

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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SAMSUNG ELECTRONICS CO., LTD.,  
Petitioner,

v.

INFOBRIDGE PTE. LTD.,  
Patent Owner.

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IPR2017-00099<sup>1</sup>  
IPR2017-000100  
Patent 8,917,772 B2

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Before CHRISTOPHER L. CRUMBLEY, PATRICK M. BOUCHER, and  
JOHN P. PINKERTON, *Administrative Patent Judges*.

PINKERTON, *Administrative Patent Judge*.

JUDGMENT

Final Written Decision on Remand  
Determining No Claims Unpatentable  
*35 U.S.C. §§ 144, 318 and 37 C.F.R. § 42.5(a)*

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<sup>1</sup> In connection with remand proceedings in these cases, we permit the parties to use this heading style.

## I. INTRODUCTION

We issue this Decision pursuant to a remand from the United States Court of Appeals for the Federal Circuit in *Samsung Electronics Co., Ltd. v. Infobridge Pte Ltd.*, 929 F.3d 1363 (Fed. Cir. 2019).

On April 23, 2018, we issued the Final Written Decisions in these proceedings in which we determined that Samsung Electronics Co., Ltd. (“Petitioner” or “Samsung”) had not proven, by a preponderance of the evidence, that the WD4 reference is a prior art printed publication under 35 U.S.C. § 102(b) and, therefore, had not proven that the challenged claims of U.S. Patent 8,917,772 B2 (“the ’772 patent”) in each case are unpatentable. *See* Paper 32, 26 (IPR2017-00099, challenging claims 1–7); Paper 30, 27 (IPR2017-00100, challenging claims 8 and 9).<sup>2</sup>

The WD4 reference is Working Draft 4 of the high-efficiency video coding (“HEVC”) standard (H.265) developed by the Joint Collaborative Team on Video Coding (“JCT-VC”). *See* Ex. 1005; *see also* Ex. 1002 ¶ 95. As discussed in the Decision, Petitioner contends that WD4 was publicly accessible prior to the ’772 patent’s critical date because (1) on October 4, 2011, it was uploaded to the JCT-VC’s document management website and to a website maintained by the Moving Picture Expert Group (“MPEG”) and (2) on that same day, Benjamin Bross, the lead author of WD4, sent an email

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<sup>2</sup> We will refer to the Final Written Decision in IPR2017-00099 (Paper 32, “the Decision”) in this decision because the Final Written Decisions in both proceedings are substantively identical in regard to issues pertaining to WD4. Except where indicated otherwise, we also cite to papers and exhibits in the record of IPR2017-00099.

(Ex. 1070) to the JCT-VC reflector (an email listserv)<sup>3</sup> stating that WD4 was uploaded to the JCT-VC document management website and available for downloading with a link to the WD4 document information webpage (Ex. 1066). *See* Decision 8–10. We determined that Petitioner failed to show by a preponderance of the evidence that WD4 was publicly accessible for any of these reasons and, therefore, failed to show that WD4 was a prior art printed publication. *Id.* at 26.

On May 23, 2018, Petitioner appealed to the Court of Appeals for the Federal Circuit. Paper 33 (IPR2017-00099); Paper 31 (IPR2017-000100). On July 12, 2019, the Court issued its decision,<sup>4</sup> and concluded, in relevant part, as follows:

Ultimately, the Board applied an erroneous legal standard in concluding that the listserv email<sup>5</sup> did not make the WD4 reference publicly accessible. We therefore vacate the Board’s findings on this point and remand for further proceedings consistent with this opinion.

*Samsung*, 929 F.3d at 1375 (footnote added).

On September 11, 2019, the Board held a telephone conference with counsel for the parties to discuss the proceedings on remand, including the issues of whether new evidence would be permitted, briefs would be filed, and an oral hearing would be conducted. *See* Ex. 1110. On September 16,

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<sup>3</sup> The email listserv address is: [jct-vc@lists.rwth-aachen.de](mailto:jct-vc@lists.rwth-aachen.de). Ex. 1002 ¶ 106 (citing Ex. 1058, 2).

<sup>4</sup> The Court issued its mandate on August 19, 2019.

<sup>5</sup> The “listserv email” referred to in the Court’s decision is the email (Ex. 1070) sent by Mr. Bross to the JCT-VC listserv on October 4, 2011, that included a download link for WD4. *See Samsung*, 929 F.3d at 1366. We will refer to this email as “the listserv email” or “Mr. Bross’s email.”

2019, we entered an Order on Conduct of Proceedings on Remand (“Order”) authorizing the parties to file briefs directed only to the issue of whether the record, as it currently exists, establishes that the listserv email made WD4 publicly accessible. Paper 34, 7–8 (IPR2017-00099); Paper 32, 7–8 (IPR2017-00100). Subsequently, the parties filed the following briefs:<sup>6</sup>

Brief	IPR2017-00099 Paper No.	IPR2017-00100 Paper No.
Petitioner’s Opening Brief on Remand (“Pet. Brief”)	36	34
Patent Owner’s Reply Brief on Remand (“PO Response”)	37	35
Petitioner’s Reply Brief on Remand (“Pet. Reply”)	38	36
Patent Owner’s Sur-Reply on Remand (“PO Sur-Reply”)	41	39

For the reasons set forth below, we determine that Petitioner has not demonstrated by a preponderance of the evidence that the listserv email made WD4 publicly accessible.

## II. ANALYSIS

### A. Federal Circuit’s Decision

The Federal Circuit considered Samsung’s arguments on appeal that WD4 was publicly accessible because it was (1) distributed at the Torino and Geneva meetings, (2) uploaded to the JCT-VC and MPEG websites, and (3) emailed to the JCT-VC listserv. *See Samsung*, 929 F.3d at 1369–75. In

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<sup>6</sup> In this Decision, we will refer to the briefs filed in IPR2017-00099 because the briefs on remand in both proceedings are substantively identical.

regard to the first argument, the Court held that “Samsung waived any separate argument on appeal that the WD4 reference was publicly accessible because it was disseminated at the Torino or Geneva meetings.” *Id.* at 1370. Alternatively, the Court held that this argument is without merit because WD4 was not created until after the Torino meeting<sup>7</sup> and, therefore, could not have been circulated at the meeting; and, Samsung conceded at oral argument that the Geneva meeting occurred after the relevant critical date.<sup>8</sup> *Id.*

Regarding Samsung’s second argument concerning uploading WD4 to the JCT-VC website, the Court determined that our finding that Samsung failed to show that ordinarily skilled artisans “who were not part of JCT-VC” would have known about or found the JCT-VC website was supported by substantial evidence. *Id.* at 1371–73. The Court also determined that our finding that a skilled artisan would not have been able to locate WD4 on the JCT-VC website by exercising reasonable diligence, even assuming the website itself was accessible, was supported by substantial evidence.<sup>9</sup> *Id.* The Court also rejected Samsung’s argument that we failed to consider

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<sup>7</sup> The JCT-VC’s sixth meeting was in Torino, IT on July 14–22, 2011. *See* Ex. 1057, 1. WD4 was completed and uploaded to the JCT-VC and MPEG websites on October 4, 2011. *See* Ex. 1002 ¶¶ 94, 103, 105; Ex. 1066, 1.

<sup>8</sup> The JCT-VC’s seventh meeting was held in Geneva, CH on November 21–30, 2011. *See* Ex. 1058, 1. The ’772 matured from a national stage PCT application filed on November 7, 2012, which claims priority to a Korean patent application filed on November 7, 2011. *See* Ex. 1001, codes (22), (30). Thus, the Geneva meeting on November 21–30, 2011, was held after the claimed priority date of November 7, 2011.

<sup>9</sup> The Court reached these same conclusions with respect to the MPEG website. *See Samsung*, 929 F.3d at 1373.

whether “access by members of the JCT-VC” could make WD4 publicly accessible. *Id.* at 1371. In that regard, the Court said that, taken together, *SRI Int’l, Inc. v. Internet Sec. Sys., Inc.*, 511 F.3d 1186, 1196 (Fed. Cir. 2008) and *Application of Bayer*, 568 F.2d 1357, 1361 (CCPA 1978),

suggest that a work is not publicly accessible if the only people who know how to find it are the ones who created it. This is why *SRI* focused on the knowledge of those outside the authoring organization and why *Bayer* discounted the knowledge of various professors on a faculty committee reviewing student theses. To hold otherwise would disincentivize collaboration and depart from what it means to publish something.

929 F.3d at 1372. The Court also said that our “analysis is consistent with this principle” because unlike the conference attendees in *GoPro, Inc. v. Contour IP Holding LLC*, 908 F.3d 690 (Fed. Cir. 2018) or *Medtronic, Inc. v. Barry*, 891 F.3d 1368 (Fed. Cir. 2018), “JCT-VC members were part of ongoing, collaborative efforts to draft the WD4 reference.” *Id.* Thus, the Court found that we properly focused on whether those “outside of the JCT-VC” knew about the website in considering whether posting WD4 on the website made it publicly accessible. 929 F.3d at 1372.

Regarding Samsung’s third argument concerning the JCT-VC listserv, the Court cited our evaluation of Mr. Bross’s email to the JCT-VC listserv with a link to WD4 “as a ‘limited distribution’ [to 254 individuals] that did not show [WD4] was ‘generally disseminated to persons interested and ordinarily skilled in the art.’” *Id.* at 1373–74. The Court held that we erred “by confusing access with accessibility.” *Id.* at 1374. The Court explained that its “cases have consistently held that the standard for public accessibility is whether a person of ordinary skill in the art *could*, after exercising reasonable diligence, access a reference.” *Id.* (citing *Jazz Pharm., Inc. v.*

*Amneal Pharm., LLC*, 895 F.3d 1347, 1355–56 (Fed. Cir. 2018); *In re Lister*, 583 F.3d 1307, 1314 (Fed. Cir. 2009); *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1569 (Fed. Cir. 1988)). Thus, the Court stated that “[i]f accessibility is proved, there is there is no requirement to show that particular members of the public actually received the information” and that “a petitioner need not establish that specific persons actually accessed or received a work to show that the work was publicly accessible.” 929 F.3d at 1374.

