UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SDI TECHNOLOGIES, INC.,

Petitioner

v.

BOSE CORPORATION,

Patent Owner

Patent No. 8,364,295
Filing Date: December 7, 2006
Issue Date: January 29, 2013
Title: Interactive Sound Reproducing

Inter Partes Review No. 2014-00346

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

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I. INTRODUCTION

Petitioner ("SDI") hereby opposes the Motion to Exclude Evidence (Paper 21) of Patent Owner ("Bose").

The very same arguments made by Bose in the present Motion were already considered and rejected by this panel in two separate proceedings in which other claims of U.S. Patent No. 8,401,682 ("the '682 patent") and 8,364,295 ("the '295 patent") were found unpatentable. (IPR2013-00350; IPR2014-00465.)

As SDI explained in opposing this Motion the first time, the Altec Lansing Manual (Exhibit 1011) is authentic under Fed. R. Evid. 902(7) in light of the Altec Lansing logo and copyright notice. Moreover, as before, Bose only attacks page 7 at that manual, which is not even required to invalidate the challenged claims.

The IRMan Web Pages (Ex. 1010) come from the well-known Internet Archive, routinely used by the Federal Courts and the Patent Office, and thus may be authenticated under Fed. R. Evid. 902(7) in light of the logo and other indicia, under Rule 901(b)(4) based on its unique characteristics, under Rule 901(b)(1) based on Dr. Lippman's testimony, by judicial notice of the accuracy of archived web pages from the Archive, or by a combination of those things.

Anyone can verify the document with the standard "web.archive.org" URL in the footer, Bose does not contest anything about the accuracy of the exhibit, and Bose even offered its *own exhibit* from the Internet Archive in the prior proceeding

(IPR2043-00465, Ex. 2002) bearing all of the same unique indicia of Ex. 1010.

Finally, Bose's arguments concerning the testimony of Dr. Lippman were also correctly rejected by the Board when Bose filed this Motion the first time. For Bose to say that Dr. Lippman's opinions suffer from "hindsight bias" is simply a mischaracterization of his testimony. As the Board has already found, the fact that Dr. Lippmann elected to not write about Bose's alternative combination of the references in his obviousness analysis does not mean he employed hindsight; it merely means that he wrote about what was relevant to his analysis.

II. ARGUMENT

A. The Altec Lansing Manual Should Not Be Excluded

"'[T]he burden to authenticate under Rule 901 is not high—only a prima facie showing is required,' and a 'district court's role is to serve as gatekeeper in assessing whether the proponent has offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.'" *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014) (quoting *United States v. Vidacak*, 553 F.3d 344, 349 (4th Cir. 2009)). As explained by the First Circuit, "[t]he burden of authentication does not require the proponent of the evidence to rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be. Rather, the standard for authentication, and hence for admissibility, is one of ***reasonable likelihood***." *United States v.*

Holmquist, 36 F.3d 154, 168 (1st Cir. 1994) (emphasis added).

Fed. R. Evid. 902(7) provides that a document with "[a]n inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control" is self-authenticating and "require[s] no extrinsic evidence of authenticity in order to be admitted." Ex. 1011 meets this criterion, as it bears the following logo and copyright notice:

ADA310W

ALTEC LANSING®

TRUE DIGITAL AUDIO™

© 1998 Altec Lansing Technologies, Inc., Milford, PA 18337-0277

(Ex. 1011 at 000001.)

Exhibit 1011 is, therefore, self-authenticating. *See, e.g.*, *Enfish, LLC v. Microsoft Corp.*, 2014 U.S. Dist. LEXIS 46523, at *14-15 (C.D. Cal. Mar. 31, 2014) (finding a user manual including a copyright notice self-authenticating); *Los Angeles News Serv. v. CBS Broadcasting, Inc.*, 305 F.3d 924, 930, 936 (9th Cir. 2002) (holding a videotape self-authenticating under Fed. R. Evid. 902(7) based on an identifying slate on the video's opening frames); *ACCO Brands, Inc. v. PC Guardian Anti-Theft Prods., Inc.*, 592 F. Supp. 2d 1208, 1219 (N.D. Cal. 2008) (holding that computers inscribed with the Macintosh Portable trade name were self-authenticating under Rule 902(7)).

