

Expert Report

Manny Kepas v. eBay

Benjamin T. Wilson, JD, CISSP, MCSE+Internet, A+ Certified
Xcera Consulting, Inc.

Expert for Plaintiffs

May 15, 2008

I. QUALIFICATIONS

Education: B.S. Honors Economics, 1987 University of Utah
Juris Doctor, 1990 University of Utah
Microsoft Systems Engineer Course, 1998 Keane, Inc.

Experience: *See attached Curriculum Vitae.*

Memberships: *See attached Curriculum Vitae.*

Publications: *See attached Curriculum Vitae.*

II. COMPENSATION

\$150/hour plus expenses.

III. OTHER CASES

Catanzaro v. Catanzaro, Civil No. 020903124, Utah Second District

Young v. Feeney, Civil No. 2:07-cv-00296-TS, U.S. District Court

IV. REPORT

A. Subject Matter and Information Considered in Forming Opinions

Plaintiffs have consulted with and retained Benjamin T. Wilson of Xcera Consulting, Inc., to analyze and testify concerning thirty-three (33) files provided by Defendant eBay. The 33 files were named EBIED0001 .. EBIED0033. File EBIED0016.xls had a modified date of June 6, 2001, and appeared to have been erroneously included in the group of files. Of the 32 Report on Files Provided in *Kepas v. eBay*

remaining files, two (2) were HTML copies of e-mails, one (1) was an MS Excel (.xls) file, and twenty-nine (29) were MS Word documents.

The MS Word Files

Of the 29 MS Word documents, nine (9) appeared to be unique and the remaining twenty (20) were essentially copies of the aforementioned nine unique files. The nine unique files are different versions of two documents at progressive stages in the editing process. The "Title" property¹ for one of the documents was "Summary of events"², and the "Title" property for the other document was "Professional Memo."³

All nine versions are attached to this report as follows:

Description	Filename	Title	Last saved by	Date last saved
Created by Susan Dutton	EBIED0030.doc	Professional Memo	sdutton	Tuesday, March 07, 2006
Modified by Susan Dutton	EBIED0031.doc	Professional Memo	sdutton	Wednesday, March 08, 2006
Modified by Susan Dutton	EBIED0029.doc	Professional Memo	sdutton	Thursday, March 16, 2006
Modified by Susan Dutton	EBIED0017.doc	Professional Memo	sdutton	Wednesday, June 20, 2007
Created by Jeff Anderson	EBIED0033.doc	Summary of events	jfanders	Monday, March 06, 2006
Modified by Jeff Anderson	EBIED0026.doc	Summary of events	jfanders	Thursday, March 16, 2006
Modified by Jeff Anderson	EBIED0004.doc	Summary of events	jfanders	Friday, March 24, 2006
Modified by Mike Bringuel	EBIED0007.doc	Summary of events	mbringue	Wednesday, March 29, 2006
Modified by Jeff Anderson	EBIED0011.doc	Summary of events	jfanders	Thursday, March 30, 2006

1 Computer data files have certain "properties" that are associated with them. "File properties" are metadata, or "data about data." The MS Word document files examined in this case had several file property fields, including "Title," "Authors," "Last saved by," "Date last saved," "Total editing time," and "Revision number" among others.

2 When an MS Word document is created without using a previous document or template, the first line of the document becomes its "title" the first time that the document is saved. Here, "Summary of events" was originally the first line of the memo.

3 "Professional Memo" is the "Title" for one of several MS Word memo templates that come pre-formatted with the MS Word program. The other "titles" for MS Word memo templates are "Contemporary Memo" and "Elegant Memo."

Based on a comparison of the files (using the date saved, Revision number, size and the document comparison feature of MS Word), I determined that EBIED0018.doc and EBIED0032.doc were copies of EBIED0029.doc; that EBIED0002.doc, EBIED0005.doc, ..12, ..19, ..20, ..22, ..23, ..24, and ..25 were all copies of EBIED0004.doc; and that EBIED0001.doc, EBIED0006.doc, ..9, ..10, ..13, ..21 and ..27 were all copies of EBIED0011.doc. See Exh. A.

