

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ALIGN TECHNOLOGY, INC.,

Petitioner,

v.

DENTAL MONITORING SAS,

Patent Owner.

Case No. IPR2023-01369

U.S. Patent No. 10,755,409

PATENT OWNER'S MOTION TO EXCLUDE

Mail Stop **Patent Board**
Patent Trial and Appeal Board
U.S. Patent and Trademark Office
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I. Introduction

Petitioner's sole ground depends on Maninis (EX1007), an article Petitioner acquired from the website arXiv.org. Paper 2, 15; EX1007. Maninis undisputedly bears no publication date establishing its status as prior art. Paper 2, 10-11; Paper 19, 25-37; Paper 23, 6. Petitioner instead argues that arXiv.org's alleged policies at the time of Maninis's submission in April 2017 indicate that Maninis would have published before the July 21, 2017 priority date of the challenged claims of U.S. Patent No 10,755,409. Paper 19, 6. To establish these alleged policies, Petitioner relies on putative archival snapshots of arXiv.org from the Internet Archive (also known as "The Wayback Machine") as establishing that: (1) those snapshots reflect the arXiv.org website as of the dates identified therein; and (2) that the contents of those arXiv.org webpages accurately reflect the policies of arXiv.org as of those dates. Not only is each such statement hearsay not falling within any exception under the Federal Rules of Evidence, Petitioner offers no timely evidence establishing these exhibits are in fact the archival snapshots they purport to be. The exhibits are inadmissible both as hearsay and as lacking authentication.

Petitioner did not address the substance of these exhibits in its Petition, instead pointing to a discussion by its computer science expert, Dr. Foroosh. Paper 2, 10-11. Dr. Foroosh repeats the hearsay from the exhibits and offers opinions characterizing arXiv.org's policies, ultimately proposing a date by which Maninis

“would have been mailed to subscribers,” despite admitting he has no personal knowledge of how Maninis was treated following submission. Dr. Foroosh’s anecdotal experience as an occasional user of arXiv.org does not qualify him to offer such speculation, and he does not even purport to testify on this subject as an expert. His discussion of these exhibits is inadmissible as *inter alia* lacking foundation, improper lay opinion testimony, and improper expert testimony. For those reasons, as further described below, these exhibits should be excluded.

II. Exhibit Objections

Exhibit 1022. Petitioner identifies Exhibit 1022 as the “arXiv.org Submission Help Page” “as archived May 3, 2017.” Paper 2, 76. Petitioner relies on the following table as allegedly showing that arXiv.org would, as of May 3, 2017, “publish submitted papers within about one business day of the date of submission”:

Submissions Received Between (all times Eastern US)	Will Be Announced (all times Eastern US)	Mailed to Subscribers
Monday 14:00 - Tuesday 14:00	Tuesday 20:00	Tuesday Night / Wednesday Morning
Tuesday 14:00 - Wednesday 14:00	Wednesday 20:00	Wednesday Night / Thursday Morning
Wednesday 14:00 - Thursday 14:00	Thursday 20:00	Thursday Night / Friday Morning
Thursday 14:00 - Friday 14:00	Sunday 20:00	Sunday Night / Monday Morning
Friday 14:00 - Monday 14:00	Monday 20:00	Monday Night / Tuesday Morning

EX1022, 3; EX1002, ¶65; Paper 2, 10-11.

Exhibit 1022 lacks any indication that this copy of the arXiv.org webpage was “archived May 3, 2017,” as Petitioner alleges, and it contains only the following header to suggest its origin: “The Wayback Machine - <https://web.archive.org/web/20170503071322/https://arxiv.org/help/submit>.”

EX1022, 1; EX1002, ¶65. Petitioner did not file with its Petition a declaration from arXiv.org or the Internet Archive to authenticate Exhibit 1022, and Patent Owner had no opportunity to test the veracity of the statements therein regarding arXiv.org’s alleged treatment of “Submissions” in 2017.

Patent Owner objected to Exhibit 1022 on both authenticity and hearsay grounds in its March 19, 2024 objections. Paper 13, 13-14. Petitioner did not serve supplemental evidence addressing these objections in response.

