

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AO KASPERSKY LAB
Petitioner

v.

WEBROOT, INC.
Patent Owner

IPR2023-00895
U.S. Patent No. 10,284,591

PETITIONER'S REQUEST FOR REHEARING

INTRODUCTION

Petitioner, AO Kaspersky Lab, requests rehearing on the Decision Denying Institution of *Inter Partes* Review (“Decision”) pursuant to 37 C.F.R. § 42.71(d). Paper 7. Petitioner sought *inter partes* review using an anticipatory whitepaper authored by Ivan Fratric entitled “*Runtime Prevention of Return-Oriented Programming Attacks*” (“Fratric Whitepaper”). The Board did not find the contents of the Fratric Whitepaper lacking as relates to the invalidity analysis. Rather, the Board denied the Petition by concluding that Kaspersky had not sufficiently demonstrated that the Fratric Whitepaper qualified as a printed publication prior to the critical date. The record contains ample evidence to establish that the Fratric Whitepaper meets the requirements of 35 U.S.C. § 102. In denying institution, the Board misapprehended the evidence in the record when considered as a whole. As such, the Board abused its discretion.

Moreover, additional evidence directly related to the argument presented in the Petition, which was unavailable to Petitioner when the Petition was filed and, in fact, was unavailable until December 2023, provides further indicia of public accessibility and demonstrates that the Fratric Whitepaper was a printed publication before January 27, 2014. Good cause supports admission and consideration of this evidence. Even without the additional evidence, however, the Petition supports institution. As such, Petitioner requests that the Board grant the request for rehearing and institute *Inter Partes* Review.

LEGAL STANDARD

A “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.” *Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29 at 13

(PTAB December 20, 2019) (precedential). The reasonable likelihood standard is “a higher standard than mere notice pleading” but “lower than the ‘preponderance’ standard to prevail in a final written decision.” *Id.* Reasonable likelihood does not require certainty. *Cf. Electronic Controlled Sys. D/B/A/ King Controls v. Winegard Co.*, Appeal 2012-008614, 2012 WL 5983993 at *7 (PTAB Nov. 27, 2012).

Petitioner bears the burden of challenging a decision denying institution. 37 C.F.R. § 42.71(d). Requests for rehearing “must specifically identify all matters [Petitioner] believes the Board misapprehended or overlooked,” including where in the record such matters were addressed. *Id.* New evidence may be considered by the Board, but only upon a showing of good cause. Patent Tr. and App. Bd. Consolidated Trial Practice Guide 90 (Nov. 2019), citing *Huawei Dev. Co. v. Optis Cellular Tech., LLC*, IPR2018-00816, Paper 19 at 4 (PTAB Jan. 8, 2019) (precedential). A decision to deny institution is reviewed for abuse of discretion. *Google LLC v. Personalized Media Comms., LLC*, IPR2020-00719, 2020 WL 6530759 at * 1 (PTAB Nov. 5, 2020). Abuse of discretion may be found when a decision: “(1) is clearly unreasonable, arbitrary, or fanciful; (2) is based on an erroneous conclusion of law; (3) rests on clearly erroneous fact findings; or (4) involves a record that contains no evidence on which the Board could rationally base its decision.” *Id.*, citing *Redline Detection, LLC v. Star Envirotech, Inc.*, 811 F.3d 435, 442 (Fed. Cir. 2015).

When determining whether a prior art reference is publicly accessible, the Board must examine “the evidence viewed as a whole,” rather than individual pieces of evidence separately. *VidStream LLC v. Twitter, Inc.*, 981 F.3d 1060, 1066 (Fed. Cir. 2020); *see also Unified Patents, LLC v. 2BCOM, LLC*, IPR2020-00996, 2023 WL 4711720 (granting request for rehearing based

on review “in context of the entirety of the evidence presented.”).

BACKGROUND

On April 28, 2023, Petitioner filed the Petition (Paper 1) for *Inter Partes* Review of U.S. Patent No. 10,284,591 B2 (“the ‘591 Patent”) challenging claims 1-17. The Petition argued that the ‘591 Patent (Ex. 1001) was anticipated by the Fratric Whitepaper (Ex. 1007) and was supported by the Declaration of Venkatramanan Siva Subrahmanian. Ex. 1002. Dr. Subrahmanian’s opinions were supported by numerous exhibits, many of which related to GitHub, a code hosting platform and repository for open source projects. *See* Ex. 1002, pp. 9-10.

