

1 The opinion in support of the decision being entered today was *not* written
2 for publication and is *not* binding precedent of the Board

3 _____
4 UNITED STATES PATENT AND TRADEMARK OFFICE
5 _____

6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES
8 _____

9 *Ex parte* SPX Corporation
10 _____

11 Appeal 2006-1875
12 Reexamination Control No. 90/006,272
13 Technology Center 3900
14 _____

15 DECIDED: March 14, 2007
16 _____

17 Before LEE E. BARRETT, RICHARD TORCZON, and MICHAEL P.
18 TIERNEY, *Administrative Patent Judges*.

19 BARRETT, *Administrative Patent Judge*.

20 DECISION ON APPEAL

21 This is a decision on appeal under 35 U.S.C. §§ 134(a) and 306 from
22 the final rejection of claims 2-4, 6-10, 12-15, 17-19, and 21-23 under
23 35 U.S.C. § 102(b). Claims 1, 5, 11, 16, and 20 have been canceled.

24 We affirm.

1 REEXAMINATION

2 A request was filed on April 26, 2002, by Third Party Requester
3 Control Components, Inc., for reexamination of U.S. Patent 6,039,076 (the
4 '076 patent) issued March 21, 2000, to Kent R. Hemme and Allan K. Shea,
5 based on Application 09/109,122, filed June 30, 1998, entitled "High Energy
6 Loss Fluid Control Device," originally assigned to Copes-Vulcan, Inc., and
7 now assigned to Patent Owner SPX Corp., Muskegon, MI.

8 BACKGROUND

9 The invention relates to a disc stack for a high energy loss fluid control
10 device. Each annular-shaped disc in the stack has a plurality of passageways
11 having a certain geometry to cause the fluid to expend energy alternately by
12 turbulent interaction and then to resolve the turbulence so that frictional losses
13 can be obtained ('076 patent, col. 1, l. 57, to col. 2, l. 25).

14 Claim 21 is reproduced below. For clarity, the claim is not underlined
15 as is required in the Office by 37 C.F.R. § 1.530(f).¹

16 21. A disc stack for a high energy loss fluid control device, said disc
17 stack comprising a plurality of annularly-shaped discs stacked one upon
18 another, each of said annularly-shaped discs having an inner periphery,
19 an outer periphery, and a plurality of passageways extending between
20 an inlet and an outlet located at said inner and outer peripheries, each of
21 said passageways having a plurality of sections connected with
22 right-angle turns with said sections alternating between extending in a

¹ New claims 21-23 submitted in the reexamination and in the appendix to the Brief should be completely underlined, as required by §§ 1.530(f) and (i), because they represent matter added by the reexamination proceeding relative to the patent being reexamined.

1 circumferential direction and extending in a radial direction, wherein a
2 first one of said sections is radially extending toward said inlet to cause
3 fluid to act upon itself and expend energy by turbulent interaction, and
4 a second one of said sections which is the next radially extending
5 section downstream of said first one of said sections is generally
6 straight and has a length which is greater than a length of said first one
7 of said sections to gain control of fluid velocity for frictional losses,
8 wherein each of said discs have passages connecting adjacent ones of
9 said passageways allowing fluid in adjacent passageways to interact
10 and stage pressures to equalize, wherein said connecting passages each
11 connect adjacent ones of adjacent sections of said adjacent
12 passageways.

13 THE REFERENCE

14 The Examiner relies on the following reference:

15 *RAVEN Control Valves*, Copes-Vulcan, Inc. sales brochure, 1997 (the
16 "Copes-Vulcan Brochure").

17 THE REJECTION

18 Claims 2-4, 6-10, 12-15, 17-19, and 21-23 stand rejected under
19 35 U.S.C. § 102(b) as being anticipated by the Copes-Vulcan Brochure.

DISCUSSION

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Issues

An employee of the Third Party Requester, a member of the public interested in the art, testified in a declaration that he received a copy of the Copes-Vulcan Brochure before the critical date, but provided no details about the conditions under which it was received. The '076 patent was originally assigned to Copes-Vulcan (so this is the original assignee's own brochure) and Patent Owner acquired Copes-Vulcan. It is not disputed that the brochure is "printed." Patent Owner does not deny that the brochure, if it is a "printed publication" prior to the critical date under § 102(b), anticipates all the pending claims.

