

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

HEWLETT-PACKARD CO.,
Petitioner,

v.

U.S. PHILIPS CORPORATION,
ORANGE, S.A.,
TDF SAS, and
INSTITUT FÜR RUNDfunkTECHNIK GMBH,
Patent Owners.

Case IPR2015-01506
Patent 5,539,829

Before BRIAN J. McNAMARA, SCOTT A. DANIELS, and
JENNIFER MEYER CHAGNON, *Administrative Patent Judges*.

DANIELS, *Administrative Patent Judge*.

DECISION
Denial of *Inter Partes* Review
37 C.F.R. § 42.108

I. INTRODUCTION

A. Background

Petitioner, Hewlett-Packard Co. filed a Petition to institute an *inter partes* review of claims 1–22 of U.S. Patent No. 5,539,829 (“the ’829 patent”). Paper 2 (“Pet.”). Patent Owners, U.S. Philips Corporation, Orange, S.A., TDF SAS, and Institut Für Rundfunktechnik GmbH¹ filed a Preliminary Response. Paper 13 (“Prelim. Resp.”).

We have authority to determine whether to institute an *inter partes* review under 35 U.S.C. § 314 and 37 C.F.R. § 42.4(a). Upon consideration of the evidence and arguments in the Petition and the Preliminary Response, we determine that Petitioner has failed to establish a reasonable likelihood of prevailing on the claims challenged in the Petition. For the reasons expressed below, we do not institute an *inter partes* review of claims 1–22 of the ’829 patent.

B. Additional Proceedings

Petitioner states that the ’829 patent is the subject of a civil action in the U.S. District Court for the Eastern District of Virginia, *Audio MPEG, Inc. v. Hewlett-Packard Co.*, Case No. 2:15-cv-00073-HCM-RJK, filed February 20, 2015, and is unaware of any other related matter involving the ’829 patent. Pet. 1.

C. The ’829 Patent and Illustrative Claim

The ’829 patent describes a digital transmission system for improving the replication of a digital signal sent from a transmitter to a receiver, specifically, “a wideband digital signal with a significant reduction of the

¹ Patent Owners indicate Audio MPEG, Inc. is also a real-party-in-interest in this proceeding. Paper 5, 2.

distortion present in the replica generated in the receiver.” Ex. 1002, 2:22–

24. Claim 1 illustrates the claimed subject matter and is reproduced below:

1. A digital transmission system, for producing a replica of a digital signal comprising at least a first component and a second component, comprising:

an encoder including analysis means for altering said digital signal to obtain a plurality of sub-signals, including at least a first sub-signal and a second sub-signal from said first component and said second component respectively,

signal combination means for combining said first sub-signal and said second sub-signal to obtain a composite sub-signal,

signal generator means for generating an indicator signal indicating that said first sub-signal and said second sub-signal are combined,

transmission means for transmitting said indicator signal, said composite sub-signal, and sub-signals which have not been combined,

receiving means for receiving the signals which were transmitted,

means, responsive to the received indicator signal and composite subsignal, for generating a signal related to at least one of said first component and said second component, and

a decoder including synthesis means for combining the transmitted subsignals and the signal related to at least one of said first component and said second component to produce said replica of the digital signal.

D. The Alleged Ground of Unpatentability

Petitioner contends that the challenged claims are unpatentable on the following specific ground.²

References	Basis	Claims Challenged
MUSICAM ³	§ 102	1–22

II. CLAIM CONSTRUCTION

Because we do not reach the issue of anticipation based on our determination below, no claim construction is necessary.

III. ANALYSIS

We address, below, the issue of whether MUSICAM, the only purported prior art reference asserted in the Petition, is a printed publication because it is dispositive of the sole asserted ground of unpatentability under 35 U.S.C. § 102 in the Petition and determinative of whether Petitioner has met the threshold standard of 35 U.S.C. § 314(a).

