

Precedential Patent Case Decisions During November 2018

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I. Introduction

This paper abstracts what I believe to be the significant new points of law from the precedential decisions in patent cases this month. Cases captions relating to the PTAB are in **red** text. Case captions of extraordinary importance are in **blue** text.

II. Abstracts and New Points of Law

Maxchief Investments Limited v. Wok & Pan, Ind., Inc., 2018-1121 (Fed. Cir. 11/29/2018).

This is a decision on an appeal from the E.D. Tenn. district court. 2:15-cv-00153-JRGMCLC. The district court dismissed Maxchief's action for DJs of noninfringement and invalidity for lack of personal jurisdiction. Maxchief appealed. The Federal Circuit affirmed.

Legal issue: Whether a patentee is subject to specific personal jurisdiction in a target state, when the patentee filed a civil action charging infringement of the patent in another state, and the supplier and indemnitor of the accused infringer resides in the target state.

Wok sued Staples in California for patent infringement. Staples received the infringing product from Meco, which is located in Tennessee. Staples requested Meco indemnify Staples for the infringement suit. Meco received the product from MaxChief, which is located in China. Meco also requested MaxChief indemnify Meco for the infringement suit. Maxchief then filed its request for DJs in the E.D. Tenn. district court.

The Federal Circuit concluded that the facts that a requested injunction might apply to a Tennessee resident (Meco) that was a non-party, but acting in concert with the defendant by distributing the infringing product to the accused infringer and indemnifying the accused infringer, provided too attenuated a connection to satisfy minimum contacts. The Federal Circuit also concluded that sending an infringement notice letter to an attorney in the target state, noting that the attorney's client located in another state was infringing, was insufficient to result in personal jurisdiction over the patentee in the target state.

Maxchief contends that Wok's lawsuit against Staples in the Central District of California created sufficient contacts with Tennessee because the suit sought a broad injunction against "all those in active concert" with Staples, including its "distributors," and the distributor of Staples' table was Meco, a Tennessee resident. Appellant's Br. at 16. Maxchief maintains this lawsuit had "effects" in Tennessee because Wok's requested injunction would extend to Meco, and Maxchief would respond to any injunction by changing its Tennessee activities. *** Contrary to Maxchief's argument, it is not enough that Wok's lawsuit might have "effects" in Tennessee. Rather, jurisdiction "must be based on intentional conduct by the defendant" directed at the forum. *Walden v. Fiore*, 571

U.S. 277, 286 (2014); see 4A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1069.1 (4th ed. 2018) (“Wright & Miller”) (“The ‘effects test’ continues to have viability, but only when the defendant’s conduct both has an effect in the forum state and was directed at the forum state by the defendant . . .”). *** Wok’s lawsuit against Staples—filed in California against a California resident—was directed at California, not Tennessee. The lawsuit alleged that the actions taken by a non-resident of Tennessee (Staples) infringed the patents. The fact that the requested injunction might apply to a Tennessee resident (Meco) and non-party to the action (acting in concert with the defendant) is too attenuated a connection to satisfy minimum contacts. [Maxchief Investments Limited v. Wok & Pan, Ind., Inc., 2018-1121 (Fed. Cir. 11/29/2018).]

Finally, Maxchief argues that Wok created minimum contacts related to patent enforcement by sending an infringement notice letter to Maxchief’s lawyer in Tennessee. As discussed more fully below, because this letter alleged infringement by Coleman, a Kansas company that is not alleged to operate in Tennessee, the letter constitutes a contact with Kansas, not Tennessee, regardless of the fact that it was mailed to a lawyer in Tennessee. For this reason alone there is no personal jurisdiction in Tennessee over the declaratory judgment claim. Alternatively, even if the letter qualified as a minimum contact with Tennessee, under *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355 (Fed. Cir. 1998), merely sending notice letters of patent infringement does not satisfy the “fair play and substantial justice” prong of the personal jurisdiction inquiry, because principles of fair play “afford a patentee sufficient latitude to inform others of its patent rights without subjecting itself to jurisdiction in a foreign forum.” *Id.* at 1360–61; *cf. Xilinx*, 848 F.3d at 1354 (personal jurisdiction over declaratory judgment action proper where patentee sent notice letters and visited plaintiff in the forum state). [Maxchief Investments Limited v. Wok & Pan, Ind., Inc., 2018-1121 (Fed. Cir. 11/29/2018).]

Enplas Display Device Corporation v. Seoul Semiconductor Company, Ltd., 2016-2599 (Fed. Cir. 11/19/2018).

This is a decision from an appeal in the N.D. Cal. case 3:13-cv-05038-NC. The district court:

issued a summary judgement that SSC's claim in the '209 patent was not anticipated, which the Federal Circuit affirmed;

denied Enplas' motion for JMOL that the '554 patent was anticipated, which the Federal Circuit affirmed; and

denied Enplas' JMOL motion of no induced infringement, which the Federal Circuit affirmed (while admitting it was "a close call").

The panel majority, consisting of Judges Hughes and Stoll, from which Judge Newman dissented, vacated the denial of Enplas' motion for JMOL that the jury's damage award was excessive and not supported by the trial evidence.

Legal issue: 35 USC 284, evidence supporting damage award must be limited to

infringing activities.

The plaintiff's damages expert theorized that the defendant would have licensed more than just infringing product. The Federal Circuit concluded that its precedent "proscribe awarding damages for non-infringing activity," and reversed, on the theory that a jury award must be based upon evidence limited to infringing activities.

On appeal, Enplas contends that the jury's \$4 million damages award should be overturned because the only evidence supporting the jury's award was based, in part, on non-infringing sales of non-accused Enplas lenses. [Footnote 2 omitted.] We agree. As we have held, a reasonable royalty "cannot include activities that do not constitute patent infringement, as patent damages are limited to those 'adequate to compensate for the infringement.'" *AstraZeneca AB v. Apotex Corp.*, 782 F.3d 1324, 1343 (Fed. Cir. 2015) (quoting § 284). *** Here, SSC's expert opined that Enplas and SSC would have agreed to a \$2 to 4 million royalty based on a royalty base comprising sales of non-accused lenses. J.A. 15538 at 721:2–5. This testimony cannot support the jury's damages award, for § 284 and our precedent proscribe awarding damages for non-infringing activity. Thus, the jury's \$4 million award for infringement of the '554 patent cannot stand. [*Enplas Display Device Corporation v. Seoul Semiconductor Company, Ltd.*, 2016-2599 (Fed. Cir. 11/19/2018).]

