

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAMSUNG ELECTRONICS CO. LTD.,
SAMSUNG ELECTRONICS AMERICA, INC.,
SAMSUNG TELECOMMUNICATIONS AMERICA, LLC, and
SAMSUNG AUSTIN SEMICONDUCTOR, LLC,
Petitioner,

v.

REMBRANDT WIRELESS TECHNOLOGIES, LP,
Patent Owner.

IPR2014-00891
Patent 8,457,228 B2

Before JAMESON LEE, HOWARD B. BLANKENSHIP, and
JUSTIN BUSCH, *Administrative Patent Judges*.

BUSCH, *Administrative Patent Judge*.

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

I. INTRODUCTION

A. *Background*

Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., Samsung Telecommunications America, LLC, and Samsung Austin Semiconductor, LLC (collectively, “Petitioner”) filed a Petition requesting an *inter partes* review of claims 26–29, 31, 36–41, 43, and 47–52 (the “challenged claims”) of U.S. Patent No. 8,457,228 B2 (Ex. 1201, “the ’228 patent”) on June 4, 2014. Paper 2 (“Pet.”). Rembrandt Wireless Technologies, LP (“Patent Owner”) filed a Patent Owner Preliminary Response on September 18, 2014. Paper 6 (“Prelim. Resp.”). We have jurisdiction under 35 U.S.C. § 314.

An *inter partes* review may be instituted only if “the information presented in the petition . . . and any[preliminary] 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.” 35 U.S.C. § 314(a); *see* 37 C.F.R. § 42.108(c). Upon consideration of the Petition and the Patent Owner Preliminary Response, we conclude Petitioner has not established a reasonable likelihood that it would prevail with respect to the challenged claims of the ’228 patent and, accordingly, we do not institute an *inter partes* review.

B. *Related Proceedings*

Petitioner indicates that the ’228 patent was asserted against Petitioner in *Rembrandt Wireless Technologies, LP v. Samsung Electronics*

IPR2014-00891
Patent 8,457,228 B2

Co., No. 2:13-cv-00213 (E.D. Tex. 2013). Pet. 1. The same parties and patent are involved in *Samsung Electronics Co. v. Rembrandt Wireless Technologies, LP*, Case IPR2014-00889 (filed June 4, 2014); *Samsung Electronics Co. v. Rembrandt Wireless Technologies, LP*, Case IPR2014-00890 (filed June 4, 2014); *Samsung Electronics Co. v. Rembrandt Wireless Technologies, LP*, Case IPR2014-00892 (filed June 4, 2014); *Samsung Electronics Co. v. Rembrandt Wireless Technologies, LP*, Case IPR2014-00893 (filed June 4, 2014); and *Samsung Electronics Co. v. Rembrandt Wireless Technologies, LP*, Case IPR2014-00895 (filed June 4, 2014).

C. *The '228 Patent (Ex. 1201)*

The specification of the '228 patent describes “a data communications system in which a plurality of modulation methods are used to facilitate communication among a plurality of modem types.” Ex. 1201, 1:23–25. The '228 patent explains that the invention addresses a problem that conventional modem pairs can communicate successfully only when the modems use compatible modulation methods. *Id.* at 1:29–32, 1:47–49.

Of the challenged claims, claim 26 is the only independent claim.

Illustrative claim 26 is reproduced below:

26. A master communication device configured to communicate according to a master/slave relationship in which a slave communication from a slave device to the master communication device occurs in response to a master communication from the master communication device to the slave device, the master communication device comprising:
a transceiver configured to transmit signals over a communications medium to a slave device using at least two

different types of modulation methods and to receive one or more responses over the communication medium that comprise at least respective response data that is modulated according to one of the at least two different types of modulation methods, the at least two different types of modulation methods comprising a first modulation method and a second modulation method, wherein the transmitted signals comprise first transmitted signals and second transmitted signals, the first transmitted signals comprise at least two transmission sequences, the at least two transmission sequences include a first transmission sequence and a second transmission sequence, the transceiver is configured to transmit the first transmission sequence using the first modulation method, and the transceiver is configured to transmit the second transmission sequence using the second modulation method wherein:

