

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COMMSCOPE TECHNOLOGIES LLC.
Petitioner

v.

BELDEN INC.
Patent Owner

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

**PETITIONER'S MOTION REQUESTING AUTHORIZATION TO FILE
SUPPLEMENTAL EVIDENCE**

TABLE OF CONTENTS

I.	Factual Background.....	1
II.	The Board Should Authorize the Filing of the Certification.....	3

TABLE OF AUTHORITIES

Cases

<i>Norman Int’l Inc. v. Andrew J. Testamentary Trust et al.</i> , IPR2014-00283, Exhibit 2012, 4 (the timely objection) and Paper 52, 13-14 (June 18, 2015).....	4
--	---

Rules

37 C.F.R. § 42.61(b).....	5
37 C.F.R. § 42.64(b).....	4
37 C.F.R. § 42.64(b)(1)	2, 3
37 C.F.R. § 42.64(b)(2)	2

Pursuant to the Board’s email of October 11, 2024, Petitioner (“CommScope”) respectfully moves for authorization to file a certification of the translation accuracy of Ex-1055 as supplemental evidence. Ex-1055 is the English translation of the Yanagita reference found in the reexamination file histories for the ’095/’537 patents that the Patent Owner (“PO”), Patent Office, and District Court all accepted as accurate and used in the prior reexaminations and lawsuit.

Patent Owner has moved to exclude Ex-1055 on the basis that it was not certified. CommScope’s opposition explained the motion should be denied for several reasons, including that PO did not timely file post-institution objections and thus waived them. Because PO chose to not file these objections, CommScope was not afforded the window to serve supplemental evidence. CommScope recently (on September 23, 2024) obtained a certification of translation accuracy, which is the supplemental evidence it would have served had PO timely objected.

PO opposes CommScope’s request to file the certification. But PO cannot have it both ways. PO should not be permitted to maintain a motion to exclude (having failed to timely object), while simultaneously trying to prevent CommScope from providing supplemental evidence to cure the objection.

I. Factual Background

CommScope relied on the “Yanagita” Japanese patent reference for Grounds 3 and 4 of the Petition. CommScope provided a certified English-language

translation of Yanagita with the Petition (Ex-1012). Petition, 38. CommScope also provided the Yanagita translation from the prosecution history files of the '095/'537 patents (Ex-1055). Petition, 38 and n.7, 39-40. PO itself submitted Ex-1055 to the Patent Office as part of an IDS filed in the reexamination of the '095 patent.¹ See December 10, 2009 IDS, and accompanying Transmittal Letter at 2 (“For the relevance of JP SHO43(1968)-15470, please see the attached English version”). Ex-1055, as on file in reexamination prosecution histories, does not include a translator certification.

PO argued in its Preliminary Response that Ex-1055 should not be considered because it was not certified. In its Institution Decision, the Board noted that CommScope had provided a certified translation with its Petition (Ex-1012), and “decline[d] to disregard” Ex-1055. Paper 10, 27-28.

Following institution, the PO elected to *not* file objections to evidence under 37 C.F.R. § 42.64(b)(1) and thus did not trigger the ten business-day window for Petitioner to serve supplemental evidence under 37 C.F.R. § 42.64(b)(2). Despite PO’s failure to timely object, it nonetheless moved to exclude Ex-1055.

CommScope recently asked Morningside (the translation service CommScope used for the other certified translations filed with the Petition) to

¹ Ex-1055 appears to have been filed in the '537 patent reexamination proceeding by the requestor Superior Essex, as part of its petition.

certify Ex-1055. When CommScope received the certification (dated 9/23/24), it promptly provided a copy to PO as supplemental evidence (on 9/24/24).

II. The Board Should Authorize the Filing of the Certification

PO's motion to exclude Ex-1055 should be denied, for the reasons in CommScope's opposition brief. However, CommScope respectfully requests that the Board also authorize the filing of the translation certification as supplemental evidence that provides an alternative way to resolve PO's motion.

The Board's rules provide that if a party moves to exclude evidence, it must have first filed objections within ten business days of institution of the trial, so as *"to allow correction in the form of supplemental evidence."* 37 C.F.R. § 42.64(b)(1) (emphasis added). Here, the PO has asked the Board to overlook its failure to do so. In fairness then, if the Board were to overlook this, it should also consider the supplemental evidence (i.e., certified translation) that CommScope would have provided had there been a timely objection.

The Board requested that CommScope address why it did not file the certification with its opposition to PO's motion to exclude. CommScope did not file the certification then because it did not have it then. CommScope received the certification from the translation service on September 23, 2024.