Our decision in *AstraZeneca* is instructive. There, the district court awarded damages that included a royalty on sales made after the asserted patents had expired but during a "pediatric exclusivity period." *Id.* at 1341. This period barred the FDA from approving competing drug manufacturers' Abbreviated New Drug Applications for six months beyond the patents' expiration date. *Id.* The district court reasoned that "the effect of the pediatric exclusivity period, like that of the patent term, is to bar the sale of a generic product until after the expiration of the exclusivity period." *Id.* Thus, the district court concluded, any license would have included the right to sell the licensed drug during the patent term as well as the pediatric exclusivity period. *Id.* at 1341–42. We rejected that theory, however, because "[t]he royalty base for reasonable royalty damages cannot include activities that do not constitute patent infringement, as patent damages are limited to those 'adequate to compensate for the infringement.'" *Id.* at 1343 (quoting 35 U.S.C. § 284). We also cited our decision in *Gjerlov v. Schuyler Laboratories, Inc.*, 131 F.3d 1016, 1024 (Fed. Cir. 1997), explaining that "it [is] improper to award a reasonable royalty damages for the defendant's sale of the prohibited non-infringing products, because acts that do not constitute patent infringement cannot provide a proper basis for recovery of damages under section 284." *Id.* at 1344. [*Enplas Display Device Corporation v. Seoul Semiconductor Company, Ltd.*, 2016-2599 (Fed. Cir. 11/19/2018).]

We do not find SSC's attempts to distinguish *Astra-Zeneca* and *Gjerlov* persuasive. SSC asserts that, unlike this case, "the district court improperly

awarded damages for non-infringing activities” in *AstraZeneca and Gjerlov*. Appellee Br. at 67. But that is precisely what occurred here. The only evidence presented at trial to support a damages award above \$570,000 was SSC’s expert’s damages theory applying a royalty to lenses that were neither accused of infringement nor shown to infringe. SSC presented no other evidence or damages theory to support an award above \$570,000. Nor did SSC’s expert provide any explanation of how past sales revenue for non-accused lenses could predict the future sales revenue of infringing or even potentially infringing lenses. Without such an explanation, her conclusion is wholly inconsistent with our precedent. The expert’s testimony that she arrived at a \$2 million to \$4 million range of possible damages due to the lack of information from which to calculate future infringing sales—as well as the 100% difference between these upper and lower limits—bolsters this conclusion. [*Enplas Display Device Corporation v. Seoul Semiconductor Company, Ltd.*, 2016-2599 (Fed. Cir. 11/19/2018).]

Hamilton Beach Brands, Inc. v. F'Real Foods, LLC, 2018-1274 (Fed. Cir. 11/16/2018).

This is a decision on an appeal from PTAB case IPR2016-01107.

The PTAB found claim 21 not unpatentable for obviousness, under 35 USC 103. Hamilton appealed. The Federal Circuit affirmed.

Legal issue: Appellee failure to appeal an issue for which it argues for change in the judgement, and on which issue it lost below

Appellee, F'Real, argued that the Federal Circuit should vacate, because of a 315(b) violation. But F'Real had not appealed. Appellee's have long been barred from arguing for modification of a judgement on an issue they did not appeal. This case extends that law to 315(b) issues.

Shortly before oral argument, f'real submitted a Notice of Supplemental Authority, arguing that the appeal should be dismissed as time barred under 35 U.S.C. § 315(b) in light of our recent decision in *Click-to-Call Technologies, LP v. Ingenio, Inc.*, 899 F.3d 1321 (Fed. Cir. 2018) (en banc in relevant part). *** That f'real lacked standing to file its 2014 complaint alleging infringement of the '662 patent involves a circumstance not present, or considered, in *Click-to-Call*. We do not decide that question in this appeal. *** It is well-established law that “a party must file a cross-appeal when acceptance of the argument it wishes to advance would result in a reversal or modification of the judgment rather than an affirmance.” *Bailey v. Dart Container Corp. of Mich.*, 292 F.3d 1360, 1362 (Fed. Cir. 2002). Although f'real frames its § 315(b) argument as an alternate basis on which to affirm the Board’s decision, its argument, if it had merit, could not support affirmance. It would instead require vacatur of the Board’s decision and a remand for dismissal of Hamilton Beach’s petition entirely. *See Click-to-Call*, 899 F.3d at 1325, 1341–42; *Luminara Worldwide, LLC v. Iancu*, 899 F.3d 1303, 1305– 06, 1308 (Fed. Cir. 2018). Accepting f'real’s § 315(b) argument thus would require that we modify the Board’s decision, which means that a

cross-appeal was required. Because f'real did not file a cross-appeal, we do not reach the § 315(b) issue. [Hamilton Beach Brands, Inc. v. F'Real Foods, LLC, 2018-1274 (Fed. Cir. 11/16/2018).]

Legal issue: 5 USC 554(b)(3) and (c), notice and opportunity to be heard, adopted claim construction different than what either party proposed

The PTAB eventually adopted a claim construction different from what each party proposed. However, unlike in *SAS*, the parties raised a claim construction issue, post institution, the issue was discussed at the final hearing, and the PTAB construed the claim in its final decision. The Federal Circuit concluded that the parties raising the issue followed by the Board's discussion of the issue at the final hearing satisfied the notice and opportunity to be heard requirements.

As formal administrative adjudications, IPRs are subject to the APA. *See Dell Inc. v. Acceleron, LLC*, 818 F.3d 1293, 1298, 1301 (Fed. Cir. 2016). Under the APA, we must “hold unlawful and set aside agency action . . . not in accordance with law [or] . . . without observance of procedure required by law.” 5 U.S.C. § 706(2). The Board must inform the parties of “the matters of fact and law asserted.” 5 U.S.C. § 554(b)(3). It also must give the parties an opportunity to submit facts and arguments for consideration. *Id.* § 554(c). Each party is entitled to present oral and documentary evidence in support of its case, as well as rebuttal evidence. *Id.* § 556(d). Pursuant to these provisions, the Board may not change theories midstream without giving the parties reasonable notice of its change. *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1080 (Fed. Cir. 2015). [Hamilton Beach Brands, Inc. v. F'Real Foods, LLC, 2018-1274 (Fed. Cir. 11/16/2018).]

