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Case IPR2015-01147 Paper No. 25

Case IPR2015-01148 Paper No. 42

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Case IPR2015-01150 Paper No. 26

Case IPR2015-01151 Paper No. 26

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September 9, 2016

RECORD OF ORAL HEARING
UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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MICROSOFT CORPORATION and MICROSOFT MOBILE, INC.,

Petitioner,

vs.

GLOBAL TOUCH SOLUTIONS, LLC,

Patent Owner.

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Case IPR2015-01147 (Patent 7,994,726)

Case IPR2015-01148 (Patent 7,498,749)

Case IPR2015-01149 (Patent 7,329,970)

Case IPR2015-01150 (Patent 7,781,980)

Case IPR2015-01151 (Patent 8,288,952)

Technology Center 2800

Before: JUSTIN BUSCH (via video link); LYNNE E.
PETTIGREW; and BETH Z. SHAW, Administrative Patent Judges.

The above-entitled matter came on for hearing on Thursday,
August 4, 2016, at 1:14 p.m., Hearing Room A, taken at the U.S. Patent and
Trademark Office, 600 Dulany Street, Alexandria, Virginia.

REPORTED BY: RAYMOND G. BRYNTESON, RMR,
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P R O C E E D I N G S

(1:14 p.m.)

JUDGE PETTIGREW: Please be seated. Good afternoon, everyone. Thank you for bearing with us during the short delay.

This is a consolidated hearing for five cases, IPR2015-01147, 01148, 01149, 01150, and 01151. Petitioners are Microsoft Corporation and Microsoft Mobile, Inc. Patent Owner is Global Touch Solutions, LLC.

Each side has 90 minutes to argue, but don't feel that you need to use all 90 minutes. Petitioners have the ultimate burden of establishing unpatentability and will argue first. Patent Owner then will present its opposing argument. And then finally Petitioners may use any time they have reserved for rebuttal to respond to Patent Owner's argument.

Judge Busch is joining us by video from out of the Detroit office, or he should be joining us.

JUDGE BUSCH: I'm here and can hear and see you. I don't know if you can see me.

JUDGE PETTIGREW: You can see us?

JUDGE BUSCH: I can see the courtroom right now. I cannot see you and Judge Shaw. I can see the podium. That should be good enough, I think, for the proceeding.

1 JUDGE PETTIGREW: All right. Just one minute.
2 All right. We will proceed. We may have someone coming to
3 help us momentarily.

4 In any event, Judge Busch is joining us from
5 Detroit and won't have the benefit of the visual queues in the
6 room, so when you speak about an exhibit or a demonstrative,
7 please identify it with a page number or a slide number, and
8 please be sure to speak into the microphone for the benefit of
9 both Judge Busch and the Court Reporter.

10 Before we begin let's have counsel for each party
11 identify themselves and the party you represent for the record.
12 Petitioners?

13 MR. MURPHY: Your Honor, I'm John Murphy,
14 counsel for Petitioners.

15 MR. GOETTLE: Dan Goettle for Petitioners.

16 JUDGE PETTIGREW: Thank you. For Patent
17 Owner?

18 MR. MANDIR: Your Honor, William Mandir from
19 Sughrue Mion in Washington, D.C. representing GTS.

20 MR. KIBLAWI: Your Honor, Fadi Kiblawi
21 representing GTS.

22 MR. CRISTLER: Nathan Cristler representing
23 GTS.

24 MR. PARK: Peter Park for GTS.

25 MR. SHELTON: Brian Shelton for GTS.

1 JUDGE PETTIGREW: Thank you. Petitioner, you
2 may begin when you are ready. And how much, if any time,
3 would you like to reserve for rebuttal?

4 MR. MURPHY: May I please reserve 30 minutes?

5 JUDGE PETTIGREW: All right.

6 MR. MURPHY: Thank you.

7 JUDGE PETTIGREW: Do you have copies of the
8 demonstratives?

9 MR. MURPHY: Yes. Mr. Goettle will distribute
10 them.

11 JUDGE PETTIGREW: Thank you.

12 You may begin.

13 MR. MURPHY: Thank you. I will be presenting
14 the Petitioner's opening argument here, relying on the slides
15 that have just been handed out to you. I will refer to those
16 slide numbers as I go.

17 There is an outline on Petitioner's slide number 2.
18 Just to start with a very brief orientation, the first thing I will
19 do is give an overview of the obviousness theory that
20 Petitioners have put forward in these related IPRs, and I will
21 give a summary of what gleaning we can glean from the Patent
22 Owner responses. Across the five IPRs are the Patent Owner's
23 arguments just to help us tee up what the key issues are for
24 discussion today.

1 Once I get through the overview then I will dive
2 into the arguments first that affect all of the patents. There
3 are two key arguments that affect all of the patents. And then
4 I will move on from that to arguments that affect particular
5 patents, or more narrow arguments related to dependent claims
6 or particular patents.

7 Dan, can I have slide 4, please? All right. On
8 slide 4, this is just an overview of the challenged claims, the
9 five IPRs across the five patents. Each one involves
10 independent claims and dependent claims that are highly
11 related.

12 They all come from the same family of patents
13 which is why they are all so highly related and why the
14 arguments are tightly overlapping. So I will leave this here
15 for a reference in case we need it. Next slide, please.

16 On Petitioner's slide 5 I have here just a very high
17 level overview of the obviousness argument that is at issue
18 here. It involves the combination of two references. One that
19 we call the Jahagirdar and one that we call Schultz.

20 Jahagirdar, there is no dispute is 102(e) prior art
21 and there is no dispute that Schultz is 102(b) prior art. I have
22 on the slide 5 a copy of claim 1 of the '726 patent which is
23 from the 1147 IPR. I'm using that claim as just an exemplary
24 and I will use the '726 patent and '726 claim as the primary
25 examples as I go throughout.

1 Unless I specifically say otherwise, the
2 implication is that the arguments would really be the same for
3 everything else. And I hope I was able to do that in a way
4 that condenses the arguments helpfully.

5 In addition to the prior art status of Jahagirdar and
6 Schultz, another issue that is not in dispute is that the
7 majority of the claim limitations are found in the Jahagirdar
8 reference. Jahagirdar is a Motorola patent on a flip phone
9 which is depicted here on slide 5.

10 The only thing, according to Petitioner's
11 contentions, that is missing from Jahagirdar is a touch sensor.

12 So the obviousness combination is as simple as
13 taking the buttons, one or more of the buttons on the side of
14 Jahagirdar, which are denoted 144 in figure 2 shown on slide
15 5, and replacing those with one or more touch sensors. That
16 is the combination that we are offering.

17 There is no dispute that touch sensors were well
18 known in the art prior to 1998. So really the focus for the
19 obviousness combination tends to be on the motivation to
20 combine, which is what I will focus on.

21 Next slide, please. So that leads me into the
22 summary of the arguments we will be discussing. The first
23 one which affects all patents is the question of whether
24 Jahagirdar would have been modified to include a touch
25 sensor. So that's the fundamental motivation question.

1 The other argument that affects all of the patents
2 is whether Jahagirdar's keys 144 activated, which is claim
3 language in various forms, the first display 516. That is not
4 an issue of obviousness so much as an issue as what
5 Jahagirdar teaches.

6 Next slide, please. And, Dan, go to slide 8,
7 please. There are a couple of arguments on slide 8 that are
8 specific to the '726 patent. One of these is the question of
9 whether claim 4 of the '726 patent is satisfied. In particular
10 the requirement that there be activation or deactivation of a
11 product.

12 And, in addition, the '726 patent for claims 5
13 through 10 will have the issue of automatic deactivation after
14 a period of time, which is one that comes up in slightly
15 different forms in some of the other patents.

16 Next slide, please. On slide 9, with regards to the
17 '970 patent, in the '970 patent there is an argument that is
18 unique to the '970, which is whether Jahagirdar teaches the
19 luminous visible location indicator, which is in almost all of
20 the claims of the '970 patent.

21 And then, finally, for the '970 patent claim 5, on
22 slide 9, and also on slide 10 for the '952 patent claim 23, there
23 are the variants of the automatic deactivation argument.

24 All right. Slide 12, please. So to dive right into
25 the Patent Owner's arguments that affect all of the patents, the

1 first one is the motivation to combine. The question is
2 whether a person of ordinary skill in the art in 1998 would
3 have put a touch sensor on the side of the Motorola flip phone
4 in Jahagirdar. And that's the question.

5 And turn to slide 13, please. What we're asking of
6 a person of ordinary skill in the art is to plug in a known
7 component into a known device to achieve the advantages that
8 that known component was known to have.

9 That's all we're asking the person of skill to do,
10 which is exactly what the Supreme Court said in KSR is a
11 prototypical obviousness reasoning, and that's what we're
12 trying to apply here.

13 Next slide, please. This is just a snippet from
14 Petitioner's reply that summarizes as succinctly as we could
15 the basic backdrop of the obviousness combination. There
16 really is no dispute here that there is any implementation
17 challenge.

18 Touch sensors were known. The ones in particular
19 described in Schultz could have been put into the flip phone
20 of Jahagirdar, and there is no particular technical obstacle to
21 doing that. Instead, what the Patent Owner focused on were
22 the three specific motivations to combine that Petitioner
23 offered and the questions the Patent Owner raised about those
24 motivations.

1 Slide 15, please. So the three motivations offered
2 in the petition were to try to minimize accidental actuation, in
3 other words, accidentally activating those buttons on the side
4 of the phone and, second, to eliminate problems of
5 contamination and mechanical failures that might be present
6 in the buttons on the side of the Jahagirdar flip phone and,
7 third, a more general design concern, which is just to enhance
8 the convenience and aesthetics for the user, which draws from
9 the well known, decades old body of touch sensor art teaching
10 that touch sensors were something that people find attractive
11 and it is a cool design choice that you might want to try.

12 Next slide, please. I'll start with the first
13 motivation, which is the minimization of accidental actuation
14 of the buttons on the side of the phone.

15 Just to introduce a little bit of language here
16 through the deposition of Dr. Morley, who is Global Touch's
17 expert, and some of the papers, the declarations that were
18 filed around that same time, we started to use the language
19 “animate objects” and “inanimate objects.”

20 And the reason that comes up is in the petition
21 submitted by Microsoft, our expert, Dr. Horenstein, discussed
22 that one of the advantages of touch sensors, and as was
23 outlined in Schultz, is that you can reduce inadvertent
24 actuation of the device or the thing that senses human contact
25 by using a touch sensor, because actual skin contact is

1 required for a capacitance in order to activate that touch
2 sensor.

3 And Dr. Morley in his responsive declaration in
4 his deposition focused on inadvertent actuation by animate
5 objects, so, in other words, accidentally actuating the phone
6 with a finger instead.

7 So Global Touch's focus is on the actuation by
8 animate objects and our focus had been in the petition and
9 still is on inadvertent actuation by inanimate objects.

10 There is no dispute, importantly there is no dispute
11 in this record, and Dr. Morley agrees, that by substituting the
12 touch sensor of Schultz into the flip phone of Jahagirdar, you
13 would actually be reducing inadvertent actuation by inanimate
14 objects, in other words, the phone being in your pants or bag
15 being knocked around the table.

16 So those types of inadvertent actuations are
17 reduced and improved. And he said as much in his declaration
18 here on slide 16, and on slide 17 he testified the same. I
19 asked directly: Wouldn't it actually alleviate the problem
20 with respect to inanimate objects? And he confirmed that,
21 yes, it would.

22 So the legal question here, which is teed up on
23 slide 18, the legal question here is what does it mean? So
24 what does it mean when you have two possible design

1 choices? You have buttons and you have touch sensors. Each
2 one has pros and cons.

3 According to the Patent Owner's theory, there is
4 particular advantage to having a physical button and that it
5 avoids inadvertent actuation by a finger. And according to
6 our theory, and admittedly by their expert, that having a touch
7 sensor avoids, reduces inadvertent actuation by inanimate
8 objects.

9 Well, the law is that that has no effect on
10 obviousness. So we have offered a motivation to combine and
11 that's a legitimate basis. I quoted some of the law that was in
12 our briefing here on the slide.

13 The essential point to take away from it is that it
14 is a tradeoff, under Patent Owner's theory. If it is true that
15 the touch sensors cause a problem with inadvertent actuation,
16 then at worst it is a simple tradeoff.

17 A good example, I think, of these cases is the
18 Apple vs. Samsung case which was decided in February,
19 February 26th, 2016. And in that case, which was an appeal
20 from District Court, the Federal Circuit held as a matter of
21 law, in spite of a jury verdict, they held as a matter of law
22 that claims were obvious directed to the slide to unlock
23 feature that I think probably everyone in this room is familiar
24 with on phones.

1 And the prior art had some different examples of
2 ways to unlock touch screens. And the prior art reference --
3 and this is something that Apple had relied upon -- the prior
4 art reference said that the slide, the slide to unlock, was an
5 inferior choice, wasn't a good choice.

6 And the Federal Circuit said, well, that is not
7 evidence of teaching away, that's a quote, "not evidence of
8 teaching away." They said, sure, it is fine, there may be some
9 inferiorities, there may be some disadvantages of what you are
10 proposing would have been obvious, but that's not a reason for
11 it not to have been obvious.

12 Another way of putting it is a design solution does
13 not have to be the best design solution, it does not have to be
14 without flaws, and it does not have to capture all of the
15 advantages of the references in order to have been obvious.

16 So we think under the correct law the admitted
17 facts on obviousness show that there is a motivation.

18 Slide 19, please. Just as a, I think, a follow-up
19 and a backup point to that, and a little bit of a reality check,
20 so what happens if you inadvertently actuate the buttons on
21 Jahagirdar?

22 So there are three buttons on the side, the buttons
23 144 -- there is 146, 148 and 150. 146 is the backlight. 148, it
24 doesn't say in the patent what it does, some other function
25 presumably left for the future to determine. And 150 is what

1 activates the top display, what we have called the visible
2 indicator.

3 And if those things were to be actuated by
4 accident, by touch of the human finger, what would happen?
5 Well, it wouldn't accidentally hang up your phone call. It
6 wouldn't accidentally send the call to voicemail. It wouldn't
7 do anything particularly bad. All it would do was light up the
8 backlight or activate the top display, which Dr. Morley in his
9 deposition admitted -- once it was pointed out that that is all
10 that would happen -- he admitted, oh, that wouldn't be a
11 detriment to the operation of the phone.

12 So even the purported disadvantage that Patent
13 Owners are relying on, their own expert said was not much of
14 a disadvantage at all.

15 JUDGE PETTIGREW: But how does that cut with
16 regard to your original argument, which is to minimize
17 accidental actuation, if with the original buttons, accidentally
18 pushing one of those buttons, has essentially no adverse
19 effects, then why would a person of ordinary skill in the art
20 change that in the first place?

