

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GRÜNENTHAL GMBH,
Petitioner,

v.

ANTECIP BIOVENTURES II LLC,
Patent Owner.

PGR2019-00003
Patent 9,867,839 B2

Before GRACE KARAFFA OBERMANN, SHERIDAN K. SNEDDEN,
and CHRISTOPHER M. KAISER, *Administrative Patent Judges*.

SNEDDEN, *Administrative Patent Judge*.

DECISION

Denying Patent Owner's Request on Rehearing of Final Written Decision
37 C.F.R. § 42.71(d)

I. INTRODUCTION

Patent Owner filed a Request for Rehearing (Paper 23, “Req. Reh’g”) seeking review of the Board’s Final Written Decision (Paper 22, “Dec.”), in which we held unpatentable claims 1–14 of U.S. Patent No. 9,867,839 B2 (Ex. 1001, “the ’839 patent”). We also refer to the Petition (Paper 2, “Pet.”), Patent Owner’s Response (Paper 9, “PO Resp.”), Petitioner’s Reply (Paper 14, “Reply”), and Patent Owner’s Sur-Reply (Paper 16, “Sur-Reply”).

For the reasons set forth below, Patent Owner’s request for rehearing is denied.

II. STANDARD OF REVIEW

“The burden of showing that a decision should be modified lies with the party challenging the decision.” Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,768 (Aug. 14, 2012). In its request for rehearing, the dissatisfied party must (1) “specifically identify all matters the party believes the Board misapprehended or overlooked” and (2) identify the place “where each matter was previously addressed.” 37 C.F.R. § 42.71(d); Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,768.

III. DISCUSSION

A. Background of the Dispute

In our Final Written Decision, we determined that the information pertaining to the publication on the face of each of Verrena 2012 (Ex. 1005), Muratore (Ex. 1006), Gatti 2009 (Ex. 1007), Dowd (Ex. 1009), Rossini (Ex. 1013), Varenna Protocol (Ex. 1014), deCastro (Ex. 1015), and Zaspel (Ex. 1016) (collectively, “Petitioner’s References”) was sufficient to establish that each document qualifies as a printed publication. Dec. 12–18. In doing

so, we considered the testimony of Dr. Poree and, additionally, the information provided by Patent Owner. *Id.*

Patent Owner requests modification of our determination regarding the publication status of Petitioner’s References and, consequently, modification of the Final Written Decision, on two grounds. Req. Reh’g 1–2. First, Patent Owner contends that our determination that each of Petitioner’s References qualifies as a prior art printed publication is based on a misapprehension of the law. *Id.* at 1. Second, Patent Owner contends that we overlooked Patent Owner’s arguments set forth in the briefing. *Id.* at 1–2 (citing PO Resp., 3–9 and Sur-Reply, 4–9). We address in turn each of those asserted grounds for modification.

i. Whether we misapprehended or overlooked evidence of public accessibility

Patent Owner contends that the panel “did not look for evidence of public accessibility, . . . which involves examining the evidence for proof that each non-patent reference was ‘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.’” Req. Reh’g 3 (quoting *Acceleration Bay, LLC v. Activision Blizzard Inc.*, 908 F.3d 765, 773 (Fed. Cir. 2018)). We do not agree. On the contrary, we addressed with particularity the substantial evidence tending to show that each of Petitioner’s References “was 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.”

Dec. 12.

Specifically, in our Decision, we properly credited indicia on the face of Petitioner’s References, such as printed dates and citation information, which are “part of the totality of the evidence” bearing on the issue of public accessibility. *Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29 at 17–18 (PTAB Dec. 20, 2019) (precedential). Using Varena 2012 as an example, those indicia included details of the copyright notice, indicating publication of Varena 2012 “by Oxford University Press on behalf of the British Society for Rheumatology” in “2012;” and also additional legends, including the statement “Advance Access publication 30 November 2012,” and a conventional edition identifier from the journal *Rheumatology*. Dec. 15–16 (quoting Ex. 1005). In the same manner, the totality of evidence supports our finding that each of Petitioner’s References was publicly available prior to the critical date of the invention. *Id.* at 15–18.

Patent Owner advanced no evidence tending to cast doubt on that publication date. PO Resp., 3–9 and Sur-Reply, 4–9. Although the burden of proof never shifted to Patent Owner on the issue of public availability, where Patent Owner declined to advance counter evidence on point, we did not err by crediting the indicia, which appear on the face of Petitioner’s References, as part of the totality of evidence bearing on the issue. Furthermore, we did not err in finding Patent Owner’s arguments, unsupported by evidence, unpersuasive in view of the facts and circumstances supporting Petitioner’s position.¹

¹ As noted in the Final Written Decision, Patent Owner did not challenge the admissibility of any evidence or otherwise identify any reason to exclude

We have considered Patent Owner’s remaining positions set forth in the Request and are not persuaded to change the conclusions set forth in the Final Written Decision. Patent Owner does not direct us to any evidence that we may have misapprehended or overlooked when reaching our conclusions. Rather, Patent Owner continues to advocate its position and expresses disagreement with the conclusions made in the Final Written Decision, but does not persuade us that we misapprehended or overlooked any matter.

ii. Whether we failed to properly consider Patent Owner’s arguments and authority

Patent Owner alleges that the Board erred by failing to “substantively address” Patent Owner’s arguments set forth in the Patent Owner Response and Sur-Reply. Req. Reh’g. 9–11 (citing PO Resp., 3–9 and Sur-Reply, 4–9). Specifically, Patent Owner contends that

[T]he Board did not critically analyze the indicia to explain how they prove public accessibility under the law. Taking Varenna 2012 as an example, the Board listed several items of indicia, but did explain how they combine to show a person of ordinary skill in the art could have located Varenna 2012, or that it was actually disseminated, i.e., that it was publicized or placed in front of the interested public without restriction on redistribution or expectation of confidentiality. *SRI Int’l, Inc. v. Internet Sec. Sys., Inc.*, 511 F.3d 1186, 1197 (Fed. Cir. 2008), *GoPro, Inc. v. Contour IP Holding LLC*, 908 F.3d 690, 694 (Fed. Cir. 2018).

Id. at 10–11.

any of Petitioner’s References. Dec. 15.

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