

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICROSOFT CORPORATION,

Petitioner,

v.

DIRECTSTREAM, LLC,

Patent Owner.

IPR2018-01605, IPR2018-1606, IPR2018-01607
Patent 7,620,800 B2

**PATENT OWNER DIRECTSTREAM, LLC'S
REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE
UNDER 37 C.F.R. §42.64**

Exhibits 1074 and 1079 Are Not Admissible

Among numerous objections, Patent Owner specifically objected to Exhibits 1074 and 1079 (“the Exhibits”) on authenticity grounds. *See* FED. R. EVID. 901; Paper 61, 4-7.¹ Patent Owner timely objected to these Exhibits. *Id.*

In its Opposition, Petitioner argues that the standard for admissibility under FED. R. EVID. 901(a) is “slight,” Paper 62 at 1, but “slight” does not mean non-existent. Rather, the burden Petitioner must satisfy to establish authenticity is simple: “To authenticate evidence, a party must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” FED. R. EVID. 901(a). Despite this simple burden, and the opportunity to provide supplemental evidence to overcome authenticity objections under 37 C.F.R. §42.64(b)(2), Petitioner offers nothing other than naked attorney argument in its Opposition to Patent Owner’s objections—which is not evidence. *TRW Auto. U.S. LLC v. Magna Elecs. Inc.*, IPR2014-01347, Paper 25 at 10 (PTAB Jan. 6, 2016) (holding

¹ With respect to issues not specifically rebutted herein, Patent Owner stands on the arguments raised in its Motion to Exclude (Paper 61). For the reasons set forth in its Motion to Exclude, and as further explained below, Petitioner has not presented any credible argument to overrule Patent Owner’s objections to Petitioner’s evidence.

“conclusory assertions by Petitioner’s counsel” are not a substitute for Rule 901(a) evidence).²

Petitioner argues that EX1074 and EX1079 are admissible under FED. R. EVID. 901(b)(8)(B) based on the age of the documents and the assertion that both documents can be acquired at the present time. Paper 62 at 4. Yet, this assertion is mere attorney argument, not evidence. Moreover, even if attorney argument regarding public-availability of EX1074 and EX1079 was accepted as fact, this argument only shows the exhibits are available today, not at any particular past date. *Magna*, IPR2014-01347, Paper 25 at 10-11.

Petitioner also argues that EX1074 is authentic because it contains a trade inscription, copyright symbol, and ISBN. Paper 62 at 2-3. But, Petitioner simply listed this exhibit in its Reply, Paper 49 at 7, 65, and now relies solely on Petitioner’s counsel’s conclusory assertions that these elements meet Rule 901(a), Rule 902(6) “and/or” Rule 902(7). Yet, when faced with similar objections to similar documents, the Board established that attorney assertions about an “ISBN” or copyright symbols, without any supporting evidence does not meet the requirements of Rule 901(a), 902(6), or 902(7). “We cannot accept, as a substitute for evidence, the

²Despite Petitioner’s suggestion to the contrary, 37 C.F.R. §42.20(c) does not relieve its burden of authentication under Rule 901(a) as the “proponent” of the evidence.

conclusory assertion by Petitioner’s counsel that the presence of [an ISBN] either alone or in conjunction with a [copyright symbol] on a document tends to prove that the document is an IEEE publication from an IEEE periodical.” *Magna*, IPR2014-01347, Paper 25 at 10.

Moreover, in *Microsoft v. IPA*, the Board made clear that IEEE or copyright dates on documents may constitute authentication if additional testimony or evidence is provided to corroborate or authenticate public availability. *Microsoft v. IPA*, IPR2019-00810, Paper 12 at 81-82 (PTAB Oct. 16, 2019). Here, Petitioner fails to provide any evidence, post-institution, that the Exhibits were provided to libraries for circulation to the public, *etc.* and fails to provide any witness testimony with knowledge of the contents of the Exhibits. *See* FED. R. EVID. 901(b)(1). Instead, Petitioner provides scant attorney conjecture and only cites cases dealing with the threshold indicia requirements to authenticate a printed publication pre-institution. *See* Paper 62, 1-4.

As the recent Precedential Board panel articulated in *Hulu, LLC v. Sound View Innovations*, Case No. IPR2018-01039, Paper 29 (PTAB Precedential Order Panel, Dec. 10, 2019), the distinction of evidence required pre-institution versus post-institution on the indicia to support public availability or authentication is determinative to establish whether Petitioner met its burden of proof. *Id.* at 14-15, 17. The argument made by Petitioner on the copyright date, ISBN numbers, *etc.*

only is applicable in the pre-institution phase to establish a reasonable likelihood the Exhibit is authentic prior art. But, as these Exhibits were introduced *post-institution* in its Reply, and Patent Owner timely objected, Petitioner needed to cure with supplemental evidence to establish its burden on authenticity by a preponderance of the evidence, as articulated by the Precedential Panel. *Id.* at 17-19.

In stark contrast to Petitioner, Patent Owner's experts and witnesses each attached all supporting documentation to their declarations under FED. R. EVID. 901(b)(1) (witness with knowledge), which Petitioner, ironically, moves to exclude. Here, Petitioner's only witness with knowledge of the Exhibits are its counsel, who are not admissible witnesses in this matter, and the other Rule 901 exceptions cited are likewise inapplicable characterizations without any corroborating evidence (*e.g.*, ancient documents).

Petitioner failed to cure Patent Owner's authenticity objections in a timely manner; thus, the Exhibits were not properly authenticated and should be excluded, along with any reliance in Petitioner's Reply. *See* Paper 61, 6-8.

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