- the first transmission sequence includes information that is indicative of an impending change in modulation method from the first modulation method to the second modulation method,

- the second transmission sequence includes a payload portion that is transmitted after the first transmission sequence,

- the first transmitted signals include first address information that is indicative of the slave device being an intended destination of the payload portion,

- the second transmitted signals comprise at least a third transmission sequence and a fourth transmission sequence,

- the transceiver is configured to transmit the third transmission sequence using the first modulation method,

- the transceiver is configured to transmit the fourth transmission sequence using the first modulation method,

- the third transmission sequence includes information indicative that the fourth transmission

sequence will be transmitted using the first modulation method,

the fourth transmission sequence includes a second payload portion that is transmitted after the third transmission sequence, and

the second transmitted signals include second address information that is indicative of a specified slave device being an intended destination of the second payload portion.

D. Asserted Grounds of Unpatentability

Petitioner asserts the following grounds of unpatentability:

Evidence	Basis	Challenged Claims
Draft Standard ¹	§ 102(b)	26–29, 37–41, 43, and 47–52
Draft Standard	§ 103(a)	26–29, 37–41, 43, and 47–52
Draft Standard and Boer ²	§ 103(a)	26–29, 36–41, 43, and 47–52
Draft Standard and APA ³	§ 103(a)	29, 31, 36, and 51
Draft Standard, Boer, and APA	§ 103(a)	29, 31, 36, and 51

¹ IEEE, DRAFT STANDARD FOR WIRELESS LAN, MEDIUM ACCESS CONTROL (MAC) AND PHYSICAL LAYER (PHY) SPECIFICATION, P802.11D4.0 (1996) (Ex. 1204) (“Draft Standard”).

² U.S. Patent No. 5,706,428 (filed Mar. 14, 1996, issued Jan. 6, 1998) (Ex. 1206) (“Boer”).

³ Petitioner alleges that the ’228 patent’s descriptions of training signals are admitted prior art. Pet. 56–57 (citing Ex. 1201, 4:5–27) (“APA”).

II. ANALYSIS

A. *Claim Construction*

Petitioner and Patent Owner each propose a construction of “first modulation method” and “second modulation method.” We, however, do not construe any term because no term needs to be construed for purposes of this Decision.

B. *Asserted Anticipation and Obviousness Grounds Based on Draft Standard*

The dispositive issue in this proceeding is whether Draft Standard, on which all of Petitioner’s asserted grounds of unpatentability rely, is a printed publication.

1. *Overview of Draft Standard (Ex. 1204)*

Draft Standard is an unapproved draft of a standard proposed by the Institute of Electrical and Electronics Engineers (“IEEE”). Ex. 1204, i.⁴ The purpose of the proposed standard was “[t]o provide wireless connectivity to automatic machinery, equipment[,] or[] stations that require rapid deployment, which may be portable, or hand-held or which may be mounted on moving vehicles within a local area” and “[t]o offer a standard for use by regulatory bodies to standardize access to one or more frequency bands for the purpose of local area communication.” *Id.* at 1.

⁴ In this Decision, we refer to the original pagination of Draft Standard rather than the Exhibit page numbers.

2. Declaration of Robert O'Hara (Ex. 1225)

Mr. Robert O'Hara was an editor of the IEEE 802.11-1997 standard. Ex. 1225 ¶ 1; Ex. 1204, iii. Mr. O'Hara states that drafts of the 802.11-1997 standard, including Draft Standard, were available to members of the 802.11 Working Group for download from the 802.11 Working Group's server. Ex. 1225 ¶ 9. According to Mr. O'Hara, announcements were sent to the Working Group's e-mail list when drafts became available, and a person could be added to the Working Group's e-mail list by providing an e-mail address to the chair of the Working Group. *Id.* ¶¶ 9–10. Mr. O'Hara states that there “were no restrictions on who could attend the 802.11 Working Group's meetings [or] on who could provide an e-mail address” and that, according to his recollection, anyone who made a request to be added to the e-mail list would be added. *Id.* ¶ 10.

