

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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SDI Technologies, Inc.  
Petitioner

v.

Bose Corporation  
Patent Owner

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Case IPR2014-00346  
Patent 8,364,295

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**PATENT OWNER BOSE CORPORATION'S  
REPLY TO PETITIONER'S OPPOSITION TO  
MOTION TO EXCLUDE EVIDENCE**

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**UPDATED LIST OF EXHIBITS**

<b>Patent Owner Exhibit Number</b>	<b>Exhibit Description</b>
Ex. 2101	06-28-2013 Bose's Preliminary Infringement Disclosure filed in <i>Bose Corp. v. SDI Technologies, Inc.</i> , Case No. 13-cv- 10277-WGY (D. Mass.) (" <i>Bose v. SDI</i> case") (Previously filed)
Ex. 2102	Excerpts of 01-15-2014 court hearing held <i>Bose v. SDI</i> case (Previously filed)
Ex. 2103	Excerpt from Webster's Third New International Dictionary of the English Language (unabridged 1993), which includes a copy of the reference's definition of "respond" on page 1935 of that reference (Previously filed)
Ex. 2104	Excerpts of 03-10-2014 Deposition Testimony of Dr. Andrew B. Lippman (Previously filed)
Ex. 2105	Operating Instructions for RM-AV2000 Integrated Remote Commander by Sony Corporation (1997) (Previously filed)
Ex. 2106	U.S. Patent 5,644,303, titled "Specialized Shaped Universal Remote Commander" (Previously filed)
Ex. 2107	U.S. Patent 5,872,562, titled "Universal Remote Control Transmitter With Simplified Device Identification" (Previously filed)
Reserved	Reserved

Ex. 2109	U.S. Patent No. 8,401,682 (sister patent to the '295 patent) (Previously filed)
Ex. 2110	U.S. Patent No. 7,277,765 (parent patent to the '295 patent) (Previously filed)
Ex. 2111	01-15-2014 Hearing Transcript in <i>Bose Corp. v. SDI Technologies, Inc.</i> , Case No. 13-cv-10277-WGY (D. Mass.) (Dkt. D108) (Previously filed)
Ex. 2112	Excerpt from 09-27-2013 Defendant's Preliminary Claim Construction Brief filed in <i>Bose Corp. v. SDI Technologies, Inc.</i> , Case No. 13-cv-10277-WGY (D. Mass.) (Previously filed)
Ex. 2113	Webpage showing the Altec Lansing ADA104 home theater speaker system. <a href="http://edsgoodstuff.com/edscart/index.php?main_page=product_info&amp;products_id=3076">http://edsgoodstuff.com/edscart/index.php?main_page=product_info&amp;products_id=3076</a> (Previously filed)
Reserved	Reserved
Ex. 2115	Excerpts of File History for U.S. Patent No. 7,277,765 (parent patent to the '682 patent) (Previously filed)
Ex. 2116	Excerpts of File History for U.S. Patent No. 8,364,295 (sister patent to the '682 patent) (Previously filed)
Ex. 2117	July 22, 2014 Patent Owner's Notice of Objections to Evidence (Previously filed)

Ex. 2118	Excerpts from William Strunk Jr. & E.B. White, <i>The Elements of Style</i> (4th ed. 2000) (Previously filed)
Ex. 2119	Excerpts from Laurel J. Brinton & Minoji Akimoto, <i>Collocational and Idiomatic Aspects of Composite Predicates in the History of English</i> , John Benjamin's Publishing 1999 <a href="http://books.google.com/books?id=jW0S0AyhGmAC&amp;printsec=frontcover&amp;source=gbs_ge_summary_r&amp;cad=0#v=onepage&amp;q&amp;f=false">http://books.google.com/books?id=jW0S0AyhGmAC&amp;printsec=frontcover&amp;source=gbs_ge_summary_r&amp;cad=0#v=onepage&amp;q&amp;f=false</a> (Previously filed)
Ex. 2120	September 16, 2014 Declaration of Dr. Robert L. Stevenson (Previously filed)
Ex. 2121	Pages from the Internet Archive website ( <a href="https://archive.org/legal/">https://archive.org/legal/</a> and <a href="https://archive.org/legal/faq.php">https://archive.org/legal/faq.php</a> ) (Previously filed)
Ex. 2122	Excerpts (pp. 194-95) from Carole A. Levitt and Mark E. Rosch, <i>Find Info Like a Pro, Volume 1, Mining the Internet's Publicly Available Resources for Investigative Research</i> , ABA Law Practice Management Section 2010

Patent Owner Bose Corporation (“Bose”) files this reply in support of its Motion to Exclude Evidence (Paper No. 20).