On September 11, 2023, Patent Owner filed its Patent Owner Preliminary Response in which it argued that Petitioner failed to show that the Fratric Whitepaper was a printed publication under 35 U.S.C. § 102. *See* Paper 6, pp. 22-29. The Board agreed with Patent Owner and identified two deficiencies in the Petition, as follows:

First, there is nothing in the record to show that the screenshot was of material that existed prior to the ‘591 patent’s filing date, as there is no citation for the screenshot, it does not appear to be taken from an exhibit, and it is undated. Second, the record shows that the visibility setting of a GitHub repository may be changed (*see* Ex. 1011), and there is no evidence that the ‘Public’ setting shown in the screenshot had not changed over time.

Paper 7, pp. 9-10.

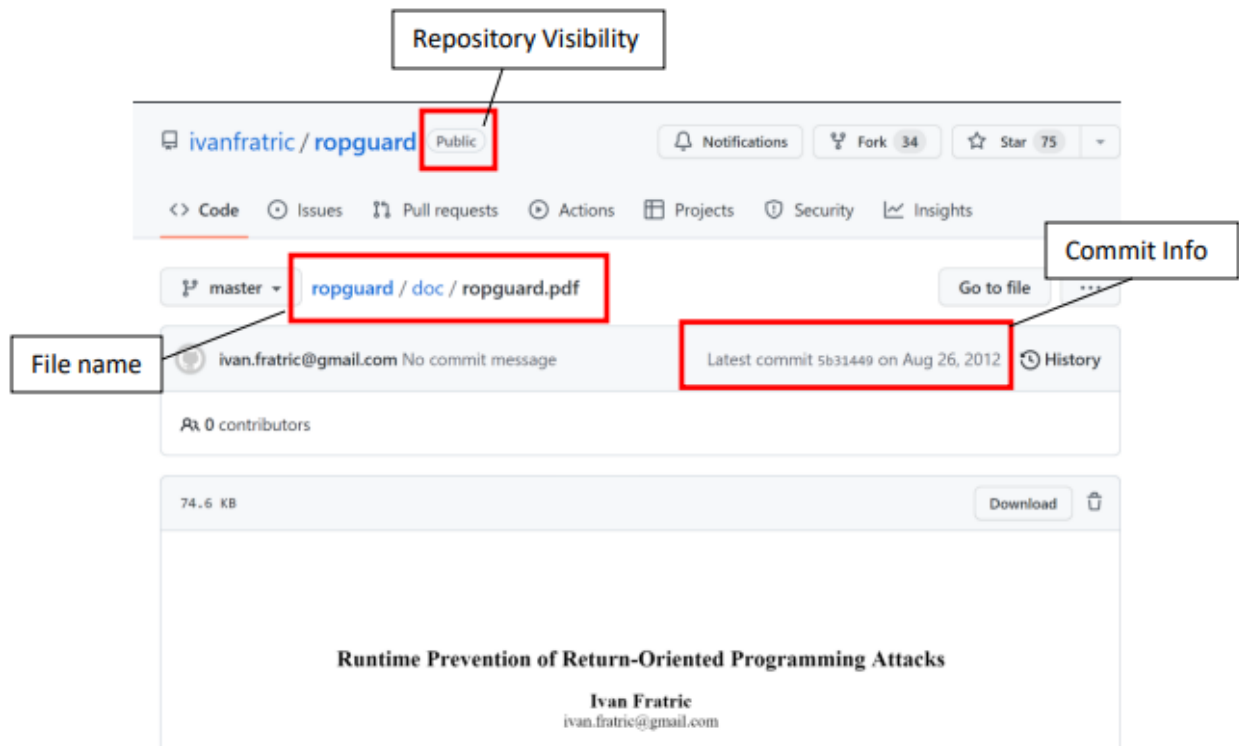
ARGUMENT

The Petition and exhibits contain ample evidence to address both alleged deficiencies the Board identified. The Decision fails to consider or reference some of the evidence upon which the Petition relies. Petitioner contends that the absence of any discussion of this evidence in the Decision demonstrates that the Board misapprehended or overlooked it and that when all of the evidence in the record is considered, institution of *Inter Partes* Review is warranted.