Further, the Court said:

Rather than requiring Samsung to prove that persons of ordinary skill actually received the listserv email, the Board should have considered *whether Samsung’s evidence established that an ordinarily skilled artisan could have accessed the WD4 reference, after exercising reasonable diligence, based on the listserv email.* This might include examining *whether a person of ordinary skill, exercising reasonable diligence, would have joined the listserv.* See, e.g., *GoPro*, 908 F.3d at 694. It also might include considering *the circumstances of the email itself, for example why the email was sent and whether it was covered by an expectation of confidentiality.* See, e.g., *Mass. Inst. of Tech.*, 774 F.2d at 1109. Because the record is not clear on these factual questions, we decline to resolve them in the first instance on appeal. See, e.g., *Medtronic*, 891 F.3d at 1381–83 (remanding for the Board to consider the public accessibility question). In particular, we are reluctant to assume that an email among potential collaborators should be treated the same as a public disclosure without clear findings by the Board. Accordingly, we vacate the Board’s finding that Mr. Bross’s email did not make the WD4 reference publicly accessible and remand so that the

Board can consider this issue after applying the correct legal standard.

*Id.* at 1374-75 (emphasis added).

In view of the Court's decision, we focus our analysis below on whether Samsung's evidence established that an ordinarily skilled artisan could have accessed the WD4 reference, after exercising reasonable diligence, based on the listserv email. In particular, we examine the evidence of whether an ordinarily skilled artisan outside of the JCT-VC, exercising reasonable diligence, would have joined the listserv. We also examine the evidence concerning why the listserv email was sent and whether it was covered by an expectation of confidentiality.

*B. The Parties' Arguments*

*1. Petitioner's Opening Brief*

In Section II. A. of its opening brief, Petitioner contends that ordinarily skilled artisans would have joined the JCT-VC listserv because they "could easily join the JCT-VC listserv" and would have been motivated to do so "given the importance and prominence of the emerging HEVC Standard." Pet. Brief 2. Petitioner argues the JCT-VC's work was widely publicized, including in a Special Section of the IEEE's video coding journal. *Id.* at 3 (citing Ex. 1007). Petitioner also argues that the purpose of the JCT-VC was to develop the new generation worldwide video coding standard, and the personnel in attendance at JCT-VC meetings represented the interest and contribution of their respective leading technology

companies, universities, and research institutions. *Id.* at n.3 (citing Ex. 1002 ¶ 96; Ex. 1041, 1; Ex. 1057, 1, 254–57; Ex. 1058, 1).

According to Petitioner, the JCT-VC’s policy was to “conduct all communications related to the HEVC Standard’s development via the JCT-VC listserv” and, for this reason, “JCT-VC members and other interested individuals would have subscribed to the JCT-VC reflector.” *Id.* at 4 (citing Ex. 1002 ¶ 106; *see also* Ex. 1053, 2, Ex. 1055–58, 2, Paper 32, 25).

Petitioner argues that any person, and not just JCT-VC members, could subscribe to the JCT-VC listserv by requesting a subscription at the JCT-VC reflector management site, and such requests were typically approved. *Id.* (citing 1002 ¶ 106; Ex. 1057 at 8 (“membership of the reflector is *not limited to* qualified JCT-VC participants”); Ex. 1058 at 8 (same)). Petitioner also argues that the JCT-VC “meeting reports” provided instructions for subscribing to the listserv. *Id.* (citing Ex. 1053, 2; Ex. 1055–58, 2). Petitioner further argues that, as the Federal Circuit noted, we agreed that the listserv was not limited to the JCT-VC members, but “may have included ‘others who may have opted into the [listserv].’” *Id.* (citing *Samsung*,<sup>10</sup> 929 F.3d at 1373–74 (quoting Paper 32, 25)).

Petitioner also argues that a person ordinarily skilled in video coding would have become aware of the JCT-VC listserv based on the Special Section of the IEEE journal, which referred to the JCT-VC’s first meeting

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<sup>10</sup> Although Petitioner uses *Infobridge* in its citations to the Federal Circuit’s decision in these cases, we use *Samsung* for consistency.

report, which “advertised the JCT-VC reflector and the procedure for joining it.” *Id.* at 4–5 (citing Ex. 1007, 1664 (reference [8]); Ex. 1053, 2).

Petitioner further argues that at the very least, “skilled artisans who belonged to the JCT-VC’s parent organizations, VCEG and MPEG, would have been aware of the JCT-VC listserv” for several reasons, including that the JCT-VC “meeting reports were sent to the parent bodies” and the reports “advertised the listserv as a means of following the JCT-VC work and receiving its main work-product, such as the Working Drafts.” *Id.* at 5 (citing Ex. 1002 ¶¶ 97–99; Ex. 1035 ¶¶ 16, 18–20; Ex. 1041, 2–4; Ex. 1057, 2–4, 8).

Thus, Petitioner argues that we should find that ordinarily skilled artisans, beyond the JCT-VC’s members themselves, exercising reasonable diligence, could have and would have joined the JCT-VC listserv during the relevant timeframe, and would have therefore received WD4 via the listserv email. *Id.* Moreover, Petitioner argues that this is the conclusion reached by other Board panels based on substantially similar evidence. *Id.* at 5–6, 8–9 (citing *Samsung Elecs. Co. v. Ibex PT Holdings Co.*, IPR2018-00011 (hereinafter, “*Ibex*”), Paper 31 at 28 (Apr. 10, 2019); *Samsung Elecs. Co. v. M&K Holdings Inc.*, IPR2018-00696 (hereinafter, “*M&K*”), Paper 48 at 51 (Sept. 4, 2019)). Petitioner also argues that the public accessibility of WD4 is further confirmed by materials in the PTO’s own records because the file histories of certain U.S. patent applications, which were discussed in *M&K*, cite WD4 and other versions of working draft 4, although some of the listed inventors did not attend the Torino meeting. *Id.* at 9–10, n.4. Petitioner

argues that we should “take official notice, as necessary, of these file histories.” *Id.* at 10, n4.

In Section II. B. of its opening brief, Petitioner argues that “there were no confidentiality restrictions relating to the distribution of WD4 via the JCT-VC listserv or its further dissemination.” *Id.* at 6 (emphasis omitted).<sup>11</sup> According to Petitioner, it is undisputed that “a download link to WD4 was distributed via the JCT-VC listserv to at least 254 video coding personnel from the JCT-VC on October 4, 2011.” *Id.* (citing Paper 32, 14–15; Ex. 1002 ¶¶ 100, 103, 105–107; Ex. 1070; Ex. 1057, 1). According to Petitioner, it is also undisputed that “there was no expectation of confidentiality associated with the October 4th e-mail distributing WD4 or with access and use of WD4.” *Id.* (citing Paper 32, 14–15, 24–26; Ex. 1041, 2; Ex. 1070; Ex. 1002 ¶¶ 100, 103, 105–107).

Petitioner argues that “[t]he purpose of the email was to solicit input from skilled artisans on WD4 (e.g., at the next JCT-VC meeting).” *Id.* at 6–7 (citing Ex. 1058, 1; Ex. 1002 ¶¶ 99–100).

Petitioner also argues that the JCT-VC’s explicit policy was to make all its work “public,” and there is no evidence that WD4 was subjected to any exception to such policy. *Id.* at 7 (citing Ex. 1002 ¶¶ 27, 28, 64, 94–96, 99, 100, 103, 105; Ex. 1035 ¶ 17; Ex. 1041, 2; Ex. 1070).

Petitioner further argues that “[t]he publication of working documents like WD4 was consistent with JCT-VC’s publication policy and critical to its mission to ensure that the technology incorporated into the standard was

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<sup>11</sup> Although Petition’s briefs refer to WD4 in italics, we omit the italics in any quotations from Petitioner’s briefs for consistency in our Decision.

robust, that there would be wide public acceptance and eventual adoption of the standard to ensure interoperability . . . .” *Id.* at 7–8 (citing Ex. 1007, 1661–63; Ex. 1041, 1–3; Ex. 1057, 1–2 (Summary), 6–7 (Sections 2.4–2.5)).

Petitioner then argues that, therefore, an ordinarily skilled artisan could have accessed WD4, after exercising reasonable diligence, based on the listserv email “given that (1) the October 4, 2011, email was sent to ordinarily skilled artisans representing leading technology companies and universities to elicit feedback on WD4, (2) such ordinarily skilled artisans would have had reason to subscribe to the JCT-VC listserv given the importance of the emerging HEVC Standard, and (3) there was no expectation of confidentiality associated with the email, its contents, or with WD4.” *Id.* at 8 (citing *Samsung*, 929 F.3d at 1374–75; *Mass. Inst. of Tech. v. AB Fortia*, 774 F.2d 1104, 1108–09 (Fed. Cir. 1985); *Medtronic, Inc. v. Barry*, 891 F.3d 1368 (Fed. Cir. 2018); *GoPro, Inc. v. Contour IP Holding*, 908 F.3d 690, 694 (Fed. Cir. 2018); *Kyocera Wireless Corp. v. ITC*, 545 F.3d 1340, 1351 (Fed. Cir. 2008)).

