

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SDI TECHNOLOGIES, INC.,
Petitioner,

v.

BOSE CORPORATION,
Patent Owner.

Case IPR2014-00343
Patent 8,401,682

Case IPR2014-00346
Patent 8,364,295

Held: February 24, 2015

BEFORE: KARL D. EASTHOM, MICHAEL J. FITZPATRICK, and
DAVID C. McKONE, Administrative Patent Judges.

The above-entitled matter came on for hearing on Tuesday, February 24, 2015, commencing at 10:00 a.m., at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

IPR2014-00343, Patent 8,401,682

IPR2014-00346, Patent 8,364,295

APPEARANCES:

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P R O C E E D I N G S

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JUDGE EASTHOM: Good morning, everybody. This is a hearing in the matter of SDI Technologies, Incorporated, versus Bose Corporation, IPR Number 2014-00343 and 00346, and the two patents are 8,401,682 and 8,364,295.

SDI, why don't you introduce yourselves for the record, please.

MR. LOWRIE: Matt Lowrie for SDI of Foley & Lardner. With the Board's permission, Mr. Luke Silva, also Foley & Lardner, could join me at counsel's table. He has not appeared and won't be addressing the Board.

JUDGE EASTHOM: Any objection?

MR. HEBERT: Of course not, no. No objection.

JUDGE EASTHOM: Okay. Welcome, gentlemen.

I'm sorry, for the -- Mr. Lowrie, who's your --

MR. LOWRIE: Luke Silva, S I L V A.

JUDGE EASTHOM: Thank you.

MR. LOWRIE: The reporter has his card.

JUDGE EASTHOM: Oh, thank you. Okay.

And then for Bose, who do we have here?

MR. HEBERT: Yes. Good morning, Your Honor. Mark Hebert from Fish & Richardson on behalf of Patent Owner Bose. With me is my partner, Jolynn Lussier, also with Fish & Richardson.

1 MS. LUSSIER: Good morning.

2 MR. HEBERT: And also my partner, Karl Renner, also
3 with Fish & Richardson. Mr. Renner is from the D.C. office. Ms.
4 Lussier and I are from the Boston office.

5 JUDGE EASTHOM: Right. Welcome.

6 And then -- so just a few -- we do have two judges. We
7 have Judge Fitzpatrick. He's in Chicago. And then we have Judge
8 McKone there on the right of the screen. He's in Detroit.

9 So if you would please remember if you're going to address
10 any of your exhibit numbers, please just spell out the number clearly
11 so the two judges can hear from the other offices. And the ground
12 rules we sent out, the hearing order, I think you're both aware we have
13 60 minutes per side.

14 Petitioner, you'll go first, then Patent Owner, and Petitioner
15 can rebut whatever Patent Owner responds to. So with that, it's 10:01.
16 Why don't we get started.

17 Mr. Lowrie.

18 MR. LOWRIE: Thank you, Your Honor. And if I could
19 inquire, can the judges who are appearing remotely see what's being
20 displayed on the screen?

21 JUDGE EASTHOM: Judge --

22 JUDGE McKONE: No.

23 MR. LOWRIE: Okay. That's good to know. So I probably
24 won't rely so heavily on what's on the screen. I think at the last

1 hearing the cameras were reversed and they actually could see it, but
2 I'm fine with it, just so long as I know.

3 JUDGE EASTHOM: Right. I mean, they have your -- the
4 exhibits on line, so they probably can't see --

5 JUDGE FITZPATRICK: Yeah, I have the demonstratives
6 for both parties.

7 MR. LOWRIE: Okay. Very good. And I would like to
8 reserve 20 minutes for rebuttal, but hopefully neither 40 nor 20 will be
9 required.

10 JUDGE EASTHOM: Okay.

11 MR. LOWRIE: So just to remind the Board of a posture in
12 this case, there's an underlying litigation. There were two IPRs filed
13 on these patents in 2013. Additional claims were identified as being
14 relevant, so an additional -- these two present IPRs were filed after
15 that.

16 SDI, the Petitioner, moved to consolidate the two IPRs,
17 instead of all being -- in fact, all of these claims, dependent claims.
18 Bose opposed that motion. The Board declined to consolidate them
19 mostly for timing issues I think and so here we are.

20 So if we go to -- just a reminder as to what happened in the
21 earlier proceedings very briefly, if we go to slide 3. That's not exactly
22 the same as my slide 3, but that's a figure from the patent. There we
23 go, we have the speaker on the left, the remote control 17 and the
24 computer, Figure 1. And as the Board may recall, what's described in

1 the patent is like a computer you'd see on a desktop. What's
2 happening in the litigation are the iPads.

3 Can we go to the next slide?

4 And, again, these are the components of the patent. There's
5 a remote control --

6 JUDGE EASTHOM: Which slide is that, Mr. Lowrie?

7 MR. LOWRIE: Thank you, Your Honor. Slide 4. We've
8 got a computer on the right that has some software, like WinAmp, in
9 the earlier IPRs that controls the playing of music. There's a sound
10 reproduction device, which is to say a speaker. It could be a Bose
11 wave radio as in the patent or the Altec Lansing speaker as here, and a
12 remote control that communicates with the speaker, which is
13 communicating with the computer.

14 Next slide, slide 5. The only difference between the two
15 patents in this case, it's not actually in this case. It's from the earlier
16 IPR. So in the '295 patent on slide 5, the claims recite an amplifier.

17 And if we go to slide 6, the claims recite audio signal
18 processing circuitry. There is some dispute over whether that one can
19 meet the other or whatnot in the earlier IPR, and that's been resolved.
20 Both of these claims -- if you hit the next slide, slide 7, one more,
21 slide 8. Both of those claims were found invalid in the earlier IPR
22 proceedings and unpatentable in view of the same prior art.

23 Now, that has an interesting connotation in the context of the
24 present case and I guess the first question is, both parties have been
25 citing the final decisions in the earlier IPRs. I don't know if it's

1 formally of record in this proceeding. It's certainly in the prosecution
2 history of the patent as a part of that record.

3 If the Board would like, we're happy to file a notice of
4 related proceedings to put it into the record for these IPRs. To the
5 extent it's not, I just -- I've never seen this situation before. I don't
6 know if the Board has a preference on that.

7 JUDGE EASTHOM: No. I think we're aware of those other
8 two proceedings. You're referring to IPRs 350 and the one you just
9 mentioned.

10 MR. LOWRIE: Yes.

11 JUDGE EASTHOM: 465.

12 MR. LOWRIE: It's IPR 350 and 465.

13 JUDGE EASTHOM: Right. We're aware of those. We do
14 have some question about that. What posture are we here, is there
15 some issue preclusion?

16 MR. LOWRIE: That's an excellent point, Your Honor. So
17 under 37 C.F.R. 42.73(d)(3), those final decisions are binding on the
18 Patent Owner. We don't need to await a resolution in front of the
19 Federal Circuit. And in our view, that wipes out probably almost all
20 of the arguments presented in this IPR.

21 There's only two new arguments, one we think shouldn't --
22 I'll get to it, but one we think shouldn't be considered and the other is
23 the added limitation from the dependent claims, and that would be a
24 new argument and that limitation I'll get to it a little bit more fully, but

1 that limitation is does the speaker respond to commands from the
2 computer and the Board --

3 JUDGE McKONE: What statute were you citing to?

4 MR. LOWRIE: I didn't cite the statute, Your Honor. I cited
5 the C.F.R. and it --

6 JUDGE McKONE: Which rule?

7 MR. LOWRIE: 37 C.F.R. 42.73(d)(3).

8 Do you have that available to just -- do you have a copy at
9 all?

10 What that provides is patent applicant or owner is precluded
11 from taking action inconsistent with the adverse judgment, including I
12 suppose without limitation, but it doesn't say that, obtaining in any
13 patent the claim that is not patentably distinct from a finally refused or
14 cancelled claim, and I think that --

15 JUDGE McKONE: Are you considering since we have not
16 had an appeal yet, are you considering this to be a finally refused or
17 cancelled claim, if the claim has not yet been cancelled?

18 MR. LOWRIE: That is correct, Your Honor, and I think the
19 rules are also clear. I believe the rules are pretty clear that it is, in
20 fact, a final judgment and I'm trying to find the rule citation cite.

21 JUDGE McKONE: Was any of this in your reply brief?

22 MR. LOWRIE: In our reply brief the final decisions had not
23 been handed down yet.

24 JUDGE McKONE: I thought they had, but okay. Go ahead.

1 MR. LOWRIE: I apologize if I'm wrong about that, Your
2 Honor, but I don't think they had. I would note in that regard, Your
3 Honor, that under Blonder-Tongue and the very recent Federal Circuit
4 decision in Sovereign. It's spelled oddly,
5 S O V E R E I N, no G I believe. Collateral estoppel applies, even if
6 it's argued for the first time on appeal. So there is no waiver by virtue
7 of not having raised it earlier whether we had an opportunity or not.

8 But, again, I don't have the C.F.R. provision right in front of
9 me, but I think it's very clear that estoppel applies when the case is
10 ready for appeal, not -- you don't actually have to have a result of an
11 appeal. And I know that's true in District Court cases. I just went
12 through that in another case. And I also know it's the case here,
13 because I looked at the regulation this morning. I believe I did. I just
14 can't find the cite immediately.

15 JUDGE FITZPATRICK: And what would you suggest
16 would be estopped from doing? This is an issued claim that they're
17 trying to maintain.

18 MR. LOWRIE: Maintaining that the claim is patentable.
19 So, for example, all of the arguments that are based -- that could be
20 presented for Claim 1, they're already -- they've already lost Claim 1.
21 They can't make it. So in terms of excluding evidence as prior art,
22 they've already lost that on a final decision. They can't argue that. In
23 terms of arguing that IR Man wouldn't be combined with Altec
24 Lansing, they've already lost that issue, and it makes perfect sense for
25 a couple of reasons.

1 First of all, to the extent that they're rearguing things this
2 Board already decided, they're essentially asking for reconsideration.
3 I mean, it's not a new argument for the dependent claim. It's an
4 argument for the independent claim, except that they're not doing it in
5 the 30-day window for reconsideration and they're not doing it under
6 the standard for reconsideration, and one can see what a disaster that
7 would be if it were permitted, because we have an appeal going up to
8 the Federal Circuit where IR Amp, for example, is found to have been
9 sufficiently authenticated.

10 With this Board to reach a different decision -- I can't
11 imagine why they would, because the arguments are pretty much the
12 same. But were the Board to reach a different decision here, what's
13 the Federal Circuit supposed to do with that first appeal? What they
14 should have done is, if they disagreed with the ruling, they should
15 have moved to reconsider. That would have delayed the appeal when
16 the Board actually decided it.

17 So that as well as the normal stare decisis, it's the same
18 evidence. You shouldn't reach a different outcome. It all kind of goes
19 towards they shouldn't be permitted to argue and I can't imagine again
20 why the Board would reach a different decision on the same
21 arguments and the same evidence, even if it were reviewed de novo,
22 but I don't think that that should be the standard that's applied here.

23 As a result, what I tried to do is look at the arguments being
24 made and try and identify, is there anything new here? So if we start

1 with I guess the motion to exclude, if we jump to slide -- well, let's go
2 to slide 41.

3 So there are three different motions to exclude and, again, to
4 the extent they're saying that this means that Claim 1 should be
5 patentable, and these are only directed to things about Claim 1, we
6 think that they're estopped. But looking at them on the merits, for
7 slide 41 --

8 So the first thing is they want to exclude the testimony of
9 Professor Lippman, not as it pertains to the dependent claims, but as it
10 pertains to the broader claims. The Board has rejected the arguments
11 in this proceeding when it granted the petition and also in the earlier
12 IPRs. They say that, you know, he didn't consider other possible
13 combinations. The Board addressed that expressly, explicitly and I
14 believe correctly in the last decision.

15 There is actually a new argument this time. I don't think it
16 should be considered for the same reason as we said. It goes to Claim
17 1, not the dependent claims, but the new argument is that Professor
18 Lippman should be excluded, because the IRMan reference doesn't
19 show a -- or doesn't have a remote. And so just to be clear on what's
20 being argued here, the IRMan reference refers to a remote. And
21 there's an earlier slide. We won't jump to it. But Exhibit 1010, as
22 shown on slide 34, shows remote control WinAmp and more, and
23 that's from the IRMan web pages.

