

## Federal Circuit Affirms Summary Judgment of Non-Infringement Because Patentee Failed To Authenticate Third-Party Source Code

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*Wi-Lan Inc. v. Sharp Elecs. Corp.*, No. 2020-1041, *Wi-Lan Inc v. Vizio, Inc.*, No. 2020-1043 (Fed. Cir. Apr. 6, 2021)

In district court, the patentee produced source code printouts from third-party chip manufacturers with declarations from employees purporting to authenticate the code. The district court granted summary judgment of non-infringement because it found the source code to be inadmissible. The patentee appealed.

The Federal Circuit first addressed the business record exception under FRE 803(6). The Federal Circuit affirmed the declarations could not authenticate the code as a business record because patentee could not show that the declarants would be available for trial. The Federal Circuit also rejected the argument that these declarations were themselves business records because the declarations were obtained during litigation and not prepared in the course of a regularly conducted activity of the business. In response to an argument that the Third Circuit permits reliance on documentary evidence, the Federal Circuit still concluded the business records exception would not apply because the accused infringers had shown that the source of information or method of preparation indicated a lack of trustworthiness (e.g., conflicting dates and revision histories in the code, and producers' claim that they could not produce one version of code for all chips).

The Federal Circuit also affirmed that the code was not admissible under FRE 901(b)(4) (allowing admission based on "distinctive characteristics") because of the lack of trustworthiness discussed above. The Federal Circuit also affirmed that the code was not admissible under FRE 703 (allowing an expert to rely on inadmissible evidence). The Federal Circuit noted that merely because an expert may rely on a document does not necessarily allow that document to be admitted into evidence. The Federal Circuit concluded that here, patentee was trying to use its expert as a "backdoor" or substitute fact witness to admit otherwise inadmissible evidence, which is not permitted. Additionally, the Federal Circuit concluded that FRE 703 did not apply because patentee did not establish that experts in the field "reasonably rely on" unauthenticated source code.

The Federal Circuit therefore held that the district court had not abused its discretion in not admitting the source code, and thus affirmed the grant of summary judgment.

Read the full decision [here](#).

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