

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LENOVO (UNITED STATES) INC. and
MOTOROLA MOBILITY LLC,
Petitioners

v.

THETA IP, LLC
Patent Owner

IPR2023-00697
Patent No. 10,129,825 B2

PETITIONERS' MOTION TO EXCLUDE EVIDENCE

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I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(c) and the Board’s October 24, 2023 Scheduling Order (Paper 11), Petitioners move to exclude Exhibits 2002, 2003, 2004, 2017, 2018, and 2020. All of these exhibits are inadmissible hearsay, and are irrelevant to the issues in this proceeding and/or lack authentication. *See* Fed. R. Evid. 401-403, 801-804, 807, 901. Petitioners timely objected to Exhibits 2002-2004 on November 6, 2023, (Paper 12), and to Exhibits 2017, 2018, and 2020 on February 6, 2024 (Paper 16). The Board should exclude these exhibits from consideration for at least the reasons set forth below.

II. APPLICABLE LAW

The Federal Rules of Evidence apply to this proceeding. *See* 37 C.F.R. § 42.62(a). To be admissible, evidence must be relevant to the action at hand. Rule 401 states: “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401. In other words, evidence is relevant if it is probative of a material fact. Even if evidence is relevant, “[a] court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403.

To be admissible, the evidence must not be inadmissible hearsay. *See* Fed. R. Evid. 802. Rule 801 defines hearsay as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” Fed. R. Evid. 801(c). Out-of-court statements made by a declarant who is subject to cross-examination or by an opposing party are not hearsay if they fall within the definitions listed in Rule 801(d). Fed. R. Evid. 801(d). Hearsay is not admissible unless it falls within the exceptions listed in Rules 803-804 and 807.

To be admissible, evidence must be authenticated. Fed. R. Evid. 901. Rule 901 states: “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a). While some evidence is considered self-authenticating, webpages are not. *See* Fed. R. Evid. 902. Courts have recognized the unreliable nature of webpages and required authentication by witnesses with personal knowledge of the maintenance of websites, the authors of webpages, and the accuracy of contents therein. *St. Clair v. Johnny’s Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 774-75 (S.D. Tex. Dec. 17, 1999).

III. EXHIBITS 2002, 2003, AND 2004 ARE IRRELEVANT HEARSAY.

Exhibits 2002, 2003, and 2004 are magazine articles concerning the alleged inventor of the '825 patent, Yannis Tsividis. Patent Owner relies on Exhibits 2002, 2003, and 2004 as evidence of Dr. Tsividis's supposed achievements and industry recognition. *See* Paper 15 at 5-6. The articles, which are inadmissible hearsay, bear no relevance to any issues in this proceeding.

A. Exhibits 2002, 2003, and 2004 Are Irrelevant and Admission Thereof Would Be Unfairly Prejudicial.

Patent Owner offers Exhibits 2002, 2003, and 2004 for nothing more than flattering characterizations of the '825 patent's named inventor and his work. None of these exhibits are probative of a material fact.

Exhibit 2002 is a complete issue of IEEE Solid State Circuits Magazine discussing the career of Dr. Tsividis, published in fall 2014, more than 11 years after the priority date of the '825 patent. Patent Owner cites Exhibit 2002 twice in its Response. First, Patent Owner cites to Exhibit 2002 to support its assertion that "the IEEE publication Solid State Circuits devoted an entire Special Edition of its magazine to [Yannis Tsividis]." Paper 15 at 5. Underneath this text, Patent Owner

reproduces the cover of said magazine, which is reproduced below as it appears in Patent Owner's Preliminary Response. *Id.*¹

