

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

META PLATFORMS, INC.; INSTAGRAM, INC.; WHATSAPP LLC; META
PLATFORMS TECHNOLOGIES, LLC; AND GIPHY, INC.

Petitioners

v.

VL COLLECTIVE IP LLC

Patent Owner

Case IPR2023-00923
U.S. Patent 7,266,682

**PATENT OWNER'S OPPOSITION TO
PETITIONERS' MOTION TO SUBMIT SUPPLEMENTAL
INFORMATION PURSUANT TO 37 C.F.R. § 42.123(a)**

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I. INTRODUCTION

Petitioners are pulling a bait and switch. The Petition alleged that the Handley reference (EX1005) was prior art because it was published in the Computer Networks Journal on February 11, 1999, and the Board instituted review based on that theory. The evidence Petitioners now seek to admit into the proceeding does not support that theory. Petitioners' supplemental evidence instead *contradicts* this theory, as it shows that *Handley (EX1005) was never published in Computer Networks Journal*.

Petitioners' evidence shows that a *different article*—with a different set of authors, a different title, and many substantive differences as compared with Handley—was published in Computer Networks Journal on February 11, 1999. Petitioners seek to admit into evidence two versions of this new article and declarations establishing when they were allegedly published. But Petitioners cannot swap in new references, and this evidence rebuts rather than supports Petitioners' theory about the publication of Handley. This evidence should thus be excluded.

Petitioners also seek to enter evidence purporting to show that Handley was accessible on websites as of January 9, 1998. But the Petition never alleged this theory of public accessibility, and the Board did not institute on it. This evidence should thus also be excluded, as Petitioners cannot change their theory of public accessibility any more than they can change the references they rely on. The Board

consistently denies motions to supplement evidence under these circumstances.

II. BACKGROUND

The Petition relies on EX1005 (herein “Petition Handley”) as an asserted reference in Grounds I, II, and IV. Paper 3 at 5. On its face, Petition Handley is titled “Very large conferences on the Internet: the Internet Multimedia Conferencing Architecture and the MBONE,” and its authors are M. Handley, J. Crowcroft, and C. Bormann. EX1005.

The Petition asserts that “**Handley (EX1005)** – *Very Large Conferences on the Internet: The Internet Multimedia Conferencing Architecture and the MBONE*, published February 11, 1999, in the Computer Networks journal.” *Id.* at 4. This public accessibility theory—publication in the Computer Networks Journal on February 11, 1999—was the only such theory disclosed for Petition Handley. *Id.* Patent Owner argued in its Preliminary Response that Petition Handley bears no indicia of publication in the Computer Networks journal, and that the Petition includes insufficient evidence to show that Petition Handley was published in the Computer Networks journal or was publicly accessible. Paper 11 at 35-36.

Petitioners then requested authorization to file a reply to the Preliminary Response with additional evidence, “including a supplemental declaration from Dr. Henry Houh, two supplemental declarations from Dr. Sylvia Hall-Ellis, and a declaration from a named author of the [Petition] Handley reference (Ex. 1005).”

Paper 13 at 2. The Board authorized the reply but “den[ied] Petitioners’ request to submit supplemental information,” holding that “no good cause exists for submitting supplemental evidence” because “[t]his is not a case where Patent owner has presented evidence or arguments that Petitioner could not have reasonably foreseen.” *Id.* at 2-3. Petitioners’ present motion seeks to submit those same declarations as supplemental information. Paper 21; Exs. 1016-1019.

In their preliminary Reply, Petitioners doubled down on their theory that Petition Handley was published in Computer Networks Journal, stating: “Dr. Houh . . . detailed [Petition] Handley’s publication in COMPUTER NETWORKS.” Paper 14 at 1 (citing EX1003 at 27). Petitioners did not indicate to the Board or Patent Owner that a materially different article (New Handley 2) is what actually published in Computer Networks Journal.

In its decision to institute, the Board found a reasonable likelihood that “Dr. Houh’s sworn testimony that [Petition] Handley was published on February 11, 1999 in the Computer Networks journal is true,” that “the Computer Networks Journal is an established publisher,” and that a person of ordinary skill “would have found [Petition] Handley in the Computer Networks Journal.” Paper 16 at 15-16. The Board did not institute on or address any other theories of public accessibility for Petition Handley, presumably because there were no others in the Petition.

