

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TOYOTA MOTOR CORPORATION,
Petitioner,

v.

AMERICAN VEHICULAR SCIENCES LLC,
Patent Owner.

Case IPR2013-00417
Patent 8,036,788 B2

Before JAMESON LEE, BARBARA A. PARVIS, and
GREGG I. ANDERSON, *Administrative Patent Judges*.

ANDERSON, *Administrative Patent Judge*.

FINAL WRITTEN DECISION
35 U.S.C. § 318(a) and 37 C.F.R. § 42.73

I. BACKGROUND

A. Introduction

On July 8, 2013, Toyota Motor Corporation (“Toyota”) filed a Petition requesting an *inter partes* review of claims 1, 3, 4, 6, 7, 8, 9, 11, 15, 16, and 18 of U.S. Patent No. 8,036,788 B2 (Ex. 1001, “the ’788 patent”). Paper 1 (“Pet.”). On January 13, 2014, we instituted trial for claims 1, 3, 4, 6, 7, 8, 9, 11, 15, 16, and 18 of the ’788 patent on certain grounds of unpatentability alleged in the Petition. Paper 14 (“Decision” or “Dec.”).

After institution of trial, American Vehicular Sciences LLC (“AVS”) filed a Patent Owner Response. Paper 30 (“PO Resp.”). Toyota filed a Reply. Paper 37 (“Reply”).

A consolidated oral hearing for IPR2013-00414, IPR2013-00415, IPR2013-00416, and IPR2013-00417, each involving Toyota and AVS, was held on August 14, 2014. The transcript of the consolidated hearing has been entered into the record. Paper 77 (“Tr.”).

AVS also filed a First Motion to Amend Claims. Paper 29 (First Motion to Amend”). That motion was subsequently withdrawn. Paper 64 (“Withdrawal”). With authorization from the Board, AVS filed a Second Motion to Amend Claims which seeks to cancel challenged claims 1, 3, 4, 6, 7, 8, 11, 15, 16, and 18 of the ’788 patent, but not claim 9. Toyota has represented that it does not oppose the Second Motion to Amend. *See* Paper 76 (“Order-Conduct of Proceedings”); Tr. 103:11–104:10. AVS’s Second Motion to Amend Claims is *granted*.

We have jurisdiction under 35 U.S.C. § 6(c). This final written decision is issued pursuant to 35 U.S.C. § 318(a).

B. Related Proceedings

Toyota indicates the '788 patent has been asserted in the following co-pending district court case: *American Vehicular Sciences LLC v. Toyota Motor Corp.*, No. 6:12-CV-405 (E.D. Tex. filed July 20, 2012). Pet. 1.

C. The '788 Patent

The '788 patent discloses a system and a method for monitoring the condition of a vehicle. Ex. 1001, 3:35–38; 4:1–14. Sensors monitor components of the vehicle and are connected to a diagnostic module. *Id.* at 3:39–41, 46–47. The diagnostic module determines an actual or potential failure of the component or subsystem. *Id.* at 3:49–50. The diagnostic module controls a communications unit that communicates through a wireless communications network with a remote site. *Id.* at 3:38–39, 48. The remote site is any site or location interested in receiving information about the diagnostic or prognostic status of the components of the vehicle. *Id.* at 3:53–56. The '788 patent describes diagnostics as generally determining the present condition of the component. *Id.* at 7:41–42. The '788 patent describes prognostics as determining when a component will fail. *Id.* at 7:45–46.

The method described collects status data for vehicle maintenance and monitors a triggering event on a vehicle. Ex. 1001, 4:42–49. The triggering event relates to a diagnostic or prognostic analysis of at least one component or subsystem of the vehicle. *Id.* The triggering event initiates a transmission between the communications unit and a remote site. *Id.* The transmission includes a diagnostic or prognostic message about the component or subsystem, e.g., a message about a failure, predicted failure, or fault code generation of the component or subsystem. *Id.*

Figure 3 of the '788 patent is reproduced below:

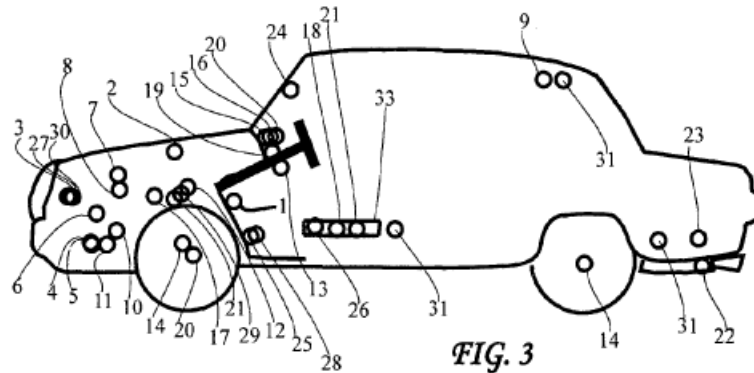


Figure 3 is a schematic of a vehicle illustrating a total diagnostic system utilizing the diagnostic module. Ex. 1001, 20:32–36. The sensors shown in Figure 3 are mounted on components within the engine of the vehicle including, among other sensors, the following: microphone 2, coolant thermometer 3, oil pressure sensor 4, oil level sensor 5, air flow meter 6, voltmeter 7, ammeter 8, engine knock sensor 10, oil turbidity sensor 11, throttle position sensor 12, oxygen sensor 17, transmission fluid level sensor 25, coolant level sensor 27, transmission fluid turbidity sensor 28, brake pressure sensor 29, and coolant pressure sensor 30. *Id.* at Figs. 3, 4, 20:59–21:10.

Figure 20C of the '788 patent is reproduced below:

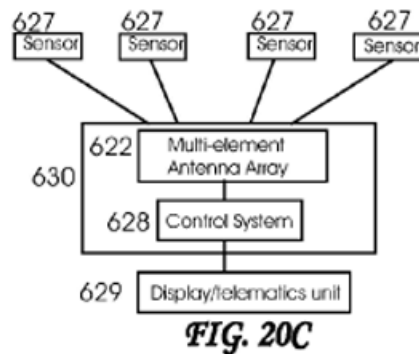


Figure 20C is a block diagram showing a general system for obtaining information about a vehicle or vehicle component. Ex. 1001, 54:26–27. Control system 628 is coupled to and controls antenna array 622, enabling reception of return signals from sensors 627. *Id.* at 54:40–43. The information is directed to display/telematics/adjustment unit 629 where the information can be displayed on display 629 to the driver and sent to a remote location for analysis via telematics unit 629. *Id.* at 54:61–66.

D. Status of Claims

Because we have granted AVS's Second Motion to Amend Claims, only claim 9 remains for further consideration.

Claim 9 depends from claim 7, which depends from independent claim 1. Claims 1, 7, and 9 are reproduced below:

1. A method for providing status data for vehicle maintenance, comprising:
monitoring for a triggering event on a vehicle having a wireless communications unit, the triggering event relating to a diagnostic or prognostic analysis of at least one of a plurality of different components or subsystems of the vehicle; and
initiating a wireless transmission between the communications unit and a remote site separate and apart from the vehicle in response to the triggering event, the transmission including a diagnostic or prognostic message about the at least one component or subsystem.

7. The method of claim 1, wherein the step of monitoring for the triggering event comprises providing at least one sensor that monitors the at least one component or subsystem.

9. The method of claim 7, wherein the at least one sensor is part of a diagnostic module on the vehicle, further comprising configuring the diagnostic module to analyze data obtained by the at least one sensor in order to predict failure of the at least

one component of subsystem and generate the triggering event based on prognostic criteria.

E. Prior Art Reference Supporting Alleged Unpatentability

The only claim remaining for review is claim 9. The Decision instituted review of claim 9 based only on anticipation under 35 U.S.C. § 102(a) based on the prior art reference Fry. Dec. 31–34. Fry is identified as follows: K. N. Fry, *Diesel Locomotive Reliability Improvements by System Monitoring*, 209 PROC. INSTITUTION MECHANICAL ENGINEERS, PART F: J. RAIL & RAPID TRANSIT 1 (1995) (Ex. 1005).

II. ANALYSIS

A. Introduction

The parties agree that the only issue before us is whether the Fry reference was accessible publicly prior to June 7, 1995. Joint Statement Introducing Supplemental Evidence, 1 (“Joint Statement,” Paper 45). At the hearing, AVS stated that the only remaining issue is evidentiary, i.e., whether or not Fry is prior art.¹ Tr. 103:1–16. Toyota stated that the only remaining issue is “whether Toyota has shown or can show by a preponderance of the evidence that the Fry reference was published prior to the asserted priority date of June 7, 1995 and, therefore, is prior art under 102(a).” Tr. 56:11–15. If Fry is found to be prior art, AVS concedes that claim 9 is anticipated by Fry. In any event, we have reviewed all of the non-excluded evidence in this case and determine that Toyota has shown by a preponderance of the evidence that claim 9 is anticipated by Fry.