24 So what they do here is they cite Professor Lippman saying,
25 yeah, the product IRMan may have shipped without a remote. The

1 whole purpose of IRMan is to use a remote with it, but it may have
2 shipped without a remote. I don't think we should exclude Professor
3 Lippman's testimony, because IRMan does disclose a remote when
4 we're talking about it as a reference, even if the product shipped
5 without a remote and you had to buy your remote separately. So that's
6 that argument.

7 The remaining two arguments, there's the Altec Lansing
8 Manual. And as the Board may recall, if we go to slide 32, the
9 reference itself has the appropriate indicia. If we go to slide 33, Bose
10 is challenging here the authenticity of page 7.

11 In the last inter partes reviews, the Board allowed Altec
12 Lansing without page 7, doesn't need page 7 in order to invalidate the
13 references, so we think the issue is moot/a nonissue. We don't need to
14 argue in this proceeding that the Board should -- we're not bound by
15 the earlier proceeding actually, because we didn't lose it, but we're not
16 arguing separately in this proceeding that page 7 needs to be
17 considered, because the Board has already found it doesn't need it.

18 JUDGE McKONE: So you agree that we cannot allow page
19 7 into this proceeding because you didn't lose on the issue of page 7 in
20 the earlier proceeding; is that right?

21 MR. LOWRIE: Not as a technical matter. As a practical
22 matter, yes, we're saying that the Board should consider this without
23 looking at page 7. Were there to be some sort of a reversal, I suppose
24 we could ask the Board to consider page 7. My guess is, at least in
25 this proceeding based on stare decisis and whatnot, the Board would

1 say, no. We don't need to make that argument in this proceeding,
2 because we've already won it in the earlier IPRs. So as a practical
3 matter, we're not asking that the Board consider page 7, because it
4 doesn't need to. It's already been decided. It doesn't need to.

5 And that leaves the third argument on slide 34 and that's the
6 IRMan wasn't adequately authenticated. The Board has already found
7 that it has been and, again, imagine on an appeal if there were a
8 different conclusion reached in a later proceeding, which only exists
9 as a later proceeding, because Bose opposed consolidation.

10 There's still no reason, I would observe, to think that there's
11 anything inauthentic about the web pages. Judge McKone was very
12 clear at the last hearing, which probably ought to be a record in this
13 one, but there's no reason to think that anything is inauthentic.

14 Bose does say, well, if an affidavit had come in, we would
15 have an opportunity to cross examine. It sounds to me like a
16 reconsideration argument, not something new for these claims and on
17 top of that it's pretty doubtful the Board would have allowed a
18 separate deposition in this context as unlikely to further the interest of
19 justice, so I don't think they would have been able to cross examine it.

20 The only thing that's actually new that I was able to
21 ascertain, two things. One is the IRMan -- I mean, excuse me, the
22 Toyota decision. They said the Toyota decision out of the Board --
23 this is in their reply brief -- January of 2015 held that an Internet
24 Archive document was inadmissible. And because we didn't address
25 it in the briefing because it came too late, I thought I'd comment on it.

1 There's two things. First of all, to the extent it's inconsistent,
2 this Board's decision in November of 2014 in the earlier IPRs
3 controls, because it's first in time. But, second, and perhaps more
4 important, they're not inconsistent. In the Toyota decision there was
5 an Internet Archive that had a publication listing, and the Internet
6 Archive might be admissible.

7 The question is, is the listing of the publication as a
8 publication, does it prove it's a publication as of that date? And the
9 answer was no, because all you have is a listing. You don't actually
10 have an Internet Archive of the publication, just a listing of it. So it's
11 a different question. It's hearsay within hearsay as it were.

12 The other thing that I think is new is -- can you put up the
13 2120 -- is one of the cases that we cite where a judge found the
14 Internet Archive adequately authenticated. And, again, to be clear --

15 JUDGE McKONE: What are you looking at on the screen?

16 MR. LOWRIE: It's going to be Exhibit 2120 and it's what --

17 JUDGE McKONE: Thank you.

18 MR. LOWRIE: And what happened here is there's -- this is
19 -- I'm looking for the spelling. Polska I guess. But there was a
20 magistrate decision that allowed it in. Bose says that that decision
21 was reversed at trial by the District Court and the only material they
22 cite saying it was reversed at trial is Exhibit 2120.

23 Can you expand that a little bit?

24 Okay. It says the -- it's on Wikipedia, which is inherently
25 unreliable. So we don't have a trial transcript saying it was reversed.

1 We don't have a judicial opinion saying it was reversed. We have
2 something that cites a Wikipedia saying it was reversed and I would
3 suggest in making an argument that the Internet Archive is not
4 reliable. To rely on Wikipedia is utterly inconsistent with something
5 like that. But again --

6 JUDGE McKONE: Exhibit 2120 is being the Stevenson
7 declaration. Do I have the incorrect record here?

8 MR. LOWRIE: Let me look. This should be --

9 JUDGE EASTHOM: Is it in the 346 case? Maybe that's the
10 difference.

11 MR. LOWRIE: 2122?

12 JUDGE McKONE: I'm looking at both.

13 JUDGE EASTHOM: Oh.

14 MR. LOWRIE: It might be 2122.

15 MR. HEBERT: Yes, I think it's 2122.

16 MR. LOWRIE: 2122, I apologize, Your Honor. I went on
17 memory and I should not have.

18 JUDGE McKONE: As long as I'm looking at the right
19 thing.

20 MR. LOWRIE: Okay. But, again, I think the case law, you
21 know, I find it amusing for Bose to say we can't cite a decision that
22 allows it. I would cite the November 2014 decision from this Board
23 as allowing it, along with all the other things that we have cited
24 before.

1 And that takes us to I think what the real issue is in this case,
2 which is the added limitations in the dependent claims.

3 So if we go to slide -- I guess we can go to slide 9.

4 The issue here, and it's going to be the only issue, is one of
5 claim construction. So the added limitation, if we go to slide 10, says,
6 “configured to respond to signals received from the computer,” and
7 that's referring to the speaker responding to communications from the
8 computer.

9 The Board considered Bose's argument before instituting
10 these proceedings and, nevertheless, interpreted “respond” as show
11 some reaction to a force or stimulus, so increase power, increase
12 amplification, turn the speaker on or off. All of those things would be
13 responding to it, which makes perfect sense. I mean, you know, if
14 somebody tells me to sit down and I sit down, I responded to it.

15 Bose argues that, no, “respond” means I have to
16 communicate back. You know, you tell me to sit down. I can't just sit
17 down in response to that. I have to also say, hey, I sat down or
18 something like that, which we think is reading in a limitation like
19 under any standard.

20 Bose argues, if we go to slide 11, that there's a claim
21 differentiation issue trying to say “configured to respond” is I think
22 somehow -- they talk about the amplifier and what not, but there are
23 other things you do in response, like turning things on and off. So it
24 does add a limitation.

1 If we look at slide 12. Configured to respond. This is where
2 it appears in the claim. And if we look at Claim 13, it's the same thing
3 from the two different -- so this is what's configured to respond.

4 If we go to slide 14. If we look at the argument based on the
5 specification, they say that it should be limited to answer or reply
6 because it's consistent with the specification. Of course, that's never
7 been the standard for claim construction in a court proceeding, let
8 alone a broadest reasonable interpretation to say that responding by
9 sitting down when someone tells me to sit down is also consistent
10 with the specification. They don't actually try to identify anything that
11 shows a specialized use of response with possibly one exception.

12 If we go to slide 15. So, here, they cite a piece of the
13 specification. It's in the slide. Do you have that specification? This is
14 what they're citing, just to be clear, as a specialized definition of the
15 word response.

16 So if we look, we're in the '682 patent, column 2, beginning
17 at the top, and maybe if you could zoom in a little bit on that.

18 So it says, it happens to be an example where if the
19 computer system doesn't respond to the control signal coming from
20 the speaker, right? So this is an example where you can respond by
21 saying, hey, Matt Lowrie, sit down, and I say, no, I'm not going to.
22 That's a response that I communicate back. It's not a definition that
23 sitting down is not -- without speaking is not responding to the
24 command to speak.

1 The second piece of this, though, is this is even referring to
2 what the computer system does in response to something coming to it.
3 What we're talking about in the claim limitations is the speaker is
4 responding to something coming from the computer. So it's not even
5 in the same setting. This is the only places that they can identify
6 where the word "respond" is used and I would suggest that respond is
7 respond and it's really not a lot more complicated than that.

8 If we go to slide 16, Bose argues that "respond" must mean
9 something different than what it would ordinarily mean, because in
10 some claims the word "respond" is used and in some claims the word
11 in response to is used. I don't think that's definitional. I don't think
12 that's a claim -- if anything, it says to me it means the same thing,
13 because they chose to use a form of the word response.

14 It may be a grammatically different setting, but that doesn't
15 mean that you're intentionally demonstrating to the public that you're
16 using these words differently and certainly not in a broadest
17 reasonable -- but even in a District Court case, I can't imagine that that
18 would show that the words are supposed to mean something different.

19 Now, if we go to -- okay. We can go ahead and go to slide
20 17. This is the combination. As I said, the Board has already found
21 these things combinable.

22 Slides 18 and 19 simply address what this Court has already
23 expressly addressed in its earlier decisions, which is why the
24 combination of IRMan and Altec is proper. It was made, of course, in
25 instituting this, but also in the decision invalidating the claims.

1 The one thing that's new and what this is about is on slide
2 23, which is does the combination show "configured to respond?"
3 And Bose admits that the Altec Lansing Manual discloses that you
4 can adjust the volume when audio is received. You can do these
5 things.

6 If you go to slide 24, we're quoting Bose or actually --

7 JUDGE McKONE: Now, Mr. Lowrie.

8 MR. LOWRIE: Yes.

9 JUDGE McKONE: Do you concede that if we construe the
10 claims to require a reply or answer or response, that the prior art that
11 you've shown doesn't do that?

12 MR. LOWRIE: If it's construed to require a response in the
13 narrow form of a communication signal, I don't think that's disclosed.
14 I mean, I think it would be obvious to have a handshake of some kind,
15 but I don't think we've cited in our petition materials that there's an
16 actual communication going back from the speaker as such.

17 JUDGE McKONE: And you haven't argued that such a
18 communication would have been obvious, right?

19 MR. LOWRIE: I don't recall making that specifically as
20 standing here right now.

21 JUDGE McKONE: So from our perspective, you're arguing
22 that this is a claim construction issue. If we decide in your favor in
23 the claim construction issue, you win. If we decide against you, then
24 you lose on this issue. Is that right?

1 MR. LOWRIE: I think it is -- I think that, yes, as we have
2 argued it. I don't know that the Board is limited as such. I've
3 certainly seen decisions where the Board has gone beyond what was
4 in the papers. But if it were limited as such, we have argued this as a
5 claim construction question.

6 JUDGE McKONE: Okay. Thank you.

7 MR. LOWRIE: And I think that's really it, unless the Board
8 would like to hear reargument of what happened in the earlier IPRs,
9 which is what the other slides are directed to.

10 JUDGE EASTHOM: Judge McKone or Fitzpatrick, do you
11 have any -- would you like to hear anything else about the other prior
12 cases?

13 JUDGE FITZPATRICK: I don't.

14 JUDGE EASTHOM: Okay. Thank you, Mr. Lowrie.

15 MR. LOWRIE: Thank you, Your Honor.

16 JUDGE EASTHOM: It's 10:27. You have about -- you still
17 have about 30 minutes left.

18 MR. LOWRIE: I don't expect to use all that.

19 JUDGE EASTHOM: Thank you.

20 Mr. Hebert.

21 MR. HEBERT: Yes. Good morning. May it please the
22 Board. I'm just going to take a moment to connect up, if we may.

23 If I may begin.

24 JUDGE EASTHOM: Please proceed.

1 MR. HEBERT: Thank you. Good morning. The first point
2 I would like to address briefly is Mr. Lowrie's opening comments
3 citing 37 C.F.R. 42.73(d)(3). Now, this is something that hasn't been
4 previously brought up by SDI. SDI certainly didn't give us notice of
5 their argument in this respect. They didn't give the Board notice of
6 their arguments respect and as you can see from the slides that they
7 prepared, they came to the hearing giving all of us, perhaps
8 unintentionally, but the impression that they were going to run
9 through all of the issues in those slides.

