

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CISCO SYSTEMS, INC.,
Petitioner,

v.

CONSTELLATION TECHNOLOGIES L.L.C.,
Patent Owner.

Case IPR2014-00871
Patent 6,845,389 B1

Before MICHAEL R. ZECHER, TREVOR M. JEFFERSON, and
PETER P. CHEN, *Administrative Patent Judges*.

JEFFERSON, *Administrative Patent Judge*.

DECISION
Denying Institution of *Inter Partes* Review
37 C.F.R. § 42.108

I. INTRODUCTION

Cisco Systems Inc. (“Petitioner”) filed a Petition (“Pet.”) requesting an *inter partes* review of claims 1–25 and 34–41 of U.S. Patent No. 6,845,389 B1 (Ex. 1001, “the ’389 patent”) pursuant to 35 U.S.C. §§ 311–319. Paper 2. Constellation Technologies L.L.C. (“Patent Owner”) timely filed a Preliminary Response (“Prelim. Resp.”). Paper 9. We have jurisdiction under 35 U.S.C. § 314(a), which provides that an *inter partes* review may not be instituted “unless . . . the information presented in the petition . . . and any response . . . shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.”

Upon consideration of the Petition, we determine that the information presented does not show there is a reasonable likelihood that Petitioner would prevail in showing the unpatentability of the challenged claims. Accordingly, pursuant to 35 U.S.C. § 314, we do not institute an *inter partes* review as to claims 1–25 and 34–41 of the ’389 patent.

A. *Related Proceedings*

Petitioner states that the ’389 patent was the subject of a Petition filed in *Cisco Systems, Inc. v. Constellation Technologies L.L.C.*, Case IPR2014-01085 (PTAB). Pet. 3. The parties identify the following matters that involve the ’389 patent: (1) *Constellation Technologies LLC v. Time Warner Cable Inc.*, No. 2:13-CV-01079 (E.D. Tex.); (2) *Charter Communications, Inc. v. Rockstar Consortium US LP*, No. 1:14-CV-00055 (D. Del.); (3) *Bockstar Technologies LLC v. Cisco Systems, Inc.*, No. 1:13-

player 50 sends “session participation request” message 52, such as an SIP (Session Initiation Protocol) INVITE message, to second player 62 via paths 56 and 60. *Id.* at 4:48–54, 4:36–39, 6:11–12, 8:14–16. The session participation request may include bandwidth and QoS requirements, such as end-to-end packet delay, or maximum tolerable lag. *Id.* at 4:51–55. Second player 62 responds by sending a negotiating message, SIP OK message, over paths 64 and 66 via game servers 58 and 54; the message includes the QoS requirements of the second player. *Id.* at 6:14–16, 2:25–30. Each player’s respective network determines whether sufficient bandwidth exists to handle the second player’s QoS requirements, and reserves the required bandwidth. *Id.* at 2:31–42, 6:23–30. If the bandwidth is reserved, first player 50 sends second player 62 an acknowledgement message, such as a SIP ACK message, completing the QoS provisioning. *Id.* at 2:42–45, 6:30–41. Thus, the ’389 patent discloses using SIP, Sessional Announcement Protocols, and Session Description Protocols to identify the QoS requirements for the session, and reserve the necessary resources. *Id.* at 4:30–45.

C. Illustrative Claim

Claims 1, 8, 18, 34, and 38 are independent claims. Claims 2–7 depend from claim 1, claims 9–17 depend from claim 8, claims 19–24 depend from claim 18, claims 35–38 depend from claim 34, and claims 39–41 depend from claim 38. Claim 1 is illustrative of the subject matter of the ’389 patent:

1. A method of setting up a multi-user communication session over a global computer network, comprising:
 - sending a session participation request message from a first user to a second user, the session participation request message including the first user's QoS requirements for the session;
 - receiving a negotiating message from the second user by the first user in response to the session participation request message, the negotiation message including the second user's QoS requirements for the session responsive to the first user's QoS requirements;
 - determining resource availability in access networks of the first and second users according to the second user's QoS requirements;
 - reserving resources in the respective access networks of the first and second users in response to resources being available to achieve the second user's QoS requirements; and
 - sending an acknowledgement message from the first user to the second user in response to receiving the negotiating message to indicate the completion of QoS provisioning.

Ex. 1001, 8: 64–9:19.