The ultimate issue is whether a preponderance of the evidence establishes that the Copes-Vulcan Brochure was "publicly accessible" more than one year before the filing date of the '076 patent so as to constitute a "printed publication" bar under 35 U.S.C. § 102(b). Subissues are: (1) Has the declaration testimony been corroborated?; (2) Is declarant's testimony that he received the Copes-Vulcan Brochure before the critical date sufficient to establish by a preponderance of the evidence that the brochure was "publicly accessible" and to shift the burden of production to the Patent Owner?; and (3) Has the Patent Owner submitted sufficient evidence indicating that the brochure was not publicly accessible before the critical date to tip the preponderance of evidence in its favor?

1 *Facts*

2 *Prosecution*

3 1. The Request for Reexamination alleged that claims 1-20 of the '076
4 patent were anticipated under 35 U.S.C. § 102 and/or unpatentable under
5 § 103(a) over one or more of eleven (11) trade publication exhibits, including
6 Exhibit 11, the Copes-Vulcan Brochure.

7 2. Mr. Herbert Miller, a Vice President of Control Components, Inc.
8 ("CCI"), the Third Party Requester, filed a declaration in support of the
9 Request for Reexamination, discussing the exhibits.

10 3. CCI is a competitor of Copes-Vulcan, Inc., as evidenced by
11 Exhibits 1-7 and 10 submitted with the Request for Reexamination.

12 4. The Examiner determined that the eleven exhibits raised a substantial
13 new question of patentability and entered an Order Granting Request for
14 Ex Parte Reexamination on June 26, 2002.

15 5. In an Office Action of March 12, 2003, the Examiner rejected
16 claims 1-20 under 35 U.S.C. § 102(a) or § 102(b) as being anticipated by the
17 Copes-Vulcan Brochure, and also rejected claims 1-20 under § 102(b) or
18 § 103(a) over other references.

19 6. Patent Owner filed an amendment on May 12, 2003, canceling claims 1
20 and 11, rewriting claims 5 and 16 as independent claims, and adding
21 dependent claims 21-23.

22 7. Patent Owner states in the May 12 amendment, page 7:

23 Patentee conducted a diligent investigation as to the first date of
24 publication of the [Copes-Vulcan] Sales Brochure. Patentee was

1 unable to establish any date of publication prior to June 30, 1997, and
2 cannot confirm the actual date the Copes-Vulcan Sales Brochure first
3 became accessible to the public.

4
5 8. Patent Owner submitted declarations under 37 C.F.R. § 1.132 by the
6 co-inventors Kent Hemme and Allan Shea, declaring that they are employees
7 of Patent Owner SPX Valves and Controls, which acquired Copes-Vulcan,
8 and the subject matter of the Copes-Vulcan Sales Brochure was the result of
9 their joint invention and, therefore, the brochure does not indicate invention
10 by "another" under 35 U.S.C. § 102(a) (May 12 amendment, page 7).

11 9. The Examiner entered a Final Rejection on September 30, 2003, of
12 claims 2-10 and 12-20, which did not rely on the Copes-Vulcan Brochure,
13 and noted that claims 21-23 were objected to but would be allowable if
14 rewritten in independent form.

15 10. Patent Owner filed an amendment on November 26, 2003, canceling
16 claims 5, 16, and 20, and rewriting claims 21-23 as independent claims.

17 11. Patent Owner filed an Information Disclosure Statement on
18 December 30, 2003, requesting the Examiner to consider an additional
19 declaration by Mr. Miller dated December 10, 2003, (2003 Miller
20 declaration), regarding the Copes-Vulcan Brochure, but also stating:

21 Patentee conducted a diligent investigation as to the first date of
22 publication of the Copes-Vulcan Sales Brochure referenced in the
23 attached declaration. Patentee was and is unable to establish any date
24 of publication prior to June 30, 1997, and cannot confirm the actual
25 date the Copes-Vulcan Sales Brochure first became accessible to the
26 public.

