

Paper No. _____
Filed: January 15, 2025

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. IPR2024-00052
Patent No. 11,049,248

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

I. INTRODUCTION

As Patent Owner (PO) admits in its Motion to Exclude (“MTE,” Paper 34 at 1), Maninis (EX1007) was acquired from arXiv.org, and PO has further admitted that, as its stamp indicates, Maninis was submitted to arXiv.org for publication on April 28, 2017. *See* POR, 40-41. Dr. Foroosh explains in his declaration that he is familiar as a user and author who publishes on arXiv.org, that it “is an openly accessible, moderated repository for scholarly articles, covering an array of scientific fields. Authors submit their articles to arXiv.org to disseminate them freely to interested members of the public.” EX1002, ¶54.

PO does not dispute that by May 3, 2017, five days after submitting Maninis to arXiv.org, the authors of Maninis included a link on their website to Maninis’s arXiv.org page to further disseminate their paper to the scientific community, as shown in the archived webpage reproduced in EX1024. Nor does PO dispute that a version of Maninis (EX1021) with materially the same disclosure had already been published by arXiv.org prior to the April 28, 2017, submission date of EX1007. POR, 41. As explained in the petition materials, the published policies of arXiv.org at the time indicate that submitted papers are published promptly after submission and that a given version, once created, is not subsequently changed. Pet., 10-11; EX1002, ¶¶53-58; *see* EX1026 (articles publicly available about one business day after day of submission and kept permanently unchanged); EX1023 (same policy

maintained after submission of Maninis); EX1022 (detailing timeline of publication for submissions); *see also* EX1025 (author page containing link to directly download EX1007). Together, the evidence shows Maninis was published prior to July 21, 2017, the earliest claimed priority date of the '248 patent.

Patent Owner's (PO's) Motion to Exclude challenges a subset of the evidence showing Maninis's date of publication. PO argues that EX1022, EX1023, EX1025, and EX1026 are hearsay, yet the exhibits are admissible as non-hearsay as well as based on multiple hearsay exceptions. PO also seeks to exclude Dr. Foroosh's testimony explaining the publication of Maninis based on archived webpages showing arXiv.org's publication practices, his own contemporaneous experience publishing on arXiv.org and review of those policies at the time of Maninis's publication, and further evidence substantiating Maninis's publication and dissemination to the public. None of PO's arguments justifies exclusion of Dr. Foroosh's testimony. In sum, and as explained below, PO fails to identify any sustainable basis to exclude any of the exhibits challenged in its Motion to Exclude, and it should thus be denied.

II. EX1022, EX1023, EX1025, AND EX1026 ARE ADMISSIBLE

PO seeks to exclude EX1022, EX1023, EX1025, and EX1026 on grounds of hearsay. MTE, 5-6. PO's motion should be denied, as PO's hearsay argument does not withstand scrutiny.

At the outset, PO's challenge to EX1022, EX1023, EX1025, and EX1026 is moot. The declaration of Mr. Frank-White, EX1031, contains copies of each of the webpages shown in EX1022, EX1023, EX1025, and EX1026. *See* EX1031, Ex. A. Yet, PO has not moved to exclude any part of EX1031 on hearsay or any other grounds. Any objection to EX1031, Ex. A is thus forfeited. Because the content of EX1022, EX1023, EX1025, and EX1026 mirrors the unchallenged evidence in EX1031, Ex. A, PO's motion to exclude EX1022, EX1023, EX1025, and EX1026 on hearsay grounds is moot.

Regardless, as explained below, the statements in EX1022, EX1023, EX1025, and EX1026 are not hearsay, or to the extent they are hearsay, they are nonetheless admissible under hearsay exceptions, as described at least in Rules 803(3), 803(6), and 807.

First, PO's hearsay arguments are not applicable to EX1025. PO argues Align relies on statements in the four exhibits "as establishing arXiv.org's actual policies as of [their] putative archival dates." MTE, 6. But Align does not rely on EX1025 to demonstrate arXiv.org's publication policy. *See, e.g.,* Pet., 10; Reply, 8; EX1002, ¶58. Thus, PO fails to set forth a basis to exclude EX1025 on hearsay grounds.

