

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GUARDIAN ALLIANCE TECHNOLOGIES, INC.,
Petitioner,

v.

TYLER MILLER,
Patent Owner.

IPR2020-00031
Patent 10,043,188 B2

Before SALLY C. MEDLEY, DAVID C. McKONE,
and JOHN R. KENNY, *Administrative Patent Judges*.

McKONE, *Administrative Patent Judge*.

DECISION
Denying Institution of *Inter Partes* Review
35 U.S.C. § 314

I. INTRODUCTION

A. *Background and Summary*

Guardian Alliance Technologies, Inc. (“Petitioner”) filed a Petition (Paper 1, “Pet.”) requesting *inter partes* review of claims 1, 5, 9, and 15 of U.S. Patent No. 10,043,188 B2 (Ex. 1001, “the ’188 patent”). Pet. 1. Petitioner indicates that Guardian Alliance Holdings, Inc., and the City of Oklahoma City are real parties-in-interest. *Id.* Tyler Miller (“Patent Owner”) filed a Preliminary Response (Paper 7, “Prelim. Resp.”).

We have authority to determine whether to institute an *inter partes* review. *See* 35 U.S.C. § 314; 37 C.F.R. § 42.4(a) (2019). The standard for instituting an *inter partes* review is set forth in 35 U.S.C. § 314(a), which provides that an *inter partes* review may not be instituted “unless . . . there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” Under the circumstances of this case, for the reasons explained below, we deny institution of an *inter partes* review of the ’188 patent.

Petitioner also filed a Motion to Correct a Clerical Mistake in the Petition Under 37 C.F.R. § 42.104(c) (Paper 11, “Mot. to Correct”) and Patent Owner filed a Motion to Terminate IPR Proceeding (Paper 10, “Mot. to Terminate”).

B. *Related Matters*

The parties indicate that Patent Owner’s exclusive licensee, Miller Mendel, Inc., has asserted the ’188 patent against Petitioner’s real party-in-interest, the City of Oklahoma City, in *Miller Mendel, Inc. v. City of Oklahoma City*, Case No. 5:18-cv-00990-M (W.D. Ok.). Pet. 1; Paper 3, 1.

C. The '188 Patent

The '188 patent describes software related to facilitating the process of performing background investigations on, for example, job applicants. Ex. 1001, 1:14–16. Figure 1, reproduced below, illustrates an example:

