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IPR2014-01338, Paper No. 38

IPR2014-01339, Paper No.38

IPR2014-01340, Paper No.37

IPR2014-01341, Paper No. 36

571-272-7822

November 18, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE, INC.,
Petitioner,

v.

VISUAL REAL ESTATE, INC.,
Patent Owner.

Case IPR2014-01338, Patent 7,389,181 B2

Case IPR2014-01339, Patent 7,389,181 B2

Case IPR2014-01340, Patent 7,929, 800 B2

Case IPR2014-01341, Patent 8,078,396 B2

Held: October 28, 2015

BEFORE: MICHAEL R. ZECHER, BEVERLY M.
BUNTING, and KEVIN W. CHERRY, *Administrative
Patent Judges.*

The above-entitled matter came on for hearing on
Wednesday, October 28, 2015, commencing at 1:00 p.m., at
the U.S. Patent and Trademark Office, 600 Dulany Street,
Alexandria, Virginia.

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

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IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 P R O C E E D I N G S

2 - - - - -

3 JUDGE ZECHER: We're on the record. All
4 right. This is a hearing for four cases, four
5 related case, IPR 2014-01338; 1339; 1340; 1341.
6 The 1338, 1339 cases both involve the same
7 patent. It's U.S. Patent Number 7,389,181. The
8 1340 case involves U.S. Patent Number 7,929,800;
9 and the 1341 case involves U.S. Patent Number
10 8,078,396. The petitioner in this case is
11 Google, Inc. The patent owner is Visual Real
12 Estate, Inc.

13 We sent out a trial hearing order
14 explaining to the parties what we expect for this
15 hearing. I understand there's an issue already
16 with respect to somebody offering documents in
17 the record. Is this for Patent Owner or
18 Petitioner?

19 MR. MACEDO: What I said is that I offered
20 to give you courtesy copies of what we filed last
21 Friday. There were no objections to anything
22 that was --

23 JUDGE ZECHER: Okay. For Patent Owner, but

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 what about Petitioner? So now, correct me if I'm
2 wrong. Patent Owner, you filed demonstratives in
3 this proceeding?

4 MR. MACEDO: We filed demonstratives and we
5 included some ELMO shots, thinking that we'd have
6 an ELMO, but -- in the demonstratives. It's just
7 pure record evidence.

8 JUDGE ZECHER: Okay. And then Petitioner,
9 you don't have any demonstratives, correct?

10 MR. ALMELING: No. We planned to just show
11 hard copies on an ELMO which we requested in the
12 email and confirmed the email, but it's not here
13 today.

14 JUDGE ZECHER: Okay. So given that we
15 don't have the ELMO in front of us, the way we're
16 going to handle it going forward is, well,
17 whatever you guys are going to show, you need to
18 be very specific as to the paper number and exhibit
19 number and what proceeding it is, and we'll try
20 to following along as best we can to understand
21 where you're at in the record. Okay?

22 MR. MACEDO: May I provide you with a
23 courtesy copy?

24 JUDGE ZECHER: Yes. Let's do

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 introductions first, and then when you get up for
2 your presentation, we'll take your copy then.

3 So let's start with Petitioner. Can you
4 please introduce yourself?

5 MR. ALMELING: Sure. Thank you, your
6 Honor. Are we loud enough for -- step to the
7 microphone?

8 JUDGE ZECHER: Maybe step to the microphone
9 just to make sure that Judge Bunting can hear
10 you.

11 MR. ALMELING: David Almeling, O'Melveny &
12 Myers, for Petitioner Google, Inc. With me from
13 Fish & Richardson is Mike Hawkins, Rick Bisenius,
14 and Kim Leung, and also from Google, Jim
15 Sherwood.

16 JUDGE ZECHER: Thank you. Patent Owner,
17 can you step forward and introduce yourself.

18 MR. MACEDO: Thank you. My name is Charlie
19 Macedo. I am the lead counsel for the patent
20 owner from Amster, Rothstein & Ebenstein. I have
21 back-up counsel, Joe Kincart, also here, and we
22 have an associate from our firm, Richard Zemsky,
23 that is in attendance. The lead inventor tried
24 to get here today, but weather did not permit.

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 JUDGE ZECHER: Thank you. Okay. We're
2 going to turn the floor over to Petitioner. I
3 know we didn't really outline the specific
4 structure on whether or not you want to start
5 with one case versus the other, so we'll give you
6 deference on that, but just explain to us what
7 case you're going to start with, what record
8 we're going to be in so we can follow along, I
9 mean, given that we don't have the ELMO present.

10 MR. ALMELING: Thank you, your Honor.

11 JUDGE CHERRY: Judge Bunting wanted to
12 remind everyone to speak into the microphone so
13 that she could hear.

14 MR. ALMELING: Thank you, your Honor.
15 Quick logistical question before we begin
16 regarding objections. Would your Honors prefer
17 that we hold our objections until it is our turn
18 to speak? Or do your Honors prefer us to give
19 standing objections in which we interrupt the
20 other side's presentation?

21 JUDGE ZECHER: Now, you're talking about
22 objections with respect to the oral proceeding,
23 correct?

24 MR. ALMELING: Correct, your Honor.

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 JUDGE ZECHER: Well, we work a little
2 differently than in the District Court, so we don't
3 want you standing up, interrupting them. If you
4 have anything specific you want to talk about in
5 your rebuttal about something they said, maybe in
6 their case in chief, please let us know. We can
7 go from there.

8 MR. ALMELING: Thank you, your Honor. I
9 thought so. I just wanted to confirm.

10 JUDGE ZECHER: Okay. Just so we're ready
11 when you begin, which case do you plan on
12 starting with?

13 MR. ALMELING: I'm going to go through all
14 of them just -- I will signpost as appropriate as
15 I'm going through the presentation, but it will
16 be one presentation with all four.

17 JUDGE ZECHER: Okay.

18 MR. ALMELING: Well, thank you again, your
19 Honors, and may it please the Board. The
20 petitioner filed four petitions, and the Board
21 granted four IPRs on each of those petitions on
22 various grounds. The 1138, 1339 relate to the
23 '181 patent. The 1340 relates to the '800, and
24 the 1341 relates to the '396. Petitioner's

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 position on all of them is simple. For those
2 grounds on which the Board instituted IPR, the
3 did Board got it right. That is, Petitioner
4 satisfied its prima facie case in both the
5 petition and in the declaration of Dr. Henry
6 Fuchs which the Board used in the institution
7 decision. Petitioner agrees with the Board's
8 claim constructions, conclusions, and analysis.
9 In short, unless the patent owner's various talks
10 on the institution decision convince your Honors
11 to reverse the decisions in the institution
12 decision, those conclusions should stand.

13 Therefore, my argument today will get to
14 the heart of the dispute and focus on specific
15 patent owner attacks. I don't plan to address
16 all of them for the reply; I already did this. I
17 will instead focus my opening presentation which
18 I expect to be approximately 40 minutes, and I
19 reserve the remainder of my time to focus on the
20 five key issues.

21 The first two issues relate to the '181
22 patent. Issue Number 1, whether the Board should
23 adopt the patent owner's construction that the
24 preamble phrase server farm means servers that

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 are housed in only one location. Two, also on
2 the '181 patent is whether the Board should
3 change its construction of desired image format
4 and reverse its decision that Yoichi discloses
5 that limitation.

6 The third issue relates to the '800 patent,
7 whether the Board should change its construction
8 of positional data and reverse its decision that
9 Di Bernardo discloses that limitation. Four,
10 whether the Board should insert the term overlap
11 into several claim limitations and reverse its
12 decision that Fruh discloses those limitation.

13 And finally, five. It concerns all three
14 patents. Whether the Board should reverse its
15 decision that Di Bernardo does not teach away
16 from all computational intensity. Now, I framed
17 these five issues as whether the Board should
18 reverse its decisions because except for the
19 first issue, all of the issues were already
20 decided by the Board in the institution decision.
21 I also frame my questions in terms of whether the
22 Board should reverse its claim constructions
23 because a majority of Patent Owner's arguments
24 relate to the patent owner trying to convince the

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 Board to adopt a narrow construction in order to
2 save validity. The Board should maintain it's
3 broadest reasonable constructions, and the Board
4 should maintain its decision in the institution
5 decisions.

6 Unless the Board has any preliminary
7 questions, I will move on to the first issue that
8 I outlined above.

9 So the first issue, again on the '181
10 patent is whether the Board should adopt the
11 patent owner's construction that the preamble
12 phrase video and data server farm should be
13 construed to mean, quote “a group of network
14 servers that are housed in one location.” Now, while Patent
15 Owner argues that this
16 is a critical part of the invention, this was
17 only presented for first time in the response.
18 It wasn't in the preliminary response. So
19 therefore, the first time the petitioner
20 responded was in the reply. And let me begin
21 with a threshold question which is your Honors
22 should not even construe this term because it's
23 in the preamble and the patent owner has failed
24 to establish that that preamble is a limitation.

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 I would like to direct your Honors'
2 attention to Claim 1 of the '181 patent which in
3 the '1339 IPR is Exhibit 1002. Claim 1
4 describes an invention in which there is a storage
5 server, a database server and an image processing
6 server. The word server farm doesn't appear
7 anywhere besides the claim -- beside the
8 preamble. It's not necessary to describe a
9 structurally complete invention. The three
10 servers do that. Nor are there any other
11 situations in which the Federal Circuit
12 recognizes for finding a claim term limiting.
13 This is not a Jepson claim. It's not necessary
14 for antecedent basis. The word farm only appears
15 in the preamble, nowhere else. It's not
16 necessary to understand the claim, and it doesn't
17 distinguish the claim over the prior art. In
18 short, there's a high bar to determine a
19 preamble's a limitation. None of the ways in
20 which the Federal Circuit recognizes to do that
21 are present here. So as a threshold, the Board
22 should not even construe this claim nor entertain
23 Patent Owner's arguments. If, however, the Board
24 would like to construe this claim, the Board

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 should not adopt Patent Owner's construction and
2 they shouldn't do it for five reasons. One is
3 there's nothing in the claims that require it.
4 Looking at Claim 1, server farm is not -- there
5 is nothing about the three types of servers
6 identified in the claim that requires them to be
7 in the same location.

8 Reason Number 2, the
9 specification doesn't give any clarity that the
10 patent owner acted as a lexicographer and
11 required them to be in one location nor disavowed
12 the idea of a remotely-connected server.

13 Reason Number 3 is the extrinsic evidence.
14 And here you have two types of testimonial
15 evidence. You have Google's original expert,
16 Dr. Fuchs, who opined, that these limitations
17 were present in the prior art. This issue hadn't
18 come up because the preamble's not limiting. So
19 he did not address the specific question.

20 Google retained Dr. Grindon who did address
21 the exact, specific question. And he provided in
22 a declaration that's been submitted to the Board
23 his analysis on how a person of ordinary skill
24 would interpret the term. And what he said was,

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 the defining characteristic of this term is not
2 the fact that they happened to be located in the
3 same place -- server racks can be located
4 elsewhere -- but rather, they are connected, and
5 they achieve a cooperation in which they act on
6 objects together.

7 JUDGE ZECHER: Was this testimony from Dr.
8 Grindon in the rebuttal declaration?

9 MR. ALMELING: It was in the declaration
10 that he submitted with the petitioner's reply,
11 your Honor.

12 JUDGE ZECHER: So essentially rebuttal to
13 what Patent Owner raised in their response,
14 correct?

15 MR. ALMELING: That's correct, your Honor.

16 JUDGE ZECHER: Okay. But he's not your
17 primary expert here. It's Dr. Fuchs, correct?

18 MR. ALMELING: Correct, your Honor.

19 JUDGE ZECHER: Okay. So why should we give
20 Dr. Grindon's testimony weight in this regard? I
21 thought you simply submitted his rebuttal
22 declaration to rebut testimony he offered in a
23 previous case in District Court.

24 MR. AMELING: So perhaps some context is

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 useful. So Google originally hired Dr. Fuchs to
2 provide a declaration that they submitted with
3 the petition. As part of the preliminary
4 response, Patent Owner argued various things,
5 including that a former Google expert in a former
6 litigation had some testimony that's relevant to
7 this case. The Board rejected that analysis in
8 the institution decision. Google presumed the
9 issue about away. The response came, and they
10 relied again on this declaration for Dr. Grindon.
11 Google contacted Dr. Grindon and said, Was the
12 criticism they gave of your declaration accurate?
13 He then provided his declaration and said no,
14 just like your Honor mentioned.

15 But there are also several other issues in
16 which they provided an analysis for the first
17 time, including server farm. So Dr. Grindon,
18 instead of going -- so Google, instead of going
19 back to Dr. Fuchs and saying, Can you provide
20 another declaration, since Dr. Grindon was
21 already providing a declaration, they had him
22 just address these issues. Because server farm
23 was raised for the first time in the response, it
24 made sense for him to include it in his

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 declaration.

2 So against that testimonial evidence, you
3 have the patent owner's side. They have no expert
4 testifying on what they think a server farm is.

5 So in addition to the testimonial evidence, there
6 is also documentary evidence. And this, I would
7 like to direct your Honors' attention to, again,
8 in the '1339 IPR, Exhibit 1011. Exhibit 1011 is
9 a prior art patent from 2004, i.e., the relevant
10 date for determining what a server farm means.

11 And I direct your Honors' attention within this
12 document to Paragraph 35, specifically the third
13 sentence which reads, quote, The plurality of
14 application servers may operate as a cluster or
15 server farm with processing and communication
16 activities distributed across multiple servers.

17 The next paragraph continues that, quote, The
18 application servers may be located in a single
19 location within a server facility or
20 alternatively may be located in different
21 geographical locations with each other and the
22 server facility and adapted to communicate via
23 any suitable communication network. This is just
24 like what Dr. Fuchs said. A server farm, the

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 focus is they are remotely connected and they
2 work together, not that they have to be
3 physically located.

4 Against this evidence, the extrinsic
5 evidence the patent owner advances is various
6 documents, most of which are from 2015, none of
7 which, however, gives the negative limitation.
8 What I mean by that is yes, several of them say
9 server farm means housed in one location. But
10 they don't come back and say, Well, that doesn't
11 mean that they can't be housed in other
12 locations, and that's what Patent Owner's asking
13 for. They're asking for that negative
14 limitation. So the third reason that your Honors
15 should not accept this construction is extrinsic
16 evidence.