Apparently recognizing that the threshold for authentication is otherwise met under Rule 902(7) for Ex. 1011 as a whole, Bose seeks to exclude only page 7.

The Altec Lansing Manual (Exhibit 1011) as a whole should certainly not be excluded. And the narrow issue raised by Bose concerning the authenticity of page 7 is one that need not be reached, because the claims are invalid with or without page 7 of Ex. 1011. (*See* IPR2014-00465, Paper 40, at 16-20.) Nonetheless, SDI would not object if the Board decides to consider Exhibit 1011 without page 7, as it did in the earlier proceeding. (*Id.*)

B. The IRMan Web Pages Should Not Be Excluded

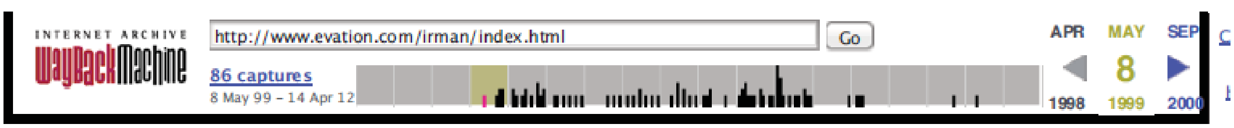
Bose's arguments concerning the IRMan Web Pages are premised on the notion that "SDI failed to cure the authenticity issue" concerning Ex. 1010. (Paper 21, at 3.) That is wrong. In the prior proceeding, the Board ***denied*** Bose's motion to exclude the exhibit. (IPR2014-004650, Paper 40, at 15-16.) There was, therefore, no "authenticity issue" for SDI to "cure" in this proceeding, and Bose's Motion should be denied again, for all the same reasons that it was denied before.

As SDI explained before, Exhibit 1010 may be authenticated multiple ways under the Federal Rules. There is well more than a "reasonable likelihood," *Holmquist*, 36 F.3d at 168, that the IRMan Web Pages are authentic. The IRMan Web Pages come from the Internet Archive (web.archive.org, also known as the "Wayback Machine"), which is known by both the Federal Courts and the Patent Office to be both reliable and unbiased.

1. The IRMan Web Pages Are Properly Authenticated Under Rule 902(7), Rule, 901(b)(4), and/or Rule 901(b)(1)

In addition to Rule 902(7), Rule 901(b)(4) provides for authentication by "Distinctive Characteristics and the Like" such as "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances" and Rule 901(b)(1) provides for authentication by "[t]estimony that an item is what it is claimed to be."

The IRMan Web Pages include the Wayback Machine's standard header, with its unique logo:



(Ex. 1010 at 000001.)

The exhibit also includes a URL at the bottom left corner that uniquely identifies the Wayback Machine—"web.archive.org":

web.archive.org/web/19990508121919/http://www.evation.com/irman/index.html

(*Id.*)

The URL of Ex. 1010 includes "**19990508**," which corresponds to May 8, 1999, also on the top of the first page. (*See* https://archive.org/legal, ¶ 5.) Ex. 1010 also includes the source, "evation.com," both at the top of the page and in the URL at the bottom. All of these indicia are consistent with the Wayback Machine (archive.org) itself ***and Bose's own Exhibit 2002 in the prior proceeding***, which included all of the same characteristics, ***right down the layout and fonts of the evation.com web page***. (*See* IPR2014-00465, Ex. 2002.)

As a result of these many distinctive characteristics, Exhibit 1010 is authentic under at least Rule 902(7) and Rule 901(b)(4). *Cf. Gonch v. Gonch*, 435 B.R. 857, 862 (Bktcy. Ct. N.D. N.Y. 2010) (authenticating the Kelley Blue Book based on its appearance, including the logo); *Madison One Holdings, LLC v. Punch Int'l, NV*, 2009 U.S. Dist. LEXIS 27406, at *28-29 (S.D. Tex. Mar. 31, 2009) (finding that press releases with the company logo, pre-printed address, and telephone number indicated that the documents were authentic).