A. Whether MUSICAM is a Printed Publication

The parties do not dispute that MUSICAM discloses the limitations recited in the '829 patent. Pet. 9. The threshold issue, therefore, is whether MUSICAM qualifies as prior art for purposes of 35 U.S.C. § 102. *Id.*; Prelim. Resp. 13–14. As explained below, we are not persuaded that Petitioner has made a sufficient showing that MUSICAM is a printed publication.

² Petitioner supports its challenge with a Declaration of Dr. Nikil Jayant, Ph.D. (Ex. 1004). *See infra*.

³ ISO/IEC JTC1/SC2/WG8, *MUSICAM, Coded Representation of Picture and Audio Information*, MPEG 89/206, December 28, 1989 (Ex. 1027) (“MUSICAM”).

1. *Legal Standard*

Petitioner has the initial burden of production of evidence establishing that asserted references are applicable as prior art. *Dynamic Drinkware LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1379 (Fed. Cir. 2015).

The Federal Circuit has held that “public accessibility” is the touchstone in determining whether a reference is a “‘printed publication’” under § 102. *In re Hall*, 781 F.2d 897, 898–99 (Fed. Cir. 1986). “A reference is publicly accessible ‘upon a satisfactory showing that such document has been 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. . . .’” *Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1350 (Fed. Cir. 2008) (quoting *SRI Int’l, Inc. v. Internet Sec. Sys. Inc.*, 511 F.3d 1186, 1194 (Fed. Cir. 2008)). The determination of whether a document is a “‘printed publication’” under 35 U.S.C. § 102(b) involves a case-by-case inquiry into the facts and circumstances surrounding its disclosure to members of the public. *In re Klopfenstein*, 380 F.3d 1345, 1350 (Fed. Cir. 2004). The party seeking to introduce the reference “should produce sufficient proof of its dissemination or that it has otherwise been available and accessible to persons concerned with the art to which the document relates and thus most likely to avail themselves of its contents.” *In re Wyer*, 655 F.2d 221, 227 (CCPA 1981).

2. *Overview of MUSICAM*

MUSICAM is a document that was submitted to an ISO (International Organization for Standardization) sponsored working group called

“MPEG/Audio group” on December 28, 1989.⁴ Pet. 3; Prelim. Resp. 8. Petitioner explained that the MPEG/Audio group was formed in 1988 including various companies “to propose a standardized audio coder to be used in conjunction with a planned standardized video coder.” Pet. 11 (citing Ex. 1004 ¶¶ 65–70). MUSICAM is an acronym for: Masking Pattern Adapted Universal Sub-band Integrated Coding and Multiplexing. Ex. 1027, 2. MUSICAM was one of the proposals for a standardized audio coder, and according to Patent Owners, “MUSICAM includes a detailed description of a sub-band coding algorithm, including the basic parameters, the selection of sub-bands to be transmitted, the manner in which they are to be formatted for transmission, and methods for decoding sub-bands and reconstructing the replica.” Prelim. Resp. 8.

3. Discussion

Petitioner asserts that MUSICAM is a printed publication that qualifies as prior art under 35 U.S.C. § 102(a) and thus anticipates claims 1–22 of the ’829 patent. Pet. 3, 9–19. Patent Owners dispute this assertion, pointing out that the USPTO has already determined that MUSICAM was not a printed publication in two *ex parte* reexamination proceedings and argues that the evidence of record in this proceeding also fails to support a finding that MUSICAM is a printed publication.⁵ Prelim. Resp. 2–4, 14–26.

Petitioner argues specifically that all documents and proposals, including MUSICAM, provided to the MPEG Audio/group were not subject

⁴ As stated in the February 1989 MPEG/Audio group meeting report, MPEG stands for Moving Picture Coding Experts Group. Ex. 1010, 1.

