

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NETFLIX, INC. AND HULU, LLC,

Petitioners,

v.

DIVX, LLC,

Patent Owner.

Case No. IPR2020-00558

U.S. Patent 10,225,588

PETITIONERS' MOTION TO EXCLUDE EVIDENCE

PURSUANT TO 37 C.F.R. § 42.64(c)

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In accordance with 37 C.F.R. §§ 42.62 and 42.64, and the Order Revising Due Dates 3 and 5-7 (Paper 38), Petitioners move to exclude Patent Owner's Exhibits 2012, 2016-2021, and 2025 based on Petitioners' Objections to Evidence (Papers 19, 20, and 41). PO filed Exhibits 2012 and 2016-2020 with and relied upon them in Paper 17 ("POR"). PO served Exhibit 2021 in response to Petitioners' Objections to Evidence (Paper 19). PO filed Exhibit 2025 with and relied upon it in Paper 40 ("SR").

I. Legal Standards

The Federal Rules of Evidence ("F.R.E.") generally applies to IPR proceedings. 37 C.F.R. § 42.62. To properly authenticate evidence, a proponent "must produce evidence sufficient to support a finding that the item is what the proponent claims it is." F.R.E. 901. Out-of-court statements relied upon for the truth of the matter asserted are inadmissible hearsay. F.R.E. 801(c) and 802.

Irrelevant evidence is not admissible. F.R.E. 402. Evidence may be excluded if "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." F.R.E. 403.

To testify as an expert a witness must be "qualified ... by knowledge, skill, experience, training, or education." F.R.E. 702. For such expert testimony, whether in the form of opinion or otherwise, the expert's scientific, technical, or other

specialized knowledge must “help the trier of fact to understand the evidence or to determine a fact in issue.” F.R.E. 702(a). The testimony must be “based on sufficient facts or data,” F.R.E. 702(b); “the product of reliable principles and methods,” F.R.E. 702(c); and such principles and methods must have been reliably applied to the facts of the case. F.R.E. 702(d).

An expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data, but the expert may be required to disclose those facts or data on cross-examination. F.R.E. 705. Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight. 37 C.F.R. § 42.65.

A non-expert’s witness testimony in the form of an opinion is limited to one that is rationally based on the witness’s perception and not based on scientific, technical, or other specialized knowledge. F.R.E. 701. A non-expert “witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” F.R.E. 602.

II. Exhibit 2012

Paragraphs 54-82 of Exhibit 2012, the Declaration of Dr. Seth Nielson should be excluded.

A. Exhibit 2012 Applies the Wrong Legal Standard

Dr. Nielson’s opinions regarding the POSITA’s alleged inability to modify

file formats for partial encryption (EX2012, ¶¶78-82) should be excluded because they are conclusory and apply the wrong legal standard. Dr. Nielson does not support this opinion with any facts or underlying data, other than an observation that Dr. McDaniel’s declaration discussed the “use” of file formats without the word “modify.” EX2012, ¶¶78-82.

Dr. Nielson’s opinions are fundamentally flawed because he opined on the allegedly limited capabilities of a POSITA but “did not do [his] analysis with [the] presumption” that a “POSITA is presumed to be aware of all pertinent prior art.” (EX1029, 230:7-12). He did not consider whether the prior art teaches the modification of file formats for partial encryption or DRM. Even though he does not consider himself to be an expert in video encoding (*see* EX1024, 13:23-14:8, 17:22-18:10; EX2012, Exhibit A), Dr. Nielson did not review any materials regarding the modification of file formats. *See* EX1029, 13:17-25. Nor did he consider whether one of PO’s other patents, Exhibit 1016, disclosed the modification of file formats for partial encryption over five years before the ’588 patent was filed (EX1029, 234:10-235:11)—even though the patent that corresponds to Exhibit 1016 was asserted by PO in district court and is the subject of co-pending IPR2020-00646.

