

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TRW AUTOMOTIVE U.S. LLC,
Petitioner,

v.

MAGNA ELECTRONICS INC.,
Patent Owner.

Case IPR2014-01347
Patent 8,508,593 B1

Before JAMES P. CALVE, MICHAEL J. FITZPATRICK, and
BARRY L. GROSSMAN, *Administrative Patent Judges*.

Opinion for the Board filed by *Administrative Patent Judge* FITZPATRICK.

Opinion Dissenting filed by *Administrative Patent Judge*, CALVE.

FITZPATRICK, *Administrative Patent Judge*.

FINAL WRITTEN DECISION
35 U.S.C. § 318; 37 C.F.R. § 42.73

I. INTRODUCTION

Petitioner TRW Automotive U.S. LLC (“TRW”) filed a Petition to institute an *inter partes* review of claims 1–3, 6–12, 16, 18–31, 33–39, 76–80, and 82–85 of U.S. Patent No. 8,508,593 B1 (Ex. 1002, “the ’593 patent”). Paper 1 (“Pet.”). Patent Owner Magna Electronics Inc. (“Magna”) filed a Preliminary Response. Paper 6 (“Prelim. Resp.”).

In a February 26, 2015, Decision, we instituted trial on all challenged claims as follows:

- (1) claims 1–3, 6–12, 16, 18–21, 23–31, 33–36, 38, 76–80, and 82–85 under 35 U.S.C. § 103(a)¹ as obvious over Campbell (Ex. 1004²), Goldbeck (Ex. 1005³), and Kuehnle (Ex. 1006⁴); and
- (2) claims 22, 37, and 39 under 35 U.S.C. § 103(a) as obvious over Campbell, Goldbeck, Kuehnle, and Yanagawa (Ex. 1007⁵).

Paper 7 (“Inst. Dec.”).

After institution, Magna filed a Patent Owner Response (Paper 9 (“PO

¹ The Leahy-Smith America Invents Act (“AIA”), Pub. L. No. 112-29, took effect on March 18, 2013. Because the application from which the ’593 patent issued was filed before that date, our citations to 35 U.S.C. § 103 are to its pre-AIA version.

² PCT Publication WO 99/43242 A1 (Sept. 2, 1999).

³ In its Petition, TRW identified Exhibit 1005, via a footnote, as follows: “Goldbeck *et al.*, ‘Lane detection and tracking by video sensors,’ Intelligent Transportation Systems, 5-8 Oct. 1999, pp. 74-79.; prior art under § 102(b).” Pet. 2 n.4.

⁴ PCT Publication WO 01/77763 A1 (Oct. 18, 2001).

⁵ Japanese Patent Application Publication No. JP S62-131837 (June 15, 1987).

Resp.”)), and TRW filed a Reply thereto. Paper 13 (“Reply to PO Resp.”).

Also before us is a Magna Motion to Exclude (Paper 16, “Mot.”), TRW’s Opposition thereto (Paper 19, “Opp.”), and Magna’s Reply thereto (Paper 21, “Reply to Opp.”).

An oral hearing was conducted on October 7, 2015. A transcript of the argument is entered in the record. *See* Paper 24.

We have authority under 35 U.S.C. § 6(c). This Final Written Decision is entered pursuant to 35 U.S.C. § 318(a).

II. ANALYSIS

Magna moves to exclude Exhibits 1005, 1012, and 1013. Mot. 1.

Both of TRW’s grounds of unpatentability rely on teachings from Exhibit 1005 (Goldbeck). Thus, its admissibility is critical to TRW’s patentability challenges. For the reasons explained below, we exclude Goldbeck, which disposes of or moots all other issues in this *inter partes* review.

A. Relevant Procedural History

Exhibit 1005 (Goldbeck) was submitted by TRW with its Petition and, thus, “during a preliminary proceeding” as that phrase is used in our Rule governing objections and motions to exclude. *See* 37 C.F.R. § 42.64(b)(1); *see also* 37 C.F.R. § 42.2 (“*Preliminary Proceeding* begins with the filing of a petition for instituting a trial and ends with a written decision as to whether a trial will be instituted.”).

Magna timely served objections to the admissibility of Exhibit 1005 on March 12, 2015, pursuant to the then-governing Rule. Ex. 2006⁶; *compare* 37 C.F.R. § 42.64(b)(1) (2012) (“Any objection to evidence submitted during a preliminary proceeding must be *served* within ten business days of the institution of the trial.”) (emphasis added), *with* 37 C.F.R. § 42.64(b)(1) (2015) (“Any objection to evidence submitted during a preliminary proceeding must be *filed* within ten business days of the institution of the trial.”) (emphasis added).

Our Rules provide a mechanism for parties to respond to evidentiary objections with supplemental evidence. 37 C.F.R. § 42.64(b)(2) (“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.”). TRW did not serve any supplemental evidence in response to Magna’s objections to Exhibit 1005. This fact is not in dispute.

In addition to objecting to the admissibility of Exhibit 1005, during trial Magna challenged the sufficiency of TRW’s evidence that Exhibit 1005 constitutes a prior art printed publication. *See* PO Resp. 48–50; *see also* 35 U.S.C. § 311(b) (“A petitioner in an inter partes review may request to cancel as unpatentable 1 or more claims of a patent . . . only on the basis of prior art consisting of patents or printed publications.”).

TRW responded to Magna’s sufficiency of the evidence arguments by presenting counter-arguments that rely on two additional exhibits, which had not

⁶ Magna subsequently filed a copy of the previously-served objections when it filed its Motion to Exclude.

been previously filed. *See* Reply to PO Resp. 23–24 (citing Ex. 1012⁷; Ex. 1013⁸). First, TRW argued that “in a related ITC case . . . the same Goldbeck reference was found to qualify as prior art under §102(b).” Reply to PO Resp. 23 (citing Ex. 1012). Second, TRW argued that Exhibit 1005 references “IEEE, the copyright date of 1999, and the ISBN . . . (0-7803-4975-X)[,] which links to the same Goldbeck article provided through the IEEE website indicating that Goldbeck was available as of October 5, 1999.” *Id.* at 24 (citing Ex. 1013, at 001).

B. Discussion

Magna’s objections to Exhibit 1005 are based on Federal Rules of Evidence (“FRE”) 901 (authentication), Rules 801 and 802 (hearsay), and Rules 401 and 402 (relevance). Ex. 2006, 1–2; *see also* Mot. 3. For the reasons discussed below, Exhibit 1005 is excluded in its entirety under FRE 901 for lack of authentication.

With respect to lack of authentication, Magna objected as follows:

On its face, Goldbeck is a document listing two people affiliated with Robert Bosch GmbH (presumably as authors), bearing a 1999 copyright date. (Ex. 1005, p. 1005-001.) The Petition includes a single footnote referencing something titled “Intelligent Transportation Systems” in connection with the Goldbeck document, referencing a date range of “5–8 Oct. 1999,” and baldly alleging that the Goldbeck document is 35 U.S.C. § 102(b) prior art. (Paper No. 1, p. 2 n.4.) But neither

⁷ Exhibit 1012 is captioned as an Initial Determination from ITC Case No. 337-TA-907.

⁸ Exhibit 1013 appears to be a print out of from the following Internet address: http://ieeexplore.ieee.org/xpl/freeabs_all.jsp?arnumber=821030&abstractAccess=no&userType=inst.

the phrase “intelligent transportation systems” nor the date range of October 5–8, 1999, appear anywhere in Goldbeck.

