

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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AVOCENT HUNTSVILLE CORPORATION and  
LIEBERT CORPORATION,  
Petitioner,

v.

CYBER SWITCHING PATENTS, LLC,  
Patent Owner.

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Case IPR2015-00690  
Case IPR2015-00725<sup>1</sup>  
Patent 7,550,870 B2

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Before MICHAEL R. ZECHER, GLENN J. PERRY, and  
NEIL T. POWELL, *Administrative Patent Judges*.

PERRY, *Administrative Patent Judge*.

DECISION ON MOTIONS

Denying Avocent's Motion to Submit Supplemental Information

Denying Avocent's Motion to Compel Testimony

37 C.F.R. § 42.123(a); 37 C.F.R. § 42.52(a)

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<sup>1</sup> This Decision applies to both captioned *inter partes* reviews. We exercise our discretion to issue one Decision to be filed in each case. The parties are not authorized to use this style heading for any subsequent papers. For convenience, only the Motions filed in IPR2015-00690 are discussed.

## I. INTRODUCTION

On February 4, 2015, Avocent Huntsville Corporation and Liebert Corporation (“Avocent”) filed a Petition for *inter partes* review of the ’870 patent. Paper 1. Patent Owner Cyber Switching Patents, LLC (“Cyber”) filed a waiver of Preliminary Response on May 20, 2015 (Paper 14, “Waiver”). We instituted trial on August 11, 2015 (Paper 16) including challenges based on the Sentry reference (Ex. 1006). Cyber objected to Avocent’s Exhibits 1006, 1008, 1011, and 1013 as inadmissible hearsay, and it objected to Avocent’s Exhibit 1017 as inadmissible under Federal Rule of Evidence 702. Paper 19, “Objection.” Avocent moved to file supplemental information by submitting the Declaration of Office Manager at Internet Archive relating to Sentry reference (Ex. 1006), Rabbit 2000 (Ex. 1008), and PIC17C75X (Ex. 1011). Paper 23, “Mot. SI.” Avocent also moved to compel discovery from a third party – Server Technology, Inc. (“ServerTech”), the author and custodian of the Sentry reference. Paper 26, “Mot. Compel.” Cyber opposes Avocent’s Motion to Submit Supplemental Information. Paper 27 (“Opp. SI”).

For reasons stated below, Avocent’s Motion to Submit Supplemental Information is *denied* and Avocent’s Motion to Compel Testimony is *denied*.

## II. DISCUSSION

### A. Legal Principles

#### a. What Constitutes a Printed Publication

Whether a document qualifies as a prior art printed publication is a legal conclusion based on underlying factual determinations. *SRI Int’l, Inc. v.*

*Internet Sec. Sys., Inc.*, 511 F.3d 1186, 1192 (Fed.Cir.2008) (citation omitted). “Public accessibility” has been called the touchstone in determining whether a reference constitutes a prior art printed publication. *Id.* at 1194. A reference is publicly accessible upon a satisfactory showing that it has been disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence, can locate it. *Bruckelmyer v. Ground Heaters, Inc.*, 445 F.3d 1374, 1378 (Fed. Cir.2006).; *see also In re Cronyn*, 890 F.2d 1158, 1160 (Fed. Cir. 1989) (“The statutory phrase ‘printed publication’ has been interpreted to mean that before the critical date the reference must have been sufficiently accessible to the public interested in the art; dissemination and public accessibility are the keys to the legal determination whether a prior art reference was ‘published.’”) (quoting *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1568 (Fed.Cir.1988)).

In *In re Klopfenstein*, 380 F.3d 1345 (Fed. Cir. 2004), our reviewing court rejected an argument that “distribution and/or indexing” are the key components to a “printed publication” inquiry because that argument “fails to properly reflect what our [Federal Circuit] precedent stands for,” explaining that “printed publication” means reasonably accessible through generally available media that serves to disseminate information. *Id.* at 1348. A printed publication need not be easily searchable after publication if it was sufficiently disseminated at the time of its publication. *Suffolk Techs., LLC v. AOL Inc.*, 752 F.3d 1358, 1364 (Fed. Cir. 2014).<sup>2</sup>

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<sup>2</sup> As explained in *Klopfenstein*, the word “disseminate” is not used in its literal sense, i.e. “make widespread” or “to foster general knowledge of” and does not require distribution of reproductions or photocopies. 380 F.2d. at 1352, n. 3.

## *2. Showing of Publication*

In order to institute trial, we require a petitioner to provide a showing of publication of an asserted reference only to the extent necessary to demonstrate a reasonable likelihood of prevailing on its patentability challenge(s). *See 35 U.S.C. § 314(a).* When a petitioner does not present sufficient or credible evidence establishing a key aspect of public availability in support of its Petition, we have denied institution. *See id.* at 5–6 (no evidence thesis was indexed, cataloged, and shelved); *Actavis, Inc. v. Research Corp. Techs., Inc.*, Case IPR2014-01126, slip op. at 10–13 (PTAB Jan. 9, 2015) (Paper 21) (same); *Cisco Systems, Inc. v. Constellation Techs., LLC*, Case IPR2014-01085, slip op. at 7–9 (PTAB Jan. 9, 2015) (Paper 11) (noting “naked assertion,” unsupported by record, that reference was published).

The fact that we institute an *inter partes* review on a not fully developed record is not dispositive of the ultimate legal conclusion as to whether a particular reference document qualifies as a publication reference. That legal conclusion is based on a preponderance of the fully developed record evidence.