Through its present motion, Petitioners seek to admit two categories of

supplemental information. The first category includes two new, non-asserted references—EX1027 (herein “New Handley 1”) and EX1028 (herein “New Handley 2”)—that were allegedly published on an Elsevier webpage on June 9, 1999 and in the Computer Networks journal on February 11, 1999, respectively. EX1017 ¶¶ 8-14; EX1016 ¶¶ 15-18; EX1018 ¶¶ 37-48. It also includes declarations purporting to explain how these new documents—which are identical to one another but have different titles, authorship, and substantive content than Petition Handley—came to be. Exs. 1016-1018; *see* Ex. 2003 (identifying differences between Petition Handley and New Handley 1, including entire sections, paragraphs, footnotes, figures, bibliographic references, copyright, and publisher marks that are in one and not the other, as well as different pagination and formatting). Petitioners’ technical expert, Dr. Houh, was aware of New Handley 1 and 2 long before the Petition was filed. EX1017 ¶¶ 8-12.

The second category of evidence relates to the alleged publication of Petition Handley on two websites. EX1016 ¶¶ 6-14. Dr. Crowcroft’s declaration claims that Petition Handley (EX1005) is from his current Cambridge academic website, but that it was also previously uploaded to his prior UCL academic website (a different website) and to an allegedly publicly accessible FTP server at University of College London on January 9, 1998. *Id.* (citing Exhibits 2020-2028).

III. LEGAL STANDARD

The party moving for supplemental information under 37 C.F.R. § 42.123(a) bears the burden of showing that the relief requested should be granted. 37 C.F.R. § 42.20(c); *see Western Digital Corp. v. Spex Techs., Inc.*, IPR2018-00082, Paper 22 at 7 (PTAB Jul. 23, 2018). The Board may permit a party to file such a motion only if timeliness and relevance requirements are satisfied. 37 C.F.R. § 42.123(a)(1)-(2).

Satisfying the timeliness and relevance requirements, however, “does not, itself, guarantee that the motion will be granted.” *See Redline Detection, LLC v. Start Envirotech, Inc.*, 811 F.3d 435, 448 (Fed. Cir. 2015). Rather, timeliness and relevance “provide additional requirements that must be construed within the overarching context of the PTAB’s regulations governing IPR and general trial proceedings,” including the Board’s mandate to interpret its rules “to secure the just, speedy, and inexpensive resolution” of the proceeding and to ensure its “integrity.” *Id.* at 443, 445-46, 448; 35 U.S.C. § 316(b); 37 C.F.R. §§ 42.100(a), 42.1(b).

Accordingly, the Board may consider whether the supplemental information reasonably could have been obtained earlier, and that § 42.123 “does not offer ‘a routine avenue for bolstering deficiencies in a petition raised by a patent owner in a Preliminary response.’” *Redline*, 811 F.3d at 444-45, 448. It may also consider whether the supplemental information changes the evidence originally relied on in the petition, *American Well Corp. v. Teladoc Health, Inc.*, IPR2021-00748, Paper

23 at 13 (Feb. 28, 2022) (citing 35 U.S.C. § 312(a)(3)), or presents a new argument not presented in the petition, *Western Digital*, IPR2018-00082, Paper 22 at 10.

IV. PETITIONERS’ MOTION SHOULD BE DENIED AS TO EX1016-1018 AND EX1020-1028 RELATED TO “HANDLEY”

A. Petitioners supplemental evidence changes the grounds of unpatentability and supporting evidence.

Consistent with the guidelines affirmed in *Redline*, the Board does not permit supplemental information where it changes the petitioned grounds or the evidence initially presented in the petition in support of those grounds. *Am. Well Corp.*, IPR2021-00748, Paper 23 at 5-7 (citing *Redline*, 811 F.3d at 445-47; collecting cases). Petitioners’ supplemental evidence does just that, and so it should be rejected.

Petitioners obscure their intended use of the supplemental evidence by referring to three different documents—Petition Handley, New Handley 1, and New Handley 2—all as “Handley.” Paper 21, at 1-2, 4-6. Petitioners then assert that the evidence supports the “public accessibility” of their three-part Handley “on or before February 11, 1999,” without mapping any of the Handleys to a particular theory of public accessibility. *Id.* Nonetheless, it is clear that Petitioners are intending to change their theory of patentability for Petition Handley from the one disclosed in their Petition and instituted on by the Board. This must be so because Petitioners’ evidence shows that Petition Handley was not published in *Computer Networks Journal* on February 11, 1999.