While PO's failure to present an argument applicable to EX1025 is fatal on its own, PO blanket hearsay objection is likewise misplaced. EX1025 is a page

showing the arXiv.org publications of Dr. Luc van Gool, one of Maninis's authors. As Dr. Foroosh explained, the archived page includes a link both to Maninis's abstract page (<https://arxiv.org/abs/1701.04658>), and a link to directly download EX1007 (<https://arxiv.org/pdf/1701.04658>). There is no statement in EX1025 relied on for the matter asserted; rather, the existence of the archived page shown in EX1025 shows that POSAs were provided with a link from which to directly download EX1007 prior to the '248 patent's earliest claimed priority date.¹ This shows that Maninis was available to POSAs at the time. The existence of a link is not an assertion relied on for its truth. EX1025 is thus not hearsay.

EX1022, EX1023, and EX1026 are also admissible for non-hearsay purposes. These exhibits collectively show the policies that were communicated to

¹ PO only disputes which version of Maninis (EX1007 or EX1021) the link provided. However, as PO does not dispute, the two contain materially identical disclosure. Pet., 10 (noting material identity of disclosure); EX1002, ¶53; POR, 41; Sur-Reply, 7. Where a document contains the same material disclosure as a prior art version of the document, that suffices to show that the document is also prior art, notwithstanding minor, non-material differences. *Valve Corp. v. Ironburg Inventions Ltd.*, 8 F.4th 1364, 1370-71 (Fed. Cir. 2021) (citing Fed. R. Evid. 901(b)(3)).

authors by arXiv.org, explaining how its publication process would work, and in particular indicating that submitted papers would be published according to a defined schedule, putting their publication within about one business day of submission. It is undisputed that Maninis's authors submitted EX1007 to arXiv.org on April 28, 2017. EX1022, EX1023, and EX1026 support the inference that the authors made that submission in order to cause Maninis to be published according to those policies and that they reasonably expected publication within about a business day. This supports the further conclusion that such publication did occur as scheduled, and certainly prior to the '248 patent's earliest claimed priority date. *See also Catalan v. GMAC Mortg. Corp.*, 629 F.3d 676, 694 (7th Cir. 2011) (written statements describing bank's intentions admissible as non-hearsay).

These exhibits are also admissible for the truth of the matter asserted, under at least the hearsay exceptions of Fed. R. Evid. 803(3), 803(6), and 807.

Rule 803(3) provides an exception to the hearsay rule for statements that show, *inter alia*, a person's plan or intent. It has been long established that such statements are admissible to show that such a person acted according to that plan or intent. *E.g.*, *Mutual Life Ins. Co. v. Hillman*, 145 U.S. 285, 295-96 (1892); *see also, e.g.*, *Packgen v. Berry Plastics Corp.*, 847 F.3d 80, 90-91 (1st Cir. 2017) (statements by refineries of plans to purchase products when needed admissible under 803(3)); *Catalan*, 629 F.3d at 694 (written statements describing bank's

intentions admissible under 803(3)).

Consistent with *Hillman*, each of these statements is a statement of intended future conduct. EX1026 was archived in 2016, prior to Maninis's submission for publication, showing arXiv.org's next-business day publication policies in effect prior to that date. EX1023 shows the page remained the same until after Maninis's publication, and still prior to July 21, 2017. EX1022, archived May 3, 2017, further demonstrates the policies regarding articles being made available via arXiv.org. Together, EX1022, EX1023, and EX1026 express the intentions or plans of arXiv.org to make each submitted paper available and to keep those papers available to the public continuously, at times after about one business day of submission. Each of these intentions or plans was expressed prior to the '248 patent's earliest claimed priority date of July 21, 2017, and they support a finding that Maninis was in fact made publicly accessible prior to that date.

Because EX1022, EX1023, and EX1026 each show arXiv.org's policies and practices, at least as of their date of archiving, these exhibits are admissible to show that the policies and practices were followed on and after the respective exhibits' archiving dates. *See* Fed. R. Evid. 803(3), 406 ("Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is

corroborated or whether there was an eyewitness.”); *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1569 (Fed. Cir. 1988) (“Evidence of routine business practice can be sufficient to prove that a reference was made accessible before a critical date.”).