CommScope recently became aware of a case where the Board resolved a similar situation by allowing petitioner to file a certification after oral argument,

even where the patent owner *had* timely objected. *Norman Int'l Inc. v. Andrew J. Testamentary Trust et al.*, IPR2014-00283, Exhibit 2012, 4 (the timely objection) and Paper 52, 13-14 (June 18, 2015). Although PO here did not timely object (requiring denial of its motion), CommScope respectfully submits that a potential alternative resolution would be to follow *Norman* to moot the motion. *Norman* also concerned a motion to exclude a translation of a Japanese reference found in Patent Office prosecution records, on the basis that the translation was not certified. *Id.*, Paper 52 at 13. At oral argument, the Board decided to allow petitioner to obtain and file a certification within five business days. *Id.* at 14. The petitioner did so; the Board then denied the motion to exclude and admitted the translation. *Id.*

PO may argue that it has not had an opportunity to depose the translator. But that is the direct result of PO's own election to not file objections under 37 C.F.R. § 42.64(b). Had PO done so, CommScope would have obtained and served the certification many months ago. Not only is any purported prejudice to PO due to PO's own decisions, it is also *de minimus* given the particular circumstances of this case, including: (i) PO did not seek to depose either translator providing the two other certifications that CommScope filed with the Petition; (ii) the certification CommScope seeks to file comes from the *same* third party translation service (Morningside) as the other two for which PO elected to not request depositions; (iii) PO itself is submitted Ex-1055 to the Patent Office (in an IDS during the '095

patent reexamination); (iv) Ex-1055 is in the prosecution histories of the '095/'537 patents, and 37 C.F.R. § 42.61(b) states “[c]ertification is not necessary as a condition to admissibility when the evidence to be submitted is a record of the Office to which all parties have access”; (v) PO used Ex-1055 in multiple prior Patent Office and District Court proceedings without objection; and (vi) PO has not clearly identified anything materially inconsistent between Ex-1055 and Ex-1012.

PO may also argue that the certifying translator is not the one who originally did the translation. But there is no basis for concluding that an otherwise-qualified translator is somehow incapable of certifying the accuracy of someone else’s translation. Further, the Board should counterbalance any such argument against the impracticalities of locating the original translator some fifteen years later. And the long passage of time is of PO’s own making—its apparent tactical decision to delay suing CommScope for nearly a decade.

PO may also argue that CommScope should have submitted the supplemental evidence earlier. But there was no need to do so (nor the window to do so) since PO did not file post-institution objections. For all CommScope knows, PO may have decided to not file post-institution objections to Ex-1055 so as to avoid giving CommScope an opportunity to provide a certification.

For all of these reasons, CommScope respectfully requests that the Board authorize filing of the certification that CommScope has already served on PO.

Dated: October 18, 2024

Respectfully submitted,

/Peter M. Kohlhepp/

Timothy A. Lindquist (Reg. No. 40,701)

Dennis C. Bremer (Reg. No. 40,528)

Peter M. Kohlhepp (*Pro Hac Vice*)

Ryan D. Rypka (Reg. No. 79,451)

CARLSON CASPERS VANDENBURGH &
LINDQUIST, P.A.

225 South Sixth Street, Suite 4200

Minneapolis, MN 55402

Telephone: (612) 436-9600

Facsimile: (612) 436-9605

tlindquist@carlsoncaspers.com

dbremer@carlsoncaspers.com

pkohlhepp@carlsoncaspers.com

rrypka@carlsoncaspers.com

Counsel for Petitioner,

CommScope Technologies, LLC

CERTIFICATION OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e) and the agreement of the parties, the undersigned certifies that on October 18, 2024, a true and correct copy of the foregoing *Petitioner's Motion Requesting Authorization to File Supplemental Evidence* was served via electronic mail upon the following:

Denis J. Sullivan (Ref. No. 47,980)
Thomas Hoehner (Reg. No. 73,474)
Pranav Katti (Reg. No. 78,713)
BARCLAY DAMON, LLP
Barclay Damon Tower
125 East Jefferson St.
Syracuse, NY 13202
Telephone: (315) 425-2700
dsullivan@barclaydamon.com
thoehner@barclaydamon.com
pkatti@barclaydamon.com

Cory C. Bell (Reg. No. 75,096)
FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER LLP
2 Seaport Lane, 6th Floor
Boston, MA 02210-2001
Telephone: (617) 646-1641
cory.bell@finnegan.com

/Peter M. Kohlhepp/
Peter M. Kohlhepp