In Section II. C. of its opening brief, Petitioner argues that the “public dissemination of WD4 is further demonstrated by record evidence showing that skilled artisans outside of the JCT-VC *did* access WD4 (or other versions of Working Draft 4 available on the JCT-VC webpage) accessible at a link in the October 4th email.” Pet. Brief 10–11 (citing Ex. 1066; Ex. 1002 ¶¶ 103, 105). Petitioner argues that skilled artisans who worked at or were connected to the companies and research institutions interested in understanding and shaping, ensuring the effectiveness of, and including their intellectual property under the new video coding standard “would have requested copies of, or access to, WD4 from their institution’s JCT-VC

representative,” who could be identified “from the attendee lists in the meeting reports,” because “evaluation of working drafts was necessary to achieving those goals.” *Id.* at 11. Petitioner also argues that the authors of input documents submitted at the JCT-VC’s seventh meeting in Geneva in regard to improvements to WD4 far exceeded, by at least 200 persons, the 254 attendees at the sixth meeting in Torino. *Id.* at 12–13 (citing Ex. 1002 ¶¶ 106–107; Ex. 1057, 254–257). Petitioner further argues that “[i]ndeed, there were at least 200 authors (outside of the 254 Torino attendees) who had access to Working Draft 4.” *Id.* at 13 (compare Ex. 1057, 254–257, with Ex. 1058, 238–301). Moreover, Petitioner argues that, “[t]herefore, at least 200 persons who did not attend the Torino meeting were aware of, and had access to, Working Draft 4 (including WD4) as a result of the JCT-VC listserv distribution.” *Id.* at 13–14.

In conclusion, Petitioner argues that the record evidence demonstrates that (1) ordinarily skilled artisans would have joined the JCT-VC listserv, (2) WD4’s distribution over the listserv was not associated with any confidentiality restrictions, and (3) “at least the 254 attendees of the Torino meeting and at least another 200 contributors to the subsequent Geneva meeting could have accessed WD4.” *Id.* at 14.

## *2. Patent Owner’s Response*

Patent Owner argues that “the Board and Federal Circuit have already held that the proper focus is whether WD4 was accessible to those **outside** the JCT-VC” (PO Response 6 (citing *Samsung*, 929 F.3d at 1372)), and “the record confirms that ‘those outside the JCT-VC’ exercising reasonable diligence would not have been able to access WD4 based on the email to

JCT-VC members” (PO Response 8). According to Patent Owner, the issue is:

whether non-JCT-VC ordinarily-skilled artisans exercising reasonable diligence would have known about the JCT-VC, its listserv, the need to join that listserv in order to gain access to WD4, and how to sign up. Put another way, whether outside interested parties could ask to join the email listserv is meaningless and irrelevant *unless Samsung first proved that the interested parties (outside of the JCT-VC), through the exercise of reasonable diligence, could even know about the listserv to make such a request in the first place.*

*Id.* at 8–9 (emphasis added). Moreover, according to Patent Owner, Samsung did not present any such evidence. *Id.* at 9.

Patent Owner argues that, in its remand briefs, Samsung acknowledged that this question is critical and argued for the first time that “[a] person of ordinary skill interested in video-coding would have become aware of the JCT-VC’s listserv” (citing Pet. Brief 4) and “joining the listserv would have been an exercise of reasonable diligence by an ordinarily skilled artisan” (citing *id.* at 5). PO Response 9. Patent Owner asserts that these are “new arguments, and tellingly, *Samsung cites no evidence to support these assertions.*” *Id.*

Patent Owner also argues that, without sufficient evidence regarding the public accessibility of the listserv, Samsung again relies on its rejected assertions that “‘JCT-VC’s work was widely publicized,’ arguing that ‘ordinary skilled artisans would have had reason to subscribe to the JCT-V[C] listserv given the importance of the emerging HEVC standard’ and noting the ‘prominence’ of the HEVC Standard to support its argument.” *Id.* at 10–11. Patent Owner asserts that we have “already properly rejected the

assertions concerning the prominence and importance of JCT-VC and HEVC.” *Id.* at 11 (citing Decision at 16–17, 20, 26; *Samsung*, 929 F.3d at 1370).

Patent Owner further argues that Petitioner “advances numerous arguments concerning theories that it never raised before,” including a JCT-VC Geneva meeting, which was not raised in the Petition and occurred after the priority date, “disseminations that may have happened after the listserv email,” and “new general assertions of access untied to the listserv email in any way.” *Id.* (citing Pet. Brief, 11–13). In addition, Patent Owner argues that Petitioner relies on the decisions in *Ibex* and *M&K*, stating that the panels “relied upon substantially similar evidence,” but “[t]hat is not what [Petitioner] told the *Ibex* and *M&K* panels.” *Id.* at 12.

Patent Owner also expands on its argument that Petitioner relies on “new arguments that cite to evidence not previously relied upon or discussed.” *Id.* at 13. In that regard, Patent Owner argues that Petitioner cites Exhibit 1007 and Exhibit 1058, but did not cite them in the Petition. *Id.* at 13–14. With respect to Exhibit 1058, the 2011 Geneva meeting report, Patent Owner also argues that Petitioner has not shown it is a public document, and the Federal Circuit held that Petitioner waived any argument regarding the Geneva meeting. *Id.* at 14 (citing *Samsung*, 929 F.3d at 1370). Patent Owner further argues that Petitioner relies on “the Torino meeting [report], Ex. 1057, for the new theory that there were instructions for subscribing to the listserv.” *Id.* (citing Pet. Brief 4–5). Patent Owner argues

that, “[a]gain, Samsung fails to show the meeting report itself was accessible to the public.” *Id.*

### 3. *Petitioner’s Reply*

Petitioner disputes Patent Owner’s accusations that its remand briefing adds new arguments and adduces new evidence not previously relied upon. Pet. Reply 2–3. Petitioner argues that the record demonstrates that the JCT-VC listserv included non-JCT-VC members because, as the Federal Circuit noted, the Board already made that finding. *Id.* at 3 (citing *Samsung*, 929 F.3d at 1373 (“[T]he Board . . . agreed that the listserv may have included ‘others who may have opted into the [listserv].’”)). Petitioner notes that the JCT-VC meeting reports state that “membership of the reflector is ***not limited to*** qualified JCT-VC participants,” and argues that Patent Owner’s sole response is that the meeting reports have not been shown to be publicly accessible. *Id.* Petitioner argues that this argument is misconceived because, given the prominence of the JCT-VC’s work, “one could find out about the listserv through means other than the meeting reports,” and in any event, the IEEE article “referred to a JCT-VC meeting report,” which advertised the JCT-VC reflector and its subscription procedures. *Id.* at 3–4 (citing Ex. 1007, 1664; Ex. 1053, 2).

Petitioner further argues that neither we, nor the Federal Circuit, addressed the issue of whether “the JCT-VC was prominent in the video coding industry,” and the Federal Circuit discussed only the Board’s reasoning whether “the JCT-VC’s *website* was prominent enough so that persons skilled in the art of video-coding ‘would [have] know[n] to check the JCT-VC site.’” *Id.* at 4 (citing *Samsung*, 929 F.3d at 1366). According to Petitioner, “[t]hat is very different from the question of whether JCT-

VC's overall work was well known and prominent." *Id.* In that regard, Petitioner argues that "record evidence (e.g., in the form of the IEEE video-coding journal's Special Section)" confirms the prominence and importance of the JCT-VC's work on the new HEVC standard for those in the video-coding field so that a person of ordinary skill, exercising reasonable diligence, would have joined the JCT-VC listserv. *Id.* at 4–5. Moreover, Petitioner asserts that Patent Owner never addresses the large number of MPEG and VCEG members who would have been aware of the JCT-VC listserv. *Id.* at 5.

Petitioner further asserts that its reliance on *Ibex* and *M&K* is proper. *Id.* at 6. In that regard, Petitioner argues it noted that the *Ibex* and *M&K* panels found "other HEVC Working Drafts to be printed publications based on substantially similar evidence (e.g., the IEEE journal's Special Section advertising the JCT-VC, the JCT-VC's communication policies in its meeting reports, testimony regarding interested person's ability to join the listserv, an announcement email to the listserv, and the JCT-VC policy of openness)." *Id.* Petitioner also argues that the issues were not identical "given the different documents at issue and different records," but the evidence on distribution of those documents via the listserv is substantially similar, and Patent Owner "fails to show otherwise." *Id.* at 6–7.

In addition, Petitioner argues that Patent Owner provides "no substantive response to the record evidence" that at least 200 individuals who did not attend the Torino meeting submitted input documents concerning WD4 for discussion at the Geneva meeting. *Id.* at 7. Instead, according to Petitioner, Patent Owner mischaracterizes the Federal Circuit's opinion, and "argues waiver." *Id.* Petitioner asserts, however, that the

Federal Circuit found waiver only as to the argument that WD4 was disseminated at the Geneva meeting, which is a different issue than “whether the evidence of outside comments on WD4 submitted at the Geneva meeting shows that WD4 was publicly accessible.” *Id.* (emphasis omitted).

#### 4. Patent Owner’s Sur-Reply

Patent Owner argues that, in contradiction to our Order, Petitioner cites new evidence and arguments not previously presented, “even in the form of a footnote.” PO Sur-Reply 1–2. Patent Owner also argues that such new theories are improper and fall short because “Petitioner has not focused on *public* accessibility.” *Id.* at 2.

