

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICROSOFT CORPORATION,
Petitioner,

v.

BRADIUM TECHNOLOGIES LLC,
Patent Owner.

Case IPR2016-00448
Patent 7,908,343 B2

BRYAN F. MOORE, BRIAN J. McNAMARA, and MINN CHUNG,
Administrative Patent Judges.

McNAMARA, *Administrative Patent Judge.*

DECISION ON PETITIONER'S MOTION TO EXCLUDE
37 C.F.R. § 42.5

Microsoft Corporation (“Petitioner”) moves to exclude the following evidence in this proceeding on the basis that the exhibits are inadmissible as hearsay under Fed. R. Evid. 802: Exhibits 2016–2018, 2021, 2030, 2032, 2035–2036, 2039, 2044–2049, 2051–2053, and 2063. Paper 45, Petitioner’s Motion to Exclude (“Pet. Mot. to Exclude”). Petitioner also moves to exclude Exhibits 2016–2018 and 2051–2053 under Fed. R. Evid. 106 and 403 as incomplete and misleading. *Id.* at 6. Bradium Technologies LLC. (“Patent Owner”) filed an opposition. Paper 52, Patent Owner’s Opposition to Petitioner’s Motion to Exclude (“PO Opp. to Pet. Mot. to Exclude”). Petitioner filed a Reply to Patent Owner’s Opposition. Paper 55, Petitioner’s Reply to Patent Owner’s Opposition to Petitioner’s Motion to Exclude (“Pet. Reply to Opp.”).

Exhibits 2016–2018 are screen shots of third party websites that purport to provide information concerning Petitioner’s research and development expenditures. Exs. 2016–2018. Although Patent Owner contends Exhibits 2016 and 2017 are not hearsay because they are based on Petitioner’s own reported data (PO Opp. to Pet. Mot. to Exclude 13), Patent Owner provides no evidence of any kind to support this position. The content of Exhibits 2016 and 2107 are out of court statements offered for the truth of the matter asserted and are excluded.

Exhibit 2018 purports to be a screenshot of a two line bullet type statement by research firm Frost & Sullivan about convergence of the North American Automotive Industry concerning 3D imagery and a 3D engine supplied by inventor Levanon’s company, 3DVU. Ex. 2018. Patent Owner contends that the evidence is not offered for its truth but to demonstrate the verbal act, i.e., that Frost & Sullivan made the statement about the activities of Google, Microsoft and 3DVU in 3D imaging. PO Opp. to Pet. Mot. to Exclude 13–14. This statement by Frost & Sullivan would be irrelevant to this proceeding unless it were offered for the

truth of the matter asserted, i.e., that Petitioner and the inventor's company are active in this area and that the inventor's company supplied a 3D engine to Nissan. Indeed, Patent Owner acknowledges that this is exactly what it relies upon the evidence to demonstrate, stating "Bradium relies on this exhibit to show that Frost & Sullivan, an international consulting firm that concentrates on uncovering future technologies and mega trends, made a statement about 3DVU, listing it among Google and Microsoft, as companies that push for 3D imagery." *Id.* Thus, Patent Owner acknowledges that Exhibit 2018 is an out of court statement offered for the truth of the matter asserted. In addition, because Patent Owner lays no foundation for its assertion that Frost & Sullivan has any basis for the statement, the statement is inherently unreliable. For these reasons, Exhibit 2018 is excluded.

Exhibits 2035 and 2036 are valuation summaries prepared for 3DVU by a third party, C.E. Unterberg, Towbin. Exs. 2035, 2036. Patent Owner states that Exhibits 2035 and 2036 show the occurrence and timing of acquisition discussion between Petitioner and 3DVU. PO Opp. to Pet. Mot. to Exclude 10–11. Patent Owner further argues that the documents are not offered for the truth of what they say, i.e., that technology has any particular worth, but as verbal acts to show what a reputable company said the technology was worth. *Id.* Patent Owner argues a distinction without a difference—a reputable company would not have stated a valuation unless it had been engaged to do so and believed its valuation to be accurate. Thus, Exhibits 2035 and 2036 are out of court statements offered to prove the truth of the matter asserted, i.e., the valuation of 3DVU. Exhibits 2035 and 2036 are excluded.