21 MR. MURPHY: It is a simple design choice. And
22 you might do it for either of the other two motivations to
23 combine that we offered that I'm about to discuss. And you
24 might do it because you could do it either way and you are

1 trying to differentiate yourself in the market and there is no
2 reason not to.

3 A final point on this is Dr. Horenstein in his
4 declarations, in both of his declarations, his opening
5 declaration and his reply declaration, testified as to a variety
6 of ways that the touch sensor could be designed in order to
7 alleviate any potential problems with inadvertent actuation by
8 the finger.

9 Next slide, please. The next motivation is the
10 reduction of contamination and mechanical failures, which is
11 an advantage of touch sensors that was long recognized in the
12 art.

13 Dr. Morley, Global Touch's expert, agreed in the
14 testimony that is shown here on slide 20, just asked generally,
15 well, why would one want a touch sensor in something like an
16 elevator? And he agreed that, well, it would probably be less
17 maintenance, less movement. Mechanical things break.
18 Touch sensors don't.

19 And that is completely consistent with the prior
20 art, the written prior art, as well as Dr. Horenstein's
21 testimony. Okay, so what is Global Touch's argument? Slide
22 21.

23 What Dr. Morley says is, okay, yeah, touch sensors
24 are fine. They do improve upon mechanical switches in that
25 way, but there is another way to achieve that advantage that is

1 better. So Dr. Morley says, instead of using touch sensors,
2 you would use membrane switches.

3 According to Dr. Morley, membrane switches offer
4 the advantages of reduction in contamination and mechanical
5 failures but they are not susceptible to inadvertent actuation.
6 Next slide.

7 That argument for what it is, even if it is accepted,
8 doesn't really have any impact on the obviousness
9 determination for exactly the same reason I just discussed.

10 I think what all Dr. Morley did was give a pretty
11 good reason why it would also have been obvious to use
12 membrane switches on the Jahagirdar phone, but that doesn't
13 mean it wouldn't have also been obvious to use touch sensors.
14 So it is the exact same --

15 JUDGE BUSCH: Counsel?

16 MR. MURPHY: Yes.

17 JUDGE BUSCH: Is a membrane switch a type of
18 touch sensor switch?

19 MR. MURPHY: No, I think a membrane switch is
20 a type of -- I think it is a type of button that lives underneath
21 a plastic membrane.

22 Dr. Morley testified that -- and I actually don't
23 know if this is true -- but what Dr. Morley testified is that the
24 buttons on the side of most phones that are in use today are

1 membrane switches. So they have kind of a clicking feel to
2 them but they are also sealed.

3 So that was his testimony, which there is no
4 particular reason to dispute it, because even if it's all true,
5 really we don't think it matters.

6 JUDGE BUSCH: Thank you.

7 MR. MURPHY: And let's go to slide 23, please,
8 for the last motivation. The last point that Dr. Horenstein
9 made in his opening declaration was sometimes you put touch
10 sensors on something just because it is cool. People think it
11 is kind of appealing.

12 And there was some prior art that was submitted to
13 illustrate this point coming from different fields, phones that
14 were not flip phones, a different kind of phone, lamps, other
15 types of products, you might put a touch sensor on just
16 because it is appealing and advantageous in those particular
17 contexts.

18 And there might be a very good reason to put a
19 touch sensor on a flip phone just because it is aesthetically
20 pleasing. Dr. Morley didn't have anything to say about this in
21 his declaration. He skipped over this, as illustrated here on
22 slide 23.

23 And on slide 24 we continued with the elevator
24 hypothetical, and I said, well, if you like these membrane
25 switches so much, why not just use them on an elevator? And

1 he said, oh, well, you know, there is aesthetics where people
2 might use the touch sensor because it is sexier, you know,
3 somehow has advantages beyond those to an engineer.

4 And I think that is exactly the point Dr.
5 Horenstein was trying to make. It is just a design choice that
6 might have some appeal in the consumer products field. Slide
7 25, please.

8 I will turn from there to the question of activation.
9 Next slide, please.

10 Slide 26, I have printed on this slide a copy of
11 claims 1 and 27 from the '726 patent, just to illustrate where
12 the activation language is found in these particular
13 independent claims.

14 And for the Board's reference, on slides 26
15 through 30, are all of the claims from all five patents, the
16 independent claims that have language on the activation of a
17 visible indicator in case the Board would like to refer to
18 those.

19 From the point of view of the argument that Patent
20 Owners made, it falls out really the same in every one of these
21 claims. There is no significant difference whenever the
22 activation language is used.

23 Slide 31. In the petition, when Dr. Horenstein laid
24 this out, the argument that he made and that was accepted in
25 our petitions was the buttons on the side of the phone, in

1 particular button 150, that is what activates the top display.
2 So the top display in slide 31 in figures 1 and 2 of Jahagirdar
3 is enumerated 130.

4 In addition, there is a circuit diagram or block
5 diagram in Jahagirdar that is figure 5. And in that diagram
6 the top display is denoted 516. So 130 and 516 are the same
7 thing. I just point that out for your convenience in reading
8 Jahagirdar.

9 And, in addition, there are other parts. For
10 instance, in figure 8, the block diagram, the logical flow chart
11 where it refers to the top display is the first display. So if I
12 have this right -- I think I do -- 130, 516, and first display are
13 all the same thing.

14 All right. So what Dr. Horenstein said is, I have
15 the phone here, it is closed as displayed on the right on slide
16 31, and if the user presses button 150, that causes new visual
17 information to show up on display area 130.

18 And that's what Dr. Horenstein testified was
19 activation. You press the button, it shows the visual
20 information, and you have activated the top display. That is
21 the visible indicator.

22 Next slide, please. Global Touch for their part, in
23 their arguments, they are focused on an embodiment where
24 information is displayed automatically when the lid of the

1 phone is shut. So you snap it closed, the lid of the phone, and
2 then information is displayed right away on top of the phone.

3 And Global Touch says, well, that's activation and
4 once it is activated you can't activate it again by pressing the
5 button because it is already activated. But they completely
6 ignore in their Patent Owner response, and I guess we will
7 hear today what they think about it, but they completely
8 ignored the language that's highlighted in blue here on slide
9 32, which is an alternative embodiment.

10 There when the phone is closed it says:
11 Alternatively, the status information may include little or no
12 information, where display area 130 is cleared.

13 So that means you close the phone, the display is
14 still off, there is nothing on it, and then you press the button
15 on the side of the phone and, kapow, it displays the visible
16 information.

17 And so that is, I think, without question, even
18 under the claim construction that's being offered by the Patent
19 Owners, that is activation of the top display when you press
20 the button on the side.

21 And I think as a very first pass, our contention is
22 that there really is no reasonable claim construction of the
23 activation, of the term activation, that would exclude the
24 embodiment that is shown in blue on slide 31.

1 JUDGE PETTIGREW: Is there anything in the
2 specification of the patents at issue that defines what activate
3 means or deactivate?

4 MR. MURPHY: I wouldn't go so far as to say
5 defines, but there is some insight you can get from the
6 specifications. And just to be clear, I'm prepared to answer
7 that question, but our position, Patent Owner's position is that
8 the claim term doesn't need to be construed. If it were to be
9 construed as Patent Owner suggests, which is turn on or turn
10 off, activate/deactivate means turn on or turn off, I don't
11 really think that changes anything because when the display is
12 blank, and then you press the button and it starts displaying
13 something, you have turned it on.

14 So with that said, there are I think some helpful
15 insights from the patent. I'm going to be referring to the '726
16 patent in answering your question, Your Honor, but it is the
17 same specification for all of the patents.

18 The first observation I would make is the word
19 "activate" is used quite loosely in these patents, and it is
20 perhaps appropriate because the word activate is kind of a
21 general concept. You know, something can be activated in
22 just normal parlance in a variety of ways.

23 So as a simple example, in the '726 patent -- let
24 me just turn to the first one I see -- in column 3 of the '726
25 patent on lines, roughly, 20 through 25, it talks about repeated

1 activations of a switch. And I will explain why this is
2 significant but let me give you a second example on the same
3 lines.

4 Column 3, lines 40 through 43, it talks about
5 repeated mechanical activations of the switch. And there are
6 more examples of them using the word activate to mean
7 actuate a switch.

8 Dr. Morley testified that, well, actuate is what you
9 would call it when you work a switch, when you physically
10 work a switch, and activate is what it is called when the
11 device actually turns on and off.

12 But the patent is not so precise. The patent
13 actually uses activate for a variety of terms, whether it is
14 working the switch, whether it is activating a function of the
15 device, not necessarily turning it on, like not pressing a power
16 button, but actually just activating a function.

17 I will give you an example of that. In column 4 of
18 the '726 patent, line 34, there is a sentence that reads:
19 According to a further embodiment of the invention, an
20 intelligent flashlight having a microchip-controlled switch is
21 provided comprising an input means -- that's a switch -- an
22 input means for sending, activating, deactivating signals to
23 the microchip, and a microchip for controlling the on/off
24 function, and at least one other function of the flashlight.

1 So there they are using activating and deactivating
2 to refer to the signal that's being sent to the chip, and then the
3 chip gets to decide if it wants to turn something on or off. So
4 the patent is using different language for an activating signal
5 which could tell the microchip to do any number of things.

6 It could tell the microchip to turn something on
7 and off or it could tell the microchip to activate at least one
8 other function of the flashlight.

9 So at risk of beating a dead horse I will give you
10 one more example. In column 10 of the '726 patent, starting
11 around line 26, there is a sentence that starts: "Due to the
12 unique."

13 And it says: Due to the unique design of the
14 microchips, as shown in figures 8A and 8B, after the device
15 into which the microchip is incorporated is shut off, the
16 microchip remains powered for an additional period of time
17 which allows for said microchip to thus receive additional
18 commands. For example, a second "on" activation within a
19 given period after a first "on" and "off" activation may be
20 programmed into the microchip control reset means to indicate
21 a power reduction or dimming function or any other function
22 as desired by the designer of said device.

23 So there it is using the word activate to mean we
24 are turning a function on, even when the device itself has
25 already been turned off.

1 So the lesson, I think, what I took away from
2 looking into the question of what does the patent specification
3 tell us about activation, is that the term is used very loosely
4 to mean a variety of different things. And we didn't really
5 think it was necessary to come up with some universal
6 definition of what it meant.

7 We would submit that it is enough to know that if
8 the top screen on Jahagirdar is blank, and you press a button,
9 and it lights up, it is an LED. It lights up and starts
10 displaying information, that is activation under any
11 construction.

12 JUDGE BUSCH: Your position is still, though,
13 that the proper construction would also include just changing
14 the display even if it was already on. Is that correct?

15 MR. MURPHY: Right, that's also -- we think that
16 is correct. And the way our expert explained it is he said,
17 well -- and this is Dr. Morley agreed with this in his
18 deposition -- he said, well, an LED is actually composed of a
19 series of individual elements. And it is a little like the clock
20 that I'm looking at in front of me.

21 And when you change the display, some of those
22 elements turn off and some of them turn on. And Dr. Morley
23 agreed in his deposition that that is what happens when you
24 change the display. The LED elements turn on and off
25 depending on what the display needs to say.

1 And we would also submit, in addition to the
2 argument I just made, we would submit that that, too, is
3 activation under any definition, including turn off or turn on.

4 Does that answer your question, Your Honor?

5 JUDGE BUSCH: Yes. Thanks.

6 MR. MURPHY: The portion of Dr. Morley's --
7 this is in our reply brief -- but the portion of Dr. Morley's
8 deposition where that is discussed is -- it is Exhibit 1017 in
9 IPR 1147, and it is page 215, line 12, to page 216, line 9.
10 That's in our reply brief in IPR 1147, page 11 and 15.

11 Slide 35, please. I will touch on another point
12 with regard to activation that I think was helpful. In talking
13 to Dr. Morley during his deposition and trying to get a handle
14 on what exactly activation is, I asked him a number of
15 questions about the Bruwer patent itself and about different
16 scenarios involving turning things on and off.

17 And what seemed to be the case and what is
18 consistent with Bruwer is that if you are talking about
19 activating something that lights up, if it is an LED or the
20 flashlight bulb, when the user can see that light, then it is on.
21 It has been activated. It is when you can see it.

22 Go back to slide 34, Dan, please. On slide 34 Dr.
23 Morley said, you know, here in this line of questioning I'm
24 asking about the LED in Bruwer. And I say, well, when it is
25 activated the LED is shining, right? He says: Right.

1 And so then go to slide 35. Here I asked him
2 questions about, well, what about a flashlight bulb or a light
3 bulb that has a dimmer, and you could imagine turning that
4 current down low enough so that you can't see the bulb any
5 more. And I said what happens there?

6 And he is explaining and he said, well, if there is a
7 small amount of current going through the filament but it's not
8 serving any purpose of illuminating anything, well, they might
9 call the things off, not activated.

10 So that is also consistent with our theory, which is
11 the screen is blank, press the button, the screen lights up, and
12 now it is activated.

13 JUDGE SHAW: Can I ask you a quick question
14 about, if you return to slide 32 which has figure 8A. Would
15 one skilled in the art read this figure to say that that first
16 display is always on or could it possibly be off and it is just
17 unclear from this figure?

18 MR. MURPHY: The way that I read figure 8A is it
19 is describing the embodiment that Global Touch is relying on.
20 It is describing the embodiment where you snap the phone
21 closed and it starts displaying information. But the figure
22 does not describe the embodiment that's shown in blue.

23 To go a level deeper than that, if it is necessary, I
24 would add that what the specification says, and it is
25 highlighted in yellow there -- sorry, it is actually above what

1 is highlighted in yellow on slide 32, is it says, well, when you
2 snap that phone closed that the controller enables power to the
3 display. So it uses this phrase "enables power."

4 So it kind of makes sense if you think about the
5 flip phone, right, when the phone is closed you never need to
6 look at the main display, and when the phone is open you
7 never need to look at the top display. So it has some kind of
8 -- and it's not shown in the patent -- but it has some kind of
9 hard switching that completely enables or disables those
10 screens.

11 So, I mean, regardless of whatever the software
12 architecture is, you can't make the main display do anything
13 when the phone is closed. You can't make the top display do
14 anything when the phone is open. It is sort of logical.

15 But Global Touch has not offered a claim
16 construction that says that, well, what activate means is
17 enable power. It doesn't mean -- you know, they said it means
18 turn on, which is what we are saying is happening in what is
19 shown in blue.

20 They didn't say that it means, oh, it means enable
21 power to. And they can't say that because the Bruwer patent
22 has no disclosure about enabling power to things because the
23 Bruwer patent is about a flashlight.