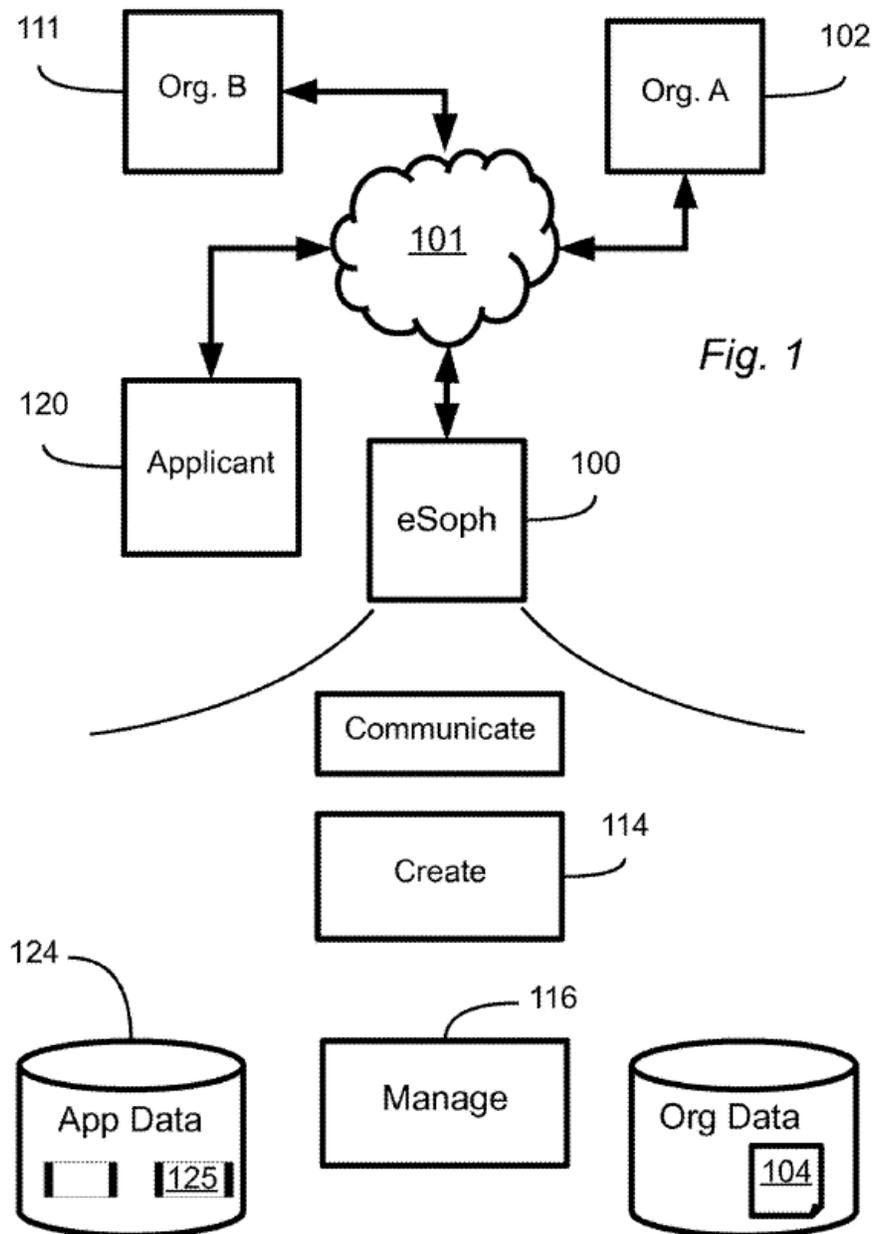


Figure 1 is a block diagram of core components of a background investigation management system. *Id.* at 1:48–51.

Using software system 100, Organization A can create and customize electronic documents 104 to send to applicants, who complete documents via software system 100 and return them to software system 100. *Id.* at 4:5–9. Software system 100 includes document creation component 114 and document management component 116. *Id.* at 4:9–11. In one feature, applicant information 124 can be shared between Organization A and Organization B. *Id.* at 4:15–21. Organization A can send electronic documents 104 to applicant 120 by emailing applicant 120 a link to log into software system 100. *Id.* at 5:29–35. Organization A can send and receive documents (e.g., questionnaires) to and from references (e.g., relatives, employers, co-workers, and neighbors) in a similar manner. *Id.* at 8:31–39. The software system also can include a feature that will retrieve law enforcement and court names, addresses, and phone numbers for a pre-defined radius around an address for the applicant, the applicant’s employer, or the applicant’s relatives. *Id.* at 9:48–52.

Claim 1, reproduced below, is illustrative of the invention:

1. A method for a computing device with a processor and a system memory to assist an investigator in conducting a background investigation of an applicant for a position within a first organization, comprising the steps of:

receiving a first set of program data comprising information identifying the applicant, the position, the first organization, and the investigator;

storing a new applicant entry in the system memory, the new applicant entry associated with the first set of program data;

transmitting an applicant hyperlink to an applicant email address associated with the applicant, the applicant hyperlink for viewing an applicant set of electronic documents;

receiving an applicant electronic response with a reference set of program data, wherein the reference set of program data comprises information regarding a reference source, wherein the reference source is a person, the program data including a reference email address associated with the reference source;

determining a reference class of the reference source based on the reference set of program data;

selecting a reference set of electronic documents based on the reference class of the reference source;

transmitting a reference hyperlink to the reference email address, the reference hyperlink for viewing the reference set of electronic documents;

receiving a reference electronic response to the reference set of electronic documents from the reference source;

storing the reference electronic response in the system memory, associating the reference electronic response with the new applicant entry; and

generating a suggested reference list of one or more law enforcement agencies based on an applicant residential address.