¹ We note that although there are evidentiary issues relating to Fry, the question of whether Fry constitutes prior art is not itself an evidentiary issue. Rather, it is a part of the substantive case that Toyota must prove.

Fry is a technical article that indicates on its face that it was copyrighted in 1995. Ex. 1005, 2–12. However, the copy of Fry of record and submitted by Toyota was downloaded from Sage Publications and includes two additional pages added from the Sage Publications website. *Id.* at 1, 13. Page 1, states “Version of Record – Jan 1, 1995.”² Page 13 of Exhibit 1005 shows a URL of [http://pif.sagepub.com/content/209/1/1.abstract\[5/22/2013 3:46:13 PM\]](http://pif.sagepub.com/content/209/1/1.abstract[5/22/2013 3:46:13 PM]). Hereinafter pages 1 and 13 of Exhibit 1005 are referenced as the “Sage Publications Webpages.”

Exhibit 1011 (the “Fry Award”) is an award Mr. Fry received in connection with the publication of Fry from The Institution of Mechanical Engineers. As relevant here, the Fry Award indicates Fry was “Published in the Proceedings Part F1 1995.”

Exhibit 1012 (“Sage Publications Website Printout”) is Sage Publications Website Listing, captioned “Index by Author — January 1995, 209 (1).” Toyota relies on the Sage Publications Website Printout to show that Fry was published in January 1995. Opposition to Motion to Exclude 2, 12 (“Opp. Mot. Exclude,” Paper 55). A number of authors and their articles are listed in the Sage Publications Website Printout, including Fry. The listing for the Fry article, in a format like all the other article listings in the Sage Publications Website Printout, states: “Part F: Journal of Rail and Rapid Transit January 1995.”

There is nothing in Fry, the article itself, which purports to indicate when in 1995 the article was published. Both parties presented evidence

² The cover page of Exhibit 1005 was “Downloaded from pif.sagepub.com by guest on June 3, 2013.” Ex. 1005, 1.

during trial concerning whether or not Fry was prior art and, thus, publicly available before June 7, 1995.

B. AVS's Motion to Exclude

As noted above, the copy of Fry in the record (Exhibit 1005) includes the Sage Publications Webpages. In addition, Toyota offers supplemental evidence including: Exhibit 1011 (Fry Award); Exhibit 1012 (Sage Publications Website Printout); Exhibit 1013 (Declaration of Kevin N. Fry, Fry Declaration); and Exhibit 1014 (Affidavit of Sarah Broadhurst, Broadhurst Affidavit). AVS filed a Motion to Exclude Toyota's evidence. ("Mot. Exclude," Paper 51). The Motion to Exclude seeks to exclude portions of Exhibit 1005 and Exhibits 1011–1014. Mot. Exclude 7–15.

*1. Sage Publications Webpages (Ex. 1005, pages 1, 13),
Sage Publications Website Printout (Ex. 1012),
and Broadhurst Affidavit (Ex. 1014)*

AVS moves to exclude the Sage Publications Webpages and the Sage Publications Website Printout on the grounds that they are irrelevant and constitute inadmissible hearsay. Mot. Exclude 7–9, 11–12. We discuss the irrelevance contention first, and then the hearsay contention.

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. The Sage Publications Website Printout and Sage Publications Webpages are offered by Toyota to prove that Fry was published in January 1995. Opp. Mot. Exclude 10–11. The copy of Fry in the record indicates that Sage Publications published Fry "on behalf" of the Institution of Mechanical Engineers ("iMechE"). Ex. 1005, 1. We cannot conclude that the Sage Publications Website Printout or the Sage Publications Webpages have "no"

tendency to make Petitioner's alleged publication date of Fry more or less probable. The Sage Publications Website Printout and Sage Publications Webpages are, therefore, relevant.

AVS seeks to exclude the Sage Publications Website Printout and the Sage Publications Webpages as hearsay. AVS contends there is no hearsay exception that would result in admission of the Sage Publications Webpages or Website Printout. Mot. Exclude 9, 11. Toyota argues Exhibit 1012 and the Sage Publications Webpages of Exhibit 1005 are admissible as an exception to the hearsay rule, citing to Federal Rule of Evidence 803(6), records of a regularly conducted activity. Opp. Mot. Exclude, 1, 10–12.