Mr. O'Hara states the copies of the drafts of the 802.11 standard available on the Working Group's servers were password-protected files, and that the members of the e-mail list were provided with passwords to access the documents, either as part of an announcement of a new draft or via “another way.” *Id.* ¶ 11. According to Mr. O'Hara, the passwords were intended to limit distribution to “interested individuals, as opposed to the entire [I]nternet.” *Id.* Mr. O'Hara also states that attending an 802.11 Working Group meeting or asking for access prior to a meeting demonstrated sufficient interest such that that person would receive the password necessary to access the drafts on the Working Group's server. *Id.*

Further, according to Mr. O’Hara, each of the 802.11 standard drafts, including Draft Standard, would have been discussed at the Working Group meetings and made available to all attendees. *Id.* ¶ 12. Mr. O’Hara also states the meetings were not limited to IEEE members but were open to the general public. *Id.*

3. *Analysis of Whether Draft Standard Is a Printed Publication*

We look to the underlying facts and circumstances surrounding the disclosure of a document to members of the public in order to make a legal determination as to whether a document is a printed publication. *Suffolk Techs., LLC v. AOL Inc.*, 752 F.3d 1358, 1364 (Fed. Cir. 2014); *SRI Int’l, Inc. v. Internet Sec. Sys., Inc.*, 511 F.3d 1186, 1192 (Fed. Cir. 2008); *In re Klopfenstein*, 380 F.3d 1345, 1350 (Fed. Cir. 2004). 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. 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).

The O’Hara Declaration is the only extrinsic evidence that Petitioner submits in support of its position that Draft Standard is a printed publication. *See* Pet. 16–17. Petitioner asserts that Draft Standard “was completed on May 20, 1996, and was available to *anyone who wanted to view it* on May 23, 1996.” Pet. 16 (citing Ex. 1225 ¶¶ 4, 5, 10, 12) (emphasis added). Petitioner argues that this availability resulted in a publication date of May

IPR2014-00891
Patent 8,457,228 B2

23, 1996. *Id.* Petitioner also argues Draft Standard “was available to any interested parties” no later than July 8, 1996, because it “was available to all members of the 802.11 Working Group’s email list” and discussed and distributed at an 802.11 Working Group meeting held July 8–12, 1996. *Id.* at 17. Thus, Petitioner concludes that this alleged distribution and availability to any interested parties by July 8, 1996, renders Draft Standard a “printed publication” under 35 U.S.C. § 102(b). *Id.*

Notably absent, however, from the Petition and the O’Hara Declaration are any assertions or evidence in support of the availability of Draft Standard to the public interested in the art. We do not find sufficient argument or evidence to indicate that the July 8–12 meeting of the 802.11 Working Group (or any other 802.11 Working Group meeting) was advertised or otherwise announced to the public. Nor do we find sufficient argument or evidence that any individual who was interested in the art would have known about Draft Standard such that he or she would have known to request a copy or ask to be added to an email list for access to Draft Standard.

“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*, 511 F.3d at 1194 (quoting *Bruckelmyer v. Ground Heaters, Inc.*, 445 F.3d 1374, 1378 (Fed. Cir. 2006)). Although Mr. O’Hara declares that

“[t]here were no restrictions on who could attend the 802.11 Working Group’s meetings” (Ex. 1225 ¶ 10) and that the meetings “were open to the general public” (*id.* ¶ 12), Petitioner has not presented persuasive argument or evidence regarding how members of the potentially interested public would have been made aware of these meetings. Similarly, although Mr. O’Hara declares that an individual could provide the chair with an e-mail address to be added to the Working Group’s e-mail list (*id.* ¶ 10), the Petition has not established how an individual would have known to attend a meeting or contact the chair in order to be added to the e-mail list.

