

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.

IPR2019-00235
Patent 7,868,912 B2 & C1

Before GEORGIANNA W. BRADEN, KIMBERLY McGRAW, and
JESSICA C. KAISER, *Administrative Patent Judges*.

McGRAW, *Administrative Patent Judge*.

DECISION

Denying Petitioner's Request for Rehearing of Decision
Denying Institution of *Inter Partes* Review
37 C.F.R. § 42.71(d)

I. INTRODUCTION

Axis Communications AB, Canon Inc., and Canon U.S.A., Inc. (collectively “Petitioner”) filed a Petition (Paper 1, “Pet.”) requesting an *inter partes* review of claims 1–4 and 6–36 of U.S. Patent No. 7,868,912 B2 & C1 (Ex. 1001, “the ’912 patent”) over certain references, including Flinchbaugh I¹ (Ex. 1005) and Kellogg (Ex. 1003). Petitioner also filed a Declaration of Emily R. Florio (Ex. 1007, “Original Florio Declaration”) supporting its Petition. Avigilon Fortress Corporation (“Patent Owner”) filed a Preliminary Response (Paper 9, “Prelim. Resp.”). Petitioner then filed an authorized Reply to Patent Owner’s Preliminary Response (Paper 14, “Reply”) and an authorized Motion to Correct the Florio Declaration under 37 C.F.R. § 42.104(c) (Paper 15). We issued a Decision (Paper 19, “Decision” or “Dec.”), in which we denied Petitioner’s Motion to Correct the Florio Declaration and declined to institute *inter partes* review of the ’912 patent. *See* Dec. 5–12.

In the Decision, we determined Petitioner had failed to establish sufficiently that Flinchbaugh I is prior art to the ’912 patent. *Id.* at 10–12. In particular, we determined that neither the Petition nor the evidence cited therein, which included the Original Florio Declaration, supported Petitioner’s contention that Flinchbaugh I was disseminated or otherwise accessible to the public before the effective filing date of the ’912 patent. *Id.* at 11–12. Because each of the asserted grounds of unpatentability relied upon Flinchbaugh I, we found Petitioner did not show a reasonable

¹ 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. (Ex. 1005, “Flinchbaugh I”).

likelihood of prevailing with respect to at least one of the claims challenged in the petition, and we determined not to institute an *inter partes* review. *Id.* at 12.

Petitioner filed a Request for Rehearing of our Decision. Paper 20 (“Rehearing Request” or “Reh. Req.”). In its Request, Petitioner contends we erred by focusing on the Original Florio Declaration and by failing to address the evidence of publication on the face of the Flinchbaugh I. Req. Reh’g 1–2. Additionally, Patent Owner requested review by the Precedential Opinion Panel (*see* Req. Reh’g. 3), which was denied (Paper 23).

For the reasons set forth below, Petitioner’s Request for Rehearing is *denied*.

II. ANALYSIS

A. *Legal Standards*

The party challenging a decision in a request for rehearing bears the burden of showing the decision should be modified. *See* 37 C.F.R. § 42.71(d). The request for rehearing “must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed.” *Id.* We review our Decision denying institution under an abuse of discretion standard. *See* 37 C.F.R. § 42.71(c). An abuse of discretion may arise if 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).

Under 35 U.S.C. § 311(b), a petitioner in an *inter partes* review may only challenge the claims of a patent based on “prior art consisting of patents

or printed publications.” Whether a reference qualifies as a “printed publication” 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). The key inquiry is whether the reference was made “sufficiently accessible to the public interested in the art” before the effective filing date. *In re Lister*, 583 F.3d 1307, 1311 (Fed. Cir. 2009). A reference is considered “publicly accessible” upon a satisfactory showing that the 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.” *Kyocera Wireless Corp. v. ITC*, 545 F.3d 1340, 1350 (Fed. Cir. 2008) (citation and internal quotation marks omitted).

After Petitioner filed its Request, the Board issued a Precedential Opinion Panel Decision in *Hulu LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29 (PTAB Dec. 20, 2019) (precedential). In that decision, the panel held that at 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, there is a reasonable likelihood that it qualifies as a printed publication. *Id.* at 13. *Hulu* explains there is no presumption in favor of finding that a reference is a printed publication. Rather, “the burden is on the petitioner to 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 16. *Hulu* further states that “indicia on the face of a reference, such as printed dates and stamps, are considered as part of the

totality of the evidence” to determine that an asserted reference was publicly accessible. *Id.* at 17–18.