1 12. The Examiner entered a non-final Rejection on August 24, 2004,
2 concluding that the 2003 Miller Declaration established a publication date for
3 the Copes-Vulcan Brochure before the critical date of June 30, 1997, and
4 rejecting claims 2-4, 6-10, 12-15, 17-19, and 21-23 under 35 U.S.C. § 102(b)
5 as being anticipated by the Copes-Vulcan Brochure.

6 13. Patent Owner filed a response on October 22, 2004, arguing that the
7 2003 Miller declaration fails to establish that the Copes-Vulcan Brochure was
8 published before the critical date, but not contesting that the brochure, if it is a
9 proper reference, anticipates all of the pending claims.

10 14. The Examiner entered a Final Rejection on March 28, 2004,
11 maintaining the rejection.

12 15. Patent Owner filed a Brief on July 26, 2005.

13 16. The Examiner entered an Examiner's Answer on September 29, 2005.

14 17. Patent Owner filed a Reply Brief on November 14, 2005.

15 *2003 Miller Declaration*

16 18. Mr. Miller testifies that he received a copy of the Copes-Vulcan
17 Brochure on or before June 20, 1997 (2003 Miller Declaration ¶ 3).

18 19. The last page of the Copes-Vulcan Brochure shows a copyright date of
19 1997 and states that it was printed in the U.S.A.

20 20. Mr. Miller refers to Exhibit 15, a copy of a memorandum with a
21 letterhead stating "Control Components Inc., An IMI Company," dated
22 June 20, 1997, from himself, Mr. H.L. Miller, to Mr. J. Chris Sykes, IMI
23 Patents and Licensing (2003 Miller Declaration, ¶ 4).

1 21. Mr. Miller testifies (2003 Miller Declaration ¶ 5) that the June 20
2 memorandum refers to the 1997 Copes-Vulcan Brochure as evidenced by
3 several textual references to the brochure: (a) the memo says that RAVEN is
4 an acronym for Reduce and Attenuate Velocity Erosion and Noise, and this
5 appears on the cover of the brochure (¶ 6); (b) the memo says that the pictures
6 in the brochure show "pressure equalizing rings," and the disc on the cover of
7 the brochure shows rings corresponding to an inner periphery ring prior to the
8 channel entry 72 and to passageways 80 and 82 in the '076 patent (¶ 7); (c) the
9 memo says that there are "only two designs shown," where a first design is
10 shown on the cover of the brochure, and repeated on pages 2, 3, and 4, and a
11 second design is shown on page 2 of the brochure (¶ 8); (d) the memo says
12 that the brochure shows expanding and non-expanding flow channels and that
13 the discs shown have 14 and 40 turns, and the brochure shows discs with 14
14 and 40 turns with the flow channels expanding toward the outer rim of the
15 discs (¶ 9); and (e) the memo comments on a picture showing noise versus
16 pressure differential on page 3 which does not mention which competitor's
17 disc is being compared, and page 3 of the brochure has a graph of noise
18 versus pressure differential which does not identify the competitors (¶ 10).

19 22. Mr. Miller testifies that the memorandum refers to a copy being sent to
20 S.A. Carson and V.K. Nagpal, and that he spoke to Mr. Carson and
21 Mr. Nagpal who both recalled receiving a copy of the memorandum of
22 Exhibit 15 and a copy of the Copes-Vulcan Brochure in the summer of 1997
23 (2003 Miller declaration ¶¶ 11-12).

1 23. Mr. Miller also refers to Exhibit 16, a copy of a letter sent by facsimile
2 and dated June 26, 1997, from Mr. J.C. Sykes, IMI Patents and Licensing
3 Department, to himself, H.L. Miller, CCI, and received June 26, 1997
4 (2003 Miller declaration ¶ 13).

5 24. Mr. Miller states that item 3, page 2, of the June 26 letter refers to the
6 memorandum of June 20 (Exhibit 15) and the RAVEN brochure of
7 Copes-Vulcan (Exhibit 11) and states (2003 Miller declaration ¶ 14).

