

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

STANDARD INNOVATION CORPORATION,
Petitioner,

v.

LELO, INC,
Patent Owner.

Case IPR2014-00148
Patent 7,749,178 B2

Before PHILLIP J. KAUFFMAN, JACQUELINE WRIGHT BONILLA,
and CHRISTOPHER L. CRUMBLEY, *Administrative Patent Judges*.

KAUFFMAN, *Administrative Patent Judge*.

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

I. BACKGROUND

A. *Procedural History*

Standard Innovation Corporation (“Petitioner”) filed a Petition (Paper 2, “Pet.”) to institute an *inter partes* review of claims 1–20 and 22–27 of U.S. Patent No. 7,749,178 B2 (Ex. 1001, “the ’178 patent”) pursuant to 35 U.S.C. §§ 311–319. Lelo, Inc., (“Patent Owner”) waived its preliminary response (Paper 6). In a May 6, 2014, Decision to Institute (Paper 7, “Dec.”), we instituted trial on claims 1–8, 10–12, 14–20, and 22–24 based on the following grounds:

1. Claims 1–8, 14–20, and 22–24 based on obviousness over LILY¹, Dahl², and Kontos³; and
2. Claims 10–12 based on obviousness over LILY, Dahl, Kontos, and McCambridge⁴.

Patent Owner filed a Patent Owner Response (Paper 12, “PO Resp.”),⁵ and Petitioner filed a Reply (Paper 22, “Pet. Reply”). Patent Owner did not file a motion to amend.

Patent Owner also filed a Motion to Exclude (Paper 28) certain evidence, which we discuss in Section II below.

¹ Ex. 1002, Specification Sheet, LELOi AB, *Introducing LILY*, http://www.lelo.com/staticPage.php?page=10years_screenshots.

² Ex. 1006, U.S. Patent 3,938,018 (Feb. 10, 1976).

³ Ex. 1003, U.S. Patent 6,350,230 B1 (Feb. 26, 2002).

⁴ Ex. 1008, U.S. Patent 6,217,533 B1 (Apr. 17, 2001).

⁵ Patent Owner filed its Patent Owner Response (Paper 12) less than an hour after Due Date 1 passed. Paper 14, 1. After consideration of Patent Owner’s Motion to deem the filing of its Response timely (Paper 14) and Petitioner’s Opposition (Paper 15), we determined it was in the interests of justice to deem the Patent Owner Response as timely filed. Paper 19.

At the request of both parties, oral hearing was held on January 9, 2015. Papers 26, 27, and 32. A transcript of the oral hearing is included in the record. Paper 38 (“Tr.”).

After the oral hearing, Petitioner contacted the Board seeking authorization to file a motion to submit supplemental information under 37 C.F.R. § 42.123. After a conference call on the matter, we denied Petitioner’s request for authorization to file such motion. Paper 39; *see also* Paper 40 (related errata).

B. The ’178 patent

The ’178 patent relates to a massager with an inductively chargeable power source. Ex. 1001, 1:13–15.

As background, the ’178 patent describes that massagers are typically either battery powered or run on conventional alternating current (“AC”) electricity. *Id.* at 1:23–25; 7:58. A drawback of prior art massagers is that internally contained disposable batteries have limited operating time, and replacement of the batteries has been associated with inconvenience and expense. *Id.* at 1:26–35. Additionally, massagers that operate on AC power tend to be unsafe for internal use or use in damp environments, and have the inconvenience of requiring proximity to a wall plug. *Id.* at 1:36–40.

The ’178 patent also discloses as background that wireless controls for prior art massagers are limited in function. *Id.* at 2:32–33. To overcome these and other drawbacks, the ’178 patent describes a vibrating massager that includes inductive charging and a highly functional radio frequency wireless control system. *Id.* at 2:40–49. In one embodiment, massager

system 10 includes inductively chargeable vibrating massager 12 and supportive, inductive charging base 14. *Id.* at 3:4–5, 9–10, 41–44.

Figures 1 and 4 of the '178 patent are reproduced below:

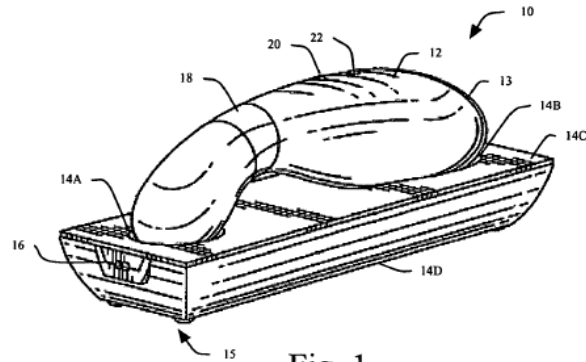


Fig. 1

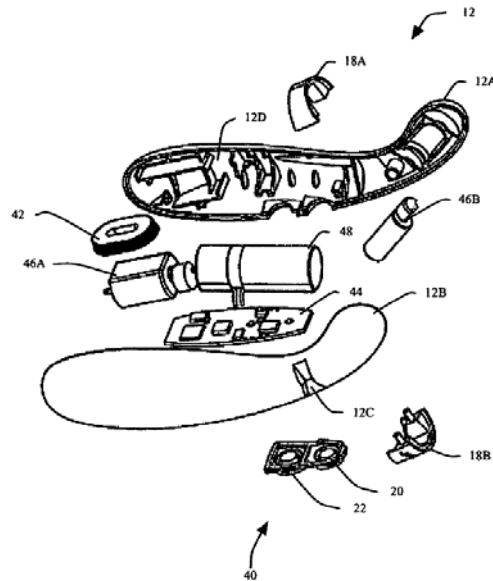


Fig. 4

Figure 1 is a perspective view of inductively chargeable massager 12 on charging base 14, and Figure 4 is an assembly view of the vibrating massager of Figure 1.