Prior to institution, neither party sought construction for the “nozzle” terms, and the Board instituted review without construing any terms. *Id.* at *5. After institution, f'real proposed constructions for the “nozzle” terms, which Hamilton Beach disputed, arguing that no express construction was needed. In its Final Written Decision, the Board decided that the “nozzle” terms of the '662 patent needed construction, and it adopted constructions that were similar, but not identical, to f'real's proposals. *Hamilton Beach Brands, Inc. v. f'real Foods, LLC*, IPR2016-01107, 2017 WL 6513981, at *2–4 (P.T.A.B. Dec. 19, 2017) (“Final Written Decision”). *** In making its APA challenge, Hamilton Beach argues that the Board violated *SAS Institute, Inc. v. ComplementSoft, LLC*, 825 F.3d 1341 (Fed. Cir. 2016), reversed on other grounds, *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348 (2018), which held that, under § 554(b)(3) of the APA, the Board may not change theories midstream by adopting a construction in its final written decision that neither party requested nor anticipated. *Id.* Hamilton Beach contends that the Board violated the APA by adopting a construction not proposed by either party without giving an opportunity to respond. [Hamilton Beach Brands, Inc. v. F'Real Foods, LLC, 2018-1274 (Fed. Cir. 11/16/2018).]

In *SAS*, the parties had agreed to the construction adopted by the Board at institution, and without any further discussion during briefing or at oral hearing, the Board adopted a different claim construction in its Final Written Decision. *SAS Inst.*, 825 F.3d at 1351. We held it was “difficult to imagine either party anticipating that already-interpreted terms were actually moving targets, and it is thus unreasonable to expect that they would have briefed or argued, in the alternative, hypothetical constructions not asserted by their opponent.” *Id.* Here, in contrast, Hamilton Beach received adequate notice in f’real’s post-institution response regarding the nozzle terms, as shown by the fact that Hamilton Beach argued against f’real’s proposed constructions in its reply brief and during the oral hearing. J.A. 1782–83; J.A. 2076–78. f’real argued in its response that the ’662 patent requires the nozzle be positioned to point toward the splash shield, thus providing the requisite notice that, for claim construction purposes, the nozzle’s position was contested. *See* J.A. 1330 (arguing that “[t]o give meaning to the two nozzle claim limitations within the context of the ’662 patent, rinsing fluid needs to be directed onto the splash shield using the nozzle from its position of being oriented towards the splash shield” (emphasis added)). During the oral hearing, the Board asked Hamilton Beach’s counsel whether the nozzles were in a fixed position. J.A. 2077 (“And to me, at least in the embodiment that’s disclosed, that’s telling me that the nozzles are in a fixed position, or prepositioned, as Patent Owner’s arguing. Why is that not right in your view?”). And the Board’s final adopted construction of the nozzle terms, while not identical to those proposed by f’real, are similar enough to f’real’s proposed constructions so as to not constitute changing theories midstream in violation of the APA. [Footnote 2 omitted.] Accordingly, because Hamilton Beach had notice of the contested claim construction issues and an opportunity to be heard, we reject Hamilton Beach’s argument that the Board violated the APA in adopting its own constructions. *See SAS*, 825 F.3d at 1351. [Hamilton Beach Brands, Inc. v. F’Real Foods, LLC, 2018-1274 (Fed. Cir. 11/16/2018).]

Ancora Technologies, Inc. v. HTC America, Inc., 2018-1404 (Fed. Cir. 11/16/2018).

This is a decision on an appeal from the W.D. Wa. district court case 2:16-cv-01919-RAJ. The district court granted HTC's FRCP 12(b)(6) motion to dismiss based upon 35 USC 101 patent ineligibility. The Federal Circuit reversed.

Legal issue: 35 USC 101, patent eligibility, *Alice* step 1, novel use of computer components and data structures.

The Federal Circuit held that "a concrete assignment of specified functions among a computer’s components to improve computer security" is not an abstract idea, and patent eligible subject matter, at *Alice* step 1. The Federal Circuit stated:

...we hold, the claimed advance is a concrete assignment of specified functions among a computer’s components to improve computer security, and this claimed improvement in computer functionality is eligible for patenting. As a result, the claims are not invalid under § 101. [Ancora Technologies, Inc. v. HTC

America, Inc., 2018-1404 (Fed. Cir. 11/16/2018).]

The Federal Circuit described the improvement and the innovation disclosed by the patent, and the corresponding claim recitations, relating to the use of BIOS memory to store the information that can be used, when a program is introduced into the computer, to determine whether the program is licensed to run on that computer.

The '941 patent describes an asserted improvement based on assigning certain functions to particular computer components and having them interact in specified ways. *** The asserted innovation of the patent relates to where the license record is stored in the computer and the interaction of that memory with other memory to check for permission to run a program that is introduced into the computer. The inventive method uses a modifiable part of the BIOS memory—not other computer memory—to store the information that can be used, when a program is introduced into the computer, to determine whether the program is licensed to run on that computer. BIOS memory is typically used for storing programs that assist in the start-up of a computer, not verification structures comparable to the software-licensing structure embodied by the claimed invention. Using BIOS memory, rather than other memory in the computer, improves computer security, the patent indicates, because successfully hacking BIOS memory (i.e., altering it without rendering the computer inoperable) is much harder than hacking the memory used by the prior art to store license-verification information. *Id.*, col. 3, lines 4–17; *see Ancora*, 744 F.3d at 733–34 (“Thus, the inventors stated that their method makes use of the existing computer hardware (eliminating the expense and inconvenience of using additional hardware), while storing the verification information in a space that is harder and riskier for a hacker to tamper with than storage areas used by earlier methods.”). [*Ancora Technologies, Inc. v. HTC America, Inc.*, 2018-1404 (Fed. Cir. 11/16/2018).]

The claim reads as follows:

1. A method of restricting software operation within a license for use with a computer including an erasable, non-volatile memory area of a BIOS of the computer, and a volatile memory area; the method comprising the steps of:
 - selecting a program residing in the volatile memory,
 - using an agent to set up a verification structure in the erasable, non-volatile memory of the BIOS, the verification structure accommodating data that includes at least one license record,
 - verifying the program using at least the verification structure from the erasable non-volatile memory of the BIOS, and
 - acting on the program according to the verification.

