

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FRIENDFINDER NETWORKS INC., STREAMRAY INC., WMM, LLC,
WMM HOLDINGS, LLC, MULTI MEDIA, LLC, AND DUODECAD IT
SERVICES LUXEMBOURG S.À.R.L,
Petitioner

v.

WAG ACQUISITION, LLC,
Patent Owner.

Case IPR2015-01033
Patent 8,327,011 B2
Case IPR2015-01037
Patent 8,122,141 B2¹

Before GLENN J. PERRY, TREVOR M. JEFFERSON, and
BRIAN J. McNAMARA, *Administrative Patent Judges*.

McNAMARA, *Administrative Patent Judge*.

DECISION DENYING REQUEST FOR REHEARING
37C.F.R. § 42.71(d)

¹ This Decision addresses issues that are substantially the same in IPR2015-01033 and IPR2015-01037. Therefore, we exercise our discretion to issue one order to be filed in each case. The parties, however, are not authorized to use this style heading in any subsequent papers.

INTRODUCTION

Friendfinder Networks Inc., Streamray Inc., WMM, LLC, WMM Holdings, LLC, Multi Media, LLC, and Duodecad IT Services Luxembourg S.À.R.L (collectively, “Petitioner”) requested rehearing of our Decision Denying Institution of *Inter Partes* Review in IPR2015-01033 (Friendfinder I) and IPR2015-01037 (Friendfinder II) entered on October 19, 2015. Paper 9 (“Req. Reh’g.”) in each proceeding.

The burden of showing a decision should be modified lies with the party challenging the decision. 37 C.F.R. § 42.71(d). The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition or reply. *Id.* For the reasons discussed below, the Request for Rehearing is DENIED.

ANALYSIS

In our Decision Denying Institution in Friendfinder I, we determined that Petitioner had failed to demonstrate that a Master of Science Thesis entitled “Continuous Media Support for Multimedia Databases” submitted by Jun Su to the Department of Computing and Information Science at Queens University, Ontario, Canada in September 1998 (“Su”) was accessible to the public in 1999. Dec. to Inst. 9–11, 13.² We applied the same analysis of Su in Friendfinder II. Friendfinder II Dec. Denying Inst. 8–9.

Petitioner contends that the panel failed to consider and give proper value to terms that would have been used by a person of ordinary skill in the

² All references cited herein are to our papers in Friendfinder I, unless otherwise noted.

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art to search for and locate references describing the subject matter of the U.S. Patent 8,327,011 (“the ’011 Patent”) (Req. Reh’g. 1–2) and U.S. Patent 8,122,141 B2 (“the ’041 Patent) (Friendfinder II Req. Reh’g. 1–2).

According to Petitioner, the panel overlooked the importance of the term “continuous” because the inventor’s goal was to achieve a continuous broadcast without interruption. Req. Reh’g. 2. Petitioner also contends that we applied the incorrect legal standard for determining public accessibility by omitting from our analysis the perspective of a person of ordinary skill in the art. *Id.* Petitioner further contends that the totality of the circumstances makes it clear that the reference was publically accessible before the critical date of the ’011 Patent. *Id.* at 3.

Petitioner fails to recognize that our Decision was based on Petitioner’s failure to present sufficient evidence of public accessibility. Public accessibility is the touchstone in determining whether a reference is a printed publication. *In re Hall*, 781 F.2d 897, 898–99 (Fed. Cir. 1986). “A reference is publicly accessible ‘upon a satisfactory showing that such document has been 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.’” *Kyocera Wireless Corp. v. Int’l Trade Comm’n.*, 545 F.3d 1340, 1350 (Fed. Cir. 2008) (quoting *SRI Int’l, Inc. v. Internet Sec. Sys. Inc.*, 511 F.3d 1186, 1194 (Fed. Cir. 2008)). Whether a reference is a printed publication is a legal question based on underlying factual determinations. *Id.* The party seeking to introduce the reference “should produce sufficient proof of its dissemination or that it has otherwise been available and accessible to persons concerned with the art to

which the document relates and thus most likely to avail themselves of its contents.” *In re Wyer*, 655 F.2d 221, 227 (CCPA 1981).

On August 6, 2015, we denied Petitioner’s request for authorization to submit a response to the Patent Owner Preliminary Response concerning this issue because, during a telephone conference on August 4, 2015, Petitioner acknowledged that it did not seek to introduce new evidence or rebut facts presented in the Patent Owner Preliminary Response and that the question before us was a legal one. Dec. Denying Inst. 6–7 (citing Paper 7, 2–3). As we noted in the Decision Denying Institution, where no facts are in dispute, the question of whether a reference represents a “printed publication” is a question of law. *Id.* at 7 (citing *In re Cronyn*, 890 F.2d 1158, 1159 (Fed.Cir.1989)).³

The sole evidence cited in the Petition is a print-out of a record created in 2008 by Theses Canada. Ex. 1013 (“TH-Su”). As we noted in our Decision Denying Institution, TH-Su includes an active PDF link to Su, identifies Su as resident on two microfiches, indicates the publisher is the Ottawa: National Library of Canada [1999], and includes an abstract. Dec. Denying Inst. 7. TH-Su also includes an AMICUS No. (20672380)1, an international standard book number (ISBN 0612312569), a Canadian Number (992099080) and the following information “Copies: NL Stacks – Mic. TJ- 31256.” *Id.* at 7-8. However, TH-Su is a document created and modified on July 18, 2008, not in 1999. *Id.* at 7–8. Petitioner failed to tie

³ We agree with Petitioner’s assertion that it did not concede any of the argument set forth in Patent Owner’s Preliminary Response. Req. Reh’g. 6, fn 4. However, our inquiry during the conference of August 4, 2016 concerned facts and evidence.

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any of these numerical designations in TH-Su to public accessibility prior to 2008. Thus, Petitioner failed to meet its burden to demonstrate that Su was publically accessible in 1999.

Notwithstanding that, Petitioner failed to meet its burden to show public accessibility, Petitioner's Rehearing Request challenges our assessment of arguments and exhibits proffered by Patent Owner in the Patent Owner Preliminary Response about practices for cataloging and shelving Su. Dec. to Inst. 10–13.

Patent Owner submitted as Exhibit 2002 a photograph of an envelope from the National Library of Canada in which microfiche indexes of bibliographic information on Canadian writings are stored. As we noted in our Decision Denying Institution, the top of the microfiche in the envelope reads: "Jan– Jul/Aug 1999 ISSN 0225-3216 Index A Authors Titles Series." Exhibit 2002 provides no further information concerning when Su may have become accessible to the public.

Ex. 2003 is a copy of an index microfiche as found in the envelope submitted as Exhibit 2002 for 1999 Canadian works having titles and author's names beginning with the letter "C." Exhibit 2004 is a similar index for the same series of works having titles and indexes beginning with the letter "S." We agreed with Patent Owner that this rudimentary indexing of the Su thesis by author name ("Su") and/or the first word of the title ("Continuous"), which is the only indexing that the evidence suggests may have occurred before the priority date, does not suggest its relevance to the streaming media network transport problem addressed by the '011 Patent and would not be sufficient to meet the applicable standard for public accessibility. Dec. Denying Inst. 13. In *In re Lister*, 558 F. 3d at 1315–16, a

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