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Paper 18
Entered: June 25, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RIOT GAMES, INC.,
Petitioner,

v.

PALTALK HOLDINGS, INC.,
Patent Owner.

Case IPR2018-00131
Patent 6,226,686 & 6,226,686 C1

Before THU A. DANG, KARL D. EASTHOM, and NEIL T. POWELL, *Administrative Patent Judges.*

DANG, *Administrative Patent Judge*.

DECISION
Patent Owner's Request for Rehearing
37 .F.R. § 42.71

I. INTRODUCTION

Patent Owner filed a Request for Rehearing (Paper 14, "Req. Reh'g") of our Decision (Paper 11, "Dec.") to *inter partes* review of claims 1–4, 7–21, 28–35, 39, 40, 47–54, 56, 57, and 64–70 of U.S. Patent No. 6,226,686 (Ex. 1002, "the '686 patent"). In the Decision, we instituted a trial on Petitioner's asserted ground that claims 1–4, 7–21, 28–35, 39, 40, 47–54, 56, 57, and 64–70 are unpatentable under 35 U.S.C. § 103 as obvious over Aldred and RFC 1692, or Aldred, RFC 1692 and RFC 1459. Dec. 48. For the reasons stated below, Patent Owner's Request for Rehearing is *denied*.

II. ANALYSIS

When rehearing a decision on petition, the Board will review the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). The party requesting rehearing bears the burden of showing an abuse of discretion, and "[t]he request must specifically identify all matters the party believes the Board misapprehended or overlooked." 37 C.F.R. § 42.71(d).

Patent Owner argues "the Board abused its discretion in accepting Petitioner's evidence that RFC 1692 and RFC 1459 are prior art publications to the '686 Patent." Req. Reh'g 2. In particular, Patent Owner contends the Crocker Declaration does not provide sufficient evidence that, on or before the filing date of February 1, 1996 ("critical date") of the '686 patent, RFC 791, RFC 1001, RFC 1459, and/or RFC 1692 were actually available to the public online, that these RFCs were actually accessed or downloaded by any member of the public, or whether and how any alleged sources such as the

anonymous FTP hosts or the RFC Editor's Website were indexed or cataloged. *Id.* at 7. Thus, according to Patent Owner, Petitioner has not shown sufficiently that RFC 791, RFC 1001, RFC 1459, and RFC 1692 were "publicly accessible" on or before the critical date, rendering the references unavailable as prior art references under 35 U.S.C. § 102.[1] *Id.* Patent Owner fails to show an overlooked or a misapprehended matter.

In our Decision, we addressed the arguments that Patent Owner made in its Preliminary Response concerning the RFCs. We determined, based on the current record and for purposes of institution, RFC 1692, RFC 1459, and RFC 791 were "publicly accessible" to persons of ordinary skill interested in computer networking and security, respectively as of August 1994, May 1993 and September 1981, i.e., before the critical date. *See*, *e.g.*, Dec. 25–30.

As we noted in the Decision,

> [a] given 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.

Dec. 30 (citing *SRI Int'l, Inc. v. Internet Security Sys., Inc.*, 511 F.3d 1186, 1194 (Fed. 21 Cir. 2008)).

As pointed out in the Decision, the '686 patent itself, in several places, relies on and cites RFC documents, including RFC 791, indicating that, generally, persons of ordinary skill interested in computer networking

[1] RFC 1001 does not appear to be at issue in this proceeding, although the parties should clarify respective positions on this point.

and security (the public) would have been able to find and subsequently access RFC documents on or before the filing date of the '686 patent. *See* Dec. 29 (citing, e.g., Ex. 1002, 3:52–54). We cited *PGMedia, Inc.*, which states "much of the development and technical management of the Internet has been by the consensus of Internet users. This is evidenced . . . by IETF and the more than 2000 RFC's which have been written and circulated.")). *Id.* (citing *PGMedia, Inc. v. Network Sols., Inc.*, 51 F. Supp. 2d 389, 406 (S.D.N.Y. 1999).[2] *PGMedia, Inc.* corroborates that RFCs were generally available to the public prior to the critical date, to help address a central concern of building a consensus for developing the Internet and associated standards, *i.e.*, not merely "today" or "*currently*" as Patent Owner contends. Req. Reh'g. 6.[3]

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[2] We also cited *VirnetX Inc.*, where the Board found RFCs were publically available notwithstanding patent owner's arguments otherwise. Dec. 29 (citing *VirnetX Inc. v. Apple Inc.*, 2018 WL 1371144 (Fed. Cir. Mar. 16, 2018) (IPR2015-00870 & IPR 2015-00871) (Rule 36)). The showing in *VirnetX Inc.* involved a later critical date than at issue here. Nevertheless, the case demonstrates that RFC dates of publication generally were reliable indicators to corroborate public accessibility in light of similar evidence regarding RFC publication practices.

[3] In *PG Media*, the court states "[i]n 1987, the Internet community agreed on a new protocol, announced in Request for Comments ('RFC') 1034, dated November 1987 and written by one P. Mockapetris." *Id.* at 391. The court also notes the following:

> RFC's are formal memos produced by members of the Internet Engineering Task Force ("IETF"). The IETF is a "loosely self-organized group of people who make technical and other contributions to the engineering and evolution of the Internet and its technologies. It is the principal body engaged in the development of new Internet standard specifications." (Strawn Decl. Ex. A.) *As there is no centralized authority that controls*

Patent Owner's contention that these "other cases . . . should not weigh against Patent Owner's position" correctly posits that the Board must solve a "case-by-case inquiry into the facts and circumstances surrounding [the RFCs] disclosure to members of the public." *Id.* (latter quote quoting *In re Klopfenstein*, 380 F.3d 1345, 1350 (Fed. Cir. 2004) (emphasis by Patent Owner)). Nevertheless, the cited cases generally corroborate the testimony of Mr. Crocker concerning practices of the IETF and the public accessibility of RFCs in general prior to and after the critical date. *See supra* notes 2, 3.

As we pointed out in the Decision, the RFC documents are as indicated in their title, "Request for Comments," typically announcing a request for suggestions and improvements for Internet standards, and thus, constitute the type of documents with a main purpose being for public disclosure and consideration. Dec. 30; note 3 (used to build consensus about the Internet). That is, the title, "Request for Comments," and statements therein further corroborate specific availability of the RFC to the public from which it seeks comments at the time of its announcement.

In the Decision, for purposes of institution, we found credible Mr. Crocker's testimony that the RFCs were available generally prior to the

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> *the Internet, the Internet's smooth functioning depends on the cooperation and consensus of its users, and IETF represents an effort to meet that goal*. The situation is well summarized in NSI's 1997 S-1 filing with the SEC[.]

Id. at 391 n.5 (emphasis added). In context to the 1987 RFC 1034 document cited, and given that the court cites over 2000 RFC published documents (numbered accordingly), the "situation" regarding RFCs and the IETF, as summarized by the court employing, in part, evidence including a 1997 SEC (Securities Exchange Commision") filing, would not have changed materially prior to the critical date (February, 1996) involved here.

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