Patent Owner further argues that Petitioner’s reliance on Mr. Bross’s declaration testimony that anyone could subscribe to the listserv and “were typically approved” is without merit because Petitioner provides no evidence that Mr. Bross has such personal knowledge. *Id.* (citing Fed. R. Evid. 602). According to Patent Owner, the record shows that “Mr. Bross never testified that he personally knew of anyone outside of the JCT-VC (from the public) that had requested access, was ‘typically was approved’ and added to the reflector.” *Id.* In regard to Petitioner’s argument that the meeting reports provide instructions for subscribing to the listserv, Patent Owner argues “the focus here is *public* accessibility, not whether a JCT-VC member (of a closed, collaborative group, like MPEG) was previously provided with listserv instructions.” *Id.* at 2–3.

Patent Owner asserts that Petitioner appears to rely on “how anyone can join the JCT-VC group (without declaratory evidence - - that was not deemed as unpersuasive), and how the purpose of the e-mail was to solicit input.” *Id.* at 3 (citing Pet. Brief 6). Patent Owner argues that, “[e]ven so,

the group is still closed and collaborative in nature, and how a closed group is formed is irrelevant.” *Id.* at 3.

Patent Owner also asserts that Petitioner relies on *Ibex* and *M&K* as “evidence” for someone actually joining the listserv, but “the evidence/findings presented in the other IPRs was different, such as supplemental evidence.” *Id.* at 4. According to Patent Owner, “[h]ere there is no declaratory evidence as objective proof to tie being ‘aware’ to a named person ‘joining’ the collaborative group.” *Id.* Further, Patent Owner argues that Petitioner’s position “clearly seesaws” depending on the outcome of the other IPRs and “should not be given weight.” *Id.*

Patent Owner further argues that Petitioner’s remand briefs do not cure the Petition’s deficiencies. *Id.* at 5. Patent Owner asserts that “[w]hether outside interested parties could ask to join the email listserv is meaningless and irrelevant unless Petitioner first proved that the interested parties (outside of the JCT-VC), through the exercise of reasonable diligence, could even know about the listserv to make such a request in the first place.” *Id.*

Moreover, Patent Owner argues that any reliance on a meeting or meeting report to show accessibility of a working draft is improper at this stage. *Id.* Patent Owner asserts that Petitioner focuses on exhibits never relied upon before, such as “Exhibit 1058 (‘approximately 1000 input documents were discussed’ during the Geneva meeting, that took place later).” *Id.* Patent Owner also asserts that Petitioner “does not point to any

previous argument or evidence in the record . . . pertaining to an input author.” *Id.* at 6.

Patent Owner also argues that, in regard to any assertion of no expectation of confidentiality, Petitioner’s declaratory evidence was “already deemed unpersuasive due to being conjectural and speculative,” and “[t]here is no evidence to support disclosure outside the JCT-VC group.” *Id.*

### *C. Analysis*

#### *1. Does Petitioner Rely on New Evidence?*

Initially, we note that the parties dispute whether Petitioner cites new evidence and presents new arguments that are raised for the first time on remand. For example, Patent Owner argues that, in violation of our Order, Petitioner “adds new arguments that cite to new evidence not previously relied upon or discussed.” PO Response 13; *see also* PO Sur-Reply 1. Petitioner asserts that Patent Owner’s accusations that Petitioner’s remand briefing adds new arguments and adduces “evidence not previously relied upon” are groundless. Pet. Reply 2.

We are not persuaded by Patent Owner’s argument that Petitioner cites or relies on “new evidence.” In our Order, we authorized the parties to file briefs based on “the record, as it currently exists.” Order, 7. Patent Owner argues, for example, that Petitioner cites Exhibit 1007 and Exhibit 1058, but did not cite them in the Petition. PO Response 13–14. Petitioner asserts that is incorrect. Pet. Reply 2. We agree with Petitioner because these exhibits were cited in the Petition at the pages identified by Petitioner. *Id.* (citing Paper 1, 4–5 (citing Ex. 1007), 35 (citing Ex. 1058)). We also agree with Petitioner that these exhibits were filed with the Petition and are

unquestionably part of “the record, as it currently exists.” *Id.* at 3. In regard to whether Petitioner’s remand briefs present “new arguments,” we address that issue *infra* in the context of the various arguments asserted by Petitioner.

2. *Would an ordinarily skilled artisan outside of the JCT-VC, exercising reasonable diligence, have joined the listserv?*

We now turn to the issue of whether Samsung’s evidence established that an ordinarily skilled artisan could have accessed the WD4 reference, after exercising reasonable diligence, based on the listserv email. Consistent with the Federal Circuit’s decision that we properly focused on whether those “outside of the JCT-VC” knew about the “JCT-VC website” (*see Samsung*, 929 F.3d at 1372), the parties argue whether an ordinarily skilled artisan, “beyond the JCT-VC’s members themselves” or “outside of the JCT-VC,” could have and would have joined the “JCT-VC listserv” and received WD4 via the listserv email. *See* Pet. Brief 5; PO Response 6, 8. Thus, in particular, we focus on whether Petitioner’s evidence establishes that an ordinarily skilled artisan outside of the JCT-VC, exercising reasonable diligence, could have and would have joined the listserv.

Petitioner initially argues that the evidence demonstrates that any person, and not just JCT-VC members, could subscribe to the JCT-VC listserv by requesting a subscription at the JCT-VC reflector management site, and such requests were typically approved. Pet. Brief 2, 4 (citing Ex. 1002 ¶ 106; Ex. 1057, 8; Ex. 1058, 8). Petitioner also argues that the JCT-VC meeting reports provided instructions for subscribing to the listserv. *Id.* at 4 (citing Ex. 1053, 2; Ex. 1055, 2; Ex. 1056, 2; Ex. 1057, 2; Ex. 1058, 2). In addition, Petitioner argues that an ordinarily skilled artisan would have

been motivated to join or subscribe to the listserv “given the importance and prominence of the emerging HEVC Standard” and because “the JCT-VC’s work was widely publicized,” including in the Special Section of the IEEE’s video coding journal. *Id.* at 2, 3 (citing Ex. 1007; Ex. 1002 ¶ 96; Ex. 1041, 1; Ex. 1057, 1; Ex. 1058, 1). Petitioner further argues that “JCT-VC members and other interested persons” would have subscribed to the JCT-VC listserv because the JCT-VC’s policy was to “conduct all communications related to the HEVC’s Standard development” via the listserv. *Id.* at 4 (citing Ex. 1002 ¶ 106; *see also* Ex. 1053, 2, Ex. 1055–1058, 2, Paper 32, 25). Moreover, Petitioner argues that an ordinarily skilled artisan would have become aware of the JCT-VC listserv based on the Special Section of the IEEE journal, which referred to the JCT-VC’s first meeting report, which “advertised the JCT-VC reflector and the procedure for joining it.” *Id.* at 4–5 (citing Ex. 1007, 1664 (reference [8]); Ex. 1053, 2).

Patent Owner argues that Petitioner failed to present evidence that those outside of the JCT-VC exercising reasonable diligence would have known about the JCT-VC listserv, the need to join the listserv to gain access to WD4, and how to join up. PO Response 8–9. Patent Owner also argues, “[p]ut another way, whether outside interested parties could ask to join the email listserv is meaningless and irrelevant unless Petitioner first proved that the interested parties (outside of the JCT-VC), through the exercise of reasonable diligence, could even know about the listserv to make such a request in the first place.” *Id.* at 9; PO Sur-Reply 5.

We agree with Patent Owner. For the reasons discussed below, we determine Petitioner has not demonstrated that interested artisans outside of

the JCT-VC, after exercising reasonable diligence, would have known about the JCT-VC listserv, the need to join the listserv to gain access to WD4, and the procedure to join. In regard to whether an ordinarily skilled artisan outside of the JCT-VC would have been permitted to join or subscribe to the JCT-VC listserv, the cited JCT-VC meeting reports state:

“The reflector to be used for discussions by the JCT-VC and all of its AHGs is the JCT-VC reflector: [jct-vc@lists.rwth-aachen.de](mailto:jct-vc@lists.rwth-aachen.de). For subscription to this list, see <http://mailman.rwth-aachen.de/mailman/listinfo/jct-vc>” [sometimes referred to hereinafter as, “the reflector management site”].

Ex. 1053, 2; Ex. 1055, 2; Ex. 1056, 2; Ex. 1057, 2; Ex. 1058, 2.

The cited meeting reports also state:

JCT-VC email lists are managed through the site <http://mailman.rwth-aachen.de/mailman/options/jct-vc>, and to send email to the reflector, the email address is [jct-vc@lists.rwth-aachen.de](mailto:jct-vc@lists.rwth-aachen.de). Only members of the reflector can send email to the list.

Ex. 1053, 4; Ex. 1055, 5; Ex. 1056, 8; Ex. 1057, 8; Ex. 1058, 8.

However, the JCT-VC meeting reports for the sixth meeting at Torino, IT, which was held on July 14–22, 2011, and the seventh meeting at Geneva, CH, which was held on November 21–30, 2011, are different from the previous meeting reports because, *inter alia*, they add the sentence stating, “However, membership of the reflector is not limited to qualified JCT-VC participants,” after the sentence stating, “Only members of the reflector can send email to the list,” as stated in the previous meeting reports. Ex. 1057, 8; Ex. 1058, 8.