Furthermore, having satisfied the 803(3) exception requirement, EX1022 is also admissible to show publication according to arXiv’s policies *prior* to its May 3, 2017, archiving date. As discussed above, EX1022 is admissible to show arXiv.org’s policies and practices on and after May 3, 2017. However, evidence showing a policy or practice as of a particular date is also admissible under Rule 406 to show that the policy existed and was followed prior to that date. *See* Fed. R. Evid. 406 (evidence of routine practice admissible to prove action in accordance “on a particular occasion,” without limit as to timing). Indeed, “post-event evidence is not only admissible for purposes of proving the existence of a...policy or custom, but may be highly probative with respect to that inquiry.” *Henry v. Cty. Of Shasta*, 132 F.3d 512, 518 (9th Cir. 1997); *see also W.R. Grace & Co. v. Zotos Int’l, Inc.*, No. 98-CV-838S, 2004 U.S. Dist. LEXIS 31262, at *4 (W.D.N.Y. May 14, 2004) (evidence concerning “routine policies and practices shortly after” date of event “is both relevant and admissible” under Rule 406 to show policy or practice on date of event). EX1022 is thus admissible to show Maninis’s publication according to arXiv.org’s policies or practices not only after but also

before May 3, 2017.

Further, the testimony of Dr. Foroosh supports admissibility under Rule 803(6) (records of a regularly conducted activity), as he explained how arXiv.org operated based on his own experience using the site, including uploading multiple papers to the site in May of 2017 and familiarizing himself with arXiv.org's policies at the time. EX1002, ¶¶53-58 (personally published papers via arXiv.org at time of Maninis's publication); *see* EX2048, 233:10-17 (testifying that when submitting his own publications in May 2017, the same time as Maninis's publication, he personally reviewed arxiv.org's policies), 233:23-234:3 (personal experience confirmed process used at the time matched published rules), 236:22-24 ("within a couple of days, it would be appearing on the [arXiv] website, available worldwide"). There is no requirement of custodian testimony from an employee of the record-keeper; it suffices under Rules 803(6) and 902(11) that a person understand the system used. *Samsung Elecs. Co. v. Huawei Techs. Co.*, IPR2017-01487, Paper 45 at 17-20 (Dec. 10, 2018) (admitting webpages and testimony regarding same to prove prior art publication).

Moreover, to the extent any of EX1022, EX1023, EX1025, and EX1026 are found to be hearsay not subject to a hearsay exception, they are admissible under the residual hearsay rule. Fed. R. Evid. 807. Under Rule 807, a statement is admissible notwithstanding a hearsay objection, even if the exceptions under Rules

803 and 804 do not apply, if it has “sufficient guarantees of trustworthiness” after considering “the totality of circumstances under which it was made and evidence, if any, corroborating the statement,” and if it is more probative for the point on which it is offered than other evidence obtained through reasonable efforts.

These exhibits demonstrate the publicly-announced policies of arXiv.org of the process by which it published each submitted paper. Given that Maninis was undisputedly submitted for publication according to those policies on April 28, 2017, these archived statements are more probative than other reasonably available evidence regarding what the policies at the time were, since they are direct, contemporaneous, public statements of those policies by arXiv.org itself.

Further evidence also corroborates the statements. Dr. Foroosh describes arXiv.org’s publication practices based on his personal experience, which confirms the policies described in these exhibits were being regularly followed. EX1002, ¶¶53-58. *See also Cisco Sys., Inc. v. Centripetal Networks, Inc.*, IPR2018-01512, Paper 32 at 78-79 (Mar. 19, 2020) (document policy exhibits corroborated by personal knowledge of policies admissible as non-hearsay or under Rule 807). Furthermore, Dr. Foroosh explained that the metadata in Maninis indicate it was created and last modified on April 30, 2017, matching the timeline for the article’s publication. EX1002, ¶57. In particular, the metadata is visible in a copy of Maninis downloaded from arXiv.org, in the properties window when opened in a

PDF reader. EX1029, ¶3. The inclusion of a link on the authors' webpage (EX1024) and the presence of a download link in EX1025 further corroborate Maninis's publication under arXiv.org's policies, as they indicate that third parties, as well as the authors of Maninis, were being directed to the site and would have an opportunity to notice and correct any failure to publish Maninis as intended.

Accordingly, EX1022, EX1023, EX1025, and EX1026 are admissible as non-hearsay or under at least the exceptions of Rules 803(3), 803(6), and 807, and PO's Motion to Exclude these exhibits should thus be denied.

III. PARAGRAPHS 53-58 OF EX1002 ARE ADMISSIBLE

PO asserts that Dr. Foroosh's testimony in EX1002, ¶¶53-58 is improper lay or expert testimony and that it lacks foundation. Each of these arguments fails.