I. The Board Abused its Discretion because the Decision Contains Clearly Erroneous Factual Findings and Conclusions of Law

The Board's first basis for denying institution constitutes an abuse of discretion.

Referencing the screenshot that appears on page 17 of the Petition (reproduced below), the Board asserted the record contained nothing to show the image “was of material that existed prior to the ‘591 patent’s filing date, as there is no citation for the screenshot, it does not appear to be taken from an exhibit, and it is undated.” Paper 7, p. 9.



The screenshot in the Petition was annotated to highlight the very information the Board contends is missing from the Petition. The screenshot in the Petition is simply a depiction of the first portion of Exhibit 1007 viewed within the GitHub webpage interface. And, in fact, all the information depicted in the screenshot beneath the row that begins “< > Code...” is depicted in Exhibit 1007, including the file name and commit

date. The remaining portion of the screenshot in the Petition (*i.e.*, the row including the “< > Code...” and above) is the GitHub navigation interface, displayed for navigation within GitHub when viewing the Fratric Whitepaper on GitHub.

The Board identified four alleged deficiencies in its first basis for denying institution. The first deficiency (“nothing in the record to show that the screenshot was of material that existed prior to the ‘591 patent’s filing date”) and fourth deficiency (“[the screenshot] is undated”) are related as each pertains to the date and accessibility of the Fratric Whitepaper. But Exhibit 1007 and the Petition screenshot recite “Latest commit 5b31449 on Aug 26, 2012.” This is a clear reference to August 26, 2012, a date preceding the critical date by 17 months. Dr. Subrahmanian referenced the August 2012 commit date in his declaration when he testified about the accessibility of the Fratric Paper. Ex. 1002, ¶77. Moreover, GitHub explains that a “commit” denotes a file revision. Ex. 1012, p. 12. Thus, the Fratric Whitepaper is a document saved in 2012. The Board did not refer to either Exhibit 1012 or Dr. Subrahmanian’s testimony relating to these issues.

The second deficiency (“there is no citation for the screenshot”) and third deficiency (“[the screenshot] does not appear to be taken from an exhibit”) are also related in that they pertain to the origin of the evidence argued in the Petition. But the Petition explicitly identifies the origin of the information on the page preceding the screenshot:

Fratric is located in the ‘ropguard.pdf’ document in the GitHub repository at: <https://github.com/ivanfratric/ropguard/blob/master/doc/ropguard.pdf>, as depicted in the annotated screenshot below.

Paper 1, p. 16. The Petition also identifies the same URL in the description of Exhibit

1007 in its Exhibit List. Paper 1, p. iv. Dr. Subrahmanian references the very same webpage in his declaration when he identifies Exhibit 1007. *See* Ex. 1002, p. 9, ¶ E. Again, the Decision did not discuss the explanation from page 16 of the Petition, the Petition Exhibit list, or acknowledge that Dr. Subrahmanian’s Declaration clearly identified the origin of the information.

Exhibit 1007 is simply the Fratric Whitepaper as displayed within the GitHub webpage interface. The webpage, as physically printed to paper and scanned or printed to PDF through a browser, was not included as an exhibit because it, like most webpages, does not render the same when printed as when viewed on the screen. But when Exhibit 1007 is compared to a browser screenshot of the webpage, it is apparent that they contain the same information.¹ For example, the wording of the Abstract of the Fratric Whitepaper is identical. *Compare* Exhibit 1007 with Exhibit 1033. Similarly, the excerpt “5b31449 · 12 years ago,” from the browser screenshot recites the same numeric identifier “5b31449” for the “commit,” and the recitation “12 years ago” coincides with the 2012 date identified in the Petition and Exhibit 1007. In part, because Petitioner used the Fratric Whitepaper (Exhibit 1007) as displayed within the GitHub web interface to