10 So that said, what I'd like to do is I'd like to request that we
11 be given leave to brief the issue of the applicability of the prior final
12 written decision in the 2013 IPRs to these IPRs. Now, that said, we
13 actually did do a very, very quick search here in the last few minutes
14 and -- can you bring up what you found?

15 And what we found was this particular decision from
16 October 17, 2014 from the PTAB in -- I'll read this for the record,
17 A.C. Dispensing Equipment, Inc. versus Prince Castle, LLC. It's IPR
18 2014-00511 and I realize, Judge Fitzpatrick and Judge McKone, you
19 don't have the benefit of the screen, but what we've done here is we've
20 gotten a copy of this decision and we've put it up on the slide. So
21 we're looking at the moment at the cover page, which gives the
22 caption and the case number.

23 And if you could scroll down to --

24 JUDGE McKONE: What was the date of the case?

25 MR. HEBERT: Yeah, back up to the date, please.

1 JUDGE FITZPATRICK: And the paper number as well,
2 please.

3 MR. HEBERT: Yes, certainly. So this is -- it was entered
4 October 17, 2014, Paper Number 18, and why don't I give the IPR
5 number again. It's IPR 2014-00511.

6 And I'm now --

7 JUDGE FITZPATRICK: I'm looking at it now.

8 MR. HEBERT: What page are we on? Okay. Page 2. So
9 this is the first time I've seen this case myself, so please bear with me.
10 So page 2 you'll see there's a cite to 37 C.F.R. 42.73(d)(3). I presume
11 that's how my colleagues found this.

12 And you see there's -- and I'll read this for the benefit of
13 Judges Fitzpatrick and McKone, but there's a statement here and I
14 don't know what the background is of this particular case and how this
15 issue arose, because this is the first time I've seen it, but there is a
16 statement that says, whether any of the claims in the '497 patent will
17 be cancelled is an issue that is not yet decided and will not necessarily
18 be decided until a final written decision is entered in this case and
19 appeals from it are exhausted.

20 Okay. And that's the quote I wanted to read. So I would
21 submit to you that the issue raised by counsel for SDI is a significant
22 issue, that this particular decision I'm pointing to may have some
23 applicability to our case and, therefore, I would request, as I said,
24 leave that we be allowed -- both parties be allowed to brief this new
25 issue.

1 So with that in mind, I'm going to get into my presentation.
2 I will say that I intend to focus as much as I can on the new issues that
3 are here. There obviously is some overlap with the prior IPRs, but --
4 so if we could get our slides.

5 Okay. I'm at the cover slide, and we can turn to slide 2,
6 please.

7 Slide 2 merely lists the claims that are at issue and the
8 ground that was accepted in the decision. Now, I'm going to focus on
9 the '682 patent primarily. The patents, as Mr. Lowrie said, are very,
10 very similar. There are just a couple of differences and I'll try to call
11 those out when I come to them. But for the most part, I'll be talking
12 about the '682 patent.

13 So slide 3, please.

14 The first issue I'd like to turn to are the evidentiary issues.

15 Slide 4. So this slide refers to the IRMan web pages and the
16 objection we raised, the two objections, the two distinct objections we
17 raised regarding hearsay and authentication, and I would like to say
18 that in terms of what Mr. Lowrie cited from 37 C.F.R. 42.73(d)(3),
19 that we would suggest that the argument here on hearsay is not an
20 argument that is inconsistent with the adverse judgment that was
21 issued previously, because there was not a explicit ruling on the
22 hearsay objection.

23 Okay. There was a ruling on authenticity and I think we
24 have some new arguments regarding that, but in terms of hearsay
25 there was not an explicit ruling on that.

1 Slide 5, please. So the hearsay issue relates to the truth of
2 the matter asserted in the IRMan web pages and there's two aspects to
3 the truth of the matter asserted. One is the date. Okay. And the date
4 of the document is a date that is represented by the Wayback
5 Machine.

6 All right. And so there's the date of the document and
7 there's also the argument that the content from IRMan, from the
8 IRMan Company, which was Evation, was available publicly on the
9 internet as of that date. So those are the --

10 JUDGE McKONE: Is the date that's applied by the
11 Wayback machine, is that a business record?

12 MR. HEBERT: No, it's not a business record. There's been
13 no argument that it's a business record. SDI hasn't offered any
14 argument at all that any hearsay objection, any hearsay exception
15 applies. SDI's only argument on hearsay, there's one paragraph in
16 their reply brief in response to the motion to exclude. They don't offer
17 a single exception to the hearsay rule.

18 What they argue instead -- and if we go to slide 6, please.
19 What they say is that because --

20 JUDGE McKONE: I'm asking you, though, is there a
21 reason we shouldn't determine this as a business record? It looks to
22 me like it's a business record. Why would I not think it's a business
23 record?

24 MR. HEBERT: Because there's no evidence it's a business
25 record. A number of the cases that are recited, and I believe the

1 Toyota decision is one of them, goes through the evidentiary
2 foundation that it was required to establish a business record, and in
3 that case there were affidavits submitted by Toyota trying to establish
4 the web pages.

5 And this is a new decision. It wasn't available at the time of
6 the prior final written decision, which is very similar to our case and it
7 deals with hearsay, the hearsay aspect of pages downloaded from the
8 internet, which are offered to prove the truth of the date of a reference.

9 Okay. So it's very much like what SDI is, in fact, trying to
10 do with the IRMan web pages, but what they say they're not trying to
11 do. So here is what SDI says. SDI says, because Exhibit 1010 is
12 offered for what it says, not the truth of what it says, it is not hearsay.
13 And if it's not offered for the truth of what it says, that's correct, it's
14 not hearsay.

15 But then this Board has to treat it as if it's not true. It has to
16 treat it as if the date is not the correct date. They disclaim reliance on
17 the truth of the IRMan web pages and this Board should accept SDI at
18 its word.

19 Now, SDI did cite a case, EMC Corp. versus PersonalWeb.
20 That's from IPR 2013-00086 in which the reference was not being
21 offered for the truth of what it was -- of what was asserted. It was
22 merely offered for the content, but the date issue as to the reference
23 was separately established by the testimony of two witnesses, two
24 separate witnesses who established that the exhibit existed as of the
25 alleged date. So the hearsay issue was reached, not based on the

1 content of the document, but by two separate affidavits from separate
2 witnesses.

3 Slide 7, please. So I mentioned the Toyota case, and the
4 Toyota case I think is very, very similar to what's going on with the
5 IRMan web pages here and what SDI says it's not trying to do, but
6 actually has to do in order to meet its burden.

7 In order to meet its burden, it has to prove the date of the
8 IRMan web pages and, therefore, it has to get this Court to accept the
9 truth of that out-of-court statement, which is hearsay, and they asked
10 this Court to do it without pointing to any exception to the hearsay
11 rule or offering any supporting affidavit, declaration, testimony, any
12 other kind of evidence.

13 Okay. Slide 8, please. So the Federal Rules of Evidence
14 apply in this proceeding, just as they applied in the Toyota case. The
15 Toyota case turns on applying the Federal Rules of Evidence to a
16 PTAB proceeding in an IPR, just as this is.

17 When we talk about authenticity, Federal Rule of Evidence
18 901(a) says, the proponent, which is here SDI, must produce evidence
19 sufficient to support a finding that the item is what the proponent
20 claims it is. Now, I'm talking about the authenticity aspect and SDI
21 hasn't offered anything at all regarding authenticity.

22 Slide 9, please. Now, as I said, Rule 901 places the burden
23 on SDI and we think that's where the burden should lie.

24 Slide 10, please. So the bottom box on slide 10 is a quote
25 from SDI from their amended petition and this is what they're offering

1 the IRMan web pages for. This is what they describe the web pages
2 as. So they say, the IRMan, described in the web pages of its
3 manufacturer, Evation, captured by archive.org on June 8, 1999, was a
4 system that included a remote control unit and had an IR receiver that
5 connected to a computer. That's from their petition, Paper 6 at 9.

6 JUDGE McKONE: Now, do you disagree that the IRMan
7 web pages were captured by archive.org on June 8, 1999?

8 MR. HEBERT: I absolutely do, right. So what we know --

9 JUDGE McKONE: What proof would you need to -- or do
10 you think we need to determine that it was, in fact, captured on that
11 date?

12 MR. HEBERT: So I'm glad you asked that. Let's go to slide
13 11. So slide 11 is a slide from -- is a quote from the Novak case and
14 the Novak case describes how the Internet Archive gets its
15 information. So the Internet Archive gets its information from third
16 parties who donate the information to the Internet Archive.

17 The Internet Archive isn't generating all of the content itself.
18 It has third parties who do this. The third parties run the web
19 crawlers. The third parties give donations to the Internet Archive.
20 This is all in the Novak case.

21 I'm glad that Mr. Lowrie mentioned the unreliability of
22 Wikipedia, which I think is pretty well established in a number of
23 cases. It's just like Wikipedia. Wikipedia is not accepted as evidence
24 under the Federal Rules of Evidence in trial proceedings, because

1 information comes from third parties. The same thing for the Internet
2 Archive. The information comes from the third party.

3 So in order to determine that it's correct, to accept it, you do
4 something like what they did -- slide 12, please -- in the Bansal case.
5 So this is case that SDI itself cited. They -- I've included the quote
6 from their paper, but I've also included the actual quote from the
7 Bansal case, which is a little bit more involved.

8 But what happened in the Bansal case is -- I believe it was a
9 criminal case -- the government got a witness, a live witness, from the
10 Internet Archive to come and testify at trial. That witness was subject
11 to cross examination at trial. That witness described how the
12 Wayback Machine worked. It described where those particular web
13 pages came from. We don't know where the IRMan web pages here
14 came from.

15 But in the Bansal case, apparently the witness who came
16 from the Internet Archive presumably did some homework to study up
17 before that witness testified, testified about where they came from and
18 also made comparisons to other copies of the website that had been
19 separately authenticated.

20 Okay. The witness also compared the screen shots with
21 previously authenticated and admitted images from Bansal's website
22 and concluded based on her personal knowledge that the screen shots
23 were authentic. So that was accepted. That's proper foundational
24 testimony. That brought that in, in the Bansal case, which SDI relies
25 on.

1 If we can turn to slide 13. I want to jump ahead actually to
2 slide 15, if I may. Well, that's the wrong one. Slide 16, I'm sorry.

3 The Internet Archive itself actually tells us that it is not
4 reliable, just like Wikipedia tells us that it's not reliable. Wikipedia
5 has a disclaimer. The Internet Archive also has a disclaimer. Now,
6 this is part of our Exhibit 2121. This is --

7 JUDGE McKONE: I don't read this as the Wayback,
8 Internet Archive is admitting that they're not reliable. They're just not
9 willing to stick their neck out in court. There's a bit of a difference
10 here.

11 MR. HEBERT: Oh, okay. Well, I would submit if they
12 wanted to say they were reliable, they would be willing to have an
13 affidavit that says that it's correct. The question -- this is a frequently
14 asked question that they themselves publish. This is related to the
15 standard affidavit that the Board downloaded in connection with the
16 final written decision in the last set of IPRs. It's linked to that page.
17 That's how we found it.

18 And the question is -- and this is Internet Archive writing the
19 question, keep that in mind -- does the Internet Archive's affidavit
20 mean that the printout was actually the page posted on the web at the
21 recorded time? They don't say yes. Their answer isn't yes. Their
22 answer is, it's up to you to prove that. Okay. They say it's only --

23 JUDGE McKONE: Later on in the frequently asked
24 questions the same exhibit on -- it's got a page 4 at the bottom of the
25 page and a page 2 at the top of the page. There's the question, how

1 can I tell when the pages from the Wayback Machine were archived?
2 Into that answer it tells you that or at least archive.org represents that
3 the URL at the bottom of the archive page tells you the date and time
4 that it was archived.

5 MR. HEBERT: So I will agree that what the Internet
6 Archive tells you -- and it's actually very carefully worded, but what
7 the Internet Archive tells you is what the URL is supposed to
8 represent and it gives you a code for the date. What it doesn't say is it
9 doesn't say that we, the Internet Archive, actually went and got that
10 web page on that date and archived it on that date. It doesn't say that
11 at all.

