

Appeal Nos. 2022-1751 and 2022-1813

United States Court of Appeals

for the

Federal Circuit

WEBER, INC.,

Appellant,

– v. –

PROVISUR TECHNOLOGIES, INC.,

Appellee.

APPEALS FROM THE UNITED STATES PATENT AND
TRADEMARK OFFICE, PATENT TRIAL AND APPEAL BOARD IN
NOS. IPR2020-01557 AND IPR2020-01556

PROVISUR TECHNOLOGIES, INC.’S PETITION FOR REHEARING EN BANC

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February 23, 2024

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 2022-1751,2022-1813

Short Case Caption Weber, Inc. v. Provisur Technologies, Inc.

Filing Party/Entity Provisur Technologies, Inc.

Instructions:

1. Complete each section of the form and select none or N/A if appropriate.
2. Please enter only one item per box; attach additional pages as needed, and check the box to indicate such pages are attached.
3. In answering Sections 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance.
4. Please do not duplicate entries within Section 5.
5. Counsel must file an amended Certificate of Interest within seven days after any information on this form changes. Fed. Cir. R. 47.4(c).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 02/23/2024

Signature: /s/ Craig C. Martin

Name: Craig C. Martin

<p>1. Represented Entities. Fed. Cir. R. 47.4(a)(1).</p>	<p>2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).</p>	<p>3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> <p><input type="checkbox"/> None/Not Applicable</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> <p><input type="checkbox"/> None/Not Applicable</p>
<p>Provisur Technologies, Inc.</p>		<p>Provisur S LLC</p>

Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable Additional pages attached

Henry C. Thomas Willkie Farr & Gallagher LLP	Mitchell M. Feldhake Willkie Farr & Gallagher LLP	

5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

Yes (file separate notice; see below) No N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable Additional pages attached

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

NOTICE OF RELATED CASE INFORMATION

Case Number 2022-1751,2022-1813

Short Case Caption Weber, Inc. v. Provisur Technologies, Inc.

Filing Party/Entity Provisur Technologies, Inc.

Instructions: Do not duplicate information. The notice must only be filed at the time of filing the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. *See* Fed. Cir. R. 47.5(b). Attach additional pages as needed. This notice must not be included in a motion, petition, related response, or brief; please only include the Certificate of Interest (Form 9) in those documents.

1. **Related or prior cases.** Provide the case title, case number, and originating tribunal for each case. Fed. Cir. R. 47.5(b)(1).

Provisur Technologies, Inc. v. Weber, Inc., No. 5:19-cv-06021 (W.D. Mo.)
Provisur Technologies, Inc. v. Weber, Inc., No. 5:20-cv-06069 (W.D. Mo.)
Provisur Technologies, Inc. v. Weber, Inc., No. 5:21-cv-06113 (W.D. Mo.)
Provisur Technologies, Inc. v. Weber, Inc., No. 23-1438 (Fed. Cir.)

Additional pages attached

2. **Names of all parties involved in the cases listed above.** Do not duplicate the names of parties. Do not relist the case information. Fed. Cir. R. 47.5(b)(2)(A).

Provisur Technologies, Inc.,
Weber, Inc.,
Weber Maschinenbau GmbH Breidenbach,
Weber Maschinenbau GmbH Neubrandenburg,
Textor, Inc.,
Textor Maschinenbau GmbH,

Additional pages attached

3. **Names of all law firms, partners, and associates in the cases listed above.** Do not duplicate the names of law firms, partners, and associates. Do not relist case information and party names. Fed. Cir. R. 47.5(b)(2)(B).

Willkie Farr & Gallagher LLP, LLP: Craig C. Martin, Michael G. Babbitt, Sara T. Horton, Heather M. Schneider, Ren-How H. Harn, Aaron J. Hersh, Henry C. Thomas, Mitchell Feldhake, Samuel J. Gamer, Adrianna Morton;
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Sterne Kessler, Goldstein & Fox, P.L.L.C.: Daniel E. Yonan, Donald Banowitz, Deirdre M. Welles, Danieli S. Block, Kyle E. Conklin, Kristina C. Kelly, Jonathan Tuminaro

Additional pages attached

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 02/23/2024

Signature: /s/ Craig C. Martin

Name: Craig C. Martin

Appendix A

3. Names of all law firms, partners, and associates in the cases listed above. Do not duplicate the names of law firms, partners, and associates. Do not relist case information and party names. Fed. Cir. R. 47.5(b)(2)(B).

Law Firm	Partners/Associates
Sterne, Kessler, Goldstein & Fox, P.L.L.C:	Paige Cloud Steven Pappas Tyler J. Dutton Brooke McLain
Erise IP, P.A	Adam P. Seitz Eric A. Buresh Megan Redmond Carrie Bader Hunter A. Horton Christina Canino

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FEDERAL CIRCUIT RULE 35(B)(2) STATEMENT

Based on my professional judgment, I believe the panel decision is contrary to the following precedents of this Court:

In re NTP, Inc., 654 F.3d 1279 (Fed. Cir. 2011); *In re Klopfenstein*, 380 F.3d 1345, 1358 (Fed. Cir. 2004); *Elbit Sys. of Am., LLC v. Thales Visionix, Inc.*, 881 F.3d 1354 (Fed. Cir. 2018); *VidStream LLC v. Twitter, Inc.*, 981 F.3d 1060 (Fed. Cir. 2020); *Jazz Pharm., Inc. v. Amneal Pharm., LLC*, 895 F.3d 134 (Fed. Cir. 2018); *Samsung Electronics Co. v. Infobridge Pte. Ltd.*, 929 F.3d 1363 (Fed. Cir. 2019); *Cordis Corp. v. Boston Sci. Corp.*, 561 F.3d 1319 (Fed. Cir. 2009); *Northern Telecom, Inc. v. Datapoint Corp.*, 908 F.2d 931 (Fed. Cir. 1990).

Further, based on my professional judgment, I believe this appeal requires an answer to the following two precedent-setting questions of exceptional importance:

1. Does the Panel's precedential decision articulate a new bright-line rule for determining whether a reference is a publicly accessible printed publication eligible to be used in an IPR under 35 U.S.C. § 311 that conflicts with this Court's prior precedent requiring a careful case by case assessment of all facts and circumstances related to the reference's disclosure?
2. In evaluating whether substantial evidence supports the Board's factual determination that a printed publication is publicly accessible, is the Panel permitted to engage in its own fact-finding, identify contrary facts in the record, and re-weigh evidence without deference to the Board's factual findings and credibility determinations?

February 23, 2024

Respectfully submitted

/s/ Craig C. Martin

I. INTRODUCTION

En banc review is warranted here because the Panel’s decision uproots this Court’s law of printed publications and appellate review. First, the Panel effectively re-wrote the rule requiring the PTAB to conduct a fact-specific, case-by-case analysis to determine whether a reference is a publicly accessible printed publication eligible to be used in an IPR under 35 U.S.C. § 311. Instead, the Panel effectively adopted a new bright-line rule that permits a Petitioner to bypass its evidentiary burden through self-serving declarations and say-so.

Second, the Panel misapplied the substantial evidence standard in its review of the Board’s ultimate factual determinations regarding public accessibility. Here, there is ample record evidence supporting the Board’s conclusion. But rather than defer to the Board’s fact finding, the Panel identified evidence contrary to the Board’s determination, credited testimony that the Board had analyzed and rejected, re-weighed the evidence and ultimately re-adjudicated witness credibility without deference to the Board as the trier of fact.