Massager 12 includes: one of a plurality of different motive sources (e.g., vibrating motors 46A, 46B), an energetic coupler (e.g., inductive

charging coil 42), and a rechargeable battery 48. *Id.* at 5:60–63; 16:19–22. Vibrating massager 12 is sealed by ultrasonic welding and further by thin bio-compatible “skin” 13. *Id.* at 3:52–55. Controls, in the form of two buttons 20 and 22, are positioned underneath, but are visible and operable through, skin 13. *Id.* at 4:3–6.

Charging base 14 includes: AC power source 16, power converter 66 (converting AC to direct current (“DC”)), and inductive coil 64 for inductively coupling the converted power to inductive coil 42 of massager 12 to charge battery 48. *Id.* at 7:56–67. Upper surface 14C of charging base 14 includes a pair of ovoid indentations 14A and 14B for receiving the ends of vibrating massager 12 in a supportive, stable relationship while being inductively charged. *Id.* at 4:24–31

C. Illustrative Claim

Of the instituted claims, claim 1, is the sole independent claim, and is reproduced below:

1. A massager apparatus, comprising:
 - [i] a massager including
 - a first electric motive source,
 - a rechargeable battery connected to the first electric motive source, and
 - a first coupler connected to the battery;
 - a massager housing adapted to receive at least the first electric motive source, the rechargeable battery, and the first coupler,
 - a soft surface overlaying at least a charging area of the massager housing so as to provide a substantially smooth operative portion for massaging application to a part of the human body;

[ii] a base including
a base housing,
a power connector at least partially contained within the
base housing,
a second coupler contained within the base housing
connected to the power connector, and
the base housing including a receiving surface
formed to support the massager housing with the first
coupler energetically coupled to the second coupler
through the receiving surface, wherein the operative
portion is in contact with the receiving surface;
whereby the battery in the massager can be charged using the
base.

Ex. 1001, claim 1 (numbering designations added.)

D Overview

Each asserted ground of unpatentability relies in part on LILY.⁶ We address a Motion to Exclude as it relates to LILY (Ex. 1002) and associated exhibits, and then address whether Petitioner has demonstrated that LILY is prior art as a printed publication under 35 U.S.C. § 102.

II. MOTION TO EXCLUDE

A. Introduction

As mentioned above, Patent Owner filed a Motion to Exclude Exhibits 1002, 1010, 1013–1023, and 1026–1029 under the Federal Rules of Evidence (“Fed. R. Evid.”). Paper 28 (“Mot.”). Petitioner filed an Opposition to the Motion (Paper 30, “Opp.”), and Patent Owner filed a

⁶ We use “LILY” to reference to Exhibit 1002, and “Lily” to refer to the massager described in Exhibit 1002.

Reply to the Opposition (Paper 31, “Opp. Reply”). For the following reasons, Patent Owner’s motion is *granted-in-part* and *denied-in-part*.

Prior to filing its Motion to Exclude, Patent Owner objected to Exhibits 1002 and 1010 within the required ten business days of institution of trial (“first set of objections”).⁷ 37 C.F.R. § 42.64(b)(1); Ex. 2020, 2–3. Patent Owner objected to Exhibits 1013–1023 and 1026–1029 within the required five business days of service of the exhibits (“second set of objections”).⁸ 37 C.F.R. §42.64(b)(1); Ex. 2030, 2–5. Petitioner did not respond to the first set of objections, and responded to some of the second set of objections. *See* Ex. 2031.

Patent Owner preserved both sets of objections by filing its Motion to Exclude Exhibits 1002, 1010, 1013–1023, and 1026–1029. The Motion identifies and explains the objections. Mot. 1–15; 37 C.F.R. §42.64(c). As noted above, Petitioner filed an Opposition to that Motion (“Opp.”), and Patent Owner filed a Reply to that Opposition (“Opp. Reply”). As moving party, Patent Owner bears the burden of proof to establish that it is entitled to the requested relief. *See* 37 C.F.R. §§ 42.20(c), 42.62(a).

Before addressing the merits of the Motion to Exclude, we address an interrelated procedural issue.

⁷ Trial was instituted on May 6, 2014, and Patent Owner served the objections on May 20, 2014. Dec.; Ex. 2030, 3.

⁸ The original versions of Exhibits 1013–1023, and 1026–1029 were served on October 23, 2014, and Patent Owner served the objections to these Exhibits on October 30, 2014. Ex. 2030, 6.

*B. Exhibits 1013–1022, 1031, 1032 as Supplemental Evidence*⁹

Petitioner contends that Patent Owner first challenged the publication date of Exhibit 1002 (LILY) in its Patent Owner Response, after the ten business day deadline of 37 C.F.R. § 42.64(b). Pet. Reply 14. As detailed below, this contention conflates different deadlines, and the issues of a challenge to the sufficiency of evidence in a Patent Owner's response and that of a challenge to the admissibility of evidence under 37 C.F.R. § 42.64(b). *See generally Groupon Inc. v. Blue Calypso, LLC*, Case CBM2013-00033, slip op. at 25 (PTAB May 12, 2013) (Paper 29) (distinguishing admissibility of evidence from sufficiency of evidence).

