

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

HULU, LLC,
Petitioner,

v.

SOUND VIEW INNOVATIONS, LLC,
Patent Owner.

Case IPR2018-01039
Patent 5,806,062

Before JAMESON LEE, DEBRA K. STEPHENS, and KAMRAN JIVANI,
Administrative Patent Judges.

STEPHENS, *Administrative Patent Judge.*

DECISION
Denying Institution of Inter Partes Review
35 U.S.C. § 314(a)

I. INTRODUCTION

Hulu, LLC (“Petitioner”) filed an *Inter Partes* Review petition (Paper 3 (“Pet.”)) to institute an *inter partes* review of claims 1–3, 7, 10, 11, 14, and 15 (the “challenged claims”) of U.S. Patent 5,806,062 (Exhibit 1001, the “’062 Patent”; 35 U.S.C. § 311). Sound View Innovations, LLC (“Patent Owner”) timely filed a Preliminary Response (Paper 10 (“Prelim. Resp.”)). The standard for instituting an *inter partes* review is set forth in 35 U.S.C. § 314(a), which provides as follows:

(a) THRESHOLD.—The Director may not authorize an *inter partes* review to be instituted unless the Director determines that the information presented in the petition filed under section 311 and any response filed under section 313 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)).

Petitioner challenges claims 1–3, 7, 10, 11, 14, and 15 as unpatentable under 35 U.S.C. § 103 (Pet. 4, 20–52). Generally, Patent Owner contends that the Petition should be denied as to all challenged claims (Prelim. Resp. *passim*). Based on our review of the record, we conclude that Petitioner has not shown a reasonable likelihood that it would prevail in demonstrating that at least one of the challenged claims is not patentable. Accordingly, for the reasons described below, we decline to institute *inter partes* review of claims 1–3, 7, 10, 11, 14, and 15 on any of the alleged grounds of unpatentability.

II. BACKGROUND

A. *Related Matters*

Both Petitioner and Patent Owner identify the following related current proceeding as involving the patent-at-issue (Pet. 2; Paper 4, 1):

Sound View Innovations, LLC v. Hulu, LLC, No. 2:17-cv-04146 (C. D. Cal.).

Patent Owner additionally identifies the following related former proceedings that involved the patent-at-issue:

Sound View Innovations, LLC v. FMR, LLC, No. 1:17-cv-01388 (D. Del.) (terminated Feb. 27, 2018, Dkt. 17)

Sound View Innovations, LLC v. Facebook Inc., No. 2:17-cv-04275 (C. D. Cal.) (terminated Jan. 10, 2018, Dkt. 59)

Sound View Innovations, LLC v. Twitter, Inc., No. 1:16-cv-00652 (D. Del.) (terminated Jan. 16, 2017, Dkt. 21)

Sound View Innovations, LLC v. LinkedIn Corp., No. 1:16-cv-00497 (D. Del.) (terminated Jan. 17, 2017, Dkt. 20)

(*id.* at 1–2).

Petitioner also has requested *inter partes* review of various other patents owned by Patent Owner.¹

B. '062 Patent (Ex. 1001)

The '062 Patent, titled “Data Analysis System Using Virtual Databases,” issued on September 8, 1998, from an Application filed October 17, 1995.² The '062 Patent is directed to creating data analysis applications using reusable software operators (Ex. 1001, Abstract). As explained in the '062 Patent, when dealing with large or complex documents, it is often desirable to analyze the structure of the documents (*id.* at 1:16–18). To accomplish this, various operators are used to analyze a repository comprising a collection of documents along with an associated database which describes the structure of the documents (*id.* at 1:23–34). An operator is a computer program that extracts or converts information from

¹ IPR2018-00017 (6,125,371), IPR2018-00366 (6,125,371), IPR2018-00582 (6,502,133 B1), IPR2018-01023 (6,708,213 B1)

² The '062 patent does not claim priority to any ancestral application.

a repository (*id.* at 1:33–34). As described in the '062 Patent, existing operators were designed for a single application and there was no convenient mechanism for combining various operators (*id.* at 1:44–52). Thus, when a new application was desired, a new operator had to be designed from scratch (*id.* at 1:52–53).

The '062 Patent describes customizable data analysis applications using reusable software operators (*id.* at 2:1–3). To accomplish this, searches are performed on virtual databases (*id.* at 2:5–9). Various operators are utilized, including initial operators that convert source information into virtual database format, query operators that perform search queries on the virtual databases, and terminal operators that convert a virtual database into an external format (*id.* at 2:2–9). Operators may be combined in various ways to create customizable data analysis applications (*id.* at 2:8–19).