¹ In Section II.A, *infra*, Petitioner establishes that good cause exists to admit the webpage (Exhibit 1032) and a browser screenshot (Exhibit 1033) from where Ex. 1007 originated to enable the Board to confirm they contain the same information. *See Valve Corp. v. Ironburg Inventions Ltd.*, 8 F.4th 1364, 1371-72 (Fed. Cir. 2021) (holding that the Board, as fact finder, was obligated to compare 10-page exhibits to authenticate them as having the same disclosure).

improve readability as opposed to a poorly-rendered copy of the webpage, as printed, the Board misapprehended this evidence. Regardless, taken together, the evidence submitted in the Petition addresses the Board's concerns and satisfies the requirement of demonstrating a "reasonable likelihood" that the Fratric Whitepaper was a printed publication that was publicly accessible before the critical date.

The Board's second basis for denying institution also constitutes an abuse of discretion. In his declaration, Dr. Subrahmanian noted several facts relevant to whether the Petition meets the threshold of "establish[ing] a reasonable likelihood that the reference was publicly accessible before the critical date" of January 2014, as follows:

- GitHub was established in 2008, six years before the critical date;
- GitHub is an open-source repository viewable by anyone (Ex. 1012, p. 27);
- The prior art reference authored by Ivan Fratric is a whitepaper;
- The visibility of the Fratric Whitepaper is set at "Public"; and
- The Fratric Whitepaper has a commit date of 2012 (Ex. 1007).

See Ex. 1002, ¶¶51-52, 77. Dr. Subrahmanian testified that he viewed and based his opinion of public accessibility of the Fratric Whitepaper based on Exhibit 1007 as it is depicted on <https://github.com/ivanfratric/ropguard/blob/master/doc/ropguard.pdf>.

Exhibit 1002, p. 9, ¶ E. The Decision, however, makes no mention of any of the above-cited testimony. Instead, the Board rejected the Petition as failing to meet the evidentiary threshold warranting institution because the GitHub visibility setting *could* be changed and there was no evidence in the Petition to prove that had not happened. Paper 7, pp. 9-10, citing Ex. 1011. The Decision misapprehended or overlooked portions of the factual

record and applied a heightened, legally incorrect evidentiary standard in conflict with *Hulu*.

The evidence supports the conclusion that Petitioner would be “reasonably likely” to prove the Fratric Whitepaper was publicly accessible before the critical date. The Fratric Whitepaper commit date precedes the critical date. By its very nature, a whitepaper is an informational document created to *promote* or highlight the features of a solution to a problem, not conceal them. Concealing such information is counterproductive to the purpose of a whitepaper. Moreover, Mr. Fratric placed the visibility setting for the Fratric Whitepaper to “Public” and there is no evidence the setting was ever changed. The “public” setting for the Fratric Whitepaper also aligns with its having been posted to the GitHub open-source repository. GitHub defines “open source” as “software that can be freely used...by anyone.” Ex. 1012, p. 24. GitHub further articulates its objective to make “open source projects” accessible and available to the public. *See* Ex. 1015. This evidence, some of which the Decision never references, is sufficient on its face to establish a “reasonable likelihood” that the Fratric Whitepaper was publicly accessible before the critical date.

The fact that the anticipatory reference is a whitepaper makes it unreasonable to presume that the visibility setting would ever have been set to private. There is no evidence to support such a conclusion and much evidence refuting it. But the Board presumed as much when it concluded, by commenting solely on the date of the Petition screenshot and no other evidence, that the Petition was insufficiently probative of the visibility of the reference before the critical date. Paper 7, p. 10. The Board could reach this conclusion only by overlooking all the other evidence and applying an improper, heightened legal standard.

