

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICROSOFT CORPORATION

Petitioner,

v.

THROUGHPUTER, INC.

Patent Owner.

Case No. IPR2022-01566

U.S. Patent No. 11,036,556

PATENT OWNER'S PRELIMINARY RESPONSE

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Ex. 2001	Declaration of W. Cook Alciati in support of Motion for Admission <i>Pro Hac Vice</i> .
Ex. 2002	Non-Final Office Action dated February 12, 2016, and mailed in U.S. Application No. 14/318,512.
Ex. 2003	Notice of Allowance dated October 27, 2020, and mailed in U.S. Application No. 16/434,581.
Ex. 2004	U.S. Pub. 2011/0321057 to Mejdrich et al.
Ex. 2005	U.S. Pub. 2009/0187756 to Nollet et al.
Ex. 2006	U.S. Patent 9,038,072 to Nollet et al.
Ex. 2007	U.S. Pub. 2012/0324458 to Peterson et al.
Ex. 2008	IPR Petition dated March 30, 2022, Paper 2 in IPR2022-00757.
Ex. 2009	Decision Denying Institution of IPR dated November 1, 2022, Paper 10 in IPR2022-00757.
Ex. 2010	Publication Information for Tuan's "A Preemption Algorithm for a Multitasking Environment on Dynamically Reconfigurable Processors."
Ex. 2011	Google Scholar Citation Results for Ex. 1005.

Patent Owner ThroughPuter, Inc. respectfully submits this Preliminary Response to Microsoft's Corporation's Petition for *Inter Partes* Review (the "Petition") of U.S. Patent No. 11,036,556 (the "'556 patent"). For the reasons that follow, ThroughPuter respectfully submits that the Board should deny institution of *inter partes* review.

I. INTRODUCTION

The Board should deny institution of this IPR pursuant to 35 U.S.C. § 325(d). For each ground, the Petition relies on the primary Kupferschmidt reference (Ex. 1004). The cited disclosure from Kupferschmidt is verbatim identical to a reference called Mejdrich, which is cited on the face of the '556 patent. Indeed, the examiner that examined the '556 patent located and specifically cited Mejdrich as a relevant reference in a Notice of References Cited (Form 892) accompanying an office action issued in connection with a parent application to the '556 patent. Patent Owner reminded the examiner of the relevance of Mejdrich by citing the examiner's earlier finding to him during prosecution of the '556 patent. MPEP 609.02(I). This is not a situation where a reference just happens to be cited on the face of the patent. Instead, the examiner located and meaningfully reviewed the very same disclosure identified in the petition in connection with a parent case, and Patent Owner reminded the examiner *again* of that previous finding during prosecution of the '556 patent.

The Petition suffers from a similar flaw as to the secondary reference Tuan (Ex. 1005). In a related IPR, Petitioner admitted that Tuan includes overlapping disclosure with the Nollet reference. Like Mejdrich, Nollet (Ex. 2005) is cited on the face of the '556 patent and was expressly considered by the examiner during prosecution of a parent application to the '556 patent. The examiner located the issued version of Nollet (Ex. 2006) and cited in a Notice of References Considered included with a notice of allowance. And as with Mejdrich, Patent Owner reminded the examiner of the relevance of Nollet by citing the examiner's earlier finding to him during prosecution of the '556 patent. Petitioner fails to acknowledge these critical facts—much less explain how they amount to any *Advanced Bionics* error that should preclude application of § 325(d) here.

The Petition fails for the additional reason that Petitioner has not established that Tuan (Ex. 1005) is a printed publication. Instead, Petitioner's declaration evidence shows that another reference by Tuan published a year prior to Ex. 1005. In other words, the reference identified by the Ms. Munford's declaration (Ex. 1007) is not the same reference cited in the Petition. Even if the Board were to overlook that fact, the Petition would still fail because Petitioner's declaration establishes—at best—that Ex. 1005 was “technically available” at a library in Japan, which is insufficient to establish public availability under the precedential *Hulu* decision. Indeed, the declaration does not even include a conclusory suggestion that a person

of ordinary skill in the art (“POSITA”) could have found Ex. 1005 before the critical date with reasonable diligence.

II. ARGUMENT

A. The Board should exercise its discretion and deny institution of *inter partes* review pursuant to 35 U.S.C. § 325(d).