24 So it doesn't -- the Bruwer patent doesn't have
25 microcontrollers that enable and disable power to things and

1 send power around. So you can't really glean such a strained
2 claim construction out of Bruwer.

3 Slide 36, please, Dan. So this slide 36 references
4 not the '726 patent which I have mainly been discussing. It
5 actually references the '970 patent, which is IPR 1149. The
6 point here is to illustrate that the Patent Owner is trying to
7 have its cake and eat it, too, on this activation issue.

8 So in the '970 patent -- and I will get to this
9 later -- they have the theory that the top display cannot be a
10 visible luminous location indicator because, they say, in order
11 to get the top display to light up, you have to be touching the
12 phone. So how could it indicate the location when you are
13 already touching it?

14 I will come back to that later. But the point is that
15 by making this argument, by making the argument that you
16 have to touch the phone to light it up, they are buying into our
17 argument that pressing the button on the side actually
18 activates the top display.

19 Dr. Morley said the same thing in his deposition.
20 I asked him, okay, if the LED turns off after the timer expires,
21 how would you get it to turn back on? He said press the
22 button, which is exactly right, you get it to turn on by
23 pressing the button.

24 Slide 37, please. I already discussed the question
25 of claim construction as to activation. I would just sum that

1 up by saying that it is not of a particular concern to me
2 exactly what the construction of activation is. Our expert said
3 it should just be given its plain meaning. He said under
4 whatever, you know, under this plain meaning there is no
5 question that pressing that button activates the top display.
6 And we stand by that.

7 We also argued in our briefs that even if the claim
8 construction is turn on and turn off, well, that's exactly what
9 happens when you press that side button.

10 The only way that Global Touch can win this is
11 with a claim construction that means activation is enabling
12 power to, which we think is entirely unsupportable.

13 Slide 38, please. There is another little aspect,
14 little tweak on the claim that says does activation of display
15 516 occur when display 520 is off? It is exactly the same
16 argument Global Touch is making.

17 So if the Board were to agree with us that pressing
18 the button on the side can activate the phone, well, then this
19 argument goes away because obviously when the phone is
20 closed, when you would be pressing that button on the side,
21 the main display is off. This argument really only works for
22 Global Touch if they are correct that the side button doesn't
23 activate the top display anyway.

24 Slide 39, please. So those were the two big
25 arguments, motivation and activation. And now I can move on

1 to some of the smaller arguments that only affect a couple of
2 the patents.

3 Slide 41, Dan, please. Starting with the '726
4 patent, we have the activation of the product argument and
5 then we have the automatic deactivation of the visible
6 indication argument. I will start with the first one.

7 Slide 43, please. So here on slide 43 is claim 1
8 and claim 4 of the '726 patent. And this argument pertains to
9 claim 4, in particular the language "the step of activating or
10 deactivating the product via commands received from the user
11 interface" raises the question what is the user interface?

12 You can learn something about that from looking
13 at claim 1, where it says, it introduces that term and it says
14 that the product includes a microchip and a touch sensor
15 forming part of a user interface.

16 So we don't know exactly what a user interface is
17 but it at least has a microchip and a touch sensor and has
18 some other stuff, too.

19 Then on the next slide, Dan, please, 44. In our
20 petition the argument that we've submitted and that Dr.
21 Horenstein testified about was if you activate the backlight,
22 which would be done through button 146 on the side of the
23 phone, if you activate the backlight on the phone you are
24 activating the product.

1 And there is no claim construction offered by
2 Global Touch that, in order to activate something, that you
3 have to activate the whole something, the whole product. You
4 have to enable power to it. There is really no disclosure.

5 And the way that our expert looked at it in the
6 petition was, if you have a phone, and it is sitting there, it is
7 dark, and you press a button on the side and the backlight
8 lights up, you have activated the product. It was really as
9 simple as that from our expert's point of view.

10 Global Touch, their argument is, first of all, the
11 only way to activate the product is to actually turn the entire
12 phone on and off.

13 And so we say, in response to that -- and this is
14 slide 45 -- okay, well, if that's true, if our expert is wrong and
15 pressing the backlight does not activate the product under
16 some sort of narrow construction of activate, it is a little
17 unclear what that would be, well, then there is a way to
18 activate, there is a way to power on the entire phone of
19 Jahagirdar, and that is to press the power button which is on
20 the front face of the phone. So that would be the backup
21 argument on this point.

22 And I think what Dr. Morley testified about that,
23 this is Global Touch's expert, was but here is the problem, the
24 power button doesn't count because it is not in the same user
25 interface as the button that works the visible indicator.

1 So just to be clear, on this slide 45, you can see
2 that button 150 on the side of the phone works the visible
3 indicator. And then the power button is on the front of the
4 phone, 138, it is button 138 in the lower left-hand corner.
5 And so the contention is that those are separate user
6 interfaces. Not without some, you know, there is not without
7 some support for that argument because Jahagirdar actually
8 says that this phone has two user interfaces, one on the side
9 and one on the front.

10 Our response to that is that Jahagirdar used the
11 word user interface in a different way than the patent claim.
12 Dan, could you go back to claim 43, that's right -- slide 43.
13 Thank you.

14 The way the user interface is used here is in a very
15 broad sense. It is introduced in claim 1 generally as having a
16 microchip and a touch sensor, those are two parts of it,
17 without limit, those are just parts of it. And then it says in
18 claim 4 that the commands are received from the user
19 interface.

20 And our contention, and this is in our reply, is that
21 it is really in Jahagirdar all one user interface. And the
22 touchstone for this we think is that there is one microchip.

23 So inside Jahagirdar, and it is shown in figure 5
24 and throughout the disclosure of Jahagirdar, there is only one
25 microcontroller that controls everything.

1 So all of the buttons on the front face of
2 Jahagirdar and all of the buttons on the side of Jahagirdar,
3 they all feed into the same microchip, at which point the
4 microchip makes decisions about what is going to happen and
5 it goes from there.

6 So because of that structure in Jahagirdar, that's
7 why we think it only has one user interface, despite
8 the nomenclature that's used in Jahagirdar.

9 So I would submit that as really two alternative
10 reasons for why claim 4 of the '726 patent, the limitations are
11 met by the references. The first being simply what our expert
12 said in our petition, and he stands by it, which is that pressing
13 a backlight on a phone activates the phone under any
14 reasonable interpretation of activate.

15 And, second, even if activate were given a very
16 narrow definition, that the power button would activate the
17 phone. And it is in the same user interface because all of the
18 buttons feed back, all of the buttons are accessible to the user
19 and they all feed back into the same microchip.

20 On slide 46, Dr. Morley confirmed in his
21 deposition that if the phone is open, then the user can access
22 both the front buttons and the side buttons at the same time.
23 So another indicator that it really is one user interface from
24 the perspective of how that term is used in the Bruwer patents.

1 47. All right. Next I will turn to the '726 patent,
2 claims 5 through 10, which have the limitation automatically
3 deactivating the visible indication a predetermined time
4 period after it was activated.

5 This argument, and really the other three segments
6 I had -- which I will not even touch on because they are the
7 same, I will just point out where they are -- this argument
8 about automatic deactivation, it flows from the same
9 reasoning that Global Touch offered about what activation is
10 in the first place.

11 Their perspective is, well, there is no automatic
12 deactivation because when you press that button on the side
13 and you light up the visible indicator, you make it display
14 something. It does say in figure 8 that that starts a timer to
15 change it back, but that's not automatic deactivation because
16 it was active the whole time. Well, that's their argument.

17 If the Board were to accept our argument that
18 pressing the button on the side of the phone is an activation of
19 the visible indicator, then this argument goes away about the
20 automatic deactivation because there is no dispute that, if that
21 is activation, the timer runs, it turns back off, that's
22 deactivation.

23 Slide 51, please. Turning to the '970 patent next,
24 as you will see in the '970 patent here on slide 51, number 6,
25 argument number 6, whether Jahagirdar disclosed activation

1 for only a period of time. That's exactly the same argument I
2 just discussed, so I will just mention it now. That's exactly
3 the same and it falls out the same way. If pressing the button
4 on the side of the phone activates the visible indicator, then
5 this limitation is met as well.

6 But I want to focus next on number 5 here, which
7 is the luminous visible location indicator. Slide 52, please.

8 I alluded, and this is on slide 52, it is claim 1 from
9 the '970 patent reprinted to show where this language is, I
10 alluded to this earlier on, the gist of the argument that Global
11 Touch has offered, which is, well, if you press the button on
12 the side of the phone to light up the visible indicator, or you
13 close the phone, perhaps, to light up the visible indicator,
14 however you do it you have to be holding it.

15 So how could it be indicating a location to the
16 user? The user already knows where it is. That's their
17 argument. All right. Well, let me break that apart, unpack it,
18 and start from the beginning.

19 So let's start from slide 53. First of all, I think
20 probably we've all picked up on this by now, but the top
21 display on Jahagirdar could be either an LCD or an LED. So
22 an LED glows. And so that's the example that Petitioners
23 have relied upon for most of the examples.

24 In fact, there is a figure 9, in some disclosure in
25 Jahagirdar relating to figure 9, focusing on an LED version of

1 it, which is, I think, very helpful for considering these
2 questions. So what does it mean that it is an LED? Well, go
3 to slide 54.

4 Here I was asking Dr. Morley some questions
5 about, well, what is an LED? And I said, so is an LED
6 luminous? Yes. And is it visible? Yes.

7 So we can set those words aside. And Dr. Morley
8 really teed up the issue that Global Touch, the point Global
9 Touch was trying to make. I said: So the issue with the LED
10 top display being a luminous visible location indicator is
11 whether it is indicating location, right? He says: Yes.

12 Okay. So that's the only dispute on this claim
13 term.

14 Next slide. The problem with this argument is,
15 well, there are a few problems. One is the whole premise of
16 this functionality in Bruwer itself is that the user would have
17 to do something at some point in time to activate the visible
18 indicator.

19 If you had the example of a flashlight with an LED
20 on it that blinks every 10 seconds or something like that, it
21 has to start somehow. The user has to get that going. Right?
22 But then what happens after that? That's the key question.

23 What happens after that is the user puts the
24 flashlight down. Right? And then after you put it down, then

1 it starts being a location indicator. Well, exactly the same
2 thing is true for us.

3 So I asked Dr. Morley, I said, well, hold on a
4 second. Let's talk about the LED on the top of the phone.
5 And we had a little digression, Dr. Morley and I, about what
6 happens with that LED, does it expire on a timer or does it
7 stay on all the time.

8 Anyway, Dr. Morley thinks it expires on a timer,
9 which is fine, but the first thing I asked him is I said, well, if
10 it doesn't expire on a timer, then it would be a
11 find-in-the-dark indicator, because you would light it up and
12 then put it down and then it would help you, right? And he
13 said, yeah, it would for a short while until the battery dies.

14 Okay. So we established in that version of the
15 universe, where the LED stays on, it is a find-in-the-dark
16 indicator. It's a luminous visible location indicator.

17 Next slide. So, okay, so let's suppose, Dr. Morley,
18 that you are right and it has a timer, it is not unreasonable, it
19 would still be a luminous visible location indicator for the
20 period when the timer was running, right?

21 And he says yes. But he says it in a little snarky
22 way, where he says: For those with short-term memory
23 problems, you know, it would turn off shortly thereafter so,
24 yes, it would.

1 But I think there is some very real-life scenarios
2 where this would be helpful. For instance, you have your
3 phone by the side of your bed, your room is dark, you place it
4 on the nightstand, you go out to reach for the phone, you
5 know where it is. Another example would be in a dark bag.

6 Slide 57, please. And a final point I would make
7 about this, and it was something that Dr. Horenstein discussed
8 in his reply declaration, sort of a fallback argument that
9 makes sense to me. The claim is actually not particularly
10 clear about what location is being indicated.

11 Now, you might take away from the claim, as I
12 think Global Touch has, that the thing that is being indicated
13 is the location of the whole product in the room. That's not
14 necessarily crazy, but another way of reading the claim -- and
15 I think it is fairly ambiguous -- is that it is actually indicating
16 the location of some part of the phone, for example, the user
17 interface.

18 You might like to know, if you are holding a
19 phone in the dark or you are looking at it in the dark, you
20 might like to know, you know, where it is you should pick up
21 the phone.

22 You know if you have this flip phone the display
23 is on the top so you know that's the top of the phone so you
24 know to pick it up in a certain orientation so that you can use
25 it easily.

1 So just another point about the location indicator.
2 It could be indicating the location of the user interface.

3 The remaining arguments for the '970 patent and
4 for the '952 patent are on the same question of disclosing
5 either activation for only a period of time or disclosing
6 automatic deactivation of a visible indication.

7 And that is covered in our briefing and it is
8 exactly the same as the argument as I just went through
9 where, okay, there is a timer clearly shown in figure 8 and
10 disclosed in the specification.

11 And I would probably, I guess I would have to
12 agree with Global Touch, is that if the button on the side does
13 not activate the visible indicator, that's not what it does, well,
14 then it doesn't automatically deactivate either because it was
15 never activated in the first place.

16 So the argument doesn't really add anything to
17 Global Touch and it should rise and fall with the same point
18 that we made.

19 JUDGE BUSCH: Do you have slide 62 up there?

20 MR. MURPHY: We are about to. Yes, Judge
21 Busch.

22 JUDGE BUSCH: I'm curious on the method
23 recited here. I'm curious if you have any guidance on what a
24 method for implementing a user interface, how that kind of
25 informs the construction of this claim?

1 I'm also curious in your position on what the step
2 of using an electronic module requires and whether this
3 energy consuming load, for example, is required in a method
4 claim like this?

5 MR. MURPHY: My hesitation in answering is just
6 because that's a question I have not been asked before and was
7 not covered in any of Global Touch's briefing.

8 So my off-the-cuff answer to your question, which
9 is a good one, is that the claim is not bringing anything new
10 to the table above and beyond any of the other claims. You
11 know, if the claim is written as a method claim, and it has a
12 step of using, I think it is fair to ask what that means.

13 The problem is that, as a matter of what is shown
14 in Bruwer, as a matter of what is discussed in Jahagirdar,
15 there is no there-there. There is no discussion that you might
16 combine these components in some way and not be
17 implementing a user interface.

18 There is no discussion that you might be
19 combining these components in a way and it would not be -- it
20 would not be -- the electronic module would not be used. So I
21 would assume that that is why Global Touch did not raise this
22 as an argument, and I don't know where they would go with it.

23 My answer, perhaps, doesn't have as much content
24 as you would like, but that's because I don't know that there is
25 much there, Your Honor.