Moreover, as before***, Bose challenges absolutely nothing about the exhibit itself*** (*see* Paper 21, at 2-7), and its failure to do so further undercuts its argument.[1] *See Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, 2004 U.S. Dist. LEXIS 20845, at *18 (N.D. Ill. Oct. 15, 2004) ("Plaintiff has presented no evidence that the Internet Archive is unreliable or biased. And Plaintiff has neither denied that the exhibit represents the contents of its website on the dates in question, nor come forward with its own evidence challenging the veracity of the exhibit."). Without any counterargument from Bose on the authenticity of the document, there is ***no***

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[1] Bose again disingenuously argues that it is confused about the date. It is ***May 8, 1999***. Other dates are simply typos ("***June*** 8, 1999" and "May 9, 1999, ***1998***").

reason to suspect that the document is not authentic.

And, were there ***any*** doubt, the Board could use the URL at the bottom of the page, http://web.archive.org/web/19990508121919/http://www.evation.com/irman/index.html, to verify that Ex. 1010 is accurate. *See, e.g., EEOC v. DuPont*, 65 Fed. Rules Evid. Serv. 706, 2004 U.S. Dist. LEXIS 20753, at *5 (E.D. La. 2004) (explaining that the "accessed website . . . and verified that webpage existed").

Courts routinely rely on this type of evidence. For example, in *Keystone Retaining Wall Sys., Inc. v. Basalite Concrete Prods., LLC*, 2011 U.S. Dist. LEXIS 145545 (D. Minn. Dec. 19, 2011), the court allowed printouts from the Internet Archive to be admitted in preliminary injunction proceedings in a patent case without any supporting declaration. The court found that the Internet Archive web pages were authenticated because "[t]he Internet Archive has existed since 1996, and federal courts have regularly accepted evidence from the Internet Archive." *Id.* at *25 n.9. Similarly, in *Web Tracking Solutions, L.L.C. v. Wexler*, 2010 U.S. Dist. LEXIS 143519 (E.D.N.Y. July 27, 2010), the court considered web sites from the Internet Archive as evidence in support of a claim construction, based on the fact that "federal courts are familiar with this internet resource." *Id.* at *57-58 n.25; *see Market-Alerts Pty. Ltd. v. Bloomberg Finance L.P.*, 922 F. Supp. 2d 486, 494 n.12 (D. Del. 2013) (noting that documents from the Wayback Machine have "generally been accepted as evidence of prior art in the patent context").

The Patent Office also regularly relies on the Wayback Machine. *See, e.g.,* Wynn W. Coggins, *Prior Art in the Field of Business Method Patents—When is an Electronic Document a Printed Publication for Prior Art Purposes?* (2002) (available at http://www.uspto.gov/patents/resources/methods/aiplafall02paper.jsp) ("Examiners utilize commercial databases and the Wayback Machine to help establish website posting dates in order to qualify the website as prior art."); *see, e.g.*, *Ex parte Rowse*, No. 2010-5057, 2011 Pat. App. LEXIS 21394, *3-6 (B.P.A.I. Aug. 30, 2011); *Ex Parte Molander*, Appeal 2008-2589, App. 9/845,537, pp. 9-12 (B.P.A.I. Mar. 17, 2009).

Finally, Dr. Lippman explained at his deposition in the earlier proceeding that the Internet Archive is an archive of as much of the Internet as the organization is able to accomplish, and that it enables someone to look at the history of the Internet. (*See* IPR2014-00465, Ex. 2015 at 107:3-23.) In *U.S. v. Bansal*, 663 F.3d 634 (3rd Cir. 2011), the court concluded that screenshot images from the Internet Archive were authenticated under Rule 901(b)(1) by a trial witness who "testif[ied] about how the Wayback Machine website works and how reliable its contents are." *Id.* at 667-68.

Bose's position boils down to a blanket argument that no document from the Wayback Machine can be authenticated without testimony that it "reflects the contents of evation.com as it appeared on a particular date." (Paper 21, at 6.) That is simply not the case. Courts (even in the cases cited by Bose) routinely find Wayback Machine pages authentic with proof of (a) the process and (b) that the document presently appears in the Machine at the subject URL.[2] All of that is present here, as the process is undisputed, and Bose cannot argue that the document is not identical to the content at that Wayback URL even now.

2. The IRMan Web Pages Are Properly Authenticated Based on Judicial Notice and Rule 901(b)(4)

SDI requests that the Board alternately, or in addition, take judicial notice of facts that authenticate Ex. 1010 under Fed. R Evid. 201.

"[A]uthentication may be accomplished by the court taking judicial notice under Rule 201 of certain foundational facts needed to authenticate an electronic record. Under this rule, the parties may request the court to take judicial notice of adjudicative facts that are either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 553 (D. Md. 2007).