In its Request for Rehearing, Petitioner contends the Decision “focused on errors made in the original Florio Declaration” but that the declaration “was *not* the only evidence of publication of the Flinchbaugh I reference.” Req. Reh’g 4. Petitioner asserts “the Petition and the face of Flinchbaugh I, 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.” *Id.* (citing Pet. 2–3); *see also id.* at 2 (stating 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 that the “indicia on the face of Flinchbaugh I is strong evidence that Flinchbaugh I qualifies as a printed publication”).

The Petition, however, does not contain any argument that indicia on the face of Flinchbaugh I is evidence of publication. Petitioner directs us to pages 2–3 of the Petition. Reg. Reh’g 4–5. These pages, however, merely state that (1) Flinchbaugh I is one of the references relied upon to show obviousness of the challenged claims (*see* Pet. 2) and that (2) “Flinchbaugh was published in the Proceedings of the 10th Annual Joint Government-Industry Security Technology Symposium& Exhibition. The Symposium occurred in June 1994 and the Proceedings were published by at least 1995” (Pet. 3 (citing Ex. 1007 ¶¶ 27–31)).

Patent Owner, in its Preliminary Response, argued that Petitioner’s evidence was insufficient to establish that either the Flinchbaugh I or Kellogg references were printed publications. *See* Prelim. Resp. 15–23. Petitioner did not seek authorization to file a reply to present any arguments or to identify with particularity any evidence to establish a reasonable

likelihood that *Flinchbaugh I* qualifies as a printed publication. Instead, Petitioner only requested authorization to file a reply to present arguments and evidence as to why *Kellogg* qualified as a printed publication. *See* Paper 13 (Order granting Petitioner’s request to file a Reply Brief and Motion to Correct). Petitioner does not provide a persuasive reason why we should now consider arguments that were not presented in either the Petition or the Reply, but rather were presented for the first time in a Request for Rehearing. Under the circumstances of this case, Petitioner has not shown that we misapprehended or overlooked any matters there were previously addressed.

Petitioner’s Request also contends the Decision “does not reference the many prior PTAB decisions that have repeatedly held that, at the institution stage, ‘conventional markers’ of publication are sufficient to show that a prior art reference is a printed publication.” Req. Reh’g 5. Petitioner cites to a number of decisions and contends the indicia of *Flinchbaugh I* “is comparable to the publication information relied on in these precedents.” *Id.* at 6.

Each of the cited decisions, however, contain evidence of publication that was not presented here. For example, in *Nobel Biocare Services AG v. Instradent USA, Inc.*, 903 F.3d 1365, 1376 (Fed. Cir. 2018) the Federal Circuit relied on declaration testimony that the catalog at issue was publicly accessible at a conference. In *Informatica Corp. v. Protegrity Corp.*, CBM2015-00021, Paper 14 at 29–30 (PTAB June 1, 2015), the Board cited to declaration testimony that the reference was published in 1971 and noted that “other indicia found in [the reference] suggest [the declarant] is likely correct about its apparent publication.” In both *Ericsson Inc. v. Intellectual Ventures I LLC*, IPR2014-00527, Paper 41 at 10–11 (PTAB May 18, 2015)

and *Provepharm Inc. v. Wista Laboratories Ltd.*, IPR2018-00182, Paper 16 at 17–18 (PTAB July 5, 2018), the Board relied on, *inter alia*, evidence that the purported publishers were well-known and established. In *Palo Alto Networks Inc. v. Juniper Networks, Inc.*, IPR2013-00369, Paper 16 at 15–16 (PTAB Dec. 19, 2013), the Board relied on a bibliographic data sheet as evidence that the reference was a technical report published by the University of Colorado at Colorado Springs. In *Toyota Motor Corp. v. American Vehicular Sciences LLC*, IPR2013-00417, Paper 14 at 33 n.6 (PTAB Jan. 13, 2014), the Board cited to a notation from a third party source as evidence that the reference was published. Thus, we see no inconsistency between those decisions and our decision in this proceeding.

III. CONCLUSION

For the foregoing reasons, Petitioner has not demonstrated we abused our discretion, or that we misapprehended or overlooked any issue, in denying institution of *inter partes* review in this case. Petitioner, therefore, has not carried its burden of demonstrating that the Decision denying institution should be modified. *See* 37 C.F.R. § 42.71(d).

IV. ORDER

Accordingly, it is ORDERED that Petitioner's Request for Rehearing (Paper 20) is *denied*.

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