The Panel’s decision deprives litigants of clarity on the test for determining public accessibility. It also converts the deferential substantial evidence standard into no standard at all—substituting this Court for the Board as the trier of fact. If allowed to stand, the decision will create substantial uncertainty to litigants and the IPR process as a whole, as litigants will be left questioning what, if any, factual

determinations by the PTAB will be left to stand on appeal. These two errors raise exceptionally important questions for the full Court to address.

In its Final Written Decision, the Board found that Weber failed to establish that its 904 Operating Manual was publicly accessible, and thus concluded that it did not constitute a printed publication that could be asserted as prior art in IPR. The Board analyzed the totality of the circumstances under which Weber supposedly made the manual available and reached its determination based on detailed findings of fact, including the Board's assessment of the credibility of Weber's and Provisur's declarants. In particular, the Board found that Weber never distributed the manuals to interested parties upon request, and imposed confidentiality restrictions on the customers who actually received the manuals, consistent with an expectation of secrecy throughout the industry. The Board further found that the only way an interested party could obtain product documentation would be to buy the machinery—at prohibitive costs ranging from approximately \$450,000 to \$760,000. *See Appx29-38.*

Disregarding the Board's full factual analysis, the Panel reversed on the basis of self-serving declarations submitted by Weber's witnesses, which the Board had carefully considered and rejected. The Panel's analysis suggests a new test for assessing public accessibility—that a reference is publicly available merely if the Petitioner says it disseminated it, regardless of any other factors. (Slip. Op. at 10-

13.). This is contrary to this Court’s established law. Indeed, this Court has long required a fact intensive, case-by-case inquiry to determine whether a reference is a publicly accessible printed publication. *See, e.g. In re Klopfenstein*, 380 F.3d 1345, 1348-51 (Fed. Cir. 2004); *Jazz Pharms., Inc. v. Amneal Pharms., LLC*, 895 F.3d 1347, 1356 (Fed. Cir. 2018). But the Panel expressly bypassed that analysis and concluded the fact that “Weber employees testified that the operating manuals could be obtained either upon purchase of the Weber food slicer or upon request directed to a Weber employee” was sufficient proof to overturn the Board’s fact-intensive determination that the manuals were not publicly accessible. (Slip. Op. at 11-12.)

The Panel also failed to apply the proper standard of review—whether the Board’s factual findings were supported by substantial evidence. The record here is replete with evidence supporting the Board’s determination that the Weber manual was not publicly accessible. But rather than defer to the Board’s factual findings as the Panel is required to do under the substantial evidence standard, the Panel identified record evidence that was contrary to the Board’s conclusion, credited it where the Board did not, and ignored still other evidence relied on by the Board to reverse on appeal. For instance, the Board rejected Weber’s self-serving declarant testimony that the company would have shared the manuals upon request (but had never done so). But the Panel credited those same declarants to conclude the manuals could be obtained “upon request” to Weber, or at Weber’s (invitation-only)

trade show showrooms to buttress its finding of public availability. Under controlling case law, the Panel was required to defer to the Board's weighing of the evidence and witness credibility, not to reverse based on its identification of some evidence that cut against the Board's determination. *See Elbit Sys. of Am., LLC v. Thales Visionix, Inc.*, 881 F.3d 1354, 1357-58 (Fed. Cir. 2018); *In re NTP, Inc.*, 654 F.3d 1279, 1296-97 (Fed. Cir. 2011). The Panel's decision effectively establishes a *de novo* standard of review for fact findings on appeal, where a deferential one is required.

As set forth more fully below, each of these issues warrants rehearing *en banc*. The Panel's decision, if allowed to stand, will confuse the settled law of public accessibility and the appropriate standard of appellate review for IPRs. Moreover, the Panel's decision would effectively permit petitioners to assert any kind of product and machine prior art in IPR in violation of the statutory mandate to limit IPR to patents and printed publications. It risks inconsistent results and inefficiencies in co-pending IPR and district court proceedings inevitably addressing the same kind of product prior art, and further burdens the already complex law of estoppel.

This Court should affirm that the public accessibility inquiry demands the fact-intensive analysis undertaken by the Board but shortchanged by the Panel, and that the substantial evidence standard does not permit this Court to identify record

evidence contrary to the Board's determination, reweigh the evidence or second-guess the Board's fact-findings and credibility assessments.

II. THE PANEL APPLIED AN IMPROPER BRIGHT LINE RULE FOR DETERMINING PUBLIC ACCESSIBILITY THAT CONFLICTS WITH THIS COURT'S PRECEDENT.

A reference qualifies as a printed publication that may be used in IPR if it was “disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence, can locate it.” *NTP*, 654 F.3d at 1296 (quoting *Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1350 (Fed. Cir. 2008)). And, as this Court has long recognized, that “requires a case-by-case inquiry into the facts and circumstances surrounding the reference’s disclosure to members of the public.” *In re Klopfenstein*, 380 F.3d 1345, 1358 (Fed. Cir. 2004); *Jazz Pharms., Inc. v. Amneal Pharms., LLC*, 895 F.3d 1347, 1356 (Fed. Cir. 2018) (quoting *Klopfenstein*); *VidStream LLC v. Twitter, Inc.*, 981 F.3d 1060, 1065 (Fed. Cir. 2020) (same); *Samsung Electronics Co. v. Infobridge Pte. Ltd.*, 929 F.3d 1363, 1369 (Fed. Cir. 2019) (“Public accessibility depends on a careful, case-by-case examination of how a particular reference was disseminated, to whom, for how long, and under what circumstances.”); *Centripetal Networks, Inc. v. Cisco Sys, Inc.*, 847 Fed. App’x 869, 876-77 (Fed. Cir. 2021) (“In determining whether interested persons could have accessed the publication, we consider factors such as the expertise of the target

audience, the avenues of distribution [], the duration of dissemination, and expectations of confidentiality or restrictions on recipients' sharing of the information.”). Ignoring this well-established test, the Panel instead reversed, finding public accessibility because Weber's declarants testified that the manuals were available notwithstanding any other factors such as confidentiality, industry expectations, or cost. The Panel's application of a new test requires *en banc* review.

The Board's determination that the manual was not publicly accessible was the result of exactly the kind of fact intensive inquiry required by the case law, relying on exactly the kind of evidence previously relied upon by this Court. As the Board concluded, Weber sold the 904 slicers at issue (and their accompanying manuals) to just ten unique customers, and required confidentiality pursuant to the terms and conditions of its sales, even going so far as to “maintain propriety rights” in the manuals after their transfer to a customer. Appx30-32. Moreover, following a sale, the Board found that Weber's customers also went to great lengths to protect the secrecy of the manuals, one keeping them in “a wire cage and locked door accessible only by certain employees.” Appx33. The Board rejected Weber's arguments that the manuals were available at trade shows and demonstrations, finding that Weber's “showrooms were open to customers by invitation only,” not the general public, and that Weber maintained possession of the manuals. Appx34-35. The Board also noted that a Weber declarant conceded that in 31 years in the

industry, he had never seen a competitor’s operating manual, further confirming their lack of public availability. Appx37-38. The Board expressly credited the testimony of Provisur declarant Scott Scriven—a former Weber employee—who averred that Weber “would only provide product manuals to customers” and that other industry competitors likewise “require[ed] confidentiality of technical product information, including product manuals” Appx37, finding him more credible than Weber’s declarants. And, the Board credited Provisur’s argument that the cost of the 904 slicer was prohibitively high, therefore rendering the manual inaccessible. *See Appx27.*

In sum, the Board concluded that “there was an expectation of confidentiality in the industry,” that “[t]here is no evidence that any 904 Operating Manual was ever freely given out” by Weber to interested members of the public, and that Weber thus failed to meet its burden to prove the manuals were available. Appx35, Appx37-38. Critically, the Board found below that Weber “[did] not attempt to [d]efine who constitutes ‘persons interested and ordinary skilled’ for purposes of gauging [the] evidence of public accessibility,” much less prove that they could have obtained the manuals exercising reasonable diligence. Appx36-37. On these facts, the Board found that the manuals were not printed publications for purposes of IPR. Appx38.