**I. Page 7 of Exhibit 1011 (Altec Lansing Manual)**

SDI does not defend the admissibility of page 7 of Ex. 1011, which is the only page that Bose seeks to exclude. *See* Paper No. 21 at 4.

**II. Exhibit 1010 (IRMan Web Pages)**

SDI is wrong to assert that Bose only presents the “same arguments” the Board considered in the prior proceeding. Bose’s motion explains why the evidentiary ruling in that proceeding, and in particular the Board’s reliance on the Internet Archive’s “standard affidavit,” was incorrect (Paper No. 20 at 5-7), which SDI ignores. The Board’s prior decision does not insulate SDI as the proponent of Ex. 1010 from having to lay the proper evidentiary foundation in *this* proceeding.

Although SDI has now had two rounds of briefing, it is still *unable to cite a single case* where an Internet Archive page was admitted *at trial* without authenticating testimony. This is not surprising, given the wealth of cases holding that the proponent of Internet Archive pages must, at minimum, provide a declaration from someone with personal knowledge. *E.g., Novak v. Tucows, Inc.*, 2007 WL 922306, \*5 (E.D.N.Y. Mar. 26, 2007) (excluding Internet Archive pages because the proponent proffered “neither testimony nor sworn statements attesting to the authenticity” of the pages), *aff’d*, 330 Fed. Appx. 204 (2d Cir. 2009); *see also Specht v.*



*Google Inc.*, 747 F.3d 929, 933 (7th Cir. 2014); *Schwartz v. J.J.F. Mgmt. Srvs., Inc.*, 2010 WL 1529241, at \*1 (D. Md. Mar. 22, 2010); *Audi AG v. Shokan Coachworks, Inc.*, 592 F. Supp. 2d 246, 278 (N.D.N.Y. 2008); *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, 2006 WL 1320242, at \*2 (M.D. Fla. May 12, 2006).

And although SDI relies on a Magistrate's ruling that an Internet Archive affidavit was sufficient for authentication in *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, 2004 U.S. Dist. LEXIS 20845, at \*18 (N.D. Ill. Oct. 15, 2004), that ruling was overruled by the District Court Judge at trial. *See* Ex. 2122 at 195.

The authenticating testimony cannot possibly come from SDI's expert Dr. Lippman, because he has no ***personal knowledge*** of the Internet Archive's contents. *See* Fed. R. Evid. 901(b)(1); *Audi*, 592 F. Supp. 2d at 260, 278; *St. Luke's Cataract*, 2006 WL 1320242, at \*2.

SDI's citations to *Keystone* and *Web Tracking* are inapposite, because neither addresses admissibility of such pages in ***a trial setting***, where the Federal Rules of Evidence apply. *See Keystone Retaining Wall Sys., Inc. v. Basalite Concrete Prods., LLC*, 2011 WL 6436210, at \*9 n.9 (D. Minn. Dec. 19, 2011) (preliminary injunction context, where rules of evidence do not strictly apply<sup>1</sup>); *Web*

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<sup>1</sup> *See, e.g., Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250, n.5 (9th Cir. 2013).

*Tracking Solutions, L.L.C. v. Wexler*, 2011 WL 3418323, at \*16 n.25 (E.D.N.Y. July 27, 2010) (considering pages in claim construction but noting “litigants seeking to submit these archived images as evidence run into authentication problems.”). Likewise, SDI’s reliance on *ex parte* Patent Office proceedings misses the mark, because unlike here, the Federal Rules of Evidence do not apply to *ex parte* patent prosecution. *See In re Epstein*, 32 F.3d 1559, 1565 (Fed. Cir. 1994).