The Patent Owner Response challenges the sufficiency of proof that Exhibit 1002 is prior art as a printed publication under 35 U.S.C. § 102. PO Resp. 9–23 (challenging the publication date and accessibility of the reference). The time limit of 37 C.F.R. § 42.64(b) does not apply to a Patent Owner's response. Separately, Patent Owner also challenged the admissibility of Exhibit 1002 in its first set of objections. As noted above, Patent Owner served those objections within the required ten business days of institution of trial. 37 C.F.R. § 42.64(b)(1); Ex. 2020, 2–3. Consequently, both Patent Owner's challenge to the sufficiency of the evidence in its Patent Owner Response and its challenge to the admissibility of the evidence in its objections are proper and timely.

Although Patent Owner has complied with 37 C.F.R. § 42.64(b), Petitioner has not. Petitioner submitted Exhibits 1013–1022, 1031, and

⁹ Exhibit 1023 is similarly situated to these exhibits; however, Petitioner did not rely on Exhibit 1023 to support the contention that Exhibit 1002 is admissible. *Opp., passim*. None of the exhibits at issue were submitted as supplemental information under 37 C.F.R. § 42.123.

1032 with its Reply, arguably in response to arguments raised in the Patent Owner Response. *See* Pet. Reply iii, iv, 12–15; 37 C.F.R. § 42.23(b); PO Resp. 9 (contending that Exhibit 1002 is not a printed publication). In its Reply, Petitioner relies upon each of these exhibits in support of the admissibility of Exhibit 1002, but only after it chose not to submit those exhibits as supplemental evidence within ten business days of Patent Owner’s first set of objections. *See* Opp. 1–5; 37 C.F.R. § 42.64(b)(2). Patent Owner’s challenge to the sufficiency of proof that Exhibit 1002 is a printed publication does not create a second window for Petitioner to submit supplemental evidence. *See* Opp. Reply 4–5 (arguing that the Exhibits at issue should have been submitted in response to Patent Owner’s objections).

Interpreting 37 C.F.R. § 42.23(b) to permit consideration of these exhibits with regard to the admissibility of Exhibit 1002 would eviscerate the requirement that supplemental evidence be served within ten business days. *See* 37 C.F.R. §§ 42.23(b), 42.64(b)(1). Such an interpretation would not promote the just, speedy, and inexpensive resolution of this proceeding. *See* 37 C.F.R. § 42.1(b). If Petitioner wanted consideration of those exhibits with regard to the admissibility of Exhibit 1002, Petitioner could have served Patent Owner with the exhibits as supplemental evidence in a timely manner, in accordance with § 42.64(b)(2). If it had done so, thereafter, Petitioner could have filed and relied upon such evidence appropriately in its Opposition to the Motion to Exclude.

Accordingly, our determination regarding the admissibility of Exhibit 1002 will not consider Exhibits 1013–1022, 1031, and 1032 as supplemental evidence.

C. *Exhibits 1013–1023*

These exhibits are inadmissible for the reasons that follow.

1. *Authentication*

a. *Exhibits 1013–1022*

In its Opposition to the Motion to Exclude, Petitioner indicates that each of these exhibits are printouts of webpages. Opp. 7–12.

Patent Owner contends that these exhibits were not properly authenticated under Federal Rules of Evidence 901 and 902. Mot. 5–11. Petitioner responds that each exhibit has distinct characteristics that authenticate it under Federal Rule of Evidence 901(b)(4), but does not identify any such characteristics. Opp. 7–13.

Federal Rule of Evidence 901 requires that the proponent produce evidence sufficient to support a finding that an item is what the proponent claims it is. When offering a printout of a webpage into evidence to prove the website’s contents, the proponent of the evidence must authenticate the information from the website itself, not merely the printout. *See Victaulic Co. v. Tieman*, 499 F.3d 227, 236 (3d Cir. 2007), *as amended* (Nov. 20, 2007) (citing *United States v. Jackson*, 208 F.3d 633, 638 (7th Cir. 2000)). For this reason, the Board has stated that “[t]o authenticate printouts from a website, the party proffering the evidence must produce some statement or affidavit from someone with knowledge of the website . . . for example a web master or someone else with personal knowledge would be sufficient.” *EMC Corp. v. Personalweb Techs., LLC*, Case IPR2013-00084, slip op. 45 (PTAB May 15, 2014) (Paper 64) (quoting *St. Luke’s Cataract & Laser Inst., P.A. v. Sanderson*, No. 8:06-CV-223-T-MSS, 2006 WL 1320242, at *2 (M.D. Fla. May 12, 2006)); *see also Victaulic Co. v. Tieman*, 499 F.3d 227,

236 (3d Cir. 2007) (citing with approval the holding in *In re Homestore.com, Inc. Sec. Litig.*, 347 F.Supp.2d 769, 782–83 (C.D. Cal. 2004), that printouts of webpages must be authenticated by a witness).

Petitioner has not provided the testimony of any witness with personal knowledge of the information on the website or the associated printouts for any of the exhibits at issue.¹⁰

Exhibits 1015, 1016, and 1022 appear to be printouts of webpages retrieved from the Internet Archive’s “Wayback Machine,” which shows archived versions of other websites. Our reviewing court has held that printouts of webpages from the Wayback Machine were admissible under Federal Rule of Evidence 901(b)(1) where the proponent provided one of two types of supporting evidence: one, a witness that testified regarding how the Wayback Machine worked and how reliable its contents were, or two, a witness having personal knowledge that the printouts were authentic. *U.S. v. Bansal*, 663 F.3d 634, 667–68 (Fed. Cir. 2011). Here, in contrast to *Bansal*, Petitioner has not provided either form of supporting evidence.