The nine versions of the documents attached to this report as Exhibit B were prepared by using the document comparison feature of Word for each subsequent version as follows:

Filename	Process used to compare
EBIED0030.doc	No comparison
EBIED0031.doc	EBIED0030.doc was compared with EBIED0031.doc marking the additions and deletions introduced by EBIED0031.doc
EBIED0029.doc	EBIED0031.doc was compared with EBIED0029.doc marking the additions and deletions introduced by EBIED0029.doc
EBIED0017.doc	EBIED0029.doc was compared with EBIED0017.doc marking the additions and deletions introduced by EBIED0017.doc
EBIED0033.doc	No comparison
EBIED0026.doc	EBIED0033.doc was compared with EBIED0026.doc marking the additions and deletions introduced by EBIED0026.doc
EBIED0004.doc	EBIED0026.doc was compared with EBIED0004.doc marking the additions and deletions introduced by EBIED0004.doc
EBIED0007.doc	EBIED0004.doc was compared with EBIED0007.doc marking the additions and deletions introduced by EBIED0007.doc
EBIED0011.doc	EBIED0007.doc was compared with EBIED0011.doc marking the additions and deletions introduced by EBIED0011.doc

Each of the files was exported to PDF file format with tracked changes showing.

The HTML Files

Plaintiffs asked me to compare two HTML files--EBIED0014.htm and EBIED0015.htm. These files were e-mails, which I examined using an Internet web browser, a text editor (Notepad.exe) and MS Word.

The Excel Spreadsheet File

I also examined the MS Excel spreadsheet file provided—EBIED0003.xls—with a file property title of “Individual Performance Plan & Review.” I examined this file using the MS Excel program and a file text editor (Notepad.exe).

**B. Substance of Facts and Opinions to be Expressed and my Basis
and Reasons therefore:**

The MS Word Files

It is my opinion based on an analysis of the MS Word files that edits to the document titled "Professional Memo" with the Re: subject line of "Performance Improvement Plan" were made by Susan Dutton between February 14, 2006, (the creation date of the document by its original author, "lchamber," as reported in the file properties) and March 7, 2006 (the date saved for filename EBIED0030.doc). This is based, in part, on the "Total editing time" file property of 27 hours and 46 minutes and a "Last saved by" file property of "sdutton." See Exh. A.

On Wednesday, March 8, 2006, the file was opened for 34 minutes on a computer with an active user login of "sdutton" and then it was saved with edits, as indicated in Exhibit B. On Thursday, March 16, 2006, user "sdutton" saved the file after it had been opened for 3 hours and 28 minutes. During that time, edits were made to the document. See Exh. B. Finally, on June 20, 2007, the file was open for 17 minutes and thereafter saved with edits identified in Exhibit B. At each of these events, the file was loaded onto a computer where the active login / user ID was "sdutton." The conclusion that these edits were made by Susan Dutton is consistent with the text of the memo, which states it is "From:" "Susan Dutton." This sequence of events is also consistent with the document revision numbers, which increment from 7 to 11 to 19 to 23 to 26. See Exh. A.

The document titled, "Summary of events," was created on Monday, March 6, 2006, by a person using the user login of "jfinders." The text of the memorandum indicates that this was Jeff Anderson. On Thursday, March 16, 2006, the user "jfinders," presumably Mr. Anderson, made edits over a five-hour period. Edits are shown in Exhibit B. Additional edits were made over a six-hour period on March 24, 2006, by user "jfinders." On March 29, 2006, user "mbringue" made edits to the document over a three-hour period, and on March 30, 2006, user "jfinders" edited and saved the document with some minor edits. The various versions created by these edits are set forth in Exhibit B.

The Excel Spreadsheet File

The Excel spreadsheet file (EBIED0003.xls) was last saved on May 10, 2006, by user "sdutton." The original creator of the file was Rick Dorsey, and the file's title was "Individual Performance Plan & Review." No further useful information can be obtained concerning who made edits to the file or when. (Although an examination of the file using Notepad.exe revealed file location, print server information and prior users of the file.)

V. CONCLUSION

My examination of the thirty-three files indicated that one was irrelevant and only twelve were unique and relevant. The other twenty files were nearly identical copies of some of the previously mentioned unique files.