C. Real Parties-in-Interest

Petitioner identifies Hulu, LLC as the real party-in-interest (Pet. 2).

Petitioner further attests that:

The following entities own ten percent or more of the stock of Petitioner: The Walt Disney Company, 21st Century Fox, Comcast Corporation and Time Warner Inc. None of the parties listed above as part-owners of Hulu controlled or funded this Inter Partes Review proceeding (IPR), nor did they contribute to the preparation of this IPR in any way
(*id.*).

Patent Owner identifies Sound View Innovations, LLC and Sound View Innovation Holdings, LLC as the real party-in-interest (Paper 4, 1).

D. Illustrative Claim

Of the challenged claims, claims 1, 7, and 14 are independent claims and reproduced below. Claims 2 and 3 depend directly from claim 1, claims 10 and 11 depend directly from claim 7, and claim 15 depends directly from claim 14.

1. A data processing apparatus comprising:

a plurality of query operators, each of said query operators configured to receive a first virtual data base having a schema, for processing data in said virtual database, and for outputting a second virtual database reflecting said processing and having said schema; and

means for combining at least two of said query operators to create an application.

(Ex. 1001, 14:65–15:5)

7. A data processing apparatus comprising:

a first software operator for receiving a first virtual database having a first schema, for processing data in said first virtual database, and for outputting a second virtual database having said first schema; and

a second software operator for receiving said second virtual database, for processing data in said second virtual database, and for outputting a third virtual database having said first schema.

(Ex. 1001, 15:19–27)

14. A method for processing information comprising the steps of:

providing a plurality of software operators each configured to receive a virtual database having a first schema, for processing information contained in said virtual database, and for outputting a virtual database having said first schema; and

combining at least two of said software operators to create an application.

(Ex. 1001, 15:66–16:7)

E. The Prior Art Relied Upon

Petitioner relies upon the following prior art reference.

Reference	Exhibit No.
Dale Dougherty, <i>Sed & Awk</i> , (edited by Tim O'Reilly) O'Reilly & Associates, Inc., November 1990	1004

Petitioner supports its challenge with a Declaration by Phillip B. Gibbons, Ph.D. ("Gibbons Decl.") dated May 8, 2018 (Ex. 1003).

F. Asserted Ground of Unpatentability

Petitioner contends that the challenged claims are unpatentable under 35 U.S.C. § 103 based on the following ground (Pet. 20–52):

Claims	Basis	References
1–3, 7, 10, 11, 14, and 15	35 U.S.C. § 103	Dougherty

For the reasons described below, we decline to institute *inter partes* review of claims 1–3, 7, 10, 11, 14, and 15 on any of the alleged grounds of unpatentability.

III. CLAIM CONSTRUCTION

The claim construction standard to be applied during an *inter partes* review depends upon whether the patent at issue is expired or unexpired. Claim terms in an unexpired patent are given their broadest reasonable construction in light of the specification of the patent in which they appear (*see* Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,766 (Aug. 14, 2012); 37 CFR § 42.100(b)).

Here, the '062 Patent expired on October 17, 2015. When interpreting claims of an expired patent, claim terms are given their ordinary and customary meaning, as would be understood by a person of ordinary skill in the art at the time of the invention, in light of the language of the claims, the specification, and the prosecution history of record (*Phillips v. AWH Corp.*, 415 F.3d 1303, 1313–17 (Fed. Cir. 2005) (en banc)). However, there is no presumption of validity, and we do not apply a rule of construction with an aim to preserve the validity of claims.

Both Petitioner and Patent Owner propose interpretations for various terms (Pet. 15–19; Prelim. Resp. 30–48). Patent Owner further asserts that “[w]ithout any explanation or support, and without mentioning the parties’ agreement, the Petition proposes constructions that are different from three of those four . . . definitions” stipulated to at an oral hearing in the related district court case (Prelim. Resp. 31). Patent Owner does not, however, provide us with any evidence or support for the “agreed-upon constructions.”

Only terms which are in controversy need to be construed, and only to the extent necessary to resolve the controversy (*see Wellman, Inc. v. Eastman Chem. Co.*, 642 F.3d 1355, 1361 (Fed. Cir. 2011); *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999)). Based on our Analysis below, we need not construe any of the claim terms.

IV. ANALYSIS

Alleged Obviousness over Dougherty – Claims 1–3, 7, 10, 11, 14, and 15

A. Overview Dougherty (Ex. 1004)

Dougherty is a text book titled “Sed & Awk.” (Ex. 1004). Dougherty describes that sed and awk are UNIX utilities that use regular expressions for

pattern matching in text files (*id.* at xv). Sed is a stream editor used to apply edits to files and awk is a programming language that permits manipulation of structured data and generation of formatted reports (*id.*).

