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Filed on behalf of Hulu, LLC.

By: David L. Cavanaugh, Reg. No. 36,476  
Scott Bertulli, Reg. No. 75,886  
Wilmer Cutler Pickering Hale and Dorr LLP  
1875 Pennsylvania Ave. NW  
Washington DC 20006

Tel: (202) 663-6000

Email: [David.Cavanaugh@wilmerhale.com](mailto:David.Cavanaugh@wilmerhale.com)

UNITED STATES PATENT AND TRADEMARK OFFICE

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**BEFORE THE PATENT TRIAL AND APPEAL BOARD**

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HULU, LLC,  
Petitioner,

v.

SOUND VIEW INNOVATIONS, LLC.  
Patent Owner.

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Case IPR2018-01039  
U.S. Patent 5,806,062

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**PETITIONER'S BRIEF IN RESPONSE TO POP REVIEW ORDER**

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## I. INTRODUCTION AND SHORT ANSWER

The Precedential Opinion Panel has asked: “What is required for a petitioner to establish that an asserted reference qualifies as a ‘printed publication’ at the institution stage?”

The answer is that, at the threshold institution stage, the petitioner must present a *prima facie* case that the reference qualifies as a “printed publication.” One method of establishing a *prima facie* case is by relying on conventional markers on the document—i.e., objective, contemporaneous evidence of public distribution that is generally expected to be found on documents of the same kind.

In the context of a published book like the one in this case, such indicia of availability include—but are not limited to—(1) a copyright notice, (2) edition identifiers and/or identifiers regarding dated changes to the book, (3) a statement that the document was published by a commercial publisher, and (4) the assignment of an International Standard Book Number (“ISBN”). Under this test or any reasonable variant, the Board erred in denying institution in this case. Because Hulu’s position is straightforward and supported by both Board and federal court rulings, Hulu does not believe that oral argument is necessary but would be available should the Panel consider it beneficial to have an oral argument to hear from the parties.

## II. BACKGROUND

Petitioner Hulu, LLC (“Hulu”) sought *inter partes* review of U.S. Patent No. 5,806,062 (“the ’062 patent”) in May 2018. The ’062 patent claims a basic method of database processing—a method that was well known to computer scientists and designers of database and record management systems for years before October 17, 1995, when the application resulting in the ’062 patent was filed. Pet. 1, 3. For example, the purported innovation was disclosed in a textbook called *Sed & Awk* by Dale Dougherty, first published by O’Reilly & Associates, Inc. in November 1990. *See* Ex. 1004 (“Dougherty”); *see also* Pet. 3.

The version of Dougherty in the record carries numerous objective indicia supporting a finding that it was placed in public circulation before October 17, 1995. The book states: “Copyright © 1990 O’Reilly & Associates, Inc.” Ex. 1004 at 4. O’Reilly & Associates is a well-known commercial publisher. *See* Request for Rehearing 7-8 & n.6.

Dougherty also lists a unique ISBN, Ex. 1004 at 4, a number assigned only to “publications that are ... available to the public.” *See* International ISBN Agency, *Scope and Assignment of ISBN*, <https://www.isbn-international.org/content/scope-and-assignment-isbn> (last visited Apr. 18, 2019). And Dougherty includes a printing history noting the dates when “[m]inor corrections” were made,

the most recent of which is November 1992. Ex. 1004 at 4.<sup>1</sup>

Patent Owner's Preliminary Response spent nearly 20 pages arguing that Hulu had failed to make even "a threshold showing" that Dougherty was a printed publication. The Board agreed and declined to institute, explaining that the fact that "Dougherty has a copyright year of 1990 and an indication that O'Reilly owns the copyright to the book" was not "sufficient evidence to show a reasonable likelihood that Dougherty is prior art with respect to the '062 patent." Decision on Institution at 10-12. The Board did not address the fact that O'Reilly is a commercial publisher with a monetary incentive to make Dougherty publicly available, the presence of the ISBN, or Dougherty's listed printing history.