17 Let's go to the fourth reason which is that
18 this construction crafted for this IPR
19 contradicts the construction the patent owner
20 gave in the District Court litigation. To this,
21 I would like to direct your Honors' attention to
22 Google Exhibit 1007, also in the 1339 IPR which
23 was cited multiple times, including in our
24 petition and in our response. In particular, I

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 would like to direct your Honors' attention to
2 the second page. This page is the claim chart in
3 which they map the server farm to Google systems.
4 Now, importantly, there is no argument that that
5 is limitation and instead it says, quote, Google
6 Street View is a system including a video and
7 data server farm called a data center. It
8 continues a little bit down the line. Quote,
9 Google Search -- Google Street View operates from
10 data centers in at least the following locations
11 in the United States. And then it lists bullets
12 everywhere from Oregon to South Carolina. Now,
13 the broadest reasonable construction can't be
14 they can be in only one location because that was
15 not the construction advanced in the District
16 Court. Nor -- and this is the fifth reason why
17 your Honors should not accept their construction,
18 it contradicts the argument that they gave
19 earlier in this proceeding. Now, as I said
20 earlier, the first time they advanced this --
21 JUDGE CHERRY: No. The patent
22 owner doesn't have to file a preliminary
23 response. That's optional. So we're now in the
24 trial. Let's kind of not dwell on that when he

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 did before. If they did or didn't, that's
2 irrelevant. We're now in the trial phase. They
3 have advanced this argument. That's their right
4 under the rules. So let's not dwell on what they
5 did or didn't do in the preliminary response.

6 MR. ALMELING: Thank you, your Honor. And
7 just a quick clarification question. In the
8 response, they give a construction that does not
9 have a one-house limitation. Would your Honor
10 like me to point that out, or would you like me
11 to --

12 JUDGE CHERRY: If they've changed
13 something, but if they've added something new,
14 that's -- that's their right. It's under our
15 rules.

16 MR. ALMELING: I see. Well, then, I owe
17 them on it. Thank you, your Honor.

18 So in conclusion, broadest reasonable
19 interpretation of server farm is not the narrow
20 limitation that they advance. It's not in the
21 claims; not in the specification; not required by
22 the extrinsic evidence; and it's contrary to what
23 they said before in the District Court.

24 But all of this is beside the point. This

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 issue is not the -- this claim is not a
2 limitation, and it should not be interpreted as
3 such because it is in the preamble. And
4 therefore, your Honors don't even need to reach
5 this claim construction issue.

6 Unless there are any another questions
7 about server farm, I will move onto the second
8 issue.

9 The second issue also relates to the '181
10 patent, and it's whether the Board should change
11 its construction of a desired image format and
12 reverse the decision that Yoichi discloses this
13 limitation. So the patent owner presented this
14 claim construction and this argument, and the
15 Board rejected it in the institution decision,
16 finding that, quote, in Yoichi, the images are
17 converted from format without a watermark to a
18 format with a watermark which is the format
19 desired and used by the system. That is the
20 right analysis, and it's the right analysis for
21 multiple reasons, one of which the claims in the
22 broadest reasonable interpretation don't require
23 any particular desired image format, only that it
24 is an image format that is desired.

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 Additionally, the specification confirms
2 that your Honors had the construct construction.
3 Indeed, not only does the specification support
4 your Honor's conclusion; it also contradicts the
5 Patent Owner's.

6 And there are two parts of the
7 specification that I want to address to your
8 Honors today. So if you bring back the '181
9 patent which is, again, Google Exhibit 1002 in
10 the 1339 IPR, I'd like to direct your Honors'
11 attention to Column 6. Column 6, Line 52 reads,
12 quote, The image processing servers convert the
13 original video drive-by data to one of many
14 potential new image formats, depending on the
15 particular application, which constitute
16 post-process video data, end quote. That
17 generally describes conversion, and it generally
18 describes conversion to many potential new image
19 formats. But I also wanted to point out that
20 immediately after the parenthetical which says
21 depending on particular application. Now, the
22 specification uses the word application about 20
23 times, and it's primarily in the context of
24 referring to different ways to use it. There's

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 government applications such as highway planning.
2 There's commercial applications such as for
3 realtors and appraisals.

4 Here, watermarking is just another example
5 of some applications, you want a secured format.
6 Other applications, you won't. The breadth of
7 this sentence was referring many new applications
8 cannot be as narrow as Patent Owner wants. So
9 instead of relying on this, which Patent Owner
10 can't, they cite to Column 9, three columns
11 later, five figures later. So let's go there now
12 and see what the patent owner argues.

13 In particular, they hang their hat on Line
14 22 which reads, quote, once a segment of video is
15 selected that contains video frames within
16 300 feet, the extractor program which it based on
17 an open-source programming tool, MENCODER,
18 converts the correct compressed MPEG-2 data into
19 lossless TIFF images -- files with each image
20 frame file encoded for camera orientation and
21 interpolated location, end quote. Now, at best,
22 this describes a single embodiment or a single
23 way to do the conversion which is what your Honor
24 found. But what's more important, this does not

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 refer back to the broad definition of conversion
2 given earlier, nor does it limit -- your Honor
3 should not limit it now.

4 And the final reason why your Honor should
5 maintain the construction is because of the
6 extrinsic evidence. And here you have both
7 Dr. Fuchs and Dr. Grindon describing in the
8 declaration because this issue came up in both
9 that a watermarked format secures an image from
10 an unsecured, un-watermarked format to a secured
11 watermarked format. And they gave other examples
12 in their deposition. There's a landscape format
13 versus a portrait format. There's a high-res
14 format versus a low-resolution format. The patent
15 is not specific to what the image format is, only
16 that needs to be desired. The only extrinsic
17 evidence Patent Owner can advance -- again,
18 there's no testimonial evidence -- is dictionary
19 definitions from Barron's Dictionary of Computer
20 Terms for the phrases file format and coercion
21 project. Obviously, these aren't the claim terms
22 that are being construed, and they do not shed
23 light on what the appropriate construction should
24 be. In the end the specification, the claims,

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 and the extrinsic evidence are one-sided on this
2 issue. And your Honors are right; Yoichi
3 discloses this limitation.

4 Unless there are additional questions about
5 this, I will move to the third issue.

6 The third issue -- and now moving to the
7 '800 patent which is in the 1440 record. This
8 issue is whether the Board should change its
9 construction of the phrase, quote, Record
10 positional data descriptive of a respective
11 location of each of two or more images and
12 reverse its decision that Di Bernardo discloses
13 this limitation. This is the question of whether
14 it needs to be the location of the object/subject
15 or whether it needs to be -- whether it can be
16 the location of the camera. The Board rejected
17 the Patent Owner's construction and analysis, and
18 the Board was right, finding that the
19 specification describes many examples of what it
20 means to be positional data and construing that
21 phrase broadly and appropriately to be, quote,
22 Record position data that is descriptive of each
23 of two or more images. The Patent Owner has
24 advanced nothing in its response to change the

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 validity and accuracy of that construction and
2 analysis, and the Board should maintain it.

3 In particular, the Board should maintain it
4 for multiple reasons, to again, the claims do not
5 require Patent Owner's construction and actually,
6 to the contrary, preclude it. For this, I would
7 like to direct your Honors' attention to Claim 1
8 of the '800 patent which in the record is Exhibit
9 1,002. The relevant elements of Claim 1 are the
10 last two limitations in the wherein clause.

11 Quote, Record positional data descriptive of a
12 respective location of each of two or more images
13 and associate the composite image with a
14 particular portion of the subject based upon the
15 positional data, end quote. Obviously, nothing
16 in that claim language requires the positional
17 data to be the location of the image shown or the
18 objects in that image.

19 Additionally, and if you look closely, it
20 prevents that. The phrase includes, quote,
21 respective location of each of two or more
22 images. Now, the plain language of that is that
23 there has to be different or respective
24 locations. The patent owner's construction,

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 however, would ask your Honor to say that the
2 focus is on the subject or the object and the
3 image which is the singular. In other words, the
4 patent owner's construction would render
5 superfluous both the words respective and each.
6 And therefore, of course, it would fall prey to
7 canon of claim construction that -- rendering
8 claim language superfluous means the construction
9 is not accurate.

10 The second reason why your Honors should
11 continue with the construction that you adopted
12 in the institution decision which is, The
13 specification does not require the patent owner's
14 construction and, again, just like the claim,
15 precludes it. Now, to begin, nothing in the
16 specification contain either the clarity or the
17 precision that the inventor acted as a
18 lexicographer and required the location to be
19 that of the subject or the object, nor did it
20 contain a disavowal that says that the location
21 cannot be the image of the camera.

22 But let's look at the two parts of the
23 specification that all parties rely on, and those
24 are specifically, first, Column 5, Line 26. This

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 paragraph begins, quote, In another aspect of the
2 invention, and referring now to Figure 4,
3 positional data descriptive of a location of the
4 subject matter of an image can also be generated
5 by the image device, image data recording device,
6 end quote. Now, that sentence by itself
7 establishes that yes, it can be the camera. The
8 location of the subject matter of an image can be
9 the image recording device or the camera.

10 Now, to make that even clearer, the next
11 sentence continues, quote, Positional data can
12 include any data indicative of where the subject
13 matter of an image is located, end quote. Any
14 data is not the language of a patent owner acting
15 as a lexicographer adopting a narrow
16 construction. It means just what it says, Any
17 data indicative. The location of the camera
18 filming something is indicative of both the
19 location of the camera and what it was filming.

20 So unable to rely on that element of the
21 specification -- again, the first broad one, the
22 patent owner then cites the next column for its
23 purported support. In particular, the patent
24 owner cites to Line 62 for Column 6 of the '800

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 patent which reads, quote, The position of a
2 camera can be combined with a direction of image
3 capture and a depth of field of the camera to
4 determine a location of the image data captured
5 by a camera at a particular instance in time.
6 Now, to be sure, this is an example of what the
7 patent owner was talking about, but it's just
8 that. It's an example. The claims are not
9 limited, and as earlier in the specification,
10 it's not so limited. But what I want to realize
11 about this example is it's not really an example
12 that supports the patent owner's construction.
13 So the rest of this paragraph goes on to describe
14 how that takes place, and it gives an example of
15 using echolocation, i.e., determining location
16 via echoes or using radar which determines
17 location via sound waves -- sorry, via radio
18 waves. In other words, the part of the
19 specification that supports their construction
20 doesn't because it requires more in order for it
21 to take place.
22 So the specification is clear. It can be
23 the image recording device and any data
24 indicative of that which, as your Honors found,

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 could be the camera.

2 The third reason in addition to the
3 specification in the claims is the extrinsic
4 evidence. And here, it's one-sided. Patent
5 Owner has none. The petitioner advanced the
6 declaration of Dr. Fuchs which made this point
7 clear. I won't delve into that because it's
8 so -- it's so clearly one-sided on that issue.
9 And so I'll go to the fourth reason why the
10 patent owner's construction is wrong and why your
11 Honor's construction was right which is referring
12 to Claim 3 of the Andrew patent.

13 Now, Patent Owner curiously or -- relies on
14 Claim 3 as purported support for its argument.
15 But if you look at Claim 3, what it requires is,
16 quote, software is additionally operative to
17 generate the positional data based on the
18 longitude and latitude coordinates of a camera
19 and longtime capturing the two or more images
20 and data indicative of the camera orientation
21 while the camera captured the two or more images,
22 end quote. Claim 3 depends from Claim 2 which in
23 turn depends from Claim 1. So even if Claim 3
24 supported this construction, by definition, Claim

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 1 is not so limited. But Claim 3 doesn't even
2 support that construction. It talks about the
3 location of the camera and the orientation of the
4 camera and using that. That's exactly what Di
5 Bernardo discloses. It also does not limit in
6 any way the location to be the location only of
7 the objects or the subject matter of the image.
8 Rather, both are explicitly focused on the camera
9 itself. Patent Owner talks about depth of field
10 numerous times. It's not in Claim 3. At best,
11 it's in the specification, and at best, it's an
12 example.

13 In short, this issue is relatively clear.
14 Your Honors reached the right conclusion on
15 positional data. It's claim-supported,
16 specification-supported. The extrinsic evidence
17 is one-sided, and even additional claims support
18 it. Your Honors should maintain that
19 construction for all the reasons that your Honors
20 adopted it in the first place.

21 Unless there are any additional questions
22 about the positional data limitation, I will move
23 on to the fourth issue.

24 So the fourth issue -- and I'd like to

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 direct your Honors' attention to the '396 patent
2 for the 141 IPR. The fourth issue is whether the
3 Board should reverse its construction and insert
4 the term overlap into Claim 1 of a '396 patent in
5 multiple places. Now, I'd like to begin my
6 discussion of this one with some numbers. So
7 Patent Owner uses the term overlap 24 times in
8 its 25-page response. Patent Owner seeks to
9 insert the word overlap into four of the '396
10 patent's seven limitations. So the '396 patent
11 doesn't use the word overlap once in the claim,
12 and it only uses it three times in the entire
13 specification. Because of this intrinsic record,
14 the Board did not adopt this argument when it was
15 advanced by it for the first time by the patent
16 owner, and the Board should not adopt it now. But
17 to make this clear, I want to focus on those
18 three times that the specification does use the
19 term overlap because that is the support that
20 Patent Owner's relying on. In particular, I
21 direct your Honors' attention to the '396 patent
22 which is Exhibit 1002. In particular, I direct
23 your Honors' attention to Column 2, Line 15.
24 Quote -- before the quote. This is in the brief

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 description of the drawings. Quote, Figure 2
2 illustrates multiple image data sets that overlap
3 subject matter, end quote. All right. So let's
4 see how the specification actually talks about
5 Figure 3, and that was one of the three times. I
6 direct your Honors' attention to Column 5, Line
7 25. Quote, in some embodiments as illustrated in
8 Figure 3, image data sets overlap the subject
9 matter captured. The overlap allows for features
10 present in one data image set to be present in a
11 second image data set and preferably in a
12 tertiary image set, end quote. The only
13 discussion of overlap anywhere in the
14 specification explicitly refers to it in some
15 embodiments. Again, that is not the precision
16 required to import a limitation, much less one
17 that the patent owner is seeking to import in
18 just so many elements of the claim.

19 So the Board addressed this decision in a
20 couple of those limitations. The Board addressed
21 this issue in the receiving step of Claim 1, as
22 well as in the first generating step, and the
23 Board's right for all the reasons it gave in the
24 institution decision. Patent Owner, recognizing

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 that the Board perhaps was right or that it would
2 be better to identify different limitations
3 glommed onto the tracking limitation and the
4 second generating. So I'd like to discuss both
5 of us now. And perhaps the easiest way to do
6 this is in the context of Petitioner's reply
7 which is Paper Number 22 of the 1341 IPR.

8 Now, in the tracking limitation of Claim 1,
9 what Patent Owner essentially argues is that
10 because Fruh has 2-D scans that don't overlap,
11 then a feature in the first scan set would not
12 overlap, and thus we couldn't track in the second
13 feature set. In order for that argument to be
14 right, Patent Owner has to rewrite the claims.

15 And so now, I direct you back to the reply,
16 and we see where that takes place. In
17 particular, I direct you to page 12 of
18 Petitioner's reply. The image in the middle of
19 page 12 identifies what the patent owner is doing
20 here. So the tracking limitation reads, quote,
21 tracking the position of at least one of the
22 plurality of features in two or more of the
23 two-dimensional images. In order for Patent
24 Owner to make its argument, they need to insert

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 the phrase that are common in overlap, and that
2 needs to apply to the plurality of features.
3 Obviously, the claims don't require this. And as
4 just mentioned a second ago when we walked
5 through the specification, the specification
6 doesn't require it. Your Honors were correct in
7 rejecting this construction the first time.