## *3. Supplemental Information*

Section 42.123 of Title 37 of the Code of Federal Regulations governs the filing of supplemental information after a decision to institute an *inter partes* review.

## *4. Objections to Evidence*

Section 42.64 of Title 37 of the Code of Federal Regulations governs objections to evidence and the appropriate follow up. For evidence other than a deposition, it provides a process by which an objection to evidence

may be obviated. This regulatory provision states, in relevant part (emphasis added):

(2) Supplemental evidence. The party relying on evidence to which an objection is timely served may respond to the objection by *serving supplemental evidence* within ten business days of service of the objection.

#### *5. Compelling Testimony and Production*

Section 42.52 of Title 37 of the Code of Federal Regulations controls compelling testimony and production.

#### *B. Cyber's Objections to Evidence*

Pursuant to 37 C.F.R. § 42.64, a party objecting to evidence serves those objections on the party proffering and relying on that evidence. Per a recent rule change, the objecting party also must file those objections with the Board. In these proceedings, Cyber has done so. Thus, noting an objection triggers the ability of the party relying on the objected to evidence to serve supplemental evidence on the objecting party in an effort to obviate the objection. In the event the objecting party is not satisfied that the supplemental evidence overcomes the objection, the objecting party may preserve its objection by filing a motion to exclude the objected to evidence.

Paper 19 recites service of Cyber's objections to Exhibits 1006 (Sentry), 1008 (Rabbit 2000), 1011 (PIC17C75X), and 1017 (Denning Declaration) as of August 25, 2015. The record reflects (*infra.*) that Avocent served supplemental evidence on Cyber following objections filed in Paper 19. Supplemental evidence, served in response to an evidentiary objection, is offered solely to support admissibility of the originally filed evidence and to defeat a motion to exclude that evidence, and not to support any argument

on the merits (i.e., regarding the patentability or unpatentability of a claim). To the extent that Avocent’s Motion to Submit Supplemental Information (Paper 23) is offered solely to support the admissibility of originally filed evidence, now objected to by Cyber, that evidence should have been served on Cyber within the time limits set forth in 37 C.F.R. § 42.64.

*C. Avocent’s Motion to Submit Supplemental Information*

Avocent’s Motion to Submit Supplemental Information (Paper 23) was made within one month of institution and is relevant to at least claims being challenged by the Sentry reference. This Motion is not couched as a discovery request, so we presume that the information sought to be submitted as “supplemental information” is already in the possession of Avocent. Avocent seeks permission to file the following information: (1) Declaration of Office Manager at Internet Archive, attesting to the authenticity of publicly available webpages catalogued by the Internet Archive; and (2) the publicly available webpages correspond Sentry (Ex. 1006), Rabbit 2000 (Ex. 1008), and PIC17C75X (Ex. 1011). Mot. SI 3.

Avocent alleges that along with its supplemental evidence (timely served but not filed) on Cyber, the Declaration establishes online accessibility and prior art status of Sentry at least as early as October 20, 2001; Rabbit 2000 at least as early as December 14, 2000; and PIC17C75X at least as early as March 15, 2003. Mot. SI 2–3.

These items of evidence, now described as “supplemental information” address Cyber’s evidentiary objections (Paper 19) and should have been served on Cyber in accordance with 37 C.F.R. § 42.64(b)(2). To the extent supplemental evidence was served on Cyber in accordance with

37 C.F.R. § 42.64 (b)(2), such evidence may be filed as exhibits in the proceeding. This is not an authorization for discovery.

*D. Avocent's Motion to Compel Testimony*

Avocent moves to compel testimony of ServerTech. Mot. Compell. 1. Avocent justifies its request by stating that the evidence rebuts Cyber's evidentiary objections. *Id.* at 3. This motion is *denied*.

Avocent made the decision to file a Petition relying on Sentry. It had ample time to consider its strategy prior to filing the Petition and to consider any problems of proof related to the Sentry reference on which it chose to rely. Now, after evidentiary objections, it argues that the requested compelled discovery is in the interest of justice. Avocent notes that record information supports a likelihood that ServerTech has information regarding publication date of the Sentry reference. Mot. Compell. 2. Avocent indicates that ServerTech has indicated a willingness to cooperate with a subpoena. *Id.* at 4.

However, Avocent has not explained adequately why it could not have obtained the requested evidence (or other evidence accomplishing its goal) prior to filing its Petition to shore up any problems of proof regarding the Sentry reference that had the potential to impact the trial. Absent such an explanation, Avocent has not carried its burden in establishing that the requested compelled discovery is in the interest of justice.

An America Invents Act *inter partes* review regime is different from the District Court regime which relies upon notice pleading and more complete discovery afforded by the Federal Rules of Civil Procedure permitting a Plaintiff to prove its case after pleading it based on reasonable certainty.

The parties are reminded that the Board instituted trial relying on Sentry based on evidence then of record that Sentry qualified as a publication reference. Cyber has not yet come forward with evidence to the contrary. It is welcome to do so in its formal response to the Petition.

### III. ORDER

Accordingly, it is:

ORDERED that Avocent's Motion to Submit Supplemental Information is DENIED;

FURTHER ORDERED that, to the extent items of evidence were served on Cyber to cure its evidentiary objections (Paper 19), such items may be filed as exhibits in this proceeding in accordance with 37 C.F.R. § 42.64(b)(2); and

FURTHER ORDERED that Avocent's Motion to Compel Testimony is DENIED.

Case IPR2015-00690; IPR2015-00725  
Patent 7,550,870

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