

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COMMSCOPE TECHNOLOGIES LLC,
Petitioner,

v.

BELDEN INC.,
Patent Owner.

Case No. IPR2023-01061
Patent 6,998,537 B2

**PATENT OWNER
MOTION TO EXCLUDE**

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EXHIBIT LIST

EXHIBIT	DESCRIPTION
EX-1007	Declaration of Kenneth Cornelison
EX-1012	English language translation of Japanese Patent Publication S43015470 (“Yanagida”), and attached Declaration of translator Anthea Heyes
EX-1055	English Translation of Japanese Patent Publication No. S43-15470 used in prior reexamination of US 6,998,537
EX-1056	Japanese Patent Publication No. S43-15470 (untranslated original)
EX-1080	Reply Declaration of Kenneth Cornelison Regarding IPR2023-01061
EX-2013	Deposition Transcript of Kenneth Cornelison, July 25, 2024

In direct violation of Patent Office Rule 37 C.F.R. § 42.63(b), Petitioner has failed to provide an affidavit attesting to the accuracy of the English translation (EX-1055) of the Yanagita Japanese language patent application (EX-1056). Accordingly, under 37 C.F.R. § 42.61(a), exhibit EX-1055 is inadmissible and must be excluded.

I. FOREIGN LANGUAGE TRANSLATIONS OF PRIOR ART REFERENCES ARE ONLY ADMISSIBLE WHEN FILED WITH AN AFFIDAVIT ATTESTING TO THE ACCURACY OF THE TRANSLATION.

The Patent Office Rules unambiguously mandate that when submitting a translation of a document: “... ***an affidavit attesting to the accuracy of the translation must be filed with the document.***” Rule 37 C.F.R. § 42.63(b).¹ The Patent Office Rules further state that “[e]vidence that is not taken, sought, or filed in accordance with this subpart ***is not admissible.***” 37 C.F.R. § 42.61(a). *Square, Inc. v. REM Holdings 3, LLC*, IPR2014-00312, Paper 58 at 34-36 (PTAB July 7, 2015) (excluding translation of Japanese patent application and finding “[t]he Board rule, as set forth in 37 C.F.R. §42.63(b), requires that such [translations] must include an affidavit attesting to the translation’s accuracy”); *Blackberry Corp. v. Zipit Wireless, Inc.*, IPR2014-01507, Paper 50 at 22-23

¹ All emphasis herein has been added unless otherwise noted.

(PTAB March 29, 2016) (declining to waive Rule 42.63(b) and excluding two exhibits for which certified translations were not provided); *Yamaha Golf Car Co. v. Club Car, LLC*, IPR2017-02143, Paper 72 at 47-48 (PTAB April 2, 2019) (excluding two exhibits for which translations were provided because the translations were uncertified).

In Patent Owner's Preliminary Response (Paper 6), in Patent Owner's Sur-Reply prior to institution (Paper 9), in Patent Owner's Response (Paper 20), and again in Patent Owner's Sur-Reply (Paper No. 34), Patent Owner consistently objected to the impropriety of EX-1055 under 37 C.F.R. § 42.63. PO Preliminary Response 18, n. 7; PO Sur-Reply prior to institution 2; PO Response 38, n. 7; PO Sur-Reply 18.

II. PETITIONER'S UNCERTIFIED YANAGITA TRANSLATION MUST BE EXCLUDED BECAUSE PETITIONER HAS NOT PROVIDED AN AFFIDAVIT ATTESTING TO ITS ACCURACY IN DIRECT VIOLATION OF 37 C.F.R. § 42.63(B).

The Petition (Paper 2) relied on the Japanese language patent application S43-15470, which was filed as exhibit EX-1056 ("Yanagita"). Pet. 38-47; EX-1007 ¶¶126-154. Clearly recognizing the requirements under 37 C.F.R. § 42.63(b), Petitioner filed as exhibit EX-1012 an English translation of EX-1056 which contains an affidavit attesting to the accuracy of that translation (the "Certified Yanagita Translation"). Petitioner and its expert relied on this

Certified Yanagita Translation throughout the Petition and its Reply (Paper 30). Pet. 38-47; EX-1007 ¶¶126-154; Reply 14-18; EX-1080 ¶¶47-53. However, Petitioner also filed as exhibit EX-1055 a previous English translation of Yanagita for which there is no affidavit attesting to the accuracy of that translation (the “Uncertified Yanagita Translation”). In both the Petition and its Reply, in addition to relying on the Certified Yanagita Translation in EX-1012, Petitioner also improperly relied on and cited to the Uncertified Yanagita Translation in EX-1055. Pet. 38, 40, 44; Reply 15-16.