Based on the Broadhurst Affidavit (Exhibit 1014), we find that iMechE is said to have previously published the journal of its proceedings twice a year. Ex. 1014 ¶ 7. At some unspecified time, and from that time forward, iMechE arranged for Sage Publications to administer the archiving of past journals and to make them available to the public “on behalf of iMechE.” Ex. 1005, 1, 13; Ex. 1014 ¶ 3.

Toyota relies on the Broadhurst Affidavit (Exhibit 1014) to lay the foundation necessary to establish the Sage Publications Website Printout (Exhibit 1012) as a record of a regularly conducted activity, i.e., a business record, under Federal Rule of Evidence 803(6). Opp. Mot. Exclude 2, 12. The same testimony is used to support the admissibility of the Sage Publications Webpages. *Id.* at 10.

Ms. Broadhurst's testimony fails to lay the necessary foundation under Federal Rule of Evidence 803(6) to admit the Sage Publications Website Printout or the Sage Publications Webpages. To be admissible, “the record was made at or near the time by — or from information transmitted

by — someone with knowledge.” Fed. R. Evid. 803(6)(A). Exhibit 1012, the Sage Publications Website Printout, includes a 2012 date. The Sage Publications Webpages have 2013 dates. Ex. 1005, 1, 13. Ms. Broadhurst has no stated knowledge of Sage Publications or their record keeping practices and her testimony does not meet the requirements of Federal Rule of Evidence 803(6)(A).

Ms. Broadhurst’s testimony also does not establish that Exhibit 1012 or Exhibit 1005, pages 1 and 13, are records “kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit.” Fed. R. Evid. 803(6)(B). Ms. Broadhurst testifies that iMechE keeps dates “received, accepted for publication, and eventually published.” Ex. 1014 ¶ 4. Ms. Broadhurst further states that “I have reviewed, on the Sage Publications’ website, the Institution of Mechanical Engineers’ records relating to the Fry article.” Ex. 1014 ¶ 5. There is no evidence that Sage Publications’ records are iMechE records or of any relationship between the two regarding records.³ Ms. Broadhurst does not identify nor mention the only records at issue, the Sage Publications Website Printout and the Sage Publications Webpages. Ms. Broadhurst offers no testimony about any business activity of Sage Publications upon which the exception under Federal Rule of Evidence 803(6)(B) is based. Similarly, because Ms. Broadhurst has no stated association with Sage Publications, her testimony cannot establish the “making the record was a

³ Toyota’s argument that Sage Publications stores or otherwise has some responsibility for the business records of iMechE is unsupported by the evidence. *See* Opp. Mot. Exclude 10 (citing *United States v. Moore*, 923 F.2d 910, 914 (1st Cir. 1991)).

regular practice of that activity” of Sage Publications. Fed. R. Evid. 803(6)(C).

Toyota has not shown by a preponderance of the evidence that Ms. Broadhurst is a “custodian or another qualified witness” of records that would include Exhibit 1012 or the Sage Publications Webpages of Exhibit 1005. *See* Fed. R. Evid. 803(6)(D). Exhibits 1012 and pages 1 and 13 of Exhibit 1005 indicate they are records of Sage Publications, and, as discussed above, Ms. Broadhurst does not testify that she has any responsibility or role in generating or maintaining records at Sage Publications. The lack of any testified involvement of Ms. Broadhurst with Sage Publications also raises an issue as to “the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.” Fed. R. Evid. 803(6)(E).

AVS requests all of Ms. Broadhurst’s testimony be excluded, including both the business records testimony as well as testimony relating to publication of Fry, as lacking personal knowledge and, to the extent it is based on Sage Publications documents, as hearsay. Mot. Exclude 13–15. Ms. Broadhurst’s testimony relative to the Sage Publications Website Printout (Exhibit 1012) and Sage Publications Webpages (Exhibit 1005, 1, 13) is not excluded as it relates to an attempt to lay a business records foundation. *See* Ex. 1014 ¶¶ 1–5. As discussed above, the testimony is, nonetheless, insufficient to lay a proper foundation for admission of Exhibits 1012 and 1005, pages 1 and 13.

Paragraphs 6 and 7 of Exhibit 1014 are part of Ms. Broadhurst’s testimony in these proceedings and are not an out of court statement, because they are made in these proceedings, i.e., in court. *See* Fed. R. Evid.