Regarding foundation, PO attacks Dr. Foroosh's reliance on EX1022, EX1023, EX1025, and EX1026 (MTE, 8), but as discussed above in §II, each of these exhibits is admissible, and each provides proper foundation for Dr. Foroosh's discussion of them in EX1002, ¶¶53-58.

PO also seeks to exclude Dr. Foroosh's testimony as improper expert testimony. However, Dr. Foroosh's expertise provides foundation for all expert testimony offered. For example, in paragraph 66, Dr. Foroosh discusses how the metadata of the Maninis paper corroborate its date of creation and last modification as April 30, 2017. EX1002, ¶57. EX1029, served as supplemental evidence in

response to PO's objections, provides further details substantiating the basis for Dr. Foroosh's testimony on this point. EX1029, ¶3. PO does not and cannot argue that Dr. Foroosh lacks expertise as a computer scientist to analyze a file's metadata.

Regarding Dr. Foroosh's own personal knowledge of arXiv.org's practices, PO seeks to cabin such testimony to expert testimony under Rules 702 and 703. However, Dr. Foroosh clearly explains that he is describing his personal experience as a user of arXiv.org at and about the time that Maninis was published. *See* EX1002, ¶54 (familiar with processes practiced by arXiv.org and submitted multiple papers in May 2017), 55-58 (other routine practices consistent with personal experience). Under Rule 406, evidence of "an organization's routine practice" is admissible as evidence that it acted in accordance with that practice, "regardless of whether it is corroborated or whether there was an eyewitness." Fed. R. Evid. 406. There is no expert qualification requirement to provide such routine practice. *See also* Fed. R. Evid 701 (opinion testimony admissible if rationally based on perception and helpful to determine fact in issue); *Cooler Masters Co. v. Aavid Thermalloy LLC*, IPR2019-00337, Paper 49 at 30, 37-38 (testimony of routine practice of Japanese Patent Office sufficient to establish publication).

Regardless, Dr. Foroosh has explained how he obtained via experience any specialized knowledge he relied on in describing arXiv.org's publication practice at the time. *See, e.g.*, EX1002, ¶54. At minimum, Dr. Foroosh's experience in

disseminating papers via arXiv.org provides him with “specialized knowledge” to help determine facts in issue, and his discussion in ¶¶53-58 bases his opinions on sufficient facts or data, applied reliably to the facts of the case. Fed. R. Evid. 702.

PO’s reliance (MTE, 7) on *Dish Network L.L.C. v. Dragon Intellectual Prop. LLC*, IPR2015-00499, Paper 7, is also misplaced. In *Dish Network*, the Board found a professor’s testimony did not show that the “indexing and cataloging” practices of a library were sufficient to enable POSAs to locate a thesis. *Id.*, 10-11. Here, the ability of POSAs to locate Maninis is not in question; it was published online, and its dissemination via the Internet is demonstrated by multiple exhibits captured by the Wayback Machine. *See, e.g.*, EX1024 (authors’ academic webpage); EX1026 (direct download link). By contrast, Dr. Foroosh’s personal knowledge and experience with arXiv.org corroborates its manner of publication, confirming the date on which Maninis was publicly available for download. *See* EX1002, ¶¶53-58; EX2048, 233:10-17, 233:23-234:3, 236:22-24. . Dr. Foroosh’s personal experience as an author who published papers on arXiv.org is admissible evidence of the practices followed by arXiv.org when Maninis was submitted for publication.

Accordingly, PO’s Motion to Exclude EX1002, ¶¶53-58 should be denied.

IV. CONCLUSION

None of PO’s arguments justify exclusion of any of exhibits 1022, 1023,

1025, 1026, or paragraphs 53-58 of exhibit 1002. PO's hearsay arguments fail, as each challenged exhibit is admissible as either non-hearsay or under an applicable exception. And PO's arguments against Dr. Foroosh's testimony in paragraphs 53-58 of EX1002 are based on PO's faulty challenges to exhibits 1022, 1023, 1025, 1026, fail to properly address Dr. Foroosh's expertise, and misapply standards for testimony showing routine practice of organizations. Accordingly, PO's Motion to Exclude should be *denied*.

Respectfully submitted,

Dated: January 15, 2025

/ Matthew A. Argenti /

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Petitioner's Opposition to Patent Owner's Motion to Exclude and Exhibit 1029 were served on January 15, 2025, at the following electronic service addresses:

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Respectfully submitted,

Dated: January 15, 2025

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