The originator of the document titled, "Professional Memo," was "lchamber," but it was saved by Susan Dutton on March 7, 2006, and it was edited by her on March 8, and March 16, 2006, and on June 20, 2007.

The author of the document titled, "Summary of events," was Jeff Anderson. Edits to "Summary of events" were made by Mr. Anderson on March 6, March 16, March 24, and March 30, 2006. On March 29, 2006, Mike Bringuel also made edits to "Summary of events."

A comparison of EBIED0014.htm with EBIED0015.htm reveals that three deletions and a capitalization of the word "it" were made by Susan Dutton in the quoted thread of four e-mails dated December 17, 2005, before the e-mail containing the quoted thread of e-mails was sent by Ms. Dutton to Jeff Anderson on March 24, 2006.

The Excel spreadsheet file EBIED0003.xls titled, "Individual Performance Plan & Review," was saved by Susan Dutton on May 10, 2006.

CURRICULUM VITAE

BENJAMIN T. WILSON, JD, MCSE, CISSP

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PROFESSIONAL DESIGNATIONS, AFFILIATIONS AND ADVISORY POSITIONS

American Bar Association

Council Member, Section of Science and Technology Law

Immediate Past Co-Chair, Information Security Committee, Section of Science and Technology Law (www.abanet.org/scitech/ec/isc)

Member, Book Publishing Committee, ABA Section of Science and Technology Law

Member, e-Notary Working Group, Electronic Filing Committee, Section of Science and Technology Law (www.abanet.org/scitech/ec/jedi)

Utah State Bar – admitted October 1990

Chair, Cyberspace Law Committee, Utah State Bar (www.utahbar.org/sections/cyberlaw)

Member, Client Security Fund Committee

Utah State University

National Advisory Council and Guest Lecturer, Department of Business Information Systems, College of Business (www1.usu.edu/cob/bis)

Certification Authority (CA) Browser Forum - Participant

International Collaboration on Identity Management (I-CIDM) Bridge-to-Bridge Working Group – Participant and member of Audit and Legal Subgroup

University of Utah

National Honors Advisory Committee, Honors Program (honors.utah.edu)

EDUCATION

Juris Doctor, S.J. Quinney College of Law, University of Utah, 1990 (www.law.utah.edu)

First Place Appellate Brief, Traynor Moot Court Competition

Extern to United States District Court Judge J. Thomas Greene

Honors Bachelor of Arts in Economics, University of Utah, 1987 (honors.utah.edu)

Honors Thesis: *Mexican Accession to the General Agreement on Tariffs and Trade:*

Transition From Prior Import Permits to Tariffs" Spring 1987

Phi Kappa Phi

Phi Beta Kappa

CURRICULUM VITAE

CERTIFICATIONS

Certified Information Systems Security Professional (CISSP), International Information Systems Security Certification Consortium, Inc., (ISC2) (www.isc2.org)

Microsoft-Certified Systems Engineer (MCSE) (www.microsoft.com/learning/mcp/mcse)

CompTIA A+ Certification (certification.comptia.org/a/)

PRESENTATIONS

RSA Conferences (www.rsaconference.com), *Hot Topics in Information Security Law*, 2002, 2003, 2004, 2005, 2006, 2007 and 2008.

Lorman Education Services (www.lorman.com), *Internet Research*, Dec. 2006.

National Business Institute (www.nbi-sems.com), *Find It Fast and Free on the Internet: Advanced Internet Strategies for the Utah Legal Professional*, 2004, 2005, and scheduled Nov. 2006; *Avoiding Ethical Tangles While Using Technology in Utah*, 2003; *Internet Basics for the Utah Attorney*, 2000; *The Law of the Internet*, 1999.

Utah State Bar, *Cyber-Liability*, 2008 Mid-Year Meeting; *Personal Jurisdiction for Internet Activities*, 2007 Annual Meeting; *Update on Legal Issues Related to E-mail: Spam, Phishing, Privacy, Etc.*, 2005, and *Safeguarding the Integrity, Confidentiality and Privilege of Electronic Information and Communications*, 2005.

