

Patent Owner's Sur-Reply to Petitioner's Supplemental Brief
IPR2025-00690 (U.S. Patent No. 9,402,120)

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SKULLCANDY, INC.,
Petitioner,

v.

EARIN AB,
Patent Owner.

Case IPR2025-00690
Patent 9,402,120

PATENT OWNER'S SUR-REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

The law is unambiguous: the Petition itself must establish public accessibility through citation of evidence. *See, e.g., Hulu, LLC, v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29, 13 (Dec. 20, 2019) (precedential) (“[A]t the institution stage, the **petition must identify, with particularity, evidence** sufficient to establish a reasonable likelihood that the reference was publicly accessible before the critical date”) (emphasis added); *Sandoz Inc. v. Abbvie Biotechnology Ltd.*, IPR2018-00002, Paper 13, 9 (May 3, 2018) (denying institution because “the **Petition** does not include sufficient discussion, nor does it direct us to **sufficient evidence**, to show a reasonable likelihood that Petitioner would establish” public accessibility) (emphasis added). Petitioner fails to do so here for the Bluetooth Spec. on which it relies.

As Petitioner confirms, all that is present in the Petition itself on this point is a conclusory allegation of the Spec.’s prior art status, unsupported by any evidence: “The Bluetooth® Spec. 4.1 is prior art to the ’120 Patent under at least § 102(a)(1) because the Bluetooth® Spec. 4.1 was published on December 3, 2013, which is before the September 5, 2014, effective filing date of the ’120 Patent.” Reply, 2 (quoting Pet., 9). This, according to Petitioner, is sufficient to “plead[] that the Bluetooth® Spec. 4.1 meets all relevant standards for the prior art, including public accessibility.” *Id.* But mere **pleading** without any supporting evidence is insufficient, as expressly addressed by *Hulu*: “This standard [for showing a reference qualifies as

prior art] is far more than is required in typical notice pleading” *Hulu*, 13. Moreover, contrary to what Petitioner suggests,¹ the submission of a reference does not somehow self-establish public accessibility. *See Medivis, Inc. v. Novarad Corp.*, IPR2023-00042, Paper 37, 3 (Apr. 23, 2024) (“Petitioner cites no evidence for public accessibility, except the references Chen, 3D Visualization, and 3D Slicer themselves. This is insufficient and tantamount to submitting no proof of public accessibility.”).

Relying on *Hulu*, Petitioner urges the Board to go beyond the Petition to consider the “‘totality of the evidence,’ including ‘the indicia on the face of a reference, such as printed dates and stamps.’” Reply, 2. But *Hulu* does not stand for the proposition of going beyond the petition, but rather repeatedly cautions against doing so: “[T]he statute requires that the **petition** identify with particularity the grounds for institution and evidence supporting such grounds ... includ[ing] the prior art relied upon and evidence that it qualifies as such.” *Hulu*, 13 (citing 35 U.S.C. § 312(a)) (emphasis added). Unlike here, where the Petition contains only allegations but no evidence or discussion of public accessibility, the petition in *Hulu* contained a threshold discussion of the evidence leading to the reference’s public

¹ “Skullcandy meets this standard ... *in its submission* of the Bluetooth® Spec. 4.1 (Ex. 1006).” Reply, 1 (emphasis added).

accessibility as of a certain date: the name of an established publisher, the date of indexing at the Cornell University Library, and an affidavit so explaining. *Hulu*, Paper 1, 20. No similar discussion or evidence is present in the Petition here.

Even if the Board were to go beyond the Petition and consider Petitioner's newly-presented indicia of publication (which it should not), it should still find that indicia lacking. First, Petitioner relies on the date "03 December 2013" listed on the Spec.'s face. The Board routinely disregards dates of this sort as hearsay when, as here, Petitioner has not established a hearsay exception applies. *See, e.g., Service Now, Inc. v. Hewlett-Packard Co.*, IPR2015-00707, Paper 12, 17 (Aug. 26, 2015) (finding dates on the face of a reference were inadmissible hearsay when offered to indicate the reference's availability, and denying institution); *Laird Technologies Inc. v. A.K. Stamping Co. Inc.*, IPR2017-02038, Paper 6, 10 (Mar. 14, 2018) (same).

But even if a hearsay exception applied, Petitioner neglects to establish "03 December 2013" was, in fact, the date of public accessibility. *See Reply*, 2-3. Petitioner submits no affidavit or documentary evidence indicating that public accessibility is tethered to the date listed on the document's face. *See, e.g., Laird*, 10 ("Petitioner does not provide sufficient evidence of the significance of that date with respect to the availability of the document to the public. Thus, the date, by itself, does not establish when, if ever, Laird became publicly accessible.").