After reviewing five of its precedents where the Federal Circuit found claims not directed

to an abstract idea, the Federal Circuit restated its holding in this case. Stating that a claim directed to "an improvement in computer functionality that has 'the specificity required to transform a claim from one claiming only a result to one claiming a way of achieving it,'" is not directed to an abstract idea (and therefore patent eligible at *Alice* step 1.)

In accordance with those precedents, we conclude that claim 1 of the '941 patent is not directed to an abstract idea. Improving security—here, against a computer's unauthorized use of a program—can be a non-abstract computer-functionality improvement if done by a specific technique that departs from earlier approaches to solve a specific computer problem. *See Finjan*, 879 F.3d at 1304–05. The claimed method here specifically identifies how that functionality improvement is effectuated in an assertedly unexpected way: a structure containing a license record is stored in a particular, modifiable, non-volatile portion of the computer's BIOS, and the structure in that memory location is used for verification by interacting with the distinct computer memory that contains the program to be verified. In this way, the claim addresses a technological problem with computers: vulnerability of license-authorization software to hacking. '941 patent, col. 1, lines 12–35; *cf. HTC*, 2017 WL 6032605, at *3–5 (PTAB conclusion regarding “technological inventions”). It does so by relying on specific and unique characteristics of certain aspects of the BIOS that the patent asserts, and we lack any basis for disputing, were not previously used in the way now claimed, and the result is a beneficial reduction of the risk of hacking. '941 patent, col. 1, line 39, through col. 2, line 59; *id.*, col. 3, lines 4–17; *id.*, col. 6, lines 59–67. The prosecution history reinforces what the patent itself indicates about the change in previous verification techniques for computer security. *See* J.A. 283 (examiner stating reasons for allowance, summarizing patent's solution of “using an agent to set up a verification structure in the erasable, non-volatile memory of the BIOS”); *Ancora*, 744 F.3d at 735–36 (quoting applicants' arguments to examiner). In short, claim 1 of the '941 patent is directed to a solution to a computer-functionality problem: an improvement in computer functionality that has “the specificity required to transform a claim from one claiming only a result to one claiming a way of achieving it.” *SAP America, Inc.*, 898 F.3d at 1167. It therefore passes muster under *Alice* step one, as it is not directed to patent ineligible subject matter. We need not and do not apply step two of the *Alice* analysis. *See Data Engine*, 906 F.3d at 1011; *Finjan*, 879 F.3d at 1306; *Visual Memory*, 867 F.3d at 1262. [*Ancora Technologies, Inc. v. HTC America, Inc.*, 2018-1404 (Fed. Cir. 11/16/2018).]

Legal issue: 35 USC 101, patent eligibility, *Alice* step 2 considerations, overlap with *Alice* step 1 considerations.

The Federal Circuit concluded that its analysis of step 2 considerations supported the conclusion that the claim was not directed to an abstract idea. In other words, the Federal Circuit seems to be importing into *Alice* Step 1, its prior analysis reserved for *Alice* step 2.

First, the Federal Circuit compared this case to one in which it found patent eligibility at

Alice, step 2.

We do note, in accord with our recognition of overlaps between some step one and step two considerations, *Electric Power Group, LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016), that our conclusion that the specific improvement in this case passes muster at step one is indirectly reinforced by some of our holdings under step two. *** In holding the claimed invention eligible under *Alice* step two, we reasoned that although “[f]iltering content on the Internet was already a known concept, . . . the patent describes how its particular arrangement of elements is a technical improvement over the prior art ways of filtering such content.” *Id.* at 1349–50. A similar characterization, we think, applies to the technical improvement claimed in this case and, in light of the line of cases we have discussed above, justifies the conclusion that claim 1 of the ’941 patent is not directed to an abstract idea, but to a computer-functionality improvement. [*Ancora Technologies, Inc. v. HTC America, Inc.*, 2018-1404 (Fed. Cir. 11/16/2018).]

Second, the Federal Circuit compared this case to one in which it did not find patent eligibility at *Alice*, step 2.

The contrast with another step-two case, *Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307 (Fed. Cir. 2016), is also instructive. There, the claimed invention required the installation of a virus-screening software on a telephone network. *Id.* at 1319. But because the claim at issue did not “recite[] any improvement to conventional virus screening software, nor . . . solve any problem associated with situating such virus screening on the telephone network,” we held that the patent did not identify a sufficient inventive concept under *Alice* to transform the claimed abstract idea into something patentable. *** In the present case, in contrast, the record described above shows that the claimed invention moves a software-verification structure to a BIOS location not previously used for this computer-security purpose and alters how the function is performed (in that the BIOS memory used for verification now interacts with distinct computer memory to perform a software-verification function), yielding a tangible technological benefit (by making the claimed system less susceptible to hacking). Thus, *Intellectual Ventures I v. Symantec* is consistent with our conclusion. [*Ancora Technologies, Inc. v. HTC America, Inc.*, 2018-1404 (Fed. Cir. 11/16/2018).]

In re Oath Holdings, Inc., 2018-157 (Fed. Cir. 11/14/2018).

This is a decision in response to a petition for a writ of certiorari relating to 1400(b).

The E.D. NY. district court denied Oath's request for reconsideration of Oath's motion objecting to venue. Oath petitioned the Federal Circuit (again) for a writ of mandamus to order the district court to grant the motion. The Federal Circuit granted the petition.

Legal issue: 28 USC 1400(b), waiver of venue in patent cases, choice of law.

This decision first reiterates that *In re Micron Technology, Inc.*, 2017-138 (Fed. Cir. 11/15/2017) and *In re ZTE (USA) Inc.*, 2018-113 (Fed. Cir. 5/14/2018) held that venue and the burden of persuasion for venue pursuant to 1400(b) are matters of Federal Circuit law. This decision goes on to hold that "that issues of waiver or forfeiture of patent-venue rights under § 1400(b) and § 1406(a) are likewise governed by our law."