Exhibits 1023 a-nd 1026. Petitioner identifies Exhibits 1023 and 1026 as the “arXiv.org Article Replacement Help Page” “as archived July 18, 2017” and “September 8, 2016,” respectively. Paper 2, 76. Petitioner relies on Exhibits 1023 and 1026 to suggest that Maninis was not edited between its submission and its unknown date of publication, citing them for the proposition that “[o]nce a paper is announced, it was arXiv.org’s stated policy that the paper may not be modified without creating a new version.” EX1002, ¶66; Paper 2, 10-11; EX1023, 1 (“It is not possible to make changes [to an arXiv.org article] without generating a new version.”); EX1026, 1 (same).

Similar to Exhibit 1022, Exhibits 1023 and 1026 lack any indication that these copies of arXiv.org webpages were “archived July 18, 2017” and “September 8, 2016,” respectively, as Petitioner alleges, and contain only the following headers to suggest their origin: “The Wayback Machine - <https://web.archive.org/web/20170718173822/https://arxiv.org/help/replace>” (EX1023, 1); “The Wayback Machine - <https://web.archive.org/web/20160908205209/https://arxiv.org/help/replace>.” (EX1026, 1). EX1002, ¶66. Petitioner did not file with its Petition a declaration from arXiv.org or the Internet Archive to authenticate Exhibits 1023 or 1026, and Patent Owner had no opportunity to test the veracity of the statements therein regarding arXiv.org’s alleged policies in 2016 or 2017 regarding article modification.

Patent Owner objected to Exhibits 1023 and 1026 on both authenticity and hearsay grounds in its March 19, 2024 objections. Paper 13, 14-15, 16-17. Petitioner did not serve supplemental evidence addressing these objections in response.

Exhibit 1025. Petitioner identifies Exhibit 1025 as the “arXiv.org Author Search Page for Luc van Gool” “as archived July 8, 2017.” Paper 2, 76. Petitioner relies on the content of the search results “as of July 8, 2017” as indicative of Maninis’s public availability. EX1002, ¶67; Paper 2, 10-11. Similar to the

foregoing exhibits, Exhibit 1025 lacks any indication that it reflects search results that would have been obtained on the arXiv.org webpage “as of July 8, 2017,” as Petitioner alleges, and contains only the following header to suggest its origin:

“The Wayback Machine -
https://web.archive.org/web/20170708002617/https://arxiv.org/find/cs/1/au:+Gool_L/0/1/0/all/0/1” EX1002, ¶67; EX1025, 1. Petitioner did not provide a declaration from arXiv.org or the Internet Archive to authenticate Exhibit 1025.

Patent Owner objected to Exhibit 1025 on both authenticity and hearsay grounds in its March 19, 2024 objections. Paper 13, 15-16. Petitioner did not serve supplemental evidence addressing these objections in response.

EX1002, ¶¶62-67. Exhibit 1002 is the Declaration of Dr. Hassan Foroosh. Petitioner relies on Dr. Foroosh’s declaration for the assertion that Maninis was published “no later than May 2, 2017, on arXiv.org.” Paper 2, 10 (citing EX1002, ¶¶62-67). Lacking any direct evidence of a publication date, Dr. Foroosh extrapolates from the April 28, 2017, submission date stamped on the Maninis reference, opining that, among other things: (1) “it was the *established policy* of arXiv.org in 2017 to publish submitted papers within about one business day of the date of submission”; (2) Maninis thus “*would have been announced* on Sunday April 30, 2017, or Monday May 1, 2017, and *would have been transmitted* to subscribers no later than Tuesday May 2, 2017”; and (3) “the version of Maninis

submitted on April 28, 2017, *would not have been changed* after its announcement (on or about April 30, 2017).” EX1002, ¶¶65-66 (emphases added). For each proposition, Dr. Foroosh cites the exhibits Patent Owner seeks to exclude here. EX1002, ¶¶62-67 (citing EX1022, EX1023, EX1025, and EX1026).

Dr. Foroosh further opines regarding the nature of arXiv.org’s publication practices, asserting that arXiv.org’s “method of publishing their papers [] *reliably* establishes a date of publication” and that “arXiv.org *consistently* publishes submitted documents to the interested scientific community *promptly* after submission.” *Id.*, ¶63 (emphases added).

Dr. Foroosh also opines that a link to Maninis’s abstract and direct download pages would have been returned in a search for one of the Maninis authors “*as of* July 8, 2017,” citing EX1025 as “*archived* July 8, 2017,” without further explanation. *Id.*, ¶67 (emphases added).