Exhibits 2021, 2030, 2032, 2039, 2046–2048, and 2063 all appear to be 3DVU's own press releases or screen shots of web pages and articles based on 3DVU's press releases. *See generally*, Ex. 1019, Deposition Testimony of Isaac

Levanon (“Levanon Dep. Tr.”) 59:12–67:24; 72:9–74:25. Patent Owner contends that Exhibit 2021 is not offered for the truth of what it reports, but to show that the statement made in 2008 is offered to show the timing of an award 3DVU received from Frost & Sullivan in 2007. PO Opp. to Mot. to Exclude 6. Mr. Levanon testified concerning the 2007 award. Ex. 2004, Decl. of Isaac Levanon (“Levanon Decl.”) ¶ 37. Patent Owner argues that “Mr. Levanon testifies that, based on his conversation with Frost & Sullivan and his understanding of their practices and the award, Frost & Sullivan chose 3DVU for the award among numerous other navigation solutions that were available at the time.” PO Opp. to Pet Mot. to Exclude 6. Patent Owner does not provide any evidence corroborating receipt of the alleged award. On cross examination, Mr. Levanon testified that he and possibly others wrote this press release. Ex. 1019, Levanon Dep. Tr. 61:22–62:11. As the document is not relied on for its truth, and there is no corroboration of the alleged award from Frost & Sullivan, no other inference can be made concerning the date of the statement. In view of the above, Exhibit 2021 is excluded.

Exhibits 2030 and 2032 are press releases concerning the use of 3DVU technology in Kenwood (DENSO) automobile navigation systems. Patent Owner references Mr. Levanon’s testimony about the use of 3DVU technology in the Kenwood system and contends that the exhibits are not offered for the truth of their contents, but only to show that the statements were made and the timing of these statements. PO Opp. to Pet. Mot. to Exclude 7 (citing Ex. 2004, Levanon Decl. ¶¶ 32–33, 43–61). There is no purpose to showing 3DVU made the statement or when the statements were made, except for the truth of the matters asserted. Patent Owner effectively acknowledges that it relies upon the exhibits to show when the statements were made, i.e., that it announced the FlyOver Visual Map Technology for the Kenwood HDD car navigation system as early as October 6, 2002. Ex.

2030, 1. Thus, Exhibits 2030 and 2032 are out of court statements for the truth of the matter asserted and are excluded.

Exhibit 2039 is a 2006 press release concerning the demonstration of 3DVU technology at the Busan International Motor Show. Mr. Levanon, who was CEO of 3DVU and had personal knowledge of the circumstances, appeared for deposition, was subject to cross examination, and testified that 3DVU cooperated with Daewoo to develop the car navigation system demonstrated at the Busan show. PO Opp. to Pet. Mot. to Exclude 7–8 (citing Ex. 2004, Declaration of Isaac Levanon (“Levanon Decl.”) ¶¶ 80–81). Nevertheless, Patent Owner contends that the press release is not relied upon for the truth of what it asserts but to show the statements were made and the dates of the statements. In view of Mr. Levanon’s testimony, Exhibit 2039 is admitted for this limited purpose and may not be relied upon for any other purpose.

Exhibits 2046 and 2047 are press releases concerning 3DVU’s Navi2Go application. Mr. Levanon testified that he reviewed these documents when they were created and believed them to be correct. Ex. 1019, Levanon Dep. Tr. 71:5–72:11. Patent Owner argues that Mr. Levanon, who was CEO of 3DVU and had personal knowledge, independently confirmed the timeline of the relevant events. PO Opp. to Pet. Mot to Exclude 8 (citing Ex. 1019, Levanon Dep. Tr. 70:19–73:11). Nevertheless, Patent Owner states that it does not rely upon the documents for their truth, but only to demonstrate the statements were made and the timing of the statements relating to the release of the 3DVU applications. Exhibits 2046 and 2047 are admitted for that limited purpose only.

Exhibit 2048 is a press release in Directions Magazine stating that 3DVU’s Mobile Navigation is a best seller on Sprint’s Shop. Mr. Levanon testified that he approved the document at the time of its creation and does not see anything

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