For each ground, the Petition relies on Kupferschmidt as its primary reference and Tuan as its secondary reference to argue that each challenged claim is obvious.¹ Petitioner fails to address the fact that the teachings of both references were expressly considered by the examiner during prosecution of parent applications of the ’556 patent. Thus, and contrary to Petitioner’s argument, the same arguments and art were “presented” to the office (by the examiner himself). Despite this, Petitioner does not even attempt to identify a material error in the examiner’s consideration of the subject matter of Kupferschmidt and Tuan as is necessary for this trial to be instituted. under *Advanced Bionics*. A review of the *Advanced Bionics* factors follows.

***Advanced Bionics* – Factor 1**

The first *Advanced Bionics* factor asks “whether the petition presents to the Office the same or substantially the same art previously presented to the Office, or

¹ The petition relies exclusively on Tuan, Ex. 1005, as disclosing certain aspects of claim elements 1.3 and 1.6. Pet. at 37-39, 50-51. The petition conditionally or alternatively relies upon Tuan to meet certain aspects of elements 1.1, 1.2, 1.4, 1.5, and 1.7. Pet. at 24-25, 34-35, 44-45, 47-48, 55.

whether the petition presents to the Office the same or substantially the same arguments previously presented to the Office.” *Advanced Bionics* at 7. Here, the answer is yes because the Mejdrich reference (Ex. 2004) is cited on the face of the ’556 patent. As shown in detail below, Mejdrich, which is cited on the face of the ’556 patent, includes the verbatim disclosure of Kupferschmidt that is relied on in the Petition. *See* Ex. 1001 at 3 (left hand column).

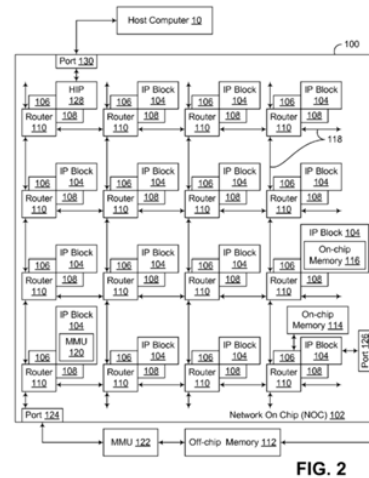
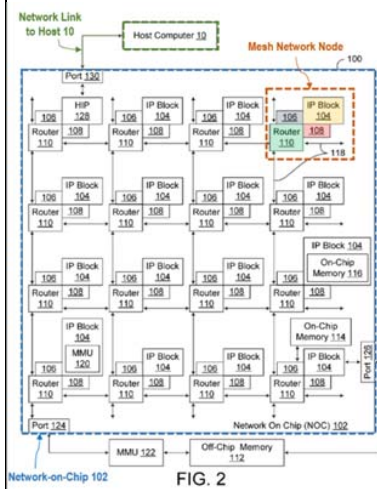
Notably, this is not a case where a similar reference is simply cited on the face of the patent. Instead, the examiner himself located and cited Mejdrich in a Notice of Reference Cited included with a February 12, 2016, office action issued during prosecution of the parent Application No. 14/318,512. Ex. 2002 at 2 (noting attachment, Notice of References Cited) and 16 (citing Mejdrich in the Notice of References Cited (Form 892)); *see Becton, Dickinson & Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper 8, 23 (PTAB Dec. 15, 2017) (denying institution under § 325(d) where Petitioner “advanc[ed] essentially the same positions raised by the Examiner during prosecution of the parent application.”). This fact highlights that the examiner found Mejdrich to be of particular relevance to the subject matter disclosed in the ’556 patent. Patent Owner then cited, and the examiner considered, the examiner’s own very same finding during prosecution of the ’556 patent. Ex. 1002 at 53, 94 (Citing item 32, “Non-Final Rejection issued in related Application

No 14/318,512 dated February 12, 2016, 25 pages”) and 46, 87 (“Mejdrich”); Ex. 2002 at 16 (the Form 892 citing Mejdrich).

Turning to the identity in the disclosures of Kupferschmidt and Mejdrich, the chart below shows that the figures cited in the Petition are identical to figures included in Mejdrich.