The Board’s precedent makes clear that at the Petition stage, the burden on a Petitioner is lower than preponderance of evidence. *Hulu*, IPR2018-01039, Paper 29 at 13. Preponderance connotes “evidence which is more credible” and connotes a weighing of evidence. *See* Black’s Law Dictionary. Conversely, when the facts identified in the Petition are accepted on their face, the Petition supports a conclusion that there is a “reasonable likelihood” that the Fratric Whitepaper meets the requirements of 35 U.S.C. § 102. The Decision, however, presumed evidence not in the record. Namely, the Board presumed the GitHub visibility setting for the Fratric Whitepaper had at one time been set to private. There is no evidentiary basis or legal precedent for such a presumption. The Board then placed conclusive weight on the presumed “evidence” and discounted all the other evidence that supports the contrary conclusion that the visibility was always set on “public.”

Petitioner need only prove public access, not that anyone ever accessed the Fratric Whitepaper. *OKI Amer., Inc. v. Advanced Micro Devices, Inc.*, No. C 04-03171 CRB, 2006 WL 2711555 at *6 (N.D. Cal. Sep. 21, 2006), citing *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1569 (Fed. Cir. 1988) (“If accessibility is proved, there is no requirement to show that particular members of the public actually received the information.”) “Public networks, such as the internet, are accessible to anyone with the right hardware and software....” *Network Protection Sciences, LLC v. Fortinet, Inc.*, No. C 12-01106 WHA, 2012 WL 6680155 at *5 (N.D. Cal. Dec. 21, 2012). Based solely on the contents in the Petition and exhibits, Petitioner met the “reasonable likelihood” standard of demonstrating that the Fratric Whitepaper was publicly accessible prior art on the internet before the filing date of the ‘591 Patent. The Board overlooked or misapprehended the evidence and employed a heightened evidentiary standard at

the Petition stage. As such, the Board abused its discretion. Institution of *Inter Partes* Review is warranted.

II. Good Cause Exists to Admit Additional Exhibits Directed at the Already Advanced Argument that the Fratric Whitepaper is a Printed Publication Under 35 U.S.C. §102 and Was Available before the Critical Date.

The Board is authorized to accept additional evidence upon a showing of good cause. *Huawei*, IPR2018-00816, Paper 19 at 4 (PTAB Jan. 8, 2019). Consistent with the public interest of maintaining valid patents, good cause may exist in various situations such as where new evidence comes to light after a Petition is filed or is highly relevant to the argument before the Board. *Google LLC v. AGIS Software Dev., LLC*, IPR2020-00871, 2022 WL 320406 at *3 (PTAB Jan. 26, 2022); *Dish Network L.L.C. v. Broadband ITV, Inc.*, IPR2021-01267, 2021 WL 1236787 at *2 (PTAB Apr. 1, 2021); *Livanova, Inc. v. Neuro and Cardiac Techs.*, IPR2018-01709, 2019 WL 338918 at *1 (PTAB Jan. 24, 2019). The Board may consider whether the new evidence relates to a previously made argument or constitutes a new argument. *Samsung Elecs. Co. Ltd. v. Dynamics Inc.*, IPR2020-00505, 2020 WL 5592707 at *3 (PTAB Sep. 18, 2020).

Additional evidence may be admitted along with a request for rehearing upon a showing of good cause. *Dish Network L.L.C. v. Broadband iTV, Inc.*, IPR2020-01280, 2021 WL 1236788 at *2 (PTAB Apr. 1, 2021) (admitting invalidity contentions that were unavailable until month before decision to deny institution and email that was unavailable until day rehearing request was filed); *Dish Network L.L.C. v. Broadband iTV, Inc.*, IPR2020-01332, 2021 WL 1236789 at *2 (PTAB Apr. 1, 2021) (admitting invalidity contentions that were unavailable until the month in which decision to deny institution was made and invalidity contentions that were not available until after decision). Good cause requires a demonstration of facts to support the request, but a

party need not show that it was fully diligent or that there is no undue prejudice to the non-movant. *Ultratec, Inc. v. CaptionCall LLC*, 872 F.3d 1267, 1272 (Fed. Cir. 2017), citing 77 Fed. Reg. 48,719 (Aug. 14, 2012).