D. The Asserted Grounds

Petitioner asserts that the challenged claims of the '389 patent are unpatentable under 35 U.S.C. § 103 for the following specific grounds (Pet. 18–19):

References	Basis	Claim(s) Challenged
RFC 2543, ¹ RFC 2205, ² RFC 2327, ³ and Rosenberg ⁴	§ 103(a)	1–3, 5–16, 18–25, and 34–41
RFC 2543, RFC 2205, RFC 2327, Rosenberg, and Leigh ⁵	§ 103(a)	4
RFC 2543, RFC 2205, RFC 2327, Rosenberg, and Schulzrinne ⁶	§ 103(a)	17

II. DISCUSSION

A. Claim Construction

We determine the meaning of the claims as the first step of our analysis. In an *inter partes* review, we interpret claims using the broadest reasonable construction. See 37 C.F.R. § 42.100(b); Office Patent Trial

¹ Handley, M., et al., Request for Comments: 2543, *SIP: Session Initiation Protocol* (Mar. 1999). (Ex. 1007, “RFC 2543”).

² Braden, R. (ed), Request for Comments 2205, *Resource ReSerVation Protocol (RSVP)—Version 1 Functional Specification* (Sept. 1997). (Ex. 1005, “RFC 2205”).

³ Handley, M. and Jacobson, V., Request for Comments 2327, *SDP: Session Description Protocol* (Apr. 1998). (Ex. 1006, “RFC 2327”).

⁴ Rosenberg, J., et al., Internet Engineering Task Force Internet Draft, *Establishing QoS and Security Preconditions for SDP Sessions* (June 1999). (Ex. 1008, “Rosenberg”).

⁵ Jason Leigh, et al., *Issues in the Design of a Flexible Distributed Architecture for Supporting Persistence and Interoperability in Collaborative Virtual Environments*, Proceedings of the ACM/IEEE SC97 Conference (1997). (Ex. 1015, “Leigh”).

⁶ Henning Schulzrinne, et al., *Interaction of Call Setup and Resource Reservation Protocols in Internet Telephony* (June 1999). (Ex. 1010, “Schulzrinne”).

Practice Guide, 77 Fed. Reg. 48,756, 48,766 (Aug. 14, 2012). If an inventor acts as his or her own lexicographer, the definition must be set forth in the specification with reasonable clarity, deliberateness, and precision.

Renishaw PLC v. Marposs Societa' per Azioni, 158 F.3d 1243, 1249 (Fed. Cir. 1998). Claim terms generally are given their ordinary and customary meaning, as would be understood by one of ordinary skill in the art in the context of the entire disclosure. See *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007).

Petitioner contends that several claim terms—specifically, “session” (claims 1–25, 34–41), “[negotiating/negotiation] message” (claims 1, 5, 6, 8, 13, 14, 18, 22, 23), “latency requirement” (claims 4, 12, 21, 36, 40), “session classification” (claims 7, 24), and “game classification” (claim 15)—do not carry their ordinary and customary meaning, but instead should be construed specifically in accordance with the ’389 specification as supported by the Declaration of Dr. Henry H. Houh (Ex. 1003 ¶¶ 42–60). Pet. 19–23 (providing specific constructions for the terms and citations to the ’389 specification and Houh declaration).

Petitioner, however, has not shown that the inventor acted as his or her own lexicographer. For purposes of this Decision, we determine that the five terms do not require express constructions.

B. Claims 1–25 and 34–41—Obviousness based on Rosenberg

Petitioner argues that each claim of the claims at issue, claims 1–25 and 34–41, is unpatentable as obvious under 35 U.S.C. § 103(a) on

combinations of prior art that each include the Rosenberg reference. Pet. 18–19. Whether Rosenberg is a printed publication is a dispositive issue in this proceeding.

1. Rosenberg (Ex. 1008)

Rosenberg, titled “Establishing QoS and Security Preconditions for SDP Sessions,” is described on its face as an “Internet-Draft[. . . working document[] of the Internet Engineering Task Force (IETF).” Ex. 1008, 1. Rosenberg “discusses how network QoS and security establishment can be made a precondition to sessions described by SDP.” *Id.* Rosenberg describes “Internet-Drafts” as documents that are “valid for a maximum of six months and may be updated, replaced, or obsoleted by other documents at any time.” *Id.* Furthermore, the Rosenberg reference states that “[i]t is inappropriate to use Internet-Drafts as reference material or to cite them other than as work in progress.” *Id.* The Petition describes Rosenberg as “a prior art printed publication that extends [the] features of RFC 2327 [Ex. 1006].” Pet. 10.