SDI attempts to excuse its failure by arguing that it has already shown (a) proof of the process of how the Internet Archive works, and (b) proof that “the document presently appears in the Machine at the subject URL.” (Paper No. 21 at 8-9.) But SDI has **not** offered any proof of how the Internet Archive works. To the extent SDI is referring to the Internet Archive’s “standard affidavit,” Bose explained in its motion that the Internet Archive itself states the affidavit **does not establish the date** on which a web page was available on the Internet. (Paper No. 20 at 6.) Had SDI obtained a “standard affidavit” (which it did not), that would not have established that Ex. 1010 is what SDI claims—a printout of the contents of *evation.com* as it appeared on a particular date.<sup>2</sup> SDI does not even attempt to address this shortcoming in its Opposition.

SDI cannot ignore the authentication requirement by relying on Fed. R. Evid. 901(b)(4) (distinctive characteristics), 201 (judicial notice), or 902(7) (trade

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<sup>2</sup> Bose would have had the right to cross examine such affidavit. 37 C.F.R. §42.53.

inscriptions and the like). To authenticate Ex. 1010, SDI must “produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a). Here, SDI claims the IRMan Web Pages show the content that was posted on the Internet on a particular date. Nothing about the alleged “distinctive characteristics” of Ex. 1010 or any trade inscriptions on it support that finding. SDI does not cite a single case holding that a web page can be authenticated by its alleged distinctive characteristics under Rule 901(b)(4) or trade inscriptions under Rule 902(7), much less an *Internet Archive* page that is a web page within a web page (*i.e.*, it purports to be a web page made by one company within another web page made by the Internet Archive). Further, although SDI cites cases regarding judicial notice of the Internet Archive generally, none involves prior art in a patent case, where the date and availability of the underlying web page (the prior art) on the Internet is a critical issue. Put simply, none of these rules, nor any case SDI cites, justifies holding that Internet Archive pages are inherently authentic under Rules 901(b)(4), 201, or 902(7). Such a rule would be contrary to *Novak*, *Audi*, *St. Luke’s Cataract*, and the other cases discussed above.

Bose’s preliminary citation of a different page from the Internet Archive (Ex. 2002) in the prior proceeding does not excuse SDI’s failure to properly authenticate Ex. 1010. Bose did not intend to rely on Ex. 2002 at trial in that prior proceeding, and thus, had no reason to pursue an authenticating declaration.

Finally, the IRMan Web Pages are hearsay. SDI ignores that the pages contain two “out of court” statements. The ***first statement*** is the content of the original website (evation.com). The ***second statement*** is the Internet Archive’s representation that the original website (evation.com) reflected that content on a particular date. The IRMan Web Pages are unquestionably being offered for the truth of this ***second statement***—what evation.com showed on a particular date—because that truth is essential to finding that the original website (evation.com) constitutes prior art. It is SDI’s burden to establish that the IRMan Web Pages are prior art. Accordingly, the IRMan Web Pages are ***classic*** hearsay, and SDI does not argue that any hearsay exception applies. In fact, SDI ***disclaims*** reliance on the truth of the IRMan Web Pages. (Paper No. 21 at 13.) Thus, they should be excluded from evidence. *See Toyota Motor Corp. v. Am. Vehicular Scis. LLC*, IPR2013-00417, slip op. at 7-11, 13 (P.T.A.B. Jan. 7, 2015) (excluding web pages offered to establish date of prior art, but without sufficient foundation testimony, as hearsay).

### **III. Exhibit 1017 (Lippman Decl., ¶¶ 39-44)**

SDI relies on the Board’s decision in the prior proceeding. But that decision was flawed because it accepted Dr. Lippman’s incorrect assertion that the IRMan reference provided its own remote control. Since the IRMan did not come with a remote control, there was no “rational underpinning” for Lippman’s declaration, and paragraphs 39-44 should be excluded.

Respectfully submitted,

Date: February 3, 2015/

/Mark J. Hebert/

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**CERTIFICATE OF SERVICE**

Pursuant to 37 CFR §§ 42.6(e)(4) and 42.205(b), the undersigned certifies that on February 3, 2015, a complete and entire copy of this Patent Owner Bose Corporation's Reply to Petitioner's Opposition to Motion to Exclude Evidence, along with Exhibit 2122, was provided via email to the Petitioner by serving the correspondence email addresses of record as follows:

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