

Reference Buried in Indexing Blizzard Is Not a Printed Publication

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Addressing the post-America Invents Act standard for determining whether a reference qualifies as a printed publication within the meaning of 35 USC § 102(a), the US Court of Appeals for the Federal Circuit upheld a Patent Trial and Appeal Board (PTAB) ruling that the test for public accessibility is not merely whether the reference has been indexed. [Acceleration Bay, LLC v. Activision Blizzard Inc.](#), Case Nos. 17-2084, -2085, -2095, -2096, -2097, -2098, -2099, -2117, -2118 (Fed. Cir. Nov. 6, 2018) (Moore, J).

Acceleration Bay owns three patents directed to broadcast techniques in which broadcast channels overlay a point-to-point communications network. Blizzard filed several petitions for *inter partes* review of the patents. During the proceeding, the PTAB found that the Lin reference, which was cited as prior art, was not a printed publication within the meaning of § 102(a).

In evaluating whether the Lin reference qualified as a printed publication, the PTAB heard testimony from a systems administrator at the computer science and engineering department of the University of California, San Diego, who testified that the Lin reference was uploaded to the library's website on November 23, 1999, before the critical date of the relevant patents. At the time the reference was uploaded, a report with a unique identifier was created, identifying the year the reference was uploaded and the order in which the reference was uploaded relative to other papers. The PTAB found that users could search the database index by either the author or the year of the report, but that advanced searching by keywords for author, title and abstract fields, while possible, was "unreliable." Based on these findings, the PTAB found that the Lin reference was not a printed publication under § 102(a). Blizzard appealed.

The Federal Circuit affirmed the PTAB's decision that the Lin reference was not a printed publication, finding that the reference was not publicly accessible because it was not indexed in any "meaningful way." The Court relied on the PTAB's finding that, despite some indexing and search functionality by author or year, there was no evidence as to how many reports were filed in the database in 1999. Thus, an individual could theoretically be sifting through thousands of reports filed that year.

The Federal Circuit also stated that the test for public accessibility is not whether the reference has been indexed, but whether the reference is available such that persons interested and ordinarily skilled in the subject matter or art, exercising reasonable diligence, can locate it. The Court found that

under this test, the Lin reference was not a printed publication under § 102(a).

Practice Note: Indexing alone is not enough to show public accessibility. To establish a reference as a printed publication, it is important to look for keyword searching by title or topic, and not just searching by the author or year.

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National Law Review, Volume VIII, Number 355

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