⁵ See *Ex parte* Reexamination of Gerardus C.P. Lokhoff et al., U.S. Patent No. 5,777,992 C1, No. 90/009,344; *Ex parte* Reexamination of Gerardus C.P. Lokhoff et al., U.S. Patent No. 5,323,396 C1, No. 90/009,345.

to non-disclosure or confidentiality agreements and were, therefore, available to the interested public.⁶ Pet. 10–12. Petitioner points to an October 1989 MPEG Audio/group meeting report as evidence that the working group documents would be freely available to persons outside the specific members of the MPEG Audio Group. *Id.* at 12. The report states in relevant part:

[T]he Chairman stated again his intention to provide the full collection of documents available at MPEG meeting to all MPEG members and to suitably identified Corresponding Members. The large attendance of MPEG meetings and the associated load in copies and mailing however had to be alleviated by defining precisely MPEG membership. He proposed that the following individuals will receive the **full collection of documents corresponding to meeting**:

- Those who took part in that meeting;
- Those who informed by fax/mail/telex their inability to attend that meeting;
- Corresponding members in other standards bodies.

The membership list will be changed every meeting to implement the above rule.

In addition to the above those who will express by fax/mail/telex their interest to receive only the **meeting reports** will receive them on permanent basis.

The meeting agreed to the proposal.

⁶ The meeting reports of the MPEG/Audio group generally refer to the technical information, documents, and presentations, including MUSICAM, that were to be submitted for consideration by the working group as part of the standard, as a “proposal,” “proposal package,” or “proposals.” See Ex. 1023, 1; Ex. 1010, 3; Ex. 1029, 14.

Ex. 1010, 3. Petitioner alleges further evidence that subsequent MPEG/Audio group meeting reports indicate that proposals to the group should include a “level of detail **sufficient for others to reproduce the results** will be required in October 1989.” Pet. 13 (citing Ex. 1023, 1).

Petitioner argues that

[a]ccordingly, MUSICAM was dated in October 1989, submitted and then presented to dozens of parties – without any evidence of an NDA or other confidentiality agreement – and those parties were free to take MUSICAM with them back to their own companies so that they could attempt to “reproduce the results.”

Pet. 14 (citing Ex. 1026; Ex. 1028, 7; Ex. 1023, 1; Ex. 1004 ¶ 78).

Additionally, Petitioner cites to evidence purportedly indicating that the working group had a procedure for circulating a non-disclosure agreement but that no submissions or proposals were subjected to this procedure. *Id.* Also, Petitioner notes that an updated version of MUSICAM was provided at a working group meeting in December 1989 and formally catalogued on December 28, 1989. Pet. 15 (citing Ex. 1027; Ex. 1004 ¶¶ 77–78).

According to Petitioner, given the above evidence, the facts that purportedly prove MUSICAM is a printed publication are that MUSICAM was:

- Promised in May of 1989 to be provided by October of 1989 so that others could reproduce the results [Ex. 1023 at 1; Ex. 1010 at 3–4]
- Provided and then described in October 1989 and December 1989 to over 30 individuals [Ex. 1026; Ex. 1029 at 1, 7, 16–17]
- Cataloged as MPEG document number 89-206 [Ex. 1026, Ex. 1029 at 14]

- Labeled with a copyright date of October 11, 1989 [Ex. 1026]
- Revised and re-distributed by the end of December 1989 [Ex. 1027]
- Freely available to any member of the MPEG/Audio group, without any member being subject to confidentiality or non-disclosure obligations [Ex. 1029 at 15; Ex. 1025 at 2]

Pet. 15–16. We address each of these asserted facts below.

