

Filed on behalf of: Meta Platforms, Inc.

Filed: September 25, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

META PLATFORMS, INC.
Petitioner,

v.

EIGHT KHZ, LLC
Patent Owner.

Case No. IPR2023-01003
U.S. Patent No. 9,226,090

**PETITIONER'S OPPOSITION TO
PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE**

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I. INTRODUCTION

Patent Owner Eight kHz, LLC ("Patent Owner" or "PO") moves to exclude various exhibits submitted with Petitioner Meta Platforms, Inc. ("Petitioner") reply to PO's response submitted on July 16, 2024 ("Reply"). Petitioner addresses PO's arguments in turn as they are presented in PO's Motion to Exclude ("Mot.").

II. EXHIBITS 1047-50 SUBMITTED WITH PETITIONER'S REPLY ARE RELEVANT AND SHOULD NOT BE EXCLUDED

PO argues that Exhibits 1047-50 should be excluded under FRE 401-403 because Petitioner "fails to state any relevance that these exhibits may have to this proceeding." Mot. at 1. Further, with respect to Exhibit 1050, PO argues that "Petitioner cannot establish any relevance, for it was published after the priority date of the '090 Patent." *Id.*

PO's arguments are, at best, misguided. First, Exhibits 1047-50 were authored by PO's own expert Dr. Begault on the topic of HRTFs. These exhibits were submitted to provide the variation in Dr. Begault's own different descriptions of HRTFs. *See* Petitioner's Reply, Paper 22, at 13. The challenged patent is based on HRTFs. As a result, these exhibits are relevant to the subject matter of the challenged claims and probative of the state of the art at the filing date of the patent. Second, "[p]ost-filing evidence may be used to show the state of the art existing at the time of filing of the patent-at-issue." *Afton Chem. Corp v. Infineum Int'l Ltd.*, IPR2017-

01321, Paper 47, 44 (P.T.A.B. Oct. 18, 2018), *Planet Genetic Sys., N.V. v. DeKalb Genetics Corp.*, 315 F.3d 1335, 1344 (Fed. Cir. 2003) (post-priority date evidence is relevant and useful as long as it is used to inform the state of the art at the time of the invention); *see also Nuevolution v. Chemgene Holding ApS*, IPR2017-01603, Paper 45, 63 (P.T.A.B. Jan. 7, 2019) (“the fact that those exhibits post-date Freskgård and the ’728 patent’s putative priority date by many years goes to their weight, not admissibility.”); *Reckitt Benckiser Pharmaceuticals Inc. v. Watson Laboratories*, No CV 13-1674-RGA, 2015 WL 6456551 (D. Del. Oct. 26 2015), at *2 (“references are not irrelevant simply by virtue of having been published after the patent priority date”). Thus, Exhibit 1050 is still relevant to the proceedings despite being published after the priority date of the ’090 Patent.

III. EXHIBITS 1047-50 AND 1053-54 SUBMITTED WITH PETITIONER’S REPLY NEED NOT BE AUTHENTICATED AND SHOULD NOT BE EXCLUDED

PO argues that Exhibits 1047-50 and 1053-54 should be excluded under FRE 901-02 because they are not authenticated. Exhibits 1047-50 and 1053-54 are copies of articles published in industry publications, periodicals, and journals, and they are therefore self-authenticating under FRE 902(6).

Exhibit 1047 was published in the Proceedings of the Human Factors Society’s 35th Annual Meeting in 1991 at pages 82-86, as indicated on the face of the exhibit. *See* Exhibit 1047.

Exhibit 1048 was published in Volume 35, No. 2 of the Journal of The Human Factors and Ergonomics Society in 1993 at pages 361-76, as indicated on the face of the exhibit. *See* Exhibit 1048. Exhibit 1048 also includes consecutively numbered pages which match the page range identified in the upper left-hand corner of the first page (361-376). *See id.*

Exhibit 1049 was published in NASA Tech Briefs in April 2000 at pages 40-46, as indicated on the face of the exhibit. *See* Exhibit 1049.

Exhibit 1050 was published in Volume 9, No. 5 of the IEEE Journal of Selected Topics in Signal Processing in August 2015 at pages 895-906, as indicated on the face of the exhibit. *See* Exhibit 1050.