Rather than engaging with this fact-intensive assessment—as this Court’s precedent demands—the Panel concluded that the manuals “were accessible to

interested members of the relevant public by reasonable diligence” because “Weber employees testified that the operating manuals could be obtained either upon purchase of the Weber food slicer or upon request directed to a Weber employee.” (Slip. Op. at 11.) The Panel simply accepted Weber’s (highly contested) representations and made no effort to reckon with the express confidentiality restrictions imposed by Weber on the scant few customers who ever received them, the expectation in the industry that such product documentation is kept confidential, or the prohibitively high cost of the slicing machines—the only way to obtain their accompanying manuals.¹ In doing so, the Panel essentially abandoned the totality of the circumstances test and established a new standard that conflicts with established law: a reference is a printed publication if a Petitioner says it was distributed, regardless of how and under what circumstances it was actually made available.

The Panel’s attempt to discount the importance of confidentiality and cost under the totality of circumstances analysis—in favor of its more bright line approach—is unavailing. With respect to confidentiality restrictions, the Board

¹ Importantly, the Panel mistakenly asserted that the Board found “that the operating manuals were not printed publications because they were subject to confidentiality restrictions”—as if that were the only basis for the Board’s conclusion. (Slip. Op. at 13.) But Weber’s imposed confidentiality on customers was just one of many facts that supported the Board’s finding of an expectation of secrecy in the industry, weighing against the public availability. *See* Appx27-38.

expressly followed this Court’s long-standing rule that “where professional and behavioral norms entitle a party to a reasonable expectation that information will not be copied or further distributed, we are more reluctant to find something a ‘printed publication.’” *Cordis Corp. v. Boston Sci. Corp.*, 561 F.3d 1319, 1333 (Fed. Cir. 2009); *see also N. Telecom Inc. v. Datapoint Corp.*, 908 F.2d 931, 936-37 (Fed. Cir. 1990) (documents distributed to 50 companies, with a legend barring further reproduction or transfer, were not printed publications because proponent did not establish “that anyone could have had access to the documents by the exercise of reasonable diligence”). Even if *Cordis* is distinguishable from this case on its facts—as the Panel held (Slip. Op. at 10-11)—this Court has long recognized that confidentiality is a relevant factor when determining public accessibility, an inquiry the Panel expressly rejected to undertake. Indeed, district courts have relied on this established rule, which the Panel’s decision now throws into flux. *See, e.g., Goss Int’l Americas, Inc. v. Graphic Mgmt. Assocs., Inc.*, 739 F. Supp. 2d 1089, 1119 (N.D. Ill. 2010) (relying on *Cordis* and *N. Telecom* to find distribution of a manual to “at most fifteen customers,” subject to analogous confidentiality disclaimers, did not establish public accessibility). The Panel thus violated precedent by failing to consider whether an expectation of confidentiality weighed against public accessibility of the manuals, as the Board found.

The Panel’s attempt to discount cost as a factor in the totality of the circumstances assessment is similarly misplaced. The Panel relied on *GoPro, Inc. v. Contour IP Holding LLC*, 908 F.3d 690, 695 (Fed. Cir. 2018) for the proposition that “[c]ost alone cannot be dispositive” because “the interested public includes commercial entities that can afford high-cost slicers.” (Slip. Op. at 11, n. 6.) Notwithstanding Weber’s failure to define the relevant public (much less establish that it “includes commercial entities,” as the Panel concluded), Appx36-37, *GoPro* held no such thing: that decision does not discuss whether a reference could be cost-prohibitive to a skilled artisan, but merely held that a trade show open only to dealers, retailers, and customers could still suffice for public accessibility where, at that show, the reference “was disseminated with no restrictions and was intended to reach the general public.” 908 F.3d at 695. Neither the Board nor the Panel made any such finding here—in fact, the Board concluded the exact opposite, finding no evidence the manuals were “ever freely given out” by Weber. Appx35. Under the totality of the circumstances standard, the cost to access a reference should be considered—not obviated provided it was on sale.

The Board properly considered the totality of the circumstances in determining that the manuals were not publicly accessible: it considered “how [the] reference was disseminated, to whom ... and under what circumstances.” *Samsung*, 929 F.3d at 1369. In reversing, the Panel did not consider these factors, contravening

case law, and requiring *en banc* rehearing to reaffirm that whether a reference qualifies as a printed publication that can be raised in IPR involves more than whether it was “on sale.”²

III. THE PANEL IMPERMISSIBLY RE-WEIGHED EVIDENCE AND FAILED TO DEFER TO THE BOARD’S FACT-FINDINGS AND CREDIBILITY DETERMINATIONS.

Compounding its application of the wrong legal test to the question of public accessibility, the Panel also erred by misapplying the substantial evidence standard of review. The Board’s determination that a reference is not publicly accessible must be affirmed if it is supported by substantial evidence, *NTP*, 654 F.3d at 1296; *see also Elbit*, 881 F.3d at 1356 (substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” which is “something less than the weight of the evidence”). As noted above, the record here is filled with evidence supporting the Board’s conclusion that the manual was not publicly accessible. (*See supra.*) But rather than defer to the Board’s factual determinations, the Panel identified contrary evidence and reversed on that basis. That is not an appropriate application of the substantial evidence standard of review. Indeed, “[i]f two inconsistent conclusions may reasonably be drawn from the evidence in record, the PTAB’s decision to favor one conclusion over the other is

² The Panel’s decision effectively conflates the “on sale” and “printed publication” prongs of 35 U.S.C. § 102(a)(1)—but the IPR statute permits PTAB challenges based solely on “patents or printed publications.” 35 U.S.C. § 311.

the epitome of a decision that must be sustained upon review for substantial evidence.” *Elbit*, 881 F.3d at 1356 (quotation omitted). Similarly, it is well established that “this court does not reweigh evidence on appeal,” *NTP*, 654 F.3d at 1292, and that “[d]etermining the weight and credibility of the evidence is the special province of the trier of fact.” *Elbit*, 881 F.3d at 1358 (quotation omitted). By reversing, the Panel improperly usurped the Board’s role as fact-finder and afforded weight to evidence and witnesses the Board appropriately rejected and found non-credible. The Panel’s opinion is contrary to the substantial evidence standard, which requires deference to the fact-finder, further necessitating *en banc* review.