1 JUDGE BUSCH: Okay. Thank you.

2 MR. MURPHY: If there are no other questions, I
3 would like to reserve the balance of my time.

4 JUDGE SHAW: I would like to ask one quick
5 question about claim 5 of -- I will just refer to the '726 patent.

6 MR. MURPHY: I think that is slide 48.

7 JUDGE SHAW: Thank you. Okay. I just want to
8 be clear about what the Petitioner is mapping to claim 5.

9 My understanding is that the step of automatically
10 deactivating the visible indication is that that would be, for
11 example, changing the display information on the first
12 display, not just necessarily turning it entirely off. It could
13 include changing the information. Is that correct?

14 MR. MURPHY: That, I think the answer to your
15 question is either one would be deactivating, yes, in our
16 contention.

17 So in our -- in the petition there was not a fine
18 point placed on this because the contention in Dr.
19 Horenstein's testimony was that the display, it would display
20 new visual information when you press the button and then,
21 after the timer expired, the new visual information goes away.

22 JUDGE SHAW: Right.

23 MR. MURPHY: Dr. Horenstein said that's
24 deactivation. Now, once Global Touch put a fine point on this
25 question, then we are able to respond in two ways: One is in

1 that embodiment colored in blue on that one slide we looked
2 at, it would return to being completely blank in that
3 embodiment. So it could be done that way.

4 Alternatively, in a more detailed way, as Dr.
5 Horenstein and Dr. Morley explained it, when the new visual
6 information were to change back to, say, old visual
7 information, various LED elements would turn off and that
8 would satisfy the claim the same way.

9 JUDGE SHAW: Okay. Thank you.

10 JUDGE PETTIGREW: Thank you, Mr. Murphy.

11 MR. MURPHY: Thank you, Your Honors.

12 JUDGE PETTIGREW: Let's hear from Patent
13 Owner.

14 MR. KIBLAWI: Thank you, Your Honor. May I
15 approach and provide you with copies? Thank you, Your
16 Honor.

17 I would like to begin my, I guess, argument with
18 just a few preliminary matters. First, I believe Patent Owner
19 had inadvertently omitted a request to file a motion to
20 withdraw an outstanding motion to exclude in some of the
21 cases we are discussing today.

22 That was an inadvertent omission. We discussed
23 this before today's hearing with the Petitioner's counsel and
24 they would not oppose such a request to -- it is an outstanding

1 motion, motion to exclude, we would like to withdraw, as we
2 did in other cases in these proceedings.

3 JUDGE PETTIGREW: So you are saying in some
4 of these cases there was a motion to exclude that has not yet
5 been withdrawn?

6 MR. KIBLAWI: That's right.

7 JUDGE PETTIGREW: And you plan to withdraw
8 it?

9 MR. KIBLAWI: Yes. We had inadvertently
10 omitted that in our request for permission to withdraw so I
11 would like to see if we can have that permission orally today.
12 It would be an unopposed motion to withdraw.

13 JUDGE PETTIGREW: Yes, you are authorized to
14 file a motion to withdraw the motion to exclude.

15 MR. KIBLAWI: Thank you, Your Honor.

16 So today I will be discussing the Patent Owner's
17 positions in these related IPRs, 2015-01147 to 51. I will be
18 specifically using the demonstrative exhibits, Patent Owner's
19 demonstrative exhibits for the '726 patent, IPR2015-01147,
20 which is what I have on the screen right now, and I will be
21 discussing first the issue of the obviousness of modifying the
22 pressure requiring push button switches of Jahagirdar on the
23 side of the phone there with the touch sensor of Schultz.

24 I will also discuss the activating or deactivating
25 the product in claim 4, I believe, of the '726 patent which we

1 just recently heard Petitioner's arguments on. And I will also
2 be discussing one additional feature in independent claim 1 of
3 the '726 patent, which actually I don't think was mentioned in
4 their demonstrative exhibits or in their arguments, their initial
5 arguments today.

6 But my colleague, Mr. Cristler, if it would be
7 acceptable, will discuss the issue of deactivating the visible
8 indicator that you just heard about.

9 If that is okay I would like to just jump right in to
10 slide number 7 of Patent Owner's demonstratives in the '726
11 patent, and to the question of whether it would have been
12 obvious to replace the pressure requiring push button switch
13 located on the side of the phone in Jahagirdar, as we see
14 illustrated there in figures 1 and 2, with the reference numeral
15 144, if it would have been obvious to replace those switches,
16 which are deliberately located where the user's hand or finger
17 would be when holding the phone, if it would have been
18 obvious to replace those with a touch sensor.

19 And as you probably know, Patent Owner's
20 position on this, we believe the answer to that question is
21 self-evident. Of course you would not replace those with
22 touch sensors because of the severe, serious degradation of
23 the product and the substantial undesirable properties that that
24 would introduce.

1 Nonetheless, Petitioners have put forth a few
2 reasons, different reasons that such a modification would
3 allegedly have been obvious, but none of which resolve the
4 big elephant in the room that making such a modification,
5 replacing those with touch sensor switches, would, as I
6 mentioned, substantially degrade the device, would result in a
7 clumsy device that would inadvertently actuate those switches
8 constantly, any time the user essentially is holding the phone,
9 or using the phone.

10 And such a problem, inadvertent actuation, would
11 sort of override any reason they may present, even if rational.

12 Now, on the subsequent following slides, shortly I
13 will go through each of their reasons and explain why Patent
14 Owner's position is that they don't meet the KSR standard of
15 an articulated reasoning of a rational underpinning.

16 But even if one were to accept that one of these
17 reasons may introduce a benefit, nonetheless, as the record
18 has shown, one would simply not make that modification.

19 Indeed, we need not speculate on this issue,
20 whether it would have been obvious to replace these buttons.
21 We kind of already know. The industry, the telephone
22 industry has itself already answered that question for us.

23 As Dr. Horenstein admitted himself during his
24 deposition, he could not recall a single phone, let alone a
25 cellular phone, that has touch sensor switches located there on

1 the side of the phone where your fingers would be when you
2 are holding it.

3 Indeed, in the almost 20 years since the filing of
4 the Jahagirdar application, and shortly thereafter the
5 grandparent or great grandparent, of the '726 patent, in the
6 almost two decades since that time we have seen tremendous
7 unbelievable advances in cell phone technology and touch
8 sensor technology.

9 In fact, if I went to my child today and showed her
10 a picture of Jahagirdar's telephone, the flip phone, she would
11 not recognize that as even being a phone. If you look at your
12 iPhone today, if you look at your Galaxy phone, your Nokia
13 Lumia phone, there is one common feature that still exists.

14 While nothing else has really resembled, in today's
15 phones, phones in the past 20 years, really resembles the old
16 flip phone, there is one feature that still exists, and that's that
17 push button switch that requires pressure to actuate on the
18 side of the phone.

19 Now, Petitioner's counsel have just argued that
20 such a modification is a simple design choice, that it is just
21 like an arbitrary change, no big deal. Well, I think the
22 evidence before us, the fact that no phones have that to this
23 day sort of evinces the fact that this is not some simple design
24 choice, does not have, you know, serious consequences.

1 Now, at the end of the day, no matter the rationale,
2 no matter what reasoning they can come up with for replacing
3 these buttons with touch sensors, none would overcome this
4 elephant in the room. By making that replacement you would
5 frustrate the very purpose of these switches, which is to allow
6 a user to selectively actuate a particular function or activate a
7 corresponding function.

8 When you replace those switches with touch sensor
9 switches, that selectivity is gone. Now that switch is going to
10 be selected whenever the user is holding the phone, thereby
11 draining power, thereby resulting in the inadvertent actuation
12 and the attendant problems of that.

13 Now, we have also heard Petitioner's counsel
14 argue in their preliminary remarks here that Dr. Morley
15 himself has admitted that there is no big deal in replacing
16 these buttons, these push buttons, pressure-requiring push
17 buttons with touch sensors. That is an absolute
18 misrepresentation of Dr. Morley's testimony.

19 If you read his declaration transcript, consistent
20 with his declarations, he uses very strong wording to
21 articulate that that would result in an "abomination." You
22 simply wouldn't do it. In fact, nobody has done it. To this
23 day it hasn't been done.

24 Instead, we still see that same button, while all of
25 the other features might be changed or gone, you don't have

1 the flip functionality, you still see that same button where
2 your finger would be that would require pressure to actuate
3 and not simply touch.

4 JUDGE SHAW: Can't something be a design
5 choice, or can't something be a terrible design choice and still
6 be obvious?

7 MR. KIBLAWI: I would say that if a particular
8 modification would result in a substantial degradation of the
9 product, and introducing substantial undesirable properties --
10 and I'm quoting from the case law, one of the cases, as I'll
11 explain shortly, that they have cited to -- then that would not
12 be a design choice. That would be taught away by the record,
13 by the state of the art.

14 In this situation -- again, I mean, I think with
15 design choice, if that's the rationale, that's more or less if it is
16 just an arbitrary change and doesn't have any sort of
17 consequences. In this case you are not trading benefits. You
18 are introducing substantial degradation of the product,
19 substantial undesirable properties.

20 And, again, I need not answer that question. You
21 can just look at how the industry has answered it.

22 JUDGE BUSCH: Can you say with an absolute
23 that you are not trading any benefits?

24 MR. KIBLAWI: I would say that even if you are
25 -- no, I said even if you are trading benefits, it's not simply

1 about trading benefits if it also introduces substantial
2 degradations of the product, undesirable properties.

3 It doesn't matter if you are exchanging, you know,
4 one benefit for a minor other benefit if that minor other
5 benefit, again, introduces substantial undesirable properties
6 and renders that product, you know, improper, unsuitable for
7 its intended purpose, frustrates the intended purpose of those
8 switches and why they require pressure.

9 That is because a user's hand is deliberately
10 located there, because a user's hand would be located there, it
11 would be convenient when you are holding the phone to be
12 able to toggle certain functionality. You are at your desire,
13 not unintentionally, not inadvertently.

14 By replacing those switches, those pressure
15 switches with touch sensor switches, you remove that sort of
16 selectivity, the intent of desiring to actuate it when you desire
17 to actuate it. Instead, it would constantly be actuated when
18 you hold it.

19 And, again, this is why to this day, you know, all
20 of the changes and features in the phones over the past 20
21 years, to this day you still have that same switch. If it was a
22 design choice, if it was sort of an equitable exchange of
23 benefits, we would have seen it in some product.

24 But Dr. Horenstein himself cannot identify a
25 product where you have a touch sensor where your finger

1 would be holding the phone because I think that would simply
2 be nonsensical.

3 JUDGE BUSCH: What are the bounds of a touch
4 sensor?

5 MR. KIBLAWI: What do you mean by the
6 bounds? Sorry.

7 JUDGE BUSCH: I mean, so a push button is not a
8 touch sensor. Is any button that does not require a mechanical
9 switch, but requires just your finger being there, is that a
10 touch sensor?

11 MR. KIBLAWI: I would say that in this case, in
12 the proceeding before us, what we are deliberating over is the
13 touch sensor in Schultz, whether it would have been obvious
14 to implement the touch sensor in Schultz.

15 Now, the touch sensor in Schultz is a specific type
16 of touch sensor. In fact, in Schultz where it talks about the
17 advantage of that touch sensor being the reduction of
18 inadvertent actuation, that's because it is an improvement over
19 another type of touch sensor, a touch sensor that only requires
20 capacitance. This touch sensor of Schultz requires resistance
21 and capacitance so that it would only be actuated by the
22 finger.

23 So I would say that at the least, the issue before us
24 here in assessing these references, that touch sensor that is
25 being incorporated or attempted to be incorporated into the

1 Jahagirdar phone would be the least capacitive touch sensor
2 that requires capacitance in human kind, in human touch,
3 vis-a-vis human touch to actuate.

4 But, again, to this day I think my point being that
5 the switch here that is used in the Jahagirdar reference, the
6 buttons there on the side, deliberately require -- are
7 deliberately push button switches that require pressure. They
8 are not the switches, the touch sensors -- they can't be the
9 touch sensors of Schultz because that requirement of pressure
10 is eliminated.

11 And, therefore, I think it is hard to deny that that
12 would result in inadvertent actuation whenever you are
13 holding the phone.

14 JUDGE BUSCH: What about a switch that is both
15 a push button and a touch sensor?

16 MR. KIBLAWI: A switch that is both a -- so how
17 would that switch operate?

18 JUDGE BUSCH: Presumably only if you both
19 pushed it and where it had a capacitance and a resistance
20 required by Schultz, so that, for example, your keys in your
21 pocket don't activate it -- well, I guess your keys are made of
22 metal, if they are the right kind of metal -- but such that you
23 are less likely to be activated by, I believe the word was
24 inanimate objects, but your finger pushing it will activate it.

1 MR. KIBLAWI: I understand your question. Give
2 me a second to gather my thoughts on this because I don't
3 think that issue has been raised in this proceeding as of yet.

4 JUDGE BUSCH: I thought Bruwer contemplated
5 combining those types of switches, not just being distinct
6 switches. Is that in the record?

7 MR. KIBLAWI: The '726 patent?

8 JUDGE BUSCH: Yes.

9 MR. KIBLAWI: I believe that that might be
10 referring to a later CIP, the proximity sensor ones.

11 JUDGE BUSCH: Oh, okay.

12 MR. KIBLAWI: Not this family, not this earlier
13 family of patents. This earlier family of patents, I don't think
14 they contemplate a combination switch, nor does the prior art
15 of record, nor does Schultz, nor has any of the arguments, you
16 know, put forth thus far on the record.

17 Unfortunately our expert has not been able to
18 opine on that, but I hope that answers your question.

19 JUDGE BUSCH: The last question: Would my
20 fingerprint scanner on my current phone be a touch sensor?

21 MR. KIBLAWI: Would the fingerprint scanner on
22 your current phone? You know, to be completely honest with
23 you, not being the expert in this case, I'm not exactly 100
24 percent sure how that works but I imagine it probably could
25 be a touch sensor.

1 I mean, I'm not sure if it is sensing capacitance or
2 resistance or exactly how it works, to be completely honest
3 with you.

4 JUDGE BUSCH: Okay. Thank you.

5 MR. KIBLAWI: But I would note that that is not
6 the touch sensor that is being proposed to be incorporated into
7 the Jahagirdar reference, or in the art of record.

8 JUDGE BUSCH: I understand.

9 MR. KIBLAWI: Thank you, Your Honor.

10 So I guess, in summary, I guess in response to the
11 question of a design choice or what not, I guess I would
12 simply ask the question, how can a terrible resulting product
13 that is not viable be an obvious design choice? That's simply
14 it, you know, how can that be an obvious design choice?

15 So I would like to move on to slide number 8 of
16 Patent Owner's demonstratives. That just sets forth the sort of
17 issue I'm addressing right now, would it have been obvious to
18 replace the pressure requiring push button keys 144 in
19 Jahagirdar with the touch sensor disclosed in Schultz?