Here, the Board can and should follow the Courts in taking judicial notice of

[2] At page 4, Bose cites two cases it did not cite when it filed this Motion before, both of which hold that authentication by someone with knowledge of the way the archive works is sufficient. *Specht v. Google, Inc.*, 747 F.3d 929 (7th Cir. 2014); *Schwartz v. J.J.F. Mgmt. Servs., Inc.*, 2010 WL 1529241 (D. Md. Mar. 22, 2010).

the foundational facts under either prong, because the necessary information about what the Internet Archive is and how it works are found in numerous sources.

For example, recently in *Pond Guy, Inc. v. Aquascape Designs, Inc.*, 2014 U.S. Dist. LEXIS 85504 (E.D. Mich. June 24, 2014), the court explained that "[a]s ***a resource the accuracy of which cannot reasonably be questioned***, the Internet Archive has been found to be an acceptable source for the taking of judicial notice." *Id.* at *9-10 (emphasis added). The court took notice of archived pages from the Internet Archive and, based on the content, also took judicial notice of defendants' use of a mark on the Internet for a period of time. *Id.* at *10-11; *see also Juniper Networks, Inc. v. Shipley*, 394 Fed. App'x 713, 2010 U.S. App. LEXIS 19020, at *1-2 (Fed. Cir. 2010) (indicating the Internet Archive may be an appropriate source for judicial notice); *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 2013 U.S. Dist. LEXIS 181837, at *16-19 n.65 (S.D.N.Y. Dec. 30, 2013) (taking notice of certain reports by way of an Internet Archive search); *Martins v. 3PD, Inc.*, 2013 U.S. Dist. LEXIS 45753, at *48-49 n.8 (D. Mass. Mar. 28, 2013) (taking notice of "the various historical versions of a website available on the Internet Archive at Archive.org as facts readily determinable by resort to a source whose accuracy cannot reasonably be questioned").

Foundational facts are available, for example, in *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 631 (E.D. Pa. 2007), which provides a detailed discussion how the Archive works, explaining that "the Internet Archive is a nonprofit organization that has created an online library of digital media in an effort to preserve digital content for future reference" and that "[i]ts digital database is equivalent to a paper library, but is filled with digital media like websites instead of books." *Id*. "The chronological records are compiled by routinely taking screenshots of websites as they exist on various days." *Id*. And "[a]ny person with a web browser can search Internet Archive's database of archived images," where "[s]earching the database is accomplished via the Wayback Machine, which Internet Archive provides on its website." *Id*.

Notably, while the Internet Archive website describes a process by which one may obtain an affidavit to be used to authenticate documents, it specifically asks that litigants "***please seek judicial notice or simply ask your opposing party to stipulate to the document's authenticity***" because they "are not in the business of responding to requests for affidavits, or authenticating pages or other information from the Wayback Machine; this is why we make our collections available at no cost via our Web site, http://www.archive.org. As a nonprofit, our resources are limited, and these kinds of requests are a significant drain on our time and funds." (*See* https://archive.org/legal.)

*   *   *

Taken ***together***, the unique indicia of Exhibit 1010, Bose's previous Exhibit

2002 bearing the same indicia, Bose's failure to raise any question about the document itself, Dr. Lippman's testimony, the fact that the URL can be used by anyone to verify the document now, and judicial notice of "*a resource the accuracy of which cannot reasonably be questioned*," are more than enough to establish a "reasonable likelihood" of authenticity of Exhibit 1010.

3. The Board Did Not Err In Denying Bose's Motion In The Earlier Proceeding

The Board did not err in finding Exhibit 1010 authentic in the prior proceeding, as Bose contends. As explained above, many features of Exhibit 1010 support the Board's conclusion that the exhibit is authentic and Bose has not challenged any of them, either in the earlier proceeding or in this one.

Confusingly, Bose faults SDI for not obtaining a "standard affidavit" from the Internet Archive in this case, while at the same time arguing that such an affidavit would be insufficient. (Paper 21, at 5.) This is a red herring. Again, whether someone at the Internet Archive has firsthand knowledge of the contents of a given website on a given date is not the issue. The point is that the Internet Archive's procedures are accepted as reliable – a fact that Bose does not even attempt to dispute.