A. Good Cause Supports Admission of the Webpage and Browser Screenshot Corresponding to Exhibit 1007.

The Decision raised questions as to whether the screenshot depicted on p. 17 of the Petition came from an exhibit or elsewhere. Paper 7, p. 9. Petitioner provided a thorough explanation to answer those questions in Section I, *supra*. As explained, Petitioner did not include a printed-out copy of the Fratric Whitepaper webpage as a separate exhibit for readability purposes because the webpage, like most webpages, does not render the same when printed, as when viewed on the screen. Perhaps mistakenly, Petitioner's intent was to provide the Board with a more useable exhibit.

In view of the Decision and in accordance with 37 C.F.R. 42.63(a), Petitioner seeks leave to file as exhibits a printout of the webpage (Exhibit 1032) and a browser screenshot (Exhibit 1033) of the first page of the webpage as rendered on screen.² These exhibits provide evidentiary continuity and demonstrate that the webpage from which Exhibit 1007 originates and the Fratric

² The complete webpage was printed on January 4, 2024, and now recites "12 years ago," consistent with the previously identified 2012 commit date. Notably, however, the page breaks of the printed webpage (Exhibit 1032) result in lines of the Fratric Whitepaper being cut off on, and the webpage printout does not include the "5b31449" designator that can be seen online as shown in the browser screenshot. Exhibit 1033. This information lost as part of the printing process exemplifies why Petitioner filed only Exhibit 1007 in the first instance.

Whitepaper (Ex. 1007) provide the same information. *See Valve Corp.*, 8 F.4th at 1371-72. Good cause exists for a variety of reasons.

Through Exhibit 1007, Petitioner provided the substantive disclosure needed to demonstrate invalidity and cited, in both the Petition and expert declaration, the associated webpage it now seeks to admit. *See* Paper 1, p. 16; Exhibit 1002, p. 9, ¶ E. These new GitHub webpage exhibits initially were not provided to the Board solely based on considerations of readability. But the evidence is highly relevant to issues of concern to the Board and relates to the previously advanced argument that the Fratric Whitepaper was an accessible printed publication in 2012. No new substantive evidence is introduced by admission of these exhibits. Rather, the exhibits simply demonstrate that Exhibit 1007 and the substance disclosed therein originates from the webpage identified in the Petition and Subrahmanian Declaration. *Id.* Petitioner has shown good cause to file the additional exhibits and accordingly seeks admission of Exhibits 1032-33.

B. Good Cause Supports Admission of New Evidence Showing Public Visibility Provided by GitHub on December 6, 2023, Pursuant to Subpoena.

Petitioner sought to obtain documentary evidence from GitHub relating to the Fratric Whitepaper. On December 6, 2023, GitHub responded to a subpoena by producing an audit log. A copy of the log is attached as Exhibit 1034. The log provides details regarding the accessibility of the Fratric Whitepaper, including the statement “‘visibility’:’public.’” The phrase “‘visibility’:’public’” appears seven times in the log. The log also includes the statement “‘access’:’public’” and the repository object is “‘public_repo.’” Exhibit 1034. The log contains no indication that the visibility of the Fratric Whitepaper was ever set to anything other than “‘public.’” This information is highly relevant to the concern raised in the Decision about GitHub

visibility settings and provides reliable indicia that the settings for the Fratric Whitepaper were always “public.”

Petitioner could not have included the information received from GitHub in the Petition. Petitioner did not possess the log until GitHub produced it on the afternoon of December 6, 2023, the day before the Decision issued. Exhibit 1035. As such, good cause exists to admit Exhibits 1034-35.

C. Good Cause Supports Admission of New Evidence Provided on December 23, 2023, by the Author of the Fratric Whitepaper, Ivan Fratric.

Petitioner has also sought to obtain documentary and other evidence from the author of the Fratric Whitepaper for months prior to the filing of the Petition. While Petitioner was able to locate Mr. Ivan Fratric online, Petitioner discovered that he resides in Zurich, Switzerland, beyond the subpoena power of U.S. courts. For months, Petitioner solicited assistance from Mr. Fratric to demonstrate the public accessibility of the Fratric Whitepaper with no success. Mr. Fratric was slow to respond and when he did, he advised Petitioner only of his desire not to become involved.