### **III. ARGUMENT**

#### **A. Consistent With The "Reasonable Likelihood" Institution Standard, A Petition Need Only Establish A Prima Facie Case That An Asserted Reference Is A Printed Publication**

The Board should apply the "reasonable likelihood" standard when assessing the petition's evidence that an asserted reference is a printed publication at the institution stage. Congress has provided that the Board may institute an IPR

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<sup>1</sup> Hulu also presented evidence that Dougherty was available in the Cornell Library as of September 1992. *See* Pet. 20. Because that additional evidence is unnecessary to resolve the question presented, Hulu does not rely upon it.



proceeding if it concludes that there is a “reasonable likelihood” that the petitioner would prevail with respect to at least one of the claims challenged in the petition. 35 U.S.C. § 314(a). This is a “comparatively low threshold,” *Dominion Dealer Solutions, LLC v. Lee*, 2014 WL 1572061, at \*6 (E.D. Va. Apr. 18, 2014), and is “a qualitatively different standard” from the preponderance of evidence standard employed at the final written decision stage, *Trivascular, Inc. v. Samuels*, 812 F.3d 1056, 1068 (Fed. Cir. 2016); *see also* 35 U.S.C. § 316(c). Requiring anything more than a reasonable likelihood of success on the printed publication question would constitute an end-run around Congress’ careful distinction between the institution and final written decision stages. *Cf. State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 442 (2016) (“Congress’ use of ‘explicit language’ in one provision cautions against inferring the same limitation in another provision.”).

The legislative history makes clear that the “reasonable likelihood” standard “effectively requires the petitioner to present a *prima facie* case justifying a rejection of the claims in the patent.” 157 Cong. Rec. S1375 (Mar. 8, 2011) (statement of Sen. Kyl); *accord* Matal, *A Guide to the Legislative History of the America Invents Act*, 21 Fed. Cir. B. J. 539, 541, 607 (2012). The *prima facie* case is a commonly used procedural device in the patent context. *E.g., In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). In litigation, once a “challenger has

presented ... evidence that might lead to a conclusion of invalidity—what we call a *prima facie* case,” “the patentee has the burden of going forward with rebuttal evidence.” *Pfizer, Inc. v. Apotex, Inc.*, 480 F.3d 1348, 1360 (Fed. Cir. 2007). Indeed, the Federal Circuit has adopted a similar understanding of the burden of proof in the IPR context when determining what entities constitute real parties-in-interest. *See Worlds, Inc. v. Bungie, Inc.*, 903 F.3d 1237, 1242 (Fed. Cir. 2018). As the court explained, the petitioner bears the initial burden of identifying all real parties-in-interest in the petition. *Id.* If the patent owner disputes those identifications, it must “produce some evidence to support its argument.” *Id.* So too here: once a petitioner puts forward “evidence that might lead to a conclusion” that a reference is a printed publication, that issue cannot pose a bar to institution unless the patent owner presents some contrary evidence rebutting the *prima facie* case.

The *prima facie* standard is consistent with the Board’s current practices. The Board routinely institutes proceedings on petitions that show a reasonable likelihood that a reference is a printed publication, but ultimately finds in the final written decision that the record as a whole did not establish the point by a preponderance of the evidence. *See, e.g., Samsung Elecs. Co. v. Ibex PT Holdings Co.*, IPR2018-00012, Paper 30 at 2-3, 10-20 (PTAB Apr. 10, 2019); *Hamamatsu Photonics KK v. SEMICAPS Pte Ltd.*, IPR2017-02110, Paper 35 at 36-43 (PTAB

Mar. 18, 2019); *Nautilus, Inc. v. ICON Health & Fitness, Inc.*, IPR2017-01363, Paper 33 at 20-21 (PTAB Nov. 28, 2018).

The Board’s recent final written decision in *Hamamatsu* is instructive. There, the Board initially ruled that the petitioner had “provided adequate evidence to make a threshold showing” at the institution stage that a paper on a “DC-Coupled Laser Induced Detection System” was a printed publication. *Hamamatsu*, Paper 35 at 6, 34-36. At that early stage, the Board relied on the fact that the asserted reference listed conference dates that predated the patent application. *Id.* at 36. But as the Board explained, “th[e] ‘threshold showing’ was Petitioner bringing forth enough evidence to demonstrate *a likelihood of prevailing* on the publication date issue during the ensuing trial and did not involve a determination, during that preliminary stage, that Petitioner had satisfied the ultimate burden of proving the matter by a preponderance of the evidence.” *Id.* at 37 (emphasis added). “After carefully reviewing the evidence presented” at trial, the Board concluded that the petitioner’s evidence was “at best, ambiguous” and found that “Petitioner has not established by a preponderance of that evidence that the” article was a prior art printed publication. *Id.* at 42-43.