Exhibit 1053 was published in Volume 9, No. 2 of the Journal of The Audio Engineering Society in April 1961 at pages 148-51, as indicated on the face of the exhibit. *See* Exhibit 1053.

Exhibit 1054 is a published project report by The Institute for Acoustic/Music Research and Coordination (IRCAM) in March 2011.

Additionally, Exhibits 1047-1050 and 1053-54 include copyright symbols, copyright dates, and footers indicating the journal title, issue, and volume number of publication. Exhibits 1047-1050 and 1053-54 are therefore self-authenticating under FRE 902(6), and no additional extraneous evidence is necessary to authenticate them.

The Board has repeatedly concluded that articles similarly published in periodicals are self-authenticating under FRE 902(6). *See, e.g., Weatherford Int'l, LLC v. Packers Plus Energy Svcs., Inc.*, IPR2016-01514, Paper 65, 11 (P.T.A.B. Apr. 3, 2018) (“[W]e determine that these documents are also industry publications, periodicals and text books containing publication numbers, printing dates and publisher indicia, all of which are understood at least under FRE 902(6) as characteristics of self-authenticating documents.”); *Funai Elec. Co., Ltd. v. Gold Charm Ltd.*, IPR2015-01468, Paper 40, 52 (P.T.A.B. Dec. 27, 2016) (“Exhibit 1012 is self-authenticating and also bears indicia of reliability regarding its status as an article in a periodical, with sufficient publication dates and other indicia bearing status of a well-known publication.”); *Grünenthal GMBH v. Antecip Bioventures II LLC*, PGR2017-00022, Paper 50, at 92-94 (“Contrary to Patent Owner’s contention that there is nothing to suggest that the Laslett Article was part of a periodical, the bottom of each page of the article includes a footer reading ‘Ann Rheum Dis 2012;71:1322–1328’ and the pages of the article are consecutively numbered 1322–1328.”).

Moreover, even if they were not self-authenticating, Exhibits 1047-1050 and 1053-54 are authenticated under FRE 901(b)(4) based on the totality of the circumstances given the information provided in the articles, including the corresponding journal’s volume and issue number, trade inscriptions for the

respective journals, and copyright symbols and dates. Nothing in these exhibits suggests that they are not what they purport to be – publications from industry publications, periodicals, and journals – and Patent Owner has not identified anything to suggest otherwise. The Board has found exhibits are authenticated in similar circumstances. *See, e.g., Microsoft Corp. v. Saint Regis Mohawk Tribe*, IPR2018-01604, Paper 76, 12-13 (P.T.A.B Apr. 30, 2020) (“Exhibits . . . [that] include an ACM trade inscription, copyright symbol, and ISBN number . . . are authentic as ancient documents, as they meet the requirements of Federal Rule of Evidence 901(b)(8).”).

IV. EXHIBITS 1052-54 SUBMITTED WITH PETITIONER'S REPLY ARE NOT HEARSAY AND SHOULD NOT BE EXCLUDED

PO argues that Exhibits 1052-54 should be excluded under FRE 801-02 for containing inadmissible hearsay statements not covered by an exception. However PO only discusses Exhibits 1052 and 1054. Mot. 3.

Exhibit 1052 is U.S. Patent 4,136,260 issued to Asahi. Dr. Kyriakakis references Exhibit 1052 in Exhibit 1055 (“Reply Declaration”) as an example of out-of-head externalization using stereophonic sound reproduction over headphones without using HRTFs. *See* Reply Declaration at 4, 15. Petitioner references Asahi in its Reply to show that Dr. Kyriakakis indeed made that exemplary argument in his Reply Declaration.

As mentioned, Exhibit 1053 is a publication in the Journal of The Audio Engineering Society, which was cited by PO's expert in his book (Exhibit 1026) and discusses substituting earphones for loudspeakers without substantial loss of space perspective using filters and delays. *See* Exhibit 1055, at 8, 35. Dr. Kyriakakis references Exhibit 1053 in his Reply Declaration as an exemplary way to provide a sound localization point that is away from and proximate to the listener such that the sound localization point simulates an origin of the sound source. *Id.* Petitioner references Exhibit 1053 in its Reply to show that Dr. Kyriakakis indeed made that exemplary suggestion in his Reply Declaration.

