

Filed: April 18, 2022

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE PATENT TRIAL AND APPEAL BOARD**

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APPLE INC.,  
Petitioner,

v.

MEMORYWEB, LLC,  
Patent Owner.

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Case No. IPR2022-00032  
U.S. Patent No. 9,552,376

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**PETITIONER'S REPLY TO PATENT OWNER'S  
PRELIMINARY RESPONSE**

Patent Owner urges the Board to decline institution, asserting that Petitioner has failed to establish a reasonable likelihood of success in relation to establishing A3UM qualifies as a printed publication. Patent Owner's Preliminary Response ("POPR"), 27. But Patent Owner's arguments rest on distortions of both the record and the legal standard for assessing public accessibility. They should be uniformly disregarded.

### **I. A3UM Is a Single Printed Publication**

As the Petition explained, with support from Dr. Terveen's and Mr. Birdsell's testimony, A3UM is a printed publication that was widely disseminated in conjunction with the distribution of retail packages of Aperture 3 in the United States in early 2010, (Petition, 14; EX1003, ¶¶78-82, 91-97; EX1020, ¶¶12-16), and was published for download by the public from the www.apple.com website (Petition, 14; EX1003, ¶¶100-103; EX1020, ¶¶17-20).

#### **A. A3UM Is a Single Publication that Was Publicly Disseminated**

Patent Owner contends that A3UM is not a printed publication because it is purportedly "a compilation of over seven hundred individual HTML files, rather than a single document or file." POPR, 29. This misrepresents what A3UM is, and employs the incorrect legal standard for evaluating it.

First, Patent Owner ignores that the HTML files that comprise A3UM are linked by not only their content (*i.e.*, they together comprise the content of a single

publication, the Aperture 3 User Manual), but by their source and organization. EX1003, ¶¶78-82, 91-97. Most notably, the files are contained in a single folder containing an “index.html” file that enables navigation of the set of files. EX1003, ¶¶95-97. The folder of HTML files is distributed in this form: (i) the folder is in a single compressed file on the Installer DVD, and (ii) the folder exists as an uncompressed folder after being transferred from the Installer DVD to the local storage of the user's computer after installation. EX1003, ¶¶78-82, 91-97 (explaining that the HTML file folder is within the Resources folder of the Aperture 3 bundle installed on the computer). A3UM thus is not a set of unrelated HTML files as Patent Owner contends—it is an organized collection of contextually-linked files that comprise the content of a single printed publication.

Second, Patent Owner's assertions ignore governing law establishing that the printed publication inquiry does not turn on the number of pages or individual files a reference comprises. Instead, “an electronic publication, including an on-line database or Internet publication . . . is considered to be a ‘printed publication’ . . . provided the publication was accessible to persons concerned with the art to which the documents relate.” Manual of Patent Examining Procedure (“MPEP”) § 2128. Notably, the Board has found documents to be printed publications despite comprising multiple webpages, and even videos, provided they are sufficiently accessible. *See e.g., Haliburton Energy Servs., Inc., v. Dynamic 3d Geosolutions*

*LLC*, IPR2014-01186, -01189, -01190, 2015 WL 5565065, at \*10 (PTAB Jan. 12, 2015) (finding “a single website with multiple webpages” constitutes a single printed publication because it “describes a single product, the Recon software, from a single source, the austiongeo.com website”); *Acco Brands Corp. v. Think Prods.*, IPR2015-01167, Paper No. 40 at 23 (PTAB Oct. 11, 2016); *Macsports, Inc. v. Idea Nuevo, Inc.*, IPR2018-01006, 2018 WL 5928385, at \*3–4 (PTAB Nov. 13, 2018) (finding webpages comprising 24 photographs were “a single printed publication” because “the collection of 24 images appears to be a collection of webpages that describe a single product, from a single source”).

#### **B. A3UM Is a User Manual, Not a Software Program**

Patent Owner also contends that Petitioner's reliance on A3UM “crosses the line between relying on material that may arguably constitute a printed publication to relying on a component within a software program that is out of bounds for an IPR.” POPR, 33. Initially, Patent Owner mischaracterizes what both the Petition and Dr. Terveen said, which was that a user could *view the content of A3UM* using a web browser or by invoking the built-in Apple Help functionality within the Aperture software when executing. Petition, 15-17; EX1003, ¶¶86-90, 99. The Petition also repeatedly explains that Petitioner is relying on the disclosures in and the public accessibility of A3UM, not the functionality or availability of the Aperture 3 software *per se*. See, e.g., Petition, 13-22; EX1003, ¶¶70-110.

Patent Owner also contends that assessing “whether and how a skilled artisan would be able to access files in an installed software product . . . is the type of fact-intensive ‘inquir[y] Congress was seeking to avoid’ in limiting the scope of IPRs.” POPR, 36. But public accessibility inquiries necessarily entail such fact-finding to determine if “persons interested and ordinarily skilled in the subject matter or art, exercising reasonable diligence, can locate” a given reference. *Jazz Pharms. v. Amneal Pharms.*, 895 F.3d 1347, 1355 (Fed. Cir. 2018); *see Ex Parte Nelson*, IPR2020-004978, 2020 WL 8186425, at \*15 (PTAB Dec. 31, 2020) (Board assessing evidence that software manuals were distributed with copies of the underlying program); *Cisco Sys., Inc. v. Centripetal Networks, Inc.*, IPR2018-01436, Paper 40 at 23-24 (PTAB Jan. 23, 2020) (Board assessing accessibility of user manual “enclosed on documentation disks (CD-ROM/DVD) included with each” product). That A3UM is on an installation DVD is of no consequence.

## II. A3UM is Publicly Accessible

Patent Owner next contends that A3UM was not publicly accessible because Dr. Terveen does not explain “(1) why a skilled artisan would have any reason to believe the installation DVD contained hidden files or (2) how one would configure their Mac to view them.” POPR, 30. Relatedly, Patent Owner complains that a “person would have to take numerous steps to find [a] local copy of the HTML files . . . .” POPR, 34. None of these assertions is accurate or legally relevant.

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