20 And as Petitioner's counsel has summarized earlier
21 today, they have put forth in their petition a few reasons as
22 reasons for making this modification, why this modification
23 would have been obvious.

24 One of them being minimizing accidental
25 actuation. The second, eliminating problems with

1 contamination and mechanical failures. Three, convenience
2 and aesthetics. And then, fourth, I believe they try to just
3 bring it all in together with the old -- replacing, a simple
4 substitution, I believe, of known parts to yield no more than
5 predictable results.

6 So turning to slide number 11, Patent Owner's
7 demonstrative exhibits, the first issue before us, whether or
8 not the touch sensor of Schultz would minimize accidental
9 actuation?

10 As I have just stated now in my preliminary
11 remarks, I think it seems fairly self-evident that overall the
12 issue of inadvertent actuation, absolutely not. The touch
13 sensor of Schultz would not minimize accidental actuation.

14 I think it is difficult to argue otherwise because
15 you are going to hold your phone, those keys are there
16 because that's where you hold your phone in Jahagirdar.
17 When you put the touch sensor of Schultz there, which is the
18 proposed modification on the record, then that would result in
19 constant and inadvertent actuation.

20 JUDGE BUSCH: But it does eliminate some
21 inadvertent actuations, correct? Dr. Morley said that it would
22 reduce or eliminate inadvertent actuations by inanimate
23 objects. Do you disagree with that?

24 MR. KIBLAWI: I do not disagree with that but I
25 think the point that Dr. Morley was trying to make -- and I

1 think it's a self-evident point -- is that is not really a big
2 problem when it comes to these pressure-requiring switches.

3 The switches still need, as Dr. Morley noted, and I
4 will quote his deposition transcript from page 164, 16 to 22:
5 Furthermore, the inadvertent actuation by an inanimate object
6 of Schultz's touch sensor, it's not clear to me that it is
7 superior to the inadvertent actuation of the type of switches
8 that one finds on the side of a telephone anyway, which are
9 these membranes, these switches, that require a certain
10 amount of force to actuate.

11 And in general I think the point he is making is
12 that the switch in Jahagirdar still requires pressure. So
13 simply putting it in your purse is unlikely to result in
14 actuation by your keys or something. There still needs to be
15 some force.

16 And the scenario where that would happen is so
17 rare that, even if you would consider that a benefit, the cost
18 of that, which is the overwhelming resultant constant
19 inadvertent actuation, in the prevailing scenarios where you
20 would be using the phone, you know, perhaps way more than
21 that, but the result of that far outweighs any potential benefit.

22 And, again, I want to again emphasize that,
23 according to the case law that Petitioners have cited,
24 Urbanski, Urbanski -- I will get to that slide shortly from the
25 Petitioner's demonstrative -- discussed the idea of trading

1 benefits. However, Urbanski distinguished their case, that
2 their case did not teach away, because there were no resulting
3 undesirable properties.

4 Specifically, the Urbanski court said that the
5 modification at issue there would have resulted in a product
6 with undesirable properties, and, therefore, that was taught
7 away. It results in undesirable properties.

8 And, again, at the end of the day, if you make that
9 switch, even if it, you know, decreases a minor, the extremely
10 rare circumstance, where you might have an inadvertent
11 actuation by an inanimate object, the tradeoff is not -- it's not
12 -- you can't really put it on the same level. The tradeoff is a
13 product that does not really work very well for its intended
14 purpose, a product whose purpose is frustrated, as I mentioned
15 earlier.

16 Beyond that, again, the issue of trading benefits
17 would be arguing like it would be obvious to puncture a hole
18 in your goggles because that would reduce -- that would give
19 you the benefit of reducing fog in your goggles.

20 But, of course, the cost of that far outweighs that
21 so you're going to say that that meets the requirements of
22 obviousness under KSR. It introduces way too many
23 undesirable properties, effectively rendering it unsuitable for
24 its intended purpose.

1 JUDGE SHAW: But here let's say that there were
2 touch sensors on the side of the phone and they were
3 constantly being inadvertently activated by someone's hand.

4 What would be the consequence? Wouldn't the
5 LED just light up? It wouldn't necessarily just activate the
6 whole phone.

7 MR. KIBLAWI: Well, there are a number of
8 consequences, and it also depends on which keys you touch.

9 Now, earlier we heard Petitioner's counsel state
10 that those buttons are insignificant, just the LED -- actually,
11 one of the buttons would hang up your call.

12 One of those buttons, if you look at column 6 of
13 Jahagirdar at lines 38 to 41: An actuation of one of the
14 plurality of keys, 144, may answer the call. So one of them
15 may answer the call and you don't intend to answer the call.

16 Column 6 of Jahagirdar, from the paragraph
17 starting, I believe it is line 39 to 45, discusses that one of the
18 plurality of keys, those keys 144, will answer a call and will
19 also terminate the call once it has been answered.

20 So it is not insignificant. It's going to obviously
21 affect your operation. How do you hold your phone? You are
22 touching those buttons. So good luck using that phone with
23 those touch sensors there.

24 Beyond that --

1 JUDGE BUSCH: Wouldn't a skilled artisan know
2 which of those buttons would be a benefit and which would
3 not be a benefit to do that?

4 MR. KIBLAWI: So the idea being that you would
5 replace one?

6 JUDGE BUSCH: Select or replace.

7 MR. KIBLAWI: Well, I don't think that was an
8 argument raised but I will say this: Each of those buttons
9 would not want inadvertently actuated.

10 Now, earlier we heard Petitioner's counsel allege
11 that Dr. Morley admitted that inadvertent actuation would be
12 no big deal here. That is, again, another blatant
13 misrepresentation of Dr. Morley's testimony.

14 They were citing, I believe, to, I want to say it was
15 around page 164, sorry, yeah, page 164 of his transcript.
16 They cited a portion of page 164 of his transcript. I can load
17 it up right now on the screen.

18 And they cited this answer right here. I'm starting
19 at line 3 of Exhibit 1017 in the '726 proceeding, page 164 of
20 that transcript. And they cited this portion as him allegedly
21 admitting that it would be no big deal to actuate one of those
22 buttons, the inadvertent actuation.

23 And that's a misrepresentation. What Dr. Morley
24 was talking about here is that -- he acknowledged that in one
25 specific scenario, if a phone call is incoming, the display is

1 already activated, then pressing that button when you pick up
2 the phone, that particular button, wouldn't do anything
3 further, maybe it would change the display content, and
4 specific to that one specific scenario, one specific button.

5 Indeed, as I scroll down, the very next point that
6 was made, right subsequent to that, starting at lines 9 to 14,
7 has Dr. Morley confirming that there would be a problem
8 clearly of inadvertent actuation.

9 Now, with respect to the other functions, the
10 backlight, for example, I think it was asked, well, wouldn't
11 you just light up the backlight? No big deal.

12 That is still a drain in current. And, again, I
13 would like to direct you to, I believe it was page 159 of Dr.
14 Morley's deposition.

15 And as you see this page in his deposition, you
16 will see it is consistent with the rest of his testimony that
17 such a modification would be -- result in an abomination.

18 Now, at page 159 of his deposition transcript,
19 lines 10 through, I believe, 13, again, he confirms his belief
20 that turning on the backlight is a big deal. You wouldn't want
21 to do it. It's a drain, causes a drain in electricity and, in fact,
22 that's the reason there is a 10-second timer incorporated into
23 the product of Jahagirdar in order to not keep it constantly on.

24 Of course, if you are holding your phone, your
25 finger is over that button, it would stay constantly on. Or if

1 you want to look at particular information, one of the buttons
2 might toggle that, you wouldn't want to do that, because you
3 want to be able to selectively choose what information you
4 want to see.

5 In either case those buttons are there to give the
6 user the choice, the choice to actuate a particular
7 corresponding function. Otherwise there would be no buttons
8 at all. You would just have it displayed constantly. That's
9 the purpose of those buttons.

10 That purpose is completely decimated and taken
11 away when you replace it with the touch sensors. The choice
12 that the user has is gone.

13 Whenever he is holding it, without his desire or
14 without his intent it is going to actuate the corresponding
15 functions of those buttons, which, you know, in some cases
16 might be more severe than others, like hanging up a call when
17 you're on it, or answering the phone when you don't want to
18 answer it.

19 In other cases it might be changing the display
20 content when you desire not to, or turning on the backlight
21 constantly, draining the electricity, which the patent itself,
22 you know, recognizes is something you would not want to do
23 by virtue of them putting a timing cycle.

24 JUDGE BUSCH: Is this argument dependent on
25 the buttons staying on the side of the phone?

1 MR. KIBLAWI: I would say I think at some point
2 during his deposition Dr. Horenstein tried to argue that it
3 would have been obvious to move those buttons around
4 anywhere.

5 Now, again, this is, I think, seems like a design
6 choice argument. It doesn't matter where you put the buttons.
7 They could be anywhere. But that ignores those buttons are
8 deliberately located, as Dr. Morley testified, and I think it is
9 fairly self-evident, they are deliberately located there because
10 that is where you hold your phone.

11 When you are holding your phone, you want to be
12 able to, at your intent, when you desire, actuate those
13 corresponding certain functions, and that's why those buttons
14 are there. It is not an arbitrary location. It is a deliberate
15 location.

16 That same location exists today for that, you
17 know, for the push button switch in phones that we see that
18 are very popular in the market today, including the iPhone.

19 JUDGE BUSCH: Some phones have the power
20 button on the top still.

21 MR. KIBLAWI: I guess that would be -- perhaps
22 that would be correct. But this is not the power button.
23 These are buttons and functions that you would be using
24 regularly, not just to turn the phone on and off. Right?

1 Just like the phones, like the iPhones still have, I
2 think the iPhones might have a power button on the top but it
3 also has a button on the side, volume buttons and so on and so
4 forth, functions that you would want to be able to readily
5 access, you know, and would be convenient to access.

6 So the idea of moving those buttons, those buttons
7 in Jahagirdar that are deliberately placed there, is you want to
8 be able to regularly access them while you are holding the
9 phone. That's why they are there. It is not an arbitrary
10 location. It's a deliberate location. You wouldn't move those
11 because there is simply no reason to and because of the
12 significance of that location.

13 You know, moving that would defeat, you know,
14 the purpose of that specifically designated selected location
15 which, again, I want to emphasize, is not an arbitrary
16 location. It is a critical location. There is a criticality to that
17 location.

18 So it is not simply a design choice let's move it,
19 who cares. There is criticality to that location and for that
20 reason it would not be just a design choice to arbitrarily move
21 it.

22 JUDGE BUSCH: I guess I struggle a little bit with
23 your argument here in the sense that, if you are holding your
24 phone as it is designed in Jahagirdar, you are not going to be

1 holding it on those buttons anyways because you don't want to
2 be pressing those buttons the whole time you are holding it.

3 So presumably the phone is designed such that
4 those buttons are within finger reach but not somewhere that
5 you're grabbing it the whole time. Is that different than your
6 understanding?

7 MR. KIBLAWI: Yes, Your Honor, that is different
8 than my understanding. I believe those buttons are where
9 your finger would be, just like with the iPhone, it's where
10 your finger would be.

11 And if your finger is there, it is not sufficient to
12 actuate those buttons, just like on the iPhone or the Galaxy
13 phone or the Nokia Lumia phone, or Microsoft Lumia phone.
14 You would have to still put pressure.

15 And like with your phones today and like the
16 phone with Jahagirdar, simply holding the phone would not
17 apply that pressure. That's the benefit. That's why they are
18 using pressure, you know, switches that require pressure to
19 actuate. That's where you would hold your phone. That's
20 where your finger would be.

21 JUDGE BUSCH: Is there any evidence other than
22 Dr. Morley's testimony that this is the reason that no one uses
23 touch sensors for these types of buttons?

24 MR. KIBLAWI: I believe other than Dr. Morley's
25 testimony, simply Dr. Horenstein's testimony that he could not

1 recall any device that would have -- that has replaced those
2 with touch sensors, that had touch sensors there on the side of
3 the phone where you hold.

4 And yet, in addition, just simply, you know, the
5 industry in general, what it has shown us over the last 20
6 years.

7 JUDGE BUSCH: Can you think of any other
8 reason the industry hasn't adopted on those particular buttons?

9 MR. KIBLAWI: The evidence of record
10 established that that is the reason because, if you replace
11 those with touch sensors, then it would, again, frustrate the
12 purpose of those buttons.

13 That's what the evidence of records establish and
14 there is no additional evidence that would suggest otherwise,
15 that there is another reason that those are push buttons and not
16 a touch sensor switch.

17 According to Petitioners, it is not for aesthetics, or
18 apparently for convenience or whatever the other reasons
19 identified, contamination, mechanical issues, but I disagree
20 with those reasons nonetheless.

21 However, there is no evidence of record that
22 establishes otherwise, if there is any other reason, and,
23 frankly, I think it just seems evident that that's why -- you
24 know, you see a touch display now. You don't see, where you
25 are holding the phone, you don't see a touch sensor switch.

1 And that's for a particular reason. And that
2 particular reason is not arbitrary. It is not just coincidence
3 over the past -- that since, you know, that there has never
4 been a phone that has touch sensors there, to Dr. Horenstein's
5 recollection and according to Dr. Morley. I don't think it is a
6 mere coincidence. There is a reason.

7 And that reason I think is fairly evident to what
8 the purpose of those buttons are, and that purpose is to give
9 the user the selectivity of selecting those functions or those
10 corresponding, you know, buttons whenever he intends.

11 JUDGE BUSCH: It just seems like there might be
12 an equally plausible reason, which is just that it's more
13 expensive to put those buttons on the side of the phone
14 without getting enough of an improvement in whatever
15 benefits are listed here. It might have been obvious to do so
16 but it wasn't worth the commercial cost to implement those
17 buttons.

18 I guess I just don't -- it doesn't seem like there
19 are no other reasons that -- it seems like you are saying it is
20 the only possible reason, when it seems like there are other
21 reasons that I could come up with that might be why they
22 didn't move it, or why they didn't implement the touch sensor.

23 MR. KIBLAWI: I suppose that based on the
24 evidence of record, nothing can test Dr. Morley's position --
25 nobody has contested Dr. Morley's position on this as relates

1 to your suggestion. However, I would say there may be other
2 benefits to not replacing that.

3 But I think that the overwhelming reason -- I think
4 it just seems very evident that the overwhelming reason, and,
5 again, the reason we have not seen this replacement or this,
6 you know, touch sensor on the side of the phone like that, is
7 because of the desirability or the criticality of requiring
8 pressure to actuate.

9 I would also like to mention that if it was simply
10 an issue of cost, we've seen products in the market over the
11 past 20 years that will increase cost to extract some certain
12 benefit, you know, no doubt about it.