Respondents contend that Micron does not apply because it arose under First Circuit law, while this case arises under Second Circuit law. But the result cannot change here on that basis. Micron noted that it was not deciding whether Federal Circuit law or relevant regional circuit law governed the waiver issue. *Micron*, 875 F.3d at 1097 n.3. We made clear, however, that the interpretation of § 1400(b), a patent-specific statute, including its relation to § 1391, is a matter of Federal Circuit law, not regional circuit law (subject, of course, to Supreme Court law). *Id.* at 1098. And we have subsequently held that the burden of persuasion on venue under § 1400(b) is a matter of our law. *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1012–13 (Fed. Cir. 2018). We conclude that issues of waiver or forfeiture of patent-venue rights under § 1400(b) and § 1406(a) are likewise governed by our law. [*In re Oath Holdings, Inc.*, 2018-157 (Fed. Cir. 11/14/2018).]

Legal issue: 28 USC 1400(b), waiver in response to TC Heartland.

On the facts, the Federal Circuit indicated that a *pre-TC Heartland* admission to venue followed by a "seasonably raised" *post-TC Heartland* venue challenge did not constitute waiver. This case should put to bed substantially all remaining venue disputes relating to timeliness of venue challenged of civil actions filed prior to *TC Heartland* that were prompted by the decision in *TC Heartland*. The Federal Circuit generally held that seasonably raising venue challenge in response to *TC Heartland* does not constitute waiver

Respondents' arguments establish no legitimate basis for concluding that Oath forfeited its § 1406(a) right to seek dismissal or transfer for lack of venue under § 1400(b). Respondents point to the fact that Oath admitted to venue in its answer and Oath's extensive participation before the Supreme Court decided *TC Heartland*. But Oath cannot be faulted for waiting to present a venue objection until after *TC Heartland* was decided, where the case was in an early stage, the defense could not properly have been adopted by the district court at the time, and Oath's answer expressly put respondents and the district court on notice that Oath was watching *TC Heartland* to see if the defense would become available. Respondents also cannot reasonably argue that Oath failed to seasonably raise its defense once available: Oath filed its motion to dismiss within 21 days of the Court's *TC Heartland* decision. *See BigCommerce*, 890 F.3d at 982 (finding no basis to remand in part because defendant filed its motion within two weeks of the issuance of *TC Heartland*). Nor do respondents identify any conduct post-*TC Heartland* that would indicate in any way that Oath somehow consented or submitted to venue. [*In re Oath Holdings, Inc.*, 2018-157 (Fed. Cir. 11/14/2018).]

[Arista Networks, Inc. v. Cisco Systems, Inc., 2017-1525, 2017-1577 \(Fed. Cir. 11/9/2018\).](#)

This is a decision on appeals from PTAB case IPR2015-00978. The PTAB upheld some challenged claims as patentable and held other challenged claims unpatentable. Both parties appealed. The Federal Circuit affirmed-in-part, reversed-in-part, and remanded. The remand resulted from the Federal Circuit's reversal of the PTAB's claim construction of "broadcast." However, the issues of general interest relate to the scope of the 314(d) bar to reviewability of IPR institution decisions, and assignor estoppel.

Legal Issue: 35 USC 314(d), test for nonreviewability of issues in IPR institution decisions.

The Federal Circuit first determined whether the PTAB's decision regarding assignor estoppel was reviewable. In making that determination, the Federal Circuit clarified the scope the bar to review ability, and then concluded under the relevant test that the PTAB's decision regarding assignor estoppel was reviewable. Ultimately, the court determined that the statute precluded application of assignor estoppel in IPR proceedings.

This Federal Circuit panel concluded that the prior panel decision in *Husky Injection Molding Sys. Ltd. v. Athena Automation Ltd.*, 2015-1726, 2015-1727, 838 F.3d 1236, 1241 (Fed. Cir. 2016)(concluding that assignor estoppel was unreviewable), was inconsistent the Federal Circuit's post-*Husky* en banc decision in *Wi-Fi One, LLC v. Broadcom Corp.*, 2015-1944, 2015-1945, 2015-1946, 878 F.3d 1364 (Fed. Cir. 2018)(en banc). The Federal Circuit reasoned that *Husky's* interpretation of the Supreme Court *Cuozzo* decision (regarding the scope of the 35 USC 314(d) bar to appealability of IPR institution decisions) was inconsistent with the en banc *Wi-Fi One's* interpretation of *Cuozzo*. More specifically and importantly, this Federal Circuit panel explained that *Wi-Fi One* construed *Cuozzo* to limit the 314(d) bar to (1) "the Director's determinations closely related to the preliminary patentability determination" and (2) "the exercise of discretion not to institute."

Before reaching the question of whether assignor estoppel should apply in the IPR context, we must first ensure that this issue is reviewable in light of the Supreme Court's analysis of 35 U.S.C. § 314(d) in *Cuozzo Speed Technologies v. Lee*, 136 S. Ct. 2131 (2016), and this court's recent en banc application of *Cuozzo* in *Wi-Fi One, LLC v. Broadcom Corp.*, 878 F.3d 1364 (Fed. Cir. 2018) (en banc). [[Arista Networks, Inc. v. Cisco Systems, Inc., 2017-1525, 2017-1577 \(Fed. Cir. 11/9/2018\).](#)]

Just three months after *Cuozzo*, a panel of this court in *Husky* applied the decision to the question of whether assignor estoppel could bar a party from filing an IPR petition. *Husky Injection Molding Sys. Ltd. v. Athena Automation Ltd.*, 838 F.3d 1236, 1241 (Fed. Cir. 2016). *** Since *Husky*, however, this court, sitting en banc, addressed the reviewability standard articulated in *Cuozzo*. *Wi-Fi One*, 878 F.3d at 1372–75. In *Wi-Fi One*, we explained that *Cuozzo* held that the bar on judicial review in § 314(d) applies where a patent owner challenges the Board's determination under § 314(a) that there is a "reasonable likelihood" of success with respect to at least one claim, as well as where a patent owner challenges the