D. Evidence

Petitioner relies on the references listed below.

Reference		Date	Exhibit No.
Background Solutions	Background Solutions, LLC, Background Assistant video	2009	1002, 1027 ¹
LaPasta	US 2005/0033633 A1	pub. Feb. 10, 2005	1003
POBITS	Peace Officer Background Investigation Tracking System and Manual	Feb. 1, 2011	1004
ADP	US 2008/0306750 A1	pub. Dec. 11, 2008	1015

Petitioner also relies on the Declaration of Thomas Ward (Ex. 1009) and the Declaration of Kingsley Klosson (Ex. 1014).

E. The Asserted Grounds of Unpatentability

Claims Challenged	35 U.S.C. §	Reference(s)/Basis
1, 5, 9, 15	103	Background Solutions, LaPasta
1, 5, 9, 15	103	POBITS, ADP

¹ Exhibit 1002 is subject to Petitioner’s Motion to Correct, in which Petitioner seeks to substitute the video of Exhibit 1027 (“the 2009 Video”) as a correction to the video of Exhibit 1002 (“the 2012 Video”). Mot. to Correct 1. Patent Owner opposes (Paper 16, “Opp. to Mot. to Correct”). Concurrently, Patent Owner files its Motion to Terminate based on Petitioner’s failure to serve the correct video with the Petition by the bar date under 35 U.S.C. § 315(b). Petitioner opposes (Paper 12, “Opp. to Mot. to Terminate”).

II. ANALYSIS

A. Claim Construction

For petitions filed after November 13, 2018, we construe claims “using the same claim construction standard that would be used to construe the claim in a civil action under 35 U.S.C. 282(b), including construing the claim in accordance with the ordinary and customary meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent.” 37 C.F.R. § 42.100(b) (2019). *See also Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc).

Petitioner proposes several claim terms for construction, essentially asking us to adopt constructions proposed by Patent Owner in the related district court litigation. Pet. 13–17. Petitioner also proposes constructions for two other terms not addressed in the district court litigation. *Id.* at 17–18. Patent Owner does not address claim construction in the Preliminary Response. Based on the record before us, we do not find it necessary to provide any express claim constructions. *See Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1017 (Fed. Cir. 2017) (noting that “we need only construe terms ‘that are in controversy, and only to the extent necessary to resolve the controversy’”) (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999)).

B. Printed Publication Status of References

Patent Owner contends that neither Background Solutions nor POBITS qualifies as a printed publication and, thus, neither is prior art to the ’188 patent. Prelim. Resp. 13–14, 19–34.

Whether a reference qualifies as a “printed publication” is a legal conclusion based on underlying factual findings. *See Nobel Biocare Servs.*

AG v. Instradent USA, Inc., 903 F.3d 1365, 1375 (Fed. Cir. 2018) (citing *Jazz Pharm., Inc. v. Amneal Pharm., LLC*, 895 F.3d 1347, 1356 (Fed. Cir. 2018)). The underlying factual findings include whether the reference was publicly accessible. *See id.* (citing *In re NTP, Inc.*, 654 F.3d 1279, 1296 (Fed. Cir. 2011)).

“The determination of whether a reference is a ‘printed publication’ under 35 U.S.C. § 102(b) involves a case-by-case inquiry into the facts and circumstances surrounding the reference’s disclosure to members of the public.” *In re Klopfenstein*, 380 F.3d 1345, 1350 (Fed. Cir. 2004).

“Because there are many ways in which a reference may be disseminated to the interested public, ‘public accessibility’ has been called the touchstone in determining whether a reference constitutes a ‘printed publication’ bar under 35 U.S.C. § 102(b).” *Blue Calypso, LLC v. Groupon, Inc.*, 815 F.3d 1331, 1348 (Fed. Cir. 2016) (quoting *In re Hall*, 781 F.2d 897, 898–99 (Fed. Cir. 1986)). “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.” *SRI Int’l, Inc. v. Internet Sec. Sys., Inc.*, 511 F.3d 1186, 1194 (Fed. Cir. 2008) (quoting *Bruckelmyer v. Ground Heaters, Inc.*, 445 F.3d 1374, 1378 (Fed. Cir. 2006)).

