

Email Distribution of a Reference to a Listserv May Be Sufficient to Show Public-Accessibility Under 35 U.S.C. 102(b)

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Samsung Electronics. Co. v. Infobridge Pte. Ltd., No. 2018-2007 and 2018-2012 (Fed. Cir. July 12, 2019)

The patent challenger filed *inter partes* review petitions challenging the claims of a patent involving a standard for high-efficiency video encoding. The Patent Trial and Appeal Board (PTAB) upheld the claims, holding that a certain prior art reference could not be considered as prior art because the patent challenger failed to show that the reference was publicly accessible before the critical date.

The Federal Circuit vacated and remanded the case for further analysis. The Federal Circuit agreed with the PTAB's finding that simply uploading the reference onto two websites was insufficient, holding that there was no probative evidence that a person of ordinary skill outside of the group of authors of the reference either knew about the website or how to locate the unindexed reference. However, the court disagreed with the PTAB's analysis concerning an email containing a link to the reference that was sent to a listserv including members of the developing organization as well as any interested subscribers.

The PTAB confused "access" with "accessibility," and the court noted that a patent challenger "need not establish that specific persons actually accessed or received a work to show that the work was publicly accessible." Rather, the court instructed the PTAB to consider whether the evidence "established that an ordinarily skilled artisan could have accessed the reference, after exercising reasonable diligence, based on the listserv email." This includes examining "whether a person of ordinary skill, exercising reasonable diligence, would have joined the listserv" and "the circumstances of the email itself, for example why the email was sent and whether it was covered by an expectation of confidentiality."

[A copy of the opinion can be found here](#)

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