

## ALERT

## Federal Circuit Patent Bulletin: *Suffolk Techs., LLC v. AOL Inc.*

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May 29, 2014

*"[A] printed publication [such as a Usenet newsgroup post] need not be easily searchable after publication if it was sufficiently disseminated at the time of its publication."*

On May 27, 2014, in *Suffolk Techs., LLC v. AOL Inc.*, the U.S. Court of Appeals for the Federal Circuit (Rader, Prost,\* Chen) affirmed the district court's summary judgment that U.S. Patent No. 6,081,835, which related to methods and systems for controlling a server that supplies files to computers rendering web pages, was invalid for lack of novelty under 35 U.S.C. § 102. The Federal Circuit stated:

"Whether an anticipatory document qualifies as a 'printed publication' under § 102 is a legal conclusion based on underlying factual determinations." "Because there are many ways in which a reference may be disseminated to the interested public, 'public accessibility' has been called the touchstone in determining whether a reference constitutes a 'printed publication' bar under 35 U.S.C. § 102(b)." "A given reference is 'publicly accessible' upon a satisfactory showing that such document has been 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."

Suffolk argues that the Post [(a newsgroup post by college student Shishir Gundavaram in response to a message by Marshall Yount asking "How to tell which page called the script?")] should not be considered a printed publication for essentially two reasons. According to Suffolk, the Post's audience was not those of ordinary skill in the art and locating the Post would be too difficult. As to the first argument, Suffolk contends that the Usenet newsgroup was populated mostly by "beginners," not those of ordinary skill in the art. Suffolk bases this claim on Yount's comment that he was a "newbie" and that "this question might seem ridiculous." And Gundavaram did state that, at the time of the post, "Most of these people who are using these newsgroups were beginners." But Suffolk's argument is unpersuasive for two reasons. First, Suffolk seems to misunderstand the level of ordinary skill in the art at that time. According to Gundavaram, there were no courses or books concerning CGI [(common gateway interface)] at the time of the Post in 1995, and he

learned about CGI through self-study. Second, the record indicates that those of ordinary skill in the art actually were using such newsgroups. At the time, only people with access to a university or corporate computer could use newsgroups, a subset of people more likely to be skilled in the art. Suffolk's own validity expert, Dr. Rhyne, used newsgroups. Gundavaram clearly used the newsgroup here, and he ultimately wrote a book on CGI. Further, Yount's question would only seem "ridiculous" if the other subscribers had more skill in the art than he. Accordingly, Suffolk's first ground for attacking the printed publication is unpersuasive.

As to the second ground, Suffolk argues that the Post was not sufficiently publically accessible to be considered a printed publication. Suffolk points out that the Post was non-indexed and non-searchable. And although the newsgroup posts did have titles, they could only be sorted by date. But this argument is also unpersuasive for two reasons. First, Suffolk overstates the difficulty in locating the Post after publication. Usenet newsgroups were organized in a hierarchical manner, as evidenced by the name of the newsgroup at issue— `comp.infosystems.www.authoring.cgi`. Thus, someone interested in CGI could easily locate a list of posts in this newsgroup. Second, and the ultimate reason Suffolk's argument fails, a printed publication need not be easily searchable after publication if it was sufficiently disseminated at the time of its publication. Thus, the question becomes whether the Post was sufficiently disseminated. We hold it was, the facts here being similar to cases holding sufficient dissemination occurred. . . . [T]he Post elicited at least six responses over the week following its publication discussing the efficacy of Gundavaram's proposal. Many more people may have viewed the posts without posting anything themselves.

Thus, we conclude the Post was sufficiently disseminated to those of ordinary skill in the art to be considered publically accessible, and Suffolk's second ground for attacking the printed publication fails. We therefore affirm the district court's holding that the Post is a printed publication for purposes of § 102.