Finally, the Board did not "improperly place the burden on ***Bose*** to show that Exhibit 1010 was not authentic" as Bose argues in its Motion. (Paper 21, at 7.) Again, SDI provided the many reasons above that tend to show the authenticity of the exhibit and Bose did not challenge any of them. (*See* IPR2014-00465, Paper 40, at 13-16.) As a result, there can be no dispute that SDI established a "reasonable likelihood" of authenticity of Exhibit 1010. The Board, therefore, correctly held that Bose had not "carried the burden on its motion" (*id.*, at 15-16), not that Bose bore some initial burden to prove the exhibit not authentic.

4. The IRMan Web Pages Are Not Hearsay

Finally, the IRMan Web Pages are not hearsay. In addition to denying Bose's earlier Motion, the Board recently rejected this very argument in another case, succinctly explaining that a "prior art document submitted as a 'printed publication' under 35 U.S.C. § 102(a) is offered simply as evidence of what it described, *not for proving the truth of the matters addressed in the document*." IPR2013-00086 (Paper 66, May 15, 2014), at 32 (emphasis added). Because Ex. 1010 is offered for what it says, not the truth of what it says, it is not hearsay.

C. Dr. Lippman's Testimony Should Not Be Excluded

Bose's argument concerning the admissibility of Dr. Lippman's testimony at pages 9-15 of its Motion is copied directly from its earlier Motion. And that earlier argument itself was simply a rehash of an argument Bose made in its Preliminary Response in that proceeding—that a person of ordinary skill in the art would combine the IRMan Web Pages and Altec Lansing Manual in the opposite way than the combination proffered by SDI. (*See* IPR2014-00465, Paper 13, at 39-40.)

Accordingly, the Board has now rejected this argument at least twice, first reasoning that "just because better alternatives exist in the prior art does not mean that an inferior combination is inapt for obviousness purposes" (IPR2014-00465, Paper 14, at 24), and then explaining "Patent Owner's evidence suggests that a skilled artisan may have had reasons to pursue one or the other of its proposed combinations in certain circumstances, [however] the mere disclosure of alternative designs does not teach away." (*Id.*, Paper 40, at 21 (internal citation and quotation marks omitted).)

Bose contends that Dr. Lippman conducted his analysis with "hindsight bias" simply because his declaration does not explicitly acknowledge that there may have been ways of combining the references other than the combination he discussed in his declaration. The argument has no merit.

Dr. Lippman explained at his deposition in the prior proceeding that he did not discuss a different way of combining the references because "[i]t doesn't bear on the combination that is relevant—that's shown in the patent" and because "it doesn't bear on the case in point." (IPR2014-00465, Ex. 2015 at 158:11-159:6 & 157:6-158:17.) Just as it did before, Bose calls this an "admission that [Dr. Lippman's] opinions . . . are fraught with hindsight bias." (Paper 21, at 14.) It is nothing of the sort. The testimony simply indicates that Dr. Lippman's declaration (unsurprisingly) discusses the combination that actually renders the claims invalid as obvious. There certainly is no requirement that, in explaining how a combination of references renders patent claims obvious, an expert must discuss all *other* possible ways of combining the references. And despite having already lost this Motion once, Bose still offers no case law to support such a requirement.

In any event, it is clear that this argument goes (at most) to the sufficiency of the evidence, not its admissibility, and Bose's effort to exclude this testimony should be denied again for that reason as well. *See* Patent Trial Practice Guide, 77 Fed. Reg. 48765, 48767 (Aug. 14, 2012) (explaining that a motion to exclude "may not be used to challenge the sufficiency of the evidence to prove a particular fact"). Indeed, in considering this issue (and, again, the very same text Bose now presents to show the testimony inadmissible), the Board reasoned that "Patent Owner has not persuaded us that testimony suffering from hindsight bias should be excluded as inadmissible. Rather, that would go to the weight we give to the testimony." (IPR2014-00465, Paper 40, n. 5.) The Board's decision was correct before and it should not be disturbed.

II. CONCLUSION

SDI respectfully requests that Bose's motion to exclude be denied.

Respectfully submitted,

Dated: January 27, 2015 By: /Matthew B. Lowrie/
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Counsel for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE, in its entirety, was served electronically on counsel for patent owner Bose Corporation, on January 27, 2015:

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