8 Your note of 20 June contains details of the Raven product offering by
9 Copes Vulcan. My copy of the photographs of the disc configuration is
10 not too clear, but . . . [rest redacted].

11 25. Mr. Miller states that since the Copes-Vulcan Brochure was sent to
12 Mr. Sykes by facsimile, one would expect that the photographs of the discs
13 shown in the brochure would not be too clear as stated in the June 26 letter
14 (2003 Miller declaration ¶ 15).

15 26. Mr. Miller states that the handwritten notes at the upper left corner of
16 Exhibit 16 were made by him, listing the names of persons to whom he
17 distributed copies of Mr. Sykes letter (2003 Miller declaration ¶ 16).

18 27. Mr. Miller states that his letter of June 20, 1997, to Mr. Sykes
19 (Exhibit 15) and Mr. Sykes letter of June 26, 1997, back to him (Exhibit 16),
20 are two dated documents corroborating the publication of the Copes-Vulcan
21 Brochure more than one year before the June 30, 1998, filing date of the
22 patent application (2003 Miller declaration ¶ 17).

1 *Principles of law*

2 Reexamination is only conducted on the basis of "patents and printed
3 publications." 35 U.S.C. §§ 301-303; 37 C.F.R. § 1.552(a).

4 "Whether an asserted anticipatory document qualifies as a 'printed
5 publication' under § 102 is a legal conclusion based on underlying factual
6 determinations." *Cooper Cameron Corp. v. Kvaerner Oilfield Prods.*,
7 291 F.3d 1317, 1321, 62 USPQ2d 1846, 1849 (Fed. Cir. 2002).

8 The test for "printed publication" is stated in *Bruckelmeyer v. Ground*
9 *Heaters, Inc.*, 445 F.3d 1374, 1378, 78 USPQ2d 1684, 1687 (Fed. Cir. 2006):

10 Whether a given reference is a "printed publication" depends on
11 whether it was "publicly accessible" during the prior period.
12 [*In re Wyer*, 655 F.2d 221, 226, 210 USPQ 790, 794 (CCPA 1981)].
13 A given reference is "publicly accessible"

14 upon a satisfactory showing that such document has been
15 disseminated or otherwise made available to the extent that
16 persons interested and ordinarily skilled in the subject matter or
17 art exercising reasonable diligence, can locate it and recognize
18 and comprehend therefrom the essentials of the claimed
19 invention without need of further research or experimentation.

20 *Id.* (quoting *I.C.E. Corp. v. Armco Steel Corp.*, 250 F. Supp. 738, 743
21 [148 USPQ 537, 540] (S.D.N.Y. 1966)).

22 The requirement of "public accessibility" can be satisfied under a variety of
23 conditions, including when there has been a meaningful distribution,
24 indexing, or display of the material to the public interested in the art even

1 though it is neither distributed nor indexed. *See generally In re Klopfenstein*,
2 380 F.3d 1345, 72 USPQ2d 1117 (Fed. Cir. 2004).

3 The initial burden of establishing that a reference was "publicly
4 accessible" so as to constitute a prior art printed publication lies with the
5 examiner. *See In re Hall*, 781 F.2d 897, 899, 228 USPQ 453, 455 (Fed. Cir.
6 1986) ("The proponent of the publication bar must show that prior to the
7 critical date the reference was sufficiently accessible, at least to the public
8 interested in the art"). "[P]reponderance of the evidence is the standard
9 that must be met by the PTO in making rejections" *In re Caveney*,
10 761 F.2d 671, 674, 226 USPQ 1, 3 (Fed. Cir. 1985). Once the U.S. Patent and
11 Trademark Office (USPTO) establishes a prima facie case, the burden of
12 production or going forward with the evidence shifts to the applicant. *Cf.*
13 *In re Epstein*, 32 F.3d 1559, 1570-71, 31 USPQ2d 1817, 1824-25 (Fed. Cir.
14 1994) (Plager, J., concurring) (discussing the concept of the prima facie case
15 in connection with a public use or on sale bar).