Board’s determination based on a statute “closely related to *that* decision to institute inter partes review.” *Id.* at 1373 (emphasis in *Wi-Fi One*) (quoting *Cuozzo*, 136 S. Ct. at 2142); *see id.* at 1370 (noting that *Cuozzo* “tied the ‘closely related’ language to the specific ‘reasonable likelihood’ determination made under § 314(a)”); *see also SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359 (2018) (“*Cuozzo* concluded that § 314(d) precludes judicial review only of the Director’s ‘initial determination’ under § 314(a) that ‘there is a “reasonable likelihood” that the claims are unpatentable on the grounds asserted’ and review is therefore justified.” (quoting *Cuozzo*, 136 S. Ct. at 2140)). [Footnote 9 omitted.] In short, we are to “examine the statutory scheme in terms of what is ‘closely related’ to the § 314(a) determination.” *Wi-Fi One*, 878 F.3d at 1373. Looking to § 314(a), we then explained that § 314(a) “does only two things: it identifies a threshold requirement for institution, and . . . it grants the Director discretion not to institute even when the threshold is met.” *Id.* at 1372 (citing *Cuozzo*, 136 S. Ct. at 2140). This “threshold” requirement “focuse[s] on the patentability merits of particular claims.” *Id.* We thus concluded that *Cuozzo* “strongly points toward unreviewability being limited to the Director’s determinations closely related to the preliminary patentability determination or the exercise of discretion not to institute.” *Id.* at 1373; *see also Cuozzo*, 136 S. Ct. at 2140 (noting the “‘strong presumption’ in favor of judicial review that we apply when we interpret statutes, including statutes that may limit or preclude review”). *Husky*’s application of *Cuozzo*’s “less closely related statutes” exception cannot be reconciled with the reasoning of this court’s subsequent decision in *Wi-Fi One*. We therefore must rely on the reasoning of the en banc court in *Wi-Fi One* to analyze whether the issue presented in this cross-appeal is reviewable. [*Arista Networks, Inc. v. Cisco Systems, Inc.*, 2017-1525, 2017-1577 (Fed. Cir. 11/9/2018).]

Legal Issue: 35 USC 314(d), review ability assignor estoppel in IPR proceedings

This Federal Circuit panel then concluded that *Wi-Fi One*’s interpretation of *Cuozzo*’s interpretation of 314(d) clearly allowed review of the PTAB’s application of assignor estoppel.

Applying the now-governing reasoning in *Wi-Fi One*, it is clear that we may review the Board’s decision as to whether § 311(a) contemplates application of assignor estoppel. [Footnote 10 omitted.] The question of whether assignor estoppel applies in IPRs stands in stark contrast to the statutory provision before the Court in *Cuozzo*, § 312(a)(3), which deals with pleading an IPR petition with particularity. Further, unlike the statutory provision at issue in *Cuozzo*, assignor estoppel does not relate to the patentability merits of an IPR petition. *See Wi-Fi One*, 878 F.3d at 1373–74 (distinguishing the statute in *Cuozzo* from § 315(b) by noting that the § 315(b) time-bar does not go to the merits of a petition). And, like the § 315(b) timebar, assignor estoppel “is not focused on particular claims, whereas § 314(a)’s threshold determination is.” *See id.* at 1373 (discussing § 315(b)). Instead, assignor estoppel, like the § 315(b) time-bar, “is unrelated to the Director’s preliminary patentability assessment or the Director’s discretion not to

initiate an IPR even if the threshold ‘reasonable likelihood’ is present.” *See id.* (discussing § 315(b)). In short, whether § 311(a) contemplates application of assignor estoppel is not “closely related to the preliminary patentability determination or the exercise of discretion not to institute.” *Id.* [Footnote 11 omitted.] We therefore conclude that, like the time-bar in § 315(b), the issue of whether § 311(a) contemplates application of assignor estoppel is reviewable. [*Arista Networks, Inc. v. Cisco Systems, Inc.*, 2017-1525, 2017-1577 (Fed. Cir. 11/9/2018).]

Legal Issue: 35 USC 311, assignor estoppel inapplicable in IPR proceedings.

The Federal Circuit generally relied upon the "any person" language in 311 as a clear expression that assignor estoppel was inapplicable in IPR proceedings.

The question before us, as is often the case, is one of congressional intent: did Congress intend for assignor estoppel to apply in IPR proceedings? *** Section 311(a) states, in relevant part: “(a) In General.— Subject to the provisions of this chapter, *a person who is not the owner of a patent* may file with the Office a petition to institute an inter partes review of the patent. . . .” § 311(a) (emphasis added). Arista contends that § 311(a) unambiguously leaves no room for assignor estoppel in the IPR context, given that the statute allows any person “who is not the owner of a patent” to file an IPR. [Footnote 14 omitted.] We agree. Where “the statutory language is plain, we must enforce it according to its terms.” *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *see also Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). In our view, the plain language of this statutory provision is unambiguous. *** The plain language of § 311(a) demonstrates that an assignor, who is no longer the owner of a patent, may file an IPR petition as to that patent. [*Arista Networks, Inc. v. Cisco Systems, Inc.*, 2017-1525, 2017-1577 (Fed. Cir. 11/9/2018).]

Note: The Federal Circuit also expressly recognized a trend of a weakening of the doctrine of assignor estoppel, over time.

Cisco’s primary argument in favor of applying assignor estoppel is that assignor estoppel is a well-established common-law doctrine that should be presumed to apply absent a statutory indication to the contrary. *** There is some merit to Cisco’s argument. In *Westinghouse*, the Court characterized assignor estoppel as “a rule well settled by 45 years of judicial consideration and conclusion” in the district and circuit courts, reaching back as early as 1880. *Westinghouse*, 266 U.S. at 349; *see also Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249, 260 (1945) (Frankfurter, J., dissenting) (“The principle of fair dealing as between assignor and assignee of a patent whereby the assignor will not be allowed to say that what he sold as a patent was not a patent had been part of the fabric of our law throughout the life of this nation.”). But, in *Lear, Inc. v. Adkins*, the Supreme Court appeared to cast some doubt on the doctrine’s

continued viability. 395 U.S. 653, 664–66 (1969). And although this court has held that the doctrine survived *Lear*, we did so recognizing that court decisions post-*Lear* “reveal[ed] some uncertainty about the continued vitality of the doctrine.” *Diamond Sci.*, 848 F.2d at 1223; *see also id.* (“Although *Lear* involved the licensing, rather than the assignment, of a patent, the opinion reviewed the history of ‘patent estoppel’ in general, and indicated that the Court’s previous decisions had sapped much of the vitality, if not the logic, from the assignment estoppel doctrine as well.”). [*Arista Networks, Inc. v. Cisco Systems, Inc.*, 2017-1525, 2017-1577 (Fed. Cir. 11/9/2018).]