13 JUDGE BUSCH: Sure, if it is worth it.

14 MR. KIBLAWI: Yeah.

15 JUDGE BUSCH: If it is worth it to them
16 commercially.

17 MR. KIBLAWI: Yeah. And so, for example, we
18 do see, you know, we do see the replacement of the key for
19 the touch sensor.

20 We do see, you know, some touch sensor
21 limitations on the front face of the phone, for example, that is
22 not -- and this is post-Jahagirdar, so it would not really affect
23 the modification of Jahagirdar at the time of the invention,
24 post the '726 filing date, but just in general we do see that
25 there have been touch sensors, you know, the front face of the

1 phone, I mean, I have seen different models of phones, some
2 that have the touch sensor and some that have mechanical
3 push buttons on the front face, generally where you would not
4 be holding it when you are carrying around your phone or
5 when you are talking on the phone or looking at it.

6 And, again, you know, in those scenarios I believe
7 that despite whatever other reasons you may believe could
8 exist to sort of dissuade or prevent the modification of the
9 side buttons to touch sensor, despite those reasons you still
10 see the implementation of touch sensors instead of push
11 buttons which is there.

12 However, you don't see that on the side of the
13 phone. I think that is another strong indicator, in addition to
14 Dr. Morley's testimony, it is another strong indicator as to the
15 primary reason, the overwhelming reason that you would not
16 replace those buttons.

17 The requirement of pressure there where your
18 finger is or where your finger -- even if it was just where your
19 finger would have access to, because that could still be
20 inadvertently actuated very easily, I think in Jahagirdar you
21 are talking about a small flip phone, that's where your finger
22 is going to be, and that in either case you would have that risk
23 of inadvertent actuation, substantial risk, and it would
24 substantially degrade the product.

1 JUDGE BUSCH: So substantially degrading
2 is kind of the basis of your nonobviousness argument. It's not
3 inoperable. It still would work for the function that is
4 intended, right?

5 MR. KIBLAWI: No, I mean, I think that there is
6 -- I think that there is such, to me, such -- for lack of a better
7 term, it is just such a nonsensical modification that there are a
8 number of reasons. One, yes, it would substantially degrade
9 it.

10 I also, as I have stated before, I also believe it
11 would render it inoperable for its intended purpose. The
12 intended purpose of those buttons there on the side located
13 where your finger would be would be to conveniently allow a
14 user, at his intent, at his desire, to select particular functions.

15 That purpose is frustrated entirely because you no
16 longer have that selectivity. The user no longer can select
17 one to actuate the function. It's going to be actuated
18 whenever. You can simply -- you can just do away with the
19 buttons, in fact, and just keep those functions actuated all of
20 the time, because whenever you are holding the phone they are
21 going to be inadvertently actuated.

22 But I do believe that yes --

23 JUDGE BUSCH: But wouldn't that be an obvious
24 modification to leave it on all of the time?

1 MR. KIBLAWI: Absolutely not. For one, the
2 Jahagirdar itself does not -- has identified that that is an
3 undesirable result by virtue, as Dr. Morley pointed out, of
4 including a timing circuit to deactivate, for example, the
5 backlight.

6 Secondly, I mean, I think -- I think especially with
7 telephones, especially with telephones, where -- and it doesn't
8 take an expert to come up with this, to confirm this, battery
9 life, battery power consumption is a huge deal, I mean, not
10 just now but since forever.

11 You want to reduce the power consumption in
12 those phones as much as possible because, you know, you
13 would want those phones to be able to be operable all day or
14 as long as possible. So I think that that is a big deal.

15 I think Jahagirdar recognizes that by virtue of
16 including certain protections, from when you do intend to
17 actuate the button but to not turn it off afterward, to prevent it
18 from staying actuated at all times.

19 So I would say that that would not be an obvious
20 modification, Your Honor.

21 JUDGE BUSCH: I guess these questions, I'm
22 trying to get at -- I'm really trying to -- it seems like you kind
23 of made various arguments around the same ideas.

24 And I'm trying to really understand what you put
25 in the briefs as the basis for telling us that this is nonobvious,

1 what kind of point of law would we point -- if we agree with
2 you, what is the point of law that we are going to find this
3 nonobviousness on, based on.

4 MR. KIBLAWI: I think that because this
5 modification is so, I think, drastic and so, I think, just
6 nonsensical, for lack of a better term, we have put forth a
7 number of reasons.

8 One of them, one of the legal bases for it is, as we
9 just discussed here, it would be rendered inoperable for its
10 intended purpose.

11 Another would be citing the cases, the legal cases
12 that they have brought in, would be that it would clearly
13 introduce undesirable properties. As Dr. Morley has testified,
14 it would result in an abomination. It would result in an
15 abomination, in an abomination. The product simply would
16 be, in his words, too touchy, you know, it wouldn't work for
17 its intended purpose.

18 And, you know, again, as I mentioned before, I
19 think there is -- I think those are probably the two main
20 reasons. The first one -- legal bases, I think -- the first one
21 being it doesn't work well. It does not work frustrates its
22 intended function, the intended purpose of it.

23 JUDGE PETTIGREW: Is that in the briefs?

24 MR. KIBLAWI: Yes. That would be -- that was
25 in the briefs. So the case that was specifically cited in the

1 briefs and put forth that argument was the Plas-Pak Industries
2 case. And, as you see, that was cited in the court and that was
3 the reason set forth.

4 In addition, it is the general argument of the costs
5 would outweigh the benefit, essentially that you would
6 introduce so much, such, you know, significant degradation
7 and so many undesirable properties that not only would, you
8 know, would it not work well for its intended function, but
9 under, for example, the cases they cite it would just
10 completely, you know, trump any other argument they may
11 come up with for a rationale for obviousness.

12 JUDGE BUSCH: So you are saying under the case
13 law cited by Petitioner, the detriments outweighing the
14 benefits would still fall in line with a finding of
15 nonobviousness under the cases that they have cited?

16 MR. KIBLAWI: That's right. I mean, first of all,
17 I would like to note that under the cases they have cited, I
18 think it was three main cases, Urbanski, Fulton and the Apple
19 v. Samsung, but those primarily relate to where you are
20 trading off two different alternatives.

21 I believe actually in Urbanski and Fulton it was
22 the general principle of where one prior art reference teaches
23 two possibilities but suggests that one may be better than the
24 other, may be preferable to the other.

1 The same as in Samsung, that the prior art
2 reference in that case, Apple v. Samsung, the prior art
3 reference disclosed two possibilities, right, sliding, touch GUI
4 or actuation and a toggle, and those are both presented as
5 possibilities.

6 What they suggested is one might be preferable to
7 the other. But none of those cases addressed the scenario of
8 where one of those introduces substantial deficiencies.

9 In fact, the Urbanski case that was cited
10 specifically states that nothing in the prior art teaches that the
11 proposed modification would have resulted in a product with
12 undesirable properties. That to them, that is why there was no
13 teaching away there. That is just two different alternatives.
14 One may be preferable to the other.

15 But none of them would have introduced
16 undesirable properties. Here, again, the only potentially
17 slight benefit that using the touch sensor of Schultz might
18 introduce, possibly, is that small scenario where there is
19 somehow an inanimate object that provides enough pressure to
20 actuate the switch.

21 JUDGE BUSCH: What about the other points
22 about contamination, the points about mechanical failure? I
23 mean, there is obviously no mechanical failure if it is a touch
24 sensor switch, right, where there could be with a button, and
25 I've experienced with my cell phones in the past.

1 MR. KIBLAWI: I'm sorry to hear that. But I
2 would say that the Jahagirdar reference buttons, okay, at the
3 time of that invention it was well known to use membrane
4 switches. It was well known to use -- it was well known --
5 that is commonly what was used.

6 And, in fact, Schultz, when it addresses
7 contamination and mechanical failure, it is with respect to the
8 same kind of conventional switch that the GTS patents, the
9 '726 patent, is addressing as well, a high current mechanical
10 switch. You look at the circuit diagram in Schultz, you will
11 see that that switch is a high current switch.

12 Now, you look at the switch in Jahagirdar, not
13 only is it almost certainly likely to have been the membrane
14 switch, that's what was commonly used at the time, as the
15 evidence of record that the Petitioner has submitted has
16 established, but it is also not a high current switch. It is a
17 low current switch.

18 So I don't think that that reasoning identified from
19 Schultz is necessarily applicable here. Again, the Schultz
20 reasoning is with respect to that electro-contact device,
21 mechanical high current switch, and not this one.

22 In terms of aesthetics, I mean, first I would like to
23 mention that Dr. Morley and Dr. Horenstein are not experts in
24 aesthetics. Now, the references that were brought in to show

1 the improvement via aesthetics were completely different
2 contexts.

3 And also the deposition transcript quoted by
4 Petitioner's counsel, in quoting Dr. Morley's testimony, also
5 completely different context than the flip phone -- a mobile
6 phone, a cellular phone, or even the flip phone of Jahagirdar,
7 an elevator, a conventional light switch. Those are entirely
8 different contexts. I don't think you can take from that an
9 aesthetics improvement or evidence of an aesthetics
10 improvement with respect to your touch sensor phone.

11 And, again, I just want to note that if these were
12 factors, if these were rationales that carried any weight, then I
13 think in the past 20 years we would have seen some phones
14 that had it. We would have seen some phones that had it. I
15 mean, if this was such an obvious modification, we would
16 have seen some phone that has it.

17 Instead, while we see every other aspect of the
18 telephone change, we still have that button on the side of the
19 phone being a push button switch and not the touch sensor
20 switch.

21 JUDGE BUSCH: I'm going to go back to my
22 earlier question, that if we are going to find in favor of Patent
23 Owner with respect to the nonobviousness issue here, you
24 cited the -- you mentioned the Plas-Pak that you cited in your
25 brief.

1 It sounds like you are actually saying that the
2 cases cited by Petitioner are not supporting but are just not
3 applicable in this situation because the detriments outweigh
4 the benefits, whereas in the cases cited there wasn't that
5 situation.

6 So I guess I want to go back again. So the
7 Plas-Pak case you cited you are saying would support a
8 position that -- teaching away or rendering it inoperable for
9 its intended purpose, is that -- what else would you think
10 would be important in your brief that we would want to focus
11 on here?

12 MR. KIBLAWI: I think Dr. Morley's declaration
13 testimony noting that to this day we don't see those phones, I
14 mean, I think ultimately what's being established here is that
15 the question of this obviousness, we don't need to speculate.
16 It has already been answered by the industry by virtue of the
17 fact that, if it was obvious, we would have seen, as Dr.
18 Morley testified, we would have seen something.

19 But we haven't seen anything. We haven't seen a
20 phone that has that touch sensor instead of the mechanical
21 push button switch. And, indeed, instead, as with the iPhone
22 of today and, I believe, every iPhone, you have seen that
23 button there, that it be a pressure requiring push button
24 switch.

1 So those, I think, are just strong reasonings, and
2 ultimately, you know, I think the consistent theme we tried to
3 raise throughout was that, no matter what, the costs
4 tremendously outweigh the benefits. I can't really see how
5 you can contest that.

6 JUDGE BUSCH: That particular point is, I guess,
7 where I'm kind of trying to get a little more depth. The cost
8 outweighing the benefits, it seems like even if we end up with
9 an inferior product that can still be obvious.

10 So that's why I go back to your point about it
11 rendering it inoperable. Well, if that's in the brief, rendering
12 it inoperable, then that may be a point we can look to, or if
13 there are specific teaching away arguments that may be
14 something we can look to.

15 But just the fact that an inferior product results,
16 that alone I think without more is not sufficient to be
17 comfortable with where I think you want us to go.

18 MR. KIBLAWI: Yes, well, thank you for
19 clarifying your position here. So I would say first, when we
20 talk about the costs outweighing the benefits, the way it's
21 presented in the briefs, first of all, I would say that we've
22 addressed the benefits as either being nonexistent or
23 potentially minor or slight.

24 Now, ultimately we're not simply saying it is a
25 cost/benefit analysis. As you've noted, we've cited to

1 Plas-Pak, we've argued that it would render it inoperable for
2 its intended purpose, and it is not simply resulting -- the
3 modification would not simply result in an inferior product; it
4 would result in a nonviable product, a product that, again, as
5 we briefed and as we cited to the Plas-Pak case, would
6 frustrate the purpose, the very purpose of those buttons and
7 would render them nonviable for their intended purpose.

8 It would be a nonviable product, not simply an
9 inferior product, a nonviable. And in terms of the costs and
10 the benefits, I will simply refer to the case law introduced by
11 Petitioners and their argument and the fact that particularly,
12 for example, in the Urbanski case that they distinguish, they
13 distinguish essentially conveying that if there was, you know,
14 substantial, or if there were undesirable properties -- I'm
15 adding the word substantial because in this case they would be
16 extremely substantial and desirable properties -- in fact, they
17 would result in nonviability.

18 So if there were, you know, undesirable properties
19 that were introduced or substantial undesirable properties that
20 were introduced that would also, based on the case law
21 introduced by Petitioners, result in a finding, I think, legally
22 of teaching away.

23 JUDGE PETTIGREW: Is that really what the
24 Urbanski case holds?

1 MR. KIBLAWI: No, I think the Urbanski case,
2 again, the scenario and the fact pattern there, I think what it is
3 trying to do is distinguish that that statement distinguished
4 from where teaching away may be applicable, which is where
5 you introduce substantial undesirable properties.

6 What I believe the Urbanski case was suggesting is
7 that where you have two alternatives that are introduced, and
8 one may result in potentially -- may be more preferable than
9 the other, or there may be some benefit tradeoff, you lose the
10 benefit here but you get the benefit here, that that would not
11 result in teaching away.

12 However, if it would introduce actual undesirable
13 properties, which is what the court distinguished over, then
14 you would have, I think, a grounds for teaching away in
15 Urbanski.

16 JUDGE PETTIGREW: But did the court
17 distinguish over a case in which there were undesirable
18 properties that led to nonobviousness?

19 MR. KIBLAWI: I believe it was the Gordon case,
20 so the Urbanski was, I think, distinguishing over In re
21 Gordon, 733 F.2d 900.

22 JUDGE PETTIGREW: So does Gordon support
23 your argument? You haven't cited it.

24 MR. KIBLAWI: I have not cited it, no, that is
25 true. Yeah, I mean, Gordon, I think, presents the same

1 principle that we did cite to, the Plas-Pak case, that that
2 modification there would not have been obvious because it
3 does -- would have rendered it inoperable for its intended
4 purpose.

5 And, in fact, the device there teaches away, the
6 reference there teaches away from the proposed modification.
7 And in the subsequent paragraph it states that this is not the
8 case here.