12 And, in fact, prior versions of the Internet Archive affidavit
13 -- and I have one if you care to see it -- actually say that we get our
14 information from third parties who run these web crawlers.

15 So I'll agree that they do explain how the URL is coded.
16 Okay. But they don't attest to it. There's no one that says, I have
17 personal knowledge that it was done that way on that date, unless
18 perhaps in the Bansal case, but the person who came to testify live
19 researched it and did that.

20 If you notice, the Internet Archive also says that another one
21 of the FAQs is that they can provide a more detailed affidavit if you'd
22 like to pay extra. They can research the issue. If you want to know
23 the history of the web page you're asking about -- and this is in our
24 same 2121.

1 I don't have a -- but in Exhibit 2121 right next to this
2 question and answer, there's another question and answer, which says
3 something like -- I'm paraphrasing -- if I want a different affidavit or a
4 more detailed affidavit, can I get one? And the answer is, yes, but it
5 will cost you more.

6 I can pull that up, if anyone would like to see it, but they're
7 willing to go and do research and maybe, maybe the research that they
8 would do would lead to a conclusion as to the source of the IRMan
9 web pages and maybe it wouldn't. We just don't know.

10 JUDGE FITZPATRICK: I have a question about the Toyota
11 case. Mr. Lowrie distinguished it as -- from this case in that the
12 reference itself here is a printout of -- it is alleged to be a printout of a
13 website or a page of a website on a specific date. Whereas in Toyota,
14 there was -- what was captured on a specific date was a listing of a
15 document that had, for example, a title or some sort of index material
16 and then a separate reference was the actual -- or a separate exhibit in
17 that trial was the source of the content that was relied upon as meeting
18 limitations.

19 So there were two steps in the Toyota case I think is the way
20 it was described. Do you have any comment on that? I see that as
21 relevant.

22 MR. HEBERT: So, first of all, the Toyota case did not deal
23 with Internet Archive web pages. Mr. Lowrie I think said it did, but it
24 didn't. The Toyota case deals with three references which are related

1 and I think I have that in my notes here. If you can bear with me for a
2 second.

3 Yeah, right. So there was a reference called Fry. Fry was
4 the reference that was being offered as the invalidating reference. It
5 was a technical article, not a website in Fry, but the issue was they
6 needed to date Fry, and in order to date Fry they looked for two sets of
7 web pages. One set was called the Sage Publications web pages and
8 the other was called the Sage Publications website printout and it's a
9 little bit confusing, because the names are so similar.

10 But these didn't come from the Internet Archive. These
11 were web pages that were downloaded and they were both offered to
12 establish the date of the Fry reference, and the Board in Toyota -- and
13 they were offered and there was a very vigorous attempt to introduce
14 those as business records. Someone asked about the business record
15 exception.

16 And so the Toyota case goes through the elements required
17 for a business record. There was an affidavit from a woman who was
18 -- supposedly had knowledge about this. Her testimony was accepted
19 by the Board and used for some purposes, but it was deemed not to be
20 sufficient to establish the business record exception and the Board
21 held that -- the Board excluded both the Sage Publication's web pages
22 and the Sage Publication's website printout as hearsay.

23 Now, the Board went on to find that the Fry reference was a
24 good reference for other reasons and I think the outcome is they
25 invalidated the claims, but the point is that the printouts from the

1 website, downloads from the website, which were offered to establish
2 the date of this other reference, were excluded as hearsay.

3 It's very much like this case, except we don't have separate
4 references. We have one document from -- that's downloaded from
5 the internet, which is offered both for its content, as the Fry
6 publication was offered in the Toyota case, as well as for the date. So
7 instead of having two steps, we only have one step in this case, but I
8 think, otherwise, it's pretty much on all fours.

9 JUDGE EASTHOM: So are you saying, Mr. Hebert, that
10 the nomenclature on the bottom of page -- from Web Archive, it's not
11 authentic because --

12 MR. HEBERT: We don't know where it came from, Your
13 Honor. So I could take a piece of paper, I can write a date. I can
14 write July 4, 1776. I can hand it to you. That doesn't prove that that
15 paper came from July 4, 1776. We don't know the history of that. We
16 don't know who donated it. We don't know which of the third parties
17 that donate information from -- to the Internet Archive assigned it that
18 date. We don't know when the crawling was done. We don't know
19 any of that.

20 JUDGE EASTHOM: Well, I guess I'm trying to get -- and I
21 don't understand completely, but I suppose that there's a web crawler
22 in 1999 at some point. Evidently this web crawler found this
23 document, this IRMan document. That's all that this -- but you're
24 saying that's inauthentic, because --

1 MR. HEBERT: We don't know that. We don't know that
2 there was a web crawler in 1999 that captured that document.

3 JUDGE EASTHOM: And is that because somebody can
4 stick another date on there that will show --

5 MR. HEBERT: I can write a date on a piece of paper. It
6 doesn't mean that that paper was -- came from that date. It's the same
7 problem with Wikipedia.

8 JUDGE EASTHOM: I don't understand what you're saying
9 about writing something versus it comes from the Wayback Machine
10 that has this date listed after it's been web crawled.

11 MR. HEBERT: We don't know who did the web crawling.
12 There's no evidence that the Internet Archive itself did it. The Internet
13 Archive has third parties do it. They donate information.

14 JUDGE EASTHOM: But what difference does it make? I
15 guess I don't understand what difference does it make if someone else
16 did the -- whoever did the web crawling, why is that relevant?

17 MR. HEBERT: We don't know when they did it.

18 JUDGE McKONE: Are you saying that they may have
19 misrepresented the date on which they -- that web crawler -- or the
20 web crawler may have misrepresented the date on which it acquired a
21 page?

22 MR. HEBERT: There could be a misrepresentation. There
23 could be an error. We don't know when it was done. There's nothing
24 to back it up.

1 So had they submitted some evidence, if they went -- if they
2 went to the Internet Archive and they got a declaration, maybe it
3 would be the standard declaration if the Board downloaded. Maybe it
4 would be a better, more detailed declaration.

5 But whatever it is, we would then have an opportunity to
6 cross examine that, and the Toyota case says that as well and we
7 would have been able to ask the very questions that you're asking. We
8 would have been able to say, where did you get this from, who
9 downloaded it, when did you download it, what are the records of you
10 doing that? We would have been able to find where it came from.

11 JUDGE EASTHOM: And your point about the declaration
12 --

13 JUDGE McKONE: I'm looking at Exhibit 1010, I think it is
14 at page 5 and there's a 1998 copyright date at the bottom of that page.
15 Why is that not additional corroboration of the date on which this
16 document was acquired by a web crawler somewhere?

17 MR. HEBERT: That's just text in the document. We don't
18 know where it came from.

19 JUDGE McKONE: Well, you're asking us to believe that
20 this date at the bottom of the document may have been
21 misrepresented, this 1999 date may have been misrepresented and also
22 that this 1998 date in the document itself may have been
23 misrepresented.

24 MR. HEBERT: We don't know where the date --

25 JUDGE McKONE: You're asking us to --

1 MR. HEBERT: So it's text itself. It's text itself. It's not a
2 logo. Okay. So SDI has made an argument about distinctive indicia
3 and they've pointed to the Altec Lansing logo in the Altec Lansing
4 Manual, and there's no logo or distinctive indicia in the IRMan web
5 pages, except for the logo of the Wayback Machine itself, but there's
6 no IRMan logo or distinctive indicia. There's text. And the copyright
7 date is merely text and we don't -- so it's not our burden to --

8 JUDGE EASTHOM: Well, it does match the website at the
9 top of, you know, evation.com.

10 MR. HEBERT: It's a name of text. It's the name of text.
11 We don't know where it comes from and it's not our burden to
12 disprove it. It's SDI's burden to establish it. SDI is the Petitioner
13 here. They have the burden as the Petitioner. They have the burden
14 under the Federal Rules of Evidence and they haven't tried to -- they
15 haven't even tried to meet the hearsay objection. They don't argue that
16 any hearsay exception applies.

17 They say we're not arguing that any hearsay objection --
18 exception applies, because we are not relying on the truth of it, and
19 that's a disclaimer that the Board is entitled to take SDI at its word.

20 So it's possible. It's entirely possible that it's correct. We'll
21 never know. We'll never know, because we don't have the evidence.
22 We haven't been able to give them -- had an opportunity to
23 investigate, cross examine and determine whether it's correct or not.

24 JUDGE EASTHOM: I'm just trying to -- is it really hearsay
25 if the copyright date says 1998 evation.com and that's the impression

1 the reader gets? We're not -- no one is asserting that it was actually
2 copyrighted then, but someone is asserting that it says that. Is that
3 hearsay?

4 MR. HEBERT: Yes, it's hearsay if the truth of the date
5 matters. So for a number of cases that deal with publications, the
6 cases say we don't care whether the description in the publication is
7 true or not.

8 So, for example, the IRMan web pages say that they can
9 work with over 40 different remotes. All right. We don't care for
10 purposes of this hearing whether the IRMan could work with 40
11 different remotes. The fact that they said it is enough. All right. But
12 the date is an out-of-court statement that is offered to prove the truth
13 of the matter asserted, the matter asserted being the date, so that is
14 hearsay. That's classic hearsay.

15 JUDGE McKONE: Now, I understand your argument about
16 the relative burdens and the uncertainty that you have in the date at
17 the bottom of the page. Is there anything about the IRMan documents
18 that would lead us to doubt the dates? Is there anything that makes
19 these documents look unreliable or that make them look like they
20 were created after 1999?

21 MR. HEBERT: It's the same answer I would have to give
22 you if you asked me the same question regarding a Wikipedia page.
23 What's in Wikipedia might be correct. We don't know. We don't
24 know the history of it. We don't know the providence of it. It's the
25 same thing with respect to these IRMan web pages, we don't know

1 where they came from. No one has come into this Court by affidavit
2 or whatever and established that, and the standard affidavit doesn't do
3 it either.

4 JUDGE EASTHOM: So you're saying for every reference
5 that the Board uses on the web, it would have to require a declaration
6 for any date reason?

7 MR. HEBERT: So if the date of the reference, if the date of
8 the reference is a material fact in the case, the truth of the date, and it's
9 an out-of-court statement, then, yes, it has to be established. There
10 has to be a hearsay exception. And there are lots of different hearsay
11 exceptions.

12 Okay. Many of the cases talk about government records.
13 Okay. There's a lot of cases that are cited in this proceeding deal with
14 government records, official government records, and there's a
15 hearsay exception for official government documents. Okay. So a
16 hearsay exception would apply.

17 The parties in Toyota recognized that they needed -- in order
18 to get that date established, they needed to have the date accepted as
19 true, and so what they did is they tried -- and I said they tried very
20 hard, a very detailed affidavit to try to establish it as a business record,
21 and the Board there said that they didn't do it. It didn't make it as a
22 business record. Therefore, it's excluded as hearsay.

23 JUDGE EASTHOM: But it sounds like in that case the
24 document itself didn't have a date on it; is that correct?

1 MR. HEBERT: I believe the documents all had dates on
2 them. Okay. That's my best recollection. I apologize if it turns out
3 my recollection --

4 JUDGE EASTHOM: You could be right.

5 MR. HEBERT: But I think that's correct.

6 JUDGE EASTHOM: I apologize, too. I haven't read it.

7 MR. HEBERT: But, I mean, the mere presence of a date
8 doesn't --

9 JUDGE FITZPATRICK: Can I interject here? If we could
10 try to maybe translate this for a second to something more historical,
11 just an article that purports to be published in a hard copy. Forget the
12 internet for now. And someone asserts it -- Petitioner asserts it in an
13 IPR. It's got a date, it's got the publishing company and copyright.

14 And the way I look at that, that publishing company is
15 telling the world that this was -- this article, the contents here were
16 published on this date or this year. Usually it's just a year. And if a
17 Petitioner used that in an IPR and that's all they had, would you have
18 any objection to that evidence?

19 MR. HEBERT: So this comes up in trial courts.

20 JUDGE FITZPATRICK: On this issue. I know it's --

21 MR. HEBERT: This very issue comes up all the time and it
22 comes up in trial and trial settings all the time, and anytime that
23 validity is at issue the defendant or the accused infringer offers up a
24 lot of purported prior art and the accused infringer needs to establish
25 that that prior art isn't hearsay.