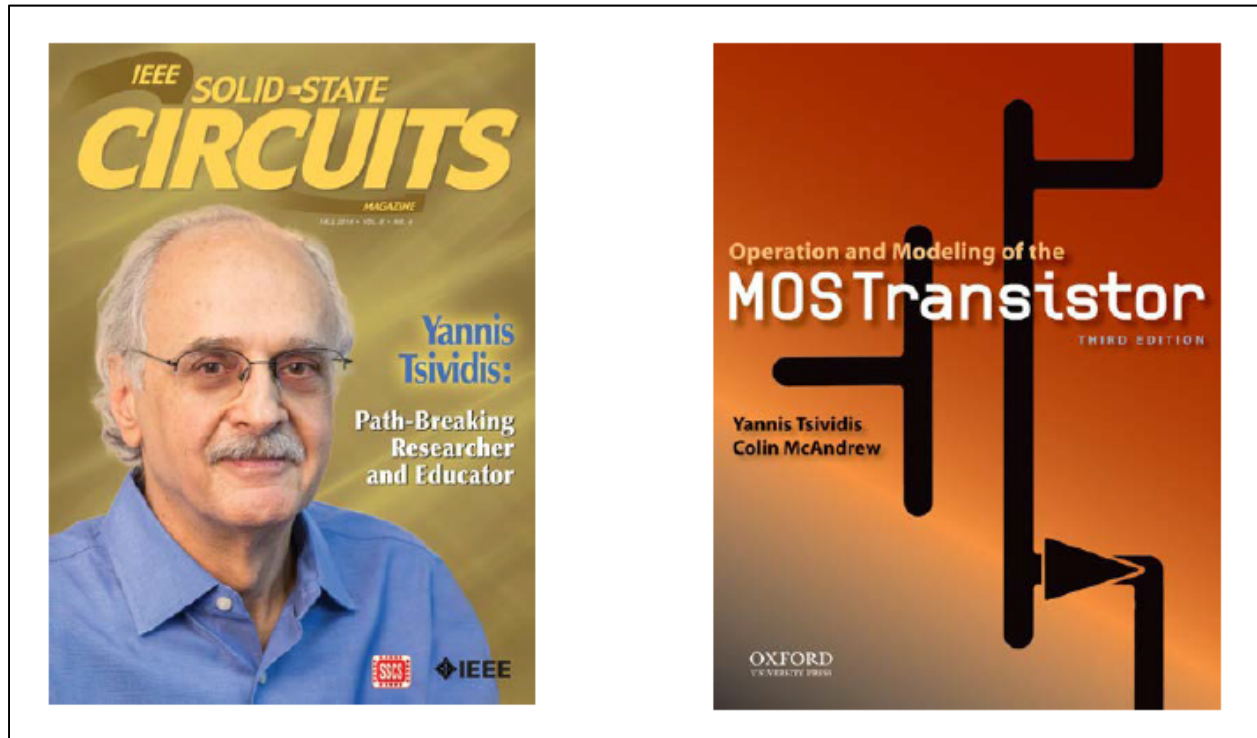


Exhibit 2003 is an article authored by Dr. Tsividis, published in IEEE Circuits & Devices Magazine in January 2003. Patent Owner cites Exhibit 2003 twice in its Response. First, Patent Owner cites Exhibit 2003 as supposed evidence for the assertion: “Intelligent circuit design for power conservation was and

¹ Patent Owner cites Exhibit 2002 later in its Response, but this citation appears to be a typographical error that was intended to reference Exhibit 1002 (Dr. Baker's Expert Declaration). *See* Paper 15 at 28.

remains a vital issue in the mobile communications industry—about which Professor Tsividis has published and taught many times throughout his distinguished career, and throughout the life of the patents.” Paper 15 at 6. Patent Owner cites Exhibit 2003 a second time for the assertion that “the specification of the ’825 Patent explains the embodiments of the disclosed and claimed inventions in clear detail and with examples much like those in his textbook, magazine articles, and teaching slides.” *Id.* at 14.