It appears that Petitioners seek to rely on their new evidence in support of two new theories: (1) that New Handley 1 and 2 are similar to Petition Handley and were published in the Computer Networks journal on February 11, 1999, and (2) that Petition Handley was available on Dr. Crowcroft's former academic website and an FTP website on January 9, 1998. *See* EX1017 ¶¶ 11-14; EX1016 ¶¶ 15-18; EX1018 ¶¶ 37-48; *See* EX1017 ¶ 13; EX1016 ¶¶ 6-14; EX1018 ¶¶ 38-39, 41, 47. Under either theory, the supplemental information “supplant[s], not supplement[s],” Petitioners’ initial theory. That is, it contradicts rather than supports Petitioners’ initial theory and evidence, and so should be excluded. *Am. Well Corp.*, IPR2021-00748, Paper 23 at 10; *Western Digital*, IPR2018-00082, Paper 22 at 8-9.

Duration Media LLC v. Rich Media Club LLC is analogous. IPR2023-00953, Paper 21 (PTAB Oct. 12, 2023). There, the petitioner asserted two U.S. patents as prior art that the Board determined did not qualify as prior art under the theory presented in the Petition (*i.e.*, under § 102(b)). *Id.* at 2-3. The petitioner moved to submit supplemental evidence comprising published patent applications corresponding to the asserted patent references. *Id.* The Board found it was unclear whether the petitioner was submitting the new evidence to replace the asserted references or to establish a different publication date of identical content. *Id.* at 3-4. The Board nevertheless rejected the supplemental evidence for either purpose, finding that doing so “would cut against the just, speedy, and inexpensive resolution

of the proceeding” given that the supplemental information “clearly was available to Petitioners before it filed its Petition” and because “it is not clear how Petitioner intends to rely on the supplemental information.” *Id.* at 3-6.

Here, as in *Duration Media*, it is unclear exactly how Petitioners intend to rely on the supplemental information. Petitioners may deny that they are seeking to swap in a different reference. But in that case, the supplemental evidence related to New Handley 1 and New Handley 2 should be excluded because it does not show when or how Petition Handley became publicly available (other than to show that Petition Handley was not published in Computer Networks Journal on February 11, 1999). If Petitioners attempt to demonstrate that Petition Handley (EX1005) was publicly accessible on an FTP site rather than in the Computer Networks journal as alleged in the Petition, then that would also be improper, as that is not a theory of public accessibility that was disclosed in the Petition or instituted on by the Board.

B. Petitioner’s supplemental evidence could have been included in the Petition.

Furthermore, all of the supplemental evidence was available to Petitioners before they filed their Petition. *Duration Media*, IPR2023-00953, Paper 21 at 6; *see also See Redline*, 811 F.3d at 444-45; *Artesian Home Prods.*, IPR2018-00031, Paper 24 at 4-5. Dr. Houh’s supplemental declaration provides facts and analysis about Petition Handley that he and Petitioners possessed before the Petition was filed but

did not include in the Petition. *Compare* EX1017 ¶¶ 5-10 *with* EX1003 ¶ 59. Dr. Houh’s new analysis of New Handley 1 and New Handley 2 (EX1017 ¶ 11-14) could have been included with the Petition as well because both references were reasonably available before the Petition was filed as they were after (*see* EX1018). Petitioners were aware of Dr. Crowcroft before they filed the Petition, as they obtained Petition Handley from his academic website (*see* Paper 3 at iii; EX1016 ¶ 7; EX1017 ¶¶ 6-8) and could have obtained a declaration from him at that time. Petitioners also obtained a declaration from Dr. Hall-Ellis prior to filing the Petition (*see* EX1010) and therefore could have obtained one from her regarding Petition Handley, New Handley 1, and New Handley 2 at that time.

Allowing Petitioners to submit supplemental information that they withheld or elected not to obtain and submit with their Petition—which could have been addressed in Patent Owner’s Preliminary Response—also offends basic notions of due process and fairness. *See Royal Brush Mfg. v. United States*, 75 F.4th 1250, 1257-58 (Fed. Cir. 2023) (“[T]he law is clear that, in adjudicative administrative proceedings, due process includes the right to know what evidence is being used against one.” (cleaned up)); *Doty v. United States*, 53 F.3d 1244, 1251-52 (Fed. Cir. 1995) (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)).

