

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SERVICENOW, INC.
Petitioner

v.

HEWLETT-PACKARD COMPANY
Patent Owner

Case IPR2015-00707
Patent 7,925,981

PETITIONER'S REQUEST FOR REHEARING
(37 C.F.R. § 42.71(d))

Petitioner ServiceNow, Inc. (“Petitioner”) respectfully submits this petition for rehearing under 37 C.F.R. § 42.71(d) of the August 26, 2015 Decision declining to institute *inter partes* review (IPR). An abuse of discretion may be established “by showing that the court made a clear error of judgment in weighing relevant factors or exercised its discretion based upon an error of law or clearly erroneous factual findings.” *Genentech, Inc. v. Novo Nordisk A/S*, 108 F.3d 1361, 1364 (Fed.Cir. 1997). As shown below, rehearing is appropriate because the Board misapprehended or overlooked significant facts set forth in the Petition, misapplied the law on public accessibility, made clearly erroneous factual findings, and abused its discretion by sustaining the patent owner’s evidentiary objections without any response from the Petitioner.

I. THE PETITION SHOWED A REASONABLE LIKELIHOOD THAT THE COLLABORATE REFERENCES WERE PRIOR ART PRINTED PUBLICATIONS

The Board found that the Petition did not adequately show that the Collaborate References (Exhibits 1004-1006) qualified as printed publications. The Board based this finding on several erroneous factual findings and misapplications of the law of public accessibility, which are addressed in detail below. In broad overview, however, rehearing is appropriate the Board misapplied the standard for determining public accessibility.

Federal Circuit law is clear that a determination of public accessibility must be based on “all of the facts and circumstances surrounding the disclosure.” *In re Lister*, 583 F.3d 1307, 1313 (Fed. Cir. 2009). This is particularly important in the context of Internet-based publications, such as the Collaborate References, that

will never see the shelves of a traditional brick-and-mortar library. Evidence of publication in the Internet context often comes from databases that are reliable, but by no means perfect. The public dissemination of a document over the Internet is invariably established through triangulation of multiple pieces of circumstantial evidence that, taken together, paint a picture of how and when the document was publicly accessible.

In the present case, the Board appeared to have employed an analysis in which each individual piece of evidence was considered and rejected separately, eschewing the holistic approach required by Federal Circuit law. For example, the Decision discounted the July 2001 date on the face of Exhibits 1004-1006. The Board stated that it was “not persuaded that the presence of a copyright notice, *without more*, is sufficient evidence of public accessibility as of a particular date.” (Decision at 17 (*italics added*)). But the Petition relied on much more than just the copyright notice to show public accessibility of Exhibits 1004-1006 prior to May 2003. As explained below, the copyright notice and July 2001 date on Exhibits 1004-1006 were corroborated by multiple other pieces of evidence, including the Internet Archive affidavit that showed that documents with the exact same title, version, and table of contents were available for download by August 29, 2001.

The evidence set forth in the Petition, considered as a whole, was more than sufficient to meet the threshold showing under 35 U.S.C. § 314(a).¹ The Internet

¹ “A ‘reasonable likelihood’ requirement is a lower threshold than a ‘more likely than not’ requirement.” 77 Fed. Reg. 48702.

Archive affidavit (Ex. 1014) attached various web pages including an August 29, 2001 download page with links to download PDF versions of the Collaborate References, and instructions on how to download those PDF documents. (Ex. 1014, at 004; Decision at 10.) The Internet Archive affidavit also attached table of contents web pages for each of the three Collaborate References. (See Ex. 1014 at 007 (Introducing Collaborate), Ex. 1014, at 008-010 (Administering Collaborate), Ex. 1014, at 011 (Programming Collaborate).) As the Board recognized, all of the documents attached to the Internet Archive affidavit predated the May 14, 2003 filing date of the '981 patent. (Decision at 10-11.)

The August 29, 2001 download page that was reproduced in the Decision showed URL download links for “Introducing BEA WebLogic Collaborate,” “Administering BEA WebLogic Collaborate,” and “Programming BEA WebLogic Collaborate Management Applications,” all documents relating to version “2.0” of BEA WebLogic Collaborate. (Decision at 13 (quoting Ex. 1014, at 004).) The Decision correctly linked these URLs to Exhibits 1004, 1005, and 1006, respectively. (*Id.*) The document titles and version number on the download page exactly matched the titles and version number on Exhibits 1004-1006. The Internet Archive affidavit also included table of contents pages for each of the three above-mentioned Collaborate References (Ex. 1014, at 007-011), and the headings for those tables of contents matched the headings in the table of contents for Exhibits 1004-1006. (*Compare, e.g.,* Ex. 1014, at 007 *with* Ex. 1004 at 003-004.) Exhibits 1004-1006 also bore a “July 2001” date in at least two places (the cover and copyright page), and stated that they were available for download from

the same BEA e-docs web site that contains the download page. (*See* Petition at 23-24; Ex. 1004, at 006 (“The WebLogic Collaborate product documentation is available on the BEA Systems, Inc. corporate Web site. From the BEA Home page, click Product Documentation or go directly to the Product Documentation page at <http://e-docs.bea.com>.”).)

All of this evidence, considered together, provided more than a threshold showing that Exhibits 1004-1006 were available from the BEA e-docs web site more than one year before May 14, 2003. (Petition at 22-24.) The Board gave several reasons for its finding that individual pieces of evidence did not show public accessibility of Exhibits 1004-1006, but none was legally sufficient.

A. THE BOARD MISSTATED THE DATE OF EXHIBIT 1014

With respect to the table of contents page for Introducing Collaborate (Ex. 1014, at 007), the Board erroneously stated that it was “archived by the Internet Archive on November 1, 2002,” less than one year prior to the filing date. The Board then concluded that the document “fails to qualify as a prior-art, printed publication under 35 U.S.C. § 102(b), as argued by Petitioner.” (Decision at 11.)

The Board’s finding was clearly erroneous and based on an apparent misreading of the URL for that document. The URL showed the document having been archived on January 11 (01/11) not on November 1, 2002 as indicated by the Board. (*See* Decision at 11 (quoting Internet Archive URL in Ex. 1014, <<https://web.archive.org/web/20020111212156>>).) Accordingly, all of the web pages attached to the Internet Archive affidavit, including the one identified by the Board, predated the filing date of the ’981 patent by more than one year.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.