Exhibit 2004 is another article authored by Dr. Tsividis, published in IEEE Solid State Circuits Magazine in fall 2018, more than 15 years after the claimed priority date of the ’825 patent. Patent Owner cites Exhibit 2004 for the same assertions for which Exhibit 2003 was cited. *See id.* at 6, 14. Exhibit 2004 is cited a third time as evidence to support the assertion that “the industry has shown continued interest in these techniques even decades after their invention by Professor Tsividis.” *Id.* at 14-15. Patent Owner reproduces Figures 18 and 23 from Exhibit 2004 and claims that the figures show “impedance scaling,” “bias current scaling,” and “a combination of bias and impedance adjustments.” *See id.* Patent Owner then reproduces FIGS. 11B-11D of the ’825 patent and states that “[t]he same combination of dynamic adjustments to impedance and to bias current as in Figure 23 above was also discussed by Professor Tsividis more than fifteen years prior, in the specification of the ’825 Patent.” *Id.* at 16.

Exhibit 2004 is cited a fourth time as evidence to support the assertion that “[t]he techniques taught and claimed in [Dr. Tsividis’s] patents have been recognized for their importance and cited across the industry, and have remained interesting and worthy of publication to this day.” Paper 15 at 59.

None of the magazine articles that are Exhibits 2002, 2003, and 2004 can be used, or are used, by Patent Owner to prove or disprove any facts related to the anticipation or obviousness of the claimed subject matter. Patent Owner’s expert does not rely on these exhibits, and these exhibits do not reference the ’825 patent. Patent Owner also does not contend that any of these exhibits demonstrate, for example, that the prior art lacks a limitation of the claims, or that a person of skill in the art would lack a motivation to combine the prior art.

These exhibits do not relate to any secondary considerations of nonobviousness because Patent Owner has alleged none. Even if Patent Owner had identified secondary considerations of nonobviousness, the exhibits would still be irrelevant. Exhibits 2002 and 2004 were published more than 11 years after the priority date of the ’825 patent, too late to have any probative value on patent validity. Neither Patent Owner nor its expert make an attempt to connect Exhibits 2002 and 2003 to the limitations of the claims or the specification. Exhibit 2004 was authored by the inventor himself, not by disinterested parties in the field. It has no probative value on how others in the field may have viewed the claimed subject

matter. Therefore, whatever fact these three magazine articles could make more or less probable is of no consequence to the Board's final written decision.

Accordingly, all three exhibits should be excluded as irrelevant pursuant to Rules 401 and 402.

Even if Exhibits 2002, 2003, and 2004 were relevant—which they are not—such relevance would be outweighed by the danger of unfair prejudice. Without alleging secondary considerations of nonobviousness, and the requisite nexus to the claimed subject matter, Patent Owner attempts to introduce general industry praise of the named inventor by way of these three magazine articles. Accordingly, even if the Board considers these exhibits to have any relevance, they should be excluded as unfairly prejudicial when weighed against their minimal probative value.

B. Exhibits 2002, 2003, and 2004 Are Inadmissible Hearsay.

Exhibits 2002, 2003, and 2004 should be excluded under Rule 802. In its Response, Patent Owner reproduces the cover page of Exhibit 2002, which states “Yannis Tsividis: Path-Breaking Researcher and Educator.” Paper 15 at 5. To the extent that Patent Owner relies on Exhibit 2002 to show that Yannis Tsividis is a “path-breaking researcher,” the magazine cover and the corresponding article are out-of-court statements offered for the truth of the matter asserted. Patent Owner additionally cites Exhibits 2003 and 2004 for the assertion that “[i]ntelligent circuit

design for power conservation was and remains a vital issue in the mobile communications industry.” *Id.* at 6. To the extent Exhibits 2003 and 2004 support Patent Owner’s proposition, such support would consist of out-of-court statements offered for the truth of the matter asserted. Notably, Patent Owner’s expert does not rely on Exhibits 2002, 2003, and 2004, and Exhibits 2002 and 2004 were published more than 11 years after the priority date. These exhibits cannot indicate what a POSITA would have known as of the priority date of the ’825 patent.

None of the exceptions in Rules 803-804 and 807 apply. Accordingly, all three exhibits are inadmissible hearsay and should be excluded from the Board’s consideration pursuant to Rule 802. *Neste Oil OYJ v. REG Synthetic Fuels, LLC*, IPR2013-00578, Paper 52, pp. 5-6 (PTAB Mar. 12, 2015).