Mr. Bross testified that, “in at least 2011–2012, all communications between members related to the development of the HEVC standard were to be conducted via the JCT-VC reflector ([jctvc@lists.rwth-aachen.de](mailto:jctvc@lists.rwth-aachen.de))” and

cited the Geneva meeting report as stating that “[t]he reflector to be used for discussions by the JCT-VC and all of its AHGs [Ad Hoc Groups<sup>12</sup>] is the JCT-VC reflector: jct-vc@lists.rwth-aachen.de.” Ex. 1002 ¶ 106, 124 (citing Ex. 1058, 2). Mr. Bross also testified that “any person could subscribe to the JCT-VC reflector by requesting a subscription at the reflector management site.” Ex. 1002 ¶ 106, 124–125. In addition, Mr. Bross testified that “[b]ased on my knowledge and recollection, in at least 2011-2012, although the [reflector] management site suggests that a list moderator would have to approve a subscription request, in practice, anyone with a valid email address requesting subscription was typically approved. Accordingly, a great number of individuals were included in the JCT-VC reflector.” *Id.* at 125.

Based on the July 2011 Torino and the November 2011 Geneva JCT-VC meeting reports, and Mr. Bross’s testimony, we find Petitioner’s evidence demonstrates that, in the months of July–November 2011, any person, including those outside of the JCT-VC, would have been permitted to subscribe to the JCT-VC listserv by submitting a request for a subscription at the reflector management site and obtaining approval of the request by the list moderator. Ex. 1002 ¶ 106; Ex. 1057, 8; Ex. 1058, 8. We find, however, that Mr. Bross’s testimony that “in practice, anyone with a valid email address requesting subscription was typically approved” is

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<sup>12</sup> As stated in the Terms of Reference of the Joint Collaborative Team on Video Coding Standard Development, dated January 2010 (hereinafter, “the Terms of Reference of the JCT-VC”), “[t]he JCT may establish ‘ad hoc groups’ to coordinate activities to perform specific tasks between meetings of the JCT.” Ex. 1041, 3.

conclusory and insufficiently factually supported. As we noted in the Decision, we understand Mr. Bross to be testifying in this regard as a fact witness pursuant to Federal Rule of Evidence 602, rather than as an expert witness pursuant to Federal Rule of Evidence 702. Decision 16. Under Rule 602, a fact witness may testify as to a matter only if “evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Fed. R. Evid. 602. Here, Mr. Bross’s testimony is based on his “knowledge and recollection,” but the particular factual knowledge on which his testimony that subscription requests were “typically approved” is based is not described. Thus, we also determine that Mr. Bross’s testimony that “[a]ccordingly, a great number of individuals were included in the JCT-VC reflector” is unpersuasive because the premise on which this testimony is based is unsupported.

We also find, consistent with Patent Owner’s argument, that Petitioner has not demonstrated that interested artisans outside of the JCT-VC, exercising reasonable diligence, *would* have known about the JCT-VC listserv, the need to join the listserv to gain access to documents of interest to those in the field, and the procedure to join or subscribe to the listserv. PO Response 8–9. Petitioner argues that “[t]he JCT-VC’s policy was to conduct all communications related to the HEVC Standard’s development via the JCT-VC listserv,” and for that reason, “JCT-VC members and other interested individuals would have subscribed to the JCT-VC reflector.” Pet. Brief 4 (citing Ex. 1002 ¶ 106; Ex. 1057, 2; Ex. 1053, 2; Ex. 1055, 2; Ex. 1056, 2; Ex. 1058, 2; Paper 32, 25). Even assuming that the JCT-VC’s policy was as stated by Petitioner, this argument is not persuasive because Petitioner has not provided sufficient evidence demonstrating that ordinarily

skilled artisans outside of the JCT-VC, exercising reasonable diligence, would have known of such policy, the listserv, or how to subscribe to it. Nor does Petitioner's citation to page 25 of the Decision support Petitioner's argument. At page 25 of the Decision, we referred to Patent Owner's contention that, even if Mr. Bross sent an email with a link to WD4 to the listserv, WD4 is not prior art because "the email did not disseminate the reference to ordinarily skilled artisans at large, but only to those who opted into the listserv." Decision 25 (citing Patent Owner Response 49). We then stated that we agree with Patent Owner and that, "We find Mr. Bross's email to the JCT-VC reflector was, at best, a limited distribution of a link to the WD4 document information webpage to a select group, the members of JCT-VC and *perhaps* others who *may* have opted into the reflector." *Id.* (emphasis added). Thus, we did not find that individuals outside of the JCT-VC "did" opt into the listserv; instead, we agreed with Patent Owner's argument to the extent that "perhaps others may have" opted into the listserv.<sup>13</sup> Moreover, considered in context, our finding does not provide support for Petitioner's argument that interested individuals outside of the JCT-VC did subscribe or would have subscribed to the listserv based on the JCT-VC's policy relating to the listserv or for any other reason because our finding was made only in the context of Patent Owner's contention that the

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<sup>13</sup> In its decision, the Federal Circuit stated that "the Board found that Mr. Bross emailed a link to the WD4 reference to the listserv in October 2011" and "[i]t also agreed that the listserv *may* have included 'others who *may* have opted into the [listserv].'" *Samsung*, 929 F.3d at 1373 (quoting Decision 25) (emphasis added).

email was sent to the members of the JCT-VC and “perhaps others who may have opted into the reflector.”

Petitioner argues that the JCT-VC meeting reports provided instructions for subscribing to the listserv. Pet. Brief 4. Petitioner also argues that an ordinarily skilled artisan in video coding would have become aware of the JCT-VC listserv based on the Special Section of the IEEE journal, which referred to the JCT-VC’s first meeting report in Geneva. *Id.* at 4–5 (citing Ex. 1007, 1664 (reference [8]); Ex. 1053, 2). As discussed *supra*, we find that the JCT-VC meeting reports provide certain instructions for subscribing to the listserv because they state, “[f]or subscription to this list, see [the reflector management site].” *See* Ex. 1053, 2; Ex. 1055, 2; Ex. 1056, 2; Ex. 1057, 2; Ex. 1058, 2.

Patent Owner argues, however, that Petitioner has not shown that the Geneva meeting report (Exhibit 1058) is “a public document” or that the Torino meeting report (Exhibit 1057) was “accessible to the public.” PO Response 14. In response, Petitioner argues that Patent Owner’s argument is misconceived because, given the prominence and importance of the JCT-VC’s work, “one could find out about the listserv through means other than the meeting reports.” Pet. Reply 3. Petitioner further argues that, in any event, the Special Section of the IEEE journal “advertised the JCT-VC reflector and its subscription procedures.” *Id.* at 3–4 (citing Ex. 1007; Ex. 1053, 2); *see also* Pet. Brief 4–5 (citing Ex. 1007, 1664 (reference [8]); Ex. 1053, 2).

We agree with Patent Owner for two reasons. First, Petitioner’s argument that “one could find out about the JCT-VC listserv through means other than the meeting reports” is conclusory and factually unsupported.

Indeed, Petitioner cites no documentary or testimonial evidence following the recitation of this argument. *See* Pet. Reply 3. Nor does Petitioner identify any “means other than” the meeting reports. *Id.*

Second, Petitioner’s argument that the Special Section of the IEEE journal “advertised the JCT-VC reflector and its subscription procedures” is unsupported by the evidence. The Special Section comprises approximately four pages of text, a list of seventeen references, and summaries of the educational and employment experience of the two authors and five other contributors. *See* Ex. 1007, 1661–66. At the end of the text portion of the article, under “References,” the Special Section refers to the JCT-VC meeting report for the first meeting in Dresden, DE,<sup>14</sup> as reference [8]. Reference [8] states the following:

G. J. Sullivan and J.-R. Ohm, *Meeting Report of the First Meeting of the Joint Collaborative Team on Video Coding (JCT-VC)*, ITU-T SG16 WP3 and ISO/IEC JTC1/SC29/WG11 document JCTVC-A200, Joint Collaborative Team on Video Coding (JCT-VC), Dresden, Germany, Apr. 2010.

*Id.* at 1664. The Special Section does not, however, mention the JCT-VC listserv, the reflector management site, or any listserv subscription procedures, much less “advertise” them.<sup>15</sup> *See generally* Ex. 1007.

Thus, we find that Petitioner has not demonstrated that any of the cited JCT-VC meeting reports, including the April 2010 Dresden (Ex. 1053),

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<sup>14</sup> The JCT-VC meeting report for the first meeting in Dresden, DE, is Exhibit 1053 in these proceedings.

<sup>15</sup> We note that the IEEE article states that “[t]he referenced JCT-VC report documents [7]-[11] . . . are publicly available for further study (through (<http://www.itu.int/ITU-T/studygroups/com16/jct-vc/index.html>)).” *See* Ex. 1007, 1663. Petitioner, however, does not refer to or cite this statement in

the July 2011 Torino (Ex. 1057), and the November 2011 Geneva (Ex. 1058) meeting reports, are public documents or would have been publicly accessible to an ordinarily skilled artisan, exercising reasonable diligence, so that such artisan could have learned about the JCT-VC listserv and how to subscribe to it.

We also find that Petitioner's argument that an ordinarily skilled artisan would have been motivated to join or subscribe to the listserv "given the importance and prominence of the emerging HEVC Standard" is not persuasive because it is conclusory and insufficiently supported by factual evidence. *See* Pet. Brief 2. Petitioner's argument that "the JCT-VC's work was widely publicized" is not persuasive either because the only publication cited is the Special Section of the IEEE journal. *Id.* at 3 (citing Ex. 1007). We also note that Petitioner provides no evidence concerning the extent of distribution of the Special Section. And, regardless of how widely-published the Special Section of the IEEE journal was, the fact remains that the Special Section did not itself identify or refer to the JCT-VC listserv.