8 In addition to trying to insert it into the
9 tracking limitation, the patent owner tries to
10 insert this into the generating step, the second
11 generating step, to be precise. And here I
12 direct your Honors' attention three pages later
13 in the same reply to page 50. Patent Owner's
14 argument on this second generating step is that
15 because Claim 1 uses images data, they must be
16 captured by the camera and the camera must
17 generate the point cloud array taking portion of
18 overlapping images that the camera took. As you
19 see on page 15 of the reply, however, that is not
20 what the second generating step requires. It
21 only requires generating a point cloud array for
22 at least one of the plurality of features. For
23 patent owner's argument to correct, they have to
24 insert the language identified on that page of

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 using portions of overlapping image data captured
2 by cameras and the tracked position of the
3 features. Your Honors held in the institution
4 decision that its generating step does not
5 require a camera to generate the images which are
6 then used to track. It could be any image data
7 set. The same argument applies here.

8 In short, the overlap term is clear.
9 Patent Owner uses it a lot. Claims don't use it
10 at all. Specification uses it as an embodiment.
11 It's not a limitation of the claims, as your
12 Honors correctly found, and it should not be
13 added now.

14 Unless there are any questions about the
15 overlap limitation, I'll move on to the fifth
16 issue that I wanted to talk about.

17 So this fifth issue applies to all of the
18 patents, and it's whether Di Bernardo teaches
19 away from any computational intensity. Now, let
20 me explain this issue before I dive into the
21 argument. So Patent Owner argues that both Di
22 Bernardo and an earlier declaration from
23 Dr. Grindon say that creating composite images
24 with three reconstruction for dense sampling

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 should not be the way to create the composite
2 image in Di Bernardo Patent Owner then makes the
3 non sequitur argument that says that means that
4 you can't use any computational intensity because
5 3-D reconstruction and then sampling are
6 computationally intense. And by anything, Patent
7 Owner means anything. I counted, and Patent
8 Owner use this computational intensity argument
9 nine times across the four IPRs.

10 Di Bernardo is too computationally
11 simplistic to contain a server farm. Second, Di
12 Bernardo lacks precision in identifying
13 locations. Three, Di Bernardo's embodiments
14 can't be combined because that would be too
15 complex. Four, Di Bernardo can't be combined
16 with Kawabe because Kawabe has additional video
17 processing. Five, Yoichi and Di Bernardo can't
18 be combined because that would increase the
19 complexity of both. Six, Yoichi can't provide
20 the exact location of a camera because that would
21 be complex. Seven, Di Bernardo teaches only
22 recording positional data of the camera, not the
23 more complex process of recording the data that's
24 subject matter. Eight, Fruh and Di Bernardo

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 teach computationally different techniques for
2 obtaining the images. And nine, Kumar's
3 georegistry of images is incompatible with Di
4 Bernardo's low-quality images.

5 Now, obviously, Di Bernardo did not address
6 all of these nine arguments, and your Board
7 rejected the patent owner's arguments of
8 computational intensity teaching away. And
9 finding that it would not read a teaching away
10 where there was nothing in the reference, that's
11 the right decision. But in order to identify
12 where all these arguments came from and why the
13 arguments are not right, it's important to look
14 at what Di Bernardo actually says about
15 computational intensity.

16 So this -- I would like to direct your
17 Honors' attention to the Di Bernardo reference.
18 This reference is in the 1339 IPR, and it's
19 Exhibit 1000 -- I'm sorry, 1005. In
20 particular, Di Bernardo -- I'd like to direct
21 your Honors' attention to Paragraph 8 which is
22 the paragraph to which the patent owner cites.
23 Quote, accordingly, there is a need for a system
24 and method for creating a visual database of a

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 comprehensive geographic area in a more time- and
2 cost-efficient manner. Such a system should not
3 require the reconstruction of 3-D scene geometry
4 nor the dense sampling of the locale in multiple
5 dimensions, end quote.

6 Now, unless there is any confusion about
7 what 3-D reconstruction and dense sampling mean
8 and whether it means everything under the sun in
9 the nine arguments the patent owner advances,
10 let's look to see what Di Bernardo actually says
11 these two things mean because they're incredibly
12 specific technologies. Three-D reconstruction is
13 described in Claim -- in Paragraph 3 of Di
14 Bernardo. And it, quote, involves the taking of
15 individual photographs of the location and
16 electronically pasting the photographs on a
17 polygonal mesh that provides a framework for a
18 three-dimensional rendering of the location, end
19 quote. Dense sampling, described in Paragraph 7
20 of Di Bernardo. Quote, Generally done in two
21 dimensions, either within a plane or on a surface
22 of an imaginary sphere surrounding the object
23 seen.

24 Three reconstruction [sic] and dense

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 sampling refer to specific techniques, and Di
2 Bernardo says, My invention will not use them to
3 create composite images. It doesn't teach away
4 from anything that be computationally intense,
5 and it does not teach away from the nine
6 arguments this patent owner's advances. But to
7 make this argument even clearer, Di Bernardo
8 doesn't show it. Dr. Grindon's declaration also
9 does not show it.

10 So what I'd like to do is to identify for
11 your Honors the purported declaration where there
12 was this teaching away. But because there is no
13 ELMO, I just want to refer to generally what
14 happened with Dr. Grindon. So Dr. Grindon's
15 prior deposition was criticized by the patent
16 owner because it says, Dr. Grindon says Dr. Di
17 Bernardo teaches away from anything
18 computationally intense. The Board rejected
19 that, but then Patent Owner presented those
20 arguments again in the response. So Google
21 contacted Dr. Grindon and said, Would you please
22 provide a declaration declarations in this case,
23 and Dr. Grindon did. He explained that no, my
24 earlier declarations, just like the Di Bernardo

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 reference, was focused on 3-D reconstruction and
2 dense sampling. It was not making up any
3 computational intensity. But not only did Dr.
4 Grindon say that all of the criticism about his
5 declaration were [sic] wrong and all of the nine
6 arguments that Patent Owner advances were wrong.
7 He gave affirmative arguments about why the
8 combination would be appropriate. For example,
9 he said they would be appropriate because by
10 removing the computationally intense process, of
11 the sampling, for example, that freed up
12 computational intensity for other things such as
13 locating images or responding to queries. Di
14 Bernardo's clear. Dr. Grindon gave a declaration
15 in which he was clear that Di Bernardo is clear
16 and that his earlier declaration wasn't saying
17 was Patent Owner said.

18 But there's a final reason why the Board's
19 construction was right, and that's the timing.
20 Even if your Honors believe the Di Bernardo
21 teaches away from anything that's computationally
22 intense, it did so in 2000. The relevant
23 priority dates are 2004 for the '181; 2007 for
24 the '800 patent; and 2008 for the '396. Dr.

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 Grindon made this point in his declaration. He
2 said that the idea of 3-D reconstruction being
3 computationally complex in 2004 was wrong. Not
4 only did he just assert that. We have a
5 reference in the system. The Fruh references
6 makes use of 3-D reconstruction. That's how it
7 generates the urban map that it generates. It
8 doesn't say in that reference that it was
9 computationally intense.

10 The record on this is clear. Di Bernardo
11 had a paragraph in which it says, I'm not going
12 to use 3-D reconstruction or dense sampling, and
13 it didn't use it. Patent Owner takes that to
14 mean nine separate things can't be combined.
15 Patent Owner is obviously -- is misleading what
16 the Di Bernardo reference says what Dr. Grindon
17 said about it.

18 Now, those were the five issues, and I'm at
19 exactly 40 minutes right now which was my earlier
20 estimate. But I'm happy to entertain any of your
21 Honors' questions, or if not, I will reserve the
22 remainder of my time.

23 JUDGE ZECHER: I have one question about
24 Dr. Grindon?

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 MR. ALMELING: Yes, your Honor.

2 JUDGE ZECHER: In his original declaration, he
3 talks about the computational intensity of Di
4 Bernardo. Was he specifically referring to any
5 of the combinations that form the asserted or
6 instituted grounds in this proceeding? Or was
7 this just a general statement based on the Di
8 Bernardo family of patents?

9 MR. ALMELING: The former. I'm sorry, the
10 latter, your Honor. He was referring to the Di
11 Bernardo. He did not opine on any other
12 references that are relevant for the purposes of
13 the proposed combinations.

14 JUDGE ZECHER: Not Di Bernardo in
15 combination with Fruh?

16 MR. ALMELING: Correct, your Honor.

17 JUDGE ZECHER: Okay.

18 MR. ALMELING: Nor Di Bernardo in
19 combination with any of the others.

20 Thank you, your Honor.

21 JUDGE ZECHER: You'll have 20 minutes left
22 for rebuttal.

23 MR. ALMELING: Thank you, your Honor.

24 JUDGE ZECHER: For -- on the patent.

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 MR. MACEDO: Hello, your Honors. Would you
2 like a courtesy copy of the handouts to make it
3 easier?

4 JUDGE ZECHER: That would be great for us.
5 But for Judge Bunting, you'll need to refer
6 specifically to the exhibit numbers if you can.

7 MR. MACEDO: I have exhibit numbers. I
8 have page numbers. I have everything the
9 transcript's going to want to have as a
10 follow-up.

11 JUDGE ZECHER: Okay.

12 MR. MACEDO: We have a courtesy copy that
13 if the Court wants to forward it to Judge Bunting
14 also, she can have hers later.

15 JUDGE ZECHER: Probably do that, but now,
16 with the minimal time we have, that's not
17 possible. If you can refer to the exhibit
18 numbers, we'd appreciate it.

19 MR. MACEDO: My pleasure. So I would like
20 to begin -- I'm not to actually petitioner's
21 order because what matters is what is failing in
22 the petition, not necessarily what he addressed.
23 So if something is missing from the petition, it
24 doesn't matter, the argument he's making; it's a

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 different argument.

2 So I'd like the begin by addressing the
3 '181 patent which is the subject of the 1338 and
4 1339 IPRs. I note that the exhibit numbers are
5 the same in both of those petitions, and so when
6 I refer to the petition, I'm referring to the
7 corrected petition in each one of those. And for
8 the exhibit numbers, it won't matter because
9 they're both identical for Petitioner and Patent
10 Owner.

11 So I'd like to point out, to start off
12 with -- by directing you to DX-1 which is the
13 first demonstrative exhibit we included which is
14 an excerpt from Paper Number 22, the patent
15 owner's reply and the 1338. There we identified
16 the three instituted grounds. I do note that
17 there's a typo in Instituted Ground 2. And where
18 it says corresponds to Ground 4, it should say
19 Ground 3, so just please note that when you're
20 reviewing the briefs.

21 Ground 1 relies upon Yoichi, Google Exhibit
22 1,004 as allegedly anticipating Claims 1, 3, 5,
23 7, and 9. Institution Grounds 2 and 3 likewise
24 depend upon Yoichi allegedly anticipating Claim

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 1. For Ground 2, please see petition at 24. And
2 for Ground 3, see petition at 30. Thus to the
3 extent that Yoichi does not expressly, inherently
4 disclose all of the elements of Claim 1, the area
5 should be granted judgment in the 1338 petition
6 on all grounds and that none of the challenged
7 grounds are invalid.

8 Similarly, with respect to VRE DX Exhibit
9 3, the PTAB instituted three ground in the 1339
10 proceeding. Those three grounds, the main
11 reference is the Di Bernardo reference we were
12 just discussing, and that's Exhibit 1,005. For
13 Grounds 1 and 3, they require all the elements of
14 Claim 1 to be expressly or inherently disclosed
15 by Di Bernardo as set forth of in the claim
16 charts on pages 30 through 36 of the 1339
17 petition. While Institution Ground 2 as set forth
18 on page 26 of the petition recognizes that Di
19 Bernardo may not expressly or inherently teach
20 Elements 1.4 and 1.5 and attempts to fill those
21 gaps with Kawabe, Exhibit 1008, it does not
22 offer any obvious combination with respect to any
23 of the other elements, including, significantly,
24 the server farm which we'll be discussing in a

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 minute.

2 For all other elements, to the extent that
3 Di Bernardo does not expressly or inherently
4 disclose such element, we are entitled to
5 judgment in our favor.

6 So let's go to the server farm, and I'm
7 going to begin Claim 1, and Element 1-P as
8 addressed by the petitioner. And it's set forth
9 on pages 32 and 33 of the 1338 petition which
10 we've included as DX-21 and 22 and on pages 30
11 and 31 of the 1339 petition which we've included
12 as DX-24 and 26. In particular, we're going to
13 focus on the term video and data server farm
14 which neither Yoichi nor Di Bernardo expressly or
15 inherently disclose. In the petitioner's reply,
16 the petitioners argue for the first time and
17 repeat this argument that since the video and
18 data server farms are located in the preamble of
19 Claim 1, it is somehow not limiting. Besides the
20 fact that this is a new and different argument as
21 the basis for the petition, if you look at DX-21,
22 22, 24, and 26, there was no claim that it was
23 not a limitation of the -- of the claim.
24 Instead, they merely said Yoichi teaches it and

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 that Di Bernardo teaches it. If they said that
2 it's not a limitation of the claim, but it's
3 taught anyhow, then they have that argument.
4 That argument is not a basis of the petition.
5 The petition is based upon the assumption that
6 those elements are taught. And based upon that,
7 I don't think they can ignore that at this point
8 in time.

9 JUDGE ZECHER: Counselor, wasn't that a
10 responsive argument to the issue you raised in
11 your patent owner response that that preamble was
12 entitled to patentable weight and the references need to teach
13 those features?

14 MR. MACEDO: Well, they said gave it
15 patentable weight because they said it was
16 taught. They didn't say it didn't get patentable
17 weight, but it's taught anyhow.

18 JUDGE CHERRY: Do we give things
19 weight just because the parties agree to give it
20 patentable weight? Don't we make an independent
21 determination as to claim construction?

22 MR. MACEDO: Well, I think as a PTAB that
23 has declared a trial based upon the petition, you
24 take the petition as filed. And when the

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 petition is filed --

2 JUDGE CHERRY: So they're estopped from now
3 saying says it's not entitled to patentable
4 weight?

5 MR. MACEDO: I would argue yes at this
6 point. I would say for the purposes of this
7 proceeding. I'm not saying they're not estopped
8 elsewhere.

9 JUDGE CHERRY: Based upon what?

10 MR. MACEDO: Based upon what?

11 JUDGE CHERRY: Is there a rule --

12 MR. MACEDO: Well --

13 JUDGE CHERRY: -- statutory regulation you
14 can cite us for --

15 MR. MACEDO: Well, I believe --

16 (Overlapping voices.)

17 JUDGE CHERRY: -- raising this issue?

18 MR. MACEDO: I believe the way that the
19 PTAB rules are written is you're only supposed to
20 institute on the petition as written and that
21 they're not supposed to advance new arguments
22 afterwards, and you're not supposed to rely upon
23 new evidence like Exhibits 1010, 11, and 12. And
24 I also would say that it's very clear that the

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 data server -- I mean, video server and -- the
2 video and data server farms is incorporated into
3 the claims because the way the specification
4 defines it is with the three elements that are
5 the elements of the claim.

