ACCELERATION BAY, LLC v. ACTIVISION BLIZZARD INC., Appeal No. 2017-2084 (Fed. Cir. November 6, 2018) (Prost, Moore, and Reyna) Appealed from the U.S. Patent and Trademark Office.

Background:

Blizzard filed six inter partes review (IPR) petitions based on two patents directed to a broadcast technique in which a broadcast channel overlays a point-to-point communications network. The Board issued final written decisions in all of the IPRs finding several claims unpatentable and that Lin is not a printed publication under §102(a). Acceleration appealed the Board's claim construction, and Blizzard cross appealed the Board's finding that Lin is not a printed publication.

Issues/Holdings:

Did the Board err in not giving patentable weight to the terms "game environment" and "information delivery service"? No, affirmed.

Did the Board err in concluding that Lin is not a printed publication under §102(a)? No, affirmed.

Discussion:

First, the Federal Circuit affirmed the Board's decision not to give patentable weight to the terms "game environment" and "information delivery service." The court noted that a preamble limits the invention if it recites essential structure or is necessary to give life to the claim, but is not limiting when the claim body is structurally complete and the preamble merely recites an intended use. Acceleration's claims do not have a transition phrase denoting a preamble, and as a result, the extent of the preambles with respect to the claims was subject to the Board's discretion. The court agreed with the Board that the terms fall within the preamble and noted that poor claim drafting is not an excuse to infuse confusion into claim scope. The court then agreed with the Board that, because the terms are located in preambles of claims and merely state an intended use, the terms are not to be given patentable weight.

Second, the Federal Circuit affirmed the Board's holding that Lin is not a printed publication despite Lin being indexed. The court noted that public accessibility requires more than technical accessibility. The court distinguished the current case from *Lister*, which also included a database of references. However, the references in *Lister* were searchable by title, which made the references publicly accessible. In contrast to *Lister*, the court found that, despite some indexing and search functionality on a website, Lin is not publicly accessible because the search functionality is limited to merely author's names or year of publication.