As described above, the Board made numerous assessments of evidence and witness credibility in reaching its determination that the manuals were not publicly accessible. Most notably, the Board rejected Weber’s assertion that interested persons could have received the manual simply by asking Weber for them. Appx31-32, Appx35-37. As it recognized, Weber’s lone evidence on the point was a series of self-serving employee declarations inconsistent with other record evidence—and one declarant later conceded at deposition that Weber maintained a “standing policy ‘that documentation, regardless [of] type, there has to be a release before it leaves the company.’” Appx36 (quoting Appx15080-15082). At most, Weber identified a single instance where a former Weber intern was granted permission to use excerpts of the manual in his thesis, but it did not identify “[w]hat excerpts those were; their

relevance, if any, to the features [Weber] relies on here; and what restrictions of confidentiality, if any, applied to the intern-student because of his former employment.” Appx35-36. Similarly, the Board rejected Weber’s assertion that the manuals were available to the public at trade shows—an argument it noted did not appear in Weber’s Petition and was thus inadmissible in the IPR. Appx34-35. The Board specifically credited Provisur’s arguments that “only customers, and not the general public, attended [Weber’s] events” and that Weber’s “showrooms were open to customers by invitation only,” and added that Weber did “not indicate that customers were shown the features of the 904 slicers that are in issue in this case.” Appx34-35.³

Rather than leave these determinations to the finder of fact—as the standard requires—the Panel impermissibly discarded the Board’s findings, ruling instead that the product manuals constituted printed publications because they “could be obtained ... upon request to a Weber employee,” and because “[a] Weber employee also testified that the operating manuals were publicly accessible at certain trade shows or at Weber’s factory showrooms.” (Slip. Op. at 12.) In so doing, the Panel

³ Still other evidence confirmed that Weber’s trade shows could not have constituted public accessibility: Weber permitted its select customers only a cursory review of the manuals—about 10 minutes—under the close supervision of a Weber employee. Appx15046-15047; Appx15085-15086. *Cf. Jazz Pharm.*, 895 F.3d at 1358 (finding “the length of time” a reference was available relevant to a determination of public accessibility); *Centripetal Networks*, 847 F. App’x at 877 (same).

credited Weber's declarants rather than the Board's analysis and rejection of their testimony, Appx34-35. Indeed, the Panel's opinion does not address the countervailing evidence cited by the Board, nor its finding that Weber's declarations were contradicted by "other evidence on this record." *Id.* This wholesale rejection of the Board's credibility determinations and factual findings is contrary to law and precedent: "[t]he PTAB is entitled to weigh the credibility of the witnesses, and, thus, we decline to disturb these credibility determinations." *Elbit*, 881 F.3d at 1358.

The Panel's discussion of *GoPro*, 908 F.3d 690, and *In re Enhanced Security Research*, 739 F.3d 1347 (Fed. Cir. 2014), further confirms that the Panel engaged in an impermissible re-weighing of the record evidence rather than applying the substantial evidence test that precedent demands. (*See Slip. Op.* at 12.) The Panel suggested this case was analogous to *GoPro* in a parenthetical describing that case as similarly "involving a trade show" (*Slip. Op.* at 12)—but the facts of that case are the exact inverse of those found by the Board below. Here, the Board concluded that Weber's trade shows demonstrations were only open to a handful of select Weber customers upon invitation, and that product documentation always remained with Weber, Appx34-35—but in *GoPro*, there were "over [] 1,000 attendees at the subject trade shows, and [] GoPro displayed and distributed hundreds of copies of the GoPro Catalog to attendees [] without restriction." 908 F.3d at 694-95. Similarly, the Panel relied on *Enhanced Security*, stating that it held that "an

operating manual distributed with a software product was publicly accessible because of testimony and advertisements” (Slip Op. at 12). But in *Enhanced Security*, this Court affirmed that a reference constituted a printed publication because “members of the public showing an interest in buying or licensing the [software] product could have obtained a copy of the manual by contacting Haystack or Network Systems Corporation and requesting one.” 739 F.3d at 1354. By contrast, as noted above, the Board found the exact opposite here, rejecting Weber’s assertion that it would have provided the manual to the interested public upon request. *See* Appx35. Contrary to the Panel’s opinion, *Enhanced Security* cannot “establish[] that the Board’s printed publication determinations are unsupported by substantial evidence.” (*Contra* Slip. Op. at 12.)

At the very least, whether there was an expectation of confidentiality in the industry for product manuals, and whether Weber’s slicing machines were cost-prohibitive, are disputed questions, and the evidence relied on by the Board in resolving them was precisely what “a reasonable mind might accept as adequate to support a conclusion,” *Elbit*, 881 F.3d at 1356—and the Panel was required to affirm on those facts. If left to stand, the Panel’s opinion rewrites the standard for appellate review and expands the role of this Court beyond what precedent contemplates. *En banc* rehearing is necessary to reestablish the proper framework for analyzing the Board’s determinations.

IV. CONCLUSION

For the reasons set forth above, the Court should grant rehearing *en banc* rehearing. The Panel's opinion rewrites the law of public accessibility and appellate review, contravenes binding precedent, and invites uncertainty into the law where there was none, leading to inefficiencies throughout the patent system.

Dated: February 23, 2024

Respectfully submitted.
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ADDENDUM

United States Court of Appeals
for the Federal Circuit

WEBER, INC.,
Appellant

v.

PROVISUR TECHNOLOGIES, INC.,
Appellee

2022-1751, 2022-1813

Appeals from the United States Patent and Trademark Office, Patent Trial and Appeal Board in Nos. IPR2020-01556, IPR2020-01557.

Decided: February 8, 2024

RICHARD CRUDO, Sterne Kessler Goldstein & Fox PLLC, Washington, DC, argued for appellant. Also represented by TREVOR O'NEILL, RALPH WILSON POWERS, III.

MICHAEL BABBITT, Willkie Farr & Gallagher LLP, Chicago, IL, argued for appellee. Also represented by CRAIG C. MARTIN, REN-HOW HARN, SARA TONNIES HORTON.

Before REYNA, HUGHES, and STARK, *Circuit Judges*.

REYNA, *Circuit Judge*.

Weber appeals two final written decisions from the Patent Trial and Appeal Board. The Board determined that Weber failed to establish the unpatentability of the claims of Provisur’s patents. The Board first found that Weber’s operating manuals were not prior art printed publications. The Board also determined that the prior art did not disclose two challenged claim terms, one of which was included in the Board’s claim construction of the challenged claims. We reverse the Board’s printed publication determinations, vacate the Board’s conclusions regarding Weber’s failure to establish unpatentability of the challenged claims, and remand for further proceedings.

BACKGROUND

A. U.S. Patent Nos. 10,639,812 and 10,625,436

Provisur is the owner of U.S. Patent Nos. 10,639,812 (“’812 patent”) and 10,625,436 (“’436 patent”). The ’812 and ’436 patents relate to high-speed mechanical slicers used in food-processing plants to slice and package food articles, such as meats and cheeses. ’812 patent at Abstract.¹ Although the slicers have numerous components, three claimed components are relevant here: (1) the “food article loading apparatus”; (2) the “food article feed apparatus”; and (3) the “food article stop gate.” *Id.* at 11:16–38.²

¹ We primarily cite to the ’812 patent, which shares a common specification with the ’436 patent. The parties agree that claim 1 of the ’812 patent is representative of the challenged claims in this appeal. Appellant Br. 12; Appellee Br. 2.