What constitutes a “printed publication” must be determined in light of the technology employed. *See Samsung Elecs. Co. v. Infobridge Pte. Ltd.*, 929 F.3d 1363, 1369 (Fed. Cir. 2019) (citing *In re Wyer*, 655 F.2d 221, 226 (CCPA 1981)). Public accessibility requires more than technical accessibility. *See id.* (citing *Acceleration Bay, LLC v. Activision Blizzard Inc.*, 908 F.3d 765, 773 (Fed. Cir. 2018)). “[A] work is not publicly

accessible if the only people who know how to find it are the ones who created it.” *Id.* at 1372. On the other hand, “a petitioner need not establish that specific persons actually accessed or received a work to show that the work was publicly accessible.” *Id.* at 1374. “In fact, a limited distribution can make a work publicly accessible under certain circumstances.”

Id. (quoting *GoPro, Inc. v. Contour IP Holding LLC*, 908 F.3d 690, 694 (Fed. Cir. 2018)).

“To prevail in a final written decision in an inter partes review, the petitioner bears the burden of establishing by a preponderance of the evidence that a particular document is a printed publication.” *Hulu, LLC v. Sound View Innovations, LLC*, Case IPR2018-01039 (PTAB Dec. 20, 2019) (Paper 29) (precedential), slip op. at 11. “[A]t the institution stage, the petition must identify, with particularity, evidence sufficient to establish a reasonable likelihood that the reference was publicly accessible before the critical date of the challenged patent and therefore that there is a reasonable likelihood that it qualifies as a printed publication.” *Id.* at 13.

1. Background Solutions

According to Petitioner, Background Solutions is a video demonstration of a Background Assistant background investigation system that was displayed at trade seminars as early as mid-2009 and publicly accessible on the Internet at Background Solutions, LLC’s website no later than November 23, 2009. Pet. 4–5. Patent Owner argues that the video in Exhibit 1002 has several indications that it was created no earlier than 2012 and, thus, is not prior art to the ’188 patent. Prelim. Resp. 14–19. As noted above, Petitioner filed a Motion to Correct Exhibit 1002, seeking to substitute Exhibit 1027 in its place. Petitioner contends that it erroneously

marked and uploaded the 2012 Video as Exhibit 1002 instead of the 2009 Video it sought to upload and now offers in substitution. Mot. to Correct 1. We grant Petitioner’s Motion to Correct for the limited purpose of considering the 2009 Video (Exhibit 1027). For the reasons that follow, however, Petitioner has not shown a reasonable likelihood that the 2009 Video qualifies as a printed publication.

Petitioner offers two theories as to why the 2009 Video was publicly accessible in mid-2009. First, Petitioner argues that Tom Ward, the founder and co-owner of Background Solutions, LLC, presented the 2009 Video at national background investigation seminars. Pet. 19. Second, Petitioner contends that the 2009 Video was publicly accessible on Background Solutions, LLC’s website, and that at the national background investigation seminars, Mr. Ward distributed pamphlets with the URL to that website. *Id.* According to Petitioner, “an oral presentation accompanied by distribution or display at a conference can establish a reference as a ‘printed publication.’” *Id.* at 20 (citing *Klopfenstein*, 380 F.3d at 1347–52).

In *Klopfenstein*, a fourteen-slide poster presentation was shown to a wide variety of viewers, a large subsection of whom possessed ordinary skill in the art of cereal chemistry and agriculture. Furthermore, the reference was prominently displayed for approximately three cumulative days at [American Association of Cereal Chemists] and the [Agriculture Experiment Station] at Kansas State University. The reference was shown with no stated expectation that the information would not be copied or reproduced by those viewing it.

380 F.3d at 1350. According to the Federal Circuit, in determining whether the presentation was publicly accessible,

[t]he factors relevant to the facts of [the *Klopfenstein*] case [were]: the length of time the display was exhibited, the

expertise of the target audience, the existence (or lack thereof) of reasonable expectations that the material displayed would not be copied, and the simplicity or ease with which the material displayed could have been copied.