IV. EXHIBITS 2017 AND 2018 ARE IRRELEVANT, UNAUTHENTICATED HEARSAY.

Exhibits 2017 and 2018 are printouts from the website “Lex Machina” listing PTAB proceedings. Patent Owner relies on Exhibits 2017 and 2018 as evidence that Petitioners’ expert, Dr. Baker, has allegedly participated in other PTAB proceedings. Paper 15 at 43, n. 5. Exhibits 2017 and 2018 are irrelevant to Dr. Baker’s credibility and expertise and, in any case, are unauthenticated hearsay.

A. Exhibits 2017 and 2018 Are Irrelevant and Admission Thereof Would Be Unfairly Prejudicial.

Exhibits 2017 and 2018 are not probative of Dr. Baker's credibility or expertise, or of any other material fact at issue in this proceeding. Patent Owner cites Exhibits 2017 and 2018 to support its allegation that Dr. Baker has submitted declarations in "at least 31 [PTAB proceedings] since Lenovo's Petitions here were filed, and 12 in the month that Lenovo's Petitions here were filed." Paper 15 at 43, n. 5. That Dr. Baker has testified in other proceedings is of no consequence to the present action. Any implication that the volume of Dr. Baker's case work is relevant to his opinions and/or the preparation of his declaration in this matter is "a waste of time [for] the Board." *Pevarello v. Lan*, 85 U.S.P.Q.2d 1771, 2007 WL 594728 at *11 (B.P.A.I. 2007).

Moreover, Patent Owner cites Exhibit 2017 for its assertion that Dr. Baker has testified about "thermostats, display optics, wireless charging, flash memory, IC packaging, and RF wireless circuits." Paper 15 at 43, n. 5. Patent Owner's characterizations of Dr. Baker's other cases say nothing of his qualifications to opine on the '825 patent. Dr. Baker's expertise in other similar subject matter in no way undermines his expertise here. Accordingly, Exhibits 2017 and 2018 are irrelevant.

Even if the Board considers Exhibits 2017 and 2018 to have some minimal probative value, any probative value would be outweighed by unfair prejudice. Exhibits 2017 and 2018 are lists of PTAB proceedings. None of the 31 PTAB proceedings listed in Exhibit 2017 involve Petitioners or Patent Owner. Only three of the 12 PTAB proceedings listed in Exhibit 2018, one of which is the present proceeding, involves Petitioners or Patent Owner. Excepting the present proceeding, none of the patents at issue in those proceedings and none of Dr. Baker's declarations in those proceedings, if he even submitted any, are of record here. Patent Owner has only supplied its own general characterizations of the subject matter of those proceedings. The prejudice to Petitioners created by Patent Owner's unsubstantiated characterizations significantly outweighs any value Exhibits 2017 and 2018 could possibly have.

B. Exhibits 2017 and 2018 Are Inadmissible Hearsay

Exhibits 2017 and 2018 should be excluded under Rule 801 as hearsay not falling within any exception of Rules 802-804. Patent Owner relies on Exhibits 2017 and 2018 as purportedly showing outside proceedings in which Dr. Baker has testified. The lists of cases allegedly tied to Dr. Baker are out-of-court statements that are offered for the truth of the matter asserted. Therefore, both exhibits are hearsay and none of the exceptions in Rules 803-804, 807 apply. *Neste Oil OYJ*, IPR2013-00578, Paper 52, pp. 5-6.

C. Exhibits 2017 and 2018 Lack Authentication

Exhibits 2017 and 2018 lack the necessary authentication for admissibility under Rule 901. Patent Owner has provided no evidence to authenticate that Exhibits 2017 and 2018 are what they claim to be. In particular, Patent Owner has made no attempt to authenticate Exhibits 2017 and 2018 by witnesses with personal knowledge of, *e.g.*, the maintenance of websites, the authors of webpages, and the accuracy of contents therein. *St. Clair*, 76 F. Supp. 2d at 774-75. In each exhibit, the first page lists one web address while the remainder of the pages list a second web address. Neither exhibit provides a date of access, printing, or publication. Further, webpages are not self-authenticating. *See* Fed. R. Evid. 902; *see also Xactware Sols., Inc. v. Pictometry Int’l Corp.*, IPR2016-00594, 2017 WL 3671031, at *5 (P.T.A.B. Aug. 24, 2017) (“Printouts from websites are not self-authenticating.”). No declaration or affidavit has been provided to establish who retrieved these exhibits and how. Accordingly, Exhibits 2017 and 2018 lack authentication and should be excluded from the Board’s consideration.