1 For the most part, for the most part, the references that are
2 used come in under an exception. Many of them are learned treatises,
3 but there are lots of different exceptions and they come in that way.
4 But anytime there's an out-of-court statement offered to prove the
5 truth of the matter asserted, then it's subject to the hearsay rule.

6 Now, there's an exception with regard to expert testimony
7 and in many trial settings there's an expert who will opine. The
8 underlying evidence that the expert relies on does not itself separately
9 need to be admissible as evidence as long as it's the type of evidence
10 that would be reasonably relied upon by an expert, and so frequently
11 that's how it comes in, because there's usually a sponsor for all of that
12 prior art, which would be one of the experts.

13 JUDGE FITZPATRICK: But if there's no sponsor, let's say
14 there's no sponsor and let's say there's an objection by the Patent
15 Owner that -- a hearsay objection and the party relying on it, the
16 accused infringer doesn't bring up the hearsay exception and doesn't
17 bring up evidence, you know, a declarant from this publishing
18 company and it's just as the record we have, an article with a date
19 from a publisher -- you know, the publishing company's name is on
20 there and we have an objection that's hearsay.

21 Have you ever seen in the patent context an article that I just
22 described like that being excluded?

23 MR. HEBERT: It depends on what the article is and where
24 the article came from as to whether it comes within a learned treatise.

1 Normally the prior art is primarily patents and there's a statutory
2 exception to the hearsay rule for patents.

3 JUDGE FITZPATRICK: Sure. And I'm just going with just
4 articles, scientific, it's in a journal, something like that, because I'm
5 trying to bring this back to the issue of burden. So they have a burden
6 to rely on 102 and 103 publications in this proceeding. You have a
7 burden to prove that you're entitled to the relief in your motion to
8 exclude and I'm trying to sort this all out.

9 MR. HEBERT: So if it was a technical journal, you know,
10 the Journal of the IEEE, for example, that would come under the
11 learned treatise exception.

12 For the most part, for the most part people challenging
13 patents don't rely on harebrain articles. Okay. I mean, to the extent
14 that they're trying invalidate something, they take effort to get prior art
15 that has a background that is defensible, that will stand up to scrutiny
16 under the hearsay rule.

17 So, I mean, it would be odd to come up with a case where a
18 USA Today article, for example, was the reason something was
19 invalidated without some support as to what was in it. I can't think of
20 an example like that.

21 I want to just make one comment, if I may, about the
22 Telewizja case.

23 JUDGE EASTHOM: Can I ask you a question? What
24 would happen if we rule in your favor, would that upset --

25 MR. HEBERT: The IRMan's out.

1 JUDGE EASTHOM: Would that affect the other case or is
2 this new evidence that wouldn't affect the other case, the 365 and the
3 450?

4 MR. HEBERT: I don't know the answer to what would
5 happen with respect to the prior case. With respect to this case, and
6 this case is a separate proceeding, they weren't consolidated, the
7 IRMan would be out and, therefore, one of the necessary references to
8 their combination would be out. I don't know what the impact, if any,
9 would be on the prior case. I haven't considered that at all.

10 So Mr. Lowrie pointed to Exhibit 2122 that we submitted
11 from the Telewizja case. I think that's how it's pronounced. And what
12 that says, it's more than just -- if you look at that exhibit, I'll just
13 characterize it and not take the time to pull it up. But if you look at
14 that exhibit, it's more than a Wikipedia article. The author of that
15 book actually spoke with an attorney who was at the trial where the
16 judge overruled the magistrate.

17 Now, that's a case -- Telewizja is a case where the party
18 offering the Internet Archive web pages went and got an affidavit
19 from the Internet Archive and submitted the affidavit, and the
20 magistrate judge in a pretrial ruling said that that affidavit was
21 enough. Okay. But then during trial, according to this book, they
22 interviewed the -- an attorney who -- the attorney for the party at trial
23 who confirmed this.

24 Oh, thank you. Okay. So here we have, this is what they
25 said. So the attorney --his name is Zisook, Z I S O O K, and for the

1 benefit of Judges Fitzpatrick and McKone, we've pulled up a section
2 of Exhibit 2122. And so Judge Guzman was the article --

3 JUDGE FITZPATRICK: Which page are you on, page 194
4 or page 4?

5 MR. HEBERT: Page 195, page 5, near the bottom.

6 And so -- and here he says that the web pages were not
7 admissible as evidence, the employee's affidavit, and that's the
8 affidavit from the employee from the Internet Archive, contained
9 hearsay and inconclusive supporting statements. And according to
10 web page printouts, and those are the Internet Archive web page
11 printouts, were not self-authenticating, and we have --

12 Can you pull up the declaration from the Telewizja case?

13 JUDGE McKONE: Has the Federal Circuit ever dealt with
14 the issue of the Wayback Machine and Internet Archive?

15 MR. HEBERT: To my knowledge, no. I will say -- I'm
16 very glad you asked that question, because I can get into the whole
17 Pond Guy issue. And if you hold off for a moment, I will get to that,
18 because there is a Federal Circuit decision that's been misinterpreted
19 and I'd like to explain that.

20 So this is -- what we have up here now for the benefit of
21 Judges Fitzpatrick and McKone is the affidavit of Molly Davis that
22 was offered in the Telewizja case downloaded from Pacer. I'll read
23 the heading off. It's Case Number 1:02-CV-03293, Document
24 Number --

25 JUDGE McKONE: Is this an exhibit in the case at all?

1 MR. HEBERT: It isn't, no, but this is the affidavit that's
2 discussed in Exhibit 2122.

3 MR. LOWRIE: We'll object to its use, Your Honor. It's not
4 something that we have.

5 JUDGE EASTHOM: It is kind of getting astray from what's
6 before us.

7 MR. HEBERT: I'll just make one point and move on.

8 JUDGE EASTHOM: You can't really see it, but if you just
9 want to explain what it says.

10 MR. HEBERT: I'll just make one point and move on. So
11 this is an affidavit from the Internet Archive dated May 11, 2004 and
12 in paragraph 4 it describes how the Internet Archive receives data
13 from third parties who compile, namely the third parties do the
14 compiling the data by using software programs known as crawlers.
15 Okay. So this is -- this, again, this is all -- this is like Wikipedia.

16 JUDGE EASTHOM: That corroborates what we've already
17 understood.

18 MR. HEBERT: Yes, right.

19 Now, there was a question about the Federal Circuit, and
20 what I can say about that is this, SDI cites a case, Pond Guy versus
21 Aquascape, and it's in their slides, some of the slides that they skipped
22 over, but --

23 JUDGE EASTHOM: Can I back up? So what you're saying
24 is, is that even if we got an affidavit, if we received an affidavit,
25 excuse me, that wouldn't be enough in this proceeding according to

1 your argument that that affidavit necessarily would contain hearsay
2 statements about how the web crawler works.

3 MR. HEBERT: The affidavit would be subject to cross
4 examination. A lot would depend on the content of the affidavit. I
5 believe in the Toyota case, the party -- I forget which party, but the
6 opposing party from Toyota elected not to cross examine the person
7 who gave the affidavit, because they didn't think it was necessary,
8 because they thought there were sufficient infirmities in the affidavit
9 itself.

10 A lot would depend on the affidavit. I mean, obviously if
11 we were confronted with an affidavit and we look at it and it's
12 thorough and it's detailed and it's -- on personal knowledge I can tell
13 you that this happened on such and such a date and I investigated this,
14 you know, maybe we would forego the opportunity for cross
15 examination or maybe we would want cross examination. In Toyota
16 they passed on cross examination. It would all depend on the content,
17 but this is all hypothetical because there is known, there is known here
18 before us.

19 JUDGE EASTHOM: But, I mean, from what you're saying,
20 though, even if you would have the ability to cross examine someone
21 and even if they've submitted an affidavit, that wouldn't be enough
22 because the affidavit necessarily would be hearsay.

23 MR. HEBERT: No, no. The affidavit itself -- I'm sorry, this
24 is addressed in the Toyota case as well. The affidavit itself is not
25 hearsay.

1 JUDGE EASTHOM: Correct, but it would be based on the
2 third party statements about how the Wayback Machine --

3 MR. HEBERT: If the affidavit says I spoke to this group
4 that likes to collect internet data and that's where it came from, then
5 that certainly would be hearsay. If the affidavit says that I was the
6 person who actually ran the web crawler on such and such a date and I
7 found this web page and I personally download it and here it is and it's
8 correct, then that would not be hearsay. That would be -- so the
9 contents of the affidavit are an in-court statement for the purposes of
10 this proceeding.

11 JUDGE EASTHOM: So the Wayback Machine Company,
12 they actually run the web crawlers themselves? Is that where the
13 affidavit would come from typically or --

14 MR. HEBERT: This says they don't.

15 JUDGE EASTHOM: So that's what I'm saying, they would
16 never be satisfying -- they would never -- even if you had an affidavit
17 from the Wayback Machine people, it wouldn't be enough.

18 MR. HEBERT: No, it could be. So in the Bansal case, as I
19 say in the Bansal case -- and another FAQ in that exhibit we cited says
20 that, you know, you can get someone to testify at trial, but we really
21 don't like to do that, because it's time-consuming and bothersome and
22 all of that. But in the Bansal case that they cited, they actually got a
23 witness live to testify at trial and there's a brief description in the case
24 of what that testimony was.

1 JUDGE EASTHOM: The Bansal -- in other words, the
2 person that actually did the web crawling?

3 MR. HEBERT: I don't know.

4 JUDGE EASTHOM: Oh.

5 MR. HEBERT: So the Internet Archive sent a person who
6 testified about it. The description doesn't have the testimony itself.
7 One perhaps could get it if the transcript is available, but they describe
8 what the testimony was and the testimony there was sufficient.

9 Now, you can well imagine a witness saying, you know, I
10 did this, I downloaded it. All right. And so that's based on personal
11 knowledge. Rule 901 requires personal knowledge and so that could
12 be sufficient. If they said we got it from somebody else, then I would
13 presume that the outcome in Bansal would have been different.

14 JUDGE EASTHOM: You were going to say something
15 about the Federal Circuit and I interrupted you.

16 MR. HEBERT: Yes. I want to just do this point and then
17 I'm going to skip a number of issues and go right to claim
18 construction, if I may, because I see my time is getting short. But I
19 want to -- there's a -- it's a little bit confusing, so I want to unwind a
20 series of cases that SDI cites and it all relates to the notion that -- and
21 the statement is --

22 So the Pond Guy case that they cite says that the accuracy of
23 the Internet Archive cannot reasonably question, cannot reasonably be
24 questioned, and this is a cite they have on their slides. This is what

1 we've seen, but I want to unwind that, because that case has no
2 explanation for the statement. It has no reasoning for it.

3 The Pond Guy case relies on three cases. Okay. All three of
4 these cases are cited in the briefs as well. One is In re Methyl Tertiary
5 Butyl Ether, another is Juniper Networks and another is Martins.
6 None of those cases say this either. None of those cases have any
7 explanation for why the accuracy of the Internet Archive cannot be
8 reasonably questioned.

9 The In re Methyl Tertiary Butyl case relies on the two other
10 cases I mentioned, Juniper Networks and Martins. The Martins case
11 relies only on Juniper Networks. So that whole line of cases all comes
12 down to Juniper Networks. Juniper Networks is a non-precedential
13 case from the Federal Circuit. The Juniper Networks case doesn't say
14 the Internet Archive pages cannot reasonably be questioned. The
15 Juniper Networks case doesn't deal with the Internet Archive at all.

16 The Juniper Networks case says that web pages may be
17 subject to judicial notice. They don't then take judicial notice of
18 anything. Okay. So it has no applicability at all. And they point to a
19 case from another circuit where the web page that they're talking
20 about are quarterly reports from a company, which is a party to the
21 case.

22 So there's a notion in a lot of their papers and lot of things
23 they say that the Internet Archive cannot really be questioned. That is
24 not any kind of worthwhile authority.

1 All right. So I'm going to move quickly to claim
2 construction, if I may. I'm going to skip a number of things, so slide
3 27. Thank you.

4 So what we have here is the term on the left from Claim 25
5 “configured to respond to signals received from the computer.” We
6 have Bose's proposed construction configured to answer or reply to
7 the computer, send a responsive communication back to the computer,
8 and I think everyone agrees at this point that if Bose's construction is
9 correct, then SDI's argument as to invalidity of those claims that
10 include that fails, because now there's only four claims in each of the
11 patents that include this “configured to respond to signals” term, not
12 all the claims. I don't want there to be any misunderstanding. There's
13 only four claims that this is subject to, but those four claims would
14 survive.