The MPEG/Audio group meeting report of May 1989 (Ex. 1023) refers to, *inter alia*, a time line for meetings and submitting proposals to the working group and the level of detail necessary for a proposal, i.e., items and information the group believed necessary to appropriately evaluate any proposal. Ex. 1023, 1. The report indicates that detailed proposals “will be required in October 1989,” and as discussed above, be sufficiently detailed “for others to reproduce the results.” *Id.* This evidence is helpful as an initial matter to understand that the working group required essentially full disclosure of algorithms and hardware implementations to develop the standard. Petitioner, however, does not explain sufficiently how this fact leads to the conclusion that the proposals as submitted to the working group were publicly available. The working group’s stated desire, or requirement, for reproducible information and a certain level of detail in proposal documents, such as MUSICAM, certainly facilitates the efforts of the working group, but does not inform us as to whether these proposals were freely available to the interested public, or on the contrary, maintained with some level of confidentiality. Petitioner appears to infer that the high level of detail and disclosure in the proposals indicates that documents such as MUSICAM were intended to be shared openly and publicly. Pet. 13–14. On the other hand, it is at least as likely that the level of detail and

information provided in the proposals, so that group members could reproduce the results, was provided by submitting members due to some level of confidentiality afforded such documents within the working group. For example, as discussed in further detail below, the meeting records of the MPEG/Audio group expressly state that submitted information and proposals were restricted to the members of the MPEG/Audio group. Ex. 1029, 15. The level of detail and disclosure in the proposals, as requested by the working group does not, therefore, persuade us that such documents were publicly available to any interested person upon submission to the MPEG/Audio group.

We are also not persuaded by the fact that these detailed and reproducible proposals were disseminated “to over 30 individuals” indicates that such documents were publicly available. Pet. 16. The 30 or so listed individuals that participated in the working group meeting on October 18–20, 1989 are apparently members of the MPEG/Audio working group, and Petitioner has not alleged that any were not. Ex. 1029, 16–17. Indeed, as recorded in the written meeting report (Ex. 1029), the listed individuals who attended this meeting were reminded during the meeting “that the distribution of the detailed descriptions of algorithms is restricted to the MPEG/Audio group and therefore, nobody is allowed to distribute these documents outside the MPEG/Audio group.” *Id.* at 15.

A first version of MUSICAM was submitted to the MPEG/Audio group as a proposal at the October 18–20, 1989 working group meeting and was provided with a copyright notice as reproduced below:

1989-10-11 (C) CCETT, IRT, PHILIPS

Ex. 1026, 4. The copyright notice, illustrated above, includes the date of October 11, 1989 and the submitting development group CCETT, IRT, and Philips. *Id.*; Ex. 1029, 14. There were other proposals submitted at this meeting as well, and MUSICAM was further designated as document MPEG 89/206 and dated October 18, 1989 as submitted to the working group.

Ex. 1026, 1. Petitioner does not explain, however, why the copyright notice and the working group document designation are evidence of public disclosure and availability. A copyright notice may be placed on a document regardless of its level of confidentiality or disclosure, and the evidentiary weight of the notice is statutorily defined as specifically applicable to defense of copyright infringement. *See* 17 U.S.C. § 401(d). Here, the fact that the authors attached a copyright notice to MUSICAM and the working group designated the document with a specific paper number is not, without more, persuasive evidence of public disclosure and availability of MUSICAM as of any particular date.

We also are not persuaded that the revision of MUSICAM submitted on December 28, 1989 to the MPEG/Audio group is an indication of public disclosure and availability.⁷ Ex. 1027, 1. MUSICAM and its coding algorithm apparently were revised in light of certain guidelines discussed at the October 18–20, 1989 working group meeting. The meeting report states

⁷ MPEG 89/206 as submitted on October 18, 1989 was titled “Universal Subband Coding,” not MUSICAM. Ex. 1026, 1. The revised version of MPEG 89/206 submitted December 28, 1989 was titled “MUSICAM.” Ex. 1027, 1. As do the parties, we refer to both documents as MUSICAM and where necessary differentiate between the two documents according to their respective submission dates to the working group. *See* Pet. 13–14; Prelim. Resp. 18–19.

that “[e]very algorithm proposer should – if necessary – revise his detailed description in such a way that it matches the guideline.” Ex. 1029, 15. Subsequently, the revised version of MUSICAM was submitted to the working group December 28, 1989. Ex. 1027, 1. Petitioner has not explained why the revised submission on December 28th, provides any more evidence than does the October 18th submission, that MUSICAM was disseminated outside of the MPEG/Audio group or made available to the interested public. Petitioner argues that the December 28th submission is corroborated by Professor Musmann at the University of Hanover, but this fact does not provide any evidence of disclosure outside the working group because Professor Musmann is listed as an MPEG/Audio group member in the October 18–20, 1989 meeting report. See Ex. 1029, 16. Professor Musmann is in fact designated as the Chairman of the MPEG/Audio group. *Id.* at 1.