Consequently, Exhibits 1013–1022 are inadmissible under Federal Rule of Evidence 901 because Petitioner has not put forth sufficient evidence to support a finding that these exhibits are what Petitioner claims, or that any of these exhibits is self-authenticating under Federal Rule of Evidence 902.

¹⁰ In response to Patent Owner’s second set of objections, Petitioner served a Declaration on Patent Owner attesting to the authenticity of Exhibits 1015, 1016, and 1022. Ex. 2031, 4. This Declaration was identified as Exhibit 1030, but never filed, and therefore is not considered here. *See* Paper 33, 4 (Petitioner’s final exhibit list showing Exhibit 1030 as unassigned).

b. Exhibit 1023

Petitioner contends that Exhibit 1023 “is a screenshot showing a PDF copy of Exhibit 1002 as it was found online and its automatically computer generated document properties.” Opp. 12; Pet. Reply 13. The left side of Exhibit 1023 is titled “Document Properties,” and the right side of the exhibit shows a document similar in appearance to page 1 of Exhibit 1002. Ex. 1023. The Document Properties section indicates a created date of October 13, 2005, and a modified date of October 15, 2005. *Id.*

Patent Owner argues that Exhibit 1023 is not properly authenticated under Federal Rules of Evidence 901 and 902. Mot. 12. Petitioner responds that the authenticity of this exhibit is corroborated by the distinct characteristics of the LELO name and description of LELO’s product (Lily) as presented the exhibit, in conjunction with the circumstances. Opp. 13. Petitioner does not elaborate on those circumstances. *Id.*

Petitioner has provided no evidence regarding the significance and reliability of the created and modified dates in Exhibit 1023. Petitioner has provided insufficient evidence linking Exhibit 1023 to Exhibit 1002. For example, Petitioner has not provided testimony of any witness with personal knowledge of the information on the website(s) or the associated printouts at issue. Indeed, Petitioner has not identified the website(s) from which Exhibits 1023 and 1002 were downloaded. The fact that Exhibit 1023 bears the “LELO” name and properties of the Lily device provides little support regarding the authenticity of Exhibit 1002 or Exhibit 1023.

Consequently, Exhibit 1023 is inadmissible under Federal Rule of Evidence 901 because Petitioner has not put forth sufficient evidence to

support a finding that this exhibit is what Petitioner claims, or that the exhibit is self-authenticating under Federal Rule of Evidence 902.

2. *Hearsay*

Patent Owner contends that the dates in Exhibits 1013–1023 are hearsay under Federal Rule of Evidence 802. Mot. 6–12. Petitioner’s contentions vary by exhibit as detailed below. If an exception does not apply, the rule against hearsay operates to prohibit out-of-court statements from being offered to prove the truth of the matter asserted. Fed. R. Evid. 801–803.

a. *Exhibit 1013*

Petitioner represents that Exhibit 1013 consists of printouts of the webpages that tell the full story of LELO’s 10-year history.¹¹ Opp. 2, 7. The first page of Exhibit 1013 includes the statements: “LELO,” “10 YEARS OF PLEASURE,” “A VIRTUAL TOUR OF HOW LELO BEGAN,” and “© 2003-2013 LELOi AB.” *Id.* at 1. The exhibit describes that in Stockholm in 2003, LELO team members initially sought to create a massager. *Id.* at 3. The story goes on to state that this led to development and marketing of the massagers “IDA” and “LILY.” *Id.* at 19.

Petitioner relies upon the dates indicated on Exhibit 1013, i.e., “(2003)” (Ex. 1013, 1), “© 2003–2014” (*id.* at 2), as proof of a date that Exhibit 1002 was disseminated publicly. Opp. 2–3¹², 7; Pet. Reply 13.

Petitioner contends the dates in Exhibit 1013 are not hearsay because they are party admissions. Opp. 8; Fed. R. Evid. 801(d)(2). For the reasons

¹¹ Petitioner states that pages 2–4 of Exhibit 1002 are a subset of that full story.

¹² Because Exhibit 1002 is a subset of Exhibit 1013, Petitioner’s contentions regarding Exhibit 1002 have application to Exhibit 1013 and vice versa.

that follow, Petitioner has not presented sufficient evidence to establish that the admissions of Leloi AB should be attributed to Petitioner (Lelo, Inc.).

Exhibit 1013 refers to Leloi AB and makes no reference to Patent Owner (Lelo, Inc.). Ex. 1013. Leloi AB is not the parent company of Patent Owner. Opp. Reply 1 (citing Ex. 2040). Patent Owner was not incorporated until 2006 (Opp. Reply 1; Ex. 2032), three years after the beginning of the LELO story told in Exhibit 1013. According to Patent Owner's counsel, Leloi AB is a Swedish company that is not a party to these proceedings, and "Lelo.com" (the website Exhibit 1013 recites) is Leloi AB's website. Ex. 1032, 3; Tr. 29, 30.

Petitioner contends that Patent Owner is in the best position to verify the publication date of Exhibit 1002, and therefore, by extension, Exhibit 1013.¹³ Opp. 4. First, as the proponent of Exhibit 1013, it is Petitioner's burden to establish admissibility. Second, Petitioner submitted a request to Patent Owner to depose a corporate representative of Leloi AB and Lelo Inc. regarding the publication date of Exhibit 1002. Ex. 1032, 3–4. Patent Owner refused to comply with the deposition requests for several reasons. *Id.* at 2–3. In particular, Patent Owner asserted that the depositions sought were not part of routine discovery, and had not been authorized as additional discovery. *Id.*; 37 C.F.R. §§ 42.51(b)(1), 42.51(b)(2), 42.52. Following this, Petitioner did not seek a conference call with the Board on the matter, nor did Petitioner otherwise seek authorization to file a motion for additional discovery. Petitioner indicates it based its inaction, at least in part, on the belief that the evidence of record was sufficient to demonstrate that Exhibit

¹³ This assertion applies to Exhibit 1013 because Petitioner contends that Exhibit 1002 is subset of the webpage printouts shown in Exhibit 1013.