² We will subsequently refer to the “food article loading apparatus” as the “loading apparatus,” the “food article feed apparatus” as the “feed apparatus,” and the “food article stop gate” as the “stop gate.”

Figures 1B and 1 below³ display the loading apparatus (108, labeled in Figure 1) (colored in blue) and the feed apparatus (120, labeled in Figure 1) (colored in orange). The loading apparatus (108) includes a lift tray (220) on which food articles are loaded while the lift tray is in a horizontal staging position. *Id.* at 2:52–54; 9:28–34. When the food is ready to be sliced, the lift tray pivots to an elevated position, as shown in Figure 1. From that position, the food articles enter the slicer's overhead feed apparatus (120). *Id.* at 4:33–43; 9:60–10:4.

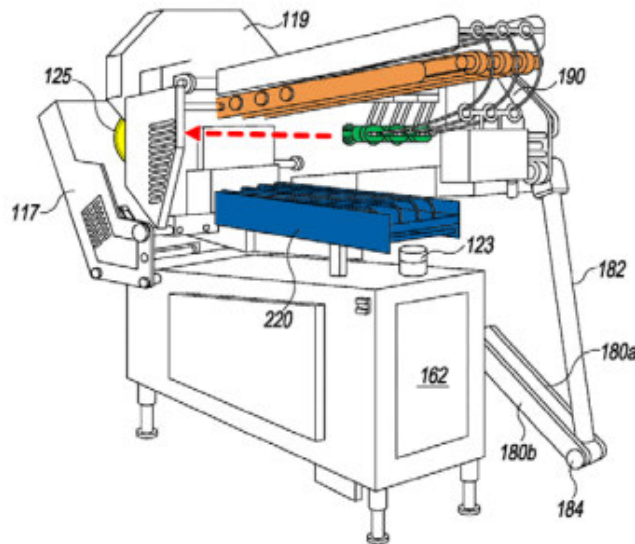


Fig. 1B

Id. at Fig. 1B; Appellant Br. 8.

³ All figure and image annotations have been provided by the parties unless otherwise noted.

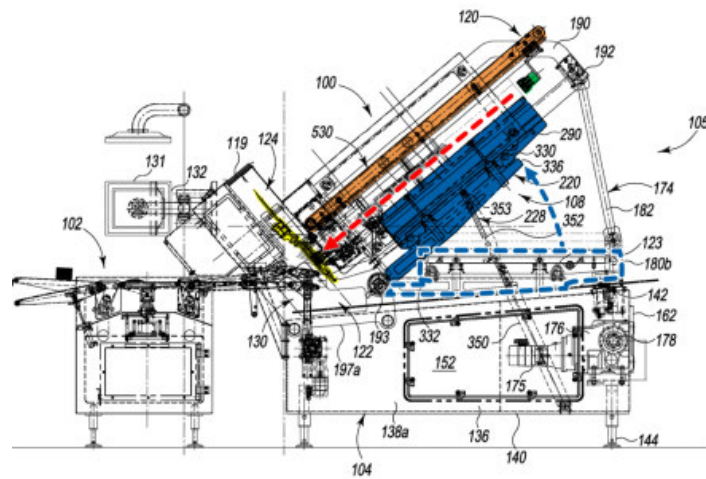


Fig. 1

Id. at Fig. 1; Appellant Br. 8.

As shown in Figures 1 and 1B above, and Figure 2 below, the feed apparatus (120) contains “grippers” (894, labeled in the patent) (colored in green). The grippers grasp the food articles from behind while they are still supported by the lift tray and drive them downward along the feed path (shown in red dashed arrow) until they reach the slicing station (124) (shown in yellow in Figure 1). ’812 patent at 2:55–60; 9:13–24. There, the food articles are sliced by the slicing blade (125) (shown in yellow in Figure 1B). *Id.* at 4:43–46.

Figure 2 shows a top-down view of the slicer where each gripper is independently driven by a conveyor belt

(802, 804, 806) coupled to its own servomotors (850). *Id.* at 9:15–24; 10:44–46.

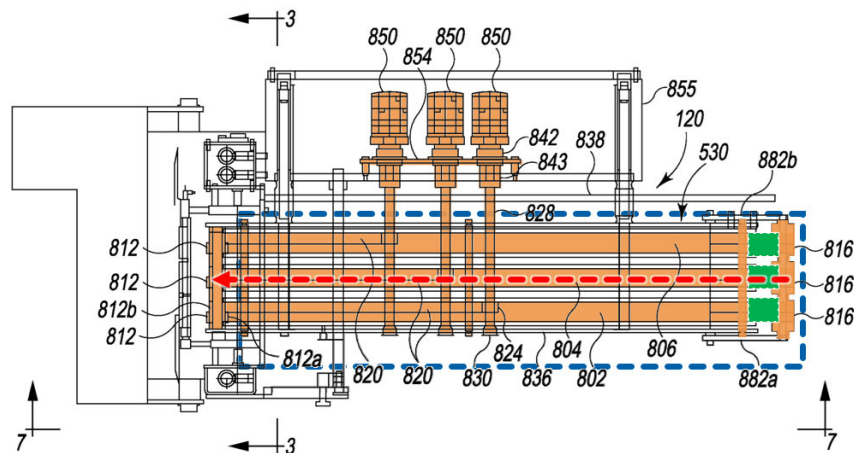
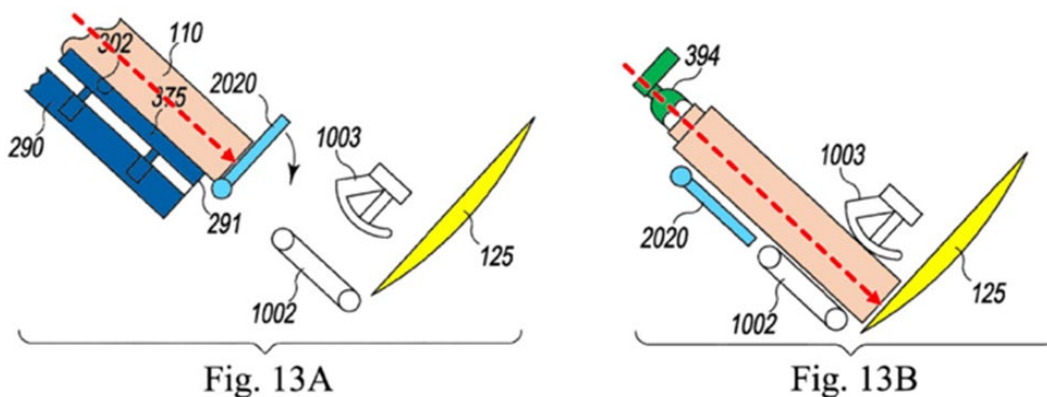


Fig. 2

Id. at Fig. 2; Appellant Br. 10. Figure 2 shows that the feed apparatus (colored in orange) is positioned above the loading apparatus's lift tray (shown in blue dashed lines), such that the grippers (colored in green), feed path (red dashed arrow), and lift tray are generally aligned when viewed from a top-down position.