6 JUDGE CHERRY: Then there -- but isn't
7 it -- doesn't that cut against you because isn't
8 it that -- isn't if the claim defines the
9 complete invention then the preamble isn't
10 limiting?

11 MR. MACEDO: No. Actually, if the claim --
12 if the invention refers to the preamble, then it
13 is limited.

14 JUDGE CHERRY: Yeah, but it -- how is it
15 referring back to it? It's not referring to a
16 video data server farm. You're saying that a
17 video data server farm has developments, and is not
18 structurally complete.

19 MR. MACEDO: Actually, if you look at DX-7
20 which is an excerpt from the patent, the video
21 and data server farm includes at least one video
22 data -- one video storage server that stores
23 video image files containing video drive-by data
24 that corresponds to geographic location; a

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 database server that processes as data query
2 received from the user over the Internet and
3 corresponds to a geographic location; and an
4 image server. Those are the three elements.
5 When it says in the claim a video and data
6 storage server comprising and then it gives those
7 three elements as the composition, that's
8 perfectly consistent with saying that's an
9 important part of the claim.

10 JUDGE ZECHER: Didn't they provide
11 citations for each of those elements, though,
12 embodying the claim?

13 MR. MACEDO: But not in the same housing.
14 Not in -- not in the same location.

15 JUDGE ZECHER: That really depends on how
16 you define a data server farm.

17 MR. MACEDO: Absolutely.

18 JUDGE ZECHER: If it's in an isolated,
19 single location or whether or not it can be in
20 different locations. But I guess our point is,
21 why do we need to give that term patentable
22 weight if what you're saying, the body of the
23 claim has the complete invention? It's got the
24 elements of a server farm. Why do we need to all

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 of a sudden take that term in the preamble and
2 say, well, you need a citation for that?

3 MR. MACEDO: Well, actually, I think that's
4 the opposite of the law, what you just stated.

5 JUDGE ZECHER: Okay. So --

6 MR. MACEDO: So I believe that the law is
7 that if the preamble merely claims the use -- I
8 think the Corning case was -- Corning versus
9 Sumitomo was the lead case on that.

10 JUDGE CHERRY: The Corning was the -- that
11 was breathe life into the meaning into the
12 claims, and that and that's the optical fiber
13 case. But there's other cases that say if it's a
14 structurally complete invention, that there's no need to refer
15 back to
16 the preamble.

17 MR. MACEDO: As I understand, whether or
18 not the preamble's a limitation, it turns on
19 whether or not it's merely a use or whether the
20 elements of the claim refer back to it. And
21 therefore, it adds meaning and life to the claim.
22 I think that in this context, it does.

23 JUDGE CHERRY: So you think they refer back
24 to this?

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 MR. MACEDO: Right, because the definition
2 according to the spec of a video and data server
3 farm, among other things, is that it includes
4 those three elements that are the same three
5 elements in the claim. And so if you say a video
6 and data server farm includes those three
7 elements, and we'll talk about whether it has to
8 be in one location or not in a minute, then those
9 elements are referring back to the video and data
10 server farm. So I think that under the Corning
11 versus Sumitomo case, the preamble is limited.

12 JUDGE ZECHER: Would you say that a
13 preamble's always limiting?

14 MR. MACEDO: No, of course not.

15 JUDGE ZECHER: So it's a case-by-case?

16 MR. MACEDO: Absolutely.

17 JUDGE ZECHER: Okay.

18 MR. MACEDO: It's a very fact-specific
19 thing, and it's an argument they didn't raise.
20 We didn't get an opportunity to brief that. We
21 didn't get an opportunity to give you case law on
22 that. They said it's a limitation. We said it's
23 not in the references. So, I mean, to say that
24 we have to now argue that it's a limitation after

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 they told us it was a limitation doesn't seem
2 appropriate in this context, with all due
3 respect.

4 JUDGE ZECHER: Okay. We understand your
5 point.

6 MR. MACEDO: Okay. Take a look at Figure 4
7 for a second of the '181 patent. I like Figure 4
8 because it draws a distinction between the video
9 and data server farm, 405 on one side of the dash
10 lines and 420 which is the video capture system
11 field driver residence on another side. And when
12 you read the corresponding description in Column
13 7 with respect to video and data server farm, I
14 would submit it leads to you understand that all
15 of the video and data server farms are at a
16 single location which I would argue is also
17 consistent with every -- all the evidence that we
18 have, including the exhibit submitted by
19 Petitioner in their rebuttal which I believe is
20 inappropriate.

21 JUDGE BUNTING: Counselor?

22 JUDGE ZECHER: The specific portion in the
23 specification that explains that the video data
24 server farm is in one, single --

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 MR. MACEDO: Yes.

2 JUDGE ZECHER: -- one, single location?

3 MR. MACEDO: Just one second. Yes. It's
4 in Column 7, and it is -- Line 57 is where it
5 discusses Figure 4.

6 JUDGE ZECHER: Can you say that again real
7 quick?

8 MR. MACEDO: Column 7, Line 57. See, it
9 says -- it goes down to after six. It says the
10 left column, 405, entitled Video and Data Server
11 Farm represents the location of the video and
12 data server farm where all data is stored and
13 subsequently delivered to the Internet. It's
14 confirming that it is at the location, not the
15 locations, not the plurality of locations. And
16 it is excluding from it the video capture part
17 which is what the petition relies on in Di
18 Bernardo as being part of the video data server
19 farm.

20 JUDGE CHERRY: So one of the key inventive
21 features is where you put the computer?

22 MR. MACEDO: I would say one of the key
23 inventive features is using a video and data
24 server farm which enables you to do the complex

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 calculations that were necessary to achieve the
2 stated purpose of the patent. I'm not saying the
3 claims were limited by that statement because --

4 JUDGE ZECHER: Well, how -- you know, your
5 description at this point to assume the
6 specification, how is that consistent with what's
7 described in Figure 1? Now, we know 100 is a
8 video data server farm. It shows -- it makes
9 that up being the Web server; the video server;
10 the database server; the map server; the landing
11 zone server. It doesn't appear by this picture
12 that these servers are all in one location. What
13 it seems to suggest is that they're either directly or
14 indirectly connected to the Internet.

15 MR. MACEDO: I actually would disagree with
16 you by the arrows. If you look at the arrows --

17 JUDGE ZECHER: Well, it has the simple
18 connections.

19 MR. MACEDO: Well, it's showing a direct
20 connection because it isn't going through the
21 Internet. If you look at Web server, that has an
22 arrow to the Internet. If you look at video
23 server, that is directly connected to image
24 processing server; and video storage server; and

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 database server; and map server; and landing zone
2 servers. And the only connection to the Internet
3 is through the video server. And that's
4 different from the user interface which has a
5 separate connection to the Internet.

6 JUDGE CHERRY: Does your claim recite that
7 only the video server can be connected to the
8 Internet?

9 MR. MACEDO: I'm not saying that it has to
10 be, but I'm saying that Figure 1 is perfectly
11 consistent with it all being in one location.

12 JUDGE CHERRY: Okay.

13 MR. MACEDO: I'm not trying to import
14 limitations from the figures. What I'm saying is
15 it is very consistent with the disclosure in the
16 '181 patent that the video and data server farms
17 are at one location, housed at one location. If
18 you look at what Dr. Fuchs had to say, he
19 actually said that his understanding was that it
20 was a rack of computers. If you look at a Google
21 search of what a server farm is, you see large
22 racks of computers generally housed in one
23 location.

24 JUDGE ZECHER: Did you say it's your

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 understanding that a video data server farm
2 includes back-up servers, for example?

3 MR. MACEDO: It could. It doesn't have to.

4 JUDGE ZECHER: It doesn't have to.

5 MR. MACEDO: Right.

6 JUDGE ZECHER: Let's say it did. Let's run
7 under the premise that it did. Would you -- is
8 it your understanding these back-up servers would
9 be in the same location as -- let's just call
10 them the primary server for the video server
11 farm. Would they be in a different location?
12 And if they weren't, would they not be part of
13 the video data server farm?

14 MR. MACEDO: Okay. So let's go down to a
15 hypothetical for a second. If I had a farm and I
16 was growing peas, and that farm had little rows
17 of peas, right? And I had a different farm a
18 hundred miles away and it was growing corn, and
19 it had different rows of corn, would you say
20 they're the same farm or different farms?

21 JUDGE ZECHER: Well, it's a little
22 different here because we're talking about
23 servers connected over the Internet. I mean, the
24 Internet connects them. It doesn't necessarily

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 mean they have to be in one location such as your
2 example.

3 MR. MACEDO: Well, it --

4 JUDGE CHERRY: I went apple picking a
5 couple weekends ago. We went to the farm, and
6 then they drove us a mile down the road to the
7 apple orchard which was across the road and like
8 I said, down the street a while. So you don't
9 think that that -- I don't think that just
10 because it's called a farm doesn't mean that it
11 is the like an actual agricultural farm.

12 MR. MACEDO: Let's look at Example 18 which
13 comes straight from Google's 2004 tower reference
14 in 1013. And if you look at what they didn't
15 cite to two which was the definition of what a
16 Web server farm is, it says, it refers to a
17 Website that uses two or more server housed
18 together in a single location to handle users'
19 requests. That's the 2004 contemporaneous
20 understanding offered by their expert,
21 Dr. Grindon, in his rebuttal expert as, This is
22 where you should look to figure out what a server
23 farm is.

24 Now, let's go back to Exhibit 14.

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 JUDGE ZECHER: But that's extrinsic
2 evidence here --

3 MR. MACEDO: That's their extrinsic
4 evidence.

5 JUDGE ZECHER: Well, we're looking at your
6 extrinsic evidence. We're looking at the
7 specification, and we're looking at the claims.
8 And we're trying to ascertain what it means in
9 light of your specification regarding how we
10 should define a server farm. Why do we need to
11 even look at this?

12 MR. MACEDO: Because it's the ordinary
13 meaning of the term that --

14 JUDGE ZECHER: You're saying this is the
15 plain and ordinary meaning?

16 MR. MACEDO: Absolutely. It's consistent
17 with all the definitions we provided, and in
18 particular, if you look at Demonstrative
19 Exhibit 14 where we are citing to VRE Exhibit
20 2015 which was the June 3rd, 2004 version of the
21 Website that we had submitted with our patent
22 owner's response, it also says the server farm is
23 a group of network servers that are housed in one
24 location. The one patent that Mr. Almeling read

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 didn't say server farm. It said service centers.
2 Service centers are not necessarily server farms.
3 The only definitions we have of server farm
4 on any of the extrinsic evidence that isn't
5 self-serving, litigation-induced, conclusory
6 testimony of an expert is that it's in one
7 location.

8 JUDGE CHERRY: What if they were all in
9 a -- in a car that was driving around? Would
10 that be a server farm?

11 MR. MACEDO: If you had a dozen of them
12 housed in a car, housed together, it could be.

13 JUDGE CHERRY: There has to be a dozen of
14 them?

15 MR. MACEDO: Well, it would be two or more.
16 Technically, there's three different computers in
17 this, but, you know.

18 JUDGE CHERRY: So you think that if I put
19 three computers in a car, that would be a server
20 farm?

21 MR. MACEDO: It isn't the traditional
22 definition. It's a twisting of it. Maybe, but
23 that's not what they're offering as the prior
24 art.

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 JUDGE CHERRY: So are you disclaiming
2 any -- anything that where there's -- one
3 computer's not at the same location?

4 MR. MACEDO: Well, let me talk about the
5 infringement contentions for a second because
6 there's a distinction between saying Google has
7 five server farms, each of which infringes and
8 each of which has all the functionality and
9 saying they've distributed the server farm at
10 different locations. The infringement
11 contentions didn't say that they distributed the
12 server farms in two different locations.

13 JUDGE ZECHER: I don't really see how the
14 infringement contentions are relevant to this
15 proceeding. We're looking at instituted grounds
16 based on prior art that's in front of us.

17 MR. MACEDO: Right. So in the prior art
18 that's in front of us, let's talk about Yoichi
19 for a second. One of the elements that they say
20 is part of the server farm is the service center.
21 That's connected through the Internet to two of
22 the other elements which they say is the memory
23 -- which isn't a server; it's just memory which
24 is the hard drive -- and the computer, both of

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 which are in each of the cars. So they're saying
2 the server farm is made up of not only a server
3 that is remotely located from each car, but each
4 of the separate, individual computers and each of
5 the separate cars, each of which are going in
6 different directions, having limited connectivity
7 and may be in it and may be out of it, that isn't
8 the load-balancing distribution technique that is
9 going to be conducive of a server farm. Yoichi
10 doesn't call it a server farm. When we asked
11 Fuchs about this -- and it's in one of the
12 demonstrative exhibits. It's in the set that we
13 gave you. Twenty-three, yeah, 23, he never had
14 seen a server farm which had consisted of
15 computers and vehicles traveling in different
16 directions.

17 And when Dr. Grindon was asked whether he
18 actually did the construction, he said he didn't
19 do a full construction. So whatever he had to
20 offer, he didn't do the right job. So it really
21 doesn't give you any use on that. He says he
22 didn't do it and we gave you that demonstrative
23 exhibit. It's Observation Number 7 in our
24 observations.

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 JUDGE ZECHER: I believe Judge Bunting had
2 a question a while ago. We skipped over it.

3 MR. MACEDO: I'm sorry, Judge.

4 JUDGE ZECHER: Do you still have a
5 question?

6 JUDGE BUNTING: I just wanted to confirm.

7 So taking us back to Claim 1, if we accept
8 that a video and data server farm is a
9 limitation, are you then saying that when we read
10 the body of the claim we should state at
11 least one video stored server in a data and video
12 server farm and add that into each -- a database
13 server and a video and data server farm, each of
14 those limitations?

15 MR. MACEDO: I don't think you need to add
16 it in because I think it's expressly there. A
17 system including a video and data service farm
18 comprising. The video and data server farm is
19 comprising the -- at least one video stored
20 server, a database server, and an image
21 processing server which is what the patent
22 teaches.

23 JUDGE BUNTING: Again, so how is that
24 portion of the video and data server farm giving

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 life and breath of the body of the claim? Why do
2 we need it?

3 MR. MACEDO: Because it's confirming that
4 it's part and parcel of the video and data server
5 farm. In other words, we refer to in the
6 preamble of video and data server farm, and then
7 we refer -- comprising specific elements. And we
8 define in the spec that it has these three
9 elements, and those are the three elements which
10 are what the spec says. It is a video and data
11 server farm. This isn't merely a use, but this
12 is the actual invention. This is part and parcel
13 of the entire invention.

14 JUDGE BUNTING: But yet going back to the
15 preamble, it says, a system including a video and
16 data server farm. So based on what you said,
17 that it would have been a video and data server
18 farm comprising versus a system including.

19 MR. MACEDO: Well, I would argue to you
20 that the preamble could just be a system
21 including a video and data server farm comprising
22 as the body of the claim. Just because they call
23 it a preamble doesn't make it a preamble.
24 Usually the preamble stops when you use the word

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 including, comprising, consisting of. So the
2 preamble here is a system. That's the
3 environment. The claim is a video and data
4 server farm, comprising. And then it goes on and
5 tells you what that a video and data server farm
6 comprises. If we had formatted this claim with a
7 carriage return before the data -- a video and
8 data server farm, would we be having this
9 discussion?