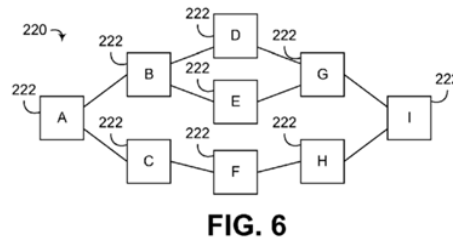
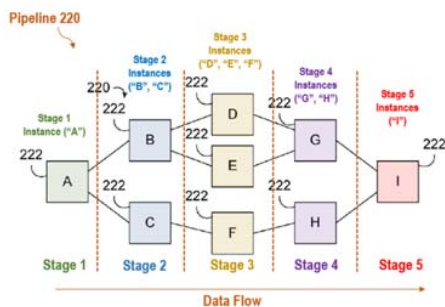
Kupferschmidt figure cited in Petition

Corresponding Mejdrich figure



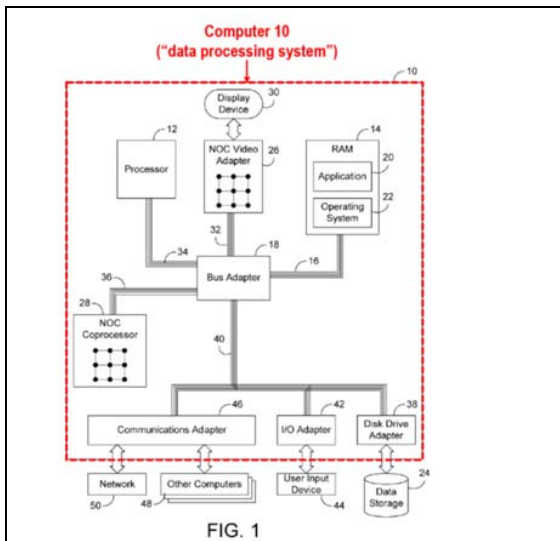
Pet. at 8, see also 37, 52.

Ex. 2004, Fig. 2

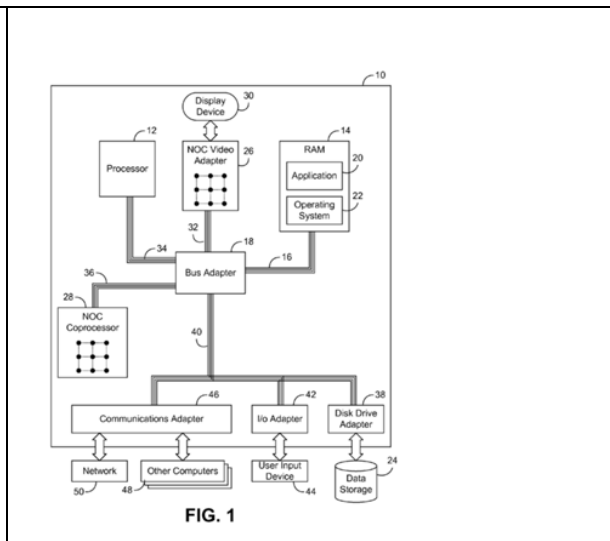


Pet at 9, 32, 59.

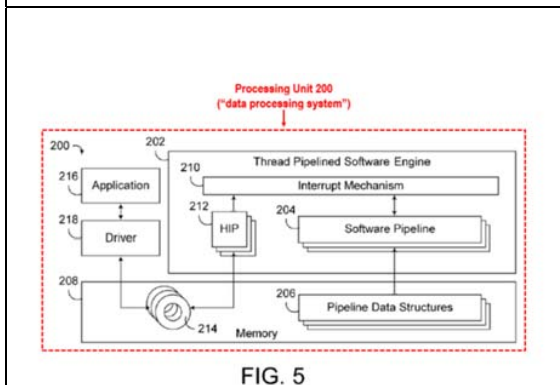
Ex. 2004, Fig. 6.



