Trials@uspto.gov
571-272-7822

Date Entered: September 2, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE INC.,
Petitioner,

v.

ART+COM INNOVATIONPOOL GMBH,
Patent Owner.

Case IPR2015-00788
Patent RE44,550 E

Before JUSTIN BUSCH, SCOTT A. DANIELS, and KEVIN W. CHERRY, *Administrative Patent Judges*.

CHERRY, *Administrative Patent Judge*.

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

I. BACKGROUND

Google Inc. (Petitioner) requests an *inter partes* review of claims 1–3, 14, 18, 25, 27–30, 32, 34, 35, 39, 43, 46, 48, 51–53, 58, 61, 63, and 83 ("the challenged claims") of U.S. Patent No. RE44,550 E (Ex. 1001, "the '550

patent") under 35 U.S.C. §§ 311–319. Paper 1 (Petition, or "Pet."). ART+COM Innovationpool GmbH (Patent Owner) filed a Preliminary Response. Paper 6 ("Preliminary Response" or "Prelim. Resp."). We have authority to determine whether to institute an *inter partes* review. 35 U.S.C. § 314(b); 37 C.F.R. § 42.4(a). Upon consideration of the Petition and the Preliminary Response, and for the reasons explained below, we determine that the information presented does not show a reasonable likelihood that Petitioner would prevail with respect to at least one claim. *See* 35 U.S.C. § 314(a).

Accordingly, we do not institute an *inter partes* review as to any of the challenged claims of the '550 patent.

A. Related Proceeding

According to the parties, the '550 patent is involved in the following district court proceeding: *ART+COM Innovationpool GmbH v. Google Inc.*, No. 14-0217 (D. Del.). Pet. 1; Paper 5, 1. There is also a related petition for *inter partes review*: Case IPR2015-00789. Paper 5, 1.

B. The '550 Patent

The '550 patent is a reissue of U.S. Patent No. RE41,428 ("the '428 patent"). Ex. 1001, at [64]. The '428 patent is, in turn, a reissue of U.S. Patent No. 6,100,897 ("the '897 patent"). *Id.* The '897 patent issued from a U.S. application filed December 17, 1996, which claimed priority, pursuant to 35 U.S.C. § 119, to a German application filed December 22, 1995. *Id.* at [30]. The '550 patent relates to methods and devices for the pictorial representation of space-related data, such as geographical data of the earth. *Id.* at Abstract.

C. Illustrative Claim

Claim 1 is illustrative.

l. A method of providing a pictorial representation of space-related data of a selectable object, the representation corresponding to a view of the object by an observer with a selectable location and a selectable direction of view comprising:

(a) providing a plurality of spatially distributed data sources for storing space-related data;

(b) determining a field of view including an area of the object to be represented through a selection of a distance of the observer to the object and an angle of view of the observer to the object;

(c) requesting data for the field of view from at least one of the plurality of spatially distributed data sources;

(d) centrally storing the data for the field of view;

(e) representing the data for the field of view in a pictorial representation having one or more sections;

(f) using a computer, dividing each of the one or more sections having image resolutions below a desired image resolution into a plurality of smaller sections, requesting higher resolution space-related data for each of the smaller sections from at least one of the plurality of spatially distributed data sources, centrally storing the higher resolution space-related data, and representing the data for the field of view in the pictorial representation; and

(g) repeating step (f), dividing the sections into smaller sections, until every section has the desired image resolution or no higher image resolution data is available.

D. Evidence Submitted with the Petition

Delorme ("Delorme")	US 4,972,319	Nov. 20, 1990	(Ex. 1008)
Wysocki et al. ("Wysocki")	US 5,381,338	Jan. 10, 1995	(Ex. 1012)

Yvan G. Leclerc & Stephen Q. Lau, Jr., SRI Int'l, *TerraVision: A Terrain Visualization System*, Tech. Note 540 (Jan. 26, 1995) (Ex. 1006, "Leclerc").

Barbara B. Fuller & Ira Richter, Mitre Corp., *An Overview of the MAGIC Project*, M 93B0000173 (Dec. 1993) (Ex. 1007, "Fuller").

Lewis E. Hitchner, Research Institute for Advanced Computer Science, *Virtual Planetary Exploration: A Very Large Virtual Environment*, *in* PROC. OF ACM SIGGRAPH '92, 6.1–6.16 (July 26, 1992) (Ex. 1009, "Hitchner").

Hanan Samet, *Spatial Data Structures*, *in* MODERN DATABASE SYSTEMS 361–85 (Won Kim, ed., Aug. 29, 1995) (Ex. 1010, "Samet").