Dr. Foroosh thus arrives at the conclusion that “Maninis *was disseminated* to interested persons in the scientific community prior to July 21, 2017.” *Id.* (emphasis added).

Dr. Foroosh is Petitioner’s computer science expert and has no expertise relevant to the evaluation of Maninis’s publication date. EX1002, ¶¶1-13; EX1003. Dr. Foroosh confirmed in deposition that he has never worked for either arXiv.org or for the Internet Archive (also known as “The Wayback Machine”); has never

been an arXiv.org article reviewer; does not know the identity of the administrators of arXiv.org in April 2017; and has no personal knowledge of how Maninis was treated by arXiv.org. EX2048, 231:14-22, 232:16-20, 233:18-21, 234:6-24. Dr. Foroosh's only knowledge of arXiv.org policies in 2017 comes from his limited experience as an occasional user and author. EX1002, ¶63; EX2048, 233:10-16. Dr. Foroosh does not purport to have any personal knowledge of Exhibits 1022, 1023, 1025, or 1026, of the practices of the Internet Archive, or of the archival dates he attributes to those exhibits. *Id.*, ¶¶62-67.

Patent Owner objected to the testimony in Paragraphs 62-67 of Exhibit 1002 as hearsay, improper lay opinion, improper expert testimony, and as lacking personal knowledge. Paper 13, 1-4. Petitioner did not serve supplemental evidence addressing these objections in response.

EX1031. Petitioner filed Exhibit 1031 for the first time with its Reply. Exhibit 1031 is a declaration of Nathaniel E Frank-White, a Records Request Processor at the Internet Archive. The declaration attaches “true and accurate copies” of browser screenshots matching Exhibits 1022, 1023, 1025, and 1026.

In its August 27, 2024, objections, Patent Owner objected to Exhibit 1031 as hearsay and as untimely and improper under 37 C.F.R. § 31.12(b). Paper 24, 3-4. Patent Owner sought the Board's permission to strike Exhibit 1031 and identified it as improper Reply evidence in the chart the Board authorized Patent Owner to

file in the alternative. Paper 27, 1. In response, Petitioner alleged that Exhibit 1031 is responsive to arguments in Patent Owner’s Response regarding the insufficiency of Exhibits 1022, 1023, 1025, and 1026. Paper 28, 2 (citing POR, 35-36).

III. Argument

A. Exhibits 1022, 1023, 1025, and 1026 Lack Authenticity

Petitioner offers each of Exhibits 1022, 1023, 1025, and 1026 as archival webpages obtained from the Internet Archive but offers no evidence to authenticate their respective archival dates. Each is inadmissible as inauthentic.

“To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901. In *Standard Innovation*, the Board excluded exhibits for lack of authenticity. *Standard Innovation Corp. v. Lelo, Inc.*, IPR2014-00148, 2015 WL 1906730, *5-6 (P.T.A.B. Apr. 23, 2015) (citing *U.S. v. Bansal*, 663 F.3d 634, 667-68 (Fed. Cir. 2011)). There, the petitioner relied on “printouts of webpages retrieved from the Internet Archive’s ‘Wayback Machine’”—containing product reviews for a ground reference—to establish that the ground reference was publicly available before the challenged patent’s priority date. *Id.*, *3-5. The Board reasoned that these exhibits lacked authenticity because Petitioner failed to provide either “a witness that testified regarding how the Wayback Machine worked and how reliable its contents

were,” or a “witness having personal knowledge that [the Wayback Machine] printouts were authentic.” *Id.*, *5.

Likewise, here, Petitioner provided neither testimony regarding the reliability and functioning of the Internet Archive, nor a witness with personal knowledge that Exhibits 1022, 1023, 1025, or 1026 are the product of any such functionality. Further, as in *Standard Innovation*, “Petitioner ... provided no evidence regarding the significance and reliability of [any] created and modified dates in” these exhibits. *See id.*, *6. Notably, none of Exhibits 1022, 1023, 1025, or 1026 contain a facially recognizable date, and Petitioner, through Dr. Foroosh, simply asserts what those archival dates are without explanation. EX1002, ¶¶62-67. Thus, Petitioner fails to establish authenticity, and exclusion is the appropriate remedy.

B. Exhibits 1022, 1023, 1025, and 1026 Are Inadmissible Hearsay

Regardless of authenticity, Petitioner relies on the truth of the out-of-court statements in these exhibits, and they should be excluded as inadmissible hearsay.