15 And then we have the Board's tentative construction, which
16 did not have the benefit of all of the arguments that we made in our
17 full response. It was only the preliminary response and, in particular
18 the claim differentiation argument, but the Board's tentative
19 construction was a broad construction configured to take an action as
20 a result of signals received from the computer and Mr. Lowrie said
21 that that would include increasing amplification, for example.

22 Okay. So slide 28. So here we have Claim 25. So this is
23 the language “configured to respond to signals received from the
24 computer,” and then the claims that are impacted by this argument,
25 '682, Claim 25 and Claim 26, which is dependent on it, and also '682,

1 Claim 52, which has the same language, and Claim 53, which is
2 dependent on it. And then in the '295 patent, it would be Claims 25
3 and 51, which have the same language, and then Claims 26 and 52,
4 which depend from those.

5 So -- now, I want to note here that the language in this claim
6 is structural. Okay. The audio system has to be configured to respond
7 to signals received from the computer. It has structure that will do
8 that. It doesn't have to actually respond. It has to be configured to
9 respond.

10 Now, slide 29. This I'm going to skip -- I'm going to just
11 briefly comment on it and skip forward. This is from the amended
12 petition. What SDI did is they actually looked at the prior art and they
13 came up with a claim construction, an implicit claim construction
14 based on the prior art, which is to take some action, and they gave two
15 examples from the prior art.

16 So I'm going to go to slide 30, please. So I want to talk
17 about claim differentiation, because I think that's a very important
18 issue for the Board to consider and this course is based on 35 U.S.C.
19 Section 112 -- 12, Section D, and I always used to refer to that as 112,
20 4, paragraph 4, but it's the requirement --

21 JUDGE EASTHOM: I can't see the slide number. I'm
22 sorry, slide --

23 MR. HEBERT: Slide 30.

24 JUDGE EASTHOM: 30. Thank you.

1 MR. HEBERT: We're on slide 30. But it's the requirement
2 that a dependent claim has to be narrower than the independent claim
3 from which it depends.

4 Now, these are the independent claims, Claim 1 from both
5 the '682 and the '295 patents, and this shows the structure that is
6 included within the claim that is configured to take some action as a
7 result of audio signals received from the computer. Both claims have
8 structure that's configured to take an action.

9 Claim 1 has audio signal processing circuitry. It also has
10 speakers for reproducing audio signals. That's the '682 patent. The
11 '295 patent has one or more speakers and it has an amplifier for
12 powering the one or more speakers. That is structure which is
13 configured to take an action as a result of audio signals received from
14 the computer.

15 So under the construction that SDI implicitly offered with its
16 petition and that the Board tentatively adopted with its decision, both
17 Claim 1 and Claim 2 meet that construction of "respond." But
18 because of claim differentiation, we know -- and we'll turn to slide 31,
19 please, and that claim -- claims --

20 JUDGE McKONE: Now, the Petitioner makes the argument
21 that the claim language in both claims, Claim 1 -- Claims 1 do not
22 actually require that the audio signal processing circuitry or the
23 speakers, they process or reproduce audio signals from the computer.
24 Do you have a response to that?

1 MR. HEBERT: Yes. So why don't we skip ahead and just
2 go to the next slide, please, the next one. I'm trying to orient myself.
3 Okay. The next one and the next one. I'm on slide 32.

4 JUDGE McKONE: I'm sorry to throw you off. I just
5 wanted to cut to the chase, because I know your time is short.

6 MR. HEBERT: I appreciate that, yes. I want to do that.

7 So slide 32 is a summary of SDI's arguments on claim
8 differentiation, and the first point they make is the one that you said,
9 Judge Fitzpatrick, that Bose's argument fails for being unsupported
10 because they do not require that the speakers play music from the
11 computer.

12 They're treating -- by doing this, they're treating the claim as
13 if it's a method claim. We just looked at the claim. The claim doesn't
14 require -- neither Claim 1 nor the dependent claim requires that the
15 speakers play music from the computer. What they require is
16 structure that is configured to take some action in response to audio
17 signals received from the computer.

18 So whether any claim requires that speakers play music from
19 the computer just doesn't matter. The computer is not an element of
20 the claim. The sound reproduction system has to be configured in a
21 certain way in order to interact with the separate computer, and the
22 structure in Claim 1 meets the broad construction that's been adopted
23 for "respond."

24 And so points one and three both go to this notion that
25 they're trying to treat it as if it's a method claim where it requires that

1 the speakers actually play music from the computer and it doesn't do
2 that.

3 The second point here I want to address separately, they say
4 that nothing in the claim requires those audio signals to come from the
5 computer, but I want to direct the Board's attention to Claims 1 in
6 both patents, the independent claims in both patents, the connector
7 limitation.

8 Okay. So -- can you pull up the connector limitation? It's
9 an important limitation for this point. So --

10 JUDGE FITZPATRICK: Will this be on slide 30 or is this
11 in a different part of Claim 1?

12 MR. HEBERT: I'm sorry, this is in Claim 1 of each patent.
13 Okay. It's not on the slide. It's in Claim 1 of each patent, but it says, a
14 connector -- so I'm reading the connector -- I'll just read it for the
15 record and I'll try to read it slowly for you.

16 A connector configured to provide a physical and electrical
17 connection exclusively between the sound reproduction system and
18 the computer. Okay. So I'm going to stop there. So SDI says there's
19 no requirement that the music signals come from --

20 MR. LOWRIE: For the record we'll object to this argument.
21 It's not in the brief, but the Board can confirm or not later, but we are
22 objecting to the argument.

23 MR. HEBERT: So SDI says there's no indication that the
24 music signals come from the computer. Well, here, here it is, the

1 connector is exclusively between the sound reproduction system and
2 the computer.

3 And then if you go down further, it says, wherein the
4 connection includes one or more signal pass configured to receive
5 audio information from the computer corresponding to the digital
6 music file stored on the computer. So right there, right in the claim it
7 does set forth the structure. The music signals come from the
8 computer to the sound reproduction system and Claim 1 of both
9 patents has structure, which is configured to respond under the broad
10 construction that the Board has adopted to those music signals.

11 And I see that I'm over time. I have a lot more to say. We
12 have it I think covered adequately in the briefs. I can answer any
13 further questions the Board might have, but I think the claim
14 differentiation point is the most important point on claim construction.

15 JUDGE FITZPATRICK: I have a follow-up question and
16 this may -- this just occurred to me, because I just heard this argument
17 about the exclusive connection. What about Dependent Claim 2
18 where it says the connector comprises a dedicated cable, is that
19 already implied by the exclusivity that you focused on in Claim 1?

20 MR. HEBERT: Claim 1 --

21 JUDGE FITZPATRICK: I'm sorry, I'm in the '682 patent.

22 MR. HEBERT: That's fine. I think I'm familiar enough
23 with it. The connector in Claim 1 need not be a cable. Okay. So
24 Claim 2 specifies the connector is a cable. A connector can be
25 something other than a cable. For example, if I had a, you know, USB

1 flash drive, I could plug it into my computer and it's directly
2 connected and there's no cable, so.

3 Is that the gist of your question?

4 JUDGE FITZPATRICK: Well, I'm not sure it answers it
5 directly. There's -- Claim 2 has an adjective for the cable and it's
6 dedicated and the USB example doesn't really work, because Claim 1
7 I think, doesn't it exclude that?

8 MR. HEBERT: So I was only offering the USB example to
9 show that there's a way to connect things that don't require a cable.
10 That's all.

11 So Claim 1 requires a connector, which provides an
12 exclusive physical and electrical connection, both physical and
13 electrical. Claim 2 -- I'm not -- I don't have it in front of me, but
14 apparently requires that that particular connector to be a type of cable.

15 JUDGE FITZPATRICK: Okay.

16 JUDGE EASTHOM: So we have a connector and then -- I
17 see that and you had another limitation, but I'm not seeing where the
18 response is necessarily flows from --

19 MR. HEBERT: Yes. So what we're talking about, I want to
20 -- the claim we're talking about --

21 JUDGE EASTHOM: I'm on Claim 1 in the '682.

22 MR. HEBERT: Yeah, it has structure, which is configured
23 to take an action.

24 JUDGE EASTHOM: So I see a connector configured to
25 accept a signal.

1 MR. HEBERT: Right. So that shows -- so the connector
2 limitation shows where the music signals come from. So SDI says,
3 you know, there's no evidence that music signals come from the
4 computer. Well, yes, there is. It's right here.

5 But earlier -- can we flash back to I think it's slide 30. In
6 both independent claims --

7 JUDGE EASTHOM: I see some limitations directing
8 responses to the computer it looks like, but I don't see necessarily
9 anything -- it doesn't jump out at me, but you said something earlier
10 and I might have missed it.

11 MR. HEBERT: So 30. Here we go. Okay. So slide 30.
12 Slide 30 has the first portion of Claim 1 from both the '682 and '295
13 patents and what we've highlighted in there is the structure that is in
14 Claim 1 that is configured to take some action as a result of audio
15 signals received from the computer.

16 So Claim 1 of the '682 patent has audio signal processing
17 circuitry for processing audio signals for your reproduction. The
18 audio signal processing circuitry is structure. That structure is
19 configured to take some action, namely process audio signals in
20 response to receiving audio signals.

21 Claim 1 of the '295 patent says that it has an amplifier.
22 Okay. The amplifier is structure, which is configured to take an
23 action, namely amplification, in response to receiving signals, audio
24 signals from the computer. And, in fact, I wrote this down, because

1 Mr. Lowrie actually described that increasing amplification means
2 “respond” under SDI's construction.

3 Both claims also include speakers for -- the '682 patent says
4 for reproducing audio signals, but the '295 patent just says speakers.
5 But in either event, the speakers are structure that's required to be
6 included in the sound reproduction device. That structure is
7 configured to take an action in response to receiving the audio signals,
8 namely to play the audio signals out loud.

9 So here we have Claim 1 in both patents meets the term
10 “respond” as tentatively construed and, therefore, under that
11 construction the dependent claim is not of narrower scope and 112(d)
12 tells us it has to be of narrower scope and, of course, many, many
13 cases I'm sure the Board is familiar with in the Federal Courts and in
14 the Patent Office with respect to claim differentiation and, therefore,
15 we say that the definition that was chosen by SDI and tentatively
16 adopted by the Board cannot be correct and it needs to be the
17 narrower definition, which is consistent with the specification, and I
18 think the Board has agreed that the specification supports the
19 construction offered by Bose with regard to “respond,” meaning send
20 an answer or reply back.

21 So is this an adequate answer?

22 JUDGE EASTHOM: I don't have any more questions.

23 Do either of you, Judge McKone or Judge Fitzpatrick, any
24 questions?

25 JUDGE McKONE: No.

1 JUDGE FITZPATRICK: No, thank you.

2 MR. HEBERT: Thank you very much. I appreciate it.

3 JUDGE EASTHOM: Thank you.

4 MR. HEBERT: Oh, I wonder if before we conclude today,
5 if we might be able to get a ruling on my request for further briefing
6 on that issue.

7 JUDGE EASTHOM: We will probably issue a ruling after
8 the hearing. We want to discuss that further amongst the panel.

9 MR. HEBERT: Okay. I'd just like to have that request live.

10 JUDGE EASTHOM: I appreciate that.

11 By the way, before we go on, how many pages would you
12 request for briefing, Mr. Hebert? I'm sorry, I don't want to interrupt
13 you. And when would you want -- when would you be able to submit
14 this?

15 MR. HEBERT: Would 10 pages in two weeks be
16 acceptable?

17 JUDGE EASTHOM: Well, we have a statutory deadline for
18 the final --

19 MR. HEBERT: One week?

20 JUDGE McKONE: I can't hear from here, unless you're
21 speaking in the microphone, I'm sorry.

22 JUDGE EASTHOM: Mr. Hebert, I'm trying to figure out
23 what kind of briefing and what timing would be -- he'd be proposing.
24 We're not ruling on that right now. We want to discuss what is in

1 front us, so he's proposed that he may be able to -- a 10-page brief in a
2 week?