E. Gobbetti, et al., *Virtual Sardinia: A Hypermedia Fly-Through with Real Data*, *in* 1 PROC. OF THE INT'L WORKSHOP ON SOFT COMPUTING IN REMOTE SENSING DATA ANALYSIS 253–60 (Dec. 4, 1995) (Ex. 1011, "Gobbetti").

Declaration of Dr. Anselmo Lastra, dated February 20, 2015 (Ex. 1002, "Lastra Decl.").

E. Asserted Grounds of Unpatentability

Petitioner asserts the following grounds of unpatentability for obviousness under 35 U.S.C. § 103(a) (Pet. 14–48):

References	**Claim(s)**
Leclerc & Fuller	1, 2, 14, 18, 27, 28, 30, 32, 34, 39, 43, 48
Leclerc, Fuller, & Delorme	3, 46, 83
Leclerc, Fuller, & Hitchner	25

References	Claim(s)
Leclerc, Fuller, & Samet	29
Leclerc, Fuller, & Gobbetti	35, 51, 52, 53
Leclerc, Fuller, & Wysocki	58, 63
Leclerc, Fuller, Wysocki, & Delorme	61

II. ANALYSIS

A. Printed Publication under 35 U.S.C. § 102

We look to the underlying facts 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). 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 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)." *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." *Bruckelmyer v. Ground Heaters, Inc.*, 445 F.3d 1374, 1378 (Fed. Cir. 2006); *SRI Int'l Inc. v. Internet Sec. Sys., Inc.*, 511 F.3d 1186, 1194 (Fed. Cir. 2008). The party seeking to introduce the reference "should produce

sufficient proof of its dissemination or that it has otherwise been available and accessible to persons concerned with the art to which the document relates and thus most likely to avail themselves of its contents." *In re Wyer*, 655 F.2d 221, 227 (CCPA 1981).

B. Leclerc (Ex. 1006)

The Petition submits generally that "each of the asserted grounds consists of references that were patented or published prior to December 17, 1995" and that "all the references herein qualify as prior art under at least pre-AIA § 102(a) and (b)." Pet. 3. We do not find any other discussion in the Petition in support of the allegation that Leclerc was published prior to December 1995.

Page 1 of Leclerc is reproduced below.

SRI International

TerraVision: A Terrain Visualization System

Technical Note No. 540

April 22, 1994

By: Yvan G. Leclerc, Senior Computer Scientist
Steven Q. Lau Jr., Software Engineer

Approved for Public Release; Distribution Unlimited

This work was supported in part by the Advanced Research Projects Agency under Contract F19628-92-C-0071.

The views, opinions and/or conclusions contained in this note are those of the author and should not be interpreted as representative of the official positions, decisions, or policies, either expressed or implied, of the Advanced Research Projects Agency, or of the United Stated Government.

333 Ravenswood Avenue - Menlo Park, CA 94025-3493 - (415) 326-6200 - FAX: (415) 326-5512 - Telex: 334486

Page 1 of Leclerc identifies SRI International as the source organization, provides the author and title information that Petitioner provides, and identifies this as "Technical Note No. 540." Ex. 1006, 1. It also includes the date "April 22, 1994," and states "Approved for Public

Release; Distribution Unlimited." *Id.* The page states that "[t]his work was supported in part by the Advanced Research Projects Agency under Contract F19628-92-C-0071." *Id.* The next page (page 2) of Leclerc repeats the title and author information from the first page, but includes the word "DRAFT" in the header and has a different date "January 26, 1995" in the footer. *Id.* at 2. The word "DRAFT" and the "January 26, 1995" date are found in the header and footer, respectively, of all of the remaining pages of Leclerc. *See id.* at 3–20. We do not discern, nor does Petitioner identify any other portion of the exhibit that is relevant to the public accessibility of Leclerc.

In this case, we agree with Patent Owner that Petitioner provides insufficient evidence tending to show public accessibility of Leclerc either prior to the December 17, 1995 critical date for § 102(b) or the December 17, 1996 filing date of the U.S. application to which the '550 patent claims priority. *See* Prelim. Resp. 3–8. Although Petitioner points to the January 26, 1995 date in the footer of pages 2 to 20 of Leclerc, this bare date, without more, does not provide any information about the date it was publicly accessible. *See In re Bayer*, 568 F.2d 1357, 1361 (CCPA 1978) (the "focus of the inquiry" is "[t]he date on which the public actually gained access to the invention by means of the publication"). The January 26, 1995 date could represent the date of authorship, an intermediate draft, approval, submission, processing, or any number of things other than a date indicative of public accessibility. Petitioner provides no evidence linking the public accessibility of the document to the January 26, 1995 date.