Petitioner further argues that record evidence, in the form of the Special Section, "confirms the prominence and importance of the JCT-VC's work on the new HEVC standard for those in the video-coding field," so that

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the IEEE article and does not argue that the JCT-VC's Dresden meeting report would have been accessible to an interested artisan because it was uploaded to the identified website. *See generally* Pet. Brief, Pet. Reply. Petitioner has, therefore, waived any argument that the Dresden meeting report was a public document or publicly accessible to an artisan outside of the JCT-VC based on the report being uploaded to this website. *See Ariosa Diagnostics v. Verinata Health, Inc.*, 805 F.3d 1359, 1367 (Fed. Cir. 2015) (finding no error in the Board's rejection of reliance on a Reply submission not previously raised)).

a person of ordinary skill, exercising reasonable diligence, would have joined the listserv. Pet. Reply 4–5. We are not persuaded that the Special Section confirms either the prominence<sup>16</sup> or importance of the JCT-VC’s work. The article states that, since developing the H.264 standard, VCEG and MPEG “have been actively seeking emerging developments to identify when the next major step forward in compression capability would become feasible.” Ex. 1007, 1661. The article explains that in January 2010, VCEG and MPEG reached an agreement to establish the JCT-VC and “to issue a joint Call for Proposals (CfP).” *Id.* According to the article, a total of 27 formal responses were received and evaluated at the first meeting of the JCT-VC in April 2010. *Id.* at 1661–62. Following an overall analysis of the proposals based on “random access” and “low delay” coding conditions, the remainder of the Special Section presents substantive reviews of eight of the proposals. *Id.* at 1663–65 (*see* references [12]–[19]). Thus, we determine that the Special Section provides a substantive analysis of specific proposals considered by the JCT-VC at its first meeting, rather than promoting or touting the JCT-VC or the JCT-VC’s work.<sup>17</sup>

Even assuming the importance of the JCT-VC’s work on the new HEVC standard, for the reasons discussed *supra*, we determine Petitioner

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<sup>16</sup> As Patent Owner argues (*see* PO Response 11), we determined in the Decision that Mr. Bross’s testimony about “the prominence of the JCT-VC in the video coding industry” is an unsupported assumption. Decision 16; *see also Samsung*, 929 F.3d at 1370–71.

<sup>17</sup> This is also evidenced by the article’s title: *Special Section on the Joint Call for Proposals on High Efficiency Video Coding (HEVC) Standardization*. *See* Ex. 1007, 1661.

has not demonstrated through the cited meeting reports, Mr. Bross's testimony, or the Special Section that a skilled artisan, exercising reasonable diligence, would have known about the JCT-VC listserv or how to subscribe to it.

Petitioner further argues that, “[a]t the very least, skilled artisans who belonged to the . . . VCEG and MPEG[] would have been aware of the JCT-VC listserv” because the JCT-VC meetings were arranged to coincide with the VCEG or MPEG meetings, the JCT-VC electronic documents were linked to the MPEG website, and meeting reports were sent to the parent bodies. Pet. Brief 5 (citing Ex. 1057, 2–4; Ex. 1041, 2–4; Ex. 1035 ¶¶ 16, 18–20). Patent Owner contends that this is a new argument, at least to the extent it relies on a meeting or meeting report to show accessibility of a working draft. See PO Response 11; PO Sur-Reply 5. Petitioner argues that Patent Owner “never addresses the large number of MPEG and VCEG members who would have been aware of the JCT-VC listserv.” Pet. Reply 5.

We agree with Patent Owner and find that Petitioner's arguments in regard to (1) the JCT-VC meetings being arranged to coincide with the VCEG or MPEG meetings and (2) the meeting reports being sent to the parent bodies are new and, therefore, are waived. See *Ariosa*, 805 F.3d at 1367. As we understand it, Petitioner's other argument that “the JCT-VC electronic documents were linked to the MPEG website” is the same as Petitioner's previously rejected argument that the electronic input and output documents, such as WD4, were uploaded to the MPEG website and,

therefore, publicly accessible. *See* Decision 20–24; *see also Samsung*, 929 F.3d at 1370–73.

Even assuming that Petitioner’s arguments are not new, we nevertheless find they are not sufficiently supported by the evidence. With respect to the JCT-VC meetings coinciding with the VCEG or MPEG meetings, the cited Torino meeting report states that “[t]he meeting took place in a collocated fashion with a meeting of WG 11 – one of the two parent bodies of the JCT-VC.” Ex. 1057, 1. Even though the JCT-VC and WG 11 meetings took place at the same institution,<sup>18</sup> there is no evidence that the meetings were conducted together or that those attending the WG 11 meeting could or did attend the JCT-VC meeting.

In regard to the argument that the JCT-VC meeting reports were sent to the parent bodies, we note that the Terms of Reference of the JCT-VC state that “[a] meeting report will be provided by the JCT Chairs after the conclusion of each meeting and will be submitted to the parent bodies and posted to the JCT electronic archive.” Ex. 1041, 4. However, there is no evidence that this procedure, set forth in the Terms of Reference in 2010, was followed. Petitioner has not identified, and we have not discerned, any testimonial or documentary evidence that any JCT-VC meeting reports were actually submitted to or received by the parent bodies, VCEG and MPEG. In that regard, neither Mr. Bross nor Dr. Vetro testified that JCT-VC meeting reports were sent to or received by VCEG and MPEG. *See generally* Ex. 1002, Ex. 1035. Nor has Petitioner demonstrated that a

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<sup>18</sup> As indicated in the Torino meeting report, the sixth meeting of the JCT-VC was held at the Politecnico di Torino, Torino (Turin), IT. Ex. 1057, 1.

meeting report “submitted to the parent bodies” would have been accessible to an ordinarily skilled artisan outside of the JCT-VC. Furthermore, even if meeting reports were posted to the JCT-VC or MPEG websites, Petitioner failed to demonstrate that ordinarily skilled artisans outside of the JCT-VC would have been aware of the JCT-VC and MPEG websites, or that, if they were aware of the site, they would have been able to locate the meeting reports. *See* Decision 17–24; *see also Samsung*, 929 F.3d at 1372–73.

Thus, for the reasons discussed *supra*, we determine that, although Petitioner has demonstrated that any person outside of the JCT-VC could have joined the JCT-VC listserv in July through November 2011, Petitioner has not shown that an ordinarily skilled artisan outside of the JCT-VC would have joined the JCT-VC listserv, and therefore received WD4 via the listserv, because Petitioner has not demonstrated that an artisan outside of the JCT-VC, exercising reasonable diligence, would have known about the JCT-VC listserv or how to subscribe to it.

Petitioner argues that other Board panels have concluded, based on substantially similar evidence, that ordinarily skilled artisans beyond the JCT-VC’s members would have joined the JCT-VC listserv and received WD4. Pet. Brief 5–6, 8–9 (citing *Ibex* and *M&K*); *see also* Pet. Reply 6–7. Patent Owner argues we should not rely on the decisions in *Ibex* and *M&K* because the reference and evidence in those proceedings are different. PO Response 12; PO Sur-Reply 4. We agree with Patent Owner. Seeking to avoid estoppel over our prior decisions in these cases, Petitioner told the *M&K* panel that “the issue here is not ‘identical’ to that in the *Infobridge* IPRs because these proceedings involve different JCT-VC publications and different record.” PO Response 12 (citing IPR2018-00696, Paper 26, 20).

Petitioner also told the *M&K* panel, in its opening brief on the Federal Circuit’s decision in *Samsung* (relating to the instant IPRs), that “The record here is different.” *Id.* (citing IPR2018-00696, Paper 44, 3). The *Ibex* panel distinguished its ruling from the Final Written Decisions in these cases by stating “the evidence in this case regarding WD5 is sufficiently different from the evidence regarding WD4 considered in the *Infobridge* cases . . . .” *Id.* at 13 (citing IPR2018-00011, Paper 31, 25). Furthermore, Petitioner has not demonstrated that the testimonial and documentary evidence regarding the public accessibility of WD4 and the JCT-VC listserv in *Ibex* and *M&K* is the same or substantially the same as the evidence here. Thus, we determine that the decisions in the *Ibex* and *M&K* proceedings are not persuasive here because they are distinguishable on their facts and evidence.

Moreover, Petitioner suggests that we should “take official notice, as necessary” of the prosecution histories of certain U.S. patent applications that Petitioner asserts were discussed in *M&K* and cite WD4, and other working versions of WD4. *See* Pet. Brief 9–10, n.4. As indicated in our Order, we previously considered Petitioner’s request to submit new evidence on remand regarding the listserv issue and determined that “the circumstances here do not require the submission of new evidence.” Order, 3, 6. In that regard, we stated that “the Federal Circuit remanded these cases because we ‘applied an erroneous legal standard in concluding that the listserv email did not make the WD4 reference publicly accessible,’” and that “the parties had the full and fair opportunity to present evidence on the listserv issue prior to the appeal, and allowing additional evidence to be presented now would be time-consuming and costly to the parties.” *Id.* at 6–7. For these same reasons, we decline to follow Petitioner’s suggestion that

we should now consider new evidence through “official notice” or otherwise.

Accordingly, for the reasons discussed above, we also agree with Patent Owner that Petitioner has not provided evidence supporting its assertions that “a person of ordinary skill interested in video-coding would have become aware of the JCT-VC’s listserv” and that “joining the listserv would have been an exercise of reasonable diligence by an ordinarily skilled artisan in the video-coding field.” PO Response 9 (citing Pet. Brief 4–5).

