

Paper No. _____
Filed: March 30, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

IBG LLC; INTERACTIVE BROKERS LLC;
TRADESTATION GROUP, INC.; TRADESTATION SECURITIES, INC.;
TRADESTATION TECHNOLOGIES, INC.; and
IBFX, INC.

Petitioners

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.

Patent Owner

Case CBM2015-00182
U.S. Patent 6,772,132

PATENT OWNER'S REQUEST FOR REHEARING

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I. INTRODUCTION

Patent Owner respectfully requests rehearing to address the legal standard of whether a reference qualifies as prior art under 35 U.S.C. § 102. Here, the Board applied the incorrect standard in ruling that the TSE manual qualified as prior art, misapprehending controlling precedent establishing that a reference is “publicly accessible” under § 102 only if it was disseminated or otherwise made available to the extent that persons interested *and ordinarily skilled in the subject matter or art* exercising reasonable diligence can locate it. Instead, the Board held that dissemination to any “interested” member of the public is sufficient to show public accessibility. As demonstrated below, however, this is not correct, and resulted in the Board arriving at the erroneous conclusion that the TSE reference qualified as prior art under § 102.

In sum, Patent Owner respectfully requests that this Board reconsider its decision and find that Petitioners have failed to show, by a preponderance of the evidence, that the TSE qualifies as prior art under § 102. Further, because the panel decision here is at odds with other decisions of the Board, e.g., *GoPro, Inc., v. Contour IP Holding, LLC*, IPR2015-01080, Paper 55 (PTAB Oct. 26, 2016), Patent Owner suggests that an expanded panel be convened to consider this rehearing request and maintain consistency among panels of the Board.

II. CONTROLLING PRECEDENT IS CLEAR THAT PUBLIC ACCESSIBILITY REQUIRES THAT THE REFERENCE BE DISSEMINATED OR OTHERWISE MADE AVAILABLE SUCH THAT A PERSON OF ORDINARY SKILL IN THE ART COULD REASONABLY LOCATE IT

The Federal Circuit, in *Blue Calypso, LLC v. Groupon, Inc.*, 815 F.3d 1331, 1348 (Fed. Cir. 2016), made clear that for a reference to be considered publically accessible, the reference must be disseminated (or otherwise made available) such that *a person of ordinary skill in the art (POSA)* (and not just any interested person) exercising reasonable diligence can locate it:

A reference will be considered publicly accessible if it was disseminated or otherwise made available to the extent that persons interested *and skilled in the subject matter or art* exercising reasonable diligence, can locate it.

Id. (emphasis added). The PTAB in other cases have confirmed that “dissemination” requires dissemination to a POSA and that dissemination to the public in general is not sufficient to show public accessibility. For example, the petitioners in *GoPro* advanced a theory that:

there are two different standards depending on the factual circumstances of the case: for “catalog” cases like a thesis stored as a university, the standard is accessibility to person interested and skilled

in the art, but for “dissemination [cases], like at a tradeshow,” the standard is only accessibility to the interested public.

GoPro, Inc., v. Contour IP Holding, LLC, IPR2015-01080, Paper 55, pp. 19-20 (PTAB Oct. 26, 2016). In *GoPro*, the PTAB rejected that theory based on the clear language in *Blue Calypso* (set forth above) and held that dissemination requires accessibility to a POSA. *Id.* at 21.

III. HERE, THE BOARD INCORRECTLY FOUND THAT PUBLIC ACCESSIBILITY ONLY REQUIRES THAT THE REFERENCE BE DISSEMINATED (OR OTHERWISE MADE AVAILABLE) TO ANY INTERESTED MEMBER OF THE PUBLIC

In its Final Written Decision, the Board stated:

The determination of whether a document is a “printed publication” under 35 U.S.C. § 102 involves a case-by-case inquiry into the facts and circumstances surrounding its disclosure *to members of the public*. *In re Klopfenstein*, 380 F.3d 1345, 1350 (Fed. Cir. 2004).

Paper 129 (“FWD”), p. 19 (emphasis added). Other parts of the Final Written Decision make clear that the Board was focusing not on POSAs (e.g., GUI designers), but instead on other members of the “interested” public such as traders and technical support personnel (such as computer scientists or engineers):

Thus, the securities companies [that allegedly received the TSE reference] would have included computer scientists or engineers, as well as traders. We find that all such persons who worked at the

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