



THINK FORWARD

Twitter, Inc. v. Vidstream LLC, No. 19-1708 (Fed. Cir. 2020)

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Petitioner Must Prove What a Reference "Fairly Suggests" by a Preponderance of the Evidence

On September 3, 2020, the Federal Circuit, in a non-precedential decision in *Twitter, Inc. v. Vidstream LLC*, No. 19-1708 (Fed. Cir. 2020), offered clarity regarding the evidentiary standard for proving what a prior art reference "fairly suggests" before the Patent Trial and Appeal Board ("Board").

Under Federal Circuit precedent, the Board's obviousness analysis must consider a prior art reference "not only for what it expressly teaches, but also for what it fairly suggests." *Bradium Techs. LLC v. Iancu*, 923 F.3d 1032, 1049 (Fed. Cir. 2019) (quoting *In re Baird*, 16 F.3d 380, 383 (Fed. Cir. 1994)).

Here, Twitter argued on appeal that the Board considered only what the prior art reference (an article referred to as "Lahti") expressly teaches, and not what it would suggest to a person of skill in the art. Twitter argued that the Board had found that Lahti's disclosed device could have operated in one of two ways, both of which were equally possible, and one of which satisfied the disputed limitation. Twitter contended, therefore, that the reference **would** have fairly suggested the disputed limitation and that the Board erred when finding otherwise. Disagreeing, the Federal Circuit found that the Board had made no such "equally possible" finding, and that Twitter had misapprehended the evidentiary standard for proving unpatentability at the Board.

The Federal Circuit explained that, while the Board found that Lahti **could** disclose the limitation, it correctly held that this was insufficient to demonstrate that Lahti discloses or suggests the limitation to a person of skill in the art. Rejecting Twitter's arguments, the Federal Circuit held that "it is the petitioner's burden to establish the scope and content of a prior art reference by a preponderance of the evidence," showing that the fact to be proven is more probable than not. Accordingly, Twitter bore the burden of establishing that it was more probable than not that Lahti fairly teaches or suggests to a skilled artisan the disputed limitation. Thus, the Board applied the correct standard when it found that a suggestion that Lahti **could** operate a certain way (and disclose the disputed limitation) does not fairly suggest to a skilled artisan that it **would** operate in such a way.

Key Takeaways

Although this is a non-precedential decision, it contains useful takeaways for petitioners and patent owners alike. Namely, this decision clarifies the "goal posts" for proving what a reference fairly suggests in connection with an obviousness challenge. Both parties will need to properly understand this evidentiary standard to effectively prove, or dispute, that the petitioner has met its burden.