V. EXHIBIT 2020 IS UNAUTHENTICATED HEARSAY.

Exhibit 2020 is a printout from online open-source encyclopedia Wikipedia.org for a page entitled “Envelope detector.” Patent Owner relies on Exhibit 2020 to support its assertions as to how a “diode detector” functions. Paper 15 at 37. Exhibit 2020 is hearsay, unauthenticated, and should be excluded.

A. Exhibit 2020 is Inadmissible Hearsay.

Exhibit 2020 is offered to support Theta's claim that "a [diode] detector needs an input that is band-pass filtered around a desired signal, and would require that receiver input filter to be re-tuned in order to measure another signal." Paper No. 15 at 37. Exhibit 2020's description of the functionality of diode detectors are out-of-court statements offered for the truth of the matter asserted. *Neste Oil OYJ*, IPR2013-00578, Paper 52, pp. 5-6. Patent Owner's expert did not rely on Exhibit 2020 in forming any of his opinions.

Further, Exhibit 2020 typifies the dangers which Rule 801 was designed to protect against. The exhibit contains no information identifying the declarant(s) of the statements contained therein. "Wikipedia is not peer reviewed, the authors are unknown, and apparently anyone can contribute to the source definition." *Ex parte Bailey*, Appeal No. 2010-010310, 2013 WL 3323969 at *2, n. 1 (P.T.A.B. Apr. 25, 2013). For these reasons, "Wikipedia has limited probative value in view of its dubious reliability." *Id.*

Accordingly, Exhibit 2020 is inadmissible hearsay and should be excluded from the Board's consideration.

B. Exhibit 2020 Lacks Authentication.

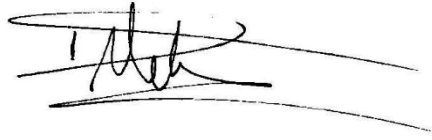
Exhibit 2020 lacks the necessary authentication for admissibility under Rule 901. Patent Owner has provided no evidence to authenticate that Exhibit 2020 is

what it claims to be. As with Exhibits 2017 and 2018, Patent Owner has made no attempt to authenticate Exhibit 2020 by witnesses with personal knowledge of, *e.g.*, the maintenance of websites, the authors of webpages, and the accuracy of contents therein. *St. Clair*, 76 F. Supp. 2d at 774-75. The exhibit includes a web address from which the article purports to be retrieved, but it fails to present a date of access or printing or a date of publication. As noted above, it does not contain information regarding the author or declarant of the statements contained within the entry. Further, webpages are not self-authenticating. *See* Fed. R. Evid. 902. No declaration or affidavit has been provided to establish who retrieved this exhibit and how. Accordingly, Exhibit 2020 lacks authentication and should be excluded from the Board's consideration.

VI. CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the Board exclude Exhibits 2002, 2003, 2004, 2017, 2018, and 2020, and Patent Owner's arguments relying thereon.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Melwani', with a long horizontal flourish extending to the right.

Dated: July 2, 2024

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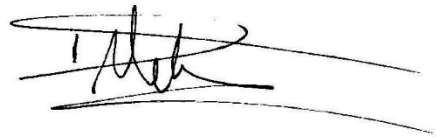
CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6, the undersigned hereby certifies that this “PETITIONERS’ MOTION TO EXCLUDE EVIDENCE” was served by filing this document through the Patent Trial and Appeal Case Tracking System (P-TACTS) and via e-mail to the following attorneys of record for the Patent Owner listed below:

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