This express recognition of weakening of assignor estoppel leaves open the door for future parties to challenge, on appeal, district court applications of assignor estoppel.

***Acceleration Bay, LLC v. Activision Blizzard Inc.*, 2017-2084, 2017-2085, 2017-2095, 2017-2096, 2017-2097, 2017-2098, 2017-2099, 2017-2117, 2017-2118 (Fed. Cir. 11/6/2018).**

This is a decision on appeals from PTAB cases: IPR2015-01951; IPR2015-01953; IPR2015-01964; IPR2015-01970; IPR2015-01972; IPR2015-01996; IPR2016-00933; IPR2016-00934; IPR2016-00935; IPR2016-00936; IPR2016-00963; and IPR2016-00964. The PTAB held certain claims patentable and other claims unpatentable in each of three patents. Acceleration appealed PTAB holdings of claim unpatentability and Activision (and others) appealed PTAB holdings of claim patentability. The Federal Circuit affirmed.

Legal issue: 35 USC 112(b), claim construction, effect of failure to include a transitional phrase.

The Federal Circuit concluded that failure to include a transitional phrase separating a preamble from a body of a claim, did not result in the body of the claim encompassing the preamble. And the Federal Circuit cautioned "patentees" [sic; patent applicants and patentees?] against failing to include a transitional word or phrase in a claim.

... Acceleration alternatively argues that these terms appear in the body of the claims because there is no transition phrase denoting a preamble. *See, e.g.*, Appellant’s Br. 38; Oral Arg. at 7:22–7:36. “A claim typically contains three parts: the preamble, the transition, and the body.” 3 Chisum on Patents § 8.06 (2018). Acceleration’s poor claim drafting will not be an excuse for it to infuse confusion into its claim scope. We conclude that “game environment” and “information delivery service” are part of the preamble of the claims. We see no beneficial purpose to be served by failing to include a transition word in a claim to clearly delineate the claim’s preamble from the body, and we caution patentees against doing so. [*Acceleration Bay, LLC v. Activision Blizzard Inc.*, 2017-2084, 2017-2085, 2017-2095, 2017-2096, 2017-2097, 2017-2098, 2017-2099, 2017-2117, 2017-2118 (Fed. Cir. 11/6/2018).]

Legal issue: 35 USC 102, qualifications for a reference being a printed publication, public accessibility.

The Federal Circuit has recently decided several cases clarifying what constitutes a

printed publication, and specifically what qualifies as public accessibility. This decision continues that line of cases. This case expands upon what functionality a website search engine must have to make a reference publicly accessible, at least when the burden is on the party attempting to show public accessibility. In this case, the PTAB found that the database's functionality "to allow a user to search keywords for author, title, and abstract fields, evidence demonstrated that functionality was not reliable," which seems to have been the most probative factor.

The Board found that Lin was not publicly accessible before the critical date. *** The Board then correctly noted that "public accessibility" requires more than technical accessibility. J.A. 13. Because there was no evidence that Lin was disseminated to the public, the Board focused on whether an interested skilled artisan, using reasonable diligence, would have found Lin on the CSE Technical Reports Library website. J.A. 13–14 (citing *Voter Verified, Inc. v. Premier Election Sols., Inc.*, 698 F.3d 1374, 1380–81 (Fed. Cir. 2012)). The Board found that despite some indexing and search functionality on the website, Lin was not publicly accessible. See J.A. 15–19. It found the website allowed a user to view a list of technical reports indexed only by author or year and that there was no evidence as to how many reports were in the Library's database in 1999. See J.A. 16–17, 22. The Board determined that at best, Blizzard's evidence "suggests that an artisan might have located Lin by skimming through potentially hundreds of titles in the same year, with most containing unrelated subject matter, or by viewing all titles in the database listed by author, when the authors were not particularly well known." J.A. 17. The Board also found the website's advanced search form to be deficient. It found that while the advanced search form appeared to allow a user to search keywords for author, title, and abstract fields, evidence demonstrated that functionality was not reliable. J.A. 18–19, 22. In sum, the Board determined that Blizzard "has not shown sufficiently that the UCSD CSE Technical Reports Library was searchable or indexed in a meaningful way so that a person of ordinary skill in the art would have located Lin." J.A. 22. The Board, therefore, concluded Lin is not a printed publication under § 102(a). J.A. 22. *** Substantial evidence supports the Board's finding that there "is insufficient evidence of record to support a finding that a person of ordinary skill in the art in 1999 could have located Lin using the CSE Library website's search function." See J.A. 19. [*Acceleration Bay, LLC v. Activision Blizzard Inc.*, 2017-2084, 2017-2085, 2017-2095, 2017-2096, 2017-2097, 2017-2098, 2017-2099, 2017-2117, 2017-2118 (Fed. Cir. 11/6/2018).]

The Federal Circuit went on to explain that mere indexing is insufficient, and not the test for public accessibility.

Blizzard argues we need not even consider the website's search functionality because Lin was indexed by title for a given year, author name, and unique sequence number, which is sufficient for public accessibility under *In re*

Hall, 781 F.2d 897 (Fed. Cir. 1986). We do not agree. The test for public accessibility is not “has the reference been indexed?” We have explained that where indexing is concerned, whether online or in tangible media, the “ultimate question 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*, 698 F.3d at 1380; *accord In re Klopfenstein*, 380 F.3d 1345, 1348 (Fed. Cir. 2004) (“Even if the cases cited by the appellants relied on inquiries into distribution and indexing to reach their holdings, they do not limit this court to finding something to be a ‘printed publication’ only when there is distribution and/or indexing. Indeed, the key inquiry is whether or not a reference has been made ‘publicly accessible.’”). Here, the Board found that although Lin was indexed by author and year, it was not meaningfully indexed such that an interested artisan exercising reasonable diligence would have found it, which is a proper consideration under our precedent. *See, e.g., In re Cronyn*, 890 F.2d 1158, 1161 (Fed. Cir. 1989) (“We conclude that in the present case, as in *Bayer* and unlike *Hall*, the three student theses were not accessible to the public because they had not been either cataloged or indexed in a meaningful way. . . . Here, the only research aid was the student’s name, which, of course, bears no relationship to the subject of the student’s thesis.”). In light of the Board’s fact findings, which are supported by substantial evidence, we agree that Lin is not a printed publication under § 102. [*Acceleration Bay, LLC v. Activision Blizzard Inc.*, 2017-2084, 2017-2085, 2017-2095, 2017-2096, 2017-2097, 2017-2098, 2017-2099, 2017-2117, 2017-2118 (Fed. Cir. 11/6/2018).]

