

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LG ELECTRONICS, INC.,
Petitioner

v.

CORE WIRELESS LICENSING S.A.R.L.,
Patent Owner

Case IPR2015-01985
Patent 8,713,476

**PATENT OWNER'S REPLY IN SUPPORT OF ITS MOTION TO
EXCLUDE PETITIONER'S EVIDENCE UNDER 37 C.F.R. § 42.64(c)**

Patent Owner moved to exclude Petitioner’s Exhibits 1010-1013 and ¶¶13-18 of Exhibit 1015 as unauthenticated, inadmissible hearsay, and irrelevant in that Petitioner has not established a date of publication, and has not established that such references would have been known to a POSITA as of the critical date. Paper 29 at 1-7. Petitioner opposes the motion for exclusion (Paper 34 or “Opp.”).

1. The Objected-to Exhibits Are Not Authenticated

F.R.E. 901(a) requires evidence to be authenticated by “evidence sufficient to support a finding that the item is what the proponent claims it is.” This can be established, for example, with “Testimony of a Witness with Knowledge” or “Distinctive Characteristics and the Like.” Fed. R. Evid. 901(b)(1), (4).

Petitioner contends that each of Exhibits 1010-1013 “are authentic under Rule 901(b)(4) because they contain ‘distinctive characteristics’ that show they are what they claim to be.” Opp. at 5. In describing Exhibit 1010, Petitioner argues that the “Audi TT and Honda S2000” were “manufactured beginning in 1998 and 1999, respectively.” Opp. at 3. For Exhibit 1011, Petitioner points to the “Ericsson logo, a UPC code, and an image of the phone in a user’s hand” and also to the “[a]rtifacts of the copying process” as such allegedly distinctive characteristics. Opp. at 4. Petitioner offers no evidence why these characteristics are allegedly distinctive and no explanation of how they establish authenticity. Further, even the allegations of distinctiveness are comprised of attorney argument, not evidence. In

essence, Petitioner asks the Board to rely on attorney argument and the contents of unauthenticated documents in order to prove authentication. This circular argument must fail, just as previous attempts to rely upon Rule 901(b)(4) before the Board have failed. *See, e.g., TRW Automotive U.S. LLC v. Magna Electronics Inc.*, Case No. IPR2014-01347, slip op. at 10-11 (PTAB Jan. 6, 2016) (Paper 25) (rejecting petitioner’s argument for self-authentication as “circular” and founded upon “attorney argument.”).

Petitioner next argues that Dr. Rhyne can properly act as a “witness with knowledge” to authenticate Exhibits 1010-1013 under Rule 901(b)(1). Opp. at 5. But Dr. Rhyne testified that *he received the exhibits from counsel* and had not seen them before LG’s attorneys gave them to him. Paper 29 at 1-5 (citing to Rhyne testimony in Ex. 2011). Petitioner responds that Dr. Rhyne once subscribed to Popular Science. Opp. at 5 (citing Ex. 2011 at 12:2). But this general statement is undercut by Dr. Rhyne’s more specific testimony at Ex. 2011, 12:5-7:

Q. So you don’t remember reading this particular issue of Popular Science back in 1999?

A. I do not.

At best, Dr. Rhyne can only confirm that the Exhibits filed in the record were the documents provided to him by Petitioner’s counsel in preparation for this

case. *Id.* That is insufficient to establish that the Exhibits are authentic as of the purported dates contained within these documents.

Dr. Rhyne’s other testimony in no way substantiates the *authenticity* of the Exhibits. For example, Exhibits 1012 and 1013 are directed to events that allegedly occurred at “CeBit” in 1999. Dr. Rhyne has not testified that he attended CeBit in 1999, or even whether (in his personal knowledge) CeBit occurred. *See* Ex. 1015 at ¶16. There is simply no evidence in the record to establish that Dr. Rhyne is a person with knowledge sufficient to authenticate these Exhibits.¹

2. The Objected-to Evidence is Irrelevant and Inadmissible Hearsay

Petitioner argues that Exhibits 1010-1013 are relevant to the knowledge that would have been possessed by a POSITA as of the critical date. *Opp.* at 8. But all Petitioner has to establish a publication date is the inadmissible hearsay contained within the unauthenticated Exhibits themselves. Without evidence of publication, Petitioner has failed to establish that any of these documents are “prior art” under pre-AIA 35 U.S.C. § 102. On its own, this renders these exhibits irrelevant as to

¹ Petitioner twice quotes the testimony of Patent Owner’s witness, Scott Denning, in attempting to establish admissibility of Exhibits 1010-1013. *Opp.* at 6, 9. But Mr. Denning’s confirmation that these Exhibits say what they say is not a confirmation of their truth or authenticity. Neither Dr. Rhyne nor Mr. Denning have established the authenticity of these Exhibits 1010-1013.

the knowledge that a POSITA would have possessed as of the critical date.

Further, Petitioner's argument on hearsay underscores that Exhibits 1010-1013 are inadmissible. In arguing that Exhibits 1010-1013 are not hearsay because they are not a "statement" under the hearsay rule, Petitioner has divided the contents of these Exhibits into two categories: the alleged dates of publication, and the technical contents of the document. Petitioner asks the Board to consider the technical contents of the Exhibits for what they disclose to a POSITA, but asks the Board to accept the dates contained within the Exhibits as *true*. Petitioner cannot have it both ways. If the contents of the Exhibits are submitted for their truth, then the Exhibits are inadmissible hearsay not subject to any exception. If the contents of the Exhibits are not submitted for their truth, then the Exhibits are not shown to be prior art and are irrelevant to the knowledge of a POSITA as of the critical date.

In any event, a date printed in a document does not establish a publication date. *Stryker Corp. v. Karl Storz Endoscopy-America, Inc.*, Case IPR2015-00677 slip op. at 18-19 (PTAB Sept. 2, 2015) (Paper 15) (a copyright notice does not establish a publication date under patent law); *ServiceNow v. Hewlett-Packard Co.*, Case IPR2015-00707, slip op. at 17 (PTAB Aug. 26, 2015) (Paper 12); *Standard Innovation Corp. v. Lelo, Inc.*, Case IPR2014-00148, slip op. at 13-16 (PTAB Apr. 23, 2015) (Paper 41).

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