801(c). As such the testimony is not hearsay. Nor do we agree that the testimony is not based on her personal knowledge. *See* Mot. Exclude 13. The Broadhurst Affidavit includes a copy of Fry as Exhibit 1002,⁴ which she testifies is a true and correct copy. Ex. 1014 ¶ 2. Ms. Broadhurst states her position with iMechE and testifies on behalf of iMechE providing her personal knowledge of the publishing records and practices of iMechE. *Id.* ¶¶ 3–4. Based on Ms. Broadhurst’s position as “Library and Archive Assistant” for iMechE, she testifies on behalf of iMechE and verifies the date of publication of Fry, i.e., when it was “made available” as of January 1995. *Id.* ¶ 6.

AVS’s argument is misplaced, that “to the extent that Ms. Broadhurst is argued to be relying on other records that are not in evidence, the law is clear—hearsay testimony about supposed ‘records’ that are not in evidence is inadmissible.” Mot. Exclude 14. The records which Ms. Broadhurst might have considered in making her statement need not be admissible evidence or even in the record of this proceeding. What matters is the statement of Ms. Broadhurst, in her official capacity relating to archived information of iMechE, that Fry was made available the public in January 1995.

Our rules provide for testimony by way of affidavit. 37 C.F.R. § 42.53(a). Ms. Broadhurst’s testimony was produced following the cited procedure. Cross examination of that testimony is routine discovery and may be taken by deposition. 37 C.F.R. § 42.51(b)(1)(ii); 37 C.F.R. § 42.53(b)(2). Cross examination of supplemental evidence, like the

⁴ The copy of Fry includes the Sage Publication Webpages, pages 1 and 13 of Exhibit 1005.

Broadhurst Affidavit, is governed by 37 C.F.R. § 42.53(d)(2). AVS elected not to cross examine Ms. Broadhurst, as it could have. Had it done so, AVS might have developed specific deficiencies in the testimony. On this record, and under our procedures, we find the testimony admissible.

2. Summary of AVS's Motion to Exclude Sage Publications Webpages (Ex. 1005, pages 1, 13), Sage Publications Website Printout (Ex. 1012), and Broadhurst Affidavit (Ex. 1014)

We grant AVS's Motion to Exclude as to Exhibit 1012 (the Sage Publications Website Printout) and Exhibit 1005, pages 1, 13 (the Sage Publications Webpages) on the grounds that they contain hearsay.

For reasons stated above, we deny AVS's Motion to Exclude Exhibit 1014 (Broadhurst Affidavit).

*3. Fry Award (Ex. 1011)
and Fry Declaration (Ex. 1013)*

AVS moves to exclude both the Fry Declaration (Exhibit 1013) and the Fry Award (Exhibit 1011). Mot. Exclude 3–4. AVS argues the Fry Award is irrelevant because it shows the same date as the Fry article, 1995, and no more. *Id.* at 10. Further, AVS argues the F1 designation in the Fry award, if offered for the truth of the designation, is hearsay. *Id.* AVS argues that Mr. Fry's testimony that the Fry article was published in January 1995 is inadmissible as the Fry Declaration fails to establish he has personal knowledge of the publication date. *Id.* at 12.

Toyota argues the Fry Award is used only to refresh Mr. Fry's recollection. Opp. Mot. Exclude 14. That is incorrect. To the contrary, Toyota does offer the Fry award to prove that the Fry article has a F1 designation. *Id.* With regard to the Fry Declaration, Toyota argues that AVS has not provided a specific objection to the Fry Declaration and is

arguing only evidentiary weight. *Id.* at 13. Toyota likewise is incorrect. AVS argues the Fry Declaration is inadmissible based on either lack of personal knowledge or inadmissible hearsay. Mot. to Exclude 12–13.

The Fry Award states only that Fry was “Published in the Proceedings Part F1 1995.” Ex. 1011. Toyota’s purpose in offering the Fry Award is to prove that Fry was published in January 1995, by way of the F1 designation in the award. Opp. Mot. Exclude 14. The F1 designation is explained by the Broadhurst Affidavit as indicating a January publication date (Ex. 1014 ¶ 7). Thus, the Fry Award is an out of court statement on the F1 designation to prove that the F1 designation is true. We determine that, for that purpose, the Fry Award is inadmissible.