16 Interest of a witness is a factor to be considered in evaluating the
17 credibility of testimony. *See Juicy Whip, Inc. v. Orange Bang, Inc.*,
18 292 F.3d 728, 737-43, 63 USPQ2d 1251, 1257-62 (Fed. Cir. 2002).
19 Uncorroborated testimony might not be persuasive. As stated in *Checkpoint*
20 *Systems, Inc. v. All-Tag Sec. S.A.*, 412 F.3d 1331, 1339, 75 USPQ2d 1200,
21 1205-06 (Fed. Cir. 2005):

22 "The law has long looked with disfavor upon invalidating patents on
23 the basis of mere testimonial evidence absent other evidence that
24 corroborates that testimony." *Finnigan Corp. v. United States Int'l*

1 *Trade Comm'n*, 180 F.3d 1354, 1366 (Fed. Cir. 1999). Thus, "[t]he
2 Supreme Court recognized over one hundred years ago that testimony
3 concerning invalidating activities can be 'unsatisfactory' due to 'the
4 forgetfulness of witnesses, their liability to mistakes, their proneness to
5 recollect things as the party calling them would have them recollect
6 them, aside from the temptation to actual perjury.'" *Id.* (quoting *The*
7 *Barbed-Wire Patent*, 143 U.S. 275, 284, 12 S.Ct. 443, 36 L.Ed. 154
8 (1892)). This "rule of reason" standard requiring corroborating
9 evidence extends to claims by individuals purporting to be co-
10 inventors. *See Ethicon, Inc. v. U.S. Surgical Corp.*, 135 F.3d 1456,
11 1464 (Fed. Cir. 1998). Physical, documentary, or circumstantial
12 evidence, or reliable testimony from individuals other than the alleged
13 inventor or an interested party, may corroborate. *See Sandt Tech., Ltd.*
14 *v. Resco Metal & Plastics Corp.*, 264 F.3d 1344, 1350-51 (Fed. Cir.
15 2001); *Ethicon*, 135 F.3d at 1461.

16 *Analysis*

17 *Has the declaration testimony been corroborated?*

18 Mr. Miller testified that he received the Copes-Vulcan Brochure before
19 the critical date of June 30, 1997. Because of the length of time since the
20 events in 1997, and because Mr. Miller is an employee of a competitor to the
21 Patent Owner in selling fluid control valves, and therefore is an "interested
22 witness" in the outcome of the reexamination, it is appropriate to examine
23 whether his declaration testimony is corroborated.

24 We conclude that Mr. Miller's testimony that he received the
25 Copes-Vulcan Brochure on or before June 20, 1997, is corroborated by the
26 following two pieces of evidence: (1) the Exhibit 15 memorandum dated
27 June 20, 1997, from Mr. Miller to Mr. Sykes, referring to the Copes-Vulcan

1 Brochure; and (2) the Exhibit 16 reply sent by facsimile from Mr. Sykes back
2 to Mr. Miller, referring to the Copes-Vulcan Brochure product and the Miller
3 memorandum, dated June 26, 1997, and stamped (two places) as also received
4 June 26, 1997. We find that Exhibit 15 contains sufficient textual references
5 to indicate that it refers to the Copes-Vulcan Brochure for the reasons stated
6 by Mr. Miller (Fact 21),² which are not contested by Patent Owner, and,
7 therefore, find that Exhibit 16 also refers to the brochure. These documents
8 are highly reliable because they were created more than a year before the
9 filing of the application which became the '076 patent. *Cf. Sandt Technology*,
10 264 F.3d at 1350-51, 60 USPQ2d at 1094 (Anticipation under § 102(g)(2):
11 "Documentary or physical evidence that is made contemporaneously with the
12 inventive process provides the most reliable proof that the inventor's
13 testimony has been corroborated. Because documentary or physical evidence
14 is created at the time of conception or reduction to practice, the risk of
15 litigation-inspired fabrication or exaggeration is eliminated." (Citation
16 omitted.)). Mr. Miller's statement that Mr. Carson and Mr. Nagpal recalled
17 receiving a copy of the memorandum (Fact 22) is not given any weight

² Exhibit 15 states: "Attached is a copy of the Copes Vulcan sales brochure on their Drag™ copy." "DRAG" is a term used by Third Party Requester CCI to refer to their tortuous path trim (*see* Exhibit 3 in the Request for Reexamination). Thus, Exhibit 15 indicates Mr. Miller's opinion that the Copes-Vulcan RAVEN product is a copy of the CCI DRAG product.

