

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 IPR2014-00791

U.S. Patent No. 6,611,349

**PETITIONERS' OPPOSITION TO PATENT OWNER'S FIRST MOTION
TO EXCLUDE (PAPER 23) AND PATENT OWNER'S UNAUTHORIZED
SECOND MOTION TO EXCLUDE EVIDENCE (PAPER 38)**

I. INTRODUCTION

Patent Owner feigns prejudice in its unauthorized **Second** Motion to Exclude; however, any alleged “prejudice” is entirely of Patent Owner’s own making. For months now, Patent Owner has buried its head in the sand and ignored Petitioners’ supplemental evidence, served on April 16th. This evidence, now of record, was responsive to Patent Owner’s First Motion to Exclude and the contemporaneous objections explicitly recited therein. Petitioners’ supplemental evidence rendered these objections (baseless as they were) moot. That is, despite Petitioners offering dates for the depositions of Messrs. Jahn and Suetens during Patent Owner’s discovery period, Patent Owner has refused to take the deposition of these declarants. (Ex. 1028.) Instead, Patent Owner clings to untenable and incorrect evidentiary theories in a back-door attempt to secure further briefing on the merits.

Petitioners have filed the declarations of Messrs. Jahn and Suetens (Exs. 1024 and 1025, respectively) as appropriate Reply exhibits in response to Patent Owner’s untimely first motion to exclude (Paper 23) as well as the duplicate argument regarding Apogee raised in Patent Owner’s Response (*see* Paper 24 at 39). Still, Patent Owner refused the offered depositions of Messrs. Jahn and Suetens without explanation.

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Now, without authorization, and vastly exceeding the cumulative 15-page total for motions to exclude evidence, Patent Owner files an unauthorized Second Motion to Exclude the declarations that it has heretofore ignored. Because Patent Owner's arguments plainly go to the weight of what is proper evidence of record, its motion to exclude should be denied.

II. EXHIBITS 1024 AND 1025 ARE PROPER SUPPLEMENTAL EVIDENCE AS WELL AS PROPER REPLY EXHIBITS

In its opening papers, Petitioners provided the declaration of Johan Suetens establishing that Apogee was distributed to the public via Agfa sales personnel in the normal course of business shortly after a press briefing held on March 17, 1998, but no later than May 28, 1998. (Ex. 1023 at ¶¶ 8, 11.) On April 2, 2015, Patent Owner simultaneously objected to Mr. Suetens declaration and the Apogee exhibit (Exhibits 1023 and 1008, respectively) under 37 C.F.R. § 42.64(b)(1), and prematurely moved to exclude the same on authentication grounds for allegedly failing to establish public accessibility of Apogee. (*See* Paper 18.)

Now, as if to signal impropriety on the part of Petitioners, Patent Owner incredibly alleges that “Petitioners chose to treat the First Motion to Exclude as objections to Apogee and Mr. Suetens' Declaration” (Paper 38 at 1, emphasis added), but Patent Owner similarly relies upon its First Motion as “timely stat[ing] its objections to Exh. 1008 and 1023.” (Paper 38 at 2.) It is Patent Owner, not

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Petitioners, that engages in a “Trojan-horse” attempt to attack the sufficiency of Petitioners’ evidence under the guise of multiple motions to exclude.

In response to Patent Owner’s April 2nd objections, as Rule 42.64(b)(2) allows, Petitioners served the Declaration of Mr. Jahn and the Supplemental Declaration of Mr. Suetens as supplemental evidence on April 16, 2015 (Exs. 1024 and 1025), which rendered Patent Owner’s first motion to exclude moot. On April 22, 2015, almost two months before the due date for motions for observations regarding cross-examination of a witness (June 11, 2015), Petitioners offered Mr. Jahn for deposition between May 12 and May 15, and Mr. Suetens for deposition on May 6. (Ex. 1027.) After repeated attempts to coordinate the depositions of Messrs. Jahn and Suetens, CTP informed Petitioners on May 1, 2015 that they believed they could not depose Messrs. Jahn and Suetens until their declarations were filed in these proceedings. (Ex. 1028.) Accordingly, in an effort to progress discovery that was otherwise being stymied by CTP, Petitioners filed its Reply in IPR2014-00791 on May 8, 2015 (almost a month before the June 1 due date), and attached the declarations of Messrs. Jahn and Suetens. Still, CTP refused to take the deposition of these declarants and continued to ignore this evidence.

Despite CTP affirmatively burying its head in the sand, the declarations of Messrs. Jahn and Suetens (Exs. 1024 and 1025) remain both proper supplemental evidence and proper Reply evidence. First, Exhibits 1024 and 1025 are

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supplemental evidence and not, as Patent Owner alleges, supplemental information. As explained by the Board:

The difference is that supplemental *evidence*—served in response to an evidentiary objection and filed in response to a motion to exclude—is offered solely to support admissibility of the originally filed evidence and to defeat a motion to exclude that evidence, and not to support any argument on the merits (*i.e.*, regarding the patentability or unpatentability of a claim). Supplemental *information*, on the other hand, is evidence a party intends to support an argument on the merits.

See, e.g., Handi-Quilter, Inc. v. Bernina Int'l AG, IPR2013-00364, Paper 30 at 2 (PTAB June 12, 2014).

Here, the Declaration of Mr. Jahn and the Supplemental Declaration of Mr. Suetens are offered solely to support the admissibility of Apogee (Ex. 1008), are not offered to further support “any argument on the merits (*i.e.*, regarding the patentability or unpatentability of a claim)” in view of Apogee and, therefore, are proper supplemental evidence. Tellingly, CTP characterizes its objection to Apogee as purely evidentiary based on alleged “authentication issues with regard to the Apogee reference – namely, that it was disseminated or otherwise made publicly available.” (Ex. 2019 at 5.) The Declaration of Mr. Jahn and the Supplemental Declaration of Mr. Suetens are offered solely in response to this evidentiary objection.

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