UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TWITTER, INC.

Petitioner

v.

VIDSTREAM, LLC

Patent Owner

Case IPR2017-00830
U.S. Patent No. 9,083,997
(Claims 20-35)

PATENT OWNER VIDSTREAM LLC's MOTION TO EXCLUDE EVIDENCE

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

A. Exhibit 1036 – Almeroth Reply Declaration

Portions of the Almeroth Reply Declaration (Ex. 1036) should be excluded as irrelevant. The portions of Dr. Almeroth's declaration that rely on exhibits shown in this Motion to be inadmissible are themselves irrelevant and inadmissible. Testimony that relies on inadmissible evidence cannot make any relevant fact more probable than it would be without the testimony. Therefore, the following testimony should be excluded as irrelevant: ¶ 14 (reliance on Ex. 1044 and cited in Reply at 4); ¶16 (reliance on Ex. 1046 and cited in Reply at 4-5); ¶ 16 (reliance on Ex. 1047 and cited in Reply at 4-5).

B. Exhibit 1041 – Certificate of Registration

Petitioner identifies Exhibit 1041 as a Certification of Registration for copyright. Petitioner relies on Exhibit 1041 in the Reply at 17-19. Petitioner objected to Exhibit 1041 as untimely in Paper 54, pages 4-5.

1. Untimely Supplemental Information

Exhibit 1041 should be excluded because it is untimely supplemental information and beyond the proper scope of a reply. 37 C.F.R. §§ 42.23(b), 42.123(b). Petitioner submitted Exhibit 1041 (along with Exhibits 1042 and 1043) with its Reply in a belated attempt to establish that Bradford (Ex. 1010) is prior art

to the '997 Patent. Reply at 17-19. Petitioner's filing of these exhibits 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 Exhibits 1041-1043 with its Reply, and it did not make either such showing in its Reply. For these reasons, Exhibits 1041-1043 are untimely submissions of supplemental information and should be excluded.

C. Exhibit 1042 – HTML5 Mastery Semantics, Standards, and Styling, but Bradford et al.

Petitioner identifies Exhibit 1042 as a copy of Bradford obtained from the Library of Congress, and relies on Exhibit 1042 in the Reply at 17-19. Petitioner objected to Exhibit 1042 as untimely and irrelevant in Paper 54, pages 5-8.

1. Untimely Supplemental Information

Exhibit 1042 should be excluded as untimely for the same reasons discussed for Exhibit 1041.

2. Irrelevant

Exhibit 1042 should be excluded as irrelevant. In order to meet its burden to establish unpatentability, Petitioner must show that the actual document it relied upon in the Petition, i.e., Exhibit 1010, is prior art. *Dropbox, Inc. v. Synchronoss Tech., Inc.*, IPR2016-00851, slip op. at 19 (PTAB Oct. 5, 2017) (Paper 40). The publication date of Exhibit 1042 has no relevance to the question of when Exhibit 1010 was published, as these two documents are, admittedly, not the same. Reply at 19 (stating that the "2015 Version" of Bradford (i.e., Exhibit 1010) is a later printing of Bradford). Furthermore, Petitioner has not provided evidence or sworn testimony that the scanned pages in Exhibit 1042 correspond to a copy of "HTML5 Mastery: Semantics, Standards, and Styling," obtained and made available to the relevant public by the Library of Congress (or any other library) prior to the '997 Patent's priority date. Nor is there any evidence that Exhibit 1042 is the same document that is the subject of the Registration Certification of Exhibit 1041. For these reasons, Exhibit 1042 does not make any relevant fact more probable than it would be without Exhibit 1042, and it is inadmissible as irrelevant.

D. Exhibit 1043 – Declaration of Raghav Bajaj

Exhibit 1043 is a declaration by Petitioner's counsel stating that portions of Exhibit 1042 are identical to portions of Exhibit 1010. Petitioner relies on Exhibit 1043 in the Reply at 17-19. Petitioner objected to Exhibit 1043 as untimely in Paper

54, pages 8-9. Exhibit 1043 should be excluded as untimely for the same reasons discussed for Exhibits 1041 and 1042.

E. Exhibit 1044 – Microsoft Computer Dictionary

Petitioner identifies Exhibit 1044 as a Microsoft Computer Dictionary. Petitioner attempts to rely on Exhibit 1044 to establish how a POSITA would have understood the teachings of Nassiri, the meaning of the term "link" before the '997 Patent's priority date. Reply at 4; Ex. 1036, ¶ 14. Patent Owner objected to Ex. 1044 as hearsay and untimely in Paper 54, page 9.

1. Hearsay

To the extent Petitioner relies on any date stated in Exhibit 1044 to establish a date of publication, such date is an out-of-court statement relied upon to prove the truth of the matter asserted and is therefore inadmissible as hearsay.

2. Untimely Supplemental Information

Exhibit 1044 should also be excluded as an untimely and improper submission of supplemental information and beyond the proper scope of a reply. Dr. Almeroth's reply arguments depend entirely on a *narrow construction* of "link"—first offered in Petitioner's Reply—that requires a link to be displayed for manual selection by a user. Reply at 4 (citing Ex. 1036, ¶¶15-18). Exhibit 1044's definition of "embedded ***hyper***link" is cited to support this new attempt to construct "link." Reply at 4-5 (citing Ex. 1044 at 8 and Ex. 1035 at 97:9-18)). This shift in theory is untimely, and

Petitioner has not sought permission under 37 C.F.R. § 42.123(b), or made either of the required showings under that rule in its Reply, to submit Exhibit 1044.

F. Exhibit 1046 – "HTML a tag"

Petitioner identifies Exhibit 1046 as coming from the w3schools website. Ex. 1036, ¶ 16. Petitioner attempts to rely on the contents of Exhibit 1046 to establish how a POSITA would have understood the teachings of Nassiri before the '997 Patent's priority date. Reply at 4-5; Ex. 1036, ¶ 16. Patent Owner objected to Exhibit 1046 as hearsay in Paper 54 at 10-11.

1. Hearsay

Petitioner relies on the statement in Exhibit 1046 that "[i]f the href attribute is not present, the <a> tag is not a hyperlink" for the truth of the matter asserted. This is an out-of-court statement and is therefore inadmissible hearsay.

G. Exhibit 1047 – "HTML iframe tag"

Petitioner identifies Exhibit 1047 as coming from the w3schools website. Ex. 1036, ¶ 16. Petitioner attempts to rely on Exhibit 1047 to establish how a POSITA would have understood the teachings of Nassiri before the '997 Patent's priority date. Reply at 4-5; Ex. 1036, ¶ 16. Patent Owner objected to Exhibit 1047 as hearsay in Paper 54 at 11-12.

1. Hearsay

Petitioner relies on the statement in Exhibit 1047 that the "src" attribute in an iframe tag "Specifies the address of the document to embed in the <iframe>" for the truth of the matter asserted. This is an out-of-court statement and is therefore inadmissible hearsay.

II. CONCLUSION

For the foregoing reasons, Patent Owner requests that the indicated evidence be excluded from this proceeding.

Dated: September 14, 2018

Respectfully submitted,

NORTON ROSE FULBRIGHT US LLP

/Eagle H. Robinson/
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Lead Counsel for Patent Owner

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that on September 14, 2018, complete copies of Patent Owner VidStream LLC's Motion to Exclude was served on the following:

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