1002 was a printed publication. Tr. 65–68. Under these circumstances, Petitioner’s contentions do not persuade us that the dates in Exhibit 1013 constitute party admissions.

Petitioner contends that even if the dates in Exhibit 1013 are hearsay, they are admissible under Federal Rule of Evidence 807. Opp. 8.

Federal Rule of Evidence 807 provides a “residual exception” to the hearsay rule, which may apply even if no specific exception of Federal Rule of Evidence 803 applies. To fall under this exception, the statement must: 1) have equivalent circumstantial guarantees of trustworthiness; 2) be offered as evidence of a material fact; 3) be more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and 4) be in the interests of justice to admit. Fed. R. Evid. 807. The residual exception to the hearsay rule is to be reserved for “exceptional cases,” and is not “a broad license on trial judges to admit hearsay statements that do not fall within one of the other exceptions.” *Conoco Inc. v. Dep’t of Energy*, 99 F.3d 387, 392 (Fed. Cir. 1996), as amended on reh’g in part (Jan. 2, 1997) (internal quotations omitted).

Petitioner provides the conclusory assertion that Exhibit 1013 has equivalent circumstantial guarantees of trustworthiness warranting admissibility under Federal Rule of Evidence 807, but does not provide persuasive supporting reasoning. *See* Opp. 8. Based on our review of Petitioner’s arguments, we do not consider this case to be an exceptional one that would merit application of the residual exception.

Accordingly, we determine that to the extent that the dates presented in Exhibit 1013 are relied upon as proof of dates relevant to the creation or

publication date of Exhibits 1013 or 1002 itself, those dates are inadmissible hearsay.¹⁴

b. Exhibits 1014–1022

Exhibit 1014 appears to be Google search results for the phrase “Lelo Lily pdf” during the time period January 1, 2004, to December 31, 2006. One of the search results listed is “INTRODUCING LILY LILY is a delicate and discrete. . . ,” beneath this is listed the website, “www.loverouge.com.au/images/prod-images/LEL.../lel_lily.pdf” and the date October 18, 2005.

Exhibits 1015, 1016, 1022 appear to be printouts of the webpage “Internet Archive Wayback Machine” and include search results having product reviews of the Lily massager.

Exhibits 1017 and 1018 appear to be some form of advertisement for the Lily massager.

Exhibits 1019–1021 appear to be Google search results for the phrase “Lelo Lily,” for the time period January 1, 2004 to February 1, 2006.

Petitioner argues that the dates in these exhibits are not hearsay because they are not being offered for the truth of the matter asserted. Opp. 10–12. As support, Petitioner cites a District Court case holding that a prior art document submitted as a “printed publication” under 35 U.S.C. § 102(a) is not hearsay when offered simply as evidence of what it describes. Opp 2; *Joy Tech., Inc. v. Manbeck*, 751 F.Supp. 225, 233 (D.D.C. 1990), judgment aff’d by 959 F.2d 226 (Fed. Cir. 1992). In contrast to *Joy Tech.*, here

¹⁴ For this Exhibit and each date in other exhibits relied upon as hearsay, the entirety of the exhibit is not inadmissible, just the dates to the extent they are offered as proof of that date.

Petitioner submits the copyright date as proof of the publication date (the matter asserted). *See* Pet. Reply 14.

Our reviewing court provides more applicable guidance. In *Epstein*, the Federal Circuit held that the Board did not err in relying upon dates in an abstract as prior art because, although the dates were hearsay, the Board was not bound by the Federal Rules of Evidence in *ex parte* proceedings and could reply upon hearsay. *In re Epstein*, 32 F.3d 1559 (Fed. Cir. 1994). In contrast, the Federal Rules of Evidence are applicable to an *inter partes* review such as the case at hand. *See* 37 C.F.R. § 42.62. Other Federal Courts have similarly held that dates are hearsay when, as here, offered to prove the truth of the matter asserted. *See, e.g., Hilgraeve, Inc. v. Symantex Corp.*, 271 F.Supp.2d 964, 974 (E.D. Mich. 2003) (copyright “dates imprinted on . . . documents are hearsay when offered to prove the truth of the matter asserted”).

With regard to Exhibit 1014 only, Petitioner additionally asserts that if the dates relied on are hearsay, the residual exception of Federal Rule of Evidence 807 applies because of the distinct characteristics of the exhibit. Opp. 10. As with Exhibit 1013, Petitioner does not elaborate on those distinct characteristics, and our analysis of this assertion with regard to Exhibit 1013 is applicable here.

Accordingly, we determine that to the extent that the dates displayed on Exhibits 1014–1022 are relied upon as proof of creation or publication dates of the exhibits themselves, these dates are inadmissible hearsay.

*c. Exhibit 1023*¹⁵

Patent Owner contends that the “created” and “modified” dates of Exhibit 1023 are hearsay under Federal Rule of Evidence 802. Petitioner’s sole response is that these dates are not hearsay because they are not a statement uttered by a person. Opp. 13 (citing *U.S. v. Khorozian*, 333 F.3d 498, 506 (Fed. Cir. 2003)). In *Khorozian*, the court observed that a fax machine automatically date-stamped a transmission, and therefore, that date was the statement of a machine rather than a person. *Khorozian*, 333 F.3d at 506. Here, in contrast, Petitioner presents only attorney argument that the created and modified dates of Exhibit 1023 were automatically generated. *See* Opp. 8; Opp. Reply 5 (arguing that Petitioner has not established that the dates are automatically generated).