10 JUDGE ZECHER: I think we understand your
11 position, so let's move on.

12 MR. MACEDO: I'd like to move on for a
13 second to Claims 7 through 10 which, curiously,
14 wasn't addressed by my compatriot. Those claims
15 are means plus function claims. There's no
16 dispute about that. Everyone agrees. They said
17 it in the petition. We agree. Your Honor said
18 it.

19 And as a means plus function claim, they
20 have that telltale means for it. I understand
21 that's no longer as telltale as it used to be,
22 but it's still good evidence, particularly
23 considering the time when this written. They're
24 construed under Section 6 of Paragraph 112

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 because it's an older patent. To properly
2 construe these claims, we begin by identifying
3 the claim function and the corresponding
4 structure to close in the specification for
5 performing the functions. The mere fact that a
6 piece of prior art may also claim the same
7 function if it does not use the same or
8 equivalent structure in performing that functions
9 [sic] does not anticipate and certainly wouldn't
10 render obvious in that sense.

11 The petition recognized and cited at page
12 11 of 1338 petition and page 11 of 1339 petition
13 that Microsoft Corp. versus Enfish IPR decision
14 which said that corresponding structure has to be
15 more than merely a general-purpose computer, but
16 also a computer program or algorithm that is
17 linked to the function corresponding to the claim
18 means. In our papers, we show what those
19 software is. We give specific examples. We talk
20 about the end coder and all the different open
21 source stuff. I don't need to repeat it here.
22 We gave you demonstrative exhibits which walk you
23 through each one of those software programs. In
24 formulating the petition, the petitioner did not

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 do an analysis as to whether the prior art, Di
2 Bernardo, Yoichi or the other one that they use
3 in their obviousness combination, whether any of
4 the prior art had used the same software
5 algorithms as disclosed or its equivalent. In
6 fact, when we took the deposition of Dr. Fuchs,
7 he said he didn't do it. In fact, Mr. Newlin was
8 kind enough to get Dr. Fuchs to confirm, No, I
9 didn't do it. And I could do it, but I didn't do
10 it yet. And then when they submitted
11 Dr. Grindon's declaration as we set forth in our
12 observations, Dr. Grindon confirmed he didn't do
13 it. Without that analysis, Claims 7 through 10
14 have to survive. They didn't do the very
15 fundamental prima facie case to address means
16 plus function claims.

17 So at a minimum, we think that we are
18 entitled to judgment, that Claims 7 through 10
19 aren't invalid in 1338 and 1339 petition.

20 JUDGE ZECHER: So just so I'm clear, let me
21 understand your position. So for these
22 means plus function claims, I think your
23 position is that there is structure in the spec,
24 corresponding structure in the spec being a

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 general-purpose computer, yet you have sufficient
2 algorithms that make it an otherwise
3 special-purpose computer, correct? That's for
4 your structure in the 112, 6th-112, 2nd analysis.

5 MR. MACEDO: Yes. It's the combination of
6 the general-purpose computer specifically
7 programmed using the software.

8 JUDGE ZECHER: And you're asserting that
9 the prior art may have computer structure that
10 doesn't have that specific algorithm.

11 MR. MACEDO: I'm asserting that the
12 petition did not meet its burden of establishing
13 that the prior art had the same or equivalent
14 algorithms to perform that structure.

15 JUDGE ZECHER: Okay. But it has a
16 computer?

17 MR. MACEDO: I don't dispute that it --
18 there's computers.

19 JUDGE ZECHER: Okay. So you don't dispute
20 that there's a computer. You just dispute that
21 it doesn't perform the same algorithm that you
22 have in your spec that makes it special-purpose.

23 MR. MACEDO: With the exception that I do
24 dispute that it doesn't have a video, it does.

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 JUDGE ZECHER: Server farm. I understand.

2 Yes. All right. Just wanted to make clear.

3 MR. MACEDO: But I believe that the law is

4 pretty clear that board means plus function of

5 the computer elements, it's not just the computer

6 that's enough. And in fact, it's the point that

7 the petition made. That was their point. And in

8 fact, when you look at the reply, they don't

9 dispute that. They say, Well, it has the

10 algorithm. But what they're talking about as the

11 algorithm is still clearly just the function.

12 JUDGE CHERRY: Right. I understand program

13 with a software -- would that be an algorithm?

14 MR. MACEDO: If you do a flow chart -- in

15 the Chicago Board of Trade versus Fifth

16 Marketing, they had a flow chart with the

17 algorithm which was sufficient for a means plus

18 function limitation.

19 JUDGE CHERRY: But that's for this --

20 that's for the obligation of

21 disclosure. For --

22 MR. MACEDO: No, I think that's 112, 6th issue.

23 JUDGE ZECHER: It is, a 112, 6th --

24 (Overlapping voices.)

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 MR. MACEDO: Right, it's a --

2 JUDGE ZECHER: And I think what he's
3 referring to is it's your obligation to show the
4 corresponding structure in the spec and whether or
5 not it has a sufficient algorithm which you're
6 telling us you have.

7 MR. MACEDO: Right.

8 JUDGE ZECHER: Now --

9 MR. MACEDO: And I believe your
10 institution says that --

11 JUDGE ZECHER: If you're applying that now
12 over an anticipation and obviousness context that
13 they need the exact, same --

14 MR. MACEDO: Yes.

15 JUDGE ZECHER: -- algorithm.

16 MR. MACEDO: Yes, anticipation, obviousness
17 and infringement --

18 JUDGE ZECHER: Can you point to some case
19 law that suggests that that exact, same algorithm
20 needs to be explicit in the prior art to
21 anticipate or render obvious that claim?

22 MR. MACEDO: If I'm entitled to submit it
23 afterwards, I'll be happy to submit that to you.
24 I mean, this is -- I mean, I think their case law

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 said it.

2 JUDGE ZECHER: Yes, but what we're --

3 MR. MACEDO: I think that's what 112,
4 Paragraph 6 was referring to.

5 JUDGE ZECHER: What we're trying to explain
6 to you is that that's the burden of the patentee
7 to explain how they have sufficient structure and
8 what the sufficient structure is.

9 MR. MACEDO: And we did that.

10 JUDGE ZECHER: And we're not disputing
11 that. We're asking you whether or not when
12 you're looking at that structure for the means plus function
13 on a case, whether or not case law
14 requires us to not just find the structure be in
15 the computer, but also the exact, same algorithm.

16 MR. MACEDO: I believe that's what the PTAB
17 did in the Chicago Board of Trade in the Chicago
18 Board of Trade versus Fifth and Market case
19 because they said that claim was valid because
20 they didn't show the prior art had the
21 corresponding means to put --

22 (Overlapping voices.)

23 JUDGE ZECHER: The Chicago Board of Trade
24 and Fifth Market case, is that a CBM?

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 MR. MACEDO: Yes.

2 JUDGE ZECHER: Okay. I was actually on
3 that panel, so it is Chicago Mercantile Exchange.

4 MR. MACEDO: I'm sorry, yes. Yes, forgive
5 me.

6 JUDGE ZECHER: Okay. But yes, there was a
7 112 2nd asserted ground in that case, and the
8 burden was on the patentee to prove whether or
9 not, in fact, the claim limitation was means for
10 matching or comparing.

11 MR. MACEDO: Right.

12 JUDGE ZECHER: And whether or not the
13 patentee has a sufficient algorithm in spec,
14 though, for the means for matching and the means
15 for comparing recited to a black box for a
16 general-purpose computer as a structure. It
17 wasn't then flipped to see whether or not the
18 prior art asserted in the obviousness ground
19 included that exact, same algorithm.

20 MR. MACEDO: I thought that claim was found
21 valid.

22 JUDGE ZECHER: That claim was found
23 indefinite. There wasn't sufficient algorithm,
24 the means for comparing limitation. That's

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 besides the point.

2 MR. MACEDO: Okay. Maybe I -- apologize.

3 JUDGE ZECHER: That's also not a

4 precedential opinion to us. That's simply, you

5 know, another case. I'm looking for

6 Federal Circuit precedent.

7 MR. MACEDO: I'll be happy to get that to

8 you --

9 JUDGE ZECHER: Okay.

10 MR. MACEDO: -- but I would have to request

11 permission to submit it afterwards. I don't have

12 it sitting here now.

13 JUDGE CHERRY: I mean, to infringe the

14 claim, you wouldn't need the exact, same

15 algorithm, right?

16 MR. MACEDO: You don't need the same. You

17 need the same or equivalent. That's what

18 Paragraph 112, 6th says.

19 JUDGE CHERRY: It could be

20 equivalent in that it performs that function.

21 MR. MACEDO: No, it has to be more than the

22 same function. Equivalents -- remember, the

23 whole point about means plus function is they

24 didn't want to say any means that performs this

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 function and then cover the work. You have to
2 give a disclosure that says, Here's examples of
3 means that perform that function, and then the
4 claim is construed to be limited to those
5 examples. That's what 112, Paragraph 6, says.

6 JUDGE ZECHER: It's corresponding structure
7 and equivalents, I believe.

8 MR. MACEDO: Right. But they didn't put
9 forth a prima facie case that there was any
10 structure that corresponded to or was the
11 equivalent. The point is that they're missing
12 the prima facie case. Without saying what there
13 was -- and it's not even like they put it in the
14 rebuttal. They punted on it. And when we asked
15 Dr. Grindon, Are you offering anything on this,
16 he said no. And Dr. Fuchs said he didn't do it.
17 And Dr. Grindon said he didn't do it. And they
18 didn't do it without an expert, so, I mean, that
19 seems to me like pretty clear, they didn't do
20 what they have to do in order to carry their
21 burden. So.

22 Any other questions on that?

23 JUDGE ZECHER: No.

24 MR. MACEDO: How am I doing on my times?

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 JUDGE ZECHER: You have roughly 30 minutes
2 left.

3 MR. MACEDO: Okay, great.

4 So let's talk about the 1341 petition for a
5 minute if you don't mind. Let me know when have
6 whenever you're ready.

7 JUDGE ZECHER: Go ahead.

8 MR. MACEDO: Okay. I'm going to focus on a
9 slightly different point than the one that was
10 addressed by counsel for Petitioner, and I'm
11 going to focus on Element B, Step B of Claim 1.
12 And if you'd look at Step B, it says, Generating
13 the composite image of the subject in portions of
14 two or more of the multiple two-dimensional image
15 data sets wherein portions -- and this is the
16 significant word -- are aligned in a dimension
17 consistent with the continuum. They have not
18 offered in the petition any evidence that they
19 have shown alignment of those portions.

20 JUDGE ZECHER: What's your understanding of
21 what alignment means in this context?

22 MR. MACEDO: Well, you know, I don't want
23 to start beating a dead horse. I think frankly,
24 you know, what the patent describes as alignment

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 is that they look for the same figure in one
2 picture and they look for the same picture in the
3 other. They make sure they overlap so that way,
4 they can align the pictures in a vertical
5 direction.

6 JUDGE ZECHER: So is there an explicit
7 definition of alignment in the spec or a special
8 definition of that?

9 MR. MACEDO: I think it's the ordinary
10 meaning of alignment. What's consistent is
11 whatever alignment means, they offered nothing to
12 show alignment. If you look at page 17 of Patent
13 Owner's response, we raise this point. We say
14 the petition also fails to say any alignment and
15 thus fails to meet the burden of proof on
16 anticipation. If you look in the petition itself
17 upon pages 29 and 30, there is no language which
18 shows what the alignment is.

19 JUDGE ZECHER: Well, yeah. I've read your
20 response here. It seems to me that you're
21 inferring that alignment necessarily
22 encompasses overlapping.

23 MR. MACEDO: No, I'm not saying that. I'm
24 saying even if it doesn't --

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 JUDGE ZECHER: Even if it doesn't?

2 MR. MACEDO: Even if it doesn't, they still
3 have to show some alignment. If all you did
4 was -- let's say, you know, Di Bernardo's driving
5 down the street for example, right? They take a
6 picture. They just down that, they just go down
7 the street. They splice the first one. They put
8 it, the second one in there. They keep going.
9 They splice it and they put it -- and they make
10 no effort to adjust. There's no alignment.
11 Alignment means you're coordinating, and this
12 also says that the alignment is in a dimension
13 consistent with the continuum which I
14 respectfully submit is the vertical direction.
15 They're not doing that, and they're not offering
16 anything to say they do that.

17 JUDGE ZECHER: When you say they aren't
18 doing anything, Fruh's disclosure doesn't
19 provide --

20 MR. MACEDO: No. I'm saying the petition
21 offers no statement saying that the prior art
22 does alignment. If you look at the element and
23 you read what they cite, they don't say and it
24 aligns.

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 JUDGE CHERRY: Where is this? Wait, where
2 are we in here?

3 MR. MACEDO: Petition, page 29 and 30,
4 Element B.

5 JUDGE ZECHER: We're on the petition now,
6 or we're on your response?

7 MR. MACEDO: Now we're on the petition.

8 JUDGE ZECHER: Usually, it's the petition.

9 MR. MACEDO: Oh, I was just showing you
10 that this is an argument we made in the response.

11 JUDGE ZECHER: Okay.

12 MR. MACEDO: I didn't want to be accused of
13 a new argument, an oral argument. I have read
14 enough transcripts.

15 JUDGE ZECHER: 2930 of the petition,
16 correct?

17 MR. MACEDO: Right. Now, while they repeat
18 the element, when you read what they cite, it
19 doesn't say anything about alignment. So putting
20 aside whether overlap is required or not which,
21 you know, obviously, we respectfully submit it
22 is. And I really don't want to argue about that
23 because I'd rather spend my time on something
24 more important.

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 Bottom line is they didn't show alignment
2 for that claim element, so I think the petition
3 fails.

4 JUDGE CHERRY: Well, I'm looking at
5 this, and they're saying that -- it's saying that
6 there's -- that they have lasers and that they
7 calibrate their camera for measurements. They
8 determine the transformation between its
9 coordinate system. Why would you have a
10 coordinate system if you're not arranging the
11 pictures?

12 MR. MACEDO: Well, first of all, there's
13 two separate issues that are going on. The way
14 Fruh works is they have a laser, and the laser is
15 what's developing the point cloud, okay? The
16 laser goes down the street. There's no overlap
17 because when you do the laser scan, it goes. It
18 does this. Now it does the next scan. And it
19 keeps going. And it does the next scan. It
20 keeps going. And it does the next scan. It
21 keeps going. There's no overlap on that.

22 They have the camera in there for a totally
23 different purpose having nothing to do with that.
24 What they have the camera in there is to spray

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 the texture on the features. That camera has
2 nothing to do with these the claim limitations.
3 It has nothing to do with this claim. That's
4 actually one of the dependent claims.
5 Interestingly, that camera and that technique is
6 exactly what they said Grindon explained. Di
7 Bernardo says, Don't combine with it because
8 that's bad. That's complex. That's
9 computationally intensive. That's bad. All the
10 wonderful things that we discussed earlier,
11 that's -- exactly what they're talking about is
12 Fruh. Fruh is exactly what they say, don't do;
13 it's bad; let's do something else because we're
14 going to make it easier and better. And the idea
15 of combining those two is amazing to me, but in
16 any event there's no alignment there because
17 there's nothing to align. The scan just keeps
18 going down. Here's the first one. Here's the
19 second one. Here's the third. There's nothing
20 to align.

