

Exhibit 1

WILSON, ROBERTSON & CORNELIUS

JENNIFER P. AINSWORTH
JON K. ALEXANDER¹
KAY K. CASERTA
WILLIAM CORNELIUS
KELLY B. LEA
MATTHEW T. MILAM
LEIGH C. PORTER
JAMES S. ROBERTSON, JR.²
JAMES D. VANDEVENTER
ROBERT H. WILSON
AMY S. YORK

A PROFESSIONAL CORPORATION
ATTORNEYS & COUNSELORS
909 ESE LOOP 323, SUITE 400
TYLER, TEXAS 75701
(903) 509-5000
FAX (903) 509-5091

POST OFFICE BOX 7339
TYLER, TEXAS 75711-7339
MURPH WILSON (1912-1998)

¹BOARD CERTIFIED ESTATE PLANNING & PROBATE LAW
²BOARD CERTIFIED OIL, GAS & MINERAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

May 27, 2014

Honorable Roy Payne
United States Magistrate Judge
Sam B. Hall, Jr. Federal Building and
United States Courthouse
100 East Houston Street
Marshall, TX 75670

VIA ECF

Re: *Personal Audio, LLC v. Togi Entertainment, Inc. et al.*,
Case No. 2:13-cv-00013-JRG-RSP (E.D. Tex.) (Relates to Dkt. No. 122 and 148)

Dear Judge Payne:

Defendants submit this reply letter brief in further support of their request for permission to move for summary judgment of invalidity (Dkt. 122). Defendants' request should be granted because Plaintiff Personal Audio, LLC fails to identify any genuine factual dispute as to any elements of the asserted patent claims not disclosed by or rendered obvious by the cited prior art references. Indeed, Plaintiff does not substantively respond to Defendants' detailed explanation of how those references disclose each and every element of the asserted patent claims.

Rather than identify differences between the asserted claims and the cited references, Plaintiff relies on vague, conclusory assertions that there are factual disputes as to whether the cited references are competent prior art and a blanket statement that those references fail to disclose all the elements of the asserted claims. Plaintiff cannot avoid addressing a summary judgment motion by simply listing general categories of issues as to which there could -- in theory -- be disputes of fact, without providing this Court with any specifics regarding actual factual disputes. Indeed, Plaintiff seems to argue that a motion for summary judgment on invalidity would never be appropriate unless the parties have agreed upon all the facts in the case, contending that "[u]ntil the existence of undisputed facts is conceded by Personal Audio, or appropriate findings are made by the finder of fact" there can be no motion for summary judgment. That is not the law. To oppose Defendant's request, Plaintiff needed to identify for the Court the specific basis on which it would oppose summary judgment. Plaintiff has chosen not to do so and thus confirms what Defendants explain in their opening letter: every single element of the asserted claims is disclosed by the prior art references.

Defendants turn now to the arguments made by Plaintiff, none of which meet the substance of the invalidity arguments and none of which supports denying Defendants' request. Plaintiff suggests, without providing any specifics, that it can avoid summary judgment because there is a factual dispute as to whether the cited references are prior art. In fact, there is no genuine dispute of fact that the cited references are prior art to the '504 patent. First, *Compton* is an article in the Proceedings of International Conference on Multimedia Computing and Systems published by the IEEE in May 1995, which is more than one year before the filing of the application from which the '504 patent claims priority. There is no basis whatsoever for Plaintiff

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to challenge *Compton* as prior art to the '504 patent. Yet, Plaintiff offers no explanation as to how it contends *Compton* fails to invalidate the asserted claims. Second, the uncontroverted record evidence is that the Surfpunk Technical Journal ("STJ") was published in 1993 through distribution to an extensive subscriber list in 1993. See *Suffolk Tech., LLC v. AOL, Inc.*, No. 13-1392 (Fed. Cir. May 27, 2014) (affirming summary judgment that newsgroup posting is prior art publication). Third, as to the NRL and NCSA websites described in Defendants' letter brief, Defendants have produced multiple corroborating documents and witness testimony to demonstrate the prior use and invention of the websites and the systems serving those websites, as set forth below:

Prior Art Use/Invention	Witness Testimony	Documents demonstrating prior art status
NRL Website	William Fenner (creator of the website)	Documents including copy of 1993 code used on the website produced by NRL in response to FOIA request; 1994 book published showing screen shot of NRL website; 1994 Usenet postings
NCSA Website	Henry Strickland (creator of STJ who used and documented the NCSA website in 1993)	STJ Issue 80 includes a copy of the HTML used for the website; cited in 3 books published in 1995; 1993 Usenet posting

Exactly what Plaintiff is arguing about the evidence mentioned in footnote 6 with respect to the proof of prior art status for STJ and the NCSA website is unclear. Footnote 6 simply summarizes the evidence that Defendants have adduced to establish conclusively that STJ was published in 1993 and the NCSA web site was in use in 1993. There is nothing unusual or improper about proffering evidence to support the finding that a particular reference is prior art and Plaintiff has not pointed out any contrary evidence that could create a genuine dispute of fact on this point. Plaintiff also states the unremarkable legal position that witness testimony requires corroboration to invalidate a patent, but it is unclear what application Plaintiff believes that principle has here. None of the references on which Defendants rely is based on uncorroborated witness testimony. Indeed, there is extensive contemporaneous documentation with respect to each of the websites as set forth above, and two of the references as to which Defendants intend to move are publications where the issue of corroboration is not relevant at all.