Petitioner alleges that MUSICAM was “[f]reely available to any member of the MPEG/Audio group, without any member being subject to confidentiality or non-disclosure obligations.” Pet. 16. This asserted fact by Petitioner is not, in our review of the record, entirely accurate. First, there was an obligation, or at least an expectation, of non-disclosure within the working group. The meeting report from October 18–20, 1989 states clearly that “[t]he chairman reminded all participants that the distribution of the detailed descriptions of algorithms is restricted to the MPEG/Audio group and therefore, nobody is allowed to distribute these documents outside the MPEG/Audio group.” Ex. 1029, 15. Professor Musmann, the Chairman of the MPEG/Audio group, not only reminded the participants at the meeting, but additionally, his warning to not distribute the proposal documents

outside the working group is explicitly reiterated in the written meeting report. *Id.* Indeed, Professor Musmann stated in subsequent correspondence that once given a MPEG document number, “documents identified in this way were only accessible to the members of the MPEG standardization group.” Ex. 2004.

We agree with Petitioner that there is no evidence of any member of the MPEG/Audio group submitting, or signing a confidentiality or non-disclosure agreement. Pet. 14. This fact, either alone or in combination with those discussed above, is not persuasive because obligations of non-disclosure and non-dissemination can arise apart from specific written and executed agreements. *Cordis Corp. v. Boston Sci. Corp.*, 561 F.3d 1319, 1333–34 (Fed. Cir. 2009) (“‘[W]here professional and behavioral norms entitle a party to a reasonable expectation’ that information will not be copied or further distributed, ‘we are more reluctant to find something a ‘printed publication.’” (quoting *Klopfenstein*, 380 F.3d at 1351)). The Federal Circuit has not required explicit written agreements to affirm a finding that disclosed material was not a printed publication. *See N. Telecom, Inc. v. Datapoint Corp.*, 908 F.2d 931, 936 (Fed. Cir. 1990).

We also are not persuaded by Petitioner’s assertion that the working group’s discussion, at a meeting in July 1989, with respect to additional safeguards of written non-disclosure agreements, means that documents or proposals without such written agreements were free to be distributed outside the MPEG/Audio group. *See* Pet. 14–15 (citing Ex. 1025, 2). First, the meeting report from July 4–6, 1989 states that the MPEG/Audio group agreed that “[d]etailed descriptions of algorithms and software should not be disseminated.” Ex. 1025, 2. In the context of the meeting report, and

membership in the MPEG/Audio group, a reasonable reading of this admonition is that the detailed descriptions should not be disseminated outside the working group. Second, the July meeting report noted that discussion regarding the ISO's position on written non-disclosure agreements resolved into a recommendation that any non-disclosure forms or agreements that members believed necessary should be circulated early before the scheduled October 1989 meeting. *Id.* We discern no evidence in this July meeting report that documents or proposals submitted to the working group must be subject to a written non-disclosure or confidentiality agreement to preclude dissemination outside the working group. In fact, we understand the opposite. What we apprehend, in the context of the report from the July meeting, is that the MPEG/Audio group members were discussing, and in effect balancing, the factors of: (1) sufficient disclosure of information under the group's own self-regulated restrictions on dissemination and disclosure so that a standard could be effectively determined by the working group; with (2) an individual's, or perhaps a company's, concern to maintain its technology proprietary and undisclosed to all interested persons and the world at large. No further discussion of non-disclosure agreements, or evidence of submission of any non-disclosure documents, appears to have occurred following the July working group meeting.⁸ Contrary to Petitioner's assertion that "in July 1989, [] the parties