The Fry Declaration alleges that Mr. Fry authored the Fry article, which appeared in the “Proceeding of the Institution of Mech. Engineers, *Part F*,” a copy of which accompanies the Fry Declaration. Ex. 1013 ¶ 2 (emphasis added). The Fry Declaration then identifies the Fry Award, which accompanies the declaration. *Id.* at ¶ 3. In addition to the Fry article and Fry Award, Mr. Fry was “aware” of the Sage Publications Website Printout (Exhibit 1012), which also accompanies his declaration and, with his memory refreshed, testified that the “Fry paper was published in January 1995.” *Id.* at ¶¶ 4–5.

Mr. Fry’s testimony related to the publication date of Fry as January 1995 (Exhibit 1013 ¶ 5) is based on a review of three documents: Fry; the Fry Award; and the Sage Publications Website Printout (Exhibit 1012). Ex. 1013 ¶ 5. With a refreshed recollection based on that review, Mr. Fry testifies the publication date of Fry was January 1995. *Id.* Mr. Fry has personal knowledge of Fry and the Fry Award, neither of which say

anything about publication of Fry in January. The only document which states January 1995 is the Sage Publications Website Printout, a document about which Mr. Fry has no personal knowledge.

The Fry Declaration is given minimal weight concerning the publication date of Fry. There are almost twenty years between 1995 and February 7, 2014, when Mr. Fry signed the Fry Declaration. Mr. Fry does not provide any explanation of why he would have any personal knowledge of the publication date or that he had any involvement with publication of the article by iMechE. The only document he reviewed to refresh his memory that had a January 1995 date was Exhibit 1012, which we have excluded from evidence. Further, Mr. Fry does not testify to having any knowledge, information, or understanding about the creation of Exhibit 1012 or the entity that did create it, Sage Publications.

*4. Summary of AVS's Motion to Exclude
Exhibit 1011 (Fry Award) and Exhibit 1013 (Fry Declaration)*

For the reasons stated above we *grant* AVS's Motion to Exclude Exhibit 1011 (the Fry Award).

The Fry Declaration is not excluded but its evidentiary value is minimal.

B. Whether or Not Fry is Prior Art

As was discussed above in connection with AVS's Motion to Exclude, we have not excluded Ms. Broadhurst's testimony, on behalf of iMechE, that Fry was made available to the public in January 1995. *See* Ex. 1014 ¶ 6. We have also considered AVS's evidence which it argues show it is unlikely that Fry was available publicly in January 1995. As discussed below, based on the Broadhurst Affidavit, Toyota has shown by a

preponderance of the evidence that Fry was available publicly prior to June 7, 1995.

1. Effective Filing Date of '788 Patent

On the face of the '788 patent a series of prior continuation-in-part applications are identified as related U.S. applications, the earliest of which has a filing date of June 7, 1995. Ex. 1001, at [60]. Both Toyota and AVS have conducted this proceeding based on the June 7, 1995 date being the earliest effective filing date of the '788 patent. *See, e.g.*, Joint Statement 1. For purposes of this proceeding, we regard the effective filing date of the '788 patent as June 7, 1995. In order for Fry to be considered prior art as alleged by Toyota, it must have been “available to the public before the effective filing date” of the '788 patent. 35 U.S.C. § 102(a)(1). Thus, Toyota has the burden of proving by a preponderance of the evidence Fry was available publicly prior to June 7, 1995.

2. Analysis

AVS contends Fry was not available publicly prior to June 7, 1995. PO Resp. 6–14. AVS argues Fry’s 1995 copyright date does not indicate any specific date prior to June 7, 1995, such that it could be considered as prior art. *Id.* at 9. Toyota acknowledges that Fry itself does not indicate publication on any particular date or in any particular month in 1995.⁵ Toyota therefor relies on its supplemental evidence (Exhibits 1011–1014, discussed in II.B. above) to prove Fry was available publicly prior to June 7, 1995. Reply Br. 3.

⁵ Toyota admits it could not locate a recipient-stamped date of Fry prior to June 7, 1995. Reply Br. 3, n.2.

Toyota relies on the testimony of Ms. Broadhurst, as a librarian, regarding library practices to testify to the approximate date of publication, based on those practices. Reply Br. 4. Further, Toyota contends Ms. Broadhurst “is testifying is merely the content and meaning of the records in question, of which ‘the witness’s own testimony’ is sufficient to establish personal knowledge.” Opp. Mot. Exclude 12 (citing Fed. R. Evid. 602).