21 JUDGE ZECHER: Just so I understand your
22 position, you're saying there's really no stop
23 and start-up as it goes down? It's just one
24 giant continuum. So in other words, it's not

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 spliced in any way such that you need to align.

2 MR. MACEDO: Well, it's not -- see, the
3 reason why you need alignment in the patent is
4 because when you take a picture, I would take a
5 picture of that; and then I go and I take a
6 picture of this; and then I go and I take a
7 picture of this. And Di Bernardo does that. And
8 the point is that you have to then splice them
9 and put them together. But what can happen is,
10 you could have misalignment this way. So you
11 have to figure out, how do I make them overlap in
12 order to make align and get together. That's why
13 we talked about overlap. In fact, when you look
14 at the claim, if you look at what they call --
15 I'm sorry.

16 JUDGE CHERRY: Can we --
17 can you have alignment without overlap?
18 You could have a gap and that could line up.

19 MR. MACEDO: Even if you can, it doesn't
20 matter because they didn't show any alignment.
21 You can have no alignment with no overlap. You
22 can have no alignment with overlap. Okay?

23 So putting aside whether overlap matters,
24 I'm happy to put that aside for now. I mean, you

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 have our papers. You have our argument about
2 that. You can decide that if necessary. I think
3 you don't have to get there because I think
4 because there is no alignment shown in the
5 petition or even the rebuttal declaration, they
6 lose.

7 JUDGE CHERRY: What do you think Fruh means
8 when he says that vertical 2-D scans are
9 parallel?

10 MR. MACEDO: Like this.

11 JUDGE CHERRY: So when he says 2-D scans,
12 it refers to more than one scan because it's
13 plural, and they're aligned parallel, or they're
14 not aligned at all.

15 MR. MACEDO: They're not aligned as in an
16 action that I align them. They're aligned in the
17 sense that if I'm driving -- forgive me for my
18 demonstration. If I'm driving down the street
19 like this and I scan like this, the line goes to
20 here, this first block on your podium. Then I
21 keep scanning to the second block. So now I have
22 two vertical strips. I have the first block and
23 the second block, and that's what they mean by
24 parallel. This block, the first block here, is

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 parallel to the second block here.

2 JUDGE CHERRY: It doesn't say -- it says
3 wherein the portions are aligned. It doesn't say
4 that you -- if they happen to be aligned after
5 you generate them, that's sufficient to meet the
6 claim limitation. It doesn't require you to
7 actually affirmatively -- it doesn't require an
8 affirmative action of aligning.

9 MR. MACEDO: I would say that that's a
10 verb.

11 JUDGE CHERRY: Wherein the portions are
12 aligned in the dimension?

13 MR. MACEDO: Yeah.

14 JUDGE ZECHER: Well, I guess I'm more
15 focused on Fruh. If Fruh's going to call these
16 vertical 2-D scans, he's going to be using
17 plural. We're talking about -- and you're
18 describing through as just going down the street,
19 continually, you know, making a scan without any
20 stops or starts. There's no need to splice an
21 image. Why does it refer to them as scans,
22 plural, not a scan? Because wouldn't it just be
23 one scan if it wasn't spliced?

24 MR. MACEDO: Well, there is an option

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 for -- that you could drive down the street more
2 than once, but that's along a different
3 continuum, so that wouldn't be relevant for the
4 claims.

5 JUDGE ZECHER: Isn't the street the
6 continuum?

7 MR. MACEDO: No. The street is the path of
8 the car driving down the street.

9 JUDGE ZECHER: Which is what Figure 1 --

10 MR. MACEDO: It's a single line.

11 JUDGE ZECHER: -- in the '396 patent shows.
12 It's a squirrely line in front of a house. It's
13 taking --

14 MR. MACEDO: The path of the car. It's not
15 the block.

16 JUDGE ZECHER: The street?

17 MR. MACEDO: No, it's not the street. It's
18 the line. It's the path of the car.

19 JUDGE ZECHER: How is that different than
20 the street?

21 MR. MACEDO: In Fruh --

22 JUDGE ZECHER: What, is the car going to
23 drive on the sidewalk?

24 MR. MACEDO: No, no, no. If I drive

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 down -- when you drive home down the same street
2 every day, are you always in exactly the same
3 position with your car?

4 JUDGE ZECHER: So you're talking about the
5 exact, same point on the street.

6 MR. MACEDO: Exactly, because if it's not
7 the same point, it won't -- it won't work.

8 JUDGE ZECHER: And that's what you say
9 continuum is --

10 MR. MACEDO: The continuum --

11 JUDGE ZECHER: -- the exact, same point.

12 MR. MACEDO: The same line, yes, yeah.

13 Okay? Anything else on this one?

14 Let's talk about Claim 5, hopefully very
15 briefly, on the '181 patent. Are you there?

16 JUDGE ZECHER: Yes.

17 MR. MACEDO: Okay. Claim 5 says a system,
18 as in Claim 4, wherein the camera array includes
19 a plurality of camera units to provide 360-degree
20 view of the neighborhood. In order to anticipate
21 Claim 5 which is what is being asserted in both
22 petitions, either by Yoichi or Di Bernardo, it
23 must either expressly or inherently disclose that
24 the camera has covered 360 degrees. What it says

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 in Yoichi is more than one camera capture, front,
2 rear, and side views. Now, maybe a front, rear,
3 and side view if each camera is at 90 degrees
4 will capture 360 degrees. If each camera is at
5 less than 90 degrees, it won't capture it.
6 Therefore, it does not inherently capture a
7 360-degree view. Similarly, when you look at the
8 Di Bernardo in the 1339 petition, they rely upon
9 the disclosure that a person skilled in the art
10 should recognize, however, that additional
11 cameras may be used to film the objects from
12 different viewing directions. And it does talk
13 about the Dewey Deckel camera system which may
14 capture 360 degrees, but it doesn't inherently
15 capture 360 degrees because there is no express
16 teaching to get a 360-degree view in either
17 reference. And because it isn't inherent in the
18 teaching in that reference that it will capture a
19 360-degree view, I argue that the petition --
20 that both petitions fail to invalidate Claim 5.
21 Any questions on that one?
22 Okay. Now, I would like to talk about
23 Elements 1.4 and 1.5 in the 1339 petition. This
24 is the part where we are referring to the

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 mutually exclusive embodiments of Di Bernardo.

2 JUDGE ZECHER: Fine.

3 MR. MACEDO: Okay. So if you look at DX
4 Exhibit 6, the Element 1.4 requires that the
5 database server transfer video image files over a
6 pre-processing network to an image processing
7 server, and Element 1.5 separately requires that
8 an image processing server, after it converts the
9 video data transfer to the post-process video
10 data via the post-processing network. So what
11 these elements require is that the data have two
12 steps, one of which is pre-processing, the other
13 of which is post-processing.

14 In the petition, the -- Dr. Fuchs and the
15 petition rely upon two mutually alternative
16 embodiments of where in the first embodiment when
17 the image is captured, they make the composite
18 image, and that's the pre-processing embodiment.
19 In the second one, the image is saved, and then
20 they post-process it. Those embodiments as
21 recognized by Dr. Grindon in his deposition as
22 well as in his prior declaration are mutually
23 exclusive in the sense that the data either do
24 one or the other and not both. And if the same

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 data isn't doing both, then it can't anticipate
2 the claim. And that, I think, is the reason why
3 Grounds 1 and any grounds that rely on Di
4 Bernardo for that don't work.

5 JUDGE ZECHER: So just so I'm clear, you're
6 asserting that Petitioner here relied on two
7 mutually exclusive embodiments in the prior art?

8 MR. MACEDO: For the same data.

9 JUDGE ZECHER: To account for those.

10 MR. MACEDO: Right. What they argue in the
11 reply for the first time is that you have a
12 hybrid system where some data goes through one
13 embodiment and some data goes through the other
14 embodiment. That's not what they said in the
15 petition, so I don't think it's appropriate. But
16 in any event, it still wouldn't be consistent
17 with the claim because you're not running the
18 same data through both embodiments. And if you
19 look at DX 43, you'll see where Dr. Grindon in
20 Observation 3 confirmed that the intent was
21 different images and not the same image.

22 JUDGE ZECHER: Before we move on to any
23 more limitations, can you really explain the
24 relevance of Dr. Grindon's testimony in these

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 proceeding. We're trying to understand how he
2 was interjected and in what way we should be
3 according his testimony weight? He wasn't the
4 primary expert in this -- these petitions were
5 filed. Dr. Fuchs was, but yet there is a lot of discussion
6 regarding Dr. Grindon. So if you can
7 explain that to us, we'd appreciate it.

8 MR. MACEDO: Sure. There was a litigation
9 which actually went to the Supreme Court called
10 Vederi versus Google. That was over the Di
11 Bernardo patent. In that litigation, Petitioner
12 Google hired an expert. His name was
13 Dr. Grindon. He offered a declaration when was
14 Exhibit 2,002 where he explains what Di Bernardo
15 says; what it teaches; what it teaches against;
16 and what it doesn't say. We rely upon those
17 teachings to show that what Dr. Fuchs said Di
18 Bernardo teaches is actually contrary to what
19 Dr. Grindon says Di Bernardo teaches. We offer
20 that in our preliminary Patent Owner response,
21 and then we relied upon it much more heavily in
22 our Patent Owner response, I believe in each of
23 the cases.

24 In response to that, the patent -- the

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 petitioner offered Dr. Grindon for two purposes.
2 One purpose was to say, Well, when I said that, I
3 was talking about a different time period. And
4 when you look at our observations, you'll see
5 Dr. Grindon confirmed it still applied even in
6 2005. It still applied in 2010. It didn't
7 matter been, that different time period. They
8 also offered him to say, Well, when I said that,
9 I didn't mean all computational intensity because
10 he drew some distinction between some types of
11 computational intensity versus others. I frankly
12 don't understand how there's different types of
13 computational intensity. Either it is
14 computationally intense, or it's not. I don't
15 quite understand what his argument is.

16 Separate from that, they said, well, during
17 the deposition of Dr. Fuchs, he admitted a lot of
18 things which, frankly, are not good for them. We
19 didn't put it in expert because we relied upon
20 Fuchs admitting things, saying the opposite of
21 what he had said, like the data server farm, for
22 example. So they put up Dr. Grindon to respond
23 to things that they probably should have
24 cross-examined Fuchs on in his deposition and

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 then submitted Fuchs' testimony. So they tried
2 to, I guess --

3 JUDGE CHERRY: Let's not theorize about why
4 they did things.

5 MR. MACEDO: Well, he said they did.

6 JUDGE CHERRY: Okay.

7 MR. MACEDO: He said they put it in in to
8 fill in the hole. I'm not theorizing. That's
9 what he said.

10 JUDGE CHERRY: Yeah, but whether they were
11 upset about Fuchs or not, that's -- let's focus
12 on why -- why should we consider this relevant?
13 Why is what he said about these patents relevant
14 to this proceeding?

15 JUDGE ZECHER: I think I understand the
16 whole, you know, who relied on what in what
17 situation with Dr. Grindon. I'm just trying to
18 figure out why his testimony in the related --
19 not related, not even related, these Google cases
20 that you just talked about going to the Supreme
21 Court is relevant to this proceeding.

22 MR. MACEDO: Well, if Google, the
23 petitioner, offers testimony that says the patent
24 says X, and then they offer in this -- in this

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 proceeding different testimony that says the
2 patent says Y, then it is a relevant judicial
3 admission that they submitted a declaration of an
4 expert to say the opposite.

5 JUDGE ZECHER: But isn't it couched in
6 those specific circumstances? I'm sure Google's
7 involved in a lot of litigation and they have a
8 lot of experts.

9 MR. MACEDO: And they --

10 JUDGE ZECHER: So we're saying that any
11 expert they ever use in any proceeding that talks
12 about somewhat related patents, their testimony's
13 now pertinent to this proceeding which is based
14 on different prior reference combinations.

15 MR. MACEDO: No, that's not what we're
16 saying. This is one of their experts who they
17 even offer in this proceeding, not just to
18 respond to a declaration, but for affirmative
19 positions to support their petition who was hired
20 by Google, paid money by Google to testify about
21 the very, identical reference that they're
22 relying on in this proceeding in order to say
23 what that reference means. And if you look at
24 VRE-DX 47, I think that's very important. This

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 comes from Observation Number 1 in both the 1339
2 and, I believe, the 1338 proceedings.

3 JUDGE ZECHER: But, you know, I've looked
4 at your observations. I'm just more interested
5 in his initial testimony in the other proceeding.
6 He was talking about the other Di Bernardo family
7 of patents. Is he specifically talking about
8 this particular Di Bernardo reference --

9 MR. MACEDO: Yes.

10 JUDGE ZECHER: -- or are we just imputing
11 that --

12 MR. MACEDO: No. The deposition --
13 (Overlapping voices.)

14 JUDGE ZECHER: -- on here?

15 So where is that testimony?

16 MR. MACEDO: In the observations, we gave
17 it to you. But in the depositions, it
18 point-blank says that. It point-blank recognizes
19 the same. You can look at the patent numbers.
20 We gave you the corresponding patents that match
21 the declaration. It's the exact, same family.

22 JUDGE CHERRY: I mean, I think what --

23 MR. MACEDO: It's the same disclosure.

24 JUDGE CHERRY: Well, we should focus on

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 those. What -- you know, we're in an obviousness
2 analysis. What elements they relying on from Di
3 Bernardo?

4 MR. MACEDO: Here's the issue.

5 JUDGE CHERRY: Well, what elements are they
6 relying on Di Bernardo for?

7 MR. MACEDO: It depends upon which case.

8 But what they want to do is they want to modify
9 Di Bernardo in a way that makes it

10 computationally more complex. Whether it makes

11 it computationally more complex because they're

12 doing image or something else, I'm not going to

13 argue with you about it, but they're making it

14 computationally more complex. The whole point

15 which Dr. Grindon drew out beautifully and agreed

16 in his deposition is that whether you read Di

17 Bernardo today, yesterday, three years from now,

18 five years ago, you know that they offered a

19 simple solution to avoid computational

20 complexity. An obviousness argument which seeks

21 to add computational complexity against the

22 teachings of Di Bernardo which says, Don't add

23 computational complexity; we want something

24 simpler, not more complex. We are willing to

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 have worse quality images. We are willing to
2 have distortion rather than have computational
3 complexity -- would not be obvious to add in an
4 icon add this, add these other things like
5 they're suggesting. It wouldn't be obvious to
6 modify Di Bernardo to add in both pre-processing
7 and post-processing when it teaches you, do one
8 or the other. It wouldn't be obvious to add in
9 everything that they want to add in to Di
10 Bernardo, it wouldn't be obvious to do that. And
11 to me, I think that it's not only because Google
12 said it and Dr. Grindon. It's because Dr.
13 Grindon was right.