In addition to the loading apparatus and feed apparatus components, the stop gate, the third claimed component relevant on appeal, serves several purposes. '812 patent at 3:7–8. As shown below in Figure 13A, when a food article is loaded, it travels along the path of the red dashed arrow toward the slicing blade (125) until it reaches the stop gate (2020). The stop gate (shown in light blue) can, in this elevated position, act as a gate to temporarily block a loaded food article from prematurely sliding into the slicing station. *Id.* at 10:8–13. When the stop gate is lowered, as shown in Figure 13B, the stop gate acts as a floor to support the loaded food article as it slides toward the slicing blade (125). *Id.*



Figs. 13A & 13B; Appellant Br. 11–12.

Representative claim 1 of the '812 patent recites a food slicer containing two limitations at issue here: (1) the “disposed over” limitation and the (2) “stop gate” limitation. The “disposed over” limitation requires “a food article feed apparatus disposed over [the] food article loading apparatus.” '812 patent at 11:17–18. The “stop gate” limitation requires that the stop gate support food articles “when the lift tray assembly is moved from its elevated position” to load new food articles. *Id.* at 11:33–36.

B. The Prior Art

Weber asserted prior art references in both inter partes review (“IPR”) proceedings that generally relate to food slicers. Weber presented its obviousness theories based on its commercial food slicer operating manuals in combination with U.S. Patent No. 5,628,237 (“Lindee”) and U.S. Patent Publication No. 2009/0145272 (“Sandberg”). J.A. 8; J.A. 84–85. Weber’s operating manuals were created and disseminated to accompany and explain how to use Weber’s commercial food slicer products. J.A. 1311–481; J.A. 1698–

99.⁴ The operating manuals disclose that Weber’s food slicer contains a “product conveyer” that is first in a horizontal position to receive food articles. J.A. 1325. After receiving food articles, the product conveyer is then elevated to a position where the food articles will be driven along a feed path toward a slicing blade. J.A. 1350. The operating manuals also disclose that a “product bed conveyor supports the transport of the product” and “prevents the products from sliding into the outlet in an uncontrolled manner.” J.A. 1331.

C. Procedural History

Provisur sued Weber in federal court alleging infringement of the ’812 and ’436 patent claims. Weber then filed two IPR petitions alleging the unpatentability of claims 1–11 of the ’812 patent and claims 1–16 of the ’436 patent. J.A. 277–345. The Board instituted the IPRs based on obviousness theories involving Weber’s operating manuals in combination with the Lindee and Sandberg references. J.A. 419–43. Relying on *In re Enhanced Security Research, LLC*, 739 F.3d 1347 (Fed. Cir. 2014), the Board initially found in its institution decisions that Weber provided evidence to “support the public availability” of the operating manuals. J.A. 434–42. In its final written decisions, the Board changed course. The Board concluded that the operating manuals do not qualify as printed publications. The Board first found that the operating manuals were distributed to just “ten unique customers.” J.A. 29; J.A. 106. The Board further found that the operating manuals were subject to confidentiality restrictions based on the Board’s interpretation of the operating manuals’ copyright notice and the intellectual property rights clause in Weber’s terms

⁴ Since the operating manuals are substantively identical in relevant portions, even though they are dated years apart, we cite to the 2006 operating manual as representative. Appellant Br. 14.

and conditions underlying the sales of each slicer product. J.A. 28–31; J.A. 105–08.

On the merits, the Board determined that, even if Weber’s manuals qualify as printed publications, Weber’s asserted prior art combinations do not disclose the “disposed over” and “stop gate” limitations from claim 1 in each challenged patent. J.A. 70; J.A. 139. For the “disposed over” limitation, the Board’s conclusion rested on its claim construction of the term “disposed over” to require that the “feed apparatus and its conveyor belts and grippers are ‘positioned above and in vertical and lateral alignment with’ the food article loading apparatus and its lift tray assembly.” J.A. 18; J.A. 95. The Board explained that vertical alignment means that the feed apparatus is “directly above the loading apparatus.” J.A. 13; J.A. 90. And in the Board’s view, laterally aligned means that “there is no offset between the sides of feed apparatus and the loading apparatus” when viewed from above. J.A. 13; J.A. 90.

For the “stop gate” limitation, the Board rejected Weber’s expert’s reliance on Figures 10 and 227 of the operating manuals. The Board faulted these figures for not physically depicting a food article in the slicer or the food lift tray and criticized this as insufficient to show that the product bed conveyor of the operating manuals supported the food article when the product conveyor moves from its elevated position. J.A. 68–69; J.A. 142.

Thus, the Board determined that Weber’s asserted prior art failed to disclose the “disposed over” and “stop gate” limitations from claim 1 in each challenged patent. As a result, the Board concluded that Weber failed to carry its burden of proving unpatentability for the dependent claims. J.A. 73–74; J.A. 146–47.

Weber appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(4)(A).

STANDARD OF REVIEW

We review de novo the Board’s legal conclusion on whether a reference is a printed publication under 35 U.S.C. § 102(b) and its underlying factual findings for substantial evidence. *Valve Corp. v. Ironburg Inventions Ltd.*, 8 F.4th 1364, 1372–73 (Fed. Cir. 2021).

Claim construction is a question of law with underlying questions of fact. *Wasica Fin. GmbH v. Cont’l Auto. Sys., Inc.*, 853 F.3d 1272, 1278 (Fed. Cir. 2017). We review de novo the Board’s ultimate claim construction and its supporting determinations that are based on intrinsic evidence. *Personalized Media Commc’ns, LLC v. Apple Inc.*, 952 F.3d 1336, 1339 (Fed. Cir. 2020).

We review the Board’s ultimate obviousness determinations on a de novo basis and any underlying factual determinations for substantial evidence. *Rembrandt Diagnostics, LP v. Alere, Inc.*, 76 F.4th 1376, 1382 (Fed. Cir. 2023). The scope and content of the prior art is a question of fact. *Intel Corp. v. PACT XPP Schweiz AG*, 61 F.4th 1373, 1378 (Fed. Cir. 2023). Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* (citation omitted).

DISCUSSION

Weber appeals the Board’s conclusions that it failed to establish unpatentability of the challenged claims. Weber first argues that the Board erred in its determinations that Weber’s operating manuals were not “printed publication[s]” under pre-AIA 35 U.S.C. § 102(b). Weber next argues that the Board erred in its claim construction of the “disposed over” claim term. Finally, Weber challenges the Board’s determinations that the operating manuals do not disclose the “stop gate” limitation. We address each issue in turn.

A. Printed Publications

The statutory phrase “printed publication” from § 102 has been defined to mean a reference that was “sufficiently accessible to the public interested in the art.” *In re Klopfenstein*, 380 F.3d 1345, 1348 (Fed. Cir. 2004) (citation omitted). The touchstone of whether a reference constitutes a printed publication is public accessibility. *Jazz Pharms., Inc. v. Amneal Pharms., LLC*, 895 F.3d 1347, 1355 (Fed. Cir. 2018). The standard for public accessibility is whether interested members of the relevant public could locate the reference by reasonable diligence. *Valve*, 8 F.4th at 1376.

Weber contends that the Board erred in determining that Weber’s operating manuals were not sufficiently publicly accessible to constitute printed publications. According to Weber, the Board misapplied our public-accessibility precedent, including *Cordis Corp. v. Boston Scientific Corp.*, 561 F.3d 1319 (Fed. Cir. 2009), and misinterpreted the record evidence. We first address the Board’s reliance on *Cordis* and then the evidence of record.