9 Here there is no introduction of, you know, in
10 terms of distinguishing this case from that directly previous
11 discussion, discusses that nothing in the prior art here teaches
12 a modification that would have resulted in undesirable
13 properties.

14 JUDGE PETTIGREW: You are not really arguing
15 a teaching away, are you?

16 MR. KIBLAWI: I think what we are arguing is -- I
17 mean, I believe it a teaching away argument. I believe that
18 it's more -- it's specifically the argument of where the
19 combination does -- I think the specific legal principle that we
20 -- one of the specific legal principles that we argued was
21 rendering it inoperable, frustrating the very purpose of that
22 switch, rendering it inoperable.

23 JUDGE PETTIGREW: Is that argument in all of
24 the cases? Is that in all of your briefs?

1 MR. KIBLAWI: I believe that was in all of the
2 briefs. Was that in all of the briefs? I believe it was. It was
3 certainly in the '726 and the '952 and the '980. Yeah, it was
4 in all of the -- that argument was in all of them.

5 JUDGE PETTIGREW: Okay.

6 MR. KIBLAWI: And Dr. Morley's testimony
7 supporting that argument I believe was identical across all of
8 the cases.

9 JUDGE PETTIGREW: Again, you are not arguing
10 that there is something that teaches away from the
11 combination? That's usually you have a reference that says,
12 no, don't do what is claimed in the patent; do this instead?

13 MR. KIBLAWI: I mean, I think I understand your
14 point. I think it is a fair point. And thank you for clarifying
15 that, Your Honor.

16 Again, ultimately what we are saying is that the
17 combination would frustrate the very purpose of it. I think
18 our position is that one of ordinary skill in the art would know
19 it is not a viable product.

20 So in a sense it would be a teaching away from
21 being the sort of knowledge of one of ordinary skill in the art,
22 but ultimately would also render it, you know, it would
23 frustrate the purpose of those switches as well.

24 And in general, I think, one of the themes that we
25 kept on arguing is that the tremendous disadvantages of

1 bringing that in would run one away from making that
2 modification. I thought that might be a teaching away, be
3 characterized as a teaching away argument, but ultimately
4 that's the position we have set forth.

5 Okay. So we went through a lot of the issues --
6 sorry, Judge Busch?

7 JUDGE BUSCH: I was just going to say, I've
8 taken enough time on that one, you can move on if Judges
9 Pettigrew and Shaw don't have any more questions on there.

10 MR. KIBLAWI: Thank you. So -- of course I had
11 a game plan and I think we've covered a lot of the issues that I
12 intended to discuss, so I'm not even sure that there is anything
13 really left to discuss about this particular issue of the
14 obviousness of the combination.

15 I guess there was a reasoning that was alleged by
16 the Petitioners that, based on the disclosure in Norimatsu,
17 here on the bottom left of slide number 14 of Patent Owner's
18 demonstrative exhibits, that that would establish an increased
19 convenience. I think Dr. Morley really addressed that
20 argument. It is fully argued in the briefs.

21 It is a completely different phone. You would
22 want a touch sensor there because essentially, when the phone
23 rings, when you pick it up you don't want to answer it. So
24 that's a completely different context in your cellular phone. It
25 is simply not applicable here.

1 And ultimately I think it's a strained argument to
2 somehow argue that putting a touch sensor on those keys there
3 would increase convenience. If anything, I think it's
4 self-evident, for the reasons discussed already, that it would
5 decrease convenience and make it, again, inoperable for its
6 intended purpose and not result in a viable product. It
7 wouldn't work.

8 Beyond that, as I go through my slides, I think I
9 mentioned this before as well, in slide number 16 of Patent
10 Owner's demonstratives, the argument of aesthetics and the
11 various concepts that they've brought up for the aesthetics to
12 support their rationale of improved aesthetics in a completely
13 different context.

14 And Dr. Horenstein, and admittedly Dr. Morley, is
15 not an expert in aesthetics and there is nothing else in the
16 record that would support that argument.

17 So I think that wraps up my -- okay, one last slide
18 I want to turn to, slide number 18 of Patent Owner's
19 demonstratives. This is in response to Petitioner's allegation,
20 throughout their reply, that Dr. Morley admitted modification
21 would have resulted in unpredictable result.

22 What he consistently stated is the exact opposite,
23 that it would result in a predictably bad result. You would
24 have predictably known that it wouldn't work and would result

1 in an "abomination." He used very strong language to
2 describe that.

3 So to somehow distort that as Dr. Morley, you
4 know, arguing that the combination would have been obvious
5 because you would have had a predictable result, I think that
6 that is improper.

7 So if there are no other questions on the issue of
8 the modification of the push button switches, I would like to
9 move on to another issue that is unique to claims 1 and 27 of
10 the '726 patent. This would be on slide number 19 of Patent
11 Owner's demonstrative exhibits for the '726 patent.

12 Now, as you see, claim 1 of the '726 patent recites
13 this microchip adapted to control the activation of a visible
14 indication while operation of the load is unaffected.

15 So, again, as I mentioned earlier, my colleague
16 Mr. Cristler will address the issue of what does it mean to
17 activate the visible indications of the display, the changing
18 content, so on, so forth.

19 But if you turn to slide number 20 first, in Patent
20 Owner's demonstratives, briefly mentioned on the construction
21 of activating and activation -- and I believe Mr. Cristler, my
22 colleague, will address this further in detail -- but as we heard
23 yesterday, you know, claim terms generally have the same
24 meaning across different claims.

1 In this case Dr. Horenstein, when construing claim
2 number 4, construing claim number 6 and construing claim
3 number 19, consistently took the position that activating or
4 deactivating means turning on and turning off.

5 But in either case, looking at slide number 21 of
6 Patent Owner's demonstrative exhibits, the issue of whether or
7 not changing the content or turning on the display, the top
8 display there, would affect operation is done well without
9 affecting operation of the load, which the Petitioners map to
10 the front display, display elements 520 to 132.

11 Now, first of all, I guess, if this Honorable Panel
12 adopts Patent Owner's construction, then the activating of the
13 display would take place -- sorry, the activating of the visible
14 indicator would take place when you turn on the visible
15 indicator, according to Patent Owners, and that would be the
16 step number 802.

17 And subsequent to that you see that that also
18 results in blocking power, turning off the second display.

19 Now, even if we took the position that any of the
20 operations or steps that take place in the box there in figure
21 21, the bottom portion of figure 8A, right, even if you took
22 the position that any of those constituted or corresponding to
23 the claimed activation of a visible indicator, none of those are
24 done while operation of the load is unaffected.

1 Indeed, while this is happening, the load, what's
2 next is the load has power to it blocked. The controller in the
3 Jahagirdar reference blocks power to what is called the load.
4 In so doing it is affecting operation of that alleged load and
5 that would be preventing its operation, any operation of it,
6 thereby the plain language, the plain meaning of that affecting
7 its operation.

8 So Patent Owners have additionally argued in their
9 briefs, and I am sure we will hear the response from
10 Petitioners in rebuttal, but I would note that they have not
11 addressed this in their demonstratives.

12 Even under Petitioner's position, you still have an
13 affecting of the operation of the load. It is affected. It is
14 prevented. It is not independent. It is entirely prevented
15 while this routine is taking place, when your phone is closed
16 and you are using that top display element, the visible
17 indicator.

18 Are there any questions on that issue before I
19 proceed?

20 JUDGE SHAW: I'm having trouble finding this
21 argument in your brief. Maybe you could point me to the page
22 or paragraph where this argument appears?

23 MR. KIBLAWI: So in our Patent Owner's
24 response, for the '726 patent, it is on page 20.

25 JUDGE SHAW: Thank you.

1 JUDGE PETTIGREW: And this is an argument
2 that applies only to the '726 patent?

3 MR. KIBLAWI: That's right.

4 JUDGE PETTIGREW: It is the only one that has
5 that load is unaffected language?

6 MR. KIBLAWI: That's correct.

7 JUDGE SHAW: And so your position, if I
8 understand you correctly, is that by blocking power to the
9 load, that affects the load?

10 MR. KIBLAWI: Affects operation of the load,
11 yes.

12 JUDGE SHAW: Affects operation of the load?

13 MR. KIBLAWI: It prevents its operation.

14 JUDGE SHAW: By preventing the operation.

15 JUDGE BUSCH: Does Petitioner's argument
16 regarding activation/deactivation generally with respect to the
17 alternative embodiment affect this argument?

18 It seems like Petitioner's argument is that if you
19 have the phone open, the main display can keep doing
20 whatever it is doing in an alternative embodiment and you
21 could still toggle the display on the -- I don't remember which
22 is the first and second -- the display on the outside of the
23 phone you can toggle with the button?

1 MR. KIBLAWI: Actually, Jahagirdar specifically
2 states that when the phone is flipped open that top display is
3 also powered off.

4 To give you a reference, in their -- so essentially
5 when one is on, the other is off, and when the other is on, that
6 one is off. So, for example, for the steps here, figure 8A,
7 when you open up -- when you close the phone and you only
8 have that top display displayed, in column 5 of the Jahagirdar
9 reference, lines 35 to 37, you see it provides that power is
10 blocked, disabled, to the what is called the -- what is mapped
11 to the load in the petition.

12 Then in column 6, lines 25 to 27, you see that
13 when you subsequently open the phone so that you can now
14 see what I called the front display, the main display, the top
15 display is powered off. The display driver for the top display
16 is powered off, turned off.

17 So I think in response, if I understood your
18 question correctly, the construction of activation doesn't
19 really matter here. It is still the same argument. It is still
20 deficient because it still prevents operation of what is called
21 the load by blocking power to it and thereby affecting
22 operation of the load.

23 But I think under Patent Owner's construction it is
24 even more inarguable because it is pretty much there in the
25 flow chart where it says turn off second display.

1 In fact, under Patent Owner's construction, where
2 the activating is the first step in figure 8A, if you recall, I
3 know there are a lot of patents here, but, if you recall, there
4 was a similar patent, the '980 patent that had the language of
5 without activating the load -- or, sorry, when the load is not
6 activated.

7 So if you adopted Patent Owner's construction, the
8 similar argument would also be applicable for that claim. But
9 even under Petitioner's argument for this claim, without
10 affecting operation of the load, the reference is deficient
11 because it does.

12 JUDGE SHAW: Well, doesn't the Petitioner argue
13 that activating the display element in step 816 is what is
14 happening, is what meets the claim element here, and in that
15 instance, because the second display is already off, the load is
16 unaffected? That's how I understood their argument.

17 MR. KIBLAWI: That's right, but the claim recites
18 that that activating is happening while operation of the load is
19 unaffected.

20 So it doesn't require that the actual step of
21 activating the visible indicator doesn't directly do something
22 with respect to the load. It is just in that context the
23 operation of the load has to be unaffected.

24 JUDGE BUSCH: By anything?

1 MR. KIBLAWI: The operation of the display here
2 would have to be unaffected by the -- while activating the
3 visible indicator is taking place, that that activating the
4 visible indicator, in that context, is entirely -- essentially
5 what I think it's trying to say -- is that it's entirely
6 independent of the load in the sense that you can still control
7 the load, you can do multiple -- as we see in the patent itself,
8 I think we discussed a lot yesterday, that part of the
9 intelligent functionality of the microchip of this patent is
10 being able to independently control different items.

11 In this case while you are controlling all of these
12 buttons on the side of the phone in Jahagirdar, necessarily
13 because the controller is taking an active step of preventing
14 power supply, it is not allowing an independent control of the
15 load. It is preventing any operation of the load. And,
16 therefore, it is affecting -- that takes place during an affected
17 operation of the load.

18 JUDGE PETTIGREW: Your argument is that
19 because the load cannot be operated, if you will, that that is
20 affecting operation of the load?

21 MR. KIBLAWI: That's right, because the
22 controller is actively preventing operation of the load by
23 preventing power to it, that that would be, preventing power
24 to the load, would be affecting operation of the load.

1 JUDGE PETTIGREW: Is it really actively doing
2 something at step 516 with regard to the load?

3 MR. KIBLAWI: Yes, it's, I guess, in the patent,
4 yes, it is actively preventing power from being supplied. If
5 that controller wasn't there the circuit would be complete and
6 power would be supplied. It is an affirmative step. It is a
7 function of that controller in Jahagirdar.

8 If there are no other questions on that point, I have
9 one more quick, very brief issue to discuss, because we are
10 running short on time, and that is, as you see on slide number
11 22 of Patent Owner's demonstrative, the claim 4, activating or
12 deactivating the product.

13 Now, I think in the petition the product was
14 generally identified as the device. But in claim 4 -- the phone
15 as a whole -- but in claim 4, for example, you see in slide
16 number 23 of Patent Owner's demonstrative exhibits, you see
17 that Petitioners, Dr. Horenstein, had mapped in claim 1 the
18 product as being the mobile station. That makes sense. That
19 is the product.

20 However, when it came to claim 4 there was an
21 inconsistency and they subsequently decided to shift
22 positions, apparently, and I guess suggest that the product is
23 the backlight, and that activating, which they had defined as
24 turning on and off, of the backlight, was an activating of the

1 product, and deactivating the backlight, turning off the
2 backlight, was a turning off of the product.

3 And I believe that the briefs, I think, explain this
4 issue from the Patent Owner's perspective fairly
5 comprehensibly. It is our position that the product is not the
6 backlight.

7 I believe that was Apple's position yesterday as
8 well. Their counsel had explicitly identified that feature as
9 being turning on or off the product, not the backlight. And I
10 think they cited to an on/off switch for the product.

11 In terms of the power switch on the phone itself,
12 the front panel of the phone, that was not raised in the
13 petition. However, as Dr. Horenstein himself admitted, as you
14 see on slide number 24 of Patent Owner's demonstrative
15 exhibits, he would consider those to be two separate user
16 interfaces.

17 Indeed, when you have the phone closed, one of
18 those interfaces is not even accessible, let alone operable, as I
19 say, operable let alone accessible.

20 And if you have no further questions on this issue,
21 if it may please this Honorable Panel, I would like to hand it
22 over to my colleague, Mr. Cristler, to discuss the last issue.

23 JUDGE PETTIGREW: Thank you, Mr. Kiblawi.

24 MR. KIBLAWI: Thank you, Your Honor.

1 MR. CRISTLER: So while we're getting ready
2 here, I would just like to point out, for Judge Busch, the
3 display to my right, right now, is currently, I would argue,
4 displaying status information that may include little or no
5 information where the display area 130 is cleared. That
6 display is currently on but not displaying any information.

7 I will now continue to get ready.

8 (Pause)

9 MR. CRISTLER: And it is still not displaying any
10 information, yet it is on.

11 (Pause)

12 MR. CRISTLER: Now we are displaying
13 activation. That's pretty parallel to figure 8A, operations 800,
14 802 and 804, 806.