Accordingly, we determine that to the extent that the dates displayed in Exhibit 1023 are relied upon as proof of dates of creation, modification, or publication of Exhibit 1023 itself, these dates are inadmissible hearsay.

3. Conclusion

Exhibits 1013–1023 are inadmissible for lack of sufficient authentication under Federal Rules of Evidence 901 and 902, and to the extent dates of these exhibits are relied upon to prove dates, they are inadmissible hearsay. Given these determinations, we need not reach Patent Owner’s other objections to these exhibits.

D. Exhibit 1002

Before addressing the admissibility of Exhibit 1002 we restate that as detailed above, Exhibits 1013–1022, 1031, 1032 were not served in

¹⁵ Exhibit 1023 is described above.

compliance with 37 C.F.R. §42.64(b)(2), and cannot be relied upon in support of the admissibility of Exhibit 1002. Further, Exhibits 1013–1023 are inadmissible for the reasons discussed above, and cannot provide support for the admissibility of Exhibit 1002.

1. Authentication

a. Specification Sheet (Page 1 of Ex. 1002)

Page 1 of Exhibit 1002, titled “LELO,” depicts and describes the Lily massager, and includes the recitation “LELOi AB © 2005-2006. ALL RIGHTS RESERVED.” Ex. 1002, 1.

Patent Owner contends that page 1 of Exhibit 1002 has not been properly authenticated under Federal Rule of Evidence 901 and is not self-authenticating under Federal Rule of Evidence 902. Mot. 2–3.

Petitioner responds that Exhibit 1002 is authenticated by circumstantial evidence such as the consistent look and feel of LELO’s branding as seen on LELO’s website. Opp. 3–4 (citing *SAP America, Inc. v. Lakshmi Arunachalam*, Case IPR2013-00195, slip op. at 22 (PTAB Sept. 18, 2014) (Paper 60)). We disagree.

SAP America provided two examples of webpages that were sufficiently authenticated: one, where the printout included circumstantial indicia of authenticity such as the date and web address, and two, where there were circumstantial indicia of authenticity such as date and web addresses and the Declaration of a witness attesting that the printouts were true and correct copies. *SAP America* at 1–2 (citations omitted). The case at hand does not fit either of these examples. Page 1 of Exhibit 1002 is a document that refers to the website of Leloi AB (i.e., www.lelo.com). Petitioner does not identify, however, the website from which Page 1 itself

was downloaded. Indeed, Petitioner has stated only that the specification sheet was “found online.” *See* Opp. 12. Nor does Petitioner provide the testimony of any witness¹⁶ stating that the printouts are true and correct copies.

Petitioner goes on to contend that authenticating information is not necessary because the Lily massager is Patent Owner’s product, and therefore, Patent Owner’s challenges to authenticity should fail. Opp. 4–5 (citing *Veeam Software Corp. v. Symantec Corp.*, Case IPR2013-00142, slip op. at 9–10 (PTAB Aug. 7, 2013) (Paper 11)). This contention is unpersuasive, because, as detailed above, page 1 of Exhibit 1002 appears to be attributable to Leloi AB, not Patent Owner (Lelo, Inc.). Petitioner’s contention is akin to asserting that because retailer A and retailer B each sell the same product, retailer A is responsible for authenticating a publication by retailer B about that product. Such contention is unpersuasive.

Additionally, *Veeam* undermines rather than supports Petitioner’s position. In *Veeam*, the Board stated that under the Federal Rules of Evidence, authentication of webpages was required, and the Board considered the webpages at issue because the case was at the preliminary stage (institution decision). *Veeam* at 9. Here, in contrast to *Veeam*, we are at the trial stage of the proceeding (final written decision), and as implied in *Veeam*, authentication of the webpages at issue is required at this stage.

Consequently, page 1 of Exhibit 1002 is inadmissible under Federal Rule of Evidence 901 because Petitioner has not put forth sufficient

¹⁶ Although Dr. Kirtley, states that LILY (Exhibit 1002) was published in 2005, Dr. Kirtley does not profess to have any personal knowledge of the Exhibit. *See* Ex. 1010 ¶ 8.

evidence to support a finding that this exhibit is what Petitioner claims, or that Exhibit 1002 is self-authenticating under Federal Rule of Evidence 902.

b. Webpage Printout (Pages 2–4 of Ex. 1002)

As explained above, Petitioner alleges that pages 2–4 of Exhibit 1002 are a subset of Exhibit 1013. Just as with Exhibit 1013, Petitioner has not provided the testimony of any witness with personal knowledge of the information on the website or the associated printout, and for that reason Exhibit 1002 has not been properly authenticated.

2. Hearsay

Regarding all of Exhibit 1002, Patent Owner contends that the copyright dates of 2005–2006 (page 1) and 2003 – 2013 (pages 2–4) are offered as proof that the dates are the publication dates of each exhibit and therefore, are inadmissible hearsay. Mot. 2.

Petitioner contends that the dates are not offered for the truth of the matter asserted in that it does not matter if the copyright was registered, and therefore the dates are not hearsay. Opp. 2. Petitioner also contends that the copyright dates are not hearsay because they constitute a party admission. Opp. 2. These contentions are unpersuasive for the reasons given in the hearsay analysis above in relation to Exhibit 1013.