Dr. Nielson did not consider the prior art and did not apply a presumption that a POSITA is presumed to be aware of all pertinent prior art. *See* EX1029,

230:7-12. However, the Federal Circuit requires that a POSITA is “presumed to be aware of all the pertinent prior art.” *Custom Accessories, Inc. v. Jeffrey-Allan Indus., Inc.*, 807 F.2d 955, 962, (Fed. Cir. 1986) (citing *Standard Oil Co. v. American Cyanamid Co.*, 774 F.2d 448, 454 (Fed.Cir.1985)); *see also* MPEP 2141.03. Because Dr. Nielson’s opinions failed to apply the requirements established by the Federal Circuit, they should be excluded.

B. Exhibit 2012 Fails to Disclose Underlying Facts and Data for Dr. Nielson’s Opinions Regarding Scalable Video.

Dr. Nielson’s opinions regarding scalable video layers (EX2012, ¶¶ 54-77) should be excluded because he lacks a sufficient factual basis and failed to disclose the underlying facts and data used to form those opinions. *See* F.R.E. 702, 705. Dr. Nielson ***does not*** consider himself an expert in video encoding. To provide his declaration, Dr. Nielson looked up materials on scalable layered video but did not disclose what those materials were and could not describe them. *See, e.g.*, EX1029, 155:13-156:5.

First, Dr. Nielson does not consider video encoding to be one of his areas of expertise. EX1024, 13:23-14:8 (“Q. Okay. So beyond computer security, are there any other technological areas that you consider yourself to be an expert in? ... A. I think I have listed the areas of my expertise. I think, in fact, I just included those, so software, computer security, networking. Within computer security, I would emphasize my subfield of cryptography.”), 17:22-18:10:

Q. ... So the lists you have on your CV of your areas of subject matter expertise would be applied cryptography, IOT devices and IOT security, network security, malware and viruses, privacy, miscellaneous security technologies, and software engineering and software analysis. Is that right?

A. Those are what's listed on my CV. Uh-huh.

Q. Okay. And are there any other areas you consider yourself to be an expert in?

A. I think that's a fairly good list.

EX2012, Exhibit A. His declaration states that he is a “subject matter expert in cyber security,” but does not identify video encoding. *See* EX2012, ¶9.

To provide opinions on scalable video layers, Dr. Nielson testified that he may have looked up materials—but he does not remember what they were.

EX1029, 155:13-156:5 (“A. I may have looked up reference materials about terms in the specification that I wanted to be refreshed about. Q. Are those reference materials cited in your Declaration or Materials Considered? A. No.”), 156:13-17 (“A. I don't recall the exact document. It was related to the specification for SVC.”).¹ This omission is critical because the missing materials form the basis for Dr. Nielson’s misguided opinions, and he was unable to explain the particulars of scalable video layers without them.

¹ This admission contradicts Dr. Nielson’s earlier testimony that everything he reviewed is cited in his Declaration or materials considered (which he did not provide). *See* EX1029, 13:17-25, 14:14-15:16.

For example, Dr. Nielson opined that scalable video layers are based on principles of “motion compensation” including “B and P” frame types. EX2012, ¶¶59, 66. But he did not know “[w]hat information is needed to perform motion compensation...” (EX1029, 91:15-92:16), and on January 13, one month after he filed his declaration, Dr. Nielson could not remember the difference between B and P frames. *See* EX1024, 52:17-53:13 (“Q. Okay. And what's the difference between a B and a P frame? A. I don't remember off the top of my head. They're both intermediate frames. I just can't remember what the difference is.”). Even though motion compensation is based on slices and macroblocks in the ubiquitous h.264 standard, Dr. Nielson did not know what slices and macroblocks are. *See* EX1024, 49:2-11:

Q. ... Have you ever heard of a macroblock?

A. Yes, I have. But I don't remember off the top of my head what it is.

Q. Have you ever heard of a slice?

A. Yes. I'm trying to remember what that is. A slice -- I don't remember off the top of my head what that does either.

When objecting to questions regarding “slices,” PO’s counsel admitted that “our expert... was at a loss about what those terms are...” EX1029, 135:8-21.