The Board improperly reviewed this case in the context of the *Cordis* framework. In *Cordis*, the references were two academic monographs describing an inventor’s work on intravascular stents that were only distributed to a handful of university and hospital colleagues as well as two companies interested in commercializing the technology. 561 F.3d at 1333–34. We observed that the record contained “clear evidence that such academic norms gave rise to an expectation that disclosures will remain confidential.” *Id.* at 1334. There was also no showing “that these or similar commercial entities typically would make the existence of such documents known and would honor requests for public access.” *Id.* at 1335.

Cordis is readily distinguishable from this case. Weber’s operating manuals were created for dissemination to the interested public to provide instructions about how to assemble, use, clean, and maintain Weber’s slicer, as well

as guidance for addressing malfunctions that users might encounter. J.A. 1313–19 (table of contents); J.A. 1312 (customer service information). These operating manuals stand in stark contrast to *Cordis* and the confidential nature of the monographs and circumstances surrounding disclosure, including academic confidentiality norms. Where, as here, “a publication’s purpose is ‘dialogue with the intended audience,’ that purpose indicates public accessibility.” *Valve*, 8 F.4th at 1374 (citation omitted).

The record evidence shows that Weber’s operating manuals were accessible to interested members of the relevant public⁵ by reasonable diligence. For instance, Weber employees testified that the operating manuals could be obtained either upon purchase⁶ of the Weber food slicer or upon request directed to a Weber employee. *See, e.g.*, J.A. 2222–34 (Weber employee declaration); J.A. 3288–97 (Weber employee declaration). Weber’s declarants provided

⁵ The parties dispute the exact number of customers who received the operating manuals (whether it was ten entities or over forty entities), but we need not resolve that dispute here to review public accessibility. Appellant Br. 31; Appellee Br. 6. No minimum number of occasions of access is dispositive of the public accessibility inquiry in all cases.

⁶ At oral argument, Provisur’s counsel argued that the high cost of Weber’s commercial slicers prevented the operating manuals from being considered sufficiently accessible by reasonable diligence. Oral Arg. 18:14–19:25. Cost alone cannot be dispositive because the printed-publication inquiry is focused on the interested public, not the general public. *See GoPro, Inc. v. Contour IP Holding LLC*, 908 F.3d 690, 695 (Fed. Cir. 2018). Here, the interested public includes commercial entities that can afford high-cost slicers.

actual examples of deliveries of the operating manuals to customers. *E.g.*, J.A. 2222–34.

Weber’s employees’ declarations are corroborated and supported by testimony, delivery notes, invoices, price lists, declarations, and email exchanges between Weber employees and customers. *See, e.g.*, J.A. 4200–427 (Weber invoices and delivery notes); J.A. 7664–68 (customer declaration); J.A. 12754–68 (email correspondence regarding manual dissemination). A Weber employee also testified that the operating manuals were publicly accessible at certain trade shows or at Weber’s factory showrooms. J.A. 9580–612 (Weber employee declaration). Provisur’s Vice-President conceded that Weber sold about forty slicers during the relevant time period, and it was Weber’s “general practice” to provide operating manuals with the purchase of each slicer. J.A. 12579–80 (40:7–41:20).

The foregoing establishes that the Board’s printed publication determinations are unsupported by substantial evidence. *See, e.g., In re Enhanced Security Research*, 739 F.3d at 1354–57 (affirming the Board’s determination that an operating manual distributed with a software product was publicly accessible because of testimony and advertisements); *GoPro, Inc. v. Contour IP Holding LLC*, 908 F.3d 690, 694–96 (Fed. Cir. 2018) (involving a trade show).

The Board’s contrary conclusions on public accessibility were based in part on the Board’s inordinate emphasis on alleged confidentiality restrictions associated with the operating manuals. The Board first reviewed the operating manuals’ copyright notice, which state that the operating manuals may not “be reproduced or transferred in any way.” J.A. 1312. The Board determined that this notice “require[s] confidentiality.” J.A. 29–30; J.A. 106–07. The Board also found another confidentiality restriction based on the intellectual property rights clause from Weber’s terms and conditions, which covers sales of each slicer product, and states “[c]ost estimates, drafts, drawings and

WEBER, INC. v. PROVISUR TECHNOLOGIES, INC.

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other documents remain the property of [Weber].” J.A. 30 (quoting J.A. 12889); J.A. 107–08.

We disagree with the Board’s decisions that the operating manuals were not printed publications because they were subject to confidentiality restrictions. The copyright notice itself allows the original owners and their personnel to copy the operating manual for their own internal use. J.A. 1312. Weber expressly instructed customers who were re-selling their slicers to transfer their operating manuals to purchasing third parties. J.A. 12487. Weber’s assertion of copyright ownership does not negate its own ability to make the reference publicly accessible. *Cf. Correge v. Murphy*, 705 F.2d 1326, 1328–30 (Fed. Cir. 1983) (“A mere assertion of ownership can not convert what was in fact a public disclosure and offer to sell to numerous potential customers into a non-disclosure.”). The intellectual property rights clause from Weber’s terms and conditions covering sales, likewise, has no dispositive bearing on Weber’s public dissemination of operating manuals to owners after a sale has been consummated.

We hold that the Board’s determinations that Weber’s operating manuals were not publicly accessible are unsupported by substantial evidence. We thus reverse the Board’s finding that Weber’s operating manuals do not qualify as printed publications.

B. The “Disposed Over” Limitation

A claim term is given its ordinary and customary meaning—the meaning that a term would have to a skilled artisan at the time of the invention. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed. Cir. 2005) (en banc). In construing a claim term, we first look to the intrinsic evidence, including the claims themselves, the specification, and the prosecution history of the patent. *Personalized Media*, 952 F.3d at 1340.

The Board construed the term “disposed over” to require that the “feed apparatus and its conveyor belts and grippers are ‘positioned above and in vertical and lateral alignment with’ the food article loading apparatus and its lift tray assembly.” J.A. 18; J.A. 95. Weber argues that this construction is incorrect because the Board narrowly construed the “disposed over” term by importing limitations from the specification when the claim term only requires that the feed apparatus “is generally positioned above” the loading apparatus. Appellant Br. 53. We conclude that the Board erred in its construction.

The claim language itself only recites that the “feed apparatus” is “disposed over” the “loading apparatus.” ’812 patent at 11:17–18. The claim language contains no restrictions that would require direct alignment of the conveyor belts and lift tray assembly from the two apparatuses. “Had the patent drafter intended to limit the claims” to address the alignment of the conveyor belts and lift tray assembly between the apparatuses, “narrower language could have been used in the claim.” *Cyntec Co. v. Chilisin Elecs. Corp.*, 84 F.4th 979, 986 (Fed. Cir. 2023). The parties’ experts generally agreed that the plain claim language did not contain additional alignment requirements. J.A. 9481 (¶74) (Weber’s expert); J.A. 12005 (133:16–22) (Provisur’s expert). Our case law does “not support prescribing a more particularized meaning unless a narrower construction is required by the specification or prosecution history.” *3M Innovative Props. Co. v. Tredegar Corp.*, 725 F.3d 1315, 1329 (Fed. Cir. 2013).