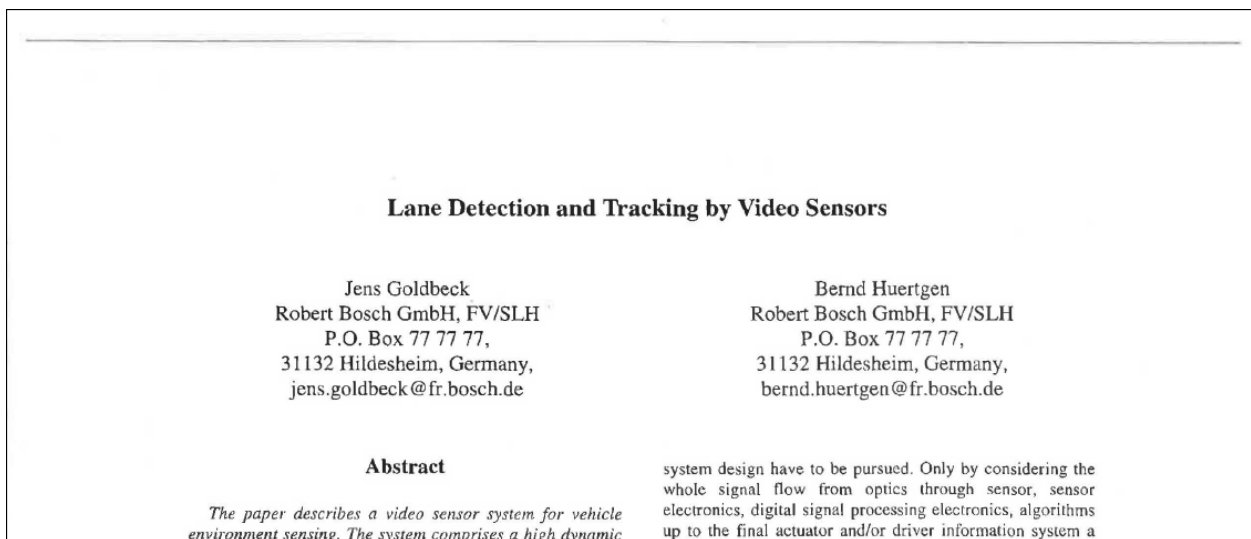
Ex. 2006, 3; *see also* Mot. 3.

Rule 901(a) states: “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a). Thus, we first look to what TRW claimed Exhibit 1005 to be.

In that regard, the only identifying information provided by TRW is a footnote in its Petition. *See* Pet. 2 n.4. The footnote offers a purported bibliographic reference for Exhibit 1005 as follows: “Goldbeck et al., ‘*Lane detection and tracking by video sensors*,’ *Intelligent Transportation Systems*, 5-8 Oct. 1999, pp.74-79.; prior art under § 102(b).” *Id.* Thus, TRW claimed that Exhibit 1005 was published during October 5–8 of 1999 in something called *Intelligent Transportation Systems*. *Id.* TRW did not cite or otherwise provide any evidence for this claim. *Id.*⁹

⁹ The dissent asserts that TRW’s declarant Homayoon Kazerooni, Ph.D., “testifies” that Goldbeck was published in 1999 in *Intelligent Transportation Systems*. Dissent at 8 (citing Ex. 1008 ¶ 5 n.2). The dissent-cited content, however, is not affirmative testimony of Dr. Kazerooni; it is a footnote consisting of a bibliographic reference, which is identical to footnote 4 of the Petition. *Compare* Ex. 1008 ¶ 5 n.2, *with* Pet. 2 n.4. Even assuming that Dr. Kazerooni, via footnote 2 of his declaration, is implicitly testifying to the accuracy of the bibliographic reference, it would not be persuasive because Dr. Kazerooni does not cite any evidence, or first-hand knowledge, to support any such testimony.

In its objections served March 12, 2015, Magna noted correctly that “neither the phrase ‘intelligent transportation systems’ nor the date range of October 5–8, 1999, appear[s] anywhere in Goldbeck.” Ex. 2006, 3; *see also* Mot. 5 (noting the same); Ex. 1005 (lacking the quoted phrase and asserted date range). This fact is not in dispute. For perspective, we reproduce below a top portion of the first page of Exhibit 1005.



In the reproduction shown above, only the title and authors of the article are provided. Magna’s Motion seeks to exclude Exhibit 1005 because, among other things, TRW failed to produce evidence to show Goldbeck is in fact an October 5–8, 1999, printed publication from *Intelligent Transportation Systems*. Mot. 4.

In opposing the Motion to Exclude, TRW does not identify any evidence to support a finding that Exhibit 1005 is—as TRW claims—an article published

October 5–8, 1999, in *Intelligent Transportation Systems*.¹⁰ Instead, TRW argues that Exhibit 1005 is self-authenticating “because it is an article from an IEEE periodical.” Opp. 4. This is a circular argument. TRW has not cited any evidence to support the underlying premise on which its argument relies, i.e., that the Goldbeck article is from any IEEE periodical, let alone one called *Intelligent Transportation Systems* that purportedly was published October 5–8, 1999, as asserted in the Petition. We also note that it would be unusual for a journal or periodical to be “published” over the course of a four day period, as asserted by TRW.

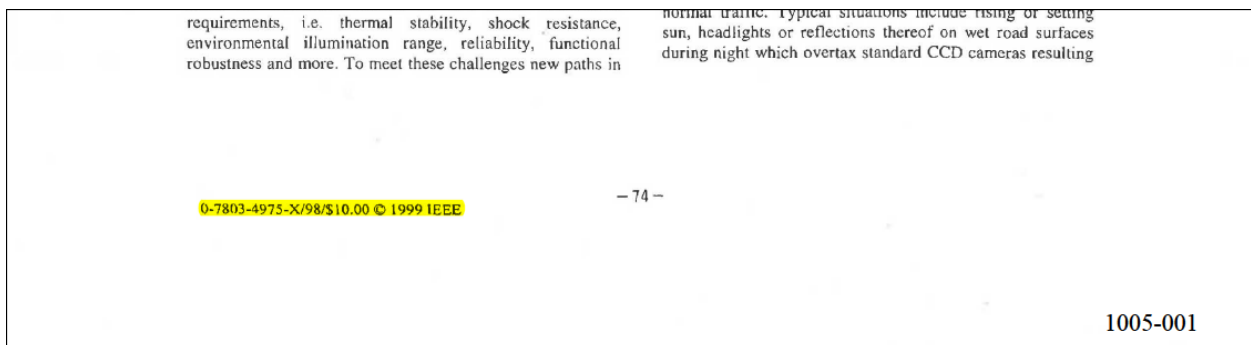
TRW points out that Exhibit 1005 bears a copyright notice from “IEEE.” Opp. 4; *see also* Ex. 1005 (“©1999 IEEE.”). Although the copyright notice is probative that IEEE owns a copyright to the article, it is not probative that the article was ever published by IEEE or anyone else. *See, e.g., Stryker Corp. v. Karl Storz Endoscopy-America, Inc.*, Case IPR2015-00677 (PTAB Sept. 2, 2015) (Paper 15) (citing 17 U.S.C. § 401 and explaining why a copyright notice does not establish when a document was publicly accessible under patent law). For the same reason, TRW’s reliance on *Liberty Mutual Ins. Co. v. Progressive Casualty Ins. Co.*, CBM2012-00010, Paper 59 (PTAB Feb. 24, 2014) (“*Liberty Mutual*”) for

¹⁰ Because Exhibits 1012 and 1013 were not filed timely as supplemental evidence in response to Magna’s objections to the admissibility of Exhibit 1005, we do not consider them in deciding TRW’s Motion to Exclude. *See* 37 C.F.R. § 42.64(b)(2). In any event, TRW does not seek consideration of Exhibits 1012 and 1013 in opposing the Motion to Exclude, at least with respect to authentication. *See* Opp. 2 (“Exhibits 1012 and 1013 were not, and are not, used to address Magna’s authentication objections.”).

its application of FRE 902(6) is misplaced.¹¹ TRW draws our attention to *Liberty Mutual's* handling of an exhibit 1025 in that proceeding. *See* Opp. 4 (citing *Liberty Mutual* at 37). That exhibit, however, stated on its face: “Published in: *Proceedings of ACM SIGMETRICS 2001/Performance 2001*, Cambridge, MA, June 2001, pages 245-256.” *See Liberty Mutual*, CBM2012-00010, Ex. 1025. In contrast, Exhibit 1005 does not bear any statement of publication, let alone an identification of the medium in which it allegedly was published.

Lastly, TRW argues that Exhibit 1005 “indicates an International Serial Book Number (ISBN) ‘0-7803-4975-X’,” which “provide[s] that Goldbeck is an IEEE publication from an IEEE periodical.” Opp. 4 (quoting Ex. 1005). But, TRW utterly fails to support this argument with evidence.

We reproduce below a bottom portion of the first page of Exhibit 1005, which includes the indication (highlighting added) on which TRW’s argument is based.



¹¹ FRE 902(6) provides that “[p]rinted material purporting to be a newspaper or periodical” is self-authenticating.