Hearsay is not admissible unless it is subject to an exception. Fed. R. Evid. 802. It is beyond dispute that the statements on which Petitioner relies from Exhibits 1022, 1023, 1025, and 1026 were not made “at the current trial or hearing”—the statements by arXiv.org appear in archival webpage exhibits, not in a qualifying declaration. It is also beyond dispute that the statements are offered

“to prove the truth of the matter asserted in the statement[s].” *See* Fed. R. Evid. 801(c). Petitioner and its expert depend on these statements—including both (1) the statements regarding arXiv.org’s alleged policies and (2) any statements regarding an alleged date as of which these arXiv.org webpages were archived—as establishing arXiv.org’s actual policies as of those putative archival dates. *Supra*, §II. The statements are offered for no other reason; if the substance of the statements in these exhibits is not true, the statements would have no relevance, and Petitioner and its expert would lack any basis for its conclusions regarding arXiv.org’s treatment of Maninis. Thus, the statements in Exhibits 1022, 1023, 1025, and 1026 are hearsay, they are inadmissible, and they should be excluded. *E.g., Standard Innovation*, 2015 WL 1906730, *6-8 (holding that to the extent “dates displayed” were “relied upon as proof of creation or publication dates of the exhibits themselves, these dates are inadmissible hearsay.”).

C. The Board Should Exclude Exhibit 1031 as Untimely Supplemental Evidence

Although filed with Petitioner’s Reply, Exhibit 1031 is in fact untimely supplemental evidence seeking to address Patent Owner’s objections and should not be considered.

Pursuant to 37 C.F.R. § 42.64(b)(2), a party may serve “supplemental evidence within ten business days of service of the objection.” *Id.* A party that has

failed to submit supplemental evidence in response to an objection may not circumvent the deadline by filing that evidence in Reply. *Toshiba Corp. v. Optical Devices, LLC*, IPR2014-01446, Paper 31, 32 (P.T.A.B. March 9, 2016); *Standard Innovation*, 2015 WL 1906730, *4-5.

In *Toshiba*, Patent Owner objected to certain of Petitioner's alleged prior art exhibits as hearsay and as lacking sufficient authentication to establish they were publicly available as of a certain date. IPR2014-01446, Paper 31, 30. Petitioner did not serve supplemental evidence or move for leave to file supplemental information and instead filed supporting evidence with its Reply, including a declaration from the Internet Archive. *Id.*, 31-32. On Patent Owner's objection and motion, the Board excluded these exhibits as untimely, rejecting Petitioner's contention that they were responsive to arguments in Patent Owner's response regarding the sufficiency of Petitioner's evidence and finding there was no justification for Petitioner's delay. *Id.*, 32-34 (“[37 C.F.R. § 42.23 does not authorize or otherwise provide a means for supplementing the evidence of record.”).

On substantially similar facts in *Standard Innovation*, the Board distinguished between responding to Patent Owner's arguments regarding the *sufficiency* of Petitioner's evidence that a ground reference was prior art and the *admissibility* of that same evidence. 2015 WL 1906730, *4-5. “Patent Owner's challenge to the sufficiency of proof that [the ground reference] is a printed publication does not

create a second window for Petitioner to submit supplemental evidence.” *Id.*, *4. Petitioner’s filing of authenticating evidence in Reply was thus improper. *Id.*, *5.

The facts here are indistinguishable from those in *Toshiba* and *Standard Innovation*. EX1031 is a custodian declaration with no relevance except to address Patent Owner’s objections to the *admissibility* of the exhibits it attaches. Petitioner did not timely file Exhibit 1031 as supplemental evidence, nor did Petitioner move to submit Exhibit 1031 as supplemental information. *Compare* EX1031 (filed August 20, 2024) *with* Paper 13 (filed March 19, 2024); 37 C.F.R. § 42.64(b)(2) (supplemental evidence must be filed “within ten business days of service of the objection”). Exhibit 1031 is thus not timely and should be excluded.

Regardless, even if considered on the merits, the declaration in Exhibit 1031 fails to address that the statements regarding the alleged policies of arXiv.org reflected in the copies of the webpages in Exhibits 1022, 1023, 1025, and 1026 contained therein are hearsay. Each such statement from arXiv.org, either as reflected in Exhibit 1031 or in the previously filed exhibits, is hearsay for the reasons described above. *Supra*, §III.B. The declarant in Exhibit 1031, Frank Wright, does not purport to have any knowledge of arXiv.org, and his testimony cannot establish any hearsay exception. *See e.g.*, Fed. R. Evid. 803(6).

