Keywords: **35 U.S.C. §102(b) (2006), public accessibility**

General: **The correct legal standard for determining that a reference is publicly accessible is whether a person of ordinary skill in the relevant art could, after exercising reasonable diligence, access the reference.**

Samsung Electronics Co., Ltd., v. Infobridge Pte. Ltd.,
United States Court of Appeals for the Federal Circuit
No. 2018-2007, 2018-2012
Decided: July 12, 2019

I. Facts

Samsung requested two inter partes review ("IPR") proceedings on October 17, 2016, challenging U.S. Patent 8,917,772 ("the '772 patent"), which is owned by Infobridge. The technology of the '772 patent generally relates to encoding and decoding video data, whose methods are essential to the High Efficiency Video Coding standard ("the H.265 standard"). Samsung argued before the Patent Trial and Appeal Board ("the Board") that the Working Draft 4 of the H.265 standard ("the WD4 reference"), developed by the Joint Collaborative Team on Video Coding ("JCT-VC"), constituted prior art that was publicly accessible before the '772 patent's critical date. The Board upheld all challenged claims of the '772 patent.

Samsung presented three examples of disclosures that it claimed established public accessibility of the WD4 reference: (1) a meeting held in Torino Italy, where JCT-VC members partially developed the WD4 reference; (2) a website, owned and maintained by JCT-VC, where the WD4 reference was uploaded; and (3) an email to a JCT-VC listserv, on which JCT-VC members and other "interested individuals" were listed, with a download link for the WD4 reference. The Board held that (1) Samsung waived any argument that the Torino meeting rendered the WD4 reference publicly accessible; (2) there was insufficient evidence to show that a person of ordinary skill in the art would have known to check the JCT-VC website for information of relevance to the art, and that there was no evidence that such a person would have located the reference on the website by exercising reasonable diligence even assuming such a person already knew of the website; and (3) Samsung's testimony was insufficient to show that the WD4 reference was generally disseminated to persons interested and ordinarily skilled in the art, and therefore that the record does not evince that the reference was accessible to anyone other than the JCT-VC. Samsung subsequently appealed the Board's decision.

II. Issue

Did the Board err in finding that the WD4 reference was not publicly accessible prior to the '772 patent's critical date?

III. Discussion

Yes, the court found that the Board erred in finding that the WD4 reference was not publicly accessible prior to the '772 patent's critical date. According to 35 U.S.C. § 102(b) (2006), a person is not entitled to a patent if their invention was "described in a printed publication . . . more than one year prior to the date of their patent application." The court has interpreted this text to "impose two

requirements: (1) that a putative prior art reference be printed and (2) that the reference be published, *i.e.*, accessible to the public." The first requirement is not at issue in this case.

Regarding public accessibility, the court noted that a reference is considered publicly accessible if "persons interested and ordinarily skilled in the subject matter or art, exercising reasonable diligence, can locate it." *Acceleration Bay, LLC v. Activision Blizzard Inc.*, 908 F.3d 765, 772 (Fed. Cir. 2018). For example, when a reference is uploaded to a website or deposited in a library, the fact that the reference is indexed or cataloged in some way can indicate that it is publicly accessible. However, indexing alone is not sufficient for a reference to be publically accessible. The court noted that in *Acceleration Bay*, a reference was uploaded to a website, making the work technically accessible, but public accessibility required more than technical accessibility, the reference at issue should be "*meaningfully* indexed such that an interested artisan exercising reasonable diligence would have found it." *Id.* at 774.

The court also noted that a reference can be publically accessible even without meaningful indexing. In *Voter Verified, Inc. v. Premier Election So-lutions, Inc.*, 698 F.3d 1374 (Fed. Cir. 2012), there was no evidence that a reference had been meaningfully indexed or cataloged on a website, however, there was evidence that a person of ordinary skill interested in the relevant subject matter would have been independently aware of the website *and* that "such an interested researcher would have found [the reference] using that website's own search functions and applying reasonable diligence." Therefore, the court noted that while indexing is not required to show that a work is publicly accessible, some evidence that a person of ordinary skill could have reasonably found the website and then found the reference on that website is critical.

On Samsung's first argument, the court agreed with the Board that Samsung waived any argument that the Torino meeting rendered the WD4 reference publicly accessible. The court further added that even if Samsung's argument were considered, it held no merit because the Torino meeting was held before the WD4 reference was created, thereby precluding any possibility of its circulation at the meeting.

Regarding Samsung's second argument, the court agreed again with the Board that there was insufficient evidence to show that persons of ordinary skill in the art would have known either that the JCT-VC website existed or how to locate the WD4 reference therein. The court stated that "a work is not publicly accessible if the only people who know how to find it are the ones who created it." The website was owned and maintained by the JCT-VC, and the JCT-VC created the WD4 reference. The Board therefore correctly focused on whether people other than JCT-VC members knew about the website and whether they, assuming they somehow knew about the website, could reasonably locate the WD4 reference unless they already knew what to look for and where to look for it.

The court agreed with Samsung's third argument that the Board incorrectly found that the email to the JCT-VC listserv did not render the WD4 reference publicly accessible. The Board erred by faulting Samsung for not proving that the WD4 reference was "generally" or "widely" disseminated and for failing to show that the email recipients "represented a significant portion of those interested and skilled in the art." Dissemination does not need to be wide, and recipients do not need to represent a significant portion of those interested and skilled in the art. The court agreed with Samsung's statement that access should not be confused with accessibility, and stated specifically that "a petitioner need not establish that specific persons actually accessed or received a work to show that the work was publicly accessible."

The court found that the Board should have considered Samsung's evidence to see if persons ordinarily skilled in the art *could* have accessed the WD4 reference, after exercising reasonable

diligence, through the listserv email. The court suggested that consideration of whether persons could have accessed the WD4 reference through the listserv email might include examining whether a person of ordinary skill, exercising reasonable diligence, would have joined the listserv and/or might include considering the circumstances of the email itself (e.g., why the email was sent and whether it was covered by an expectation of confidentiality).

IV. Conclusion

The court ruled that the Board applied an erroneous legal standard in concluding that the listserv email did not make the WD4 reference publicly accessible. The court vacated the Board's findings on this point alone and remanded for further proceedings consistent with the correct legal standard.