As shown, the first page of the document states: “0-7803-4975-X/98/\$10.00 © 1999 IEEE.” Ex. 1005, 1. TRW does not produce evidence showing that “0-7803-4975-X” is an ISBN, what an ISBN is, what an ISBN signifies, how an ISBN is assigned, who assigns it, or when and under what circumstances an ISBN is stamped onto something.¹² We cannot accept, as a substitute for evidence, the conclusory assertion by Petitioner’s counsel that the presence of “0-7803-4975-X,” either alone or in conjunction with “©1999 IEEE,” on a document tends to prove that the document is an IEEE *publication* from an IEEE *periodical*.

For the same reason, TRW’s reliance on FRE 901(b)(4) is misplaced. TRW notes that a document may be authenticated under that Rule “based on ‘[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.’” Opp. 5 (quoting FRE 901(b)(4)). TRW directs us to the purported ISBN as just such a distinctive characteristic, and argues that it “link[s] to the article via IEEE’s website” and that the article “is immediately accessible to the public through IEEE’s on-line library system.” Opp. 5 (no citations provided). This is attorney argument, not supported with evidence. Furthermore, even if this attorney

¹² In fact, the Dissent would find that the “0-7803-4975-X” (or an eight digit subset of the foregoing) constitutes an International Standard *Serial* Number (ISSN) and, thus, not an ISBN as asserted by TRW. But, TRW has similarly not produced evidence showing that “0-7803-4975-X” contains an ISSN, what an ISSN is, what an ISSN signifies, how an ISSN is assigned, who assigns it, or when and under what circumstances an ISSN is stamped onto something.

argument were established as fact, it would merely prove that the article is published as of today, not as of any particular past date.

The case law cited by the Dissent also does not support admitting Exhibit 1005 for either what the Petition specifically claimed it to be (i.e., an article published October 5–8, 1999 in *Intelligent Transportation Systems*) or what TRW generally claims it self-authenticates as (i.e., an article published sometime in 1999 in an unidentified IEEE periodical). *See* Dissent at 5–6 (citing *Alexander v. CareSource*, 576 F.3d 551, 561 (6th Cir. 2009); *Pass & Seymour, Inc. v. Hubbell Inc.*, 532 F.Supp.2d 418, 438 (N.D.N.Y. 2007); *Milton H. Greene Archives, Inc. v. BPI Commc'ns, Inc.*, 378 F.Supp.2d 1189, 1195 n.3 (C.D. Cal. 2005); *Fenton v. Sterling Plumbing Gp., Inc.*, 21 F.3d 1113, at *2 n.2 (9th Cir. 1994) (unpublished); *Byrne v. CSX Transportation, Inc.*, Case No. 14-3791, 2015 WL 3916450, at *4 (6th Cir. June 26, 2015)). For example, the Dissent relies on *Alexander* for the proposition that a “job description on a company letterhead was self-authenticating under Fed. R. Evid. 902(7) because it contained a trade inscription indicating the source of origin of the document.” *See* Dissent at 6. That court, however, did not hold that the job description was self-authenticating as a publication in a periodical. Rather, it held that the document was self-authenticating for what it appeared on its face to be, i.e., a job posting authored by defendant. *See Alexander*, 576 F.3d at 561 (noting that “job description was generated on CareSource’s letterhead”). Similarly, in *Pass & Seymour*, the court held that “self-promoting advertising and press materials[] are treated under the Federal Rules of Evidence as self-authenticating.” *Pass & Seymour*, 532 F.Supp.2d at 438. Again, however, that court held the document was self-authenticating merely for what it

appeared on its face to be, i.e., efforts by defendant to market its allegedly infringing products. *See id.* (noting that “Hubbell has presented nothing to cast doubt upon the validity or authenticity of the disputed exhibit as reflecting efforts by Hubbell to market its quick-connect devices.”). The other Dissent-cited cases—*Milton*, 378 F.Supp.2d 1189; *Fenton*, 21 F.3d 1113; and *Byrne*, 2015 WL 3916450—likewise do not stand for the proposition that the existence of a trade inscription on a document renders that document self-authenticating *as a publication* of the owner of the trade inscription.

In its Petition, TRW offered Exhibit 1005 as an article published October 5–8, 1999, in *Intelligent Transportation Systems*. Pet. 2 n.4. Magna timely objected for, among other things, lack of authentication. TRW did not serve any supplemental evidence that Exhibit 1005 is what TRW claims it is. And, in opposing the Motion to Exclude, TRW has not directed us to evidence probative of Exhibit 1005 being an article published October 5–8, 1999, in *Intelligent Transportation Systems* or persuaded us that Exhibit 1005 is self-authenticating for that which TRW generally claims it to be: “an IEEE publication from an IEEE periodical.” Opp. 4.

Magna’s Motion to Exclude Exhibit 1005 for lack of authentication is granted.

III. CONCLUSION

Both of Petitioner’s grounds of unpatentability rely on Exhibit 1005 (Goldbeck). Because we exclude Exhibit 1005 from evidence, both of Petitioner’s grounds of unpatentability necessarily fail.

IV. ORDER

Accordingly, it is

ORDERED that Magna's Motion to Exclude is granted with respect to Exhibit 1005 and dismissed as moot with respect to Exhibits 1012 and 1013;

FURTHER ORDERED that claims 1–3, 6–12, 16, 18–31, 33–39, 76–80, and 82–85 of U.S. Patent No. 8,508,593 B1 are not unpatentable on the record before us; and

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

IPR2014-01347
Patent 8,508,593 B1

For Petitioner:

Jon Trembath
A. Justin Poplin
Timothy Sendek
Allan Sternstein
Douglas W. Link
Dan Cleveland, Jr.
Hissan Anis
JTrembath@LathropGage.com
JPoplin@LathropGage.com
tsendek@lathropgage.com
asternstein@lathropgage.com
DLink@LathropGage.com
DCleveland@LathropGage.com
HAnis@LathropGage.com
Patent@LathropGage.com

For Patent Owner:

David K.S. Cornwell
Timothy A. Flory
Terence Linn
Richard D. Coller III
Daniel E. Yonan
davidc-PTAB@skgf.com
Flory@glbf.com
davidc-PTAB@skgf.com
linn@glbf.com
rcoller-PTAB@skgf.com
dyonan@skgf.com

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Patent 8,508,593 B1

Before JAMES P. CALVE, MICHAEL J. FITZPATRICK, and
BARRY L. GROSSMAN, *Administrative Patent Judges*.

CALVE, *Administrative Patent Judge*, dissenting.

I respectfully dissent from the majority's decision to grant Magna's Motion to Exclude Goldbeck (Ex. 1005) from evidence.

First, Magna's Motion to Exclude challenges the sufficiency of the evidence that TRW has proffered to establish that Goldbeck is a prior art publication under 35 U.S.C. § 102(b). Such challenges are not made in a motion to exclude. *Office Patent Trial Practice Guide*, 77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012).

Magna's Response reiterates the arguments presented in its Motion to Exclude. PO Resp. 48–50. TRW is required to establish Goldbeck as a printed publication under 35 U.S.C. § 102(b) and may use its Reply to respond to these issues.

Second, as movant, Magna has the burden of showing that Goldbeck is not admissible. 37 C.F.R. § 42.20(c). In *inter partes* reviews, references are admitted into evidence subject to an opposing party asserting objections to the evidence and moving to exclude the evidence. 37 C.F.R. § 42.64. Magna has not met its burden of showing that Goldbeck (Exhibit 1005) is inadmissible on the grounds asserted by Magna in its motion

Compliance with Office Patent Trial Practice Guide

A party challenging the admissibility of evidence must object timely to that evidence and preserve the objection by filing a motion to exclude. 37 C.F.R. § 42.64; *Office Patent Trial Practice Guide*, 77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012). A “motion to exclude evidence must: (a) Identify where in the record the objection originally was made; (b) Identify where in the record the evidence sought to be excluded was relied upon by an opponent; (c) Address objections to exhibits in numerical order; and (d) Explain each objection. *Office Patent Trial Practice Guide*, 77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012).

Magna moves to exclude (1) Goldbeck (Ex. 1005); (2) ITC Initial Determination (Ex. 1012); and (3) IEEE Abstract (Ex. 1013). Mot. 1. Magna argues Goldbeck should be excluded under Fed. R. Evid. 901, 802, and 402. *Id.*

Identify Where Goldbeck Was Relied Upon by TRW

Magna’s Motion to Exclude does not identify sufficiently where in the record Goldbeck was relied upon by TRW, as required by the *Office Patent Trial Practice Guide*. 77 Fed. Reg. at 48,767 (Section II.K.(a) Challenging Admissibility). Magna identifies only a statement in footnote 4 of page 2 of the Petition. Mot. 4. Magna argues that “TRW alleges that the Goldbeck document

qualifies as 35 U.S.C. § 102(b) (pre-AIA) prior art because the Goldbeck document is connected with something titled ‘Intelligent Transportation Systems’ having a date range of ‘5–8 Oct. 1999.’” *Id.* at 4.