According to Dougherty, sed and awk are useful for devising general solutions to text editing problems (*id.* at 2). Specifically, sed can be used to automate editing actions to be performed on one or more files, to simplify performing the same edits on multiple files, and to write conversion programs (*id.* at 5). “Sed is a ‘non-interactive’ stream-oriented editor” with input provided from a file or keyboard, and output provided to a terminal or file (*id.* at 3). Sed offers text-editing capabilities such as a search-and-replace facility that can be applied globally to a single file or a group of files (*id.* at 4). “Using sed is similar to writing shell scripts” in that a series of actions to be performed in sequence is specified (e.g., replacing text, deleting lines, inserting new text) (*id.*). This allows the user to specify all editing instructions in one place and execute them on a single pass through a file (*id.*). Sed also can be used to edit very large files that would be slow to edit interactively and used to process an input file, sending the output to another program (*id.*).

Awk offers a more general model, than sed, for processing a file (*id.* at 5). Awk “extend[s] the idea of text editing into computation, making it possible to perform a variety of data processing tasks, including analysis, extraction, and reporting of data” (*id.* at 6). Example awk programs include a program that “transforms data into a formatted report,” and “a data processing application comprising separate data entry and data retrieval programs” (*id.* at 5). Awk allows “use [of] the structure of a text file in writing the procedures” and provides the “[a]bility to view a text file as made up of records and fields in a textual database” (*id.* at 6). Additionally, Awk allows “[u]se of variables to manipulate a database,”

“[u]se of arithmetic and string operators,” and “[u]se of common programming constructs such as loops and conditionals” (*id.*). Awk also provides the ability to generate formatted reports (*id.*).

B. Public Availability of Dougherty (Ex. 1004)

In the grounds proffered by Petitioner, Petitioner relies on Dougherty, Exhibit 1004, which has a copyright date of 1990. Petitioner additionally submits Exhibit 1005, pages from a different version of Dougherty, showing a date-stamp from Cornell University Library, which has a copyright date of 1991 (hereinafter, “the Cornell Dougherty”). Petitioner further provides an affidavit from an Administrative Supervisor in the Original Cataloging Unit of Cornell University Library, Ms. Stansbury, (Exhibit 1006), to support the “public availability” of the Cornell Dougherty.

Patent Owner asserts “Petitioner’s attempt to show that Dougherty, a book allegedly dated 1991, was publicly available as a printed publication before the Patent’s 1995 filing date is legally insufficient for multiple reasons” (Prelim. Resp. 3). Specifically, Patent Owner contends the Dougherty reference relied upon in the Petition is not the same as the Cornell Dougherty; Petitioner has not shown the two are materially the same; Petitioner’s relied upon librarian Ms. Stansbury’s affidavit is legally insufficient because declarant’s testimony is not based on her technical knowledge or expertise; and the Board has previously found an affidavit by Ms. Stansbury was insufficient to show public accessibility (*see* IPR2017-01395, Paper 8 at 7–8 (PTAB Nov. 22, 2017)) (*id.* at 3–23).

Petitioner has the burden to prove Dougherty qualifies as prior art under 35 U.S.C. §§ 102 (a) and 102 (b) (*see In re Magnum Oil Tools International, Ltd.*, 829 F.3d 1364 (Fed. Cir. 2016)). We agree that Petitioner has not shown Dougherty to

have been publicly available as a printed publication before the '062 Patent's filing date, October 17, 1995. Initially, we note the Cornell Dougherty, is different from Dougherty, the actual reference relied on by Petitioner in the proffered grounds (compare Ex. 1004, copyright page with Ex. 1005, 2, 4³). Petitioner has not provided any evidence that the version date-stamped by Cornell University Library is materially the same as the actual prior art reference itself. Indeed, the printing history of the later copyrighted version (Ex. 1005), indicates that corrections were made in the March 1991 printing. Moreover, it is unclear based on the printing history of Dougherty (Ex. 1004) and the Cornell Dougherty (Ex. 1005), which document was printed later. Petitioner has not explained the differences. The affidavit of Ms. Stansbury, the librarian from Cornell University, Exhibit 1006, is also not helpful because the affidavit does not address the actual reference Dougherty relied upon in the grounds proffered (Ex. 1006). Exhibits 1005 and 1006 do not help to establish the date of publication of the actual prior art reference Dougherty (Ex. 1004).

Petitioner has not presented sufficient evidence to show a reasonable likelihood that Dougherty is prior art with respect to the '062 patent. Specifically, the record indicates only that Dougherty is a book having a copyright date of 1990 and that the copyright owner is O'Reilly & Associates, Inc. (hereinafter, "O'Reilly") (Ex. 1004).

