

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

INTEL CORPORATION,  
Petitioner,

v.

ALACRITECH, INC.,  
Patent Owner.

---

Case IPR2017-01395  
Patent 8,805,948 B2

---

Before STEPHEN C. SIU, DANIEL N. FISHMAN, and  
CHARLES J. BOUDREAU, *Administrative Patent Judges*.

BOUDREAU, *Administrative Patent Judge*.

DECISION

Denying-in-Part and Granting-in-Part Petitioner's Request for Rehearing  
*37 C.F.R. § 42.71(d)*

Intel Corporation ("Petitioner") filed a Request for Rehearing (Paper 9, "Req. Reh'g") of the Decision Denying Institution (Paper 8, "Decision") of U.S. Patent No. 8,805,948 B2 (Ex. 1001, "the '948 patent") in the above-captioned proceeding. In the Request for Rehearing, Petitioner

argues that the Decision misapprehended or overlooked certain evidence in denying review of the challenged claims. For the reasons set forth below, the Request for Rehearing is *denied*.

When considering a request for rehearing, we review the Decision for an abuse of discretion. 37 C.F.R. § 42.71(c). The party requesting rehearing bears the burden of showing that the Decision should be modified, and “[t]he request must specifically identify all matters the party believes the Board misapprehended or overlooked.” 37 C.F.R. § 42.71(d). A request for rehearing is not an opportunity to present new arguments. *See id.* An abuse of discretion may arise if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors. *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *Arnold P’ship v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004); *In re Gartside*, 203 F.3d 1305, 1315–16 (Fed. Cir. 2000).

Institution of an *inter partes* review is authorized by statute only when “the information presented in the petition . . . and any response . . . shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. § 314(a). In the Decision, the Board determined that the record before it was insufficient to show that Stevens<sup>1</sup> is a prior art printed publication under 35 U.S.C. §§ 102, 311(b) with respect to the ’948 patent. Stevens<sup>2</sup> is one of the references relied upon in the sole asserted ground of the Petition, Accordingly, the Board concluded that Petitioner did not establish a

---

<sup>1</sup> W. Richard Stevens *et al.*, *TCP/IP Illustrated, Volume 2*, 1995 (“Stevens<sup>2</sup>,” Ex. 1013).

reasonable likelihood of prevailing on its sole asserted ground of unpatentability because the Petition failed to provide a threshold showing that Stevens2 qualified as a printed publication prior art reference. Dec. 4–8.

Petitioner contends the Board overlooked or misapprehended the evidence of record that established the threshold showing that Stevens2 is a printed publication.

Initially we observe the Petition, *per se*, provides only a statement that “Stevens2 was published no later than April 7, 1995 and is prior art under 102(b).” Pet. 45 n.9 (citing Ex. 1063 in support thereof (the “Stansbury Declaration”)). The Petition, *per se*, provides no other evidence or argument to establish a threshold showing that Stevens2 is a printed publication—publicly accessible by an interested person of ordinary skill in the art before the critical date.

Thus, Petitioner’s assertion regarding printed publication status of Stevens2 relies primarily on the Stansbury Declaration. Petitioner is correct that we erroneously discounted the Stansbury Declaration as lacking acknowledgment of the potential penalty for perjury. Req. 8–10. Petitioner is correct that the Stansbury Declaration is a *sworn* affidavit and, thus, complies with our rules’ definition of an “affidavit.” *See* 37 C.F.R. § 42.2. Therefore, we grant Petitioner’s Request for Rehearing only to the extent that we recognize the Stansbury Declaration is a sworn affidavit compliant with our rules.

However, our Decision further determined that, even if accorded due weight as a sworn affidavit, the Stansbury Declaration is insufficient because it fails to describe any facts relating to indexing or cataloging procedures to support an assertion that Stevens2 would be locatable by an interested

person of ordinary skill. 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.” *SRI Int’l, Inc. v. Internet Sec. Sys., Inc.*, 511 F.3d 1186, 1194 (Fed. Cir. 2008). We assess public accessibility on a case-by-case basis. See *Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1350 (Fed. Cir. 2008). In instances of references stored in libraries, for example, “competent evidence of the general library practice may be relied upon to establish an approximate time when a thesis became accessible.” *In re Hall*, 781 F.2d at 899. “In these cases, we generally inquire whether the reference was sufficiently indexed or cataloged.” *Blue Calypso, LLC v. Groupon, Inc.*, 815 F.3d 1331, 1348 (Fed. Cir. 2016); accord *Voter Verified, Inc. v. Premier Election Solutions, Inc.*, 698 F.3d 1374, 1380 (Fed. Cir. 2012) (“[I]ndexing is a relevant factor in determining accessibility of potential prior art, particularly library-based references.”). “Indexing by subject offers meaningful assurance that an ordinarily skilled artisan, exercising reasonable diligence, will be able to locate a particular reference among the many volumes stored in a library.” *Blue Calypso*, 815 F.3d at 1349. Petitioner correctly observes that Ms. Stansbury’s title is Administrative Supervisor in the Original Cataloging Unit. Req. 11; Ex. 1063 ¶ 2. Ms. Stansbury states she is “familiar with the policies and procedures of the Library as they relate to . . . cataloging.” Ex. 1063 ¶ 1. However, Ms. Stansbury does not disclose details of those procedures nor does she disclose how she determined that “as best [she] can determine, [Stevens2] was publicly available at the Cornell University Library as of April 7, 1995.” *Id.* ¶ 4. Furthermore, Ms.

Stansbury's testimony indicates "as best [she] can determine" suggesting some degree of uncertainty.

Thus, even granting Petitioner's request to the extent that we accord some weight to the Stansbury Declaration, we stand by our determination in the Decision that the evidence of record is insufficient to demonstrate a reasonable likelihood that Stevens<sup>2</sup> qualifies as a printed publication prior art reference.

Petitioner further argues, "Consistent with this, Petitioner's expert attested that Stevens<sup>2</sup> was 'standard reference book on TCP/IP' that was 'widely cited and relied upon,' 'well known resources to a [person of ordinary skill in the art]' (Petition at 15 (citing Ex.1003 at ¶¶21-88, including ¶¶27, 60, and FN3), 45 (citing Ex.1003 at ¶121<sup>2</sup>), FN9)." Req. 12. Initially we observe the Petition cites these paragraphs of Dr. Horst's Declaration as part of the "Background Of Technology" discussion rather than as support for public accessibility of Stevens<sup>2</sup>. *See* Pet. 15–24. Furthermore, incorporating by reference such a substantial portion of Dr. Horst's Declaration (paragraphs 21–88) is improper under our rules. *See* 37 C.F.R. § 42.6(a)(3). Regardless, even if we consider Dr. Horst's description of well-known background material (including Stevens<sup>2</sup>) as support for public accessibility of Stevens<sup>2</sup>, his testimony does not indicate any personal knowledge that Stevens<sup>2</sup> was publicly accessible on any particular date. In particular, none of paragraphs 27, 60, and 121 of Exhibit 1003 testify to any personal knowledge of Dr. Horst regarding any particular date of public accessibility of Stevens<sup>2</sup>.

---

<sup>2</sup> We observe paragraph 121 of Exhibit 1003 makes no reference to Stevens<sup>2</sup>.

# 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.