⁸ The Chairman of the MPEG/Audio group, Professor Musmann, posed two questions for potential discussion in the October 1989 meeting in regards to this balancing of factors:

- Are there regulations for non-disclosure agreements within the ISO?
- Is there any regulation for rejecting parties who insist on a non-disclosure agreement?

had agreed that anyone attempting to restrict dissemination of standards documents would need to circulate a non-disclosure agreement” (Pet. 14), we determine that a more reasonable understanding of this evidence is that the MPEG/Audio group and its constituent members were sufficiently assured that disclosure of documents including algorithms, and software and hardware implementations for audio coding would be maintained within the working group membership and not disseminated to parties outside the MPEG/Audio group. *See* Ex. 1010, 3; Ex. 1025, 2 (July 1989 meeting report admonishing members that “[d]etailed descriptions of algorithms and software should not be disseminated”); Ex. 1029, 15 (October 1989 meeting report reminding working group members that “distribution of the detailed descriptions of algorithms is restricted to the MPEG/Audio group and therefore, nobody is allowed to distribute these documents outside the MPEG/Audio group”).

Turning to Petitioner’s assertion based on the meeting reports that the members of the MPEG/Audio group “were free to take the reference back to their company so that they could attempt to recreate the results,” we are not apprised by any evidence that MUSICAM was ever disseminated outside the working group. Pet. 17. As explained by Petitioner’s expert, Dr. Jayant, group members “were free to take the information discussed at the MPEG meetings and disclosed in the various documents back to their companies so that they could use them to develop their proposals.” Ex. 1004 ¶ 78.

Dr. Jayant also testified “that those of us in the working group would have the freedom to discuss the concepts from the working group with our

Ex. 1025, 2. No answers or further discussions as to these questions are noted in the meeting report from October 1989. Ex. 1029.

colleagues who were not in attendance and/or not part of the working group.” *Id.* ¶ 68. Tellingly, Dr. Jayant does not state that the members could freely *disseminate* or otherwise distribute the MUSICAM reference or any other documents from the working group to anyone not a member of the working group. Dr. Jayant testifies merely that as a member, he had “freedom to discuss the concepts.” *Id.* Neither Dr. Jayant nor Petitioner point to any evidence that persuades us that members disseminated MUSICAM or any other reference or document, even once, to any party outside the working group.⁹ See Pet. 10–19, Ex. 1004 ¶¶ 65–78. It appears to the contrary, that Dr. Jayant treated MUSICAM and any other reference including detailed descriptions of algorithms and related software and hardware with confidential deference consistent with the working group’s agreement to restrict access to MPEG/Audio group members. See Ex. 1029, 15.

We are unpersuaded also that the facts here comport with those in *Massachusetts Institute of Technology v. AB Fortia*, 774 F.2d 1104, 1109 (Fed. Cir. 1985), as Petitioner contends. Pet. 17–18. In *Massachusetts Institute of Technology*, the Federal Circuit determined a contested reference was prior art where Dr. David Levine, a researcher in cell culturing at Massachusetts Institute of Technology, gave a copy of his paper (“the Birmingham paper”) to the head of the conference at which Dr. Levine

⁹ We note that the written report from the October 1989 meeting specifically permitted dissemination of a single reference, “[t]he list of agreed test sequences (document MPEG 89/166), which contains the exact source informations, [sic] can be distributed without restrictions.” Ex. 1029, 16. We find no such evidence, nor does Petitioner point to any, that such permissions were applied to MUSICAM or any other reference.

