

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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TOYOTA MOTOR CORPORATION

Petitioner

v.

Patent of AMERICAN VEHICULAR SCIENCES LLC

Patent Owner

Patent No. 8,036,788

Issue Date: October 11, 2011

Title: VEHICLE DIAGNOSTICS OR PROGNOSTIC MESSAGE  
TRANSMISSION SYSTEMS AND METHODS

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**PATENT OWNER'S OBJECTIONS TO FEBRUARY 18, 2014  
SUPPLEMENTAL EVIDENCE SUBMITTED BY TOYOTA MOTOR  
CORPORATION**

Case No. IPR2013-00417

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Pursuant to 37 C.F.R. § 42.64 and the Initial Conference Call on February 3, 2014, Patent Owner American Vehicular Sciences (“AVS”) serves and submits the following objections to supplemental evidence served on February 18, 2014 by Toyota Motor Corporation (“Toyota”) for *Inter Partes* Review of U.S. Pat. No. 8,036,788 (“the 788 patent”). These objections to Toyota’s supplemental evidence are in addition to the previous amended objections submitted by AVS on February 5, 2014, and are only in response to new evidence submitted by Toyota. AVS does not waive its prior amended objections.

**1. EXHIBIT 1011 (AWARD TO KEVIN FRY)**

As set forth in AVS’s previous amended objections, AVS objects to the admissibility of K.N. Fry, “Diesel Locomotive Reliability Improvement by System Monitoring,” Proc. Instn. Mech. Engrs. Vol. 209, 3-12 (1995) (“Fry”) because Toyota has not sufficiently established that Fry is prior art to the 788 patent. For that reason, Fry is irrelevant pursuant to Fed. R. Evid. 402. *See, e.g., Nordock Inc. v. Systems Inc.*, No. 11-C-118, 2013 U.S. Dist. LEXIS 34661, at \*7 (E.D. Wis. Mar. 13, 2013) (“Because insufficient evidence has been presented regarding the dates of the two publications, they are not admissible as prior art and Nordock’s motion to exclude ‘undated’ and ‘unpublished’ references from evidence as asserted ‘prior art’ references is granted.”); *Amini Innovation Corp. v. Anthony California, Inc.*, No. 03-8749, 2006 U.S. Dist. LEXIS 100800, at \*19

(C.D. Cal. Sept. 21, 2006) (“Without knowing the publication dates, the documents are not admissible as prior art.”).

One of the pieces of “evidence” that Toyota has now submitted as part of its supplemental evidence to allegedly support the publication date of the Fry reference is Exhibit 1011, a photocopy of an award purportedly given to Mr. Fry for authoring the Fry reference. (*See* Exhibit 1011.) That award, however, is not relevant in any way to the publication date of Fry, as it does not provide any date other than “1995”. *See* Fed. R. Evid. 401-402. The fact that Mr. Fry may have received an award sometime in 1995 does nothing to show that the Fry reference was publicly accessible prior to June 7, 1995. It is apparently being submitted only to bolster Mr. Fry, a purpose not allowed by the Federal Rules of Evidence. *See* Fed. R. Evid. 403.

Further, Exhibit 1011 constitutes inadmissible hearsay, as it is being offered for the truth of the matter asserted and does not qualify for any hearsay exception. *See* Fed. R. Evid. 801-804.

## **2. EXHIBIT 1012 (SAGE PUBLICATIONS WEBSITE LISTING)**

AVS objects to the admissibility of Exhibit 1012 on the basis of hearsay and lack of relevance. The Fry reference purports to be an article that the Institution for Mechanical Engineers arranges to have published. Exhibit 1012 is a website print-out from a current publisher of the Fry reference, Sage Publications, printed

out in February of 2014. (See Exhibit 1012.) In 1995, the Fry reference was purportedly published by a different third party organization, Mechanical Engineering Publications Limited. (See Exhibit 1014 at ¶ 3.) Sage Publications currently publishes the Fry reference on behalf of the Institution of Mechanical Engineers. (See *id.* at 4.) The website print-out indicates a publication date for the Fry reference of January 1995. Toyota, however, has not provided any foundational evidence or testimony to establish that the Sage Publications web-site printout record meets an exception to the hearsay rule, as being made “at or near the time” of the act purported to be true, i.e., the alleged publication date of Fry. See Fed. R. Evid. 803(6). Indeed, it appears that Sage Publications was not even the organization that published the Fry reference in 1995. (See Exhibit 1014 at ¶ 3.) Moreover, it is highly doubtful that the Fry reference was available for download on the Internet in 1995—when the Internet was in its infancy and download speeds were not sufficient for making articles available on the Internet. Because the web-site printout has not been established as being made contemporaneous with the publication date of Fry, it would not be enough that the web-site may be a “record of regularly conducted activity” in 2014—it is still inadmissible hearsay. See Fed. R. Evid. 803. Here, it is more than likely that when Sage created its web-site download system sometime well after 1995, that it gave the Fry reference a date of January 1995 out of recordation convenience since

the Fry reference itself does not have a date of publication beyond “1995.” *See* Fed. R. Evid. 802. *See also United States v. Jackson*, 208 F.3d 633, 637 (7th Cir. 2000) (web postings from the Internet were inadmissible hearsay); *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 775 (S.D. Texas 1999) (“Any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretations of the hearsay exception rules.”); *Hilgraeve, Inc. v. Symantec Corp.*, 271 F. Supp. 2d 964, 974 (E.D. Mich. 2003) (“Plaintiff correctly notes that the dates imprinted on these documents are hearsay when offered to prove the truth of the matter asserted, that is, that SAM 1.3 was accessible to the public as of the date set forth on the documents.”).

Further, because the Sage Publications web-site printout at best only establishes how Sage, in 2014, now records the release date of the Fry reference (rather than the date that the Fry reference was actually accessible to the public, such as indexed in a library), it is not relevant. The only relevant date is the date on which Fry was accessible to the public—not the date that Sage Publications gives the reference (in hindsight) in 2014, nor even the date on which the Fry reference was mailed out. Indeed, it is common knowledge that magazines or journals are not necessarily publicly available on the date affixed to the magazine or journal. Under the law, Toyota must establish the date on which the Fry reference was available and indexed in a library or available for download from the

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