

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TOYOTA MOTOR CORPORATION

Petitioner,

v.

AMERICAN VEHICULAR SCIENCES LLC

Patent Owner.

Patent No. 8,036,788

Issue Date: October 11, 2011

Title: VEHICLE DIAGNOSTIC OR PROGNOSTIC MESSAGE
TRANSMISSION SYSTEMS AND METHODS

**PETITIONER'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE
AND EXPUNGE EX2035-EX2041**

Case No. IPR2013-00417

Toyota's Motion (Paper 66) requests the Board eliminate from the record seven new hyperlink print-out exhibits that AVS included with its reply brief in support of its Motion to Exclude (Paper 58). AVS' Opposition (Paper 67) provides no justification for AVS' inclusion of that new evidence. Rather, it merely serves as a vehicle for AVS to introduce more new, substantive arguments regarding the accuracy of the dates on Sage Publications' website and the truthfulness of Ms. Broadhurst and Mr. Fry. AVS' arguments and newly proffered exhibits should have been presented in AVS' Response to Toyota's Petition, or, at the latest, in AVS' Motion to Exclude, not in AVS' Reply on its Motion to Exclude, or in AVS' Opposition brief here.

I. MS. BROADHURST'S AFFIDAVIT IS CLEAR

During the August 7, 2014 teleconference, AVS tried to suggest that its new exhibits were somehow responsive to allegedly new arguments made by Toyota in its opposition to AVS's motion to exclude. However, as Toyota explained in its motion to strike, the points AVS tries to characterize as new are all set forth in the Broadhurst Affidavit that AVS has had since February. (Paper 66 at 3-4).

Even though Toyota relied on verbatim quotes from the Broadhurst Affidavit in its opposition to AVS' motion to exclude, AVS insists Toyota "mischaracterized" the affidavit, because it is not worded in the exact way AVS would like. (Paper 67 at 3-4). For example, AVS argues that the affidavit did not state that "IME assigned the dates in Sage's cover page and abstract," that "IME maintained [the] Sage website in the normal course of business," or that "all of the Fry-related documents on Sage's

website are IME’s business records.” (*Id.* at 4). But AVS’s insistence on exactly what the Broadhurst Affidavit does not state is pedantic and beside the point. The affidavit does state that the IME “maintains records of the dates on which the articles it published were received, accepted for publication and eventually published,” that “these records are maintained as part of the ordinary course of business of the [IME],” and that these IME records were reviewed “on Sage Publications’ website.” (Ex. 1014, ¶¶ 4 and 5). This is more than sufficient to establish that the IME records on the Sage website are IME business records, and that they include the dates on which articles are received, accepted and published.

The fact that the affidavit does not separately address Ex. 1012 is also beside the point. It attaches Ex. 1005, including the dated cover and abstract pages. If AVS wanted to challenge the testimony or exhibits, it should have deposed Ms. Broadhurst months ago when Toyota could collect additional evidence to respond.

II. TOYOTA’S OTHER ARGUMENTS ARE NOT NEW

In its reply on petition, Toyota stated that it was relying on the “records maintained on the website of Sage Publications,” the Broadhurst affidavit, and the Fry declaration showing that “the Fry article was published before June 7, 1995,” although “it has not been able to confirm that fact by locating physical copies with a recipient-stamped date prior to that date.” (Paper 37 at 3-4.) Pursuant to agreement, Toyota provided AVS with 12 date-stamped copies of the F1 issue that contains Fry, and the copies were submitted with a joint identifying statement. (Paper 41 at 6-7.)

Not satisfied with the joint submission, AVS then filed a motion to exclude that extensively cited the 12 copies in support of a speculative argument that the only way the Fry article became publicly available was as part of a bound journal received and stamped in libraries in England in early September 1995 and libraries in the US thereafter. (*See* Paper 51 at 7.) Toyota responded that this speculation is unsupported by the record, including AVS’s own exhibits, which show a variety of ways Fry may have become publicly available. This includes dissemination of “25 free offprints” to authors, and copies provided directly to subscribers. (*See* Paper 55 at 2, 7.) This, coupled with the undisputed fact that the Fry article was submitted in November 1993 and accepted in December 1994, undermines AVS’s speculation, and is consistent both with the Broadhurst Affidavit and Fry’s recollection that the article itself was published in January 1995. (Ex. 1013 at ¶ 5; *Compare id.* at ¶ 3). This was not a “new” argument—it responded to erroneous speculation in AVS’s motion to exclude. And, it was not premised on any “new” exhibits—it cited the very exhibits that AVS referenced. It does not justify AVS’s attempts to now introduce more new evidence (particularly since the evidence does not even relate to the Fry article itself).

III. CONCLUSION

AVS’ brief provides no justification for the new evidence in AVS’s reply. The Board should grant Toyota’s motion.

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