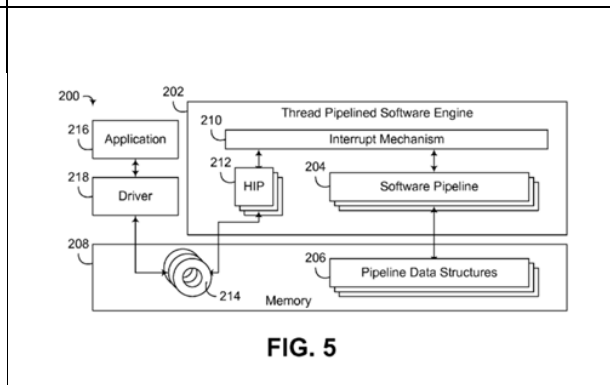
Pet. at 20.



Ex. 2004, Fig. 1.



Pet. at 23, see also 26.



Ex. 2004, Fig. 5.

Beyond the figures, the Petition relies on text from Kupferschmidt that appears verbatim in Mejdrich. For example, for element 1.1, the Petition relies (*e.g.*, at 25-26) on Kupferschmidt's disclosure of a host interface processor ("HIP") 212 citing to paragraph 76 of Kupferschmidt. As shown below, paragraph 76 of Kupferschmidt is identical to paragraph 78 of Mejdrich.

Kupferschmidt ¶0076	Mejdrich ¶0078 (Ex. 2004)
One or more host interface processors (HIP's) 212 are also provided in engine 202 to handle the issue of work to software pipelines 204. One or more push buffers 214 are provided to interface each HIP 212 with a software application 216 and driver 218, which are resident outside of the engine. In order to initiate work in a pipeline, a software application 216 issues requests through an appropriate driver 218 in the form of API calls, which then generates appropriate requests for the HIP and stores the requests in a push buffer 214. The HIP 212 for the relevant pipeline pulls work requests off of push buffer 214 and initiates processing of the request by the associated pipeline.	One or more host interface processors (HIP's) 212 are also provided in engine 202 to handle the issue of work to software pipelines 204. One or more push buffers 214 are provided to interface each HIP 212 with a software application 216 and driver 218, which are resident outside of the engine. In order to initiate work in a pipeline, a software application 216 issues requests through an appropriate driver 218 in the form of API calls, which then generates appropriate requests for the HIP and stores the requests in a push buffer 214. The HIP 212 for the relevant pipeline pulls work requests off of push buffer 214 and initiates processing of the request by the associated pipeline.

For element 1.2, Petitioner relies (at 30-31) on Paragraph 81 of Kupferschmidt, which is identical to Paragraph 83 of Mejdrich.

Kupferschmidt ¶0081	Mejdrich ¶0083 (Ex. 2004)
In the illustrated embodiment, each instance of each stage of a pipeline is typically implemented as an application-level module of computer program instructions executed on a separate IP block on a NOC, and each stage is assigned to a thread of execution on an IP block of a NOC. Each stage is assigned a stage ID, and each instance of a stage is assigned an identifier. HIP 212 (FIG. 5) typically sets up the pipeline by configuring each	In the illustrated embodiment, each instance of each stage of a pipeline is typically implemented as an application-level module of computer program instructions executed on a separate IP block on a NOC, and each stage is assigned to a thread of execution on an IP block of a NOC. Each stage is assigned a stage ID, and each instance of a stage is assigned an identifier. HIP 212 (FIG. 5) typically sets up the pipeline by configuring each

stage with a desired number of instances, with the network location of each instance of each stage provided to other instances of other stages to enable each instance to send its resultant workload to the proper instance in the next stage. Multiple instances may be assigned to a particular stage to provide additional processing resources relative to other stages, e.g., so work flows through the pipeline as efficiently as possible, and no single stage presents a bottleneck to performance. It will also be appreciated that workload monitoring may be performed during runtime, and that instances may be dynamically added or removed from a stage as needed for balancing the load among the stages of the pipeline.	stage with a desired number of instances, with the network location of each instance of each stage provided to other instances of other stages to enable each instance to send its resultant workload to the proper instance in the next stage. Multiple instances may be assigned to a particular stage to provide additional processing resources relative to other stages, e.g., so work flows through the pipeline as efficiently as possible, and no single stage presents a bottleneck to performance. It will also be appreciated that workload monitoring may be performed during runtime, and that instances may be dynamically added or removed from a stage as needed for balancing the load among the stages of the pipeline.
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Petitioner likewise relies on Paragraph 81 of Kupferschmidt for elements 1.3, 1.4, 1.6, and 1.7. Petition at 36-37, 42-43, 50-54.