3 MR. HEBERT: We'd actually request two I'm being told.

4 JUDGE EASTHOM: Two weeks? Okay.

5 And then, Mr. Lowrie, what would you say about that,
6 what's your --

7 MR. LOWRIE: I don't think it's going to be overly
8 complicated. I'll explain why as a part of my argument, but I would
9 think a week and five pages should be plenty. If there's a personal
10 issue -- we could meet that. I leave it, of course, to the Board as to
11 how to accommodate Bose's request.

12 MR. HEBERT: The deadline I don't believe is until July,
13 the statutory deadline.

14 JUDGE EASTHOM: Right. Okay. Now, this would be a
15 brief by Petitioner moving to have --

16 MR. LOWRIE: I would suggest simultaneous briefs on the
17 effect of the first IPR on the issues in this IPR.

18 MR. HEBERT: Simultaneous makes sense, I agree.

19 JUDGE EASTHOM: Okay. Thank you. So we could have
20 them both due in a week or two or conceivably 10 days.

21 MR. HEBERT: And then be done with it.

22 JUDGE EASTHOM: Okay. Thank you. I appreciate that.

23 MR. LOWRIE: And may it please the Board, thank you.
24 The first 50 minutes or so, maybe it was 45, 50 minutes of counsel's
25 argument was a request to reconsider the ruling in the earlier case on

1 the IRMan, whether it can be considered as a publication as of the
2 date that it said. I would respectfully submit that the deadline for
3 reconsideration was 30 days after the final written decision. That's
4 long gone and it's inappropriate for the entire argument.

5 I'll go on to talk about the merits of it. It's obviously
6 interesting, but it seems to me it's a reconsideration request. There is
7 nothing about any of that argument that has to do with the limitation
8 we just discussed of a speaker -- it's not even the speaker part. It's the
9 IRMan. It's got nothing to do with the Altec Lansing speaker and it's
10 responding to what the computer is telling it to do.

11 The second point, and I'll apologize to Judge McKone, the
12 reply brief in this case was submitted after the decision on final by a
13 week or two. My statement was incorrect on that and I apologize. I
14 would note, however, that in the reply brief, the very first thing we say
15 is to note that most of these decisions have already been decided,
16 including on the motion to exclude, which is to say I think it was put
17 in play in the reply brief. We did not cite 37 C.F.R., that is correct. I
18 don't think that matters. I think it was preserved. Even if it had to be,
19 which it doesn't, because you can't waive a collateral estoppel.

20 The third point in that regard, and, again, apologies probably
21 to Judge McKone or to the entire Board, of course, because I couldn't
22 get the cite that said this was a final decision. So Section 37 C.F.R.
23 Section 42.2 says, judgment means a final written decision by the
24 Board. Final means final for the purpose of -- final means final for
25 the purpose of judicial review to the extent available, which is to say

1 the regulations make clear a final written decision is a final decision
2 for purposes of what a judgment is.

3 42.73(d) is the estoppel provision. (d)(3) is patent applicant
4 or owner is precluded from taking action inconsistent with the adverse
5 judgment. The regulations couldn't be clearer. It may be that there's a
6 case out there that says not until it's final and appealed. My guess is
7 that's dicta on the appeal part, because there wasn't a final written. It
8 really doesn't matter. I don't think it could be any clearer based on the
9 regulations.

10 Turning to the I guess merits of the authentication question,
11 to be honest since I do some trial work, I know some people from the
12 Board have done the same. It was kind of hard to listen to the way
13 everything was conflated, so I'd like to break it out.

14 First of all, hearsay is not as easy of a concept as one likes to
15 think. I'm asked a question when I'm on the stand, what's your name?
16 Matt Lowrie. Objection, hearsay. Well, how do you know your name
17 is Matt Lowrie? Well, that's what my mom told me. Hearsay,
18 out-of-court statement offered for the truth of the matter asserted.
19 Well, that's what everyone calls me. Hearsay, out-of-court statement
20 and offered for the truth of the matter asserted. It's on my driver's
21 license. That's based on hearsay, because you told them that was your
22 name.

23 So it's not as easy as it would think, but in this case it is.
24 And here's why. What does it mean to authenticate a document? It
25 means the document is what it says it is, which is to say when we

1 authenticated IRMan, when this Board concluded it was authentic, it
2 is what it says it is, which is a website from a particular date, and it
3 was authenticated by the Wayback Machine and whatnot.

4 So if we look at what Bose asks, you have a journal article, a
5 magazine article, a newspaper publication. In order to authenticate
6 that, you can't use the date on the book, unless it's a learned treatise.
7 You can't use a date on a journal article, which is not a learned
8 treatise, certainly not a publication. How about a conference
9 proceeding with a date on it? You can't use that, unless you call either
10 the publisher or someone who was at the conference who remembers
11 seeing it. That has never been the requirement and most District
12 Courts would hand an attorney their head if they insisted on that at
13 trial in most circumstances, and I can say that from personal
14 experience having seen that happen. That has never been what the
15 law requires.

16 So when Bose says we're not disputing what happened
17 before it's authentic, we're saying it's hearsay, that's just code for we're
18 disputing that it's authentic. It is what it says it is. And I think the
19 Board correctly determined that it was admissible.

20 Bose goes on to say, usually there would be a sponsor at a
21 District Court case. Most District Court judges would hand you your
22 head if you were going to waste a jury's time with a sponsor for
23 something that there's no reason to question its truth.

24 There was, by the way, a sponsor even in this case as cited
25 in our reply brief. Professor Lippman sponsored it. He said, I've

1 looked at this and this looks exactly what happens on the Wayback
2 Machine and it would be something as of that date. That was referred
3 to in the briefing and the -- referred to in the briefing in this case, but
4 it was really referring I think to the declaration from the earlier one
5 when this issue was really in play. I don't think it is in play anymore.

6 So now let's -- if we can go to slide 30.

7 So authentication. Bose would have you require -- well, of
8 course, anybody in Bose's position would require something that
9 would be virtually impossible to meet. What we're asking is, is the
10 document what it says it is a website from a certain date. The burden
11 to authenticate is not high as the Federal Rules of Evidence say.

12 If we go on, again, to the next page. It's just a court case --

13 JUDGE McKONE: The evidence that we're looking at to
14 determine whether the date was correct is the material that was put at
15 the bottom of the pages in the IRMan web pages by Internet Archive
16 and what the hearsay challenge is, is that that date is being offered for
17 the truth of the matter the date and that it's unreliable; is that right?

18 MR. LOWRIE: That is the assertion, but it is authenticated
19 in the same manner through the judicial notice among other things and
20 I'll get to that, because there are other exceptions to Rule 901.

21 This isn't a hearsay exception, although one might apply it.
22 This is an authentication question and part of the authentication is the
23 stamp from the Wayback Machine, which is -- which purports to be
24 the stamp from the Wayback Machine that looks just like that.

1 It was submitted by counsel. No one has ever questioned
2 that that is exactly what it is. Bose says we didn't have a chance to
3 investigate. Of course, they did. They can go look at it themselves as
4 part of why it's authenticated. I'll get to the kind of list of factors at
5 the end under Rule 901.

6 JUDGE McKONE: Do you have any cases where the date
7 of a prior art article was considered to be an authentication issue
8 rather than a hearsay issue?

9 MR. LOWRIE: I don't standing here now, but I've seen it
10 done many times. I mean, if you're looking at, here's a contract you
11 have to authenticate it, any document that you have to authenticate it,
12 part of it is what it says it is. An E-mail that gets authenticated has a
13 date on it. That's a part of it.

14 You don't say, well, it's an authentic E-mail bearing the date
15 of August 10th of 2006, but it hasn't been established that it was as of
16 that date. It's a part of the authentication requirement, but I can't cite
17 it.

18 JUDGE McKONE: Because I see there's a hearsay
19 difference between saying that, okay, IRMan described a remote, but
20 then we're not offering that for the truth of the fact that the system
21 actually worked and that the remote actually worked. We're just
22 offering it for the disclosure.

23 But for the date, it's a little bit different. We're offering that
24 date for the matter that, yes, that date is a correct representation of
25 when the document was archived.

1 MR. LOWRIE: That is right and --

2 JUDGE McKONE: Why isn't that a hearsay issue?

3 MR. LOWRIE: It's a -- I suppose you could call it a hearsay
4 issue, but it gets perfected through Rule 901 looking at it. Like I said,
5 you don't have to call the editor of the Chicago Tribune to prove that
6 there was an article that published on the day of the newspaper, right?
7 I mean, you don't -- I suppose you could and one could insist on that,
8 but the courts have not required it. The courts have admitted it with
9 things like what the court in Exhibit 3004 in the last IPR --

10 JUDGE McKONE: But I see newspapers as being in some
11 sense reliable or people don't understand what a newspaper is that
12 how the process works and so forth. Here, it's a little bit different.
13 We have some evidence that the Patent Owner has put forward that
14 the way that these Internet Archive articles are collected, you have
15 third parties that are collecting the information and handing it over to
16 the Internet Archive who then posted it on their website that
17 represents a certain date at the bottom.

18 How do we know when the date stamp gets affixed to the
19 Internet Archive articles?

20 MR. LOWRIE: That is in the Internet Archive affidavit that
21 was cited as Exhibit 3004, which is that the Internet Archive assigns
22 the date that it comes in, right. So it may have been published --

23 JUDGE McKONE: How do they assign it, when do they
24 assign it? Is there anything in it that says?

1 MR. LOWRIE: Yeah, I believe it's the whole purpose of
2 Wayback Machine as described by Professor Lippman is to establish
3 what something looked like on a particular date. I mean, that's why
4 they have the Wayback Machine. That's why it's called the Wayback
5 Machine.

6 And there are these crawlers, but they don't -- they assign
7 not the date that something was published or said it was published.
8 It's the date that it comes in and it's the date that's assigned by the
9 Wayback Machine according to their affidavit. And if Bose's
10 argument was correct, no one could ever rely on something on the
11 Wayback Machine.

12 We know that a government agency relies on it regularly,
13 that's to say the United States Patent and Trademark Office and Patent
14 prosecution proceedings relies on it. There is indicia of reliability and
15 the question becomes is there a reason to doubt it? Okay. If there's a
16 reason to doubt it, you might require more.

17 There has been in this case no reason to doubt the Wayback
18 Machine and there are a number of cases that have relied on Wayback
19 Machines. It kind of goes back. You look at these 2004-2007 cases.
20 You know, I remember a time in my legal career when DNA
21 fingerprinting was inadmissible, because it wasn't scientifically
22 proven. That's not the case anymore, right? I mean, we see it all the
23 time.

24 Here, the Wayback Machine, you have a judge in 2007
25 probably hasn't, you know, been as involved in the internet and

1 technology issues. Plainly his description was incorrect, but that was
2 back in 2007.

3 We now have court cases that take judicial notice of what's
4 happening on the Wayback Machine, because most judges don't want
5 to waste a jury's time by having somebody come in for the Wayback
6 Machine so that the person cross examining who has no reason to
7 contest the authenticity of what it is can waste the time trying to muck
8 up and confuse things.

9 So I would suggest -- I'm sorry.

10 JUDGE McKONE: Do you take issue with how the case
11 law is represented and how the Internet Archive works, have you
12 produced evidence as to how you believe it works?

13 MR. LOWRIE: The Court took judicial notice of it in the
14 last proceeding and it's Exhibit 3004 I think, which is the affidavit in
15 the other materials from the Wayback Machine, which is, again,
16 where it belonged in the last IPR.

17 JUDGE McKONE: Is that the only evidence you have to
18 point to?

19 MR. LOWRIE: Not exactly.

20 JUDGE McKONE: How it actually works?

21 MR. LOWRIE: If we could go to 39.

22 So this is the rule for looking at authenticity. Taken
23 together, you have unique indicia, including the website pages, as
24 noted I think by Judge Fitzpatrick on Exhibit 1010. We have Bose's
25 submission in Exhibit 2002 using exactly the same thing to show

1 exactly the same thing as a publication date and this is what it's about.
2 So not only has SDI relied on that, Bose relied on the Wayback
3 Machine apparently until now thinking it was sufficiently reliable.

4 Three. Bose's failure to raise any question about the
5 document itself. There's no reason to doubt that it is what it says it is.