2. Analysis of Whether Rosenberg is a Printed Publication

“Where no facts are in dispute, the question of whether a reference represents a ‘printed publication’ is a question of law.” *In re Klopfenstein*, 380 F.3d 1345, 1347 (Fed. Cir. 2004) (citing *In re Cronyn*, 890 F.2d 1158, 1159 (Fed.Cir.1989)). We look to the underlying facts to make the legal determination of whether a reference is a printed publication. *Suffolk Techs., LLC v. AOL Inc.*, 752 F.3d 1358, 1364 (Fed. Cir. 2014). The determination of whether a document is a “printed publication” under 35 U.S.C. § 102(b)

involves a case-by-case inquiry into the facts and circumstances surrounding its disclosure to members of the public. *In re Klopfenstein*, 380 F.3d at 1350. The Federal Circuit informs us that public accessibility is a key question in determining whether a document is a printed publication and is determined on a case-by-case basis. *Suffolk Techs.*, 752 F.3d at 1364.

Patent Owner contends that Petitioner fails to provide any evidence supporting the assertion that Rosenberg is a prior art printed publication that was published in June 1999. Prelim. Resp. 10 (citing Pet. 10). Patent Owner further argues that Petitioner’s lack of evidence supporting the public accessibility of the “Internet-Draft” reference, Rosenberg, disqualifies it as a printed publication under 35 U.S.C. § 311(b). Prelim. Resp. 11. Section 311(b) limits the scope of an *inter partes* review to “only . . . a ground that could be raised under section 102 or 103 and only on the basis of prior art consisting of patents and printed publications.”

We agree with Patent Owner (Prelim. Resp. 10–11) that Petitioner’s lack of evidence supporting its contention that Rosenberg was accessible publicly to those interested in the art is fatal to its Petition. Petitioner fails to present sufficient argument, declaration testimony, or evidence that indicates that Rosenberg, an Internet-Draft, which was “valid” for only a limited time and was deemed inappropriate for citation (Ex. 1008, 1), was accessible to the interested public. *See* Pet. 10–11. Indeed, the Petition is silent on the manner in which Rosenberg was purportedly “*published* as an Internet-Draft in June 1999.” *Id.* (emphasis added).

To qualify as a printed publication, a document “must have been sufficiently accessible to the public interested in the art.” *In re Lister*, 583 F.3d 1307, 1311 (Fed. Cir. 2009). “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)).

In the present case, Petitioner provides insufficient evidence by declaration or document to establish the public accessibility of Rosenberg. *Cf. In re Hall*, 781 F.2d 897, 899 (Fed. Cir. 1986) (examining affidavit in support of public availability of thesis); *Samsung Elecs. Co. v. Rembrandt Wireless Techs.*, Case IPR2014-00514, slip op. at 5–10 (PTAB Sept. 9, 2014) (Paper 18) (determining whether the declaration of an editor of an IEEE draft standard sufficiently showed public accessibility of the proposed draft standard). Petitioner’s naked assertion that Rosenberg was published (Pet. 10–11) is not supported by the record, which fails to identify the circumstances and manner in which persons interested and ordinarily skilled in the subject matter could locate the reference.

In light of Patent Owner’s challenge, and based on Petitioner’s insufficient supporting evidence, we find that Petitioner has not shown that Rosenberg was sufficiently accessible to the public interested in the art. Accordingly, Petitioner has not made a sufficient showing that Rosenberg

qualifies as a printed publication under 35 U.S.C. § 102(b) and, thus, falls within the proper scope of an *inter partes* review.

Because each of Petitioner's asserted grounds of unpatentability is based, in part, on Rosenberg (Pet. 18–19), and Petitioner has not met its burden of establishing that Rosenberg is a “printed publication” and, thus, satisfies the statutory requirement of 35 U.S.C. § 311(b), Petitioner has not shown a reasonable likelihood of prevailing on the asserted grounds.

III. CONCLUSION

For the foregoing reasons, we determine that the information presented in the Petition does not establish a reasonable likelihood that Petitioner would prevail in establishing the unpatentability of: (1) claims 1–3, 5–16, 18–25, and 34–41 of the '389 patent as obvious over Rosenberg, RFC 2543, RFC 2205, and RFC 2327; (2) claim 4 of the '389 patent as obvious over Rosenberg, RFC 2543, RFC 2205, RFC 2327, and Leigh; and (3) claim 17 as obvious over Rosenberg, RFC 2543, RFC 2205, RFC 2327, and Schulzrinne.

IV. ORDER

Accordingly, it is

ORDERED that the Petition is *denied* and no trial is instituted.

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