The Petition relies on Goldbeck to disclose the use of CMOS cameras as digital cameras in a forward facing windshield accessory as claimed. *Id.* at 7. The Petition sets forth how Goldbeck teaches a CMOS camera and a communication bus, and how these teachings are combinable with Campbell and other prior art to render obvious some of the challenged claims. *Id.* at 12–14, 18–19, 23–27, 41–42, 44, 45, 48, 50, 52–55. The Motion to Exclude does not challenge these portions of the Petition. Thus, it is unclear what we should exclude beyond the reference to Goldbeck on page 2 of the Petition.

Magna’s Motion to Exclude Challenges the Sufficiency of Evidence

Magna’s Motion also runs afoul of the prohibition against using a motion to exclude “to challenge the sufficiency of the evidence to prove a particular fact.” 77 Fed. Reg. at 48,767; *FLIR Sys., Inc. v. Leak Surveys, Inc.*, Case IPR2015-00065, slip op. at 4–5, 9 (PTAB Sept. 3, 2015) (Paper 71).

Whether a document is a printed publication under 35 U.S.C. § 102 is a question of law based on underlying facts. *Orion IP, LLC v. Hyundai Motor Am.*, 605 F.3d 967, 974 (Fed. Cir. 2010). Whether Goldbeck is a printed publication is not decided in a motion to exclude. *FLIR Sys., Inc. v. Leak Surveys, Inc.*, Case IPR2015-00065, slip op. at 4–5, 9 (PTAB Sept. 3, 2015) (Paper 71); *Hayward Indus., Inc. v. Pentair Water Pool and Spa, Inc.*, Case IPR2013-00285, slip op. at 3 (PTAB July 3, 2014) (Paper 31); *Valeo N. Am., Inc. v. Magna Electronics, Inc.*, IPR2014-00222, slip op. at 11–12 (PTAB May 28, 2015) (Paper 55).

Although Magna couches its Motion as one involving authentication, hearsay, and relevance (Mot. 3), Magna’s arguments actually challenge the sufficiency of evidence needed to establish that Goldbeck is a printed publication under 35 U.S.C. § 102(b).

First, Magna argues that Goldbeck is not self-authenticating and “a copyright date on a document, absent any other showing, is insufficient to show that the document was accessible to the public and qualifies as a printed publication.” Mot. 4. Magna also argues that “[t]here is . . . nothing to authenticate TRW’s allegation that the Goldbeck document . . . qualifies as 35 U.S.C. § 102(b) (pre-AIA) prior art.” *Id.* at 5.

Regarding hearsay, Magna argues that “TRW seeks to rely on the copyright date for a hearsay purpose to which no hearsay exception applies” and “bare copyright dates are insufficient to establish public accessibility.” *Id.* at 6. Magna argues “TRW is attempting to rely on the 1999 copyright date appearing in the Goldbeck document to establish publicly accessibility as a printed publication, that copyright date is hearsay under FRE 801 and is inadmissible under FRE 802.” *Id.* at 7.

Regarding relevance, Magna argues that “[i]f the Goldbeck document is not established as a prior art printed publication, it cannot be relevant to a patentability determination—or any other determination—in the present action.” *Id.* at 7–8. Magna argues that “the Goldbeck document’s copyright date does not have any tendency to make the Goldbeck document’s alleged public accessibility more probable because copyrighting a document and publishing it are completely decoupled processes.” *Id.* at 8.

Magna raises these same arguments in its Response, which belies the fact that Magna's Motion to Exclude challenges the sufficiency of evidence needed to prove Goldbeck is a printed publication under 35 U.S.C. § 102(b). Magna argues a petitioner has "the burden of proving that a document is a 'printed publication' by showing that the document was publicly accessible to persons concerned with the art to which the document relates." PO Resp. 48, 50. Magna also argues that "there is not sufficient evidence to establish that Goldbeck was publicly accessible prior to the alleged 2002 priority date of the '593 patent" because the mere appearance of a 1999 copyright date on a document "does not establish that it was available to and/or disseminated to the public." *Id.* at 48, 49. Magna cites the *Wyer*, *L-3 Communications*, *Lister*, and *Neutrino* decisions in its Response and Motion to Exclude for the same propositions. *Id.* at 48–49; Mot. 4–5, 7.

Motion to Exclude Goldbeck

Magna has the burden of establishing that Goldbeck is not admissible. 37 C.F.R. § 42.20(c); *FLIR Sys., Inc. v. Leak Surveys, Inc.*, Case IPR2014-00411, slip op. at 5 (PTAB Sept. 3, 2015) (Paper 113). Magna has not carried that burden.

Authentication of Goldbeck under Fed. R. Evid. 902(6) & 902(7)

Magna argues Goldbeck is not self-authenticating and a copyright date does not establish a date Goldbeck was available or disseminated to the public. Mot. 4.

Magna's arguments are not persuasive in view of TRW's argument that Goldbeck is self-authenticating under Fed. R. Evid. 902(7) because it contains an IEEE trade inscription, copyright symbol, and ISBN. Opp. 4–5 (citing *ACCO Brands, Inc. v. PC Guardian Anti-Theft Prods.*, 592 F. Supp. 2d 1208, 1219 (N.D. Cal. 2008) (Macintosh Portable computers were self-authenticating under Fed. R.

Evid. 902(7) “because they are inscribed with the Macintosh Portable trade name”).¹³

In other cases, trade inscriptions such as marks and logos were held to be self-authenticating. *Alexander v. CareSource*, 576 F.3d 551, 561 (6th Cir. 2009) (job description on a company letterhead was self-authenticating under Fed. R. Evid. 902(7) because it contained a trade inscription indicating the source of origin of the document); *Pass & Seymour, Inc. v. Hubbell Inc.*, 532 F. Supp. 2d 418, 438 (N.D.N.Y. 2007) (self-promoting advertising for Snap Connect Devices and press materials containing a company logo were self-authenticating); *Milton H. Greene Archives, Inc. v. BPI Commc’ns, Inc.*, 378 F. Supp. 2d 1189, 1195 n.3 (C.D.Cal. 2005) (advertising campaign books bearing trade inscriptions were self-authenticating); *Fenton v. Sterling Plumbing Gp., Inc.*, 21 F.3d 1113, at *2 n.2 (9th Cir. 1994) (videotape with Kohler logo and mark was self-authenticating under Fed. R. Evid. 902(7)) (unpublished); *Byrne v. CSX Transportation, Inc.*, Case No. 14-3791, 2015 WL 3916450, at *4 (6th Cir. June 26, 2015) (invoices with Conrail logos were self-authenticating under Fed. R. Evid. 902(7)).

The IEEE mark on the first page of Goldbeck appears as “0-7803-4975-X/98/\$10.00 © 1999 IEEE.” Ex. 1005, 1. IEEE is a registered word mark of The Institute of Electrical and Electronics Engineers for publication of books, periodicals, standards, video materials, conference proceedings and self-study

¹³ The Federal Circuit reviews evidentiary determinations under the law of the regional circuit. *E.g., Pozen Inc. v. Par Pharm., Inc.*, 696 F.3d 1151, 1161 n.6 (Fed. Cir. 2012). Neither party indicates which regional circuit law applies here.

courses in the field of scientific, electronics and electrical engineering.¹⁴

Registration 1,770,511, May 11, 1993 (first use in commerce in 1963). IEEE is self-authenticating under Fed. R. Evid. 902(7). *Ericsson Inc. v. Intellectual Ventures I LLC*, Case IPR2014-00527, slip op. at 12 (PTAB May 18, 2015) (Paper 41) (IEEE publication authenticated under Fed. R. Evid. 901(b)(4)); *see United States v. Franz*, 772 F.3d 134, 141–42 (3d Cir. 2014) (noting government admitted two pamphlets under Fed. R. Evid. 902(7) based on the inscription on each pamphlet: “Printed in Denmark Copyright 1973 Color Climax Corporation”).