The *prima facie* standard—which, again, is implicit in the statute, consistent with Federal Circuit precedent, and actually applied in cases like *Hamamatsu*, *Samsung*, and *Nautilus*—simply makes good sense. It gives the Board flexibility

to consider viable IPR challenges while maintaining the ability to ultimately deny relief under the preponderance standard when all of the evidence developed during trial is in. *See In Re Magnum Oil Tools Int'l, Ltd.*, 829 F.3d 1364, 1376 (Fed. Cir. 2016) (the Board “is not bound by any findings made in its Institution” and that “[a]t that point, the Board is considering the matter preliminarily without the benefit of a full record”). The very idea of allowing both sides to present evidence at trial would be meaningless if the petitioner had to present that same quantum of evidence in its initial petition. Moreover, unless a *prima facie* showing is sufficient at the institution stage, petitioners will be forced to submit reams of public availability evidence in conjunction with their initial petition for every reference asserted—even as to references that the patent owner does not ultimately challenge. Applying the *prima facie* case standard will thus significantly simplify the record.

The few decisions on institution that have required more than a *prima facie* case are outliers that fail to account for the different evidentiary standards that apply at the institution and final written decision stages. The ruling in this case, for example, effectively applied a preponderance standard—perhaps because it relied uncritically on the legal standards outlined in Federal Circuit decisions reviewing final written decisions rather than decisions on institution. *See* Decision on Institution 10-11; *see also Acceleration Bay, LLC v. Activision Blizzard Inc.*, 908

F.3d 765, 767-768 (Fed. Cir. 2018) (reviewing final written decision); *Blue Calypso, LLC v. Groupon, Inc.*, 815 F.3d 1331, 1335 (Fed. Cir. 2016) (same). As discussed above, this is error; different standards of proof apply at the different stages. *See supra* p. 4.

Other Board decisions that have required substantially more than a *prima facie* case do not mention—and are indeed inconsistent—with the reasonable likelihood standard for institution. *See* Request for Rehearing 8-9 (collecting cases). This Panel should reject any rule that ignores the “qualitatively different standard[s]” applied at the institution and final written decision stages.

*Trivascular*, 812 F.3d at 1068.

**B. Permitting A Petitioner To Establish A *Prima Facie* Case For A Printed Publication Based On Conventional Markers Is Consistent With Federal Case Law, Agency Practice, And Common Sense**

**1. Demonstrating that a reference has conventional markers of publication is sufficient to establish a *prima facie* case**

Whether a petitioner has established a *prima facie* case that a particular reference is a prior art printed publication does not have a one-size-fits-all answer, given that it requires a fact-sensitive analysis. *See In re Klopfenstein*, 380 F.3d 1345, 1351 (Fed. Cir. 2004).

Petitioner submits that one way to establish a *prima facie* case at the institution stage is by demonstrating that the asserted reference has “conventional

markers” of publication. *See, e.g., Provepharm Inc. v. Wista Labs. Ltd.*, IPR2018-00182, Paper 16 at 17-18 (PTAB July 5, 2018). In other words, the reference must have markings that provide objective, contemporaneous evidence of public distribution that are generally expected to be found on documents of the same kind. Additional evidence, like a supporting declaration, could be used if a reference lacks indicia sufficient to establish a *prima facie* case of public availability.

*Provepharm* is instructive. In finding that petitioner presented sufficient evidence of printed-publication status at the institution stage, the Board looked to the conventional markers on the face of the document that demonstrated the fact and date of publication. *Provepharm*, Paper 16 at 17. These included (1) the stated publication date of the article, (2) the statement on the article’s face that “the authors submitted the article to the publisher, American Chemical Society, for review on June 25, 1999, and then submitted a final version on August 17, 1999,” and (3) the fact that “[t]he face of the journal article also indicates that the final form of the article was published on the Web on October 23, 1999.” *Id.* at 17-18; *see also Nobel Biocare Servs. AG v. Intradent USA, Inc.*, 903 F.3d 1365, 1376 (Fed. Cir. 2018) (date on front of a catalog was evidence supporting a finding of public accessibility as of that date). In the “[a]bsen[ce of] evidence to the contrary,” the Board concluded that the petitioner had made a sufficient showing at the institution stage. *Provepharm*, Paper 16 at 18; *see also id.* (distinguishing

earlier Board decision where the asserted reference “contained no indicia on its face that the article had, in fact, been published”).

**2. Conventional markers in the context of a published book include a copyright notice, edition identifiers, publication by a commercial publisher, and the assignment of an ISBN**

On the particular facts of this case—a copyrighted book—federal courts and the Board have relied on numerous indicia that appear on the face of the reference to establish that it is a printed publication. These include, but are not limited to (1) a copyright notice, (2) edition identifiers and/or identifiers regarding dated changes to the book, (3) a statement that the document was published by a commercial publisher, and (4) the assignment of an ISBN.

