

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

EASTMAN KODAK COMPANY, AGFA CORPORATION,
ESKO SOFTWARE BVBA, and HEIDELBERG, USA
Petitioners

v.

CTP INNOVATIONS, LLC
Patent Owner

Case IPR2014-00790
Patent 6,611,349

**PATENT OWNER'S REPLY TO OPPOSITION TO MOTIONS TO
EXCLUDE**

CTP Innovations, LLC (“Patent Owner”), respectfully submits this Reply to Petitioners' Opposition to Motions to Exclude (Paper 35).

1. Petitioners Have Treated the First Motion to Exclude As Objections.

The document filed as a Motion to Exclude on April 2, 2015 (Paper 18) (the “April 2nd Motion”), resulted from John Suetens' deposition in which his testimony substantially undercut and refuted his declaration (Ex. 1023) that was submitted with the original and corrected petitions. His testimony also called into question whether the Apogee reference (Ex. 1008) was actually published prior to the earliest effective filing date of the subject patent.

Petitioners elected to treat the April 2nd Motion as a timely submitted Notice of Objections on the record. Petitioners' Reply Brief (Paper 29) at 16-17. According to Petitioners, Patent Owner's objection provided Petitioners the opportunity to submit "supplemental evidence." This led to the submission of the Declaration of Michael Jahn (Ex. 1024), and the Supplemental Declaration of Johan Suetens (Ex. 1025). Among other objections, Patent Owner objected to these declarations as comprising "supplemental information," not "supplemental evidence," and the filing of these declarations led to the Motion to Exclude filed on June 11, 2015 (Paper 31) (the "June 11th Motion").

Because Petitioners have treated the April 2d Motion as a timely submitted notice of objections, Patent Owner has done the same when filing the June 11th Motion. Petitioners cannot have it both ways: if the April 2d Motion is treated as a notice of objections permitting Petitioners to submit alleged "supplemental evidence," then the June 11th Motion cannot be objected to as being beyond page limits or otherwise improperly filed. To the extent the April 2 Motion is considered to be only objections, the June 11th Motion should be considered as Patent Owner's sole motion to exclude, and includes all of the grounds for excluding all four of the exhibits in question (Ex. 1008, 1023, 1024, 1025).

2. *Toyota Motor Corp.* Supports Patent Owner.

Petitioners rely upon *Toyota Motor Corp. v. Am. Vehicular Sci. LLC*, IPR2013-00417, Paper 78 (PTAB Jan. 7, 2015), for the position that a declaration submitted in response to an objection to the lack of publication date is supplemental evidence instead of supplemental information. However, *Toyota Motor Corp.* actually supports the opposite conclusion:

We note that although there are evidentiary issues relating to Fry, the question of whether Fry constitutes prior art is not itself an evidentiary issue. Rather, it is part of the substantive case that Toyota must prove.

Id. at 6 n.1. Thus, a declaration submitted in response to an objection to the lack of publication date goes to the merits of the case, and must, by definition, be supplemental information.

The patent owner in *Toyota Motor Corp.* did not object on the basis of the distinction between supplemental evidence and supplemental information. Instead, the patent owner only objected on the bases of relevance and hearsay. Accordingly, at best, Petitioners cite to pure dicta and, at worst, misrepresent *Toyota Motor Corp.* as addressing an issue not actually raised in that case. Here, Patent Owner specifically objected on the basis of the distinction between supplemental information and supplemental evidence.

3. Petitioners Have Revealed Their “Trojan Horse” Theory for Admissibility.

Petitioners’ reliance on the March Apogee Brochure confirms their “Trojan Horse” position on invalidity. Faced with the fact that they cannot prove that Apogee was publicly available at the critical time, Petitioners attempt to include the March Apogee Brochure to show “that the Apogee platform was a key piece of software sold and [sic] marketing by Agfa.” Paper 35 at 14. It is Petitioners’ burden to show that Apogee qualifies as a prior art “printed publication.” Whether an underlying technology, such as “the Apogee platform,” existed is irrelevant to a determination of whether a document is a “printed publication” for purposes of unpatentability in this proceeding. *See A.R.M., Inc. v. Cottingham Agencies LTD*, IPR2014-00671, Paper 10, at 7-8.

4. *Whether Patent Owner Elected to Take Additional Depositions is Irrelevant.*

Petitioners make much ado over Patent Owner’s decision not to take the additional depositions of Messrs. Jahn and Suetens. Nothing in the any rule of this Board requires a patent owner to take a deposition prior to making an objection or prior to filing a motion to exclude. Patent Owner has asserted that the declarations at issue are deficient on their face as being supplemental information improperly submitted as supplemental evidence (among other reasons), and taking depositions to discover additional deficiencies or grounds were, in Patent Owner’s opinion,

unnecessary. This Board should not give more weight to a declarant's testimony simply because a party chooses not to cross-examine such testimony, especially when there are fatal evidentiary flaws apparent in the declaration itself.

Dated: June 23, 2015

Respectfully submitted,

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