6 Four. Dr. Lippman sponsored it. He looked at it. He said,
7 this is what it does. This is what it appears to be.

8 Five. The fact that the URL can be used by anyone to verify
9 the document even now. This isn't one can go out and look at it. This
10 isn't like I came in and set it. The court can and, in fact, in the earlier
11 proceeding I believe did go out and verify it itself.

12 Six. Judicial notice of a resource the accuracy of which
13 cannot reasonably be questioned. There's no reason we should
14 question the dates on it. The Internet Archive tells you it's published
15 as of the date that they collected it.

16 So that is, we believe, more than enough to establish the
17 burden, reasonable likelihood if it were fairly raised in this
18 proceeding. In reconsideration, the burden would be on Bose, but it's
19 enough to establish a reasonable likelihood that it's authentic, and
20 that's all one needs. We don't need to go further.

21 So the fact that there are these possibilities for a fraud
22 somewhere in the system, that doesn't impact that it's a reasonable
23 likelihood that it is what the Internet Archive machine says it is,
24 which is a document that published on that particular date.

1 JUDGE EASTHOM: Well, wait. I mean, that's the standard
2 for a petition where you have a little bit of a higher standard now.

3 MR. LOWRIE: Oh, no, I'm sorry, Your Honor. This is --
4 what I'm citing here is the standard for admissibility under the Federal
5 Rules of Evidence.

6 JUDGE EASTHOM: Oh, a reasonable likelihood?

7 MR. LOWRIE: Yeah, because it's not required that you
8 have to prove conclusively that something is authentic, right? If you
9 have a reasonable likelihood, it goes to the fact finder and it's
10 determined authentic, and the fact finder could determine it's not
11 reasonably likely. The Board has already addressed that.

12 JUDGE EASTHOM: But then who has the ultimate burden
13 after that if once it's challenged?

14 MR. LOWRIE: That is it, reasonable likelihood. If it's
15 reasonably likely, it's admissible.

16 JUDGE EASTHOM: Is that less than a preponderance?

17 MR. LOWRIE: Yes, Your Honor, certainly in these
18 proceedings. I'd have to think a little bit harder if we were talking
19 about it in a District Court litigation.

20 JUDGE EASTHOM: Well, that's -- I mean, that's the
21 standard we're talking about I guess, right? I'm trying to figure out
22 what --

23 MR. LOWRIE: The standard here would be reasonable
24 likelihood.

1 JUDGE EASTHOM: And that would be -- you're not sure if
2 that's less than the burden of persuasion or --

3 MR. LOWRIE: Yeah, I don't think so. I think we need to
4 establish it's reasonably likely that it's authentic. And in the absence
5 of any reason to think that -- certainly in the absence of any reason to
6 think that it's not, I would say that is a preponderance.

7 JUDGE EASTHOM: Okay.

8 MR. LOWRIE: So I don't know that that is a distinction that
9 actually makes a difference.

10 Oh, I just -- in this petition is I think page -- excuse me,
11 Your Honor. It's the opposition to the motion to exclude evidence on
12 page 8. We do cite Dr. Lippman explaining in his deposition in the
13 earlier proceeding what the Internet Archive is and concluding that --
14 he testified and concluding that they are what they appear to be, which
15 is to say it's a witness who testified about how the Wayback Machine
16 website works and how reliable its contents are.

17 So it actually was in the earlier proceeding when it was
18 squarely raised and referenced in this proceeding, so there is in that
19 sense a sponsor.

20 JUDGE McKONE: Is that referenced in this proceeding?

21 MR. LOWRIE: It's referenced in this proceeding. It's a part
22 of the record, I would assume in that at least it's a part of the
23 prosecution history, and we do reference specifically the documents.
24 Of course, the Court could take judicial notice of those documents,

1 because they are now government records as well. And as I said, it's
2 specifically cited in our opposition brief on the motion to exclude.

3 JUDGE EASTHOM: Can I ask you a quick question about
4 the rule, the issue -- preclusion issue?

5 MR. LOWRIE: Yes, Your Honor.

6 JUDGE EASTHOM: So your view is that because there
7 was a final written decision that there's no -- they can take no action
8 adverse to that ruling. Does that include arguing the dependent claims
9 that weren't argued before or --

10 MR. LOWRIE: It includes arguments with respect to
11 dependent claims that would apply equally to the broader ones,
12 because the rule is very explicit that you can't -- you can only argue
13 things that are patentably distinct, and so the argument about the
14 admissibility of IRMan had nothing to do with the added limitations.
15 It's not a question.

16 JUDGE EASTHOM: So the only proper argument here
17 would be the argument about the response?

18 MR. LOWRIE: The claim construction argument, yes, Your
19 Honor. And as I noted in my opening, there was an additional new
20 argument with respect to Lippman, the argument being IRMan doesn't
21 show -- was shipped without a remote, but it was for use with a
22 remote. I don't think the Board would grant that and I don't think it's
23 squarely in, because it applies equally to Claim 1 as it does to the
24 others. I think the only legitimate argument -- there are only two new

1 and there's only one that's legitimate and that's the claim construction
2 question.

3 I guess --

4 JUDGE EASTHOM: I probably started you a little late.

5 Can you try to wrap it up, please?

6 MR. LOWRIE: Yes, Your Honor. So on the claim -- let me
7 go, then, to the claim construction question. I guess there's a couple
8 things. First, claim differentiation gets ignored by the Federal Circuit
9 where it's against the plain meaning of a claim. It's not an overriding
10 principle in a broadest reasonable construction doing something in
11 response to what the computer tells you would include sitting down
12 when you're told to sit down, I would suggest, which is the only real
13 issue, because that's how the Board construed it.

14 In connection with the independent claims, the counsel for
15 Bose showed -- he showed one independent claim that says an
16 amplifier to power on. I would suggest that as is in the prior art that
17 we cited when the music signal goes in and it powers on, the amplifier
18 is powering on in response to a signal from the computer, just because
19 the amplifier is powering on as part of the speaker and it's powering
20 on in response to what it's getting from the computer.

21 It's not inconsistent and it is an added limitation and for that
22 particular claim, changing the audio processing, which is more than
23 just playing music, you can make it louder, you can maybe do
24 different types of things. Changing what the audio processing
25 circuitry does is in response to something from the computer.

1 The other claim that was shown talks about increasing
2 amplification. He says, well, the music is coming from the computer.
3 Yeah, but that doesn't mean that changing the amplification, for
4 example, isn't also a response, all of which was cited in our brief. So I
5 think the Board had it right when it looked at the same argument and
6 granted the petition. I think a broadest reasonable construction
7 responding to means responding to.

8 Thank you, Your Honor.

9 JUDGE EASTHOM: Thank you both.

10 MR. HEBERT: May I have a minute? Just a couple of
11 points real quickly?

12 JUDGE EASTHOM: Sure.

13 MR. LOWRIE: I would like to reserve -- I think I'm entitled
14 to the last words, so.

15 JUDGE EASTHOM: Why don't we just hear what you each
16 have to say and we'll wrap it up.

17 MR. HEBERT: Okay. Thank you.

18 Regarding Dr. Lippman as a sponsor of the IRMan, he has --
19 he's never been an employee of the Internet Archive. He has no
20 internal knowledge. Rule 901 specifies that the burden to authenticate
21 is to have a witness with knowledge, with personal knowledge. So he
22 doesn't work.

23 A party tries something like that in the St. Luke's Cataract
24 case. They had two guys who accessed the web pages and testified
25 that they got it and that wasn't sufficient.

1 Regarding the stamp from the Wayback Machine, that
2 merely says that the document came from the Wayback Machine. It
3 doesn't say it came from the Evation Company. In terms of the Patent
4 Office's reliance on the Wayback Machine, all of those cases are ex
5 parte prosecution cases where the Federal Rules of Evidence don't
6 apply and we've cited over and over again cases to the effect that the
7 evidence rules don't apply. They do apply here, of course.

8 The fact that the Board could access the IRMan web page
9 from the Internet Archive also doesn't support that it was available as
10 of that date. As of the date back in -- to be prior art. You know, it
11 accessible now, certainly, but that doesn't establish --

12 JUDGE McKONE: I mean, it doesn't sound like the
13 arguments you're making now are responsive to what Petitioner just
14 made.

15 MR. HEBERT: Yes.

16 JUDGE McKONE: These are arguments you should have
17 made already, aren't they?

18 MR. HEBERT: These are arguments that Mr. Lowrie just
19 made that I'm responding to.

20 JUDGE EASTHOM: I'm confused. Doesn't the date on the
21 bottom of the page show when it was crawled so that that would --

22 MR. HEBERT: That's what it purportedly represents. That
23 is the out-of-court statement that is offered for the truth.

24 JUDGE EASTHOM: Right, that's the issue before us. I
25 understand that.

1 MR. HEBERT: That is. And then, finally, on the estoppel
2 issue there was no prior -- I mentioned this earlier. There was no
3 prior ruling on the hearsay objection.

4 JUDGE EASTHOM: Oh, okay. So that would be a
5 different issue.

6 MR. HEBERT: Yes.

7 JUDGE EASTHOM: Okay.

8 MR. LOWRIE: Your Honor, I disagree completely. It came
9 in for what it is. That is what the Board decided and the claims were
10 invalid as a result. Whether you want to call it hearsay, authentication
11 or whatever else, the Board decided it.

12 In connection with Dr. Lippman, counsel would like to
13 impose a requirement of personal knowledge. That's not a
14 requirement. He's an expert and he can talk about it. In general Rule
15 901 is looking for authenticity, not any particular form, ex parte patent
16 prosecution and other things.

17 It's not one of these things. The fact that the Patent Office
18 takes it alone is not one thing. It is the aggregate of things that Rule
19 901 looks at, which makes it I think plainly admissible.

20 Last and perhaps most important, just to be clear on what the
21 Wayback Machine does, it's crawled. Information is sent to the
22 Wayback Machine. The date that the Wayback Machine records is
23 the date they got it, so it can't be any later than that.

24 If it was crawled and says something else, they're not saying
25 both -- what that date from the Wayback Machine says is this is when

1 we got it. So it could have been earlier. It could say this is from the
2 year 2010, but it doesn't matter. It says this is the date we got it.

3 JUDGE EASTHOM: Okay. Well, thank you, gentleman.
4 We have the case under consideration. I just want to make one ruling.
5 We're going to allow the briefing. We're going to have a six-page due
6 in two weeks. Both parties will file it within the two weeks at the
7 same time I suppose so that -- that would be fairest I guess. Do you
8 want to just file it on whatever the date is two weeks from then? I
9 don't have a calendar in front of me. Does anybody?

10 MR. HEBERT: We can look at the calendar and we can
11 coordinate so that we file at the same time.

12 JUDGE EASTHOM: Okay. That's great. That will be the
13 order. We're not going to issue a separate order.

14 Do you have anything else, Judge McKone or Judge --

15 JUDGE FITZPATRICK: Yeah, I wanted to add for the
16 briefing on 42.73(d), I would be interested to see what -- not just
17 whether or not it applies in this situation, but what is the scope of that
18 rule when it refers to any action inconsistent. For example, at the
19 minimum can a Patent Owner say Petitioner hasn't proven its case?

20 I mean, if you can't even do that, it seems to me maybe the
21 rule -- maybe we're arguing that the rule just says we shouldn't even
22 have an IPR at this point on these claims. So I'd like to see some -- I'd
23 like to see the parties address that issue.

24 JUDGE EASTHOM: Would you like to --

1 JUDGE McKONE: And also I would be interested -- I'd
2 also be interested to hear whether the scope of an estoppel or issue
3 preclusion would preclude us from, you know, considering the
4 evidentiary issues, in particular the IRMan evidentiary issues.

5 JUDGE EASTHOM: Okay. Why don't we just have one
6 more round of feedback from Petitioner and --

7 MR. HEBERT: I think we just acknowledge what you're
8 looking for and we'll address it in our briefs.

9 MR. LOWRIE: And I'm starting to wonder if maybe 10
10 pages would be better.

11 JUDGE EASTHOM: We're going to go with -- let's go with
12 eight pages. It sounds like there are some -- a number of issues. We
13 do want to keep it brief, so we appreciate your feedback on that.

14 With that, are there any other questions, Judge Fitzpatrick or
15 McKone?

16 JUDGE McKONE: No.

17 JUDGE EASTHOM: Okay. We're adjourned. Thank you.

(Concluded at 12:05 p.m.)