*First*, federal courts have held that—even under a preponderance standard—a movant citing “[p]ublished documents” can rely on a copyright notice to “establish public availability, absent a showing that would indicate otherwise.” *See DexCom, Inc. v. AgaMatrix Inc.*, 2018 WL 3342927 at \*12 (C.D. Cal. Feb. 5, 2018) (collecting cases), *aff’d*, 755 F. App’x 1016 (Fed. Cir. Mar. 7, 2019); *see also Garrido v. Holt*, 547 F. App’x 974, 979 (Fed. Cir. 2013) (that copyrighted book was published “December 16, 1996 was sufficient to render it prior art” as of that date). The Board has similarly relied on a copyright notice at the institution stage. *See Arista Networks, Inc. v. Cisco Sys., Inc.*, IPR2016-00244, Paper 10 at 19 (PTAB May 25, 2016); *see also RayVio Corp. v. Nitride Semiconductors Co.*,

IPR2018-01141, Paper 14 at 26 (PTAB Dec. 4, 2018) (“Solymar’s copyright page recites a 1993 copyright date and is probative evidence that Solymar existed as of 1993 and was publicly available at that time.”). This makes sense. A copyright notice provides objective evidence both that the publisher contemplated that the document would be distributed to the public (and was thus at risk of being copied) and the date as of which the publisher contemplated distribution would begin.

*Second*, even at the final written decision stage, the Board has relied on the printing history listed inside a book as printed publication evidence, whether that information identifies when particular editions were published or simply identifies the dates that minor changes were made to the book. *See, e.g., Google LLC v. Blackberry, Ltd.* IPR2017-01620, Paper 31 at 39 (PTAB Dec. 19, 2018) (considering, *inter alia*, that reference identified when the first printing occurred); *Provepharm*, Paper 16 at 16 (placing weight on the fact that reference “contains the notation ‘Third Edition’” and “Supplement 2001”). As with the copyright notice, the edition/publication history identifiers support the notion that the book was published and released to the public on the stated dates. If that were not so, then there would be no need to distinguish between various editions and versions in the book’s front matter.

*Third*, the Board has placed weight on a book’s publication by a commercial publisher. This makes sense because “a book publisher is generally in business *to*



*publish books and to make them widely accessible to the public* for purchase.”

*Microsoft Corp. v. Corel Software, LLC*, IPR2016-01086, Paper 14 at 9 (PTAB Dec. 1, 2016) (emphases added). Accordingly, a printed statement that a book was published by a specific “commercial publisher in the business of printing and selling books ... lends credence” to the notion that a book “was publicly accessible as of its copyright date.” *CIM Maintenance, Inc. v P&RO Sols. Grp., Inc.*, IPR2017-00516, Paper 8 at 18-19 (PTAB June 22, 2017); *see also Giora George Angres, Ltd. v. Tinny Beauty & Figure, Inc.*, 1997 WL 355479, at \*7 (Fed. Cir. June 26, 1997) (unpublished) (finding “no reason to suspect that [a reference published by an established publisher] was not publicly available” when “no evidence was presented that it was not”).

Finally, “the assignment of an ... ISBN code by a publisher” also provides “a circumstantial guarantee of trustworthiness” that the reference is a printed publication. *Ericsson Inc. v. Intellectual Ventures I LLC*, IPR2014-00527, Paper 41 at 11 n.10 (PTAB May 18, 2015); *see also Microsoft Corp. v. IPA Techs. Inc.*, IPR2018-00734, Paper 10 at 9 (PTAB Sept. 19, 2018) (“the indicia of publication appearing on the face of [the reference] are particularly persuasive of public availability, including ... the ISBNs”); *Reg Synthetic Fuels, LLC v. Neste Oil, OYJ*, IPR2018-01374, Paper 11 at 6 (PTAB Feb. 19, 2019) (an ISBN “is an indicia of an established publisher”). As noted above, the assignment of an ISBN number

provides evidence of publication because it is intended only for “publications that are ... available to the public.” *See supra* p. 2.

### **3. The conventional markers test makes good sense**

There is good reason for the Board to adopt a printed publication test that relies on some or all of these indicia of availability. *First*, as discussed above, all of these indicia are objective evidence that the Board—and, in some cases, federal courts—have concluded provide support for a finding that a given reference is a printed publication. *See supra* pp. 11-13. Taken together, they at a minimum provide “evidence that might lead to a conclusion of invalidity”—i.e., a *prima facie* case, which is all that is needed at the institution stage. *See supra* pp. 3-8.