Therefore, Dr. Nielson’s opinions regarding scalable video layers is not based on his pre-existing knowledge or expertise; rather, it was based on

unspecified materials that he referenced. However, during cross-examination, Dr. Nielson was unable to identify the materials that form the basis for his opinions. *See* EX1029, 155:13-156:5, 156:13-17. Therefore, his opinions lack sufficient factual basis, and Dr. Nielson failed to disclose the underlying facts and data used to form them. *See* F.R.E. 702, 705.

III. Exhibits 2016-2020

Exhibits 2016-2020 are purported to be webpages (EX2016-2017, 2020) and papers (EX2018-2019). DivX cites Exhibits 2017-2018 for purported characterizations of partial frame encryption and adaptive streaming. *See, e.g.*, POR, 17. DivX cites Exhibits 2016 and 2019-2020 for purported characterizations of global decryption keys. *See, e.g.*, POR, 49-50.

A. Exhibits 2016-2020 Are Not Authenticated

Exhibits 2016-2020 should be excluded because they have not been authenticated. F.R.E. 901(a). Petitioners timely objected to these exhibits. *See* Paper 19. DivX has failed to produce any evidence to show that these exhibits are what DivX claims them to be—i.e., documents written by the listed authors and published or made available to the public by their respective purported copyright dates.

None of these exhibits are authenticated by evidence or a witness with personal knowledge about (a) the exhibits themselves, or (b) the respective

websites or sources from which the exhibits were downloaded or otherwise obtained. There is no evidence that the exhibits are accurate copies of documents as they existed on their dates of alleged publication, or whether the documents or websites have been modified. There is absolutely no evidence regarding the maintenance of the documents or websites in the 10+ years () since their alleged publication.

Additionally, Exhibits 2016-2017 and 2020 are purported webpages. Courts have recognized the unreliable nature of webpages and required authentication by witnesses with personal knowledge of the maintenance of websites, the authors of webpages, and the accuracy of contents therein. *See, e.g., St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 774-75 (S.D. Tex. Dec. 17, 1999) (“There is no way Plaintiff can overcome the presumption that the information he discovered on the Internet is inherently untrustworthy. Anyone can put anything on the Internet. No web-site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation.”); *Wady v. Provident Life*, 216 F. Supp. 2d 1060, 1064 (C.D. Cal. Apr. 30, 2002); *In re Homestore.com, Inc. Sec. Litig.*, 347 F. Supp. 2d 769, 782-83 (C.D. Cal. 2004). There is no showing that Exhibits 2016-2017 and 2020 accurately represent content from the purported websites, or whether the webpages has been manipulated. That is the sort of information that could be provided by a

custodian of the websites—which PO did not provide.

Patent Owner served a declaration (EX2021) from counsel of record in this matter attempting to authenticate these exhibits. However, counsel has no personal knowledge regarding when these exhibits were allegedly published, or whether they are accurate copies of documents on those alleged dates. Exhibit 2021 is deficient because it is not based on counsel’s first-hand knowledge, relying instead on hearsay statements from third-party websites from which counsel allegedly downloaded the exhibits. Counsel is not a custodian of these exhibits or websites and has no personal knowledge of the creation, authorship, maintenance, or modification of the websites from which the exhibits are downloaded. *See Wady*, 216 F. Supp. 2d at 1064 (one who “has no personal knowledge of who maintains the website, who authored the documents, or the accuracy of their contents... cannot authenticate these documents [from the website].”); *Vasquez v. H.K. & Shanghai Banking Corp., Ltd.*, 477 F. Supp. 3d 241, 259-60 (S.D.N.Y. 2020) (counsel declaration on records retrieval “establishes only the fact that the records were accessible on the websites at issue at the time he accessed them”); *United States SEC v. Berrettini*, No. 10-CV-1614, 2015 WL 5159746 at *6-7 (N.D. Ill. Sep. 1, 2015) (testimony on document retrieval “would not be sufficient to establish that the material was actually on the website on any date other than [retrieval date]”); *Homestore.com*, 347 F. Supp. 2d at 782-83.