After receiving the Decision, Petitioner made a final effort to reach Mr. Fratric. On December 23, 2023, Mr. Fratric sent a LinkedIn message and again conveyed his desire to avoid involvement. Exhibit 1036. For the first time, however, he also provided a substantive response regarding the public accessibility of the Fratric Whitepaper. In relevant part, Mr. Fratric conveyed that his effort was an “open-sourc[e]” project, that “everything” about it was “public,” and that it had been “announced in multiple places.” Exhibit 1036. Mr. Fratric’s statement that “everything” relating to the ROPGuard project was public includes the Fratric Whitepaper that is the basis of the Petition. Petitioner’s investigation supported the factual assertions it first learned

of on December 23, 2023. Specifically, the 2012 public announcement of the Fratric Whitepaper includes a previously unknown tweet from Mr. Fratric’s Twitter page and a disclosure made in his personal blog. *See* Exhibits 1036-1039.³

Both the Twitter page and the personal blog bear the same August 26, 2012, date as the commit date found in Exhibit 1007. Exhibits 1037-1039. The Twitter page indicates that 74 individuals responded to Mr. Fratric’s tweet (46 people reposted and 28 liked it). Exhibits 1037. The Twitter page also provides a link to code.google.com/p/ropguard/, which directs to the archive of Google Code, which is a public repository for documents such as the Fratric Whitepaper.⁴ Exhibit 1040. The Google Code Archive page indicates that “ROPGuard has moved to GitHub” and directs viewers to the webpages Petitioner relied upon in the Petition. Exhibit 1040. Notably, the audit log provided by GitHub pursuant to subpoena references “GoogleCodeExporter,” which is consistent with the statement on the Google Code archive webpage. *Compare* Exhibit 1034 *with* Exhibit 1040.

Of the 74 individuals who responded to Mr. Fratric’s tweet, one was identified as Gursev Kalra (@igursev). Exhibit 1041, (bottom of p. 1). If one then examines Mr. Kalra’s Twitter feed,

³ Exhibit 1038 is a December 28, 2023, printout of the personal blog identified in Mr. Fratric’s LinkedIn message (Exhibit 1036). Exhibit 1039 is a scrape from the Wayback Machine internet archive, dated December 23, 2012, that includes a verbatim copy of the personal blog. *See* Exhibit 1039, pp. 3-5.

⁴ If a user clicks the “Downloads” link on the Google page identified in Mr. Fratric’s tweet, the Fratric Whitepaper appears to also still be available on the Google Code archive webpage.

it is apparent that Mr. Kalra re-posted Mr. Fratric’s tweet that very same day, August 26, 2012. As shown from a screenshot of Mr. Kalra’s Twitter feed, his re-posting of Mr. Fratric’s 2012 tweet is bounded on either side by repostings on other topics—before on August 21, 2012, and after on August 29, 2012. *See* Exhibit 1042. The re-posting of Mr. Fratric’s tweet with its included link to the Fratric Whitepaper further establishes the public accessibility of the Fratric Whitepaper by virtue of publicly-available tweets. *See Unsworth v. Musk*, No. 19-mc-80224-JSC, 2019 WL 5550060 at * 4 (N.D. Cal. Oct. 28, 2019) (taking notice of “the existence of a public tweet”) citing *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (“Courts may take judicial notice of publications introduced to indicate what was in the public realm at the time”).⁵

Mr. Fratric’s personal blog dated Sunday, August 26, 2012, is entitled “My BlueHat Prize entry: ROPGuard – runtime prevention of return-oriented programming attacks.” Ex. 1038. The title of the blog is the same as the title of the Fratric Whitepaper submitted with the Petition. *See* Exhibit 1007. Later in his blog, Mr. Fratric asserted, “Now, finally, I’m happy to announce that *I published the entire project* on Google Code. You can find all of the source and project files as well as the project documentation here.” Exhibit 1038, ¶3 (emphasis added). The words “Google Code” and “here,” each of which end the two quoted sentences above, contain links to the Google Code archive webpage, which is Exhibit 1040.

⁵ The Federal Rules of Evidence, including judicial notice (*i.e.*, “official notice”), apply to *Inter Partes* Reviews. 37 C.F.R. § 42.62.