Half Moon Seminars, *Digital Discovery and the Proposed New Rules of Civil Procedure*, 2005.

American Bar Association, *Sarbanes-Oxley: What You Don't Know About Information Security Can Hurt You*, 2004.

American Inns of Court, Sutherland/Watkiss Inn, *Digging Up and Preserving Digital Evidence for Use at Trial*, 2001

American Bankers Association, *Digital Signatures*, 2001; *Internet Compliance*, 2000.

King County Bar Association, Seattle, WA, *Electronic Signatures & Electronic Contracting: Introduction to PKI and PKI Assessment*, 2001.

California State Bar, *Electronic Contracting: Recent Developments and Practical Implications*, 2000.

PUBLICATIONS

Information Security: A Legal, Business, and Technical Handbook;
ISBN: 1-59031-300-3, 2004 (co-author).

Public Key Infrastructure Assessment Guidelines;
ISBN 1-57073-943-9, 2003 (co-reporter).

CURRICULUM VITAE

OTHER REPRESENTATIVE WORK

DigiCert, Inc., Certificate Policy / Certification Practice Statement, Subscriber Agreement, Relying Party Agreement, and Security Policy, 2006 (www.digicert.com/ssl-cps-repository.htm)

IdenTrust, SAFE Issuer, Certification Practice Statement, 2006 and **RosettaNet**, Relying Party Agreement, 2006.

State of Washington, Certificate Policy, Certification Practice Statement, Subscriber Agreements, Registration Authority Agreement, (www.digsigtrust.com/certificates/policy/sowindex.html) 2000 and 2006.

Higher Education Bridge CA (HEBCA) / U.S. Higher Education Root (USHER) CA, preparatory work for cross-certification with Federal Bridge CA, 2005

American Express, Certificate Policy and Certification Practice Statement for X.509, SSL and Europay/Mastercard/Visa Certificates, 2002.

OneHealthPort, Participating Organization Agreement, Terms and Conditions, Subscriber Agreement, Notary Form (www.onehealthport.com/register/index.php), 2002

Digital Signature Trust Co.,

TrustID - Certificate Policy, Certification Practice Statement, Subscriber Agreement, Relying Party Agreement, Relying Party Warranty, Registration Authority Agreement, Local Registration Authority Security Handbook, 1999 through 2002

TrustMint – Certificate Policy, Registration Authority Agreement

Clareon (BoFA Paymode) Certificate Policy
(<https://secure.paymode.com/policies/certpolicy.htm>)

Department of Defense Interim External Certification Authority for Digital Signature Trust – Certification Practice Statement, Notary Form, Key Recovery Practices Statement, 2000-2003 (www.digsigtrust.com/certificates/policy/iecaindex.html)

Access Certificates for Electronic Services (ACES) for Digital Signature Trust - Certification Practice Statement, Privacy Policy, Subscriber Agreements, 1999-2004; Registration Practices Statement for Department of Health and Human Services, Registration Authority Agreement, Certificate Administrator Agreement and Subscriber Agreement, 2004. (www.identrust.com/certificates/aces_policies.html)