None of these exhibits are purported to be self-authenticating under F.R.E. 902. Any reliance on text from the exhibits themselves, or from the websites from which they were purportedly downloaded, would be inadmissible hearsay. Such text would be out-of-court statements, made by the purported authors of the exhibits and websites, offered for the truth of matter asserted, e.g., the alleged circumstances and date of the exhibit's publication. PO's supplemental declaration from counsel, Exhibit 2021, should, therefore, also be excluded because it depends on inadmissible hearsay statements from third-party websites.

B. Exhibits 2016-2020 Contain Inadmissible Hearsay and Lack Relevance

Exhibits 2016-2020 should be excluded as inadmissible hearsay containing out-of-court statements purportedly published by third parties. F.R.E. 801(c) and 802. None of the statements were made in the current proceeding. *See* 37 C.F.R. § 42.53.

None of these exhibits have been authenticated, and none have been shown to be prior art. Even the hearsay dates for Exhibits 2017 and 2020 point to December 3, 2020, years after the relevant 2011 date for analyzing obviousness in this IPR. Therefore, these exhibits cannot be relied upon to show the knowledge of a POSITA or as teachings in the prior art. Instead, Patent Owner relies on these exhibits for the alleged truth of the matter asserted. For example, PO relies on the following:

- EX2016, to argue that “a global key system can be compromised in its entirety even where one of many licensees who use the product inadvertently does not secure the key.” POR, 50; EX2016, 1;
- EX2017 and EX2018, to argue that “leading experts in cryptography understand that, ‘[y]ou can’t make systems secure by tacking on cryptography as an afterthought’ and that, rather, ‘[y]ou have to know what you are doing every step of the way, from conception through installation.’” POR, 17 (citing EX2017, 1; EX2018, 1);
- EX2019 to argue that “in the 1990s, DVDs were encrypted using a global key-until the key was compromised and the entire system was rendered obsolete.” POR, 49-50; EX2019, 1; and
- EX2020, to argue that “when media is broadcast without the need for any restriction (e.g., geographical restriction) it is broadcast as ‘free-to-air,’ which has no encryption whatsoever.” POR 49; EX2020, 1.

For each of the above, PO relies on the exhibit for the alleged truth of the matter asserted. None of the exhibits satisfy an exception to the rule against hearsay, and therefore these exhibits should be excluded.

C. Exhibits 2016-2021 Contain Improper Opinions

The statements in Exhibits 2016-2021 contain impermissible opinion testimony that is not rationally based on the witness’s perception or personal

knowledge of the matter and instead is based on scientific, technical, or other specialized knowledge. *See* F.R.E. 701, 602. For example, the exhibits contain opinions on topics such as implementation of partial frame encryption with adaptive streaming (POR, 17; EX2017-2018) and implementation of a global key (POR, 49-50; EX2016, 2019-2020). These opinions require scientific and technical knowledge on video encryption and adaptive streaming, which are prohibited for non-expert opinion.

Exhibit 2017, which contains inadmissible hearsay, does not establish the qualifications of the purported author of Exhibit 2018, and does not show that the purported author of Exhibit 2018 is qualified to provide expert testimony. PO has made no effort to establish the qualifications of the authors of Exhibits 2016 and 2019-2020 or to show that the authors of these exhibits are qualified to provide expert testimony. The identity of the author of Exhibit 2020 is entirely unknown.

IV. Exhibit 2025

Exhibit 2025 was filed with PO's Sur-Reply.