For elements 1.5 and 1.7, Petitioner relies on Paragraph 88 of Kupferschmidt, which is identical to Paragraph 123 of Mejdrieh. Petition at 46-47, 54.

Kupferschmidt ¶0081	Mejdrieh ¶0123 (Ex. 2004)
HIP 408 sets up the software pipeline, assigns threads of execution to stage instances in the pipeline, issues work requests to the pipeline, and monitors workflow to dynamically reallocate threads of execution to different stages of the pipeline to maximize throughput and minimize bottlenecks. In this regard, HIP 408, which is itself typically implemented in an IP block	HIP 408 sets up the software pipeline, assigns threads of execution to stage instances in the pipeline, issues work requests to the pipeline, and monitors workflow to dynamically reallocate threads of execution to different stages of the pipeline to maximize throughput and minimize bottlenecks. In this regard, HIP 408, which is itself typically implemented in an IP block

from a NOC, assigns one or more IP blocks to handle each stage of the pipeline, as well as other supporting logic that may be required to manage operation of the pipeline. A thread of execution in this regard constitutes a hardware thread implemented within an IP block, it being understood that in IP blocks that support multiple hardware threads, multiple stage instances in a pipeline may be assigned to different threads in the same IP block.	from a NOC, assigns one or more IP blocks to handle each stage of the pipeline, as well as other supporting logic that may be required to manage operation of the pipeline. A thread of execution in this regard constitutes a hardware thread implemented within an IP block, it being understood that in IP blocks that support multiple hardware threads, multiple stage instances in a pipeline may be assigned to different threads in the same IP block.
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Despite the fact that the cited portions of Kupferschmidt appear verbatim in Mejdrich, Petitioner argues (at 74) “the instant Petition’s art and arguments cannot be said to be the same as, or substantially similar to, art and arguments previously presented to the Office in connection with the ’556 Patent.” But that is plainly false. The examiner himself found Mejdrich and cited it in a Notice of References Cited included with an office action during prosecution of a parent application to the ’556 patent. Ex. 2002 at 16. Patent Owner then took the affirmative step of reminding the examiner of his finding of Mejdrich’s relevance by citing the examiner’s earlier finding during prosecution of the ’556 patent. Ex. 1002 at 94 (Citing item 32, “Non-Final Rejection issued in related Application No 14/318,512 dated February 12, 2016, 25 pages.”) and 87 (citing Mejdrich). The examiner also considered Patent Owner’s citation to the examiner’s earlier finding. *Id.* at 46, 53 It was Petitioner’s burden to address the “similarities and material differences between the asserted art

and the prior art involved during examination,” under *Becton* factor (a). *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper 8 at 17 (PTAB 2017). The Petition does not even attempt a comparison between Kupferschmidt and Mejdrich, falling well short of that burden.

Separately, the examiner also considered and applied the Peterson reference in a rejection, which is also cited on the face of the '556 patent, during prosecution of a parent application to the '556 patent. Ex. 2002 at 6-14; Ex. 2007 (Peterson); Ex. 1001 at 3 (left hand column citing Peterson). The examiner found that that Peterson teaches a number of processing stages with at least one program instance assigned for execution and that the system is configured to host each task of the instance on different stages. Ex. 2002 at 7. These teachings are cumulative to Kupferschmidt's disclosure of stages on which the Petition repeatedly relies. Petition, *e.g.*, at 30-35.

Petitioner also fails to address the examiner's consideration of references that include substantially the same disclosure as the secondary Tuan reference. The Petition cites Tuan for the teachings concerning the reconfigurability of FPGA-based cores. For example, the Petition cites (at 38) Tuan as disclosing “a networked array of FPGA-based cores, each core implemented as or including an FPGA that can be dynamically reconfigured to implement an assigned task.” In a petition directed to another of Patent Owner's patents, Petitioner argued that “Nollet and

Tuan both relate to parallel processing on dynamically-reconfigurable hardware, including assigning individually-reconfigurable tiles to tasks of an application.” Ex. 2008 at 41-42 (“IPR2022-00757, Petition”); *see also* Ex. 2009 at 19 (IPR2022-00757, Decision explaining “we understand the Petition to be applying Tuan and Miller mainly as alternatives to Nollet, or as evidence of the knowledge of one of ordinary skill in the art.”).² Thus, by Petitioner’s own admission Nollet and Tuan include overlapping disclosure on the question of dynamic reconfiguration of FGPA’s.