Further, Exhibit 1054 is a published project report by The Institute for Acoustic/Music Research and Coordination (IRCAM) on a three-dimensional sound spatialization technique. *Id.*, at 52. Dr. Kyriakakis references Exhibit 1054 in his Reply Declaration as an exemplary disclosure to counter Dr. Begault's statement regarding motivation. *Id.* Petitioner references Exhibit 1054 in his Reply merely to show that Dr. Kyriakakis indeed made that exemplary argument in his Reply Declaration.

In view of the above, Petitioner does not rely on Exhibits 1052-54 for the truth of the matter asserted, but rather to show that its expert made statements involving these exhibits. Accordingly, Exhibits 1052-54 should not be excluded.

V. PO'S IDENTIFIED PARAGRAPHS OF EXHIBIT 1055 (KYRIAKAKIS

DECLARATION) SHOULD NOT BE EXCLUDED

PO provides no reasonable basis to exclude paragraphs of Exhibit 1055, which is the Reply Declaration by Dr. Kyriakakis.

A. Paragraphs 1-5, 11-16, 17, 21-24, 29, and 42

PO objects to paragraphs 1-5, 11-16, 17, 21-24, 29, and 42 for allegedly not being cited by Petitioner. Mot. 3. To the contrary, Petitioner cites the Kyriakakis Reply for his opinions and analysis, and any other paragraphs which are not pinpoint cited provide support and context for the opinions of Dr. Kyriakakis. Petitioner addresses certain paragraphs together.

Paragraphs 1 and 2 of the Reply Declaration are introductory paragraphs indicating that Meta retained Dr. Kyriakakis and that the Reply Declaration responds to, among other things, Patent Owner's Response and the Declaration by Dr. Begault. Paragraphs 1 and 2 should not be excluded.

Paragraphs 3 and 4 introduce the claim construction section and the opinions of Dr. Kyriakakis for the term "away from and proximate to," found at paragraph 5 of the Reply Declaration. Contrary to PO's allegation, Petitioner's Reply does cite paragraph 5, stating that a POSITA would not have understood the '090 Patent to provide a special definition of "away from and proximate to" restricted to HRTFs and 6DOF tracking. Reply at 5.

Paragraphs 6-23, which include paragraphs 11-17 and 21-23 expand on his opinions for the term “away from and proximate to.” Paragraphs 11-18 discuss the specification and Dr. Kyriakakis’s opinion that the term does not require 6DOF. The Reply cites the Reply Declaration, paragraph 17-20. Reply at 6. Moreover, Dr. Kyriakakis expands on his opinion at paragraphs 21-23 that the specification includes embodiments without any 6DOF tracking, including the empty kitchen chair embodiment, which Dr. Kyriakakis introduces at paragraph 17. Paragraphs 11-17 and 21-23 should not be excluded.

Paragraph 24 is the introductory paragraph for Dr. Kyriakakis’s opinions that extrinsic evidence does not support a construction requiring HRTFs and 6DOF. The Reply addresses such extrinsic evidence. Reply at 7-9. Paragraph 24 should not be excluded.

Paragraph 29 is the introductory paragraph for Dr. Kyriakakis’s opinions in paragraph 30 that externalization and binaural synthesis do not require HRTFs or 6DOF tracking. The Reply addresses this. Reply at 7. Paragraph 29 should not be excluded.

Paragraph 42 is a two-sentence introductory paragraph for Dr. Kyriakakis’s opinions addressing Bedingfield as it relates to binaural sound. Dr. Kyriakakis provides his opinion on this topic at paragraphs 43-50, which the Reply cites. Reply at 18. Paragraph 42 should not be excluded.

B. Paragraphs 8, 13, 16, 24, 33, 35, 40, 45, 47, 49, 52-56

PO objects to paragraphs 8, 13, 16, 24, 33, 35, 40, 45, 47, 49, 52-56 alleging that they are unduly misleading and confusing, but only discusses paragraphs 8 and 35. Mot. 4. Petitioner addresses paragraphs 8 and 35 only.

For paragraphs 8 and 35, PO complains that Dr. Kyriakakis did not provide pinpoint citations to Exhibits 1052 and 1053. However, a general citation is proper. Moreover, on cross-examination, Dr. Kyriakakis testified that he “was making a statement based on having read Bauer,” and it’s a “summary sentence,” which “can be interpreted even from the title of Bauer.” *See* Exhibit 2031 85:5-87:13.