EXHIBIT A

Total editing time	Filename	Title	Authors	Last saved by	Date last saved	Time	Date Modified	Time	Type	Size	Rev. #	Content created	Time
Irrelevant	EBIED0016.xls	None (HomeMarket.cc:Angela Sumi)	Angela Sumi	Angela Sumi	Wednesday, June 06, 2001	7:30 PM	Wednesday, June 06, 2001	6:27 PM	Excel	19 KB		Wednesday, June 06, 2001	6:54 PM
Dated March 6, 2006	0:02:00 EBIED00033.doc	Summary of events	ifanders	ifanders	Monday, March 06, 2006	4:59 PM	Monday, March 06, 2006	3:59 PM	Word	104 KB	7	Monday, March 06, 2006	4:51 PM
Created by Susan D.	27:46:00 EBIED00030.doc	Professional Memo	lchamber	sdutton	Tuesday, March 07, 2006	4:16 PM	Tuesday, March 07, 2006	3:45 PM	Word	74 KB	11	Tuesday, February 14, 2006	6:42 PM
Modified by Susan D.	28:20:00 EBIED00031.doc	Professional Memo	lchamber	sdutton	Wednesday, March 08, 2006	1:14 PM	Wednesday, March 08, 2006	2:18 PM	Word	73 KB	19	Tuesday, February 14, 2006	6:42 PM
Modified by Jeff A.	5:36:00 EBIED00026.doc	Summary of events	ifanders	sdutton	Thursday, March 16, 2006	10:16 AM	Thursday, March 16, 2006	9:16 AM	Word	118 KB	25	Monday, March 06, 2006	4:51 PM
Modified by Susan D.	31:48:00 EBIED00029.doc	Professional Memo	lchamber	sdutton	Thursday, March 16, 2006	5:11 PM	Thursday, March 16, 2006	4:11 PM	Word	68 KB	23	Tuesday, February 14, 2006	6:42 PM
Copy of EBIED00029.doc	31:48:00 EBIED00018.doc	Professional Memo	lchamber	sdutton	Thursday, March 16, 2006	5:11 PM	Thursday, March 16, 2006	4:14 PM	Word	74 KB	23	Tuesday, February 14, 2006	6:42 PM
Copy of EBIED00029.doc	31:48:00 EBIED00032.doc	Professional Memo	lchamber	sdutton	Thursday, March 16, 2006	5:11 PM	Thursday, March 16, 2006	4:14 PM	Word	74 KB	23	Tuesday, February 14, 2006	6:42 PM
Modified by Jeff A.	EBIED00015.htm	None	no	sdutton	Friday, March 24, 2006	12:49 PM	Friday, March 24, 2006	12:49 PM	HTML	7 KB		Friday, March 24, 2006	12:49 PM
Copy of EBIED0004.doc	13:44:00 EBIED00004.doc	Summary of events	ifanders	ifanders	Friday, March 24, 2006	7:13 PM	Friday, March 24, 2006	6:25 PM	Word	108 KB	62	Monday, March 06, 2006	4:51 PM
Copy of EBIED0004.doc	13:44:00 EBIED00005.doc	Summary of events	ifanders	ifanders	Friday, March 24, 2006	7:13 PM	Friday, March 24, 2006	6:25 PM	Word	108 KB	62	Monday, March 06, 2006	4:51 PM
Copy of EBIED0004.doc	13:44:00 EBIED00012.doc	Summary of events	ifanders	ifanders	Friday, March 24, 2006	7:13 PM	Friday, March 24, 2006	6:25 PM	Word	108 KB	62	Monday, March 06, 2006	4:51 PM
Copy of EBIED0004.doc	13:44:00 EBIED00019.doc	Summary of events	ifanders	ifanders	Friday, March 24, 2006	7:13 PM	Friday, March 24, 2006	6:25 PM	Word	108 KB	62	Monday, March 06, 2006	4:51 PM
Copy of EBIED0004.doc	13:44:00 EBIED00020.doc	Summary of events	ifanders	ifanders	Friday, March 24, 2006	7:13 PM	Friday, March 24, 2006	6:25 PM	Word	108 KB	62	Monday, March 06, 2006	4:51 PM
Copy of EBIED0004.doc	13:44:00 EBIED00025.doc	Summary of events	ifanders	ifanders	Friday, March 24, 2006	7:13 PM	Friday, March 24, 2006	6:25 PM	Word	108 KB	62	Monday, March 06, 2006	4:51 PM
Copy of EBIED0004.doc	13:44:00 EBIED00024.doc	Summary of events	ifanders	ifanders	Friday, March 24, 2006	7:13 PM	Friday, March 24, 2006	6:25 PM	Word	108 KB	62	Monday, March 06, 2006	4:51 PM
