

QSC Audio Products, Inc. v. Crest Audio, Inc., Final Written Decision IPR2014-00127

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[Takeaway: Petitioner was able to establish that certain “preprints” for a convention were “printed publications” for purposes of patent law based on circumstantial evidence related to the cover page of the preprints.](#)

In its [Final Written Decision](#), the Board concluded that all challenged claims, claims 1-22 of the '153 Patent are unpatentable. Petitioner had filed a Petition seeking inter partes review of the claims based on two grounds of obviousness. The first ground included admitted prior art and non-patent document, Hancock, and the second ground included admitted prior art and non-patent document, Gordon. Patent Owner argued that neither Hancock nor Gordon were published references and sought to exclude them as evidence. Patent Owner did not make any substantive arguments regarding the subject matter alleged to be taught by Hancock or Gordon.

The '153 Patent relates to an audio amplifier circuit employing a switching power supply. Specifically, the '153 Patent provides a schematic diagram of a prior art audio amplifier circuit employing a switching power supply, and labels the Figure as such. This Figure provides at least part of the admitted prior art submitted by Petitioner. The '153 Patent discloses adding a power factor correction circuit to the power supply as an improvement on the prior art device. Additionally, the '153 Patent disclosed that power factor correction circuits including “boost” configurations were known, but no used in audio amplifiers. The '153 Patent also incorporated by reference four U.S. patents describing power factor correction circuits. Petitioner also submitted this description and the four U.S. patents as admitted prior art. During prosecution of the application resulting in the '153 Patent, Applicant was successful in arguing that the cited references failed to provide “motivation” to combine the power factor correction circuits with an audio amplifier.

Patent Owner argued that Hancock and Gordon are not “printed publications,” and that they be excluded from evidence along with portions of Petitioner’s expert’s Declaration and the Deposition of Patent Owner’s expert. First, Patent Owner argued that the “publications” were not authenticated, and that Fed. R. Evid. 901 and 902 prevent the Board from considering the documents. The Board noted that one example of evidence that satisfies the authentication requirement is Fed. R. Evid. 901(b)(4), which states that a document can be authenticated based on “[t]he appearance, contents, substance, internal patterns, or other distinctive characteristic of the item, taken together with all the circumstances.” The cover pages of both documents include many identifying markings and

qualifiers, such as (1) distinctive logos, (2) statement that the document is a “preprint” produced from an author’s advance manuscript, (3) statement of a unique number assigned to the preprint, (4) identification of a particular session of a convention at which it was “presented,” (5) identification of the dates of the convention, and (6) statement of how additional preprints may be obtained. Petitioner also provided declaration testimony of a librarian at the law firm of Petitioner’s Counsel that demonstrated that one can purchase and download copies of these papers from the “AES E-Library” website.

The Board determined that Patent Owner was conflating two different issues: (1) whether Hancock and Gordon are authentic, and (2) whether they constitute publications under the patent law. The Board further determined that based on the cover pages and the circumstances surrounding their retrieval from the AES E-Library, the documents are what they appear to be – “preprints” from the Audio Engineering Society. Accordingly, the Board concluded that Petitioner had met its authentication burden under Fed. R. Evid. 901 and 902, but that whether the “publications” qualify as prior art under the patent law is a separate matter.

Petitioner argued that the “publications” are prior art based on the dates provided on the respective cover pages of Hancock and Gordon. Patent Owner argued that the dates on the cover pages are hearsay evidence. The Board was not persuaded by Petitioner’s argument that the statements of when they were presented are not hearsay. Although the “publications” had been authenticated as preprints maintained by AES, Petitioner relied on the truth of the matter asserted on the cover pages of the preprints, namely that they were presented at the AES convention on the date listed. This is the only evidence that those documents were actually available as printed publications.

The Board then assessed whether Petitioner provided sufficient evidence showing that the statements relied on are admissible under an exception to the hearsay rule. The Board determined that the Hancock preprint qualified as an ancient document subject to Fed. R. Evid. 803(C)(16), which applies to documents that are at least 20 years old and in whose authenticity has been established. The Board agreed with Petitioner that both Hancock and Gordon meet the circumstances outlined in Fed. R. Evid. 807 (residual exception to hearsay), which requires: “(1) the statement has equivalent 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 will best serve the purposes of these rules and the interests of justice.” Specifically, Petitioner argued that circumstantial guarantees of trustworthiness are shown by all the indicia on the cover pages; convention dates are evidence of a material fact; more probative than other documents Petitioner obtained, such as the website listing of alleged publication dates; and that admitting the statements as evidence serves the interest of justice. Based on the totality of the information provided by Petitioner, the Board found that the statements on the cover page of Hancock and Gordon regarding the dates of the presentation of the preprints at a convention are admissible.

Patent Owner also asked the Board to exclude paragraphs of Petitioner’s expert’s declaration that included statements about the presentation and dates thereof of Hancock or Gordon. The Board agreed with Patent Owner that because Dr. Santi did not personally attend the conventions at which the papers were purported to have been presented, the Board should not take the indicated paragraphs as evidence that Dr. Santi observed their presentation or otherwise knows that presentations were carried out as described on the cover sheets.

Patent Owner also asked the Board to exclude portions of its own expert’s deposition in which its expert, Cordell, testified that he had also made presentations at AES conventions that the typical

practice Cordell observed was that preprints were made available for a fee to convention participants before they entered the convention session for the talk. Patent Owner argued that Cordell's testimony did not establish that the preprints at issue were presented or made available, and that the testimony was irrelevant. The Board agreed with Petitioner that the testimony of Cordell is relevant and that it was not confusing to the Board, because it is well-positioned to determine and assign appropriate weight to evidence presented. Accordingly, the Board denied Patent Owner's Motion to Exclude.

The Board noted that Patent Owner challenged the sufficiency of the evidence presented by Petitioner, but did not offer any evidence that Hancock and Gordon are not publications, and thus, the Board concluded that Petitioner had shown by a preponderance of the evidence that Hancock and Gordon are publications within the meaning of the patent law. As Patent Owner provided no arguments regarding the substance of the references, the Board merely assessed whether it believed Petitioner provided enough evidence to establish by a preponderance of evidence that the claims were unpatentable. The Board concluded that Petitioner did provide enough.

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Paper 43: Final Written Decision

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Patents: 6,023,153

Before: Glenn J. Perry, Bryan F. Moore, and Miriam L. Quinn

Written by: Perry

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