

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ADVANCED MICRO DEVICES, INC.

Petitioner

v.

AQUILA INNOVATIONS INC.

Patent Owner

Case IPR2019-01526
U.S. Patent No. 6,895,519

PATENT OWNER'S SUR-REPLY

PATENT OWNER'S EXHIBIT LIST

Exhibit No.	Description
2001	Joint Claim Construction Statement dated May 17, 2019
2002	Revised Joint Claim Construction Statement dated November 1, 2019
2003	Markman Order re <i>Infineon Technologies AG and Infineon Technology North America Corp. v. Atmel Corporation</i>
2004	Email Correspondence with Board re Sur-Replies

Pursuant to the Board's email of January 20, 2020, Exhibit 2004, Patent Owner Aquila Innovations Inc. submits this sur-reply to Petitioner's reply. Petitioner sought and obtained leave to address the purported printed publication status of Exhibit 1005, a reference on which the petition relies in Ground 2 to challenge claims 2 – 6. Paper 1 at 2.

The preliminary response showed that Petitioner failed to establish that Exhibit 1005 was reasonably likely to be a printed publication. Stung by the criticism, Petitioner sought and obtained leave to file a reply addressing the printed publication status of Exhibit 1005. The totality of the circumstances does not support the conclusion that it is reasonably likely that Exhibit 1005 was publicly available before the priority date of the '519 patent.

Hulu, LLC v. Sound View Innovations, Inc., IPR2018-01039, Paper No. 29 (PTAB Dec. 20, 2019), stands for the proposition that Petitioner bears the burden of showing that it is reasonably likely that an asserted reference is a printed publication. The “totality of the evidence,” including Petitioner's new arguments, does not establish a “reasonable likelihood” that Exhibit 1005 was “disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence, can locate it.”

Blue Calypso, LLC v. Groupon, Inc., 815 F.3d 1331, 1348 (Fed. Cir. 2016)

(quoting *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340, 1350 (Fed. Cir. 2008)).

Petitioner argues that the Board, in an unrelated case, has “endorsed” four types of evidence that can establish a reference is publicly accessible:

- (1) indicia on the document itself—i.e., a copyright notice and the release date of the printed version;
- (2) a declaration from the office manager of the Internet Archive;
- (3) a declaration from an expert stating she located and obtained a copy of the reference before the patent’s filing date; and
- (4) publicly available information relating to the document—i.e., metadata information from the reference on the company’s website.

Reply at 2 (citing *Syncro Soft SRL v. Altova GmbH*, IPR2018-00660, Paper 6, 8-10 (P.T.A.B. Sept. 5, 2018)). Petitioner’s challenge in establishing Exhibit 1005 as a printed publication is apparent from its arguments and the deficient evidence filed with the Petition.

Petitioner argues that the purported copyright date and revision date found on Exhibit 1005 are “indicia” of public accessibility. But the “indicia” on Exhibit 1005 on which Petitioner relies is inadmissible hearsay not subject to any exceptions, and in any event are “accorded little weight to prove public

accessibility.” *Smart Microwave Sensors GmbH v. Wavetronix LLC*, 2017 Pat. App. LEXIS 11318 (P.T.A.B. July 17, 2017). Neither the revision date nor the copyright marking date printed on Exhibit 1005, taken together or alone, is evidence that Exhibit 1005 was publicly accessible. “The fact that a date is printed on the face of a reference, without more, is not enough to establish that the reference was publicly accessible on that date.” *Hewlett-Packard Co. v. U.S. Philips Corp., et al.*, Case IPR2015-01505, Paper 16, 8 (PTAB Jan. 16, 2016); *see also Hulu*, Paper 29 at 19 (citing *In-Depth Geophysical, Inc. v. Conocophillips Co.*, IPR2019-00849, Paper 14, 4–13 (PTAB Sept. 6, 2019)) (“a copyright date of 2012 and including a date of September 2012 on its cover, was insufficient to show that the paper had been disseminated prior to the conference”); *see also Google Inc. v. ART+COM Innovationpool GmbH*, Case IPR2015-00788, Paper 7, 8 (PTAB Sept. 2, 2015) (“[T]his bare date, without more, does not provide any information about the date [the reference] was publicly accessible.”).

Second, the declaration of the office manager of the Internet Archive does not show that Exhibit 1005 was publicly accessible. *See* Exhibit 1016. As explained in the preliminary response, the Butler declaration shows, at best, that the Microsoft website hosted a ZIP file at the web addresses identified in the declaration. Mr. Butler’s declaration does not connect the contents of the ZIP file with Exhibit 1005. Petitioner attempts to address these failures with Exhibit 1020,

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