Id.

In support of its arguments, Petitioner offers the testimony of Mr. Ward. Mr. Ward testifies that Background Solutions began developing the Background Assistant™ software in 2006, “with product sales being generated in mid-2009 based on company records.” Ex. 1009 ¶ 5. Such “company records” are not part of the record in this proceeding. According to Mr. Ward, the product development team for the Background Assistant software “outsourced the production of a power point video demonstration (Ex. 1002) of Background Assistant™ background investigation software for marketing purposes.” *Id.* ¶ 6. Mr. Ward testifies that he “played the Background Assistant™ product video (Ex. 1002) for the seminar attendees” and “had embedded the video in my background investigation seminar power point presentation.” *Id.* ¶ 7. According to Mr. Ward, he “used the video to explain to seminar attendees that an electronic solution for police background investigations was available through the Background Assistant software.” *Id.* Petitioner argues that “Mr. Ward’s presentation and demonstration of the Background Solutions video to a national conference of background investigators, i.e. those interested and skilled in the subject matter, qualifies it as a printed publication.” Pet. 20–21.

In response, Patent Owner argues that Mr. Ward does not identify any specific seminars at which he presented the 2009 Video, does not present any evidence of the backgrounds of the attendees of the seminars (or whether any attendees had backgrounds in software development), and does not address the length of the seminar presentation. Prelim. Resp. 21.

According to Patent Owner, “Ward does not identify a single conference by name or date,” and “Petitioner provides no corroborating evidence regarding the audience size or the number of [persons of ordinary skill in the art] that attended any alleged presentation.” *Id.* at 25.

We agree with Patent Owner. At the petition stage, Petitioner must identify “with particularity” the evidence it contends shows a reasonable likelihood that the 2009 Video is a printed publication. *Hulu*, at 13. Petitioner’s evidence lacks particularity. Although Mr. Ward testifies that he presented the 2009 Video at “law enforcement and background investigation seminars,” he does not testify as to how many such seminars he presented at, when or where those seminars were, who attended the seminars, or who watched the 2009 Video at the seminars.² Ex. 1009 ¶¶ 7–9. Rather, his testimony is vague and conclusory.

Petitioner cites *Klopfenstein* for the proposition that an oral presentation accompanied by a display at a conference can be enough to establish that a reference is a printed publication. Pet. 20 (citing *Klopfenstein*, 380 F.3d at 1347–52). However, Petitioner’s showing does not address any of the factors the *Klopfenstein* court considered in deciding that the reference in that case was a printed publication. Here, for example, Mr. Ward does not testify as to when or where he presented the 2009 Video,

² Mr. Ward testifies that “[a]mongst other customers, Background Solutions provided the Background Assistant™ product and background investigation services to King County (WA) Sheriff’s Department.” Ex. 1009 ¶ 12. However, Mr. Ward does not testify that he showed the video to the customer, or that the customer attended a seminar. He also does not testify as to when King County was a customer or whether it was prior to the effective filing date of the ’188 patent. Thus, this testimony does not support any of Petitioner’s arguments.

the length of time it was exhibited, or the expertise of the seminar audiences. *See Klopfenstein*, 380 F.3d at 1350. Moreover, because he does not provide any details about seminar dates or attendees, Mr. Ward does not indicate whether he presented the 2009 Video at any seminar prior to April 6, 2012, the earliest filing date on the face of the '188 patent,³ or whether any skilled artisans⁴ attended those seminars. Ex. 1009 ¶¶ 7–9.

Petitioner further argues that Background Solutions, LLC, made the 2009 Video accessible on its website no later than November 23, 2009. Pet. 21–24. Mr. Ward testifies that, at the seminars discussed above, he “distributed a product brochure advertising the Background Assistant™ background investigation software, which provides the URL for the Background Solutions website, www.backgroundsolutions.com,” and that the 2009 Video “was made available to the public at the URL www.backgroundsolutions.com,” which “contained a link to the same Background Assistant™ product video presented at the above-described law enforcement and background investigation seminars.” Ex. 1009 ¶¶ 8–9.