presented the paper, and “[a]fterward, copies were distributed on request, without any restrictions, to as many as six persons, more than one year before the filing date of the [] patents.” *Id.* at 1108–09. In *Cooper Cameron Corp. v. Kvaerner Oilfield Products*, 291 F.3d 1317 (Fed. Cir. 2002), which Petitioner cites also in support of its position that MUSICAM is a printed publication, the Federal Circuit was not persuaded that “a single confidentiality notice relating to financial information on the fourth page of its 130 pages,” rendered the documents inaccessible as prior art where employees averred that the documents were not considered confidential and were distributed to outside parties and contractors. *Id.* at 1324. In both cases that Petitioner relies on, there was substantial evidence that no restrictions were placed on dissemination of the papers and documents, and further that the papers and documents were in fact freely distributed outside of the scientific conference in *Massachusetts Institute of Technology*, and distributed to entities beyond the joint venture members in *Cooper Cameron Corp.*

The facts presented here are different. The MPEG/Audio group through its Chairman and written meeting reports consistently cautioned the working group members that the proposals and related information were restricted to MPEG/Audio group membership and were not to be disseminated beyond the group. *See* Ex. 1025, 2; Ex. 1029, 15. Indeed, no evidence of dissemination outside of the working group has been presented by Petitioner. The facts as presented here align more appropriately with our colleagues’ Decision in *Samsung Electronics Co. v. Rembrandt Wireless Technologies, LP*, Case IPR2014-00514 (PTAB Sept. 9, 2014) (Paper 18). In *Samsung*, the Board determined that although non-members could attend

meetings of the IEEE 802.11 working group and provide an email address to the chair of the working group to receive information and a password to access the documents on an open server, that the Standard Draft was not publicly available. *Id.* at 6–10. The Board explained that there was no evidence that the potentially interested public, or anyone outside the 802.11 working group, would have been made aware of the meetings or known to contact the chair to be added to the email list and hence access the Standard Draft on the open server. *Id.* at 9. In light of the dearth of evidence suggesting public availability, the Board determined that the Standard Draft was therefore not a printed publication. *Id.* at 9–10.

Moreover, in *Samsung* the Board noted “the fact that an interested individual needed to contact IEEE in order to obtain a password or other means of accessing Draft Standard (and needed to know who to contact in the first place) weighs against public accessibility.” *Id.* at 9. Similarly, in the present case although the MPEG/Audio group was not a “closed” group, i.e., new members could be added, there was a protocol for defining members of the working group to whom documents would be provided and the protocol was generally known only to those in the working group. *See* Ex. 1010, 3. Even more compelling than in *Samsung*, in the present case we are not apprised of any evidence that MUSICAM or other reference documents were available to anyone via the internet or posted on an open, or even a secure, server of any type.

The evidence, particularly the working group’s written meeting reports, in this proceeding is persuasive that access to references such as MUSICAM and other algorithm informational documents beyond the working group was restricted. The evidence of individual member behavior,

such as Professor Musmann and Dr. Jayant, also shows consistent conduct of the individual members of the MPEG/Audio group not disseminating such documents. Also weighing in favor of MUSICAM not being a printed publication is the lack of any evidence that it was ever accessed or even available to anyone outside the working group. Altogether, the evidence weighs in favor of finding MUSICAM is not a printed publication.

Therefore, based on the evidence Petitioner provided, we conclude Petitioner has not made a sufficient showing that MUSICAM was a printed publication as of December 28, 1989 or earlier, available to an interested individual in MPEG audio coding upon the exercise of reasonable diligence.

4. Asserted Grounds of Unpatentability

Because Petitioner has not met its burden in establishing that MUSICAM is a “printed publication,” and thus, prior art, Petitioner has not shown a reasonable likelihood of prevailing on the ground asserted.

IV. SUMMARY

For the foregoing reasons, we determine that the information presented in the Petition fails to establish a reasonable likelihood that Petitioner would prevail on the alleged ground of unpatentability with respect to each of claims 1–22 of the ’829 patent.

V. ORDER

For the reasons given, it is

ORDERED that no trial is instituted as to any of the challenged claims.

IPR2015-01506
Patent 5,539,829

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