C. Petitioners’ “wait and see” approach warrants denial of their motion for supplemental information.

Redline confirmed that supplemental information may not be used in the manner Petitioners intend to here, *i.e.*, as a “routine” avenue for responding to deficiencies identified in a patent owner’s preliminary response in a “wait-and-see” fashion. *Redline*, 811 F.3d at 448; *Am. Well Corp.*, IPR2021-00748, Paper 23 at 6-7 (collecting cases); Paper 21 at 1, 3 (arguing that the Board “routinely” allows the type of relief requested). *Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29 (PTAB Dec. 20, 2019) (Precedential) (“*Hulu*”) is consistent with those limitations; it recognizes the possibility that a declaration in support of public accessibility arguments may be submitted under § 42.123 “if a patent owner does *not* challenge the reference’s status as a printed publication.” *Hulu* at 15 (emphasis added).

Here, Patent Owner argued in its Preliminary Response that the Petition was deficient because it lacked evidence sufficient to show that Petition Handley published in Computer Networks journal on February 11, 1999. Paper 11 at 35-36. Petitioners now seek supplemental evidence for the sole and direct purpose of filling that evidentiary gap: “Until Patent Owner challenged the public accessibility of Handley and PacketCable in its Preliminary Response (Paper 11), there was no apparent need for this supplemental information.” Paper 21 at 8. But the Board

already held that Patent Owner's arguments were reasonably foreseeable, and that Petitioners lack good cause to submit the very supplemental information they now seek to submit in reply to those arguments. Paper 13 at 2-3. The Board should deny Petitioners' second attempt for the same reasons. *See Triller, Inc. v. TikTok Pte. Ltd.*, IPR2022-00179, Paper 18 at 4 (PTAB Aug. 25, 2022) (denying motion under § 42.123(a) in part because there was no good cause to permit supplemental information).

D. Granting Petitioners' motion would be unduly prejudicial to Patent Owner and create delay.

Patent Owner's Preliminary Response arguments did not introduce unforeseeable issues or new evidence, Paper 13 at 2-3, thus no new evidence from Petitioners is warranted, let alone thirteen new exhibits including five witness declarations. Granting Petitioners' motion would require Patent Owner to respond to over 50 pages of new arguments and opinions (which draw on over 200 pages of supporting materials), effectively extending the Petition far beyond the wordcount limit. 37 C.F.R. § 42.24(a)(1)(i). That would be inherently prejudicial and "fundamentally unfair" to Patent Owner, especially given that the Petition already exceeded the permissible length through its extensive use of improper incorporation by reference. *Cisco Sys., Inc. v. C-Cation Techs., LLC*, IPR2014-00454, Paper 12 at 9 (Aug. 29, 2014) (Informative) ("[The] practice of citing the Declaration to support

conclusory statements that are not otherwise supported in the Petition also amounts to incorporation by reference.”); *see Microsoft Corp. v. DataTern, Inc.*, 755 F.3d 899, 910 (Fed. Cir. 2014). This is particularly true here, because Patent Owner’s arguments were reasonably foreseeable, Paper 13 at 2-3, and because Petitioners withheld information from the Petition that could have been addressed in Patent Owner’s Preliminary Response. *See* §§ IV.B-C, *supra*.

That the supplemental information obscures how Petitioners may rely on it, *see* § IV.A, *supra*, is also prejudicial. Requiring Patent Owner to address new evidence without knowing how Petitioners intend to rely on it promotes neither a just nor speedy resolution of the proceeding. *See Duration Media*, IPR2023-00953, Paper 21 at 6. Addressing each of Petitioners’ new printed publications theories that were not included in the Petition (*e.g.*, based on accessibility via a website or FTP site, based on accessibility of *different* articles, etc.) would involve discrete factual and legal analyses, diminishing Patent Owner’s ability to address the arguments in the Petition within the permitted wordcount. *See Samsung Elecs. Co. v. Infobridge Pte. Ltd.*, 929 F.3d 1363, 1368-69 (Fed. Cir. 2019) (“[P]ublic accessibility depends on a careful, case-by-case examination of how a particular reference was disseminated, to whom, for how long, and under what circumstances.”).

Granting Petitioners’ motion is also likely to result in additional delay and motion practice. Dr. Houh’s deposition has already been scheduled to take place on

February 16, before Petitioner's motion is likely to be resolved. If the motion is granted, Patent Owner may need to take at least four more depositions (of the declarants of the supplemental evidence), which may require Patent Owner to seek modifications to the case schedule to be able to take the depositions and incorporate the testimony into its Patent Owner's Response. And to the extent Petitioners improperly rely on the supplemental information in their Reply, motion practice will be necessary to strike Petitioners' improper arguments.