Further, PO takes issue with the statement by Dr. Kyriakakis, “Bauer (1961)¹, which was also cited in Dr. Begault’s book (Ex. 1026) at page 69[], discussed substituting earphones for loudspeakers without substantial loss of space perspective

¹ During cross-examination, Dr. Kyriakakis acknowledged a typo that Bauer should have been Exhibit 1053 because there was a misnumbering of exhibits in his files and further he should have referenced pg. 57, not pg. 69. *See* Exhibit 2031, 84:22-85:4; 89:3-11. The Bauer (1961) paper is Exhibit 1053. *See* Reply at viii (identifying Exhibit 1053 as, “B.B. Bauer, *Stereophonic Earphones and Binaural Loudspeakers*, Journal of the Audio Engineering Society, 2 (9) 148-151 (April 1961)”).

using filters and delays, not HRTFs.” *See* Exhibit 1055, 35. The fact that Dr. Begault’s book cites Bauer (1961) is not in dispute, and Dr. Kyriakakis clearly states that. Rather, PO takes issue with its own misinterpretation and possible implications of the statement. In its motion, PO improperly makes argument suitable for a Sur-Reply. Whether or not this statement implies agreement by Dr. Begault is suitable for cross-examination and the PO Sur-Reply, not a motion to exclude.

Paragraphs 8, 13, 16, 24, 33, 35, 40, 45, 47, 49, 52-56 should not be excluded.

C. Paragraphs 7-8, 33, 35, 44, 52, and 55-56

PO objects to paragraphs 7-8, 33, 35, 44, 52, and 55-56 alleging that they contain inadmissible hearsay, and references “the reasons discussed above [in PO’s Motion to Exclude] with respect to Exs.1052-54.” Mot. 4. Yet, PO has not presented any argument or basis that these paragraphs contain inadmissible hearsay other than citations to Exhibits 1052-54. *See also*, Section IV, *supra*. Rather, these paragraphs provide Dr. Kyriakakis’s opinions relating to Exhibits 1052-54, which is not hearsay.

Paragraphs 7-8, 33, 35, 44, 52, and 55-56 should not be excluded.

VI. PO’S IDENTIFIED PORTIONS OF EXHIBIT 1051 (BEGAULT DEPOSITION TRANSCRIPT) SHOULD NOT BE EXCLUDED

PO moves to exclude testimony from its own expert for being based on Exhibits 1047-50. Mot. 5 (moving to exclude portions of Exhibit 1051, citing 9:12-10:12, 11:12-17 and 15:10-16). As discussed above, Exhibits 1047-50 are self-

authenticating and relevant to the proceedings. *See* Sections II-III, *supra*. Thus, the cited portions of Exhibit 1051 should not be excluded.

VII. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Board deny PO's Motion to Exclude.

Date: September 25, 2024

By: /Lisa K. Nguyen/
Lisa K. Nguyen (Reg. No. 58,018)
PAUL HASTINGS LLP
1117 S. California Avenue
Palo Alto, CA 94304
Telephone: (650) 320-1800
lisanguyen@paulhastings.com

Counsel for Petitioner
Meta Platforms, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of **PETITIONER'S
OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE
EVIDENCE** was served via electronic email on Patent Owner's counsel of record
listed below, pursuant to its Mandatory Notices, on September 25, 2024:

Erick S. Robinson (Reg. No. 51,354)
Homayoon Rafatijo (Reg. No. 80,870)
Patrick M. Dunn (Reg. No. 70,474)
Jayme Partridge (Reg. No. 39,011)
Jayne C. Piana (Reg. No. 48,424)
BOCHNER LLP
24 Greenway Plaza, Suite 1800
Houston, TX 77046
erobinson@bochner.law
hrafatijo@bochner.law
pdunn@bochner.law
jpartridge@bochner.law
jpiana@bochner.law
8khz-meta@bochner.law

Dated: September 25, 2024

By: /Lisa K. Nguyen/
Lisa K. Nguyen (Reg. No. 58,018)
PAUL HASTINGS LLP
1117 S. California Avenue
Palo Alto, CA 94304
Telephone: (650) 320-1800
lisanguyen@paulhastings.com

*Counsel for Petitioner
Meta Platforms, Inc.*