Patent Owner argues that “Petitioner provides no evidence that Ex. 1002 was distributed to any person at said unnamed conferences” and

³ Patent Owner seeks to file a Petition for Correction of Priority Claim to claim the benefit of an earlier-filed provisional application. Paper 9. An earlier priority date would not affect our analysis, as Petitioner has not shown that the 2009 Video was publicly accessible before the later filing date on the face of the patent.

⁴ The parties dispute the level of skill of a skilled artisan. Pet. 5–6; Prelim. Resp. 6–7. We need not resolve this dispute, as Mr. Ward does not testify as to the backgrounds of any seminar attendees. Thus, we are unable to ascertain whether any seminar attendee had either of the two proffered levels of skill.

that “there is no corroborating proof of what, if anything was on Ward’s website.” Prelim. Resp. 27.

For a reference posted to a website, there are multiple ways that Petitioner could show that the reference was publicly accessible. For example, Petitioner could show that the website was indexed, through search engines or otherwise. *See Blue Calypso*, 815 F.3d at 1349. Petitioner and Mr. Ward, however, offer no evidence of how Background Solutions, LLC’s website was indexed, if at all.

Petitioner also could show that the record indicates that, despite a lack of indexing, the website was well known to the community interested in the subject matter of the reference. *See Voter Verified, Inc. v. Premier Election Solutions, Inc.*, 698 F.3d 1374, 1380–81 (Fed. Cir. 2012) (“[T]he uncontested evidence indicates that a person of ordinary skill interested in electronic voting would have been independently aware of the Risks Digest as a prominent forum for discussing such technologies. And upon accessing the Risks Digest website, such an interested researcher would have found the Benson article using that website’s own search functions and applying reasonable diligence.”). Petitioner does not allege, and Mr. Ward’s testimony does not suggest, that Background Solutions, LLC’s website was a well-known forum for the community interested in the subject matter of the 2009 Video. Pet. 19–24; Ex. 1009. *See also Blue Calypso*, 815 F.3d at 1349–50 (“[I]n contrast to *Voter Verified*, the present case lacks any testimonial evidence that a person interested in e-commerce and peer-to-peer marketing would be independently aware of the web address for Dr. Ratsimor’s personal page. In other words, there was no evidence that the ordinarily skilled artisan would know of Dr. Ratsimor’s personal webpage or its web address.”).

Petitioner also could show that the 2009 Video was publicly accessible through the use of a “research aid,” such as a published article or patent that made reference to the 2009 Video. *See Blue Calypso*, 815 F.3d at 1350. The research aid would need to provide “a sufficiently definite roadmap” to the 2009 Video, although “[a]n adequate roadmap need not give turn-by-turn directions, but should at least provide enough details from which we can determine that an interested party is reasonably certain to arrive at the destination: the potentially invalidating reference.” *Id.* To that end, as noted above, Mr. Ward testifies that he distributed at seminars product brochures with the URL to Background Solutions, LLC’s website, where the 2009 Video could be found. Ex. 1009 ¶¶ 8–9. Petitioner argues that “[t]he URL for the homepage of the website, www.backgroundsolutions.com, was distributed to all of the attendees at these background investigation seminars,” and, thus, a skilled artisan “could have gained access to the Background Solutions . . . demonstration video describing Background Assistant™, through either (1) attendance at the national background investigation seminar, or (2) the Background Solutions publicly accessible website.” Pet. 24. However, as also noted above, Mr. Ward does not testify as to when or where the seminars occurred or who attended them. Thus, the evidence does not show who, if anyone, would have been given such a brochure or when they would have received it.

We further note that Mr. Ward does not testify as to when the 2009 Video was posted on Background Solutions, LLC’s website, or whether it would have been posted before April 6, 2012. Ex. 1009. Nevertheless, Petitioner argues that the Internet Archive, in particular Exhibit 1023, supports Mr. Ward’s testimony and establishes that the 2009 Video was

posted before November 23, 2009. Pet. 23. A portion of Exhibit 1023 is reproduced below:



The above figure is a portion of an Internet Archive capture of the webpage www.backgroundsolutions.com/index.html, purporting to have been captured on November 23, 2009. Ex. 1023, 1.

