary skill in the art could locate it." *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340, 1350 (Fed. Cir. 2008). Petitioner has provided no evidence that a person of ordinary skill in the art had located Tanenbaum96 before October 14, 1997, the filing date of the supporting

provisional application U.S. Prov. App. No. 60/061,809 (The '809 provisional application).

Petitioner concludes from the "1996" date appearing on Tanenbaum96 that it was a printed publication prior to October 14, 1997 provisional application to which the Patent claims priority. Petitioner, however, does not explain the significance of this date. When the significance of these dates are taken in context, it is plain that they fail to establish public availability.

The year "1996" appears on Tanenbaum96 in two places:



Library of Congress Cataloging in Publication Data

Tanenbaum, Andrew S. 1944-.
Computer networks / Andrew S. Tanenbaum. -- 3rd ed.
p. cm.
Includes bibliographical references and index.
ISBN 0-13-349945-6
1.Computer networks. I. Title.
TK5105.5.T36 1996 96-4121
004.6--dc20 CIP

INTEL Ex.1006.005.

Prentice-Hall, Inc.
A Simon & Schuster Company
Upper Saddle River, New Jersey 07458

INTEL Ex.1006.005

The first instance relates to the Library of Congress's "Cataloging in Publication record." However, as stated by Library of Congress, "A Cataloging in Publication record (aka CIP data) is a bibliographic record ***prepared by the Library of Congress for a book that has not yet been published***. When the book is published, the publisher includes the CIP data on the copyright page thereby facilitating book processing for libraries and book dealers. " Ex. 2500.001. On the FAQ page, the Library of Congress further states, under the question "How can I get cataloging for a book which is already published," that "CIP ["Cataloging in Publication"] data is available ***only for works that are not yet published***. Published works are not eligible for CIP data." Ex. 2500.002. Therefore, the year 1996 in the Library of Congress Cataloging in Publication Data only shows that Tanenbaum was ***not*** published at that time.

Petitioner further relies on the "1996" date printed at the bottom of Exhibit 1006.005, which it alleges is a copyright date. Copyright dates, however, are not evidence of public availability. For example, in *Microsoft Corporation v. Corel*

Software, LLC, the Board expressly stated that "a copyright notice, alone, sheds virtually no light on whether the document was publicly accessible as of that date, therefore additional evidence is typically necessary to support a showing of public accessibility." *Microsoft Corporation v. Corel Software, LLC*, Case IPR2016-01300, Paper 13 at 14 (Jan. 4, 2017). In addition, the Board has found that the copyright date was inadmissible hearsay. *See Standard Innovation Corp. v. Lelo, Inc.*, Case IPR2014-00148, Paper 41 at 13-16 (Apr. 23, 2015) (determining that to the extent that the dates presented in [the] Exhibit [] are relied upon as proof of dates relevant to the creation or publication date of [the] Exhibit[] itself, those dates are inadmissible hearsay).

Petitioner further argues that the '072 patents citation to Tanenbaum96 establishes public availability. It does not. The '072 patent cites Tanenbaum96 in the non-provisional application filed on June 25, 2007, which is ***after*** the critical date. Ex. 1001.001.

Petitioner attempts to remedy these deficiencies through its service of supplemental evidence. This supplemental evidence, however, only further underscores that Tanenbaum96 was not publicly available in 1996 . Specifically, Petitioner cites five other patents (U.S. Patent Nos. 6,119,230, 6,401,127,

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