UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Axis Communications AB, Canon Inc., and Canon U.S.A., Inc.,

Petitioner

v.

Avigilon Fortress Corporation,

Patent Owner

Case: IPR2019-00235

U.S. Patent No. 7,868,912
Issue Date: January 11, 2011

Title: Video Surveillance System Employing Video Primitives

PETITIONERS' REPLY TO
PATENT OWNER'S PRELIMINARY RESPONSE

Pursuant to the Board's Order of March 28, 2019 (Paper 13), Petitioners hereby submit the following reply to Patent Owner's Preliminary Response of March 6, 2019 (Paper 9), including the contentions therein regarding *Kellogg*.

I. Patent Owner's Cited Authority Does Not Support Its Stringent Declarant Requirement of "Personal Knowledge"

Avigilon challenges the sufficiency of the Florio Declaration (Ex. 1007) by arguing that "[t]he Federal Circuit has repeatedly held that proof of a prior-art reference's public availability at a library *requires* competent evidence from witnesses with *personal knowledge* of the particular library's practices." Paper 9 at 18 (emphases added). Yet the cases cited by Avigilon do not create such a stringent requirement for declarants, let alone "personal knowledge" based on *prior employment* at the library in question. *See* Paper 9 at 19 (emphasis added).

In *Hall*, the Court affirmed the Board's finding of a "printed publication" based on an affidavit from a director of the library where a thesis paper was made publicly available. *In re Hall*, 781 F.2d 897, 897 (Fed. Cir. 1986). In *Acceleration Bay*, the Court upheld the Board's conclusion that an article was not a "printed publication" in view of testimony from an administrator at the library maintaining the website where the article could be accessed. *Acceleration Bay, LLC v. Activision Blizzard Inc.*, 908 F.3d 765, 773 (Fed. Cir. 2018).

Avigilon argues that because declarations from library employees are competent evidence showing public availability at a library, this type of evidence is

"require[d]" to establish a reference's public availability. Paper 9 at 18. But this is a non-sequitur. Neither *Hall* nor *Acceleration Bay* turned on the relationship between the declarant's knowledge and the publishing library. Indeed, that issue was not raised in those cases. Also, these decisions do not preclude competent evidence of a reference's public availability being shown by a declaration of a professional librarian with knowledge of a library's practices or a standardized cataloging system (such as the MARC system) widely used by libraries to record and make references accessible to the public.

II. Board Precedent Supports the Sufficiency of Ms. Florio's Declaration

Avigilon's purported evidentiary requirements also conflict with prior Board decisions repeatedly finding that declarations from professional librarians are sufficient to establish the public availability of a reference. In *Symantec*, the patent owner—like Avigilon here—argued that a reference was not shown to be publicly available because the librarian declarant "had no first-hand knowledge as to the public availability" of the reference "or the creation of the MARC record" for it. *Symantec Corp. & Blue Coat Sys. LLC v. Finjan, Inc.*, No. IPR2015-01892, 2017 WL 1041718, at *12 (P.T.A.B. Mar. 15, 2017). The Board rejected these arguments, "credit[ing] Dr. Hall-Ellis's testimony regarding ***the reliability of MARC records*** and the procedures that she employed in formulating her opinion in this case." *Id.* at *13 (emphasis added). The Board found that "neither first-hand

knowledge of the distribution of Swimmer [the reference] at the Virus Bulletin conference nor physical presence at the creation of the MARC record in December 1995 is required to prove public accessibility as of December 1995." *Id.*

Here, Ms. Florio is a professional librarian who, based on her years of experience, has knowledge of the MARC cataloging system and the practices of libraries, including the publishing library, the Massachusetts Institute of Technology ("MIT") Libraries.[1] IPR2019-00235, Ex. 1007. And as the Board found in *Symantec*, it is not necessary that Ms. Florio have "personal knowledge by virtue of her employment at the library" at issue, as Avigilon contends. Paper 9 at 19. Ms. Florio's declaration is therefore credible evidence that *Kellogg* is a "printed publication" and should be afforded weight in the present proceeding.

Avigilon's purported evidentiary requirements also conflict with Avigilon's positions in a prior IPR involving *Kellogg*. In IPR2018-00138, a proceeding involving a related patent assigned to Avigilon, Petitioners presented the very same evidence through a similar declaration from Ms. Florio to establish that *Kellogg* is a "printed publication." IPR2018-00138, Paper 1 at 4; Exs. 1003, 1007, and 1011.

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[1] The practices of the MIT Libraries are also a matter of public record, as evidenced by the declaration of Marilyn McSweeney, Exhibit 1007 in IPR2014-00200, who had personal knowledge of those practices. That declaration confirms Ms. Florio's statements regarding the practices of the MIT Libraries in the 1990's. IPR2014-00200, Ex. 1007 at ¶ 10.

Avigilon did not challenge the sufficiency of that evidence. IPR2018-00138 at Paper 7. And the Board found that Petitioners had shown a reasonable likelihood of showing unpatentability based in part on *Kellogg* being a prior art reference. IPR2018-00138, Paper 8 at 16-21.

III. Petitioner Has Shown That *Kellogg* Was "Publicly Accessible"

Avigilon contends that "[i]n order for a reference like *Kellogg*—a thesis paper—to qualify as a 'printed publication," it must be '*meaningfully*' indexed for a POSITA to find," and that "[i]ndexing itself is not enough, as a reference must also be 'cataloged or indexed *in a meaningful way*.'" Paper 9 at 20-21. But the Federal Circuit has expressly stated that this is not the standard for public accessibility. *In re Lister*, 583 F.3d 1307, 1312 (Fed. Cir. 2009). Instead, the relevant inquiry involves a consideration of "all of the facts and circumstances surrounding the disclosure" and determining "whether an interested researcher would have been sufficiently capable of finding the reference and examining its contents." *Id.* The totality of facts presented by Petitioner support a finding that *Kellogg* was publicly accessible.

First, on its face, *Kellogg* has a stamp showing it was accepted into the MIT library archives in 1993. Ex. 1003, 1 (stamped "Jul 09 1993"); *see also* Ex. 1007, ¶¶19-26 (supported by the Barton Catalog record, existence of a MARC record, and citation in another publication, etc.). *Kellogg* was also cited in *Flinchbaugh*,

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