In addition, Patent Owner points out that Leclerc is marked "DRAFT." These markings suggest that this was not the type of document that was meant for public release. *See Cisco Sys., Inc. v. Constellation*

Techs., L.L.C., Case IPR2014-00871, slip op. at 9 (PTAB Dec. 19, 2014) (Paper 12) (standard indicated as "Internet-Draft" not shown to be publicly accessible). Despite the obvious questions this marking generates, Petitioner provides no explanation why Leclerc is not a draft document that was not publicly accessible. Moreover, we note that Leclerc also bears multiple inconsistent dates. The front page of the document is marked "April 22, 1994" and the remaining pages have the "January 26, 1995." Again, Petitioner provides no explanation why we should find, despite these inconsistencies that suggest Leclerc was not a finished document, that Leclerc was publicly available as of January 26, 1995.

As for the markings that the report was "Approved for Public Release; Distribution Unlimited," Petitioner provides no evidence that SRI International procedure permitted access to these reports. Even if we accept, for sake of argument, that in 1995, SRI International would have provided copies of Leclerc upon request, that still does not demonstrate that Leclerc was sufficiently accessible. *See Itron, Inc. v. Certified Measurement, LLC*, Case IPR2015-00570 slip op. at 19–20 (PTAB July 9, 2015) (Paper 13) (USGS "open file report" not shown to be a printed publication where there was no evidence a person of ordinary skill could locate it); *Groupon, Inc. v. Blue Calypso, LLC*, Case CBM2013-00035, slip op. at 18–23 (PTAB Dec. 17, 2014) (Paper 45) (finding report posted on a website not shown to qualify as prior art where there was no evidence a person of ordinary skill could locate it). We cannot, based on the evidence before us, determine that Leclerc is a printed publication because the Petition does not explain cogently how a person of skill in the art would have learned of the report in the first place. *See Bayer*, 568 F.2d at 1361 (finding a thesis was not prior

art because the "thesis could have been located in the university library only by one having been informed of its existence by the faculty committee[,] . . . 'the probability of public knowledge of the contents of the [thesis]' . . . was virtually nil."). It is not enough that a reference is accessible, we must "consider whether anyone would have been able to learn of its existence and potential relevance." *In re Lister*, 583 F.3d 1307, 1314 (Fed. Cir. 2009). Petitioner has not provided any evidence that an interested researcher could have located Leclerc.

We note that, in a footnote in his declaration, Dr. Lastra testifies that even though "certain pages" of Leclerc contain the word "DRAFT" that "this is in fact the version of Leclerc that was published on or before January 26, 1995." Ex. 1002, 5 n.2. Dr. Lastra continues that "[t]he title page indicates that it was 'Approved for Public Release; Distribution Unlimited,' and the currently available version on SRI International's website also contains the word 'DRAFT,' which confirms that this was the published version." *Id.* None of this testimony was cited or discussed in the Petition, so we decline to give any weight to it. *See* 37 C.F.R. § 42.104(b)(5)("The Board may exclude or give no weight to the evidence where a party has failed to state its relevance or to identify specific portions of the evidence that support the challenge."). But even if we were to consider it, we do not find that it shows that Leclerc was publicly accessible before the critical date. Indeed, Dr. Lastra's testimony does not indicate any personal knowledge of public accessibility or dissemination of Leclerc to the public beyond what is expressed by the document itself. As we discussed above, the mere fact that the document says that it was "Approved for Public Release; Distribution Unlimited," is insufficient to establish that a document

was a printed publication, without additional evidence concerning how a person of skill in the art could have located it. Moreover, Dr. Lastra's assertions about the current contents of SRI International's website are not probative of whether the document was available 20 years earlier. In addition, this evidence still fails to provide any information about how a person of ordinary skill, exercising reasonable diligence, could have apprised themselves of the existence of this document. Thus, even if we were to consider it, we do not find Dr. Lastra's testimony persuasive.

In sum, we conclude that, on this record, Petitioner has failed to provide sufficient evidence in the Petition to meet its burden of at least a preliminary showing that Leclerc is a printed publication as contemplated by 35 U.S.C. §§ 102 and 311(b).

III. CONCLUSION

Because each proposed ground of unpatentability relies on a combination that includes Leclerc, the Petition fails to demonstrate a reasonable likelihood of prevailing on the grounds that the challenged claims are obvious over the prior art.

IV. ORDER

In consideration of the foregoing, it is

ORDERED that the petition is denied as to all challenged claims and no trial is instituted.

PETITIONER:

Cono A. Carrano
Ashraf A. Fawzy
AKIN GUMP STRAUSS HAUER
& FELD LLP
ccarrano@akingump.com
afawzy@akingump.com
aggoogleartcom@akingump.com

PATENT OWNER:

Michael Hawes
BAKER BOTTS LLP
michael.hawes@bakerbotts.com