*3. Why was the listserv email sent and was it covered by an expectation of confidentiality?*

We now examine the evidence concerning why the listserv email was sent and whether it was covered by an expectation of confidentiality. Petitioner contends it is undisputed that “a download link to WD4 was distributed via the JCT-VC listserv to at least 254 video coding personnel from the JCT-VC on October 4, 2011.” Pet. Brief 6 (citing Paper 32, 14–15; Ex. 1002 ¶¶ 100, 103, 105–107; Ex. 1070; Ex. 1057, 1). Patent Owner does not expressly dispute this contention, but argues that “Petitioner’s declaratory evidence was already deemed unpersuasive due to being conjectural and speculative.” PO Sur-Reply 6. In the Decision, we found it is not disputed that, on October 4, 2011, Mr. Bross sent an e-mail to the JCT-VC reflector listserv announcing WD4 was uploaded to the JCT-VC document management site and available for downloading with a link to the WD4 document information webpage. Decision 14, 25. Mr. Bross testified that he announced completion of WD4 “to the JCT-VC members via the reflector on October 4, 2011” and that he “widely distributed WD4 to about 254 individuals via the reflector at least on October 4, 2011.” Ex. 1002

¶ 107. We also found in the Decision that Mr. Bross’s testimony that “the number of individuals subscribed to the JCT-VC reflector in at least 2011-2012 must have been much greater than 254 at that time,” is “factually unsupported and nothing more than conjecture and speculation.” *Id.* at 25–26. Thus, we further found that “Mr. Bross’s testimony only establishes that his e-mail to the JCT-VC reflector with the link to the WD4 document information webpage was sent to 254 individuals, all or substantially all of whom were members of JCT-VC.” Accordingly, considering Petitioner’s contention in view of these findings, we determine the evidence demonstrates that a download link to WD4 was distributed via the JCT-VC listserv to 254 video coding personnel from the JCT-VC on October 4, 2011.

Petitioner also contends it is “undisputed that there was no expectation of confidentiality associated with the October 4th e-mail distributing WD4 or with access and use of WD4.” Pet. Brief 6 (citing Paper 32 at 14–15, 24–26; Ex. 1041 at 2; Ex. 1070; Ex. 1002 ¶¶ 100, 103, 105–107). Patent Owner does not expressly dispute this contention, but argues that in regard to “any assertion of no expectation of confidentiality . . . [t]here is no evidence to support disclosure outside the JCT-VC group.” PO Sur-Reply 6.

The Terms of Reference of the JCT-VC state that “to facilitate cross-organizational communication, all input and output documents of the JCT will be public” (Ex. 1042, 2), and Petitioner argues “there is no evidence that WD4 was subjected to any exception to this policy.” Pet. Brief 7. Based on the statement in the Terms of Reference, Mr. Bross testified that “the JCT-VC had a general policy of making JCT-VC related documents publicly available.” Ex. 1002 ¶ 100. Mr. Bross also testified that, based on his knowledge and recollection, consistent with this general policy, “there were

no restrictions [such as a username and password] for downloading documents uploaded on the JCT-VC site in at least the 2011-2012 timeframe.” *Id.* Mr. Bross’s email states that WD4 “was uploaded to the document management site and is now available,” and as Petitioner argues, does not indicate that WD4 was confidential or restrict its use or dissemination. Ex. 1070; Pet. Brief 7. Thus, we agree with Petitioner that the evidence demonstrates, and Patent Owner does not dispute, that there was no expectation of confidentiality associated with the listserv e-mail or with access and use of WD4.

In regard to *why* the listserv email was sent, Petitioner argues that “[t]he purpose of the e-mail was to solicit input from skilled artisans on WD4 (e.g., at the next JCT-VC meeting).” Pet. Brief 6–7 (citing Ex. 1058, 1; Ex. 1002 ¶¶ 99–100). Petitioner also argues that “[t]he publication of working documents like WD4 was . . . critical to its mission to ensure . . . the standard was robust, that there would be wide public acceptance and eventual adoption of the standard to ensure interoperability . . .” *Id.* at 7–8 (citing Ex. 1007, 1661–63; Ex. 1041, 1; Ex. 1057, 1–2 (Summary), 6–7 (Sections 2.4–2.5)). Petitioner then argues as follows:

Therefore, given that (1) the October 4, 2011, email was sent to ordinarily skilled artisans representing leading technology companies and universities to elicit feedback on WD4, (2) such ordinarily skilled artisans would have had reason to subscribe to the JCT-VC listserv given the importance of the emerging HEVC Standard, and (3) there was no expectation of confidentiality associated with the email, its contents, or with WD4, an ordinarily skilled artisan could have accessed the WD4

reference, after exercising reasonable diligence, based on the listserv email.

*Id.* at 8.

We are not persuaded by Petitioner’s argument. Instead, we determine that, except for Petitioner’s assertion that “there was no expectation of confidentiality associated with the email, its contents, or with WD4,” which the evidence supports as discussed *supra*, Petitioner’s conclusion that “an ordinarily skilled artisan could have accessed WD4, after exercising reasonable diligence, based on the listserv email,” and the premises on which it is based, are not supported by the evidence.

First, Petitioner’s argument that the listserv email was sent to “solicit input from skilled artisans on WD4 (e.g., at the next JCT-VC meeting)” is not factually supported by the portion of the sentence Petitioner quotes from Exhibit 1058 or Mr. Bross’s testimony. As previously discussed, Exhibit 1058 is the meeting report of the JCT-VC’s seventh meeting in Geneva on November 21–30, 2011. The sentence quoted by Petitioner describes several “primary goals of the meeting,” including “editing the 4<sup>th</sup> HEVC specification Working Draft (WD4),” as quoted by Petitioner, and “review[ing] technical input documents,” which is not quoted by Petitioner. This sentence refers to the internal work of the JCT-VC at the Geneva meeting, and does not mention or refer to the listserv or to providing a link to WD4 via the listserv to “solicit input” from those outside of the JCT-VC.

Similarly, in the paragraphs cited from Mr. Bross’s declaration, he did not testify that the purpose of the listserv email was to “solicit input” from ordinarily skilled artisans outside of the JCT-VC. Rather, Mr. Bross testified that, from time to time, he would “announce the availability of the

latest version of a Working Draft of the HEVC standard.” Ex. 1002 ¶ 99. As previously discussed, he also testified that “the JCT-VC had a general policy of making JCT-VC related documents publicly available” and cited the provision in the Terms of Reference stating, “In order to facilitate *cross-organisational [sic] communication*, all input and output documents of the JCT will be public (including the drafts of the coding specification, reference software, and conformance test data).” *Id.* at ¶ 100 (citing Ex. 1041 at 2) (emphasis added).

Mr. Bross specifically testified about disseminating WD4 via the listserv email in paragraphs 106 and 107 of his declaration. After testifying that, on October 4, 2011, WD4 “was disseminated to the JCT-VC community by email,” Mr. Bross further testified that, “in at least 2011-2012, *all communications between members* related to the development of the HEVC standard were to be conducted via the JCT-VC reflector (jctvc@lists.rwth-aachen.de)” and cited the Geneva meeting report stating, “The reflector to be used for *discussions by the JCT-VC and all of its AHGs* [Ad Hoc Groups] is the JCT-VC reflector: jct-vc@lists.rwth-aachen.de,” and “The ad hoc groups established to progress work on particular subject areas until the next meeting are described in the table below [second entry of table includes WD4]. The *discussion list for all of these ad hoc groups* will be the main JCT-VC reflector (jct-vc@lists.rwth-aachen.de.” Ex. 1002 ¶ 106 (citing Ex. 1058, 2, 180–181) (emphasis added). Thus, based on Mr. Bross’s testimony, the JCT-VC listserv was for internal communications and discussions by members of the JCT-VC, including its ad hoc groups, relating to the development of the HEVC standard, which would facilitate cross-organizational communication between VCEG and MPEG concerning the

development of the standard. There is insufficient basis to conclude, based on Mr. Bross' testimony, that the listserv was also intended for publication, to skilled artisans outside of the JCT-VC, of the working drafts and other documents being discussed by the members of the JCT-VC.

Second, Petitioner's conclusion is based on the factually unsupported premise or "given" that "the October 4, 2011, email was sent to ordinarily skilled artisans representing leading technology companies and universities to elicit feedback on WD4." *See* Pet. Brief 8. For the reasons previously discussed, the evidence establishes that the listserv email was sent to 254 members of the JCT-VC for internal communications and discussions and not to ordinarily skilled artisans outside of the JCT-VC to "solicit input" or "elicit feedback" on WD4. *See also* Ex. 1002 ¶ 107 (Mr. Bross testifying that "I announced completion of WD4 *to the JCT-VC members* via the JCT-VC reflector on October 4, 2011") (emphasis added).

Third, Petitioner's premise or "given" that "such ordinarily skilled artisans would have had reason to subscribe to the JCT-VC listserv given the importance of the emerging HEVC Standard" is unsupported and unavailing because, even assuming the importance of the HEVC Standard, as discussed *supra*, there is no evidence that ordinarily skilled artisans outside of the JCT-VC, after exercising reasonable diligence, knew about the listserv or how to subscribe to it.

Thus, we find that Petitioner's evidence does not demonstrate that the listserv email was sent to solicit feedback from artisans outside of the JCT-VC or to otherwise publicly disclose WD4. Instead, for the reasons discussed above, the evidence establishes that the listserv email was sent for the purpose of internal communications and discussions by members of the

JCT-VC, including its ad hoc groups, relating to the development of the HEVC standard, as Mr. Bross testified. As the Federal Circuit stated, the “JCT-VC members were part of ongoing collaborative efforts to draft the WD4 reference.” *Samsung*, 929 F.3d at 1372. And, we note the court’s “reluctan[ce] to assume that an email among potential collaborators should be treated the same as a public disclosure without clear findings by the Board.” *Id.* at 1375. We find the evidence establishes that the purpose of the listserv email was to inform the JCT-VC collaborators about the completion of WD4 and to assist them in their work on developing the new HEVC standard, rather than to provide a public disclosure of WD4. The fact that there was no expectation of confidentiality associated with the listserv email or WD4 is consistent with this purpose because the JCT-VC members could freely discuss WD4 among themselves in regard to the development of the new standard. Thus, for these reasons, we further determine that Petitioner has not demonstrated that an ordinarily skilled artisan, exercising reasonable diligence, could have accessed WD4 based on the listserv email.