Based on the evidence before us, we find that the purpose of the 802.11 Working Group’s storage of drafts of the standard on a server is similar to the placement of a file on an “FTP server solely to facilitate peer review in preparation for later publication,” which the U.S. Court of Appeals for the Federal Circuit found weighed against public accessibility of the file. *SRI Int’l*, 511 F.3d at 1197. In *SRI*, even though the “paper was ‘posted’ on an open FTP server and might have been available to anyone with FTP know-how and knowledge of the” subdirectory in which it resided, the Federal Circuit found the fact that the paper was not publicized suggested an absence of public availability. *Id.* In this case, the submitted evidence does not show that the 802.11 Working Group’s server was an open server and, to the extent that it was, the evidence shows that the documents were password protected. Ex. 1225 ¶ 11.

Moreover, notwithstanding Mr. O’Hara’s statement that passwords were distributed to the 802.11 Working Group e-mail list (*id.*), the fact that an interested individual needed to contact IEEE in order to obtain a password or other means of accessing Draft Standard (and needed to know who to contact in the first place) weighs against public accessibility. *Cf. Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1351 (Fed. Cir. 2008) (finding facts weighed towards public accessibility because “[t]he specifications themselves were visible to any member of the interested public without requesting them from an ETSI member”). Mr. O’Hara states that the drafts of the 802.11 standards, including Draft Standard, were (and still are) protected by passwords in order to limit distribution to “interested individuals, as opposed to the entire [I]nternet.” Ex. 1225 ¶ 11. However, as previously discussed, the record does not contain persuasive evidence showing how an individual outside the 802.11 Working Group would have known of the existence of Draft Standard, the 802.11 Working Group meetings, or the 802.11 Working Group itself. Therefore, we are not persuaded that such an individual, exercising reasonable diligence, would be able to change one’s status from an anonymous member of “the entire [I]nternet” to an “interested individual.” Moreover, the Working Group created Draft Standard. *See* Ex. 1023 ¶ 2. Provision of a document to co-authors of the document does not constitute dissemination, or availability, of the document to the public.

Therefore, based on the evidence Petitioner provided, we conclude Petitioner has not made a sufficient showing that Draft Standard was a printed publication as of July 1996 or earlier, as alleged, i.e., that Draft Standard was available as of July 1996 or earlier to an ordinarily skilled individual, exercising reasonable diligence, who might have been interested in the subject matter of Draft Standard.

*4. Analysis of Asserted Anticipation and Obviousness Grounds
Based on Draft Standard*

We do not determine whether Draft Standard anticipates or renders obvious any of the challenged claims in this case because, as discussed above, Petitioner has not made a sufficient showing that Draft Standard may be relied upon as prior art to demonstrate a reasonable likelihood that Petitioner would prevail in demonstrating the unpatentability of the challenged claims.

III. CONCLUSION

For the foregoing reasons, we determine that Petitioner has not shown a reasonable likelihood that it would prevail in demonstrating that:

(1) claims 26–29, 37–41, 43, and 47–52 of the '228 patent are unpatentable as anticipated or obvious in view of Draft Standard; (2) claims 26–29, 36–41, 43, and 47–52 of the '228 patent are unpatentable as obvious in view of Draft Standard and Boer; (3) claims 29, 31, 36, and 51 of the '228 patent are unpatentable as obvious in view of Draft Standard and APA; or (4) claims

IPR2014-00891
Patent 8,457,228 B2

29, 31, 36, and 51 of the '228 patent are unpatentable as obvious in view of Draft Standard, Boer, and APA.

IV. ORDER

For the reasons given, it is ORDERED that the Petition is denied as to all challenged claims and no trial is instituted.

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