*Second*, reliance on such evidence would create more consistent outcomes for petitioners and patent owners alike. Currently, the Board has taken a variety of approaches to determining the sufficiency of printed publication evidence at the institution stage, such that institution decisions appear to depend heavily on panel composition. *See Request for Rehearing* at 1-3. This cannot be squared with the general equitable principle that “similarly situated litigants should be treated the same.” *E.g., James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991). Narrowing the inquiry to the kind of indicia of availability discussed above would level the playing field by solidifying what kind of evidence a petitioner must present at the institution stage. Notably, this will not cause any real prejudice to

the patent owner. If the patent owner legitimately disputes the veracity of the copyright notice or the other indicia, the patent owner can prevail by presenting some evidence supporting its position. *See supra* pp. 5-8.

*Third*, a conventional markers test would also lessen the Board’s workload at the institution stage. Rather than being forced to wade through voluminous printed publication evidence (or pages of attorney argument, as in this case), the Board could quickly resolve the question by examining the front matter of a given book. In other words, simplifying the printed publication inquiry would serve the fundamental goal of the IPR system—creating a “streamlined patent system that will improve patent quality” by making it easier to challenge “questionable patents.” H.R. Rep. No. 112-98 at 39-40 (2011).

**C. Regardless Of The Precise Test Applied, The Board Erred By Not Instituting Hulu’s Petition**

The printed publication evidence presented in this case satisfies any reasonable standard that this Panel might adopt. As discussed in more detail in Hulu’s Request for Rehearing, various panels have taken differing approaches to the question. Request for Rehearing at 4-8; *see also, e.g., Provepharm*, Paper 16 at 15 (“We acknowledge that panels have differed on whether a copyright notice is inadmissible hearsay or probative evidence of a printed publication.”). For example, the Board has held in various cases that (1) a copyright notice is *prima facie* evidence that a reference is a printed publication, (2) a copyright notice

combined with other objective, corroborating evidence is sufficient, and (3) a copyright notice by a well-known publisher is sufficient. *See* Request for Rehearing at 4-8.

The Dougherty reference invoked by Hulu satisfies all of these tests. It has a copyright notice that is corroborated by an ISBN and a printing history noting the timing of “minor corrections” to the text. *See supra* pp. 2-3. And Dougherty includes a statement that it was published by O’Reilly & Associates, which the Board has previously acknowledged is a well-known commercial publisher. *See supra* p. 2. Finally, the patent owner did not put forward any independent evidence controverting these indicia of availability.

Accordingly, Hulu respectfully requests that this Panel adopt its proposed conventional markers standard (here, assessing the reasonable likelihood of a printed publication based on the indicia of availability discussed above) and hold that—under that standard or any reasonable variant—the Board erred by declining to institute Hulu’s petition.

Respectfully Submitted,

/David L. Cavanaugh/

David L. Cavanaugh  
Registration No. 36,476

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing brief complies with the page limit set forth in the Board's Order dated April 3, 2019, authorizing the parties to file a brief of no more than 15 pages.

I also certify that this brief has been prepared in a proportionally spaced type (Times New Roman, 14-point) using a Microsoft Word word-processing system.

Dated: May 1, 2019

/David L. Cavanaugh/

David L. Cavanaugh  
Registration No. 36,476

**CERTIFICATE OF SERVICE**

I hereby certify that on May 1, 2019, I caused a true and correct copy of the foregoing material:

- PETITIONER'S BRIEF IN RESPONSE TO POP REVIEW ORDER

to be served upon the following by ELECTRONIC MAIL:

Kenneth J. Weatherwax, Lead Counsel (Reg. No. 54,528)

[weatherwax@lowensteinweatherwax.com](mailto:weatherwax@lowensteinweatherwax.com)

Parham Hendifar, Back-Up Counsel (Reg. No. 71,470)

[hendifar@lowensteinweatherwax.com](mailto:hendifar@lowensteinweatherwax.com)

Nathan Lowenstein, Back-Up Counsel (admitted *pro hac vice*)

[lowenstein@lowensteinweatherwax.com](mailto:lowenstein@lowensteinweatherwax.com)

Edward Hsieh (Reg. No. 54,188)

[hsieh@lowensteinweatherwax.com](mailto:hsieh@lowensteinweatherwax.com)

[SVI\\_IPRs@lowensteinweatherwax.com](mailto:SVI_IPRs@lowensteinweatherwax.com)

/David L. Cavanaugh/

David L. Cavanaugh  
Registration No. 36,476