This creates another § 325(d) problem for Petitioner because Nollet—like Mejdrich—was not only cited by the Patent Owner but also previously located and cited by the examiner during prosecution of the immediate parent application to the ’556 patent. Ex. 1001 at 1 (bottom on right hand column, citing published application version of Nollet, Ex. 2005); Ex. 2003 at 12. And as with Mejdrich, Patent Owner took the step of reminding the examiner that he had cited Nollet in a Notice of References Cited included with a notice of allowance issued during prosecution of a parent application. Ex. 1002 at 100. The examiner then considered Patent Owner’s citation during prosecution of the ’556 patent. Ex. 1002 at 26 (Notice of Allowance issued in Application No. 16/434,581 dated October 27,

² The examiner and the earlier petition cited the issued version of Nollet (Ex. 2006), whereas the patent applicant disclosed in the IDS the published application (Ex. 2005). The specifications and disclosures that are identical in all material respects.

2020); Ex. 2003 at 12. Nollet, like Mejdrich, is cited on the face of the '556 patent. Ex. 1001 at 2 (right hand column).

In view of the foregoing it is clear, the examiner was well familiar with Nollet and had expressly considered it in connection with the immediate parent application to the '556 patent. And as explained above, Petitioner has admitted in a related proceeding that Nollet and Tuan include overlapping disclosures on the question of FPGA reconfigurability. Accordingly, and as acknowledged by Petitioner, Tuan's teachings cited in the Petition are cumulative to Nollet, which reference was expressly cited by the examiner during prosecution of the parent application to the '556 patent. Factor 1 is thus met with respect to the secondary Tuan reference as well.

Just as in *Becton* where the Board (at 25) was "not persuaded on this record that rearranging previously substantively considered prior art, and advancing essentially the same positions raised by the Examiner during prosecution of the parent application, presents persuasive new evidence of unpatentability that was not evaluated by the Office," the Board here should not be persuaded by Petitioner's repurposing of identical disclosures and arguments that are substantively the same.

Advanced Bionics – Factor 2

Under Factor 2 of *Advanced Bionics*, it was Petitioner's burden to demonstrate "that the Office erred in a manner material to the patentability of challenged claims."

Advanced Bionics at 8. Because Petitioner did not address the Nollet and Mejdrich references, Petitioner does not identify any material error in the examiner's consideration of the references' disclosures. To that end, Patent Owner notes that Petitioner incorrectly argues that a shortcut to a § 325(d) analysis exists anytime art not cited in an office action is applied in a Petition. Specifically, Petitioner argues (at 74):

Because the '556 Patent's prosecution did not involve negotiation between the applicant and the Examiner regarding the teachings of the prior art applied in the instant Petition, the instant Petition's art and arguments cannot be said to be the same as, or substantially similar to, art and arguments previously presented to the Office in connection with the '556 Patent."

If Petitioner's argument were accepted the *Advanced Bionics* question would collapse into whether there are any overlapping references. But that is clearly not the holding of *Advanced Bionics*. It was not sufficient for Petitioner to simply assume Factor 1 would not be met because it found references that were not expressly negotiated during prosecution. And because Petitioner failed to meaningfully address Factor 1, it has not even attempted to address Factor 2.

B. The Petition Fails to Demonstrate Public Accessibility of Tuan

As discussed *supra*, the Petition relies on the combination of Kupferschmidt and Tuan for each ground directed to each challenged claim. Tuan (Ex. 1005) is a doctoral thesis dated 2009 that bears no objective indicia of public availability (e.g., a copyright date or publication reference). Accordingly, Petitioner relies on the

declaration of Ms. Munford to argue that “Tuan ‘was made available to the public shortly after its initial acquisition [by the Keio University library] in Fall 2009.’” Petition at 10 (quoting Ex. 1007, ¶11). Ms. Munford’s declaration falls short of establishing that Ex. 1005—which is dated 2009—was in fact publicly available. Instead, Ms. Munford establishes that a different reference dated November 5, 2008, became available in 2008. In other words, Ms. Munford at best establishes that a different document that is **not** Ex. 1005 was available in 2008. Even then, however, Ms. Munford’s brief discussion of Tuan is entirely conclusory and insufficient under *Hulu*.

