

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Axis Communications AB, Canon Inc., and Canon U.S.A., Inc.

Petitioner

v.

Avigilon Fortress Corporation,

Patent Owner

Case: IPR2019-00235

U.S. Patent No. 7,868,912

Issue Date: January 11, 2011

Title: Video Surveillance System Employing Video Primitives

PETITIONERS' REQUEST FOR REHEARING

Petitioner respectfully requests rehearing of the Board's decision (Paper 19) not to institute review on the present Petition for *Inter Partes* Review of U.S. Patent No. 7,868,912 (the "912 patent"). The Board's decision is based on a purported failure to present sufficient evidence for purposes of institution that Flinchbaugh I is a prior art printed publication under pre-AIA 35 U.S.C. § 102(b). *See* Paper 19 at 10-12.

The Precedential Opinion Panel ("POP") is currently deciding the basic issue of what evidence is required to establish that a reference qualifies as a "printed publication" at the institution stage. *Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 15 at 2 (April 3, 2019). There is a split among panels at the PTAB over this issue. Many panels hold that under the reasonable likelihood standard, indicia on a document should be a sufficient threshold showing of publication to support institution. This is particularly relevant where, as here, the Patent Owner merely raises speculative questions about a document's publication status, without any contrary evidence. Indeed, Hulu is explicitly asking the POP to adopt this threshold showing as meeting the reasonable likelihood standard. *Hulu*, IPR2018-01039, Paper 17 at 5, 9 (May 1, 2019) (citing *Worlds, Inc. v. Bungie, Inc.*, 903 F.3d 1237, 1242 (Fed. Cir. 2018)).

Here, the Board denied institution of the current petition because of errors in the Florio declaration. But the Florio declaration merely provided supplemental

evidence of publication. The Board did not address the evidence of publication on the face of the Flinchbaugh I reference itself—which was expressly cited by Petitioners—and shows that Flinchbaugh I was published in June 1994, more than five years before the '912 patent's earliest priority date. The indicia on the face of Flinchbaugh I is strong evidence that Flinchbaugh I qualifies as printed publication and is sufficient to meet the threshold “reasonable likelihood” standard at institution. *See* 35 U.S.C. § 314(a); Ex. 1005 at pp. 1-6. This is especially so where there is *no* evidence that contradicts publication.

Accepting the uncontroverted evidence on the face of the document as satisfying the reasonable likelihood standard also promotes efficiency. In most cases, there is no dispute that a particular reference is a printed publication. Indeed, publication disputes typically arise when the date of a reference is close in time to the critical date of the patent or there is evidence that call its publication status into question. Moreover, detailed evidence of publication is often unavailable at the pre-institution phase in which there is no subpoena power.

Thus, for the reasons set forth in detail below, because the Petition cited evidence of publication on the face of Flinchbaugh I and because the POP is about to rule on the proper standard regarding the sufficiency of publication evidence, rehearing is appropriate here pursuant to 37 C.F.R. § 42.71(d).

I. The Precedential Opinion Panel’s Upcoming *Hulu* Decision is Likely to Set the Standard for Publication Evidence at the Institution Stage

The requisite level of publication evidence at the institution stage is currently being heard by the Precedential Opinion Panel (“POP”) in *Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 15 at 2 (April 3, 2019) (the issue to be addressed is: “What is required for a petitioner to establish that an asserted reference qualifies as ‘printed publication’ at the institution stage?”).

Petitioner Hulu is similarly situated to Petitioner in the proceeding here. Petitioner Hulu has taken the position that “[a]dditional evidence, like a supporting declaration,” is only necessary prior to institution “if a reference lacks indicia sufficient to establish a prima facie case of public availability.” *Hulu*, IPR2018-01039, Paper 17 at 9 (May 1, 2019). Thus, the POP decision in *Hulu* will **directly address** the sufficiency of facial evidence, like the evidence on *Flinchbaugh I*, that is crucial to the correct determination of whether an IPR should be instituted here.

Briefing before the *Hulu* POP Panel has been completed, and the panel heard oral argument on June 18, 2019. The POP’s decision should set the precedential standard for demonstrating a reference satisfies the printed publication requirement at institution. However, in the event the *Hulu* decision is limited to its facts or is otherwise not applicable to the present situation, Petitioner is concurrently requesting POP review to address the specific issues here.

II. Evidence on the Face of Flinchbaugh I Alone Is Sufficient to Show Its Publication Status at the Institution Stage

The Board’s decision focused on errors made in the original Florio Declaration (Ex. 1007). But the Florio Declaration was *not* the only evidence of publication of the Flinchbaugh I reference. Rather, the Petition and the face of Flinchbaugh I,¹ to which it cites (Ex. 1005), establish the publication status of Flinchbaugh I, at least for institution purposes, *without* considering the Florio Declaration at all. Petition at 2-3.

The pages of the Petition cited to by the Board (Paper 19 at 11) correctly refer to “‘Autonomous Scene Monitoring System’ by Bruce Flinchbaugh et al. (‘Flinchbaugh,’ Ex. 1005),” which is Flinchbaugh I, and state the following information relating to the circumstances of the publication of Flinchbaugh I: “Flinchbaugh was published in the Proceedings of the 10th Annual Joint Government-Industry Security Technology Symposium & Exhibition. The Symposium occurred in June 1994,” making Flinchbaugh I “prior art under pre-

¹ “Flinchbaugh I” is B. Flinchbaugh, et al., “Autonomous Scene Monitoring System,” Proceedings of the Joint 10th Annual Government-Industry Security Technology Symposium & Exhibition, June 20–23, 1994, pp. 205–209, which is Ex. 1005 to the Petition and Exhibit D to the original Florio Declaration (which itself is Ex. 1007 to the Petition).

“Flinchbaugh II” is B. Flinchbaugh, et al., “Autonomous Video Surveillance,” SPIE Proceedings, 25th AIPR Workshop: Emerging Applications of Computer Vision, Feb. 26, 1997, Vol. 2962, p. 144-151, which is not an exhibit in this IPR but was erroneously referred to in the body of the original Florio Declaration.

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