As with the GitHub log discussed *supra*, Petitioner could not have included the information received from Mr. Fratric in the Petition. Despite efforts for an extended time prior to filing the Petition, Petitioner was not in possession of the information provided by Mr. Fratric until December 23, 2023, more than two weeks *after* the Decision issued and nearly eight months *after* the Petition was filed on April 28, 2023. This information is highly relevant to the Board's determination of whether there is a "reasonable likelihood" that the Fratric Whitepaper was publicly accessible before the critical date.

Not until two weeks *after* the Decision did Petitioner obtain this new evidence, which more fully demonstrates the public accessibility of the Fratric Whitepaper. The information provided by Mr. Fratric's LinkedIn message, tweet, and elsewhere were unknown to Petitioner and, as such, could not have been provided sooner. As such, Petitioner has shown good cause for admission of this evidence, which "provides critical new information" about the Fratric Whitepaper as an accessible printed publication before the critical date. *Dish Network*, IPR2021-01267, 2021 WL 1236787 at *2. For the reasons articulated above, good cause exists to admit Exhibits 1036-1042.

CONCLUSION

The Board has in other instances granted institution of petitions, even when a Patent Owner has raised evidentiary concerns over the sufficiency of evidence relating to the public availability of a prior art reference. *See, e.g., Analog Devices, Inc. v. Menon*, IPR2020-01596, Paper 52 at 9- 11. Here, as in *Analog Devices*, there is a "reasonable likelihood" that the Fratric Whitepaper was publicly accessible before the critical date. The evidence in the Petition, when viewed as a whole, supports institution or *Inter Partes* Review. The Petition establishes a

“reasonable likelihood” that the Fratric Whitepaper was publicly accessible before the January 27, 2014, critical date. And while perhaps alone “no piece of evidence definitively establishes [the Fratric Whitepaper’s] public accessibility,” the evidence when considered as a whole does. *VidStream*, 981 F.3d at 1066. Because the Board overlooked or misapprehended evidence sufficient to establish a reasonable likelihood that the Fratric Whitepaper was publicly accessible before the critical date of the ‘591 Patent,” it abused its discretion in denying institution. For that reason alone, Petitioner respectfully requests that the Board grant this request for rehearing and institute *Inter Partes* Review.

But the case for institution becomes even stronger when new evidence, supported by good cause is considered. Publicly-accessible tweets and a blog, publicly visible repositories, and a statement from Mr. Fratric—substantiated by documentary evidence—that “everything” about the ROPGuard project was “public” back in 2012 together far exceed the required standard for institution. When this further evidence is also considered, as it should be, Petitioner has shown more than a “reasonable likelihood” that the Fratric Whitepaper was publicly accessible before the critical date of the ‘591 patent and, therefore, that there is a reasonable likelihood the Fratric Whitepaper qualifies as a printed publication. *See Hulu*, IPR2018-01039, Paper 29 at 13. For these reasons, Petitioner respectfully requests that rehearing be granted and that *Inter Partes* Review be instituted.

Dated: January 5, 2024

Respectfully submitted,

By: /s/ Joseph T. Miotke

Joseph T. Miotke, Reg. No. 47,798
Dewitt LLP

IPR2023-00895 Request for Rehearing
Inter Partes Review of US 10,284,591

901 Marquette Avenue
Suite 2100
Minneapolis, MN 55402
Tel: (612) 305-1400

CERTIFICATE OF SERVICE

The undersigned certifies that, in accordance with 37 C.F.R. § 42.6(e) and 37 C.F.R. § 42.105, service was made on Patent Owner as detailed below.

<i>Date of service</i>	January 5, 2024
<i>Manner of service</i>	FEDERAL EXPRESS
<i>Documents served</i>	Petitioner's Request for Rehearing by the Director
<i>Persons served</i>	KING & SPALDING LLP 1401 Lawrence Street, Suite 1900 Denver, CO 80202

Dated: January 5, 2024

Respectfully submitted,

By: /s/ Joseph T. Miotke

Joseph T. Miotke, Reg. No. 47,798
Dewitt LLP
901 Marquette Avenue
Suite 2100
Minneapolis, MN 55402
Tel: (612) 305-1400