1. Petitioner’s declaration evidence avers to the public availability of a reference that is not Ex. 1005.

Tuan is bears a date of 2009 on its face. Ex. 1005 at 1Consistent with the 2009 date, the Petition alleges (at 10) that it was publicly available at the Keio University library in Fall 2009 based on Ms. Munford’s declaration. In an attempt to substantiate her conclusion that Ex. 1005 became publicly available in 2009, Ms. Munford relies on a translation of a “MARC” record. Ex. 1007 at 26-30. On its face, the MARC record refers to a Tuan reference dated November 5, 2008. Ex. 1005, however, is dated 2009. Thus, there is no evidence that the 2008 document identified in the MARC record is Ex. 1005, which is dated one year later.

Appendix TUAN01 clearly indicates that the paper identified in the MARC record is dated 2008.

タイトル (29)	A study on a multitasking environment for dynamically reconfigurable processors
著者 (30)	Vu Manh Tuan.
学位論文 (31)	Vu Manh, Tuan >
出版年 (32)	博士学位論文: 慶應義塾大学 (工学 開放環境科学専攻), 2008.11.5 2008

The translation of Field 32 clearly indicates that the paper that is the subject of the MARC record was dated November 5, 2008.

32	博士学位論文: 慶應義塾大学 (工学 開放環境科学専攻), 2008.11.5	Doctoral Dissertation: Keio University (School of Science for Open and Environmental Systems, Graduate School of Science and Technology), November 5, 2008
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In contrast—and as alleged in the Petition—Ex. 1005 was plainly created in 2009. The cover page of Ex. 1005 bears a date of 2009 and the **dissertation cites references that were created in 2009**. Ex. 1005, *e.g.*, at 127-128. The November 5, 2008, document identified by Ms. Munford appears to be a different reference that is not Ex. 1005. Ms. Munford does not address these obvious discrepancies. Rather, she simply asserts that “Exhibit 1005 is the same document that is referred to in this library record [Appendix TUAN01]” without addressing the clear date discrepancy.³ Ex. 1007, ¶10.

³ Notably, Dr. Tuan published an article titled “A Preemption Algorithm for a Multitasking Environment on Dynamically Reconfigurable Processors” in a journal called IEICE Transactions on Information Systems in December 2008. See Ex. 2010. This article bears a substantially similar title as Tuan’s dissertation starting with the words a “Preemption Algorithm” instead of the words “A Study

Because the evidence relied upon in the Petition to demonstrate public availability of Ex. 1005 refers to a different document created and published the year prior, there is no record evidence which could meet Petitioner's burden at institution to "identify with particularity evidence sufficient to establish a reasonable likelihood that the reference [Ex. 1005] was publicly accessible." *Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29 at 13 (PTAB Dec. 20, 2019) (precedential).

2. Even if the Board were to overlook the MARC record's date discrepancy, Petitioner still fails to demonstrate public accessibility.

Even if the Board were to overlook the fact that the library records refer to a document authored and published a year earlier than Ex. 1005, the Petition still falls far short of meeting the institution-stage standard set by *Hulu* for establishing public accessibility.

"[A]t the institution stage, the petition must identify, with particularity, evidence sufficient to establish a reasonable likelihood that the reference was publicly accessible before the critical date of the challenged patent and therefore that there is a reasonable likelihood that it qualifies as a printed publication." *Id.* In *Hulu*, the Board held that "[p]ublic accessibility requires more than technical

On." The December 2008 publication date is consistent with a creation date of November 5, 2008.

accessibility.” *Id.* at 10. “[A] work is not publicly accessible if the only people who know how to find it are the ones who created it.” *Samsung Elecs. Co. v. Infobridge Pte., Ltd.*, 929 F.3d 1363, 1369, 1372 (Fed. Cir. 2019). Under *Hulu*, a reference is deemed “publicly accessible” upon a satisfactory showing that the document was made available to the extent that “persons interested and ordinarily skilled in the subject matter” who are “exercising reasonable diligence” could locate it at the relevant time. *Hulu* at 10-11.