Plaintiff also seeks to avoid summary judgment by pointing to contacts with third party fact witnesses by Defendants' counsel, in particular the fact that counsel (1) sent a link to publicly available articles about the '504 patent to a potential witness and (2) made a comment in an email exchange with one witness that Defendants would like his "help to invalidate" the '504 patent. It is beyond hyperbolic for Plaintiff to label this as "litigation misconduct" as there is no impropriety here at all. There is nothing wrong with sending a potential witness background articles describing the case and, in fact, the witness testified that he did not even read the articles in question. Nor is it improper for Defendants who are in fact trying to invalidate a patent to tell the third party witness that they are seeking help of third party witnesses to do so. The witness in question, Mr. Fenner testified as follows on this point:

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Q. Do you understand that you're helping to invalidate a patent by your testimony here?

A. No. I'm helping to provide information about what work I had done and that it will –it will be used in these proceedings, but my goal is just to provide truthful information about what I accomplished in 1993 and 1994.

Ultimately, Plaintiff's argument for why this Court should not grant Defendants permission to file a motion for summary judgment boils down to an argument that summary judgment is not appropriate because it is possible that a jury may find the witnesses less than credible. The law has long been clear that a party may not avoid summary judgment by merely asserting that the testimony in the record may be disbelieved by the jury. *See, e.g., Curl v. Int'l Business Machines Corp.*, 517 F.2d 212 (5th Cir. 1975) (“the opposing party may not merely recite the incantation credibility and have a trial on the hope that a jury may disbelieve factually uncontested proof”). This is particularly the case where, as here, the testimony is supported by source code produced by the government and a book containing a screenshot of the website.

On the substance of what the cited references disclose, Plaintiff has not identified any specific way in which the references are lacking. Instead, Plaintiff simply asserts that the references are not relevant because they are “web sites/pages.” This argument contradicts Plaintiff's own expert report in which the expert explains that he analyzed “whether the various limitations of the Asserted Claims are performed” by “navigat[ing] to the Defendant's web site, and for an exemplary show, review[ing] the resulting web page that was displayed to a user.” According to Plaintiff's expert, the “compilation file” required in the asserted claims is an HTML web page. Moreover, the cited references are not, as Plaintiff contends, “a web site alone.” *Compton* includes a Figure showing the use of the web server and the Internet connection and the uncontroverted evidence is that the NCSA and NRL websites used web servers, communication interfaces and data storage. Indeed, as Plaintiff's expert explains, the Web uses a client server system so that any operational web site would by definition use a web server and communication interfaces to receive requests over the Internet.

Plaintiff also suggests that because this Court has not yet issued its final claim construction and because the parties do not agree on a definition of the person of ordinary skill in the art Defendants should not be permitted to move for summary judgment. But, Plaintiff has not identified any claim construction issue or any difference in the POSITA definition that would preclude summary judgment of invalidity. Neither of these disagreements between the parties precludes a motion for summary judgment.

Because Plaintiff has failed to identify any genuine dispute of fact with respect to whether the prior art references identified in Defendants' letter brief anticipate or render obvious the asserted claims of the '504 patent, Defendants' request for permission to file a motion for summary judgment should be granted.

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Respectfully submitted,

/s/ Jennifer Parker Ainsworth

Jennifer Parker Ainsworth
WILSON ROBERTSON & CORNELIUS PC
909 ESE Loop 323
Suite 400
P.O. Box 7339
Tyler, TX 75711-7339
903-509-5000
Fax: 903-509-5092
Email: jainsworth@wilsonlawfirm.com

Steven Lieberman
slieberman@rfem.com
Brian S. Rosenbloom
brosenbloom@rfem.com
Sharon L. Davis
sdavis@rfem.com
Jennifer Maisel
jmaisel@rfem.com
ROTHWELL, FIGG, ERNST & MANBECK, P.C.
607 14th Street, N.W.
Suite 800
Washington, DC 20005
Telephone: (202) 783-6040
Facsimile: (202) 783-6031

*Attorneys for CBS Corporation, NBCUniversal
Media, LLC, Fox Broadcasting Company,
Fox Networks Group, Inc.*

/s/ Josh Krevitt

(with permission by Jennifer P. Ainsworth)

Josh Krevitt
GIBSON DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-4035
Jason Lo
Raymond LaMagna
GIBSON DUNN & CRUTCHER LLP
333 South Grand Avenue

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Page 5

Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

Michael C. Smith
SIEBMAN, BURG, PHILLUOS & SMITH, LLP
113 East Austin Street
Marshall, TX 75670
Telephone: (903) 938-8900
Facsimile: (972) 767-4620

Attorneys for Defendant Howstuffworks, LLC

/s/ David Folsom
(with permission by Jennifer P. Ainsworth)

David Folsom
Texas State Bar No. 07210800
dfolsom@jw.com
John M. Jackson
Texas State Bar No. 24002340
jjackson@jw.com
Matthew C. Acosta
Texas State Bar No. 24062577
macosta@jw.com
JACKSON WALKER L.L.P.
901 Main Street, Suite 6000
Dallas, Texas 75202
Telephone: (214) 953-6000
Facsimile: (214) 953-5822

Attorneys for Defendant Lotzi Digital, Inc.

/s/ Bijal V. Vakil
(with permission by Jennifer P. Ainsworth)

Bijal V. Vakil
CA State Bar No.: 192878
WHITE & CASE, LLP
3000 El Camino Real
Five Palo Alto Square 9th Floor
Palo Alto, CA 94306
Telephone: (650) 213-0300
Facsimile: (650) 213-8158
Email: bvakil@whitecase.com

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Gregory L. Doll
CA State Bar No.: 193205
DOLL AMIR & ELEY LLP
1888 Century Park East, Suite 1850
Los Angeles, CA 90067
Telephone: (310) 557-9100
Facsimile: (310) 557-9101
Email: gdoll@dollamir.com

*Attorneys for A Partnership Consisting of
Adam Carolla, Donny Misraje and Sandy Ganz*