



## **NOVELTY: WHAT IS “AVAILABLE TO THE PUBLIC” IN THE AIA?**

New Section 102, entitled “*Conditions for Patentability: Novelty*”, reads in part as follows:

A person shall be entitled to a patent unless -  
(1) the claimed invention was patented, described in a printed publication, or in public use, on sale, or *otherwise available to the public* before the effective filing date of the claimed invention.

The phrase “otherwise available to the public” provides a “catch-all” expansion of the type of prior art that can be used to prevent a patent from issuing or that can be used to invalidate a patent in a civil action. On its face, it is not geographically limited.

“Otherwise available to the public” is analogous to “known or used by others” in Section 102(a) of the previous patent statute, but without the geographic limitation to the United States. That statutory language “known or used by others” has been interpreted to mean “knowledge or use which is accessible to the public.” See *Carella v. Starlight Archery*, 804 F.2d 135 (Fed. Cir. 1986). Such knowledge or use was considered accessible to the public if there had been no deliberate attempt to keep it secret. See *W. L. Gore & Assoc. v. Garlock, Inc.*, 721 F.2d 1540 (Fed. Cir. 1983). Under new Section 102 almost any disclosure in tangible form that is made available without any secrecy is “available to the public”.

As the Federal Circuit said in *In re Klopfenstein*, 380 F.3d 1345, 1348 (Fed. Cir. 2004), “the key inquiry is whether or not a reference has been made ‘publicly accessible.’”

The means used to disseminate information today are much different from the means available even a few years ago, and they continue to evolve. The language “otherwise available to the public” provides this section with the breadth to cover past, present and future communication media. In today’s landscape, this type of prior art would clearly include electronic communication media such as webpages, podcasts, webcasts, web video, and social media sites.