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Published Application Art at the PTAB: *Lynk Labs v. Samsung Electronics, Co., Ltd.*

In *Lynk Labs, Inc., v. Samsung Electronics Co., Ltd.*, the Federal Circuit reinforced that patent applications may serve as prior art in IPR proceedings as of their filing date—even where those applications were not published until after the priority date of the challenged patent.

PTAB Background

In an IPR initiated by Samsung, the PTAB invalidated 10 of Lynk Labs's '400 patent's claims as obvious over US Patent Application Publication No. 2004/0206970 (Martin). Martin was filed on April 16, 2003 (before the '400 patent's priority date) and was published on October 21, 2004 (after the '400 patent's priority date).

Lynk Labs appealed, arguing to the Federal Circuit that Martin was not a proper prior art reference because it was not publicly available until after the '400 patent's priority date. The Federal Circuit disagreed and affirmed the PTAB's ruling of unpatentability.

Federal Circuit Analysis

1. Public Availability

Lynk Labs first argued that the Martin application was not a proper “printed publication” prior art reference. Under [35 U.S.C. § 311\(b\)](#), IPRs may only rely on “prior art consisting of patents or printed publications.” Lynk Labs conceded that Martin is a printed publication but “argue[d] that Martin is not a *prior art* printed publication.” Slip Op. at 6. In support, Lynk Labs cited case law directed to prior art under §§ 102(a) and (b) that was argued as requiring such art to be “sufficiently accessible to the public interested in the art before the critical date.” Id. at 7 (quoting *Voter Verified, Inc. v. Premier Election Sols., Inc.*, [698 F.3d 1374](#), 1380 (Fed. Cir. 2012)).

But the court held that § 102(e)(1) sets forth a “special rule” for published patent applications like Martin. Under that section, “a person shall be entitled to a patent unless . . . the invention was described in an *application for patent, published under [35 U.S.C. § 122\(b\)](#), by another filed in the United States before the invention* by the applicant for patent” (emphasis added). So § 102(e)(1)'s plain language means that a US patent application “filed . . . before” the challenged patent's priority date is prior art to that patent, regardless of the application's publication date. In other words, only the application's filing date—not its publication date—is relevant to its status as prior art.

The court also noted that § 102(e)(2)—which includes as prior art “a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent”—contemplates a prior art patent application that does “not become a patent until after the challenged patent's priority date.” Slip Op. at 9 (citing *Becton, Dickinson & Co. v. Baxter Corp. Englewood*, 998 F.3d 1337, 1345 n.7 (“The Supreme Court's

decision in *Hazeltine Research, Inc. v. Brenner* . . . forecloses” an argument that prior art under 102(e) must be publicly available as of the claimed invention’s priority date)); see *Hazeltine*, 382 U.S. 252, 254-56 (1965) (holding that a prior-filed but not-yet public patent application was prior art under § 102(e)(2) because the applicant “had done what he could to add his disclosures to the prior art” upon filing, and the “delays of the patent office ought not to cut down the effect of what has been done”) (quoting *Alexander Milburn Co. v. Davis-Bournonville Co.*, 270 U.S. 390 (1926) (Holmes, J.)).

2. Exclusion of Patent Applications Under § 311 (b)

Lynk Labs also argued that Congress’s use of the term “printed publication” in § 311(b) carried “old soil” case law into the PTAB. That case law generally holds that i) patent applications are not printed publications and ii) printed publications must be publicly accessible before the patent priority date. According to Lynk Labs, therefore, § 311(b) either excludes patent applications as prior art altogether or requires that such applications be published before the challenged patent’s priority date.

But as Judge Prost’s opinion points out, much of Lynk Labs’s “old soil” is no longer fertile; most of the case law cited by Lynk Labs is from before 1999, when the PTO began publishing patent applications 18 months after filing. See Slip Op. at 14 (citing [35 U.S.C. § 122\(b\)\(1\)\(A\)](#)).

And although the court agreed with Lynk Labs that “printed publications” must be publicly accessible to qualify as prior art, it disagreed that the term “printed publication” has “its own, specific baked-in temporal requirement” of pre-priority public accessibility. Otherwise, the court reasoned, the distinct temporal requirements of § 102(a) (“before the invention”) and 102(b) (more than one year prior to the date of the patent application”) would be “confusing, redundant, or both.” Slip Op. at 16-17.

Takeaways

Whether *Lynk Labs* is good law in the AIA context is an open question. Given the similarities between AIA § 102(a)(2) and pre-AIA § 102(e)(1), however, AIA patent owners should be prepared for IPRs based on pre-priority patent applications. Compare § 102(a)(2) (“the claimed invention was described . . . in an application . . . effectively filed before the effective filing date of the claimed invention.”), with pre-AIA § 102(e)(1) (“the invention was described in an application . . . filed in the United States before the invention by the applicant for patent.”). Where those IPRs include § 103 challenges, lack of motivation to combine may be a strong defense.