The IEEE copyright indicates IEEE first published Goldbeck in 1999. 17 U.S.C. § 401; *Ford Motor Co. v. Cruise Control Techs., LLC*, Case IPR2014-00291, slip op. at 10 (PTAB June 29, 2015) (Paper 44); *Stryker Corp. v. Karl Storz Endoscopy-America, Inc.*, Case IPR2015-00677, slip op. at 18 (PTAB Sept. 2, 2015) (Paper 15). Magna’s argument that the “unstylized, non-trademarked text ‘IEEE’ on Goldbeck is not necessarily a trade inscription *from* IEEE” (Reply to Opp. 2) is not persuasive in view of this recognized use of a copyright and mark.¹⁵ As movant, Magna bears the burden of showing Goldbeck is not authentic.

¹⁴ It has been used in commerce for “[d]ownloadable electronic publications in the nature of magazines, books, conference proceedings and newsletters in the fields of science, engineering and engineering technology” since December 12, 1998. Trademark application serial number 86516750, filed Jan. 28, 2015. “IEEE” also has been used for “[p]roviding news and information in the fields of computer science, electrical engineering and engineering technology via the Internet” since January 29, 1999. *Id.*

¹⁵ A document may be authenticated with an affidavit from the custodian attesting to its authenticity and publication. *See Valeo N. Am., Inc. v. Magna Electronics, Inc.*, Case IPR2014-00222, 11–12 (PTAB May 28, 2015) (Paper 55).

Magna’s attempt to distinguish the holding in *Liberty Mutual Ins. Co. v. Progressive Casualty Ins. Co.*, Case CBM2012-00010, slip op. at 37 (PTAB February 24, 2014) (Paper 59) is unpersuasive. Magna argues that the article in that case was self-authenticating under FRE 902(6) because it included the statement “published in the Proceedings of ACM SIGMETRICS at pages 245–256 in June 2001” whereas Goldbeck does not purport to be published at all, let alone in a periodical on a specified date. Reply to Opp. 1.

Although Goldbeck does not include the words “published in” on its face, Goldbeck’s IEEE copyright notice is evidence of first publication in 1999, as discussed above. Dr. Kazerooni’s also testifies that Goldbeck was published in 1999 in *Intelligent Transportation Systems* at pages 74–79 as *Lane detection and tracking by video sensors*. Ex. 1008 § 5 n.2; 37 C.F.R. § 42.53(a). Goldbeck (Ex. 1005) is numbered from pages 74–79. The eight-digit International Standard Serial Number (ISSN) in the IEEE copyright notice on page one of Goldbeck indicates Goldbeck is a periodical.¹⁶ Thus, Goldbeck is self-authenticating under Fed. R. Evid. 902(6) as a periodical. Opp. 4.

Whitted v. General Motors Corporation, 58 F.3d 1200 (7th Cir. 1995), cited by Magna (Reply to Opp. 2), is inapposite. In that case, the court held that the contents of a 1987 Nova owner’s manual were not authenticated by a General Motors inscription on the manual. *Whitted*, 58 F.3d at 1204. Magna does not

¹⁶ Official Notice is taken that an International Standard Serial Number is an eight-digit code that is used to identify newspapers, journals, magazines, and periodicals. See Library of Congress, U.S. ISSN Center, ISSN Resources at www.loc.gov/issn/; ISSN International Center at www.issn.org.

challenge the contents of the Goldbeck article, but rather challenges the authenticity of Goldbeck as a printed publication under 35 U.S.C. § 102(b). Even so, the IEEE copyright notice authenticates Goldbeck as an IEEE article, first published in 1999. The ISSN in the IEEE copyright notice indicates Goldbeck is a periodical. Goldbeck may be considered for all that it discloses. *In re Young*, 927 F.2d 588, 591 (Fed. Cir. 1991).

Arguing that “mere appearance of a date on a document does not establish the date of when the document was available to or disseminated to the public” challenges sufficiency of the evidence that Goldbeck is a printed publication. Mot. 4. *L-3 Communication Holdings, Inc. v. Power Survey, LLC*, Case IPR2014-00832, slip op. at 11 (PTAB Nov. 14, 2014) (Paper 9), which is cited by Magna (Mot. 4) discusses when a non-patent reference is a printed publication under 35 U.S.C. § 102.

Magna’s citation of *In re Lister*, 583 F.3d 1307 (Fed. Cir. 2009) is not persuasive. Mot. 4. *Lister* held that a certificate of registration from the U.S. Copyright Office did not establish that Dr. Lister’s manuscript was publicly accessible in Westlaw or Dialog databases, or the Copyright Office prior to the critical date. *Lister*, 583 F.3d at 1316–17.

The decision in *Neutrino Dev. Corp. v. Sonosite Inc.*, 337 F. Supp.2d 937, 947 (S.D.Tex. 2004), *aff’d*, 210 F. App’x 991 (Fed. Cir. 2006) is not apposite. The decision ends on page 942, not page 947, which Magna cites. Mot. 4. The decision seems to have been reversed in part by *Neutrino Dev. Corp. v. Sonosite, Inc.*, 423 F. Supp. 2d 673 (S.D.Tex. 2006).

CNET Networks, Inc. v. Etilize, Inc., 584 F. Supp. 2d 1260, 1273–74 (N.D. Cal. 2008) (cited in Mot. 4–5) held that a 2001 copyright date did not prove a user guide was publicly accessible prior to an April 10, 2001 critical date. *CNET Networks*, 584 F. Supp. 2d at 1273–1274. A 2001 copyright was evidence the user guide was published in 2001, but not that it was *publicly accessible* before April 10, 2001. The critical date of the ’593 patent is January 31, 2001, so any date of publication in 1999 antedates that critical date. Public accessibility is an issue to be decided on the merits.

Magna’s reliance on *iOnROAD Ltd. v. Mobileye Technologies*, also is unpersuasive for similar reasons. Mot. 5. That case held that a 1999 copyright date did not prove a reference was published prior to a November 26, 1999 filing date of the challenged patent. *iOnROAD Ltd. v. Mobileye Techs. Ltd.*, Case IPR2013-00227, slip op. at 15–16 (PTAB Aug. 27, 2013) (Paper 18).¹⁷ *Id.*

In sum, TRW’s representations (Pet. 2 n.4) and Dr. Kazerooni’s testimony (Ex. 1008 ¶ 5 n.2), which is provided as an affidavit (*see* 37 C.F.R. § 42.53(a)) are evidence that the Goldbeck article filed as Exhibit 1005 was published in 1999. Their testimony is corroborated by the 1999 copyright to IEEE, which is self-authenticating, and corroborated by the page numbers on Goldbeck and the ISSN. That should be sufficient evidence to establish Goldbeck’s authenticity as an IEEE

¹⁷ In *TRW Automotive US LLC v. Magna Electronics Inc.*, IPR2015-00960/ IPR2015-00961 (PTAB Oct. 5, 2015) (Paper 9), a 2004 copyright notice was not sufficient to establish that a reference was publicly accessible before the December 23, 2004 priority date of the challenged patent.

periodical publication barring evidence to the contrary that Magna can produce. Magna could have deposed Dr. Kazerooni, if it desired, to challenge his testimony.

Again, Magna has the burden of showing that Goldbeck is not authentic. Magna might have contacted IEEE to obtain evidence showing that Goldbeck is not an IEEE publication, was not published in 1999 by IEEE, or is not a periodical.

Whether and when Goldbeck was accessible to the relevant public and interested persons after IEEE published Goldbeck in 1999 is a separate issue. That issue should be decided on the merits to determine whether Goldbeck qualifies as a printed publication under 35 U.S.C. § 102(b).

Admissibility of Goldbeck Under Hearsay Exceptions

Admissibility under Fed. R. Evid. 803(18)

Statements in treatises, periodicals, and pamphlets may be admitted if (A) the statement is relied on by an expert on direct examination and (B) the publication is established as reliable authority by the expert's admission or testimony, other expert testimony, or judicial notice. Fed. R. Evid. 803(18).

Magna argues that Goldbeck is not admissible under Fed. R. Evid. 803(18) because nothing indicates it is an IEEE periodical, publication, or learned treatise, periodical, or pamphlet. Reply to Opp. 4. Magna argues that Goldbeck has not been shown to be reliable and trustworthy by persons in the field and judicial notice cannot be taken of this fact because nothing in Goldbeck establishes it as a publication or part of a periodical. *Id.* at 4–5.

