



# THINK FORWARD

## Update: Is it Accessible? Internet Publications As CBM Prior Art

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On March 1, 2016, the Federal Circuit, in *Blue Calypso, LLC v. Groupon, Inc.* (Appeal Nos. 15-1391, -1393, and -1394), ruled that a document posted on a webpage did not qualify as prior art under the printed publication provision of 35 U.S.C. § 102(b). The Court's decision provides guidance on the evidence required to show that a webpage is publicly accessible and qualifies as a printed publication.

There are at least three options for showing public accessibility for webpages on the Internet: (1) evidence that the reference was actively distributed to the public or actually retrieved by members of the public, (2) evidence that the prior art was indexed, and (3) the presence of a research aid. The Federal Circuit addressed options 2 and 3 in its opinion.

### Indexing

Some references are indexed by default, such as when a particular online publication is well-known to the community interested in the subject matter of the reference. In those instances, the online journal is considered publicly accessible, regardless of whether a search engine has indexed the article. If, however, an online document or webpage is not well-known, then evidence is required to show that a query of a search engine before the critical date would have led to the reference appearing in the search results. In this case, such evidence was lacking. As a result, the Federal Circuit affirmed the PTAB's determination that an interested party exercising reasonable diligence would not have located the webpage and that it did not qualify as § 102(b) art under the indexing analysis.

### Research Aids

A research aid is a printed publication that can point to the potentially invalidating reference at issue and therefore render it a printed publication. A research aid "need not give turn-by-turn directions, but should at least provide enough details from which we can determine that an interested party is reasonably certain to arrive at the destination: the potentially invalidating reference." An explicit citation to the potentially invalidating reference in the research aid would provide sufficient guidance. Also, an issued patent automatically serves as a research aid to its accompanying application, regardless of any explicit citations. In the present case, however, the Federal Circuit found the path between the asserted research aid and the webpage at issue to be too tenuous.

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