14 JUDGE CHERRY: Okay. Now, I guess we'll
15 focus -- let's focus on that. Why -- why were
16 these -- now, my
17 understanding was that they were starting with
18 Fruh and they're modifying Fruh to incorporate
19 elements with Di Bernardo.

20 MR. MACEDO: Well, it depends which -- it
21 depends which one. They use Di Bernardo in all
22 four.

23 JUDGE CHERRY: So, I think
24 you probably have a better argument in terms of

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 modifying Di Bernardo. But in terms of modifying
2 Fruh, if you're taking elements from an already
3 computationally complex system, can't you borrow
4 elements from a less computationally complex
5 system?

6 MR. MACEDO: Okay.

7 JUDGE CHERRY: Especially when it's related
8 to just generalized processes.

9 MR. MACEDO: Fruh, but the whole point of
10 Fruh -- and Fruh has its own teaching against
11 computational complexity, okay? The whole point
12 of Fruh is that they're not using a camera to
13 generate the point cloud. They're using
14 scanners.

15 Di Bernardo is using a camera to make
16 composite images. Why would you substitute the
17 camera of Di Bernardo with the scanners of Fuchs
18 when Fruh tells you that the scanners do a great
19 job? It makes no sense.

20 JUDGE CHERRY: Well, there's
21 tradeoffs. You may want -- you may want
22 other elements. That's
23 what we're trying to figure out is why.
24 They put forward this rationale. What

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 evidence? So you put forth the teach away based
2 on this. Do you have any other evidence that the
3 rationale that they've offered may be for the
4 tradeoff they're proposing wouldn't be
5 reasonable?

6 MR. MACEDO: Well, how do -- how do you
7 incorporate the composite images of Di Bernardo
8 into Fruh? I don't see how you can do it. It
9 makes absolutely no sense. And conversely, for
10 Kawabe with Fruh -- with Di Bernardo, that
11 clearly is doing exactly the opposite of what
12 they taught. They said, here's two mutually, you
13 know, exclusive embodiments. Do one or the
14 other. And they're saying, Let's do both which
15 would certainly be the exact opposite of avoiding
16 the computational intensity in everything else.
17 So that doesn't make any sense there.

18 They add Di Bernardo to the -- in the first
19 petition to Iochi for dependent claims on -- I'm
20 not going to really spend time arguing that here.
21 I just -- it just doesn't make any sense to me.

22 JUDGE ZECHE: I understand what you're
23 saying, but I'm still struggling to understand
24 the relevance of his initial testimony in the

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 Google proceeding that you said went to the
2 Supreme Court. I'm looking exactly at what you
3 cited to in the 341 case, and bear with me. You
4 cited to this exhibit, 2002, Paragraph 39. You
5 cited to this on page 20 of your patent owner
6 response. And if I'm looking at the correct
7 paragraph you cited to, it says -- I'm going to
8 read it verbatim. The patents in suit, in
9 seeking to improve upon the so-called
10 computational amount -- intensive and cumbersome
11 methods of forming composite images in the prior,
12 teach a single way to form composite images that
13 seek to minimize this computational burden. This
14 process is illustrated by Figure 2-C, Paragraph
15 50 below. If I go to Paragraph 50 below, it's
16 talking not about Di Bernardo. It's talking
17 about Verde patents, the Verde patents. So --
18 MR. MACEDO: Verde is Di Bernardo.
19 JUDGE ZECHER: Verde is the --
20 MR. MACEDO: Verde's the patent owner for
21 Di Bernardo.
22 JUDGE ZECHER: So these are general --
23 okay. So now -- that helps explain what you
24 taught.

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 MR. MACEDO: Sorry.

2 JUDGE ZECHER: But we have these general
3 statements about the Di Bernardo patent. I don't
4 see new statement in and of itself is relevant
5 to, for example, the asserted ground based on
6 Fruh and Di Bernardo. I just -- I'm struggling
7 to understand its relevance.

8 MR. MACEDO: Well, I will tell you it's
9 mostly relevant in the 1339 proceeding.

10 JUDGE ZECHER: Okay, but I still have a
11 argument before me in the 1331.

12 MR. MACEDO: I understand. And I -- and
13 with respect to the 1341, I still think that if
14 you go to the alignment argument, they don't
15 offer any cure for that in any of the grounds.

16 JUDGE ZECHER: Okay.

17 MR. MACEDO: So, I mean, I think the
18 alignment argument is a way of avoiding all those
19 headaches.

20 JUDGE ZECHER: Understood.

21 MR. MACEDO: But I do appreciate your
22 point.

23 JUDGE ZECHER: You know, you have roughly
24 five minutes left. We'll give you a little extra

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 time if you need some more because we've asked
2 you so many questions.

3 MR. MACEDO: Listen, I'm happy to address
4 anything that you guys want or sit down if you
5 don't want me to. But my goal is to help you.

6 So let's talk, hopefully very briefly,
7 about the '800 patent. If you look in our
8 response at page 12, you'll see a beautiful
9 picture from the patent that we annotated.

10 JUDGE ZECHER: In your response on page 12?

11 MR. MACEDO: Yes, the patent owner
12 response.

13 JUDGE ZECHER: I'm there.

14 MR. MACEDO: Okay. So you have three
15 different position that are involved. One
16 position is the path of the camera location, that
17 line that we were referring to, and that's where
18 the position of the camera is. The second
19 position is the image location which at ribbon of
20 the picture going in there. And the third
21 location is the location of the subject. And
22 when you look at the quotes that Mr. Almeling was
23 reading earlier from this patent, every, single
24 one of them is talking about how you figure out

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 the location of the subject.

2 Now, one way that you can figure out the
3 location of the subject is by using the camera
4 position in conjunction with other things. But
5 it still is requiring you to have those other
6 things, and they still have to point to it in the
7 petition. And the camera position by itself is
8 not sufficient. You need more information, and
9 they need to show that inherently or expressly,
10 they're calculating that position of either the
11 image, the ribbon, or the subject. You can
12 choose whichever one you want. I happen to think
13 the subject is right. The claim construction in
14 the institution decision said it was the image.
15 The image is what is shown as the ribbon view in
16 that picture. Nothing that he said contradicts
17 that.

18 When you look at the claim itself, if you
19 go to the next element of it -- it's always hard
20 because I don't have it here -- it talks about
21 the positional data. It talks about to associate
22 the composite image with a particular portion of
23 the subject based upon the positional data. If
24 the positional data doesn't give you more

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 information than the information of where the
2 camera is, you can't do that. That claim can't
3 be achieved. So unless the petition shows that
4 they have more information than just the position
5 of the camera, they did not meet this claim
6 limitation. And that's what our argument is.
7 And again, because the petition didn't show it
8 even if the reference otherwise has it, it's too
9 late for this petition. We haven't had an
10 opportunity respond to that.

11 Any questions?

12 So one last comment. I want to talk about
13 watermarks, and then I'll be done.

14 JUDGE ZECHER: Okay.

15 MR. MACEDO: Okay. So our point about the
16 Element 1.5 of the Claim 1 of the '181 patent is
17 a different point. It's not about the desired
18 image format. You know, we disagree with them,
19 but I'm not going to waste your time arguing that
20 right now. You have our briefing on that.

21 Our point is, first of all, that conversion
22 means it has to change. One of the comments this
23 the institution decision is, Can't it be the same
24 beforehand as it is afterwards? Well, then it

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 wouldn't be converted. It would be transferred.
2 By definition, conversion means there's a change
3 of state. So if it doesn't change it doesn't
4 converted. I just wanted to address that because
5 the institution decision --

6 JUDGE ZECHER: Well, wouldn't it change if
7 you added a watermark?

8 MR. MACEDO: Well, that's an interesting,
9 question, what's changing. But let's assume for
10 a second that you do change the format which I
11 don't agree with because I think that if it's a
12 .tif beforehand, it's a .tif afterwards, and the
13 format remains the same. I also think that in
14 the context of that, the applications is the
15 software that is running and what runs the MPG
16 Windows Viewer, what runs the .tif images in
17 Apple Viewer or whatever it is. That's what it's
18 talking about terms of application there. But
19 when you read what they actually say in the -- in
20 the claim charts, and if you turn to VRE 28, DDX
21 28, they never show that anything with a
22 watermark is provided in response to a query.
23 What they cite with respect to Element 1.5B is
24 that the service center provides data and results

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 analyses to the customers, including secured
2 images on a critical event, for example, an image
3 of an accident, blah blah. It doesn't say it
4 does it in response to a query. There's no
5 evidence showing that they're doing it in
6 response to a query. Whether you say response to
7 the query refers to transfer or whether you say
8 response to the inquiry refers to the conversion
9 and the transfer as we say, they still haven't
10 shown that they did at least the transfer in
11 response to a query. It's an automatic event.
12 If you look at what they say in 1.5A, they do
13 that upon detection of the occurrence of an
14 emergency event. That's not a query of -- that's
15 not a user query. That's the car got into an
16 accident. It detects it got in an accident, and
17 it watermarks it to weigh the other, secure image
18 for later on. For that reason alone, it's
19 defective, and they don't offer anything to cure
20 this. Okay?

21 If there's no other questions, thank you
22 for your time. I hope this was helpful. Do you
23 want me to submit something afterwards about the
24 preamble?

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 JUDGE ZECHER: We'll -- we're going to
2 confer after this, and if we want you to submit
3 something, we'll enter an order.

4 MR. MACEDO: Okay. And I assume we'll get
5 to respond to whatever's submitted.

6 JUDGE ZECHER: We'll outline details.

7 MR. MACEDO: We're happy to do that.

8 JUDGE ZECHER: I'm not saying we're going
9 to ask you to do that.

10 MR. MACEDO: I don't mean to imply that you
11 did. I'm just making sure it's clear if you want
12 it, we'll be happy to address that. And if you
13 don't, we're sure that your research will show
14 you whatever the law is. Thank you.

15 JUDGE ZECHER: Thank you.

16 MR. ALMELING: So give your Honors a road
17 map of where I plan to go to insure that I
18 address the questions that you would like me to.
19 I will begin addressing server farm. Going to
20 address the needs plus function argument. I will
21 address the alignment argument. Fourth, I will
22 address the Claim 5 360-degree argument. Fifth, I
23 will address the Di Bernardo doesn't disclose
24 mutually exclusive embodiments argument. And

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 finally, I will discuss the Dr. Grindon argument.

2 I do not plan on discussing the positional data

3 argument because I think we went over that in

4 depth in the opening, as well as the end response

5 to the query for the same reason. Do those six

6 arguments address your Honors' concern? Would

7 you like me to add any to that list?

8 JUDGE ZECHER: Yeah. I would actually like

9 you to just move on past the server farm argument

10 and go to the means plus function argument, if you would.

11 MR. ALMELING: Yes, sir. That brings us

12 down to five.

13 All right. Starting with the means plus

14 function argument, so the way that I understand

15 their argument is that the structure of the means

16 plus function claims, 7 through 10, have to be

17 the specific open-source software programs

18 identified in the spec. And so let me identify

19 them: MENCODER for Claim 7; OpenGL and Graphic

20 Magic for Claim 8; GL for Claim 9; Map Server for

21 Claim 10, and those are the four.

22 To begin with, this argument's moot. As

23 the Board correctly addressed in the institution

24 decision, the analysis doesn't change if you use

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 our construction or their construction. It's
2 shown -- the prior art discloses all of the
3 limitations. Therefore, the Court doesn't even
4 need to get into the difficult of construing
5 these claims. But if it does, the correct
6 construction is the one advanced by Petitioner
7 and not Patent Owner for multiple reasons.

8 JUDGE CHERRY: I don't think that it's
9 quite a construction issue. They seem to be --
10 as best as I can understand it, they say that
11 there is, the Aristocrat and that WMS
12 Gaming line of cases have said that for software programs,
13 it's not just enough for a
14 general-purpose computer, but it has to have an
15 algorithm. And they're saying you didn't show --
16 their argument isn't so much a claim
17 construction, but it's saying that you have to --
18 what you have to show to show anticipation.
19 They seem to be contending that you have to show
20 this algorithm. And what is your response to
21 that?

22 MR. ALMELING: Two responses, your Honor.
23 First, it is a claim construction issue because
24 they say the claim construction should be limit

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 just to that one algorithm, and that's wrong.

2 I'll talk about it in a second.

3 JUDGE CHERRY: Okay.

4 MR. ALMELING: More to your second

5 question, just like you, I was surprised that the

6 argument that they were taking, that you had to

7 disclose that in order to create an anticipatory

8 case. I know of no such case law. The case law

9 is clear, in fact, that you need to find that

10 structure and its equivalents. What our expert

11 did and what he testified in his deposition

12 was -- I looked and I -- of course, I didn't look

13 to see whether or not I used the word MEncoder in

14 the prior reference because that doesn't matter.

15 I looked at the structure to see if it discloses

16 the same thing. And yes, it did.

17 But going back to the claim construction

18 argument because I do think this is important. I

19 hope this also answers your question. So they

20 have a very narrow claim construction right now.

21 The structure in Claim 10, for example, equals

22 Map Server. That's not the original construction

23 that they gave. I direct your Honors' attention

24 to the patent owner's preliminary response which

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 for your Honors' record is Paper Number 9 in the
2 1339.

3 MR. MACEDO: Your Honors, I think that
4 there's a misstatement of our position here. It
5 might help to clarify it before you get too deep.

6 JUDGE ZECHER: Let's hear him out.

7 MR. MACEDO: Okay.

8 JUDGE ZECHER: Listen for a time right now.
9 You've had your opportunity.

10 MR. MACEDO: I appreciate it, but our
11 position isn't that it's the same. It's the same
12 or the equivalent is what we said.

13 JUDGE ZECHER: I think he did use the word
14 equivalent. Let's hear him out.

15 MR. MACEDO: Okay. Sorry, your Honor.

16 MR. ALMELING: Turning to to the
17 preliminary response, the patent owner construed
18 these terms over three pages, beginning on page
19 22. Claim 7, they construed it to be, quote,
20 software, for example, based on open source
21 programming tool MEncoder, operable with
22 processor, end quote, to do various things.
23 Claim 8, they said a render program, for example,
24 open source programming tool or tool suite,

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 OpenGL and Graphics Magical -- Graphics Magic
2 operable with the processor, end quote, to do
3 various things. Nine, on the next page, quote,
4 Software operable with a processor to perform
5 range calculations from latitude and longitude
6 position of the subject property and video
7 segments that contain images where the property's
8 not new which, incidentally, doesn't mention G at
9 all until the next sentence which described an
10 example. And the next page, Number 10, quote,
11 software operable with a processor to calculate a
12 set of relative positions by combining the
13 positions of landmarks with the GPS data using
14 interpolation techniques, end quote.
15 Importantly, none of these are limited to the
16 open source software programs that they then
17 argue in the response. And at best, they don't
18 even recite them. I would argue that if we're
19 looking at what the broadest reasonable
20 interpretation is, the patent owner admitted in
21 the preliminary response it cannot be that broad.
22 Additionally, the Patent Owner in its
23 infringement contingents -- and this was Exhibit
24 Number 1,007 in 1339 -- and I'm not going to go

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 through this here, but I guarantee you it doesn't
2 use the words MEncoder, OpenGL, Map Server in
3 mapping the Google software. It says Google
4 software performs these various functions.
5 Patent Owner has repeatedly taken the position
6 that these terms are broadly construed. The
7 newfound construction that they're limited to a
8 GDOL is simply not accurate. It's also
9 inconsistent with the specification. In each of
10 the specification descriptions of these, they
11 explicitly refer to them as an example. In
12 short, the proper construction of these and the
13 proper applications of these for prior art
14 analysis is not the newfound, narrow
15 construction. It's what the specification says.
16 They're examples that perform these functions.
17 You know, Google took the position that these are
18 indefinite. But to the extent that they are
19 definite, then they have the following structure.
20 Then Google applied that structure. That is
21 sufficient under Section 20121 analysis as well
22 as under Section 102 and 113. That was the
23 analysis that was performed.
24 Unless there are any questions about mutual

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 assumption, I'll move on to the alignment
2 argument.