The IEEE copyright indicates that IEEE first published Goldbeck in 1999. Dr. Kazerooni testified (*see* 37 C.F.R. § 42.53(a)) that Goldbeck was published in 1999 in *Intelligent Transportation Systems* at pages 74–79. Ex. 1008 § 5 n.2. His

testimony is corroborated by the ISSN and page numbers on Goldbeck, and TRW's representations in the Petition. *See* Pet. 2 n.4; 37 C.F.R. § 11.18(b).

Magna does not address TRW's argument that IEEE articles like Goldbeck are relied on by the scientific and technical communities. Opp. 7–8. Dr. Kazerooni relies on Goldbeck in his testimony that claims of the '593 patent are unpatentable. Ex. 1008 ¶¶ 5, 29–31, 33. Dr. Kazerooni states that Goldbeck teaches a CMOS camera and CAN bus. *Id.* ¶ 29. His testimony evinces Goldbeck's trustworthiness. 37 C.F.R. § 42.53(a).

Magna's expert, Dr. Nranian, discusses Goldbeck without deprecating Goldbeck's trustworthiness. Dr. Nranian testifies that Campbell as modified by Kuehnle's housing could not capture the correct field of view required for functions relied upon by TRW in Goldbeck. Ex. 2003 ¶ 134. Dr. Nranian opines that a skilled artisan would not have found motivation in Goldbeck's disclosure to combine Goldbeck with Kuehnle or Campbell. *Id.* ¶ 139.

Magna's argument that Dr. Kazerooni could have attested to the reliability and trustworthiness of Goldbeck misses the point. As movant, Magna bears the burden of proving Goldbeck is inadmissible. Magna might have deposed Dr. Kazerooni about the trustworthiness of Goldbeck or contacted IEEE to determine if Goldbeck (Ex. 1005) was authentic.

In addition to Dr. Kazerooni's testimony and TRW's representation that Goldbeck was published in Intelligent Transportation Systems in 1999 at pages 74–79 (*see* Pet. 2 n.4; Ex. 1008 § 5 n.2), the ISSN (7803-4975) on Goldbeck indicates Goldbeck is a periodical. An ISSN uniquely identifies serial publications such as journals, magazines, newspapers, annuals, and monographs in print or

electronic media. The ISSN is consistent with Magna's assertion that "an internet search for the characters '0-7803-4975-X' results in numerous documents not pertaining to Goldbeck." Reply to Opp. 3. Because the ISSN identifies an IEEE periodical Intelligent Transportation Systems, it would identify other publications in that IEEE periodical besides Goldbeck.

Goldbeck cites other references, all of which predate 1999. Ex. 1005, 6 (page 79). Among the cited references are two articles from the Proceedings of the 1995 IEEE International Vehicle Symposium, held on September 25–26, 1995, in Detroit, Michigan.¹⁸ *Id.* A third article is from proceedings of the 1998 IEEE Conference on Intelligent Vehicles.¹⁹ These articles provide evidence that papers delivered at annual IEEE conferences on intelligent vehicles and transportation systems are published and accessible. The paper by Risack was presented at the 1998 IEEE conference and was available soon enough to be incorporated into Goldbeck for publication in 1999.

Admissibility under Residual Hearsay Exception of Fed. R. 807

If Goldbeck is not admissible under Fed. R. Evid. 803(18), Goldbeck should qualify for admission under the residual hearsay exception. Under Fed. R. Evid. 807, a hearsay statement is not excluded if: (1) the statement has equivalent

¹⁸ The articles are (1) W. Enkelmann, *ROMA – A system for model-based analysis of road markings*, PROC. OF THE 1995 IEEE INT. VEH. SYM., (Sept. 25–26, 1995), and (2) D.A. Pomerleau, *RALPH: Rapidly Adaptive Lateral Position Handler*, PROC. OF THE 1995 IEEE INT. VEH. SYM., (Sept. 25–26, 1995).

¹⁹ The article is by R. Risack, *Robust lane recognition embedded in a real-time driver assistance system*, PROC. OF THE 1998 IEEE CONF. ON INT. VEH. 35–40 (Oct. 28–30).

circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice.

TRW provides persuasive evidence that Goldbeck is admissible under Fed. R. Evid. 807. Goldbeck's IEEE 1999 copyright is evidence that IEEE published Goldbeck in 1999. Dr. Kazerooni's testimony corroborates this evidence, as indicated above. Ex. 1008 ¶ 5 n.2. Goldbeck's ISSN "0-7803-4975-X" (Ex. 1005) is evidence that Goldbeck was published in a periodical as are Goldbeck's page numbers (74–79), which match page numbers that TRW and Dr. Kazerooni identify for the Goldbeck reference published in *Intelligent Transportation Systems* in 1999. Pet. 2 n.4; Ex. 1008 ¶ 5 n.2; Ex. 1005. The \$10.00 is evidence that Goldbeck was offered for sale.

This evidence provides circumstantial guarantees of trustworthiness. In addition, the IEEE mark is self-authenticating. False copyright notices may expose a party to liability. *See* 17 U.S.C. § 506(c). Magna has not provided evidence that Goldbeck is not trustworthy as Magna must. *See* Reply to Opp. 5.

Goldbeck is evidence of a material fact and is more probative of the points for which it is offered than other evidence in the case. Fed. R. Evid. 807(2) & (3). TRW relies on Goldbeck to disclose a CMOS camera and a vehicle bus communication, which are elements of the challenged claims. Pet. 25. As Magna points out, Goldbeck is the only reference offered by TRW for these elements of the challenged claims. Mot. 1.

The purposes of the Federal Rules of Evidence and interests of justice are best served by not excluding Goldbeck from evidence. Evidence is admitted in AIA proceedings subject to objections by an opposing party and a motion to exclude. 37 C.F.R. § 42.64. Magna has not met its burden of showing that Goldbeck is inadmissible. 37 C.F.R. § 42.20(c).

This case is exceptional because Magna has used a Motion to Exclude to challenge the sufficiency of the evidence showing that Goldbeck is a printed publication under 35 U.S.C. § 102(b). Such challenges should be raised in the case-in-chief, not a Motion to Exclude. *FLIR Sys.*, IPR2015-00065, Paper 71, at 4–5, 9; *Hayward Indus.*, IPR2013-00285, Paper 31, at 3. Magna makes the same arguments in its Motion to Exclude and Response.

Magna has not asserted that it will be prejudiced by the admission of Goldbeck. TRW asserted Goldbeck as prior art in the initial Petition that was filed. Pet. 2. Thus, Magna was on notice *ab initio* that TRW’s grounds of unpatentability relied on Goldbeck.

AIA trial practice rules should be construed to secure the just, speedy, and inexpensive resolution of every proceeding. 37 C.F.R. § 42.1. Use of motions practice to raise substantive issues is not efficient or inexpensive.

Interests of justice and the Federal Rules of Evidence favor admitting Goldbeck under the residual hearsay exception and deciding the patentability of the ’593 patent on the merits. One issue is the limitation “generally wedge-shaped structure” that appears in the challenged claims as follows:

wherein said camera, with said module mounted at said mounting element attached at the vehicle windshield, views forwardly through

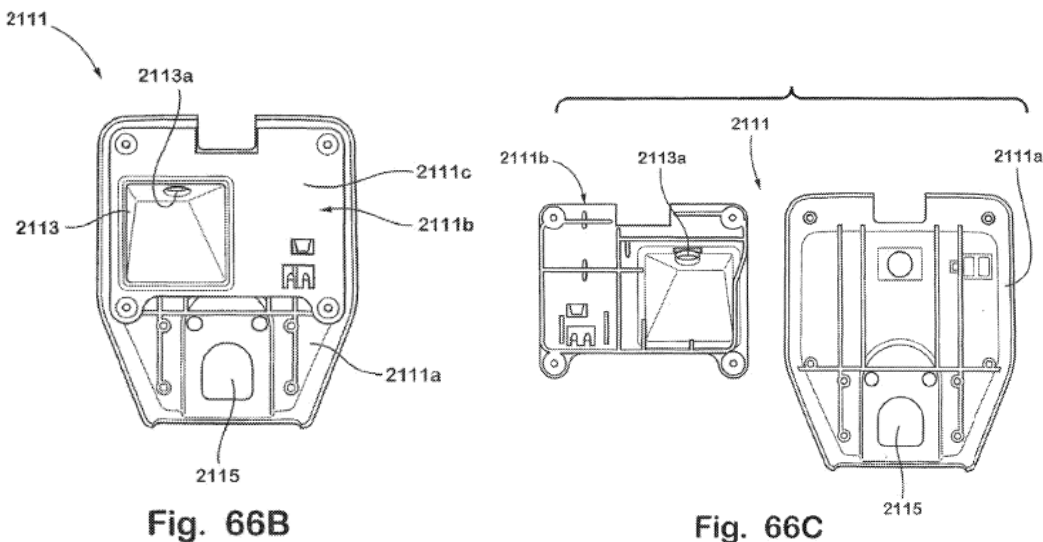
the vehicle windshield via a generally wedge-shaped structure of the windshield facing side of said housing;

Ex. 1002, 51:31–34 (claim 1), 54:40–44 (claim 40), 57:38–42 (claim 61), 59:63–67 (claim 77), 62:12–17 (claim 89).