1 because, among other reasons, there is no indication that they received the
2 brochure before the critical date.

3 *Is Mr. Miller's testimony that he received the Copes-Vulcan Brochure*
4 *before the critical date sufficient to establish by a preponderance of the*
5 *evidence that the brochure was "publicly accessible" and to shift the*
6 *burden of production to the Patent Owner?*

7 Patent Owner argues that "[w]ithout conceding or denying, the truth of
8 the matters asserted in the Declaration, Patentee respectfully submits that the
9 Declaration, even if taken on its face, fails to meet the case law test for
10 showing that the Patentee or anyone else did, in fact, publish the Brochure
11 before June 30, 1997" (Br. 10). It is argued that "[t]here is no indication in
12 the Declaration of any public accessibility, distribution, indexing, public
13 display or 'associated facts and circumstances' surrounding a 'public
14 disclosure'" (Br. 11) and "even if the alleged 'receipt' in the Declaration is
15 taken as true, the mere occurrence of someone having possession of a
16 document does not mean that the document was 'published' under the
17 applicable law" (Br. 11). That is, Patent Owner argues that even if the
18 2003 Miller Declaration is accepted as true, it merely establishes receipt of
19 the brochure before the critical date and does not provide any description of
20 "surrounding circumstances" which would prove public accessibility.
21 "Whatever the 'surrounding facts' were, the Declaration does not provide
22 them, and the Patentee is unable to determine them [and] consequently, the
23 Patentee has no way of 'disproving' the surrounding facts which have not been

1 provided by Mr. Miller, since Mr. Miller has not come forward with them."

2 Br. 14. Patent Owner further argues (Br. 15):

3 Patentee submits that at present, the circumstances surrounding
4 the receipt of the Brochure are still unknown, and Patentee has been
5 unable to determine them. Further, Patentee in this proceeding does not
6 have any discovery provisions to investigate the facts surrounding
7 Mr. Miller's alleged receipt of the Brochure. These facts are
8 knowledge that apparently is or should be in the hands of Mr. Miller.
9 Moreover, even if Patentee accepts Mr. Miller's account of the alleged
10 receipt as correct, the alleged receipt alone, again, does not constitute
11 publication by itself.

12 It is true that the 2003 Miller Declaration does not explain the facts
13 surrounding the receipt of the Copes-Vulcan Brochure by Mr. Miller.
14 Nevertheless, the corroborated receipt of the Copes-Vulcan Brochure before
15 the critical date by Mr. Miller, who is a member of the pertinent public
16 interested in high pressure fluid control valves, speaks for itself and is
17 circumstantial evidence that the brochure was "publicly accessible" to
18 members of the pertinent public before the critical date. Under the
19 preponderance of the evidence standard that applies to proof of facts in the
20 USPTO, this evidence makes it more likely than not that the brochure was
21 "publicly accessible" and, hence, a "printed publication" more than one year
22 before the filing date of the '076 patent under § 102(b), and is sufficient to
23 shift the burden of going forward with the evidence to Patent Owner to show
24 that the brochure was not publicly accessible.

25 This shifting of the burden of production is not an unreasonable or
26 unfair requirement since Patent Owner SBX Corp. acquired Copes-Vulcan

1 (see Rule 132 declarations of co-inventors Hemme and Shea noted in Fact 8)
2 and, thus, Patent Owner presumably had access to Copes-Vulcan records
3 relating to the printing and distribution of the Copes-Vulcan RAVEN
4 Brochure and to Copes-Vulcan personnel who may have knowledge of the
5 circumstances of printing and distribution. Patent Owner is in the best
6 position to investigate and provide evidence that Mr. Miller's receipt of the
7 brochure was not part of a public dissemination of the brochure even if it
8 cannot account for how Mr. Miller received his copy. The USPTO should not
9 have to prove how Mr. Miller came into possession of the brochure or search
10 for other interested persons who received copies of the brochure when there is
11 circumstantial evidence that the brochure was published and Patent Owner
12 has access to the information to disprove publication.