3 So I -- I apologize. Judge Zecher. Is
4 that --

5 JUDGE ZECHER: Zecher.

6 MR. ALMELING: So Judge Zecher asked the
7 question, Is this the overlapping argument?
8 Because I had the exact question. When they
9 started making this argument, I was flipping
10 through my notes trying to figure out what I
11 would say because I didn't know what he was
12 saying until I realized, yes, this is exactly the
13 overlapping argument. They just didn't want the
14 use the word overlap this time. But the
15 arguments I gave earlier still apply.

16 But in addition, let me narrow in on the
17 word alignment because there's a lot of argument
18 here. So Patent Owner argues now that alignment
19 means, I wrote it down, coordinating, apparently.
20 It's a new construction that was advanced in
21 their argument. But let's focus on the claim
22 language aligning. In particular, I would like
23 to direct your Honors' attention to Exhibit 1,012
24 of the 1440 IPR because the position is that

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 Petitioner never explained what aligning is. J.

2 JUDGE ZECHER: Isn't the alignment argument
3 in the 1341?

4 MR. ALMELING: Yes, your Honor. I
5 apologize.

6 JUDGE ZECHER: So is it in 12, 13, 14?

7 MR. ALMELING: Yes, it should be. It's
8 Dr. Grindon's declaration.

9 JUDGE ZECHER: Okay.

10 MR. ALMELING: You're right, your Honor.
11 Exhibit 102, and direct your Honors' attention to
12 Paragraph 1. Dr. Grindon opines, quote, Fruh
13 plainly describes a conventional practice of how
14 to align the non-overlapping vertical scans using
15 the pose of the laser scan and camera images, and
16 it cites to Fruh page 6 which says, Since the
17 vertical 2-d scans are parallel and do not
18 overlap, it is necessary to determine the pose of
19 successive laser scan in camera images in a
20 global coordinate system with centimeter or
21 sub-degree accuracy in order to construct a
22 consistent model. That describes we're taking
23 the scans, and you're doing that at a very close
24 proximity to the other scans. And because

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 that -- you're doing that, you're able to
2 establish the coordinates of when the scan was
3 taken versus when the successive scan was taken.
4 In doing so, you can match it up.

5 Fruh gets even clearer on this point. I'd
6 like to direct your Honors' attention to Fruh or
7 Froo which is Exhibit 1,004, also on 1441, page
8 12. Fruh describes here that, quote, We
9 calibrate the camera for our measurements and
10 determine the transformation between its
11 coordinate system and the laser coordinate
12 system.

13 JUDGE ZECHER: Excuse me. What column are
14 you in?

15 MR. ALMELING: I'm sorry, your Honor. It's
16 the top of page 12, right-hand column, the
17 paragraph that begins Furthermore.

18 JUDGE CHERRY: Is this Fruh's numbering or
19 your numbering?

20 MR. ALMELING: Fruh, page 16, upper
21 left-hand corner, our numbering 12.

22 JUDGE ZECHER: Okay. Thank you. You said
23 the paragraph again was the top right-hand corner
24 paragraph?

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 MR. AMELING: Yes, your Honor. It's where
2 it begins Furthermore.

3 JUDGE ZECHER: Go ahead.

4 MR. ALMELING: So here, Fruh describes,
5 quote, We calibrate the camera before our
6 measurements and determine the transformation
7 between its coordinate system and the laser
8 coordinate system. Therefore, for every
9 arbitrary 3-D point, we can compute a
10 corresponding image coordinate and map the
11 texture onto the mesh triangle which is, of
12 course, created by the 3-D scans. In other
13 words, the alignment analysis in Fruh is pretty
14 simplistic. You take a series of scans. You
15 know where they're taken because they're aligned
16 with a coordinate system. You map the coordinate
17 system to the image coordinate system because you
18 know that, as well, they are immediately aligned
19 next to each other. In fact, by definition,
20 they're sort of aligned one after another.
21 That's what Dr. Grindon was explaining. That's
22 what Fruh explains. That's what we explained in
23 the petition, all of which establish that Fruh
24 discloses the alignment. The only way it doesn't

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 import the overlapping limitation which of course
2 we shouldn't --

3 JUDGE ZECHER: So your position is Fruh
4 does have a series of scans. It's not one,
5 single scan. There is a start and stop. It's
6 spliced in some way, correct?

7 MR. ALMELING: Correct. Fruh describes how
8 to scan every certain amount of time, and you can
9 -- and Fruh says that you can vary that. And
10 because you do it with centimeter, sub-centimeter
11 precision, there's a whole lot of scans. You
12 then take those scans which are, obviously,
13 orthogonal to each other, but also successive to
14 each other. And that's how you construct the 3-D
15 model.

16 Any other questions on the alignment point?

17 The fourth argument I'm going to address is
18 the Claim 5 of the '181, 360-degree argument. On
19 both of these, the Board has considered them and
20 rejected them for the analysis provided in the
21 petition and the accompanying declaration, and
22 the Board did so for good reasons.

23 The patent describes a hexagonal camera
24 array, 6. Di Bernardo does a dodecahedron or 12.

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 It's hard to think that 6 creates you 360, but
2 somehow, a dodecahedron doesn't. It's not
3 inherent that it would rather explicitly
4 disclose. We make no such inherence in the
5 argument because there is no need. Likewise, on
6 Yoichi, it describes 4, and it explicitly does in
7 the concept of the cardinal directions, front,
8 right, left, behind which combined create the
9 360-degree view.

10 But even if those references are not
11 sufficiently clear, the claim itself only
12 requires a functional recitation. It's, quote,
13 Camera units are arranged to provide a 360-degree
14 view. It doesn't say how that 360-degree view
15 was provided. It's not a hexagonal array. It's
16 any way you provide it. Fruh has it in 4. Di
17 Bernardo has it in 12. Either way, it's the
18 same.

19 Two more arguments, the incompatibility
20 argument and the Grindon argument.

21 On the incompatibility argument, Patent
22 Owner makes the position that Di Bernardo
23 discloses mutual exclusive embodiments. This
24 argument is misleading, it's wrong, and it's

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 moot. It's misleading because Dr. Grindon never
2 says they're mutually exclusive or inoperable.
3 He says they're alternative, and that's what they
4 are. They're different types of embodiments of a
5 way to take certain processing. One is going to
6 put it in the acquisition device. The other is
7 going to put it in the post-processing system.
8 It's also wrong. These [sic] so-called
9 alternative embodiment is actually only three
10 sentences long, and all it does is take a
11 certainly functionality and moving it someplace
12 else. Both embodiments still fully go through
13 all the steps. Both embodiments fully disclose
14 and anticipate the limitation. Dr. Grindon made
15 this clear in his declaration in which he said
16 that the description of what he said was
17 inaccurate. But finally it's moot. So --

18 JUDGE ZECHER: Doesn't that raise an issue
19 in the anticipation context if they are or, in
20 fact, as has been asserted here, you're citing
21 two different or separate embodiments?

22 MR. ALMELING: That goes to my third point,
23 your Honor, that this is moot. So we cite to
24 them, but the question is how. We cite to them

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 twice in our claim charts, both of which is an
2 example of storing drive-by data. We give an
3 example of ten other ways in which you store
4 drive-by data, including the main embodiment. In
5 other words, the alternative embodiment is only
6 used in the prima facie case to say, Here's a way
7 that you can store it. You can store it in the
8 alternative embodiment. Let's say that you took
9 that out completely. You still have the prima
10 facie case and the primary embodiment that says
11 you can store the primary embodiment. In other
12 words, these are not combined. They are two
13 embodiments, to be sure, but they're not combined
14 to create some hydra-headed system. Rather,
15 they're combined merely to show that you can
16 store it one, you store it in the other. The
17 argument is moot because it doesn't change our
18 position.

19 JUDGE ZECHER: So in other words, both
20 embodiments were cited which essentially teach
21 same thing, but they weren't -- there's no
22 collective teachings of both that you're relying
23 on to account for the single feature.

24 MR. ALMELING: That's exactly right, your

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 Honor. They independently teach and anticipate
2 the claim.

3 Final issue, Dr. Grindon. So the question
4 is, what is his relevance to this proceeding?
5 Why do we keep talking about Dr. Grindon?
6 Frankly, he was not relevant to this proceeding
7 at all. That's why Google did not contact him
8 originally. Goggle had --

9 JUDGE CHERRY: At the end of the
10 day, Di Bernardo does say, does have that
11 language about that he's -- that it's -- trying
12 to find an alternative to computationally
13 intensive ways. So Dr. Grindon does say that,
14 but he's merely saying what's in the reference.
15 So I think what would be most helpful to us is if
16 you focus on Di Bernardo and that
17 discussion, as filtered through
18 Dr. Grindon, I guess. But how does that -- is
19 that a teaching away? And why isn't it teaching
20 away? You know, why can we combine these two in
21 spite of that teaching in Di Bernardo?

22 MR. ALMELING: Yes, your Honor. And I'll
23 do that with the following preference of what Dr.
24 Grindon says about Di Bernardo. Doesn't change

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 what Di Bernardo says. They make an argument
2 that say Di Bernardo teaches away, and I'll
3 address that, and they make the gloss that says
4 Dr. Grindon says it teaches away. He, of course,
5 is just repeating what Di Bernardo itself said.
6 He didn't say anything new, and he provided a
7 second declaration that says, I didn't say
8 anything new, and it doesn't -- but because he
9 was providing a declaration, he also said a
10 couple other things like server farm.

11 Anyway, so that's what they do. They
12 create a gloss on the Grindon, Dr. Grindon. He
13 didn't do a gloss. Di Bernardo says what it
14 says.

15 So now, let's talk about what Di Bernardo
16 says. Di Bernardo says -- and I went through
17 this in a little bit of detail -- 3-D
18 reconstruction is a particular, specific thing
19 defined in Di Bernardo; dense sampling is a
20 specific thing defined in Bernardo, both of which
21 are ways that one can construct composite images
22 if one wants to. Dr. Grindon and Di Bernardo
23 itself says, 2000, I'm not going to use those
24 ways. Instead, I'm going to create a different

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 way. I'm going to create a way in which I drive
2 along the road, and I'm going to have a camera.
3 And the camera, I'm going to have an imaginary
4 camera behind that camera, and I'm going to
5 create a composite image. That is what Di
6 Bernardo discloses, and that's how it's used
7 throughout this proceeding. The fact that Di
8 Bernardo says, I'm going to do it that way which
9 is the anticipatory way as opposed to dense
10 sampling or 3-D reconstruction doesn't change the
11 prima facie case nor the analysis. All Di
12 Bernardo says is don't use these two ways to
13 construct composite image. We read composite
14 image in numerous ways throughout the petition.
15 What they're trying to do is to say, because you
16 don't use dense sampling in 3-D reconstruction,
17 that means you also can't do anything else
18 complex. That's laughable. All the nine ways in
19 which they argue it will not specific to the two,
20 arguably, ways in which Di Bernardo says, Don't
21 do this in 2000. So the bottom-line answer to
22 your Honors' question is Dr. Grindon's gloss on
23 this didn't say anything different than Di
24 Bernardo. Di Bernardo didn't say anything other

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 than, Don't use dense sampling in 3-D
2 reconstruction which is not the ways in which
3 proposed combinations are rendered.

4 JUDGE CHERRY: I think at one point, your
5 opponent suggested that Fraw or Fruh -- how do
6 you say it -- that it was doing dense sampling in
7 3-D reconstruction. And how do you respond to
8 that?

9 MR. ALMELING: Sure. I mean, we've gone
10 back and forth internally whether it's Fraw or
11 Fruh, and I haven't got it right in my head yet.

12 So Fruh is an interesting case because Fruh
13 is the primary reference that is being combined
14 with Di Bernardo. Therefore, Di Bernardo's
15 teaching away about what you should or should not
16 do is wholly irrelevant to that proposed
17 combination. But even if it was arguably
18 relevant, what we take Fruh for establishing and
19 what we take Di Bernardo to add to that is the
20 composite images. In other words, we take Fruh,
21 we have an already-created composite images. The
22 fact that the images may be created in Fruh using
23 3-D reconstruction and the fact that Di Bernardo
24 says, Well, don't use 3-D reconstruction, it was

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 like your exact question earlier where you said,
2 Well, it's already created because the technology
3 already exists. So the combination is not
4 actually even a teaching away, so it's not an
5 applicable argument to say that's one of the nine
6 in which they make. And that's why it's not
7 applicable.

8 JUDGE ZECHER: Do you think there's any
9 relevance into how Di Bernardo says
10 not to use 3-D reconstruction? In other words,
11 what I'm trying to get at, in discussing that in
12 the background invention section and not so much
13 in detailed description. So yes, in some ways,
14 it can be considering disparaging, but it is in the background
15 invention section. Do
16 you think that has any relevance in a teaching
17 away argument? Can you opine on that?

18 MR. ALMELING: I think it does, your Honor.
19 I think you're right. I think that teaching away
20 is a relatively stringent standard and what is
21 required, and describing what people did in the
22 prior art and how that differs from what you are
23 doing now doesn't rise to that level. The fact
24 that it is done in the context of a historical

IPR2014-01338 (Patent 7,389,181 B2)
IPR2014-01339 (Patent 7,389,181 B2)
IPR2014-01340 (Patent 7,929, 800 B2)
IPR2014-01341 (Patent 8,078,396 B2)

1 explanation only confirms that.

2 Thank you, your Honors.

3 JUDGE ZECHER: Judge Bunting, do you have
4 any more questions?

5 JUDGE BUNTING: No, I don't. Thank you.

6 JUDGE CHERRY: No.

7 JUDGE BUNTING: Thank you, your Honor.

8 JUDGE ZECHER: All right. So that
9 concludes today's hearing. Final written
10 decisions are due in February, early portion of
11 the February. If we need additional briefing on
12 the case law, we'll enter an order on that.
13 The panel can discuss that prior -- after this --
14 after we adjourn this hearing. But -- we appreciate the
15 parties'
16 participation in this proceeding. And as of now,
17 the hearing's adjourned.

18 (Whereupon, at 3:09 p.m., the hearing was
19 adjourned.)