E. Petitioners' case law is inapposite.

Petitioners describe their request as one that is "routinely" granted, but the cases Petitioners cite (mostly pre-*Redline*) involve very different circumstances. In all of Petitioners' cases, the Board expressly found that the supplemental information supported existing theories of unpatentability disclosed in the petition and did not change the evidence presented in the petition to support the petitioned grounds. *Palo Alto Networks, Inc v. Juniper Networks, Inc.*, IPR2013-00369, Paper 37 at 3-5 (P.T.A.B. Feb. 5, 2014); *Apple, Inc. v. VirnetX, Inc.*, IPR2015-00810, Paper 21 at 4-8 (P.T.A.B. Nov. 2, 2015); *Valeo N.A., Inc. v. Magna Elecs., Inc.*, IPR2014-01204, Paper 26 at 4 (P.T.A.B. Apr. 10, 2015); *Baker Hughes Inc. v. Packers Energy Servs., Inc.*, IPR2016-00597, Paper 80 at 3 (P.T.A.B. Sept. 26, 2018). By contrast, Petitioners' supplemental information contradicts rather than supports the public accessibility theory it disclosed in the Petition (*i.e.*, that Petition Handley published

in Computer Networks journal) and relates to entirely new theories of public accessibility (*i.e.*, that Petition Handley published on a website or FTP site and that New Handley 1 and 2 were published). *See* §§ II and IV.A, *supra*.

Palo Alto is further distinguishable because in that case “there [was] no indication from Patent Owner that the supplemental information Petitioner now seeks to submit was withheld intentionally.” IPR2013-00369, Paper 37 at 4; *see* §§ IV.B-D, *supra*. But here, Dr. Hough’s declaration indicates that he and Petitioners had information about the public accessibility of Handley that was not disclosed in the Petition. *See* §§ IV.B-C, *supra*. Valeo is distinguishable for the same reason, as the petitioner there “represent[ed] that [the] information was not withheld intentionally,” and “[h]aving no evidence to the contrary, [the panel] accept[ed] Petitioner’s assertion.” IPR2014-01204, Paper 26 at 4. The Board has found that Patent Owner’s challenge to the publication of Handley was reasonably foreseeable, and Petitioners have offered no reason why they did not include relevant publication-related information about Handley in their Petition.

Baker Hughes Inc. v. Packers Energy Servs., Inc. is also distinguishable because the panel held that the petitioner’s response to the patent owner’s arguments with “additional evidence bolstering its public accessibility contention” was not unduly prejudicial. IPR2016-00597, Paper 80 at 3. As demonstrated above, however, Petitioners’ supplemental information in this case does not bolster Petitioners’ initial

public accessibility contention, and the nature and timing of the new evidence is unduly prejudicial. *See* §§ II and IV.A, *supra*.¹

V. CONCLUSION

Patent Owner respectfully requests denial of Petitioners' motion and expungement of Petitioners' EX1016-1018 and EX1020-1028 from the record.

¹ Petitioners also seek to submit supplemental evidence related to PacketCable (EX1007). *See* EX1019. Despite averring in its Reply that PacketCable published in December 1999, that POSITAs would have found it, and that as a standard it was publicly accessible, Petitioners' supplemental evidence does not support any of these assertions. The evidence merely purports to show that PacketCable is presently available on a website. Nonetheless, in the interest of minimizing disputes, Patent Owner does not oppose Petitioners' motion with respect to PacketCable.

Case IPR2023-00923

Patent No. 7,266,682

Dated: February 13, 2024

By: / Christine E. Lehman /

Christine E. Lehman

PTO Reg. No. 38,535

Counsel for Patent Owner

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Patent Owner's Opposition to Petitioners' Motion to Submit Supplemental Information Pursuant to 37 C.F.R. § 42.123(a) complies with the type-volume limits of 37 C.F.R. § 42.24 and consists of no more than 15 pages, excluding the table of contents, table of authorities, certificate of service, and this certificate of compliance.

Dated: February 13, 2024

Respectfully submitted,

/Christine E. Lehman/

Christine E. Lehman

PTO Reg. No. 38,535

Counsel for Patent Owner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Patent Owner's Opposition to Petitioners' Motion to Submit Supplemental Information Pursuant to 37 C.F.R. § 42.123(a) was served on February 13, 2024, via electronic mail to Meta_VideoLabs@kirkland.com, as agreed to by counsel for Petitioners, upon the following counsel:

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