Petitioner contends that to the extent the dates are hearsay, the residual exception of Federal Rule of Evidence 807 applies. Opp. 3. Specifically, Petitioner contends that:

- (1) the statements have equivalent circumstantial guarantees of trustworthiness, particularly given that LELO has not disputed that the exhibit identifies LELO's own product, (2) the statements are offered as evidence of a material fact (*i.e.*, that the information contained in Exhibit 1002 was known by the person having ordinary skill in the art as of the filing date of the

'178 Patent), (3) the statements are more probative on what was known about the Lily at the relevant time than any other evidence that SIC can obtain through reasonable efforts, and (4) admitting Exhibit 1002 will best serve the purposes of the Federal Rules of Evidence and the interests of justice.

Id.

We are not persuaded. For example, regarding Petitioner's first point, whether the Lily massager is Patent Owner's product sheds no light on the trustworthiness of Exhibit 1002. Regarding Petitioner's third point, Petitioner has not explained persuasively why information regarding the source of Exhibit 1002 could not have been obtained by reasonable efforts. Regarding Petitioner's fourth point, the conclusory assertion that admitting Exhibit 1002 would serve the purposes of the Federal Rules of Evidence and the interests of justice is simply a recitation of the rule involved, and does not provide a persuasive explanation tied to the facts of the case at hand. As explained above, the residual exception to the hearsay rule is to be reserved for exceptional cases. Here, Petitioner has not demonstrated this to be an exceptional case.

Consequently, to the extent that the copyright dates depicted on Exhibit 1002 are offered to prove the publication date of the reference, these dates are inadmissible hearsay.

E. Exhibits 1010 and 1026–1029

These exhibits relate to the underlying merits of Petitioner's grounds of unpatentability. Because we determine below that LILY (Ex. 1002) is not a printed publication under 35 U.S.C. §§ 102(a) or 102(b), we need not reach the Motion to Exclude with regard to these remaining exhibits.

F. Conclusion

Patent owner's Motion to Exclude is granted with regard to Exhibits 1002 and 1013-1023, and dismissed as moot with respect to Exhibits 1010 and 1026-1029.

III. PRINTED PUBLICATION

A. Introduction

In an *inter partes* review, a ground of unpatentability cannot be based upon a public use or a sale; rather, the ground must be based upon prior art in the form of a patent or a printed publication. 35 U.S.C. § 311(b); 35 U.S.C. § 102. The determination of whether a particular reference qualifies as a prior art printed publication “involves a case-by-case inquiry into the facts and circumstances surrounding the reference’s disclosure to members of the public.” *In re Klopfenstein*, 380 F.3d 1345, 1350 (Fed. Cir. 2004). To qualify as a printed publication, a document must be generally available. *Northern Telecom, Inc. v. Datapoint Corp.*, 908 F.2d 931 (Fed. Cir. 1990). The key inquiry is whether the reference was made “sufficiently accessible to the public interested in the art” before the critical date. *In re Cronyn*, 890 F.2d 1158, 1160 (Fed. Cir. 1989).

Petitioner contends that LILY (Exhibit 1002) is prior art as a printed publication.¹⁷ Pet 19. The '178 patent was filed on February 1, 2006. Ex

¹⁷ Petitioner initially contended that LILY qualifies as prior art under 35 U.S.C. § 102(b) or § 102(a) (Pet. 19–20), and later only asserted that LILY was prior art at least under 35 U.S.C. § 102(a) (Pet. Reply 15, Tr. 27). Because Petitioner did not explicitly withdraw the contention based on 35 U.S.C. § 102(b), we evaluate both bases.

1001, 1. Therefore, the critical date under § 102(a) is February 1, 2006, and the critical date under § 102(b) is February 1, 2005.

B. Sufficiency of Proof

Given our determination above that Exhibit 1002 is inadmissible, Petitioner has not adequately demonstrated that LILY (Exhibit 1002) is a printed publication under either 35 U.S.C. §§ 102(a) or 102(b). Because both asserted grounds of unpatentability rely in part upon the assertion that LILY (Ex. 1002) is prior art, Petitioner has not demonstrated by a preponderance of the evidence that claims 1–20 and 22–27 of the '178 patent are unpatentable.

IV. ANALYSIS CONSIDERING ALL EVIDENCE

Even considering all of the evidence provided by Petitioner, the outcome would not change for the reasons that follow.

A. Pages 2–4 of Exhibit 1002

We narrow our inquiry by clarifying that pages 2–4 of Exhibit 1002 are not a printed publication for two primary reasons. First, as noted above, these pages tell the story of the development of Lily from 2003 to 2013. Consequently, this document was not created until at least 2013, well after the critical date of the '178 patent under either §§ 102(a) or 102(b). Second,

the pages at issue do not describe sufficiently the Lily device.¹⁸ Petitioner largely concedes this point by acknowledging that pages 2–4 are corroborating evidence that the product described on page 1 of Exhibit 1002 is the same as that described on pages 2–4. Tr. 60–61.

B. Page 1 of Exhibit 1002

Petitioner contends that the designated copyright date and online availability, of page 1 of Exhibit 1002 demonstrate that this document was sufficiently available by the critical date.

1. Copyright

Petitioner contends that the copyright date of 2005–2006 indicates the “holiday season” of 2005–2006, or 2005.¹⁹ Pet. 19; Pet. Reply 13.