*4. Petitioner’s Argument that “Public Dissemination” of WD4 is Demonstrated by Input Documents at JCT-VC’s 7<sup>th</sup> Meeting in Geneva*

We now turn to Petitioner’s argument in Section II.C. of its opening brief on remand. Pet. Brief 10–14. Petitioner argues that the “public dissemination” of WD4 is further demonstrated by record evidence “showing that skilled artisans outside of the JCT-VC *did* access WD4 (or other versions of Working Draft 4 available on the JCT-VC webpage) accessible at a link in the October 4<sup>th</sup> email.” *Id.* at 10–11. In particular, Petitioner argues that there were at least 200 authors of input documents submitted at the seventh JCT-VC meeting in Geneva, other than the 254

Torino meeting attendees, who accessed Working Draft 4, including WD4, as a result of “the JCT-VC listserv or secondary distribution.” *Id.* at 12–14.

Patent Owner argues that Petitioner “advances numerous arguments concerning theories that it never raised before.” PO Response 11.

Specifically, Patent Owner argues that Petitioner relies on:

a JCT-VC Geneva meeting that was not raised in the Petition (and occurred after the priority date); new arguments concerning public accessibility based on disseminations that may have happened after the list[s]erv email, rather than the email dissemination itself; and new general assertions of access untied to the list[s]erv email in any way.

*Id.*

We agree with Patent Owner that Petitioner’s argument in Section II.C. of its opening brief is a new argument or theory of public disclosure that was not raised in the Petition and, therefore, is waived. *See Ariosa*, 805 F.3d at 1367. As the Federal Circuit found, Samsung argued in the Petition that WD4 was publicly accessible because it was uploaded to the JCT-VC and MPEG websites and emailed to the JCT-VC listserv. *See Samsung*, 929 F.3d at 1369–1373. Petitioner now argues for the first time that WD4 was “publicly disseminated” because ordinarily skilled artisans working at companies and institutions interested in the new HEVC standard would have requested copies of WD4 from their institution’s JCT-VC representative who could share WD4 or the listserv email with a link to WD4 without restriction. Pet. Brief 11–12. In other words, Petitioner argues that WD4 or another version of Working Draft 4 was obtained through “secondary distribution” after the listserv email—distributions from a JCT-VC member who received the listserv email to an interested co-worker. According to

Petitioner’s theory, the co-worker receiving the email with the link, of WD4 or another version of Working Draft 4, may be, or may have further provided it to, one of the at least 200 authors who submitted an input document at the Geneva meeting in excess of the 254 attendees of the Torino meeting. *See id.* at 12–14. We determine that this is a new argument or theory because the argued dissemination is not based on the listserv email, but on post-listserv email “secondary distribution” that may have occurred with respect not only to WD4, but also “other versions of Working Draft 4.” Accordingly, Petitioner’s new “public dissemination” argument is waived.

Even assuming that Petitioner’s argument is not new, we find it is not factually supported. First, for the reasons discussed *supra*, we have determined that Petitioner has not demonstrated that ordinarily skilled artisans outside of the JCT-VC would have joined the listserv, as Petitioner argues in Sections II.A–B. of its opening brief on remand. *See* Pet. Brief 2–9. Similarly, we determine that Petitioner has not adequately supported its argument that “skilled artisans outside of the JCT-VC *did* access WD4 (or other versions of Working Draft 4 available on the JCT-VC webpage) accessible at a link in the October 4<sup>th</sup> email.” *See* Pet. Brief 10–11. Indeed, Petitioner’s argument in this regard is unsupported with any citation to the record.<sup>19</sup> And, we find there is no evidence of record that such an artisan *did* access WD4 via the link sent with the listserv email. Moreover, as

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<sup>19</sup> Petitioner’s citations to Ex. 1066 and Ex. 1002 ¶¶ 103, 105 after the sentence following the argument at the top of page 11 do not support the argument because they identify and discuss the Document information webpage for Working Draft 4, rather than accessing the webpage. *See* Pet. Brief 11.

instructed by the Federal Circuit, the relevant issue is not whether “persons of ordinary skill actually received the listserv email.” *See Samsung*, 929 F.3d at 1374–75.

Second, Petitioner’s argument that “[b]ecause evaluation of working drafts was necessary to achieving those goals,<sup>20</sup> skilled artisans within those companies would have requested copies of, or access to, WD4 from their institution’s JCT-VC representative(s)” is not factually supported and nothing more than conjecture and speculation. *See* Pet. Brief 11. Petitioner has not identified any evidence supporting its argument that skilled artisans would have requested copies of WD4, such as examples of skilled artisans within a company or institution actually requesting WD4 from such company’s or institution’s JCT-VC representative. Third, we also determine that Petitioner’s argument that “at least 200 persons who did not attend the Torino meeting were aware of, and had access to, Working Draft 4 (including WD4) *as a result of the JCT-VC listserv distribution*” is conclusory and factually unsupported by the evidence of record. *Id.* at 13–14 (emphasis added). Petitioner has not identified any evidence of record demonstrating *how* any of the at least 200 persons were aware of or had access to WD4 or other versions of Working Draft 4, much less that any such person was aware or had access “as a result of the JCT-VC listserv

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<sup>20</sup> Petitioner asserts that because the new video coding standard would affect the development of products and services, these companies and institutions would have had “a substantial interest in understanding and shaping the standard, ensuring effectiveness of the new technology, and including their intellectual property under the new standard’s umbrella.” Pet. Brief 11 (citing Ex. 1002 ¶¶ 95–96, 100; Ex. 1007, 1661–64; Ex. 1041, 1–3; Ex. 1057, 1–7).

distribution.” Lastly, we are not persuaded by Petitioner’s argument because it is based on “WD4 (*or other versions of Working Draft 4* available on the JCT-VC webpage”—“Working Draft 4 (including WD4),” whereas the only reference at issue in these proceedings is WD4. *See id.* 10–14 (emphasis added).

Thus, for the reasons discussed above, we are not persuaded by Petitioner’s arguments that the evidence demonstrates (1) that ordinarily skilled artisans outside of the JCT-VC exercising reasonable diligence would have joined the listserv and (2) that “at least 200 contributors to the subsequent Geneva meeting could have accessed WD4” based on the JCT-VC listserv email. *See id.* at 14.

### III. CONCLUSION

Pursuant to the Federal Circuit’s remand, we have again considered the evidence and the parties’ arguments asserted in the Petition regarding whether Petitioner has demonstrated that WD4 was publicly accessible based on the listserv email. As set forth in our findings above, the undisputed evidence demonstrates that the listserv email was sent by Mr. Bross on October 4, 2011, with a link to the document information page for Working Draft 4 on the JCT-VC website from which WD4 could be downloaded. The undisputed evidence also demonstrates that there was no expectation of confidentiality associated with the listserv e-mail or with access and use of WD4. Based on the evidence, as discussed *supra*, we determine that the listserv email was sent to 254 members of the JCT-VC, the collaborative group formed to develop the new HEVC standard. Although the evidence reflects that ordinarily skilled artisans outside of the JCT-VC *could* subscribe to the JCT-VC listserv in July–November 2011,

Petitioner has not sufficiently demonstrated that artisans outside of the JCT-VC, after exercising reasonable diligence, would have subscribed to the listserv or that such artisans would have known about the listserv, the need to join it to access WD4, or the procedure for subscribing to the listserv. Moreover, as discussed *supra*, the evidence demonstrates that the purpose of the listserv email was twofold: (1) to apprise the members of the JCT-VC of the completion of WD4 on October 4, 2011, following the Torino meeting on July 14–22, 2011; and (2) for internal discussions by the JCT-VC in connection with its work on the new HEVC standard. We also determine that Petitioner has not demonstrated that the evidence supports its arguments or theories that any JCT-VC members would have shared WD4 with others for any reason, including for use in preparing input documents concerning the HEVC standard for submission at other meetings of the JCT-VC.

For all of these reasons, we find that Petitioner’s evidence does not demonstrate that an ordinarily skilled artisan could have accessed WD4, after exercising reasonable diligence, based on the listserv email. Thus, we determine that Petitioner has not proven, by a preponderance of the evidence, that WD4 is a prior art printed publication under 35 U.S.C. § 102(b) and, therefore, Petitioner has not proven that claims 1–7 of the ’772

patent in IPR2017-00099, and claims 8 and 9 of the '772 patent in IPR2017-00100, are unpatentable based on the listserv email.

#### IV. ORDER

In consideration of the foregoing, it is:

ORDERED that claims 1–9 of the '772 patent have not been shown to be unpatentable; and,

FURTHER ORDERED that, because this Decision on Remand is a Final Written Decision, parties to this proceeding seeking judicial review of our decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

In summary:

<b>Claims</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Claims Shown Unpatentable</b>	<b>Claims Not Shown Unpatentable</b>
1–9	102(b)	WD4		1–9
1–9	103(a)	WD4, Han		1–9
8	103(a)	WD4, Zhou		8
8	103(a)	WD4, Han, Zhou		8
9	103(a)	WD4, Zhou, WD3		9
9	103(a)	WD4, Han, Zhou, WD3		9
<b>Overall Outcome</b>				1–9

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