

BLUE CALYPSO, LLC. v. GROUPON, INC., Appeal Nos. 2015-1399, 2015-1401 (Fed. Cir. March 1, 2016). Before Reyna, Schall, and Chen. Appealed from Patent Trial and Appeal Board.

Background:

Groupon filed petitions for review of five of Blue Calypso's patents directed to a peer-to-peer advertising system under the transitional program for covered business method patents. The PTAB granted the petitions and found various claims of Blue Calypso's patents unpatentable under 35 U.S.C. §102 and §112. In its decision, the PTAB rejected Groupon's arguments that additional claims were unpatentable as anticipated or obvious in light of a report published on a webpage by a graduate student, now Dr. Ratsimor, at the University of Maryland Baltimore County Department of Computer Science and Electrical Engineering. The PTAB found that Groupon failed to carry its burden of establishing that the Ratsimor report was sufficiently publicly available to qualify as prior art. Blue Calypso appealed and Groupon cross-appealed, asserting that the PTAB erred in concluding that the Ratsimor report was not prior art.

Issue/Holding:

Did the PTAB err in holding that the Ratsimor report was not sufficiently publicly accessible to constitute prior art? No, affirmed.

Discussion:

The Federal Circuit agreed with the PTAB that Groupon failed to prove that an interested party exercising reasonable diligence would have located the Ratsimor report, which was allegedly available via a hyperlink on Dr. Ratsimor's personal webpage prior to the critical date of Blue Calypso's patents. In its opinion, the Federal Circuit opined that Groupon failed to point to any evidence demonstrating that the Ratsimor report was viewed or downloaded or any evidence that a person interested in the relevant technical field would be independently aware of Dr. Ratsimor's personal webpage or its web address.

The Federal Circuit further emphasized the role of indexing in evaluating whether a reference is publicly accessible, regardless of whether the reference is in a library or published online. The Federal Circuit opined that indexing by subject matter, through search engines or otherwise, provides meaningful assurance that one of ordinary skill in the art, exercising reasonable diligence, would be able to locate a particular reference. The Federal Circuit held that Groupon's argument that an internet search engine would have been able to locate the Ratsimor report is insufficient to establish that Dr. Ratsimor's webpage was sufficiently indexed and therefore findable by a search engine. The Federal Circuit found that the record was devoid of any evidence that the Ratsimor report would have appeared in search results from a search engine query using any combination of search words before the critical date.

Although the Federal Circuit agreed that a "research aid" can be used to establish public accessibility, the Federal Circuit disagreed that an article published by Dr. Ratsimor and several of the same co-authors would have led the ordinarily skilled artisan to the Ratsimor report because the published article did not include a citation to the Ratsimor report and even if the published article would have led a reader to the UMBC Department website, there is no evidence that it would have led a reader to Dr. Ratsimor's personal website.