13 In the absence of any evidence to the contrary, Mr. Miller's testimony
14 that he received the Copes-Vulcan Brochure before the critical date is
15 sufficient to establish by a preponderance of the evidence that the brochure
16 was "publicly accessible" and to shift the burden of going forward with the
17 evidence to the Patent Owner.

18 *Has the Patent Owner submitted sufficient evidence indicating*
19 *that the brochure was not publicly accessible before the critical date*
20 *to tip the preponderance of the evidence in its favor?*

21 The only information provided by the Patent Owner about the
22 Copes-Vulcan Brochure is the following statement in the Information

1 Disclosure Statement filed December 30, 2003 (which is similar to a
2 statement in the amendment May 12, 2003):

3 Patentee conducted a diligent investigation as to the first date of
4 publication of the Copes-Vulcan Sales Brochure referenced in the
5 attached declaration. Patentee was and is unable to establish any date
6 of publication prior to June 30, 1997, and cannot confirm the actual
7 date the Copes-Vulcan Sales Brochure first became accessible to the
8 public.

9 That is, Patent Owner asserts that it is without knowledge of the date of
10 "publication" of the Copes-Vulcan brochure. This statement, even if
11 considered evidence, is entitled to little weight because it does not tend to
12 prove that "publication" of the brochure occurred after the critical date, or
13 disprove that "publication" occurred before the critical date.

14 No facts or details are provided about the brochure or the investigation.
15 Patent Owner does not even say whether it discovered the date of printing
16 and, if so, what it was. The quotation above is open to the interpretation that
17 Patent Owner knows that the brochure was printed before the critical date, but
18 was unable to confirm the specific date it became publicly accessible (i.e., the
19 date of "publication"). Patent Owner does not explain what records were
20 searched, with what results, or what personnel were interviewed. For
21 example, the co-inventors Hemme and Shea submitted Rule 132 declarations
22 stating that the RAVEN control valve in the Copes-Vulcan Brochure was
23 their work, but there is no indication that they were asked if they knew about
24 the circumstances surrounding the distribution of the brochure or when the
25 RAVEN control valve went on sale. Patent Owner does not provide any

1 evidence of routine business practice in 1997 that would tend to indirectly
2 show that the brochure was *not* accessible to the public before the critical
3 date. *Cf. Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560,
4 7 USPQ2d 1057 (Fed. Cir. 1988) ("Intel presented extensive uncontroverted
5 evidence of business practice that was sufficient to prove that Exhibit 5 was
6 widely available and accessible to the interested public before October 14,
7 1979."). Evidence of when the RAVEN control valve went "on sale" might
8 also have been indirect evidence of when the brochure was published.

9 Therefore, Patent Owner has not presented sufficient evidence that the
10 Copes-Vulcan Brochure was not published before the critical date to tip the
11 preponderance of the evidence in its favor.

12 *A preponderance of the evidence establishes that the Copes-Vulcan*
13 *Brochure was "publicly accessible" more than one year before the*
14 *filing date of the '076 patent so as to constitute a "printed publication"*
15 *bar under 35 U.S.C. § 102(b)*

16 We conclude that the 2003 Miller Declaration establishes by a
17 preponderance of the evidence that the Copes-Vulcan Brochure was
18 disseminated and/or otherwise became publicly accessible before the critical
19 date of June 30, 1997, and constitutes a "printed publication" bar under
20 35 U.S.C. § 102(b). Patent Owner has not provided sufficient evidence to tilt
21 the preponderance of evidence in the other direction. Patent Owner does not
22 deny that the brochure, if it is a "printed publication" prior to the critical date
23 under § 102(b), anticipates all the pending claims. Accordingly, the
24 anticipation rejection of claims 1-41 under § 102(b) is affirmed.