Petitioner does not state with specificity where the 2009 Video can be found in this capture. However clicking on the “Background Assistant” icon leads to a product brochure; thus, we presume that Petitioner intended to point us to the “Demo” icon. As Patent Owner argues, however, clicking on the “Demo” icon leads to a blank webpage, without any indication that the 2009 Video was reachable via that webpage. Prelim. Resp. 21–23. Thus,

Petitioner's Internet Archive capture (Ex. 1023) does not provide evidence that the 2009 Video would have been available on Background Solutions, LLC's website prior to April 6, 2012.

In sum, we have considered Petitioner's evidence, including Mr. Ward's testimony (Ex. 1009) and Petitioner's Internet Archive capture (Ex. 1023), and conclude that Petitioner has not shown a reasonable likelihood that the 2009 Video was publicly accessible before April 6, 2012. Neither Petitioner nor Mr. Ward provide enough specificity to determine when the 2009 Video was presented at seminars, when those seminars occurred, or who attended the seminars. Thus, even if we credit Mr. Ward's testimony, it is not sufficient to show that Mr. Ward presented the 2009 Video to skilled artisans at a seminar prior to April 6, 2012. The evidence also does not support a finding that the 2009 Video was posted to Background Solutions, LLC's website prior to April 6, 2012, or, even if it was, that a skilled artisan exercising reasonable diligence would have been able to locate it. Thus, on this record, Petitioner has not shown a reasonable likelihood that the 2009 Video qualifies as a printed publication and, accordingly, that it qualifies as prior art to the '188 patent. Therefore, on this record, Petitioner has not demonstrated a reasonable likelihood that it would prevail in showing that claims 1, 5, 9, and 15 would have been obvious over Background Solutions (i.e., the 2009 Video) and LaPasta.

2. *POBITS*

POBITS is an Internet Archive capture of an online user's manual. As Petitioner notes (Pet. 24), POBITS bears a copyright date of 2010. *See, e.g.*, Ex. 1004, 1. Petitioner contends that the testimony of Mr. Klosson, along with the Internet Archive capture, shows that POBTIS was available at

the website www.esdevllc.com/pobits/help/index.html no later than December 31, 2010. Pet. 24.

Mr. Klosson testifies that he “began developing one of [his] products, the Peace Officer Background Investigation Tracking System (‘POBITS’), in 2005 and developed a web-based version of the product in 2008, which went live in 2010.” Ex. 1014 ¶ 6. According to Mr. Klosson, “[t]he POBITS product and system has been offered for sale since 2005 and the modernized system since 2010.” *Id.* ¶ 9. Mr. Klosson testifies that “[i]n conjunction with marketing and offering the POBITS product for sale, between 2005 and 2010, [he] posted a POBITS online user manual and technical reference (Ex. 1004) to [his] company’s website,” and that the Internet Archive corroborates that POBITS was available to the public no later than February 1, 2011. *Id.* ¶ 10. Mr. Klosson further testifies that Exhibit 1004 (POBITS) “is a collection of screenshots of the Internet Archive (<http://web.archive.org>) crawls or snapshots of the online POBITS user manual and technical reference, taken on February 1, 2011” and “correctly depicts the online POBITS user manual and technical reference as of February 1, 2011.” *Id.* ¶ 11. Mr. Klosson concludes that “Ex. 1004 is a true and correct copy of the POBITS online user’s manual that was available to the public through the Essential Software Development website no later than February 1, 2011.” *Id.* ¶ 12.