Interpreting this term in light of the claims and Specification illustrates the problems faced by parties assessing their liability under the '593 patent.

The '593 patent Specification discloses wedge shaped structures. However, the wedge-shaped structures pertain to “a wedge type mount” for mounting a mirror to button 2016b of mounting portion 2011a (Ex. 1002, 37:13–17) and “a wedge style button” to which a mirror can be mounted (*id.* at 37:63–66). These elements are disclosed in Figures 62–65.

Magna asserts that the “generally wedge-shaped structure” is a structure that forms cavity 2113 in Figures 66–68. As shown in Figures 66B and 66C, which are reproduced below, this structure appears to be a portion of cover plate 2111 that forms cavity 2113.



Figures 66B and 66C show an accessory housing. Ex. 1002, 8:36–37.

Although cavity 2113, which is formed by cover plate 2116, may be said to have a generally wedge shape, cavity 2113 is a void or space formed by cover plate 2111b. Cavity 2113 is not a *structure*.

The structure of cover plate 2111b that forms cavity 2113 has sloping walls but cover plate 2111b is not a generally wedge-shaped structure as shown in Figure 66B. Figure 66C shows cover plate 2111b separated from accessory housing casing 2111a. Cover plate 2111b is generally flat with an indentation that forms cavity 2113. There is no indication that cover plate 2111b has a generally wedge shape, as commonly understood.

Treating cover plate 2111b as a generally wedge-shaped structure, as Magna does, is not an ordinary usage of wedge-shaped structure. This usage conflicts with Magna's evidence and arguments. Magna defines a wedge as "a structure that tapers from a wider portion at one end to a narrower portion at the other end, with the structure having two generally planar surfaces that are converging." PO Resp. 8. Magna offers an illustration of a wedge shape from a dictionary definition of "wedge," reproduced below. *Id.* at 9.



Figure A – Dictionary illustration of a wedge W

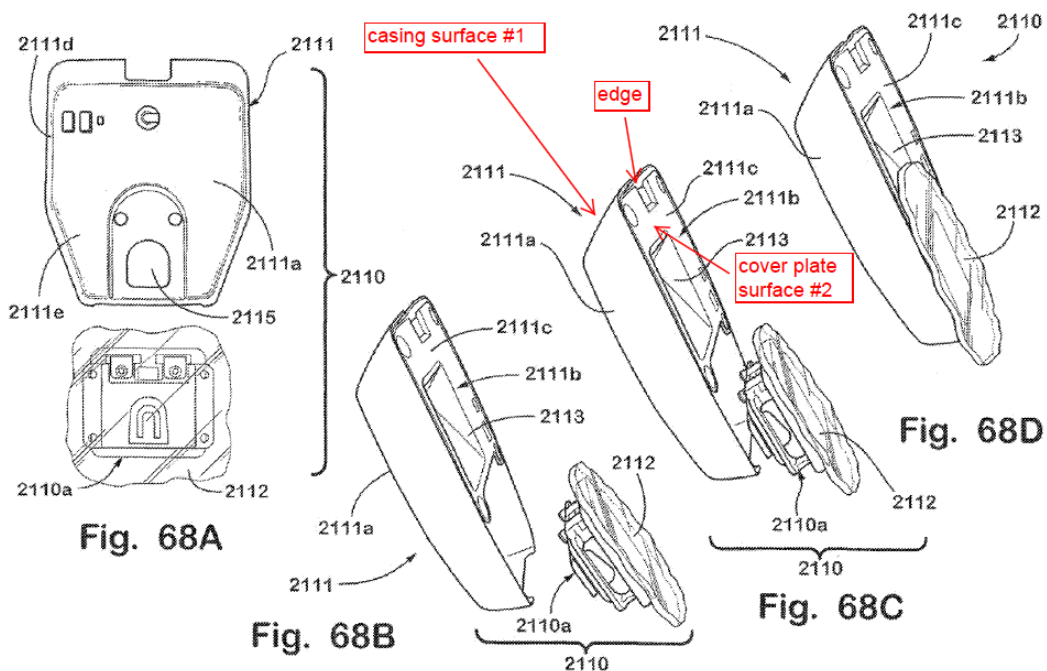
In this illustration, the wedge is denoted by letter "W." Ex. 2004, 2.

Applying this illustration to the '593 patent and Figure 66, cover plate 2111b is analogous to the tree trunk because it forms wedge-shaped cavity 2113 in the same way the tree trunk forms a wedge-shaped cavity for wedge "W." That does

not make the tree trunk a wedge. The wedge “W” in this dictionary illustration is analogous to cavity 2113, except that cavity 2113 is a complete absence of structure. If cover plate 2113 has a generally wedge-shaped structure, the tree trunk in the illustration above is a generally wedge-shaped structure because its tapering, generally planar surfaces converge.

Magna has asserted a definition for “generally wedge-shaped structure” that is contrary to an ordinary usage of wedge or wedge shaped. Magna does not rely on a lexicographic definition in the ’593 patent Specification to support such an unconventional usage of the term “wedge” or “wedge-shaped” to encompass structure that forms a wedge-shaped cavity 2113.

This situation, by itself, would be confusing. But the accessory mounting module housing 2111 also is wedge-shaped or generally wedge-shaped. Figures 68A–68D illustrate this configuration, as reproduced below with annotations.



Figures 68A–68D are perspectives of accessory module 2110 and accessory housing 2111 and mounting module 2110a. Ex. 1002, 8:41–43.

As is immediately apparent from the perspective views, casing 2111a of accessory housing 2111 and cover plate 2111b form a generally wedge-shaped structure. Casing 2111a includes a generally planar surface that is annotated as “casing surface #1.” Cover plate 2111b includes a generally planar surface that is annotated as “cover plate surface #2.” As shown in the annotations in Figure 68C above, casing surface #1 and cover plate surface #2 converge to form an “edge,” which also is annotated on Figure 68C.

Thus, accessory housing 2111 tapers from a wider portion at one end to a narrower portion at another end with two generally planar surfaces as illustrated above. A camera inside module 2111 views through windshield 2112 and this generally wedge-shaped structure by viewing through part of cover plate 2111b, which is part of this generally wedge-shaped structure.

Thus, the claims are susceptible of at least two meanings. First, the structure of cover plate 2111b that forms cavity 2113 is a “generally wedge-shaped structure” using those terms in nonconventional ways. Second, that accessory housing 2111 is generally wedge-shaped. *See Ex parte Miyazaki*, 89 USPQ2d 1207, 1211–12 (BPAI 2008) (precedential). This issue could be resolved on the merits because TRW has asserted a reference – Kuehnle – that satisfies both interpretations in that it has a generally wedge-shaped front housing 21 and generally wedge-shaped opening in front housing 21 through which a camera (optical detector 23) views. Ex. 1006, Figs. 2, 3.

Goldbeck Has Not Been Shown to be Irrelevant

Magna argues that Goldbeck’s copyright date and other information are inadmissible to prove a date of public availability, so Goldbeck is not prior art and is not probative of patentability.” *See* Mot. 7–8; Reply to Opp. 5. Magna’s arguments are not persuasive because Magna has not shown Goldbeck to be unauthentic or inadmissible hearsay, as discussed above. Magna’s arguments again challenge the sufficiency of evidence.

Goldbeck is a Printed Publication under 35 U.S.C. § 102(b)

Sufficient evidence was presented to establish Goldbeck as a printed publication. As discussed above, Goldbeck was published in 1999 by IEEE in a periodical titled Intelligent Transportation Systems that is accessible to interested persons. Goldbeck is authentic, admissible, and relevant.