Moreover, that the Spec. indicates it can be found at <http://www.bluetooth.com> likewise does not establish public accessibility as of “03 December 2013.” Again, Petitioner points to no evidence tying that date with when the Spec. became available at the URL. But even assuming it was available online as of “03 December 2013,” availability online, without evidence of meaningful indexing, does not demonstrate public accessibility. *See Blue Calypso, LLC v. Groupon, Inc.*, 815 F.3d 1331, 1349-50 (Fed. Cir. 2016). Namely, Petitioner neglects to “present (1) any evidence that the reference was viewed or downloaded, (2) any testimony evidence that one of ordinary skill in the art would have been independently aware of the webpage, and (3) any evidence that a query of a search engine before the critical date, using any combination of search words, would have led to the reference appearing in the search results,” as required under controlling Federal Circuit precedent. *Google LLC v. IPA Technologies Inc.*, IPR2018-00384, Paper 13, 15-16 (Dec. 20, 2018) (citing *Blue Calypso*, 815 F.3d at 1349-50).

And Petitioner's analogy of the Bluetooth SIG to the publisher in *Hulu* is also a stretch too far. Reply, 3. In *Hulu*, the publisher at issue was the established textbook publisher O'Reilly. *Hulu*, 19. The Bluetooth SIG, on the other hand, is an “industry body,” (Reply, 3), that happens to promulgate standards. This does not make it an “established publisher.” *Hulu*, 19. In contrast here, Petitioner's only “evidence” is its say-so—“The Bluetooth SIG is an established publisher” Reply, 3. This fails

to meet Petitioner's burden to come forward with supporting evidence. *See ABS Global, Inc. v. Inguran, LLC*, IPR2016-00927, Paper 18, 28 (Oct 2, 2017) (“[A]lthough it might be the case that SPIE is a well-known, reputable compiler of scientific and technical publications, Petitioner has not presented evidence to establish that as fact.”).

Finally, Petitioner misapprehends its own expert's testimony. Reply, 4-5. Dr. Cooperstock never opines “a POSITA was aware of the [Spec.]” nor that they “would have known to seek it out, including where the Bluetooth® Spec. 4.1 itself states that it is ‘found.’” Reply, 5. In fact, Dr. Cooperstock never opines that a POSA would have been aware of the document at issue, nor how and where to look for it. *See* EX1007, ¶68. Dr. Cooperstock merely opines “[a] POSITA as of the Critical Date would have been aware that various wireless communication protocols, such as Bluetooth® and Wi-Fi®, were promulgated.” *Id.* But awareness of the Bluetooth protocol does not establish public accessibility of a particular document describing it. *See Medivis*, 5-6 (availability of software product, without more, does not establish availability of a particular document describing it).

Patent Owner's Sur-Reply to Petitioner's Supplemental Brief
IPR2025-00690 (U.S. Patent No. 9,402,120)

Respectfully Submitted,

Dated: August 20, 2025

/Moses Xie/

David D. Schumann (Reg. No. 53,569)
Palani P. Rathinasamy (Reg. No. 63,541)
Ryan Meyer (Reg. No. 61,435)
Amy E. Hayden (Reg. No. 64,817)
Moses Xie (Reg. No. 74,491)
Folio Law Group PLLC
1200 Westlake Ave. N., Suite 809
Seattle, WA 98109
Tel: (206) 880-1802
Email: david.schumann@foliolaw.com
palani@foliolaw.com
ryan.meyer@foliolaw.com
amy.hayden@foliolaw.com
moses.xie@foliolaw.com

Timothy Dewberry (Reg. No. 62,947)
Folio Law Group PLLC
13492 Research Blvd.
Ste. 120, No. 177
Tel: (206) 880-1802
Email: timothy.dewberry@foliolaw.com

Attorneys for Patent Owner

CERTIFICATE OF SERVICE

As authorized by Patent Owner's Mandatory Notice, I hereby certify that on August 20, 2025, a copy of this document has been served in its entirety by electronic mail on Petitioner's lead and backup counsel.

James C. Watson
JCWatson@traskbritt.com

J. Jeffrey Gunn
JGunn@traskbritt.com

Dated: August 20, 2025

/Moses Xie/
David D. Schumann (Reg. No. 53,569)
Palani P. Rathinasamy (Reg. No. 63,541)
Ryan Meyer (Reg. No. 61,435)
Amy E. Hayden (Reg. No. 64,817)
Moses Xie (Reg. No. 74,491)
Folio Law Group PLLC
1200 Westlake Ave. N., Suite 809
Seattle, WA 98109
Tel: (206) 880-1802
Email: david.schumann@foliolaw.com
palani@foliolaw.com
ryan.meyer@foliolaw.com
amy.hayden@foliolaw.com
moses.xie@foliolaw.com

Timothy Dewberry (Reg. No. 62,947)
Folio Law Group PLLC
13492 Research Blvd.
Ste. 120, No. 177
Tel: (206) 880-1802
Email: timothy.dewberry@foliolaw.com

Attorneys for Patent Owner