Even if we credit Mr. Klosson’s testimony, it is insufficient to show a reasonable likelihood that POBITS was publicly accessible. As explained above, to establish public accessibility of a reference alleged to be available on a website, a petitioner could show that the website was indexed, through search engines or otherwise. *See Blue Calypso*, 815 F.3d at 1349. Petitioner and Mr. Klosson, however, offer no evidence of how Essential Software

Development's website was indexed, if at all. A petitioner also could show that the website was well known to the community interested in the subject matter of the reference. *See Voter Verified*, 698 F.3d at 1380–81. Neither Petitioner nor Mr. Klosson has alleged facts that would support a finding that Essential Software Development's website was well known to the community interested in the subject matter of POBITS. *See* Pet. 24; Ex. 1014. Nor do Petitioner or Mr. Klosson allege that some other public document could serve as a “research aid” that would lead skilled artisans to POBITS. *See Blue Calypso*, 815 F.3d at 1350.

Other than arguing the existence of POBITS on a public website on February 1, 2011, Petitioner makes no allegations that would support a finding of public accessibility. Petitioner's theory is, simply, that “[a]n interested [person of ordinary skill in the art] could have gained access to the POBITS printed publication through the publicly accessible website.” Pet. 24. Even if we accept this as true, it is not sufficient to show public accessibility. *See Blue Calypso*, 815 F.3d at 1349–50.

Patent Owner also argues that the February 1, 2011, archive date only applies to the outer “frame” of POBITS, which essentially depicts a selectable table of contents, and not to the individual pages contained within the frame. Prelim. Resp. 29–33. We need not reach this argument. As explained above, even if we assume that the entirety of POBITS was available on a public website on February 1, 2011, that, without more, is insufficient to show public accessibility. *See Blue Calypso*, 815 F.3d at 1349–50.

As noted above, Petitioner also points out that POBITS carries a copyright date of 2010. *Id.* As Patent Owner notes (Prelim. Resp. 33–34), however, a copyright date does not, by itself, establish that a document was

published by the copyright date. We may consider indicia such as copyright dates as “part of the totality of the evidence.” *Hulu*, at 17–18. In this case, a copyright date of 2010 would tend, at most, to corroborate that POBITS was posted on a public website around that time. As explained above, that, by itself, is not sufficient to show a reasonable likelihood that POBITS was publicly accessible. *See Blue Calypso*, 815 F.3d at 1349–50.

In sum, Petitioner’s evidence, at most, supports a finding that POBITS was posted on a public website by February 1, 2011. That is insufficient to show that POBITS was publicly accessible by that date. On this record, we conclude that Petitioner has not shown a reasonable likelihood that POBITS is a printed publication and, accordingly, prior art to the ’188 patent. Therefore, on this record, Petitioner has not demonstrated a reasonable likelihood that it would prevail in showing that claims 1, 5, 9, and 15 would have been obvious over POBITS and ADP.

C. Petitioner’s Motion to Correct and Patent Owner’s Motion to Terminate

We grant Petitioner’s Motion to Correct for the limited purpose of considering Exhibit 1027, the 2009 Video, in the context of denying institution. As explained above, however, Petitioner still cannot show, on a record that includes Exhibit 1027, that Background Solutions is prior art to the ’188 patent.

Because we deny the Petition for the reasons given above, it is not necessary to decide Patent Owner’s Motion to Terminate. We dismiss that motion as moot.

III. CONCLUSION

Petitioner has not shown a reasonable likelihood that either Background Solutions or POBITS is prior art to the '188 patent. Thus, Petitioner has not demonstrated a reasonable likelihood that it would prevail in showing that claims 1, 5, 9, and 15 would have been obvious over Background Solutions and LaPasta or that claims 1, 5, 9, and 15 would have been obvious over POBITS and ADP.

Petitioner's Motion to Correct (Paper 11) is granted for the purpose of considering Exhibit 1027.

Patent Owner's Motion to Terminate (Paper 10) is dismissed as moot.

IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that the Petition is *denied* as to the challenged claims of the '188 patent, and no *inter partes* review is instituted; and

FURTHER ORDERED that Petitioner's Motion to Correct a Clerical Mistake in the Petition Under 37 C.F.R. § 42.104(c) (Paper 11) is *granted* for the purpose of considering Exhibit 1027; and

FURTHER ORDERED that Patent Owner's Motion to Terminate IPR Proceeding (Paper 10) is *dismissed* as moot.

IPR2020-00031
Patent 10,043,188 B2

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