As to this issue, Petitioner makes only a conclusory assertion that the Tuan thesis “was made available to the public shortly after” the university acquired the Tuan thesis in 2009 and that “library records that demonstrate Keio University library’s acquisition of Tuan in October 2009, and is consistent with the year (2009) printed on Tuan’s title page.” Petition at 10 (quoting Ex. 1007, ¶11). Critically, Ms. Munford does not explain how a POSITA would have accessed Ex. 1005 prior to the relevant date.

For example, she does not testify that a POSITA could have found Ex. 1005 by searching the library’s website prior to the critical date, much less *how*. Nor does Ms. Munford make even make a conclusory assertion that the Keio University library maintained a publicly accessible database prior to the critical date. Indeed, Ms. Munford’s declaration is bereft of any suggestion that a POSITA could have found the dissertation with the exercise of reasonable diligence. Ms. Munford

simply avers that Ex. 1005 was publicly available in 2009. But that is a classic example of technical accessibility, which is insufficient to meet *Hulu*'s public accessibility requirement. *Hulu* at 10. To that end, it is notable that while Ex. 1005 appears in the Google Scholar database, no "cited by" link or information is provided. See Ex. 2011. This suggests that Tuan has not, in fact, been cited by any other publication, further highlighting its lack of public accessibility at the critical date.

The Board's decision in *Salesforce.com, Inc. v. WSOU Investments, LLC*, IPR2022-00428, 2022 WL 2719175, at *5 (PTAB Jul. 13, 2022) is instructive here. In *Salesforce.com*, the Petitioner submitted a declaration that at least averred that a POSITA could have found the reference at issue through reasonable diligence. The declaration asserted, in relevant part, as follows (emphasis added):

Given that the Code Project website was accessible to the public prior to March 31, 2008, I understand that **persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence could have located the Erdogan article from the website using the common search terms** discussed above and/or reasonable diligence. Indeed, upon accessing the Code Project website, **such an interested researcher would have found the Erdogan article by simply clicking on the "articles" link followed by the topic and applying reasonable diligence.**

But this assertion—which is conspicuously lacking from Ms. Munford's declaration—was found to be insufficient in *Salesforce*. Instead, the Board found that the declarant did "not explain from where she derived that understanding, and

she does not identify any evidence to support her understanding as to how the Code Project website would have been searched before the critical date.” *Salesforce*, 2022 WL 2719175, at *5. For example, the declarant did “not identify any evidence about the specific search capabilities” of the website used to find the reference at issue as of the critical date. *Id.*

The Board continued in *Salesforce* by noting that, at best, the declarant established technical accessibility. *Id.* The Board found that the petitioner fail[ed] to identify evidence showing that an ordinarily skilled artisan exercising reasonable diligence” could have located the reference through the use of “common search terms.” *Id.* at *6. Here, Ms. Munford does not even allege that a POSITA could have found Ex. 1005 with the exercise of reasonable diligence before the critical date. At best—and assuming the Board overlooks the date discrepancy discussed *supra*—Ms. Munford’s declaration establishes only that Ex. 1005 was “technically accessible” in 2009 at Keio University library. That the reference was theoretically available to those who knew where to find it before the critical date is insufficient to demonstrate that Ex. 1005 is a printed publication that is appropriately relied on in an IPR. Indeed, it appears Petitioner located the obscure Tuan dissertation for no other reason than a failed attempt to overcome § 325(d) as discussed *supra*.

IV. CONCLUSION

For the foregoing reasons, Patent Owner ThroughPuter, Inc. respectfully submits that the Board should decline to institute trial in this proceeding.

Dated: March 9, 2023

Respectfully submitted,
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WORD COUNT CERTIFICATE OF COMPLIANCE

Pursuant to 37 C.F.R. § 42.24 (d), I hereby certify that the foregoing
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Respectfully submitted,

Dated: March 9, 2023

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing PATENT OWNER'S PRELIMINARY RESPONSE and all supporting exhibits were served in their entirety by filing these documents through the Patent Trial and Appeal Case Tracking System (P-TACTS) as well as providing a courtesy copy via e-mail to the following attorneys of record for the Petitioner listed below:

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