

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COMCAST CABLE COMMUNICATIONS, LLC,
Petitioner,

v.

PROMPTU SYSTEMS CORP.,
Patent Owner

Case No. IPR2018-00344
U.S. Pat. No. 7,047,196

PATENT OWNER'S MOTION TO EXCLUDE

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I. PRELIMINARY STATEMENT

Pursuant to this Board's Rules and the Federal Rules of Evidence, Promptu moves to exclude certain portions of Comcast's Exhibit 1024 (Excerpts from Deposition Transcript of Paul M. Cook).

In accordance with the Trial Practice Guide, Promptu (a) identifies where in the record Promptu's original objections were made, (b) identifies where in the record Exhibit 1024 was relied upon by Comcast, and (c) explains the objections. 77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012).

II. PORTIONS OF EXHIBIT 1024 SHOULD BE EXCLUDED

Comcast's Exhibit 1024 includes scattered excerpts of Mr. Cook's lengthy deposition transcript, but it does not provide necessary context regarding the scope of Mr. Cook's combined deposition for the related district court litigation and several PTAB proceedings. For the deposition, the parties agreed to delineate where Mr. Cook's district court testimony ended and where his PTAB testimony began, but that line is blurred by Comcast's exhibit. For example, while the complete deposition transcript spans 455 pages, Mr. Cook's PTAB testimony is limited to only the final 10 pages of the transcript, a fact that is not readily apparent from the page excerpts included in Ex. 1024. Because Comcast did not file Mr. Cook's complete PTAB deposition testimony, Promptu files the entirety of the PTAB portion herewith (pages 446-455 of the transcript, with a transition between

proceedings occurring at page 445) as Exhibit 2045 in order to provide context for the scope of Mr. Cook's PTAB testimony.

Promptu timely objected to Exhibit 1024 under FRE 801, 802, and 805 as containing hearsay and/or hearsay within hearsay, as well as for containing testimony outside the scope of the IPR depositions. Paper 33 at 1. Comcast relies on Mr. Cook's district court testimony (i.e., questions and answers from the transcript prior to page 446) throughout its Petitioner Reply (Paper 29).

In particular, Comcast cites to Mr. Cook's district court deposition testimony: (1) to support its assertion that the AgileTV product wasn't successful (Paper 29 at 1 (citing Ex. 1024 at 206:2-17)); (2) as a purported admission that the Diva Systems video-on-demand system provided pay-per-view (Paper 29 at 15 (citing Ex. 1024 at 22:2-13, 249:6-17)); (3) as evidence that Comcast rejected Promptu's product (Paper 29 at 21 (citing Ex. 1024 at 215:13-217:7)); (4) as evidence that the AgileTV product employed voice recognition processing provided by a third-party vendor (Paper 29 at 23 n.5 (citing Ex. 1024 at 250:15-253:14, 255:22-258:21, 316:4-6)); (5) as evidence that Comcast's payment to Promptu was a loan that Promptu later repaid in full, that Promptu offered a paid-up license to its patents, and that Promptu dropped its television product and shifted to an automotive product (Paper 29 at 23-24 (citing Ex. 1024 at 106:20-107:9, 117:12-118:7, 135:4-5, 156:5-12, 160:20-161:2, 215:13-218:13)); and (6) as

evidence that Promptu received substantial funding to develop an automobile product (Paper 29 at 24 (citing Ex. 1024 at 217:22-219:18)).

In each of these instances, Comcast relies on Mr. Cook's statements for the truth of the matter asserted despite the fact that he did not offer that testimony in this proceeding. Because the testimony is hearsay not subject to any hearsay exceptions, the Board should exclude all of Mr. Cook's testimony cited in Comcast's reply relying on the above-noted portions of district court testimony.

Promptu notes that Comcast could not have properly asked its district court questions in the PTAB portion of the deposition because the questions exceeded the proper scope of PTAB cross-examination by going far afield of Mr. Cook's direct testimony. *See* 37 C.F.R. § 42.53(d)(5)(ii) ("For cross-examination testimony, the scope of the examination is limited to the scope of the direct testimony."); Fed. R. Evid. 611(b); 37 C.F.R. § 42.62(a). The scope of cross-examination here is limited to Mr. Cook's brief authentication declaration, Ex. 2042, which was previously served in response to Comcast's objections to several of Promptu's exhibits (but not filed). 37 C.F.R. § 42.64. Promptu files Ex. 2042 herewith solely to illustrate the limited scope of Mr. Cook's direct testimony. All of Comcast's questions outside the scope of this declaration (including at least Comcast's citations to excerpts of pages 1-316 in Exhibit 1024) fall beyond the scope of permissible cross-examination and should be excluded.

III. CONCLUSION

The Board should exclude the following portions of Exhibit 1024 relied on by Comcast in its Petitioner Reply: 22:2-13, 106:20-107:9, 117:12-118:7, 135:4-5, 156:5-12, 160:20-161:2, 206:2-17, 215:13-219:18, 249:6-17, 250:15-253:14, 255:22-258:21, and 316:4-6.

Respectfully submitted,

Dated: December 28, 2018

By: /Daniel F. Klodowski/
Daniel F. Klodowski, Reg. No. 72,693

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing
PATENT OWNER'S MOTION TO EXCLUDE was served by email on
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