

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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MICROSOFT CORPORATION

Petitioner

v.

UNILOC 2017 LLC

Patent Owner

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IPR2019-00973

U.S. PATENT NO. 7,075,917

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**PATENT OWNER SUR REPLY TO PETITION**

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## **I. INTRODUCTION**

Uniloc 2017 LLC (the “Patent Owner” or “Uniloc”) submits this Sur-Reply to the Petition for *Inter Partes* Review (“Pet.” or “Petition”) of United States Patent No. 7,075,917 (“the ’917 patent” or “Ex. 1001”) filed by Microsoft Corporation (“Petitioner”) in IPR2019-00973. For the reasons given in Uniloc’s Response (Paper 9, “POR”) and herein, Petitioner fails to carry its burden of proving unpatentability of the challenged claims of the ’917 patent based on the grounds presented in the Petition.

## **II. PETITIONER FAILS TO MEET ITS BURDEN TO ESTABLISH THAT TR25.835 CONSTITUTES A PRIOR ART PRINTED PUBLICATION AS TO THE ’917 PATENT**

As a threshold issue addressed in detail in Patent Owner’s Response, Petitioner has failed to meet its burden to establish that TR25.835 (Ex. 1005) constitutes prior art. As the sole Ground relies on TR25.835, the Board is respectfully requested to hold Claims 1–3 and 9–10 not unpatentable.

Petitioner does not dispute in its Reply that the Petition itself “does not recite any applicable standard that TR25.832 must meet to qualify as a printed publication under pre-AIA 35 U.S.C. §102(a) or 102(b), or explain how the supporting evidence allegedly demonstrates that the applicable standard is met, thus failing to meet the minimum standards required to explain the significance of evidence, both under applicable regulations and under applicable case law.” POR 17.

Petitioner tacitly acknowledges the Petition is itself deficient by purporting to rely, instead, on new argument and evidence introduced in its Reply. Indeed, the deficiency of the Petition is conceded by the fact that Petitioner filed with its Reply no less than *twenty* additional exhibits made up of unauthenticated documents containing inadmissible hearsay (as explained further below).

The Federal Circuit has instructed that “[u]nlike district court litigation—where parties have greater freedom to revise and develop their arguments over time and in response to newly discovered material—the expedited nature of IPRs bring with it an obligation for petitioners to make their case *in their petition to institute.*” *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016) (emphasis added); *see also see* 37 C.F.R. § 42.23(b); Trial Practice Guide Update 15 (August 2018).

Even if the Board were inclined to consider the new argument and evidence Petitioner impermissibly attempts to introduce in its Reply, this still would not cure the failure of the Petition to provide sufficient evidentiary support to prove, by a preponderance of the evidence, that TR25.835 qualifies as prior art here.

**A. Patent Owner has been prejudiced by Petitioner’s failure to specify the pre-AIA statutory subsection under which TR25.832 allegedly qualifies as a prior art printed publication**

Patent Owner’s Response noted, and Petitioner does not contest in its Reply, that the Petition fails to specify the pre-AIA which statutory subsection under which

TR25.832 allegedly qualifies as a prior art printed publication. POR 16. Under the section heading “Critical Dates” (*in the plural*), Petitioner acknowledges in its Reply that different dates would be relevant depending, for example, on whether TR25.832 is allegedly asserted under pre-AIA 35 U.S.C. §102(a) or 102(b). Rep. 4. Petitioner has effectively admitted, therefore, that the failure in the Petition to assert a statutory subsection under which TR25.835 allegedly qualifies as prior art has prejudiced Patent Owner’s ability to respond.

**B. The undisputed cataloging and indexing factors weigh in favor of finding TR25.832 was not publicly accessible**

It remains undisputed that TR25.832 “was not publicly accessible by virtue of indexing or cataloging” and that “the document bore an arbitrary title that had no information regarding its subject matter.” POR 16. Rather than contest these factual observations, or point to any record evidence in rebuttal, Petitioner’s Reply merely offers the Federal Circuit instruction that “neither cataloging nor indexing is a necessary condition for a reference to be publicly accessible.” Rep. 3 (quoting *In re Lister*, 583 F.3d 1307, 1312 (Fed. Cir. 2009)).

Petitioner tellingly ignores the remainder of that Federal Circuit instruction that, while not a necessary condition, “cataloging and indexing have played a significant role” and remain relevant factors bearing on public accessibility. *Lister*, 583 F.3d at 1312. Further underscoring the continued relevance of these factors

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