"A reference is considered publicly accessible if it 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'" (*Acceleration Bay v. Activision Blizzard*, 908 F. 3d 765 (Fed. Cir. 2018)).

³ Exhibit 1005 page references are to the Exhibit page numbers provided by Petitioner.

“Accessibility goes to the issue of whether interested members of the relevant public could obtain the information if they wanted to” and “[i]f accessibility is proved, there is no requirement to show that particular members of the public actually received the information” (*Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1569 (Fed. Cir. 1988)). Accordingly, “[a] reference will be considered publicly accessible if it 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’” (*Blue Calypso*, 815 F.3d 1331, 1348 (Fed. Cir. 2016) (quoting *Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1350 (Fed. Cir. 2008))). The test for public accessibility is “whether the reference was ‘available to the extent that persons interested and ordinarily skilled in the subject matter or art, exercising reasonable diligence, can locate it’” (*Voter Verified, Inc. v. Premier Election Sols., Inc.*, 698 F.3d 1374, 1380 (Fed. Cir. 2012)).

Here, Dougherty has a copyright year of 1990 and an indication that O’Reilly owns the copyright to the book. Copyright immediately vests upon creation without the need to register it (*see* 17 U.S.C. §§ 102, 408). A copyright date does not indicate anything more than the author indicates this is the date the work was fixed in a tangible medium of expression, i.e., first published (*see* 17 U.S.C. §§ 102, 401). The identification of O’Reilly & Associates indicates that it is the owner of the copyright in the Dougherty book (*see* 17 U.S.C. § 401). None of this informs us as to the extent of public accessibility of Dougherty. There is insufficient evidence, even at this stage, to show when the book was sufficiently made available to the public, i.e., when persons interested and ordinarily skilled in the subject matter, exercising reasonable diligence, could have located it.

Specifically, the Board cannot speculate as to when and even whether, based only on a copyright year and the identity of the owner of copyright, the book was sufficiently publicly accessible such that persons interested and ordinarily skilled in the subject matter, exercising reasonable diligence, could have located it. In particular, the Board has no information on which to determine what the routine practices of O'Reilly, as a publisher, were, such as how long it typically takes from O'Reilly's printing of a manuscript to making the document available to the public, and whether O'Reilly always made every book that it printed available to the public, as required to qualify as prior art. Indeed, even after publication or printing, many business factors may impact whether an entity, such as O'Reilly, actually makes a printed book publicly accessible, and if so, when.

We cannot speculate as to whether or when O'Reilly actually made the book available to the public such that an ordinarily skilled artisan would have been able to have located it and in particular, whether the book was actually accessible to the public or accessible only privately, and as to when any publicly accessible book was available (*see e.g., Microsoft Corporation v. Corel Software, Inc.*, Case IPR2016-01083, slip op. at 15-16 (PTAB Dec. 1, 2016) (Paper 14) (finding a copyright notice insufficient); *see also ServiceNow, Inc. v. Hewlett-Packard Co.*, Case IPR2015-00716, slip op. at 17 (PTAB Aug. 26, 2015) (Paper 13) (finding a copyright notice insufficient).

For the foregoing reasons, Petitioner has failed to persuade us sufficiently that Dougherty qualifies prior art under 35 U.S.C. §§ 102 (a) and 102 (b).

C. Alleged Deficiencies of Dougherty

Patent Owner argues Dougherty describes flat files, Dougherty does not allow records to refer to other records, and Dougherty's "operators" are not

configured to preserve schema (Prelim. Resp. 53–56). In light of our determination that Petitioner has failed to establish sufficiently that Dougherty constitutes prior art, we need not address these arguments directed to the contents of Dougherty.

V. MOTION FOR DISTRICT COURT CLAIM CONSTRUCTION

On June 7, 2018, Patent Owner filed a Motion for District Court-Type Claim Construction in Accordance with 37 C.F.R. § 42.100(b) (Paper 7). The motion was made within thirty (30) days from the filing of the Petition (*id.*).

In light of our reasoning, this motion is moot, and the motion is dismissed.

VI. CONCLUSION

After consideration of the Petition, the Preliminary Response, and the evidence of record, we are not persuaded that Petitioner has demonstrated a reasonable likelihood of prevailing in showing that any of claims 1–3, 7, 11, 14, and 15 of the '062 Patent is unpatentable on any asserted ground. On this record, we decline to institute *inter partes* review of 1–3, 7, 11, 14, and 15 of the '062 Patent.

VII. ORDER

In consideration of the foregoing, it is hereby:
ORDERED that an *inter partes* is not instituted.

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