Copy of EBIED0004.doc	13:44:00 EBIED00022.doc	Summary of events	ifanders	ifanders	Friday, March 24, 2006	7:13 PM	Friday, March 24, 2006	6:25 PM	Word	108 KB	62	Monday, March 06, 2006	4:51 PM
Copy of EBIED0004.doc	13:44:00 EBIED00023.doc	Summary of events	ifanders	ifanders	Friday, March 24, 2006	7:13 PM	Friday, March 24, 2006	6:25 PM	Word	106 KB	62	Monday, March 06, 2006	4:51 PM
Copy of EBIED0004.doc	13:44:00 EBIED00002.doc	Summary of events	ifanders	ifanders	Friday, March 24, 2006	7:13 PM	Friday, March 24, 2006	5:13 PM	Word	106 KB	62	Monday, March 06, 2006	4:51 PM
Modified by Mike B.	16:49:00 EBIED00007.doc	Summary of events	ifanders	mbringue	Saturday, March 25, 2006	2:18 AM	Saturday, March 25, 2006	2:18 AM	HTML	7 KB		Saturday, March 25, 2006	2:18 AM
Copy of EBIED0007.doc	0:05:00 EBIED00008.doc	Summary of events	ifanders	mbringue	Wednesday, March 29, 2006	4:56 PM	Wednesday, March 29, 2006	4:52 PM	Word	120 KB	3	Tuesday, March 28, 2006	8:55 PM
Modified by Jeff A.	0:02:00 EBIED00011.doc	Summary of events	ifanders	ifanders	Wednesday, March 29, 2006	5:01 PM	Wednesday, March 29, 2006	4:03 PM	Word	120 KB	2	Wednesday, March 29, 2006	5:01 PM
Copy of EBIED0011.doc	0:02:00 EBIED00012.doc	Summary of events	ifanders	ifanders	Thursday, March 30, 2006	7:48 AM	Thursday, March 30, 2006	6:49 AM	Word	120 KB	2	Thursday, March 30, 2006	7:48 AM
Copy of EBIED0011.doc	0:02:00 EBIED00013.doc	Summary of events	ifanders	ifanders	Thursday, March 30, 2006	7:48 AM	Thursday, March 30, 2006	6:49 AM	Word	120 KB	2	Thursday, March 30, 2006	7:48 AM
Copy of EBIED0011.doc	0:02:00 EBIED00010.doc	Summary of events	ifanders	ifanders	Thursday, March 30, 2006	7:48 AM	Thursday, March 30, 2006	6:49 AM	Word	120 KB	2	Thursday, March 30, 2006	7:48 AM
Copy of EBIED0011.doc	0:02:00 EBIED00001.doc	Summary of events	ifanders	ifanders	Thursday, March 30, 2006	7:48 AM	Thursday, March 30, 2006	6:49 AM	Word	120 KB	2	Thursday, March 30, 2006	7:48 AM
Copy of EBIED0011.doc	0:02:00 EBIED0010.doc	Summary of events	ifanders	ifanders	Thursday, March 30, 2006	7:48 AM	Thursday, March 30, 2006	6:49 AM	Word	120 KB	2	Thursday, March 30, 2006	7:48 AM
Copy of EBIED0011.doc	0:02:00 EBIED00027.doc	Summary of events	ifanders	mbringue	Friday, September 15, 2006	12:38 PM	Friday, September 15, 2006	9:48 AM	Word	120 KB	2	Thursday, March 30, 2006	12:38 PM
Copy of EBIED0011.doc	0:02:00 EBIED00006.doc	Summary of events	ifanders	mbringue	Thursday, March 30, 2006	1:38 PM	Thursday, March 30, 2006	12:38 PM	Word	118 KB	2	Thursday, March 30, 2006	1:38 PM
Copy of EBIED0011.doc	0:02:00 EBIED00009.doc	Summary of events	ifanders	mbringue	Thursday, March 30, 2006	1:38 PM	Thursday, March 30, 2006	12:38 PM	Word	118 KB	2	Thursday, March 30, 2006	1:38 PM
Modified by Susan D.	32:05:00 EBIED00017.doc	Individual Performance Memo	lchamber	sdutton	Wednesday, May 10, 2006	3:46 PM	Tuesday, August 08, 2006	3:06 PM	Excel	143 KB	26	Thursday, October 21, 2004	9:27 AM
Copy of EBIED0017.doc	0:00:00 EBIED00028.doc	Professional Memo	lchamber	sdutton	Wednesday, June 20, 2007	4:05 PM	Wednesday, June 20, 2007	3:05 PM	Word	69 KB	2	Wednesday, June 20, 2007	4:05 PM