Further, the specification does not require the direct alignment of the conveyor belts and lift tray assembly between the two apparatuses. The phrase “disposed over” does not appear in the specification. The specification does explain, which the Board relied on, that the loading apparatus’s grippers and lift tray are “in line with the food article feed paths.” ’812 patent at 2:52–53; 9:10–25. But these passages merely describe the spatial relationship of

specific components—the feed path and grippers as aligned with the loading apparatus’s lift tray. These passages do not disclose a limitation that the feed apparatus, including the conveyer belts that drive the grippers, must be aligned with the loading apparatus and its lift tray. “[A]lthough the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments.” *Phillips*, 415 F.3d at 1323. Our review of the prosecution history does not change our conclusion.

The plain language of the claims, read in view of the specification, requires only that the feed apparatus be generally positioned above the loading apparatus. The claim term’s recitation of broad language “compels a similarly broad result.” *Malvern Panalytical Inc. v. TA Instruments-Waters LLC*, 85 F.4th 1365, 1372 (Fed. Cir. 2023). We need not consider the extrinsic evidence that limits the claim scope in a manner not contemplated by the intrinsic record. *Genuine Enabling Tech. LLC v. Nintendo Co.*, 29 F.4th 1365, 1372–73 (Fed. Cir. 2022). Accordingly, we reverse the Board’s claim construction.

We note that Provisur does not dispute that Weber’s prior art satisfies this limitation under Weber’s proposed construction. *See generally* Appellee Br.; Oral Arg. 7:10–7:50, 27:54–28. As a result, our review of the Board’s claim construction is dispositive of this issue. We therefore hold that the asserted prior art discloses the “disposed over” limitation from claim 1 in each challenged patent.

C. The “Stop Gate” Limitation

Weber contends that the Board erred in determining that the “product bed conveyer” disclosed in Weber’s operating manuals, including as shown in Figures 10 and 227, does not disclose the “stop gate” limitation. We conclude that the Board’s determinations are not supported by substantial evidence.

The claim language requires that the “stop gate” support food articles “when the lift tray assembly is moved from its elevated position” back down to load new food articles. ’812 patent at 11:33–36. Like the stop gate, the product bed conveyer “supports the transport of the product” and “prevents the products from sliding into the outlet in an uncontrolled manner.” J.A. 1331. The core remaining issue is whether the product bed conveyer is in its floor position *when* the product bed (lift tray) moves from its elevated position to the loading position.

Figures 10 and 227 below depict the product bed conveyer (shown in light blue) acting in the supporting floor position *when* the product holders are at the end of the feed path and the product bed (shown in dark blue) is lowered to receive more food articles.

5.12.1 Product bed conveyer (product length up to 1200 mm)

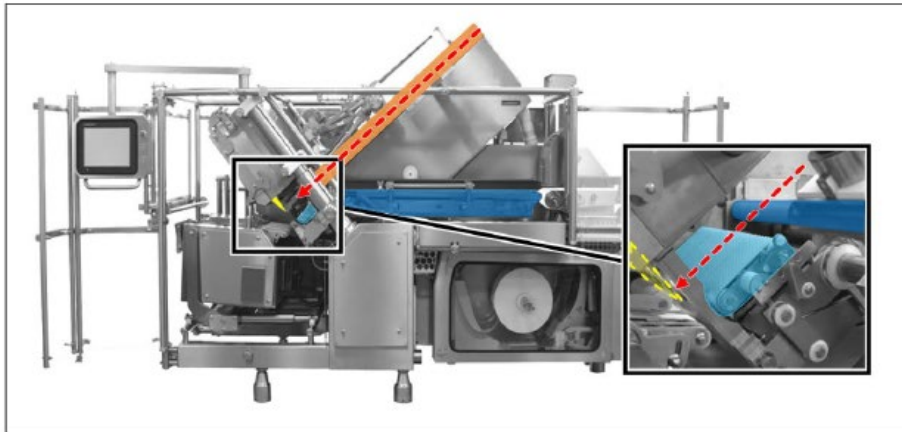


Fig. 227 Position of the product bed conveyer

J.A. 1480 (Fig. 227); Appellant Br. 64.

1.6.2 Product bed conveyor (product length up to 1200 mm)

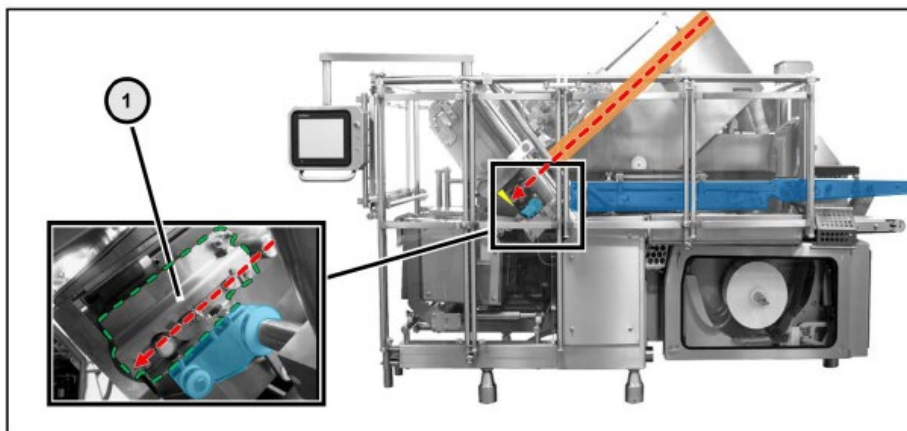


Fig. 10 Position of the product bed conveyor

J.A. 1331 (Fig. 10); Appellant Br. 64.

Based on these figures, Weber's expert testified that a skilled artisan would understand that, because the product holder is near the blade, the food slicer is at the end of the slicing operation and the product holder has finished feeding the food article into the blade while the product bed conveyor is in the floor position. J.A. 9486–90 (¶¶86–88). Weber's expert explained that a skilled artisan would understand that the lift tray moves from its elevated position to its loading position for additional food articles during the fast-slicing operation when the product bed conveyor is in the floor position. *Id.*

In reaching a contrary conclusion, the Board failed to meaningfully consider Weber's cited Figures 10 and 227 and accompanying expert testimony. J.A. 65–69; J.A. 141–42. The Board primarily faulted the operating manuals for not physically showing a food article in the slicer or the product conveyor. J.A. 68–69; J.A. 142. But since the product conveyor is expressly disclosed by the operating manuals, an image of a food article is not needed to understand those teachings. The evidence offered by Weber, showing

that the operating manuals disclose the “stop gate” limitation from claim 1 in each challenged patent, leaves the Board’s contrary finding without substantial evidentiary support. Thus, we reverse the Board’s finding.

CONCLUSION

We have considered Provisur’s remaining arguments and find them unpersuasive. We reverse the Board’s determinations that Weber’s operating manuals are not printed publications and that the prior art does not disclose the “disposed over” and “stop gate” limitations. We vacate the Board’s conclusions that Weber failed to establish unpatentability of claims 1–11 of the ’812 patent and claims 1–16 of the ’436 patent, and remand for further proceedings consistent with this opinion.

REVERSED-IN-PART, VACATED-IN-PART AND REMANDED

COSTS

Costs against Provisur.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on February 23, 2024.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 23, 2024

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**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 22-1751, 22-1813

Short Case Caption: Weber, Inc. v. Provisur Technologies, Inc.

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Signature: /s/ Craig C. Martin

Name: Craig C. Martin