AVS argues that Fry was not accepted for publication until December 22, 1994, and publication by “January 1, 1995—less than ten days later (as asserted by Toyota)” is highly unlikely. PO Resp. 11 (citing Ex. 1005, 13). We excluded page 13 of Exhibit 1005. The evidence from Ms. Broadhurst, which we find admissible is that Fry was published “as of January 1995.” Ex. 1014 ¶ 6. The Broadhurst Affidavit also states Fry was “received” on November 25, 1994. *Id.* We have no evidence of record about what “received” or “accepted for publication” mean or the timing of those events relative to publication. Whatever those events signify in the process of publication by iMechE, there are somewhere between thirty-five and sixty-five days, not less than ten, between the events and publication. Therefore, AVS’s argument is not supported on the record and is unpersuasive.

Exhibits 2014 through 2026 were submitted by the parties and admitted into evidence. Exhibits 2014 through 2026 are recipient date-stamped copies of the Fry reference (or cover pages thereof) obtained by counsel for Toyota from libraries in the United States and abroad which that the journal in which Fry appeared (published in England) was first received in September 1995 by organizations in England. *See* Exs. 2023, 2025, 2026. AVS argues the date stamps support its position that Fry was not available publicly prior to September 7, 1995, the earliest date stamp for the copies of

Fry . Mot. Exclude 6–7. The journal in which the Fry article appeared arrived at libraries in the United States between September 19, 1995 and October 10, 1995. *See* Exs. 2014–2022. Toyota could not find a copy with any earlier date. Reply Br. 3, n.2. Exhibit 2025 is a date stamped copy of the Fry article from The Institution of Mechanical Engineers, the publishers of the journal in which the Fry article appeared. *See* Ex. 1005. Exhibit 2025 is dated September 7, 1995.

The date stamped copies of Fry do not relate directly to the publication date for Fry. The most that can be found from the date stamped copies is that Fry was available publicly prior to September 1995. This is not inconsistent with Ms. Broadhurst’s testimony. AVS raises a supposed credibility issue by pointing to a date stamped copy of Fry received by iMechE in September of 1995, which AVS argues is inconsistent with Ms. Broadhurst’s testimony that Fry was available in January 1995. Mot. Exclude 14 (citing Ex. 1014 ¶ 6, Ex. 2025). This argument is not persuasive given that iMechE was the publisher of Fry and would have had a copy without the need to receive one from through other means.

Based on the Broadhurst Affidavit that Fry was “made available to the public as of January 1995,” Toyota has proven by a preponderance of the evidence that Fry was available publicly prior to June 7, 1995, and thus constitutes prior art to the ’788 patent.

C. Petitioner’s Motion to Strike

Toyota filed a Motion to Strike and Expunge AVS’s proposed Exhibits 2035–2041 filed with Patent Owner’s Reply in Support of Motion to Exclude (“Mot. Strike,” Paper 66). AVS seeks to have Exhibit 2035 to show that the “Jan 1, 1995” on the Sage Publications Website Printout

(Exhibit 1012) was assigned by Sage, not iMechE. Opp. Mot. Strike 5 (Paper 67). Exhibits 2036–2041 relate to publications *other than Fry* listed in Exhibit 1012.

Exhibits 2035–2041 are all offered on issues relating to Exhibit 1012. Because we have granted AVS’s Motion to Exclude, as it relates to Exhibit 1012, we need not address Toyota’s Motion to Strike. The exhibits in question are irrelevant to any pending issue and the Motion to Strike is denied as moot.

III. ORDER

For the reasons given, it is

ORDERED that Patent Owner’s Second Motion to Amend Claims, seeking to cancel claims 1, 3, 4, 6, 7, 8, 11, 15, 16, and 18 of the ’788 patent is *granted*;

FURTHER ORDERED that Patent Owner’s Motion to Exclude is *granted* as to Exhibits 1011 and 1012, and pages 1 and 13 of Exhibit 1005;

FURTHER ORDERED, Petitioner’s Motion to Strike is *denied*;

FURTHER ORDERED that claim 9 of U.S. Patent No. 8,036,788 has been shown by a preponderance of the evidence to be unpatentable; and

FURTHER ORDERED that, because this is a final written decision, parties to the proceeding seeking judicial review of the decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

IPR2013-00417
Patent 8,036,788 B2

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