D. The Board Should Exclude Exhibit 1002, ¶¶62-67 as Lacking Foundation and as Improper Opinion Testimony

Dr. Foroosh lacks sufficient knowledge and/or perception to rationally support the opinions he draws regarding Maninis’s publication and the practices of arXiv.org. The Board should exclude his testimony on these issues.

“If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is ... rationally based on the witness’s perception.” Fed. R. Evid. 701(a). In particular, a “witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony.” Fed. R. Evid. 602. Here, Dr. Foroosh admits that he has no personal knowledge regarding the conclusions he draws concerning Maninis’s publication date. *Supra*, §II. Nor does Dr. Foroosh’s occasional and anecdotal experience provide a sufficient basis for his opinions regarding the “consisten[cy],” “reliab[ility],” or “prompt[ness]” of arXiv.org’s publication practices, particularly as applied to a specific reference (*i.e.*, Maninis). *Supra*, §II. His testimony is thus inadmissible as lacking foundation and as improper lay opinion testimony. *C.f. Dish Network L.L.C. v. Dragon Intellectual Property, LLC*, IPR2015-00499, Paper 7 (PTAB July 17, 2015) (professor’s testimony lacked personal knowledge regarding

public availability of alleged prior art thesis and was insufficient evidence of university library practices).

Nor are Dr. Foroosh's opinions admissible as expert testimony. A witness must be "qualified as an expert by knowledge, skill, experience, training, or education" in order to "testify in the form of an opinion or otherwise." Fed. R. Evid. 702. In addition, the proponent of expert testimony must demonstrate how "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." *Id.* Only if an expert is qualified, may he "base an opinion on facts or data in the case that the expert has been made aware of or personally observed." Fed. R. Evid. 703.

Here, Petitioner has not shown that Dr. Foroosh is an expert in the policies of arXiv.org or in their likely application to Maninis. Dr. Foroosh confirmed that he has no "specialized knowledge" regarding arXiv.org, only anecdotal experience. *Supra*, §II. Even if qualified, his opinions regarding the Maninis's publication date are not the result of any disclosed principle or methodology—it is pure speculation based on his acceptance of the hearsay in Exhibits 1022, 1023, 1025, and 1026. Dr. Foroosh's testimony is thus also inadmissible as improper expert testimony.

To the extent that Dr. Foroosh's testimony simply repeats hearsay in the underlying exhibits, it is inadmissible for the same reason as above. *Supra*, §III.B.

IV. Conclusion

Each of Exhibits 1022, 1023, 1025, and 1026 lack evidence demonstrating they are what Petitioner alleges: archival copies of arXiv.org webpages captured on a specific date. Petitioner's Internet Archive declaration purporting to address that objection (EX1031) was not timely served. Regardless of authentication or timeliness, the statements in those exhibits concerning arXiv.org's alleged policies are hearsay, and Petitioner has no evidence that could establish an exception. That Petitioner chose to include its analysis of this evidence in the declaration of its computer-science expert Dr. Foroosh (EX1002, ¶¶62-67) rather than in the Petition is irrelevant—the statements are still hearsay when Dr. Foroosh repeats them. Nor does his declaration convert them into admissible expert or lay opinion testimony. Dr. Foroosh lacks any personal knowledge that would support his speculation about the nature of arXiv.org's practices or how they were applied to Maninis, and he does not have any specialized expertise and does not identify or apply any reliable methodology that would allow him to address those subjects as an expert.

For the foregoing reasons, Patent Owner respectfully requests that the Board exclude Exhibits 1022, 1023, 1025, and 1026, and paragraphs 62 through 67 of Exhibit 1002.

Date: November 12, 2024

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Certificate of Service

Pursuant to 37 C.F.R. §§ 42.6(e), the undersigned certifies that on November 12, 2024, a complete copy of **PATENT OWNER'S MOTION TO EXCLUDE** was served via electronic mail on the following counsel of record for Petitioner at the email addresses: mrosato@wsgr.com, margenti@wsgr.com, and pmedley@wsgr.com, as indicated in the Petition for electronic service to the following Petitioner counsel:

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