The Goldbeck authors are associated with Robert Bosch GmbH. Ex. 1005, 1. The names Jens Goldbeck and Bernd Huertgen appear at the top of the paper with their email addresses at “fr.bosch.de.” Email addresses are evidence of self-authentication of the origin of email messages. *See ATS Int’l Svcs, Inc. v. Kousa Int’l, LLC*, Civil Action No. RDB-12-2525, 2014 WL 1745004, at *5 (D.Md. May 1, 2014) (citing *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534 (D.Md. 2007)). Whatever copyright they obtained when they fixed their work in a tangible medium, they transferred at least some of the copyright in their paper to IEEE, which asserted a copyright in their paper in 1999. The IEEE mark is self-authenticating as discussed above.

The 1999 IEEE copyright on Goldbeck is evidence of first publication of Goldbeck in 1999. 17 U.S.C. § 401; *e.g.*, *ZTE Corp. v. IPR Licensing, Inc.*, 2014

WL 4715525, *8 (PTAB Sept. 17, 2014) (copyright notification and date “©European Telecommunications Standards Institute 1998” on each document reasonably suggested publication prior to the critical date of September 21, 1999); *IBM v. Intellectual Ventures II LLC*, 2014 WL 5585264, *9 (PTAB Oct. 30, 2014) (copyright date of 1997 on face of reference was several years before the March 26, 2002 priority date and suggested the reference was published and accessible to users on or around the 1997 copyright date where patent owner provided no contrary evidence).

The IEEE mark is evidence of Goldbeck’s accessibility to interested persons. IEEE is a registered word mark of The Institute of Electrical and Electronics Engineers, Inc., for publication of books, periodicals, standards, video materials, conference proceedings and self-study courses in the field of scientific, electronics and electrical engineering. Registration 1,770,511, May 11, 1993 (first use in commerce in 1963).²⁰ Goldbeck corroborates this business practice of IEEE. As discussed above, Goldbeck cites three references – Enkelmann, Pomerleau, and Risack. Ex. 1005, 6 (page 79, n.3,8,9). Goldbeck associates these references with

²⁰ IEEE has provided downloadable electronic publications like magazines, books, conference proceedings, and newsletters in the fields of science and engineering since December 12, 1998. Trademark application serial number 86516750, filed Jan. 28, 2015 for “IEEE” by The Institute of Electrical and Electronics Engineers, Inc., 445 Hoes Lane, Piscataway, New Jersey. IEEE’s registered mark and application are public records of the U.S. Patent and Trademark Office. 15 U.S.C. § 1; *see* Fed. R. Evid. 803(8). To the extent necessary, Official Notice is taken of IEEE’s mark and application.

IEEE intelligent vehicle conferences and symposiums that occurred in 1995 and 1998. *Id.*

Goldbeck provides evidence that IEEE references were accessible to Goldbeck and other interested persons. For example, Goldbeck notes the contributions in the field made by “pioneering ones” like Enkelmann “[3]” and Pomerleau “[8].” *Id.* at 1 (page 74). Goldbeck discusses the need to be independent of absolute gray values by following the gradient based method similar to Risack “[9].” *Id.* at 4 (page 77). This discussion of Enkelmann, Pomerleau, and Risack indicates that these publications were accessible to the relevant community. In the case of Risack, Goldbeck provides volume and page numbers of its 1998 publication, which was accessible to the Goldbeck authors early enough to discuss Risack. *Id.*

Thus, Goldbeck, which is self-authenticating and admissible under a hearsay exception, as discussed above, provides evidence of IEEE’s practice of publishing papers from IEEE Intelligent Vehicle Conferences in IEEE periodicals that are accessible to interested persons.

It was enough in *In re Wyer*, for the Australian Patent Office to lay open for public inspection in its main office and five sub-offices a patent application. *In re Wyer*, 655 F.2d 221, 226 (CCPA 1981). Although the records may have been kept on microfilm, they were “sufficiently accessible to the public and to persons skilled in the pertinent art to qualify as a ‘printed publication’” even though no evidence was presented to establish that copies of the patent application actually were viewed or disseminated. *Id.* at 226 (discussed in *Klopfenstein*, 380 F.3d 1345, 1349–50 (Fed. Cir. 2004)).

The IEEE copyright notice includes other information germane to the publication of Goldbeck. The “\$10.00” provides evidence of the cost of the Goldbeck article. The ISSN is evidence that Goldbeck was published in an IEEE periodical.

Goldbeck’s pagination indicates Goldbeck was published in another work. Dr. Kazerooni testifies that Goldbeck was published in *Intelligent Transportation Systems* at pages 74–79 in 1999. Ex. 1008 ¶ 5 n.2. His testimony corroborates the page numbers on Goldbeck and Goldbeck’s 1999 copyright notice. *See* Ex. 1005.

Dr. Kazerooni’s testimony and TRW’s representation that Goldbeck was published in *Intelligent Transportation Systems* at pages 74–79 in 1999 also corroborate Goldbeck’s ISSN “0-7803-4975-X” which is evidence that Goldbeck was published as a periodical.

Distributing a paper to a commercial company without restriction on its use, as the Goldbeck authors have done, is evidence of publication. *See Garrett Corp. v. United States*, 422 F.2d 874, 878 (Cl. Ct. 1970) (“[w]hile distribution to government agencies and personnel alone may not constitute publication, distribution to commercial companies without restriction on use clearly does.” (internal citation omitted)) (discussed in *Massachusetts Institute of Tech. v. AB Fortia*, 774 F.2d 1104, 1109 (Fed. Cir. 1985) and *Northern Telecom, Inc. v. Datapoint Corp.*, 908 F.2d 931, 936–37 (Fed. Cir. 1990)). In this case, the Goldbeck authors distributed their paper to IEEE, which is in the business of publishing and disseminating such papers to interested persons.

If Goldbeck was delivered at an IEEE conference, that act may have constituted publication because attendees who are persons interested in the subject

matter were apprised of the existence of the paper and its contents. *Massachusetts Institute of Tech. v. AB Fortia*, 774 F.2d 1104, 1109 (Fed. Cir. 1985) (paper presented orally at a conference to 50–500 interested persons of ordinary skill in the subject matter was a printed publication as the persons were informed of its existence and contents by oral presentation and the paper was disseminated without restriction to at least six persons).

Admissibility of Exhibits 1012 and 1013

Exhibits 1012 and 1013 were not considered for the admissibility of Goldbeck because TRW did not submit those references as supplemental evidence. *See* 37 C.F.R. § 42.64(b)(2); *Standard Innovation Corp. v. Lelo, Inc.*, Case IPR2014-00148, slip op. at 9 (PTAB Apr. 23, 2015) (Paper 41). However, TRW should be able to rely on Exhibits 1012 and 1013 in its Reply (Paper 13) to respond to issues raised in Magna’s Response (Paper 9). *See Standard Innovation Corp.*, IPR2014-00148, Paper 41, at 10–11.

Magna’s argument that Exhibit 1012 (ITC Initial Determination) is not relevant (Mot. 8–9) is not persuasive. The ALJ’s finding that Goldbeck qualifies as prior art under 35 U.S.C. § 102(b) (Exhibit 1012, 4) can be considered for any persuasive value it offers. *Opp.* 11; *Texas Instruments Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1569 (Fed. Cir. 1996) (ITC decision has no preclusive effect in other forums but district court can attribute persuasive value to a prior ITC decision, as justified).

Magna argues that Exhibit 1013 is inadmissible because the statement “Published in: Intelligent Transportation Systems, 1999. Proceedings. 1999 IEEE/IEEJ/JSAI International Conference” is hearsay. Mot. 10–11. Magna also

argues that Exhibit 1013 is irrelevant because it does not indicate the date of publication of Goldbeck. *Id.* at 11–12.

Magna’s arguments do not address TRW’s contentions that Exhibit 1013 (IEEE document) is admissible under Fed. R. Evid. 803(17) 803(18), or 807. *Opp.* 12–13. Magna’s arguments also do not address TRW’s assertion that Exhibit 1013 is relied on as “a direct response to sufficiency arguments in Magna’s Response” rather than “supplemental evidence to Magna’s Objections to Evidence.” *Id.* at 13.

TRW should be permitted to rely on Exhibits 1012 and 1013 to establish Goldbeck as prior art under 35 U.S.C. § 102(b). Exhibits 1012 and 1013 do not change the scope of disclosure of Goldbeck that is relied upon by TRW in its grounds of unpatentability. *See* 37 C.F.R. § 42.23(b).