A. Exhibit 2025 Constitutes New Evidence Prohibited for Sur-Reply

The rules are clear: “[a] sur-reply ... *may not be accompanied by new evidence other than deposition transcripts of the cross-examination of any reply witness.*” 37 CFR § 42.23(b) (85 Fed. Reg. 79128, Dec. 9, 2020); *see also* Trial Practice Guide (November 2019) at 73-74 (“The sur-reply may not be

accompanied by new evidence other than deposition transcripts of the cross-examination of any reply witness.”). Exhibit 2025 was filed with Sur-Reply and therefore must be excluded under 37 CFR § 42.23(b).

Moreover, Petitioners would be prejudiced if PO is allowed to circumvent PTAB rules. PO offered these exhibits for the first time on Sur-Reply, at a point in the proceeding when Petitioners have no right under the rules to present competing evidence, direct testimony, or cross-examination. *As PO has argued previously, this fact alone warrants exclusion of these exhibits. See IPR2020-00052, Paper 72 at 4-5 (Jan 8, 2021).*

Here, the prejudice is amplified because Petitioners do not have an opportunity to explain PO’s misleading arguments, which take statements out of context. Therefore, any alleged probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, and misleading the factfinder. *See F.R.E. 403.*

Portions of the Sur-Reply rely on the improper new evidence or arguments explained above. Since these portions violate PTAB rules, Petitioners respectfully request that they be stricken.

B. Exhibit 2025 Is Not Authenticated

Exhibit 2025 should be excluded because it has not been authenticated. F.R.E. 901(a). PO has not even attempted to do so, despite the extremely unreliable

nature of the exhibit: Exhibit 2025 purports to be a memo from a website. PO has not produced any evidence to show that this exhibit is what PO claims it to be.

This exhibit is not self-authenticating. Any reliance on text from the document itself would be inadmissible hearsay, e.g., out-of-court statements offered for the truth of matter asserted involving the alleged circumstances and date of the exhibit's alleged publication. Moreover, Exhibit 2025 is purportedly obtained from a website. Courts have recognized the unreliable nature of materials obtained from websites and required authentication by witnesses with personal knowledge of the maintenance of websites, the authors of materials, and the accuracy of contents therein. *See St. Clair*, 76 F. Supp. 2d at 774-75; *Wady*, 216 F. Supp. 2d at 1064; *In re Homestore.com*, 347 F. Supp. 2d at 782.

C. Exhibit 2025 Contains Inadmissible Hearsay and Lack Relevance

Exhibit 2025 should be excluded as inadmissible hearsay. F.R.E. 801(c) and 802. This exhibit contains out-of-court statements purportedly published by third parties. None of the statements were made in the current proceeding. *See* 37 C.F.R. § 42.53.

This exhibit has not been authenticated and has not been shown to be prior art. Therefore, the exhibit cannot be relied upon to show the knowledge of a POSITA or as teachings in the prior art. Instead, PO relies on the exhibit for the alleged truth of the matters asserted. For example, PO relies on the Exhibit 2025 to

argue that that Forward Error Correction (FEC) packets based on an encrypted media stream should also be encrypted. *See* SR, 10, 15. PO relies on the exhibit for the alleged truth of the matter asserted. The exhibit does not satisfy an exception to the rule against hearsay, and therefore the exhibit should be excluded.

D. Exhibit 2025 Contains Improper Opinions

The statements in this exhibit contain impermissible opinion testimony that are not rationally based on the witness's perception or personal knowledge of the matter and instead is based on scientific, technical, or other specialized knowledge. *See* F.R.E. 701, 602. For example, the exhibit contains opinions on topics such as application of FEC to an encrypted media stream. These opinions require scientific, technical, and specialized knowledge, which is prohibited for non-expert opinion. PO has made no effort to establish the qualifications of the authors of Exhibit 2025.

V. Conclusion

For the reasons stated above portions of Exhibit 2012 and Exhibits 2016-2020 and 2025 should be excluded from consideration when the Board issues its Final Written Decision.

Date: April 23, 2021

Respectfully,
/Harper Batts/

Harper Batts (Reg. No. 56,160)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 23, 2021, a complete copy of the foregoing document was served via email to all parties to this proceeding at the addresses indicated:

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