It is undisputed that the English translations of the underlying Yanagita Japanese patent application (EX-1056) in the Certified Yanagita Translation (EX-1012) and the Uncertified Yanagita Translation (EX-1055) are different. PO Sur-Reply (Paper 34) 18; EX-2013 132:12-133:3 (Petitioner’s expert admitting “Well, the language is -- on each side is English, both, but they do have different words as part of the translations.”). And on cross-examination, Petitioner’s expert was unable to establish which translation is truer to the original Japanese language. EX-2013 133:16-135:6. Of course, this uncertainty is precisely the reason for Rule 37 C.F.R. § 42.63(b), which requires an affidavit of accuracy regarding translations.

In Petitioner’s Reply, despite acknowledging Patent Owner’s objection to EX-1055, and rather than remedy its failure under 37 C.F.R. § 42.63(b) and

provide an affidavit attesting to the accuracy of the translation in EX-1055, Petitioner simply alleged, without any evidence or analysis, that “Ex-1055 is not inconsistent with Ex-1012.” Reply 15, n. 3. That is insufficient, as Petitioner is well aware given that it filed the proper affidavit along with the Certified Yanagita Translation in EX-1012. Petitioner has been on notice of Patent Owner’s objection to EX-1055 since before institution, but did nothing to remedy it.

In direct violation of 37 C.F.R. § 42.63(b), Petitioner has not submitted an “affidavit attesting to the accuracy of the translation” for the Uncertified Yanagita Translation. This Rule is unambiguous – in order for the Board to admit the Uncertified Yanagita Translation (EX-1055), Petitioner **must** submit “an affidavit attesting to the accuracy of the translation with the document.” 37 C.F.R. § 42.63(b). The burden of submitting an accurate translation of Yanagita and attesting to that accuracy falls on Petitioner, not Patent Owner.² Because

² Patent Owner points out that on page 27 of the Decision Granting Institution (Paper No. 10), the Board stated “Patent Owner does not provide a persuasive reason why the panel may not consider evidence outside of the art that forms the basis of Petitioner’s challenge when assessing obviousness.” It is respectfully

Petitioner failed to provide the required affidavit of accuracy, the Board must follow Rules 37 C.F.R. § 42.63(b) and 37 C.F.R. § 42.61(a) and exclude exhibit EX-1055.

Date: August 29, 2024

Respectfully submitted,

/ Thomas Hoehner /

Denis J. Sullivan (Reg. No. 47,980)

Thomas Hoehner (Reg. No. 73,474)

BARCLAY DAMON, LLP

Email: dsullivan@barclaydamon.com

Email: thoehner@barclaydamon.com

Email: pkatti@barclaydamon.com

Cory C. Bell (Reg. No. 75,096)

FINNEGAN, HENDERSON, FARABOW,

GARRETT, & DUNNER LLP

Email: cory.bell@finnegan.com

Attorneys for Patent Owner Belden Inc.

submitted that this is improper as it shifts the burden from the Petitioner to the Patent Owner contrary to the express requirement of 37 C.F.R. § 42.63 and 37 C.F.R. § 42.61 (stating that a certification of the translation “**must**” be filed, and if not, the uncertified translation is “**not admissible**”).

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing **PATENT OWNER MOTION TO EXCLUDE** was served pursuant to 37 C.F.R. § 42.6(e) via electronic mail on August 29, 2024, on the following:

Timothy A. Lindquist (tlindquist@carlsoncaspers.com)
Dennis C. Bremer (dbremer@carlsoncaspers.com)
Peter M. Kohlhepp (pkohlhepp@carlsoncaspers.com)
Ryan D. Rypka (rrypka@carlsoncaspers.com)

CARLSON, CASPERS, VANDENBURGH & LINDQUIST P.A.

/ Thomas Hoehner /

Denis J. Sullivan (Reg. No. 47,980)
Thomas Hoehner (Reg. No. 73,474)
BARCLAY DAMON, LLP
Email: dsullivan@barclaydamon.com
Email: thoehner@barclaydamon.com
Email: pkatti@barclaydamon.com

Cory C. Bell (Reg. No. 75,096)
FINNEGAN, HENDERSON, FARABOW,
GARRETT, & DUNNER LLP
Email: cory.bell@finnegan.com

Attorneys for Patent Owner Belden Inc.