Petitioner’s assertion is unpersuasive for several reasons. First, Petitioner presents only attorney argument that a two-year hyphenated date (i.e., “© 2005–2006”) indicates publication during the holiday season. Nor has Petitioner provided evidence explaining why the explicit date of “2005–2006” should be interpreted as 2005. Patent Owner’s contention that the date range of 2005 to 2006 indicates that at least some portion of the document was modified in 2006 is equally persuasive. In such case, the entire content of the document can at best be attributed to 2006 and not before either critical date of the ’178 patent. Petitioner has not established

¹⁸ The claim chart only cites to page 2 of Exhibit 1002 with regard to the preamble’s recitation of a massager, all other citations to LILY are to page 1 of Exhibit 1002, indicating that pages 2–4 of Exhibit 1002 are not relied upon as disclosing the Lily device. Pet. 23–38.

¹⁹ Petitioner’s assertion that it does not matter whether the copyright was registered (Opp. 2) is somewhat inconsistent with reliance on the copyright date as proof of accessibility.

sufficiently which, if any, parts of Page 1 of Exhibit 1002 were created in 2005, or any time before February 1, 2006.

Further, the Federal Circuit has held that registration of a copyright, without more, does not demonstrate sufficient accessibility to establish that the reference is a printed publication. *In re Lister*, 583 F.3d 1307, 1311 (Fed. Cir. 2009). Here, Petitioner has made a lesser showing in that Petitioner has not provided evidence that page 1 of Exhibit 1002 was registered with the U.S. Copyright Office. Therefore, even assuming the document was created and marked with a “©” in 2005, the copyright date indicated on page 1 of Exhibit 1002 does not demonstrate sufficient accessibility to the public interested in the art at any time in 2005 or 2006.

2. *Availability Online*

The Petition does not state the source of page 1 of Exhibit 1002. *Pet. passim*. Subsequently, Petitioner’s Reply contends that Exhibit 1014 demonstrates that page 1 of Exhibit 1002 was published online as early as October 18, 2005. *Pet. Reply* 14.

As mentioned above, Exhibit 1014 appears to be a search with a result titled, “INTRODUCING LILY LILY is a delicate and discrete. . . ,” tied to the website www.loverouge.com.au, indicating the date October 18, 2005. *Ex. 1014*, 1.

Exhibit 1014 does not demonstrate that Exhibit 1002 was available online as of either critical date. As pointed out by Patent Owner, Petitioner provides no evidence that the search results of Exhibit 1014 are associated with page 1 of Exhibit 1002, nor evidence explaining the significance of dates in the search results. *Mot. 7*. This is particularly troublesome given that Patent Owner points to evidence indicating that these dates are estimates

and that websites may provide an explicit date. Mot. 7 (citing Ex. 2039). Further, evidence of record indicates that the domain name for the website identified in the search result (www.loverouge.com.au) did not exist until 2011. Mot. 6 (citing Ex. 2034). Petitioner has not persuasively explained how a website could display a document on October 18, 2005, when that website was not created until 2011.

Petitioner also asserts that Exhibits 1014–1022 publish the same information contained in the specification sheet (page 1 of Exhibit 1002) beginning in January 2005, corroborating that page 1 of Exhibit 1002 is prior art as a printed publication.²⁰ Pet. Reply 14. Exhibit 1014 is addressed above. Regarding Exhibits 1015–1022, even if these exhibits contain and publish online the same information as page 1 of Exhibit 1002 that does not demonstrate that page 1 of Exhibit 1002 was published as of a certain date. Petitioner’s ground of unpatentability is based on the assertion that page 1 of Exhibit 1002 is prior art as a printed publication, and it is page 1 of Exhibit 1002 that must be sufficiently accessible, not the same information on another website.

Exhibits 1015, 1016, and 1022 are product reviews of the Lily device and each of Exhibits 1017 and 1018 is an advertisement for the Lily device. Petitioner’s ground of unpatentability is not based upon a public use or sale, it is based upon prior art in the form of a printed publication. Therefore, the critical inquiry is the accessibility of page 1 of Exhibit 1002, and these exhibits shed no light on that question. Similarly, Exhibits 1019–1021 are

²⁰ Petitioner relies upon Exhibits 2031 with regard to the admissibility of Exhibit 1002 (Opp. 4), but does not rely upon it with regard to proving that Exhibit 1002 is a printed publication (Pet. Reply 12–15).

Google search results containing some information pertaining to the Lily massager, but none of this information relates to page 1 of Exhibit 1002 in particular.

Petitioner contends Exhibit 1023 shows that page 1 of Exhibit 1002 was created October 13, 2005, and modified on October 15, 2005. Pet. Reply 13. Petitioner presents attorney argument, but not evidence, that the document shown on the right side of Exhibit 1023 is a pdf version of page 1 of Exhibit 1002. *See* Mot. 11. Even assuming that Exhibit 1023 supplies the created and modified dates of Exhibit 1002, such evidence does not demonstrate that Exhibit 1002 was sufficiently accessible to the public interested in the art before either critical date.

Because Petitioner has not established sufficiently that LILY (Exhibit 1002) constitutes prior art as a printed publication under 35 U.S.C. § 102 as of a relevant critical date, Petitioner has not demonstrated by a preponderance of the evidence that claims 1–20 and 22–27 of the '178 patent are unpatentable based on two grounds that rely on LILY.

V. ORDER

For the reasons given, it is

ORDERED that claims 1–8, 10–12, 14–20, and 22–24 of U.S. Patent No. 7,749,178 B2 have not been shown by a preponderance of the evidence to be unpatentable;

FURTHER ORDERED that Patent Owner's Motion to Exclude is granted with regard to Exhibits 1002 and 1013–1023, and dismissed with respect to Exhibits 1010 and 1026–1029; and

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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.

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