



## PTAB Allows Patent Owner to Subpoena and Depose Internet Archives Employee for Limited Purpose

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The PTAB explained that a party can compel testimony under 37 CFR §42.25(a), but must be “very specific” as to the evidence it seeks and must show good cause. Additionally, any showing by Patent Owner that it is entitled to such relief must be balanced with the “significant inconvenience” to an uninterested third-party witness, such as Mr. Butler.

Patent Owner offered four factual bases for seeking to cross-examine Mr. Butler and met its burden on three. The PTAB rejected the first basis, in which Patent Owner argued that certain pages were not authentic based on the lack of footers. The PTAB stated that Patent Owner was essentially accusing someone of wrongdoing and that such a showing had not been made. But the PTAB permitted Patent Owner to cross-examine Mr. Butler on (1) his knowledge of the dates of image files subsumed within a webpage, (2) the particular hyperlink that Mr. Butler selected to arrive at the archived webpage, and (3) his personal knowledge of the statements in his affidavit.

The PTAB nonetheless “cautioned that cross-examination that deviates from the underlying basis for the narrow subject matter set forth in Mr. Butler’s Affidavit . . . will not be tolerated.” Order at 7. The PTAB also limited cross-examination to two hours, limited re-direct to one hour, and limited the use of cross-examination testimony to credibility and weight of evidence (as opposed to admissibility).

*Coastal Indus., Inc. v. Shower Enclosures Am., Inc.*, IPR2017-00573, Paper No. 27 (PTAB Feb. 20, 2018)).

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