GoPro, Inc. v. Contour IP Holding LLC, 2017-1894, 2017-1936 (Fed. Cir. 11/1/2018).

This is a modification of an opinion originally issued 7/27/2018, based upon appeals from PTAB cases IPR2015-01078, IPR2015-01080. The PTAB held that GoPro had not shown the challenged claims to be obvious. GoPro appealed. The Federal Circuit vacated and remanded.

I copy in below my July 2018 writeup, and modify the original by showing changes in 11/1/2018 modification relative to the 7/27/2018 original, by underlining for added text and strikethrough for deleted text.

Legal issue: 35 USC 102, printed publication, requirements for a reference to be sufficiently accessible to the relevant public, for the reference to qualify as a prior art printed publication.

The Federal Circuit concluded that the PTAB erred in concluding the GoPro Catalog was not sufficiently accessible to qualify as a printed publication prior art document. The Catalog was distributed at a trade show, and then posted on a corresponding website. The Federal Circuit stated that the test for availability was whether "reasonable diligence" by "members of the relevant public" would result in access to the document, and factors to be considered included (1) the nature of the conference; (2) any restrictions on public disclosure; (3) expectations of confidentiality; and (4) expectations the information would be shared.

We have interpreted § 102 broadly, finding that even relatively obscure documents qualify as prior art so long as the relevant public has a means of accessing them. *See, e.g., Jazz Pharm., Inc. v. Amneal Pharm., LLC*, Nos. 17-1671, -1673, -1674, -1675, -1676, -1677, -2075, --- F.3d ----, slip op. at 11–22, 2018 WL 3400764, at *5–9 (Fed. Cir. July 13, 2018). For example, we have determined that a single cataloged thesis in a university library was “sufficient[ly] accessible to those interested in the art exercising reasonable diligence.” *In re Hall*, 781 F.2d 897, 900 (Fed. Cir. 1986). Subsequently, we explained that “[a]ccessibility 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 at 1348 (quoting *Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1350 (Fed. Cir. 2008)). *** The principal issue on appeal is whether the GoPro Catalog was sufficiently accessible as contemplated under § 102(b). [*GoPro, Inc. v. Contour IP Holding LLC*, 2017-1894, 2017-1936 (Fed. Cir. 7/27/2018).]

We disagree with the Board’s conclusion that the evidence presented by GoPro failed to satisfy the § 102(b) requirements. The case law regarding accessibility is not as narrow as the Board interprets it. The Board focused on only one of several factors that are relevant to determining public accessibility in the context of materials distributed at conferences or meetings. The Board cited no cases where we have strictly held that the expertise of the target audience is dispositive of the inquiry of accessibility. *Cf. Medtronic v. Barry*, 891 F.3d 1368, 1382 (Fed. Cir. 2018) (“The expertise of the target audience can be a factor in determining public accessibility. But this factor alone is not dispositive of the inquiry.” (citations omitted)). Rather, our case law directs us to also consider the nature of the conference or meeting; whether there are restrictions on public disclosure of the information; expectations of confidentiality; and expectations of sharing the information. *Id.* at 1382–83. When direct availability to an ordinarily skilled artisan is no longer viewed as dispositive, the undisputed record evidence compels a conclusion that the GoPro Catalog is a printed publication as a matter of law. [*GoPro, Inc. v. Contour IP Holding LLC*, 2017-1894, 2017-1936 (Fed. Cir. 7/27/2018).]

The Federal Circuit identified the relevant facts and applied its test to those facts, to find the Board erred. Uncontroverted evidence included: that “Tucker Rocky ... an annual trade show ... draws thousands of attendees;” that “GoPro displayed and distributed hundreds of copies of the GoPro Catalog to attendees at the show without restriction;” that “a primary purpose of POV cameras is for use on vehicles in extreme action environments, such as the ones advertised at the

Tucker Rocky Dealer Show;" that "attendees attracted to the show were likely more sophisticated and involved in the extreme action vehicle space than an average consumer"; that "[t]he vendor list provided ... a number of vendors who likely sell, produce and/or have a professional interest in digital video cameras." and that the Tucker Rocky "show was attended by actual and potential dealers, retailers, and customers of POV video cameras." Based upon this evidence, the Federal Circuit concluded that the Board erred in not concluding that the GoPro Catalog was a printed publication:

The Board concluded that the GoPro Catalog was not a printed publication because the Tucker Rocky Dealer Show was not open to the general public [footnote 8 omitted] and GoPro failed to provide evidence that someone ordinarily skilled in the art actually attended the dealer show. But, the standard for public accessibility is one of "reasonable diligence," *Blue Calypso*, 815 F.3d at 1348, to locate the information by "interested members of the relevant public." *Constant*, 848 F.2d at 1569 (emphasis added). ~~A dealer show focused on extreme sports vehicles is an obvious forum for POV action sports cameras. And although the general public at large may not have been aware of the trade show, dealers of POV cameras would encompass the relevant audience such that a person ordinarily skilled and interested in POV action cameras, exercising reasonable diligence, should have been aware of the show.~~ Mr. Jones testified that the dealer show was attended by actual and potential dealers, retailers, and customers of POV video cameras. Additionally, the GoPro Catalog was disseminated with no restrictions and was intended to reach the general public. Based upon Mr. Jones's testimony, the evidence provided by GoPro regarding the Tucker Rocky Dealer Show, and the evidence of the Tucker Rocky Distributing website, we conclude that GoPro met its burden to show that its catalog is a printed publication under § 102(b). [*GoPro, Inc. v. Contour IP Holding LLC*, 2017-1894, 2017-1936 (Fed. Cir. 7/27/2018).]

Note: It seems that the Court found its original reliance upon inferences ("likely more sophisticated" and "who likely sell, produce and/or have a professional interest in digital video cameras") ill advised, and revised to rely upon facts of record (that the Tucker Rocky road "show was attended by actual and potential dealers, retailers, *and customers of POV video cameras.*") to support its conclusion that the catalog was sufficiently accessible to be a printed publication.