15 So I would like to start with some prepared
16 remarks. I invite you to ask any questions you might have at
17 any time and I will do my best to provide great answers for
18 them.

19 On the display now, the information that I am
20 displaying is slide 32 from Petitioner's demonstratives.

21 So may it please the Court, I'm here, as we all
22 know, to discuss activation and deactivation in the context of
23 the patents and the claims at issue today.

24 We see generally two issues that need clarification
25 and discussion, namely, what is activation and deactivation

1 and what is not, and then activation of the load is not
2 activated, or operation of the load is unaffected.

3 There are various implementations of this language
4 throughout the claims but the concept would be applicable to
5 all recitations, basically activation of the visible indicator
6 while the load is not activated.

7 So similar to Petitioner's counsel, when I refer to
8 first display, 516, I think 130, all of those are the display on
9 the top of the phone that is visible when the phone is shut.
10 And then the second display is the main display that is visible
11 when the display is open, or when the phone is open.

12 So I would like to start with stepping through
13 some of the features of figure 8A, and I think it really
14 provides a clear basis for our discussion.

15 So we start at operation 800, figure 8A. This is
16 where we take the phone from an open position to a closed
17 position. And this is shown in figures 1 and 2 of Jahagirdar.

18 So in operation 802, upon closing of the phone
19 "controller 504 enables power to driver 514 and display
20 element 516 through line 524 (step 802)." That is exactly
21 quoted from column 5, about lines 29 and 30.

22 So at this point the driver and the display, 516,
23 which corresponds to the display area 130, are powered but do
24 not yet have information to display, exactly like when I was
25 setting up here. The display on the wall was powered. We

1 could all see that it actually to some extent had a backlight
2 on, it was active, but it was not displaying information.

3 So moving through 8A, I note that step 802
4 specifically says: Turn on first display. It is right there in
5 the operations. Again, this is before data is delivered to
6 display 516 but display 516, via the driver 514, is now
7 capable of receiving data and displaying data because it has
8 power. It is turned on. Display 516 is activated independent
9 of whether data is displayed.

10 So moving on, now we're at operation 804, and I'm
11 quoting from the specification: "Driver 514 sends data to
12 display element 516 for displaying visual information,
13 preferably status information, in display area 130 (step 804)."

14 In terms of figure 8A, operation 804 is described
15 as display status info of the first display. So this is made
16 possible by the first display being turned on in operation 802.
17 The driver 514 is powered and display 516 is also powered
18 and capable of displaying received data. And in 804 received
19 data is displayed.

20 So now, in operation 806, again, Jahagirdar says if
21 power is previously enabled for driver 518 and display
22 element 520, controller 504 disables power thereto. That
23 would be deactivation. Operation 806 specifically says turn
24 off second display.

1 So our position is very simple here. We've got
2 three operations, 802, 804 and 806. You've turned on all of
3 the devices. And then you send data to be displayed and it is
4 displayed on the device. And then you turn off the second
5 display.

6 So this brings us to the status information in
7 Petitioner's critical sentence. In operation 804 status
8 information was displayed on the first display. And as an
9 alternative, the status information may include little or no
10 information where display area 130 is cleared.

11 Petitioners wonder how can a display be activated
12 or turned on when no information is displayed? I
13 demonstrated it right here in the courtroom and described it
14 for Judge Busch.

15 And, further, the clear answer is provided by
16 Jahagirdar. The first display is activated, is turned on even
17 when the display area is cleared because the driver 514 and
18 the display element 516 are receiving power through line 512,
19 as indicated in step 802, in lines 29 to 30 of column 5.

20 In other words, the first display remains on after
21 having been turned on in step 802 and is capable of receiving
22 and displaying the received data.

23 The only time that the first display is turned off is
24 when the phone is opened and you answer a call in operation,
25 I think, 838.

1 So I would like to potentially draw your attention
2 to an analogy now. So it is important that the display, the
3 driver 514 and display 516 are operable and receive power
4 from the controller.

5 So it is like when you are -- if the TV was off over
6 here, and I had a television controller, and I'm over here
7 hitting change the channel, trying to tell the display to change
8 the channel, it doesn't know that I'm even sending commands
9 to change a channel because it is not powered. It is necessary
10 for the driver to be powering -- to receive power from the
11 controller and the display to be receiving power from the
12 controller.

13 So Petitioners argue that key 150 delivers power,
14 or key 150 actuates, or, I'm sorry, activates the display, but
15 there is no disclosure in Jahagirdar that key 150, with a
16 pressing of key 150 delivers power to the driver 514 or the
17 display. So the pressing of key 150 alone is insufficient to
18 activate the display.

19 JUDGE SHAW: But that's only if we agree that
20 activate only means turn on. Is that right? We would have to
21 agree that activate means turn on and it cannot include
22 sending display information?

23 MR. CRISTLER: Well, I think the problem with
24 sending the display information is that they characterize it as
25 activate or deactivate or turn on or turn off, and they use

1 those terms interchangeably throughout the Petitioner's reply
2 and the petition, everything that I have seen.

3 It is usually presented as activate, parentheses,
4 turn on. Well, it is actually an unreasonable position. And
5 unfortunately for -- I'm sorry, Judge Busch, you are not here,
6 but the big red clock behind Judge Pettigrew, right now it says
7 19:14, 19:13 -- their position, if you use interchangeably
8 activate and turn on, at every second that clicks that is turning
9 on the device. That is activating the device.

10 Well, instead, what their true position is, is that
11 only a portion of the display is activated. And, yes, of
12 course, transistors are firing throughout any display.
13 Whenever I switch slides back and forth, is that activation?
14 There are circuits that are being tripped and there are circuits
15 that are being turned on and there are circuits that are being
16 turned off.

17 However, when you go to the language of the
18 claims, I don't think that fits with respect to the language of
19 the claims.

20 For example, it is provided as an alternative in the
21 '970 patent, option B, wherein the visible indicator is
22 activated at least to indicate an activation signal from the
23 switch when the load is not activated. It is the visible
24 indicator that is activated.

1 And merely transistors in a display I don't think
2 count as the visible indicator. That's a portion of a display
3 device, not the visible indicator.

4 JUDGE PETTIGREW: Why isn't the portion that
5 shows information of visible indicator?

6 MR. CRISTLER: I think it is parsing devices in a
7 way that doesn't make sense. So, again, to rely on Petitioner's
8 own language, the eight bar -- or the seven bar LED behind
9 you, yeah, each of those individual LEDs may be activated
10 and deactivated, but sending new information to the display is
11 not activation.

12 And I think Dr. Morley has some relevant
13 testimony. So when it -- and Petitioners haven't provided any
14 evidence or discussion of this. So he has testimony. I can
15 find it in my prepared remarks.

16 But basically the gist of it is that when there is a
17 decoder between the controller, it is necessary that there is a
18 decoder between the controller -- here we go, page 216 of his
19 deposition transcript. Somewhere in the path between the
20 controller and the actual LED --

21 JUDGE PETTIGREW: I'm sorry, this is --

22 MR. CRISTLER: Sorry, Morley's deposition
23 transcript.

24 JUDGE PETTIGREW: -- Morley's deposition
25 transcript.

1 MR. CRISTLER: Page 216, and I'm reading from
2 line 15. And I think this goes to why merely a portion of a
3 display can't count as being activated or deactivated with
4 regards to the languages of the claim. And it has a basis in
5 the electrical structure behind even all of these devices we're
6 surrounded by right now.

7 So somewhere in --

8 JUDGE BUSCH: Excuse me.

9 MR. CRISTLER: Yes.

10 JUDGE BUSCH: If we look at column 9 -- and I
11 think most of the patents have pretty much the same row
12 numbers -- column 9 of the patents in these suits, in this
13 proceeding, I'm looking at the '952 patent.

14 MR. CRISTLER: Okay.

15 JUDGE BUSCH: Around line 45, that paragraph
16 talks about an output may be provided to indicate a condition.
17 Then it talks about using an LED as the indicator. And it
18 talks about that that condition can be a battery status. It can
19 be a find-in-the-dark location. These are all different uses of
20 a visible indicator.

21 Is that the correct way of reading that portion?

22 MR. CRISTLER: Yes, I think -- I am looking at
23 '970 and it looks to be around that same area. I don't really
24 see the language that you are citing to. But I will point to --

1 JUDGE BUSCH: It says, for example, the
2 beginning of the paragraph says that, according to another
3 embodiment, an output may be provided to indicate a
4 condition, for example, a battery is in good condition or bad
5 condition. It may also be suitable to assist in locating a
6 device, for example, but not limited to a flashlight, in the
7 dark.

8 I will skip a sentence. This output or indicator
9 may be a switch input. This output or indicator may be an
10 LED.

11 So it basically seems to be saying that this LED
12 can be an indicator of these different functions. Is that
13 accurate?

14 MR. CRISTLER: Yeah, I think that is exactly
15 accurate. And if we go on to the next paragraph, it starts
16 with: According to a further specific embodiment.

17 There we get some illustration as to how the
18 specification deals with activate and deactivate. And I'm
19 quoting from the '970, column 9, line 60: "According to a
20 further specific embodiment of the invention, referring to
21 figure 11, microchip 1113 can activate the LED 1104 for a
22 short time, e.g. every 100 milliseconds, every 10 seconds."

23 I think that is actually an incorrect statement. I
24 think it should say something like every 100 milliseconds for
25 10 seconds.

1 Basically what we've got is we've got a flashing
2 LED light. The LED light is turning on and off. And that is
3 specifically regarded as activating and deactivating.

4 JUDGE BUSCH: So when I look at that with
5 respect to the language of the claim, again, I'm just looking at
6 the '952 patent, claim 1, it talks about activating a visible
7 indication in response to an activation signal.

8 And it then goes on to say that the visible
9 indication provides information on at least one of the
10 following, and it talks about the different options, state or
11 condition, location, or battery power level indication.

12 That implies to me that the visible indication
13 could be, it doesn't have to be, but it could be whatever
14 provides the information about those things.

15 And so if the visible indication provides
16 information about a battery status, doesn't that only happen
17 when you press button 150 in the Jahagirdar reference?

18 MR. CRISTLER: So let me restate the question to
19 make sure that I'm understanding it correctly. So in view of
20 '952, claim 1, it indicates a state or condition of the product,
21 location of the user interface and battery power level
22 indication. That's the LED, I guess, from figure 11, which
23 would be 1104, I think, right?

1 And so you are asking whether the pressing of key
2 150 and the now new display of information corresponds to
3 that feature.

4 JUDGE BUSCH: Because it seems like the claim
5 is tying the visible indication to the information it is
6 conveying. That information is not conveyed until the button
7 is pressed.

8 So why wouldn't that be activating the visible
9 indication? Because you have no information about one of
10 those elements that you're trying to map, Petitioner is
11 mapping, until you press that button.

12 So activating the screen doesn't give you
13 information about at least one of those conditions. Activating
14 the button gives you information about one of those
15 conditions.

16 MR. CRISTLER: Now, in your question right
17 there you just used activation in two different senses,
18 activating the button versus activating the screen.

19 It is our position that in order to activate a screen,
20 the screen would be required to have a driver that has power
21 enabled to it and a display that has power enabled to it. So
22 the activation of the screen would then be dependent upon
23 that. And then, when it displays information, can convey
24 information.

1 In the context of, for example, figure 11, I think
2 even -- I think Petitioners took the opportunity to
3 mischaracterize --

4 JUDGE BUSCH: But turning the screen on doesn't
5 indicate anything except for maybe location, right?

6 MR. CRISTLER: Well --

7 JUDGE BUSCH: So if the visible indication is not
8 active until something is conveyed --

9 MR. CRISTLER: Well, I think --

10 JUDGE BUSCH: -- for example, turning your
11 overhead on, the screen on over there --

12 MR. CRISTLER: Yeah.

13 JUDGE BUSCH: -- there wasn't an indication
14 there, that was just a screen that was being turned on, correct?

15 You didn't have any information on there. The
16 slides weren't up.

17 MR. CRISTLER: Correct.

18 JUDGE BUSCH: There was no content being
19 conveyed. It seems like the visible indication in the claim
20 isn't just a light. It is an indication of one of these things.

21 MR. CRISTLER: Correct.

22 JUDGE BUSCH: So to be able to encompass one
23 of those things, turning that -- pushing that button in the
24 reference would activate that indication?

1 MR. CRISTLER: I think that, first, that without
2 the first operation 802 of figure 8A of Jahagirdar, where
3 power is enabled to the driver and power is enabled to the
4 display, regardless of how many times you push that button,
5 that is no activation.

6 If there is no power to the display, there is no
7 power to the driver, you can push that button all day and it is
8 not going to do anything, and that is not an activation.

9 JUDGE BUSCH: It also is not going to display
10 information until you push the button.

11 MR. CRISTLER: I'm sorry?

12 JUDGE BUSCH: It also will not display that
13 information until you hit that button while the screen is
14 active, correct?

15 MR. CRISTLER: I think in this case that it would
16 be activation with regards to, for example, figure 11, the
17 activation is that the LED receives power and then it does that
18 second thing of blinking to convey information.

19 In figure 11 is a simple LED. A lot of times LEDs
20 are, for example, just one light, a simple, just a simple light,
21 not even a seven bar representation. And in figure 11, the
22 microchip can activate the LED 1104 for a short time, every
23 hundred milliseconds -- or 400 milliseconds every 10 seconds
24 or so.

1 That could activate -- that could indicate
2 information via -- it could indicate the location of the device.
3 It could also indicate, for example, charge status information,
4 you know, it could blink to indicate that there is sufficient
5 charge in the battery.

6 So I think the conveyance of information along
7 with the necessary power to enable the device is necessary for
8 activation.

9 JUDGE BUSCH: So if a screen is -- if a screen in
10 another product turns on at some point and then later you hit a
11 button to get the find-in-the-dark feature activated on that
12 screen, that is not read on by this claim because the activation
13 of the screen that is displaying information, the information --
14 the screen was already displayed prior to pushing the button,
15 but once you push the button now you are getting the
16 information of where the product is, but the screen was
17 already on, that's not activating the find-in-the-dark function
18 or the visible indication?

19 MR. CRISTLER: I think the activation both
20 requires the display -- or the enablement of power as well as a
21 conveyance of information with regards to operation of 802
22 and 804 of Jahagirdar. So the display could be powered on
23 and convey information and that would be the activation in
24 terms of the claims. You don't look convinced.

1 JUDGE BUSCH: I'm just trying to understand the
2 answer. I'm just trying to process it to see if I have a
3 follow-up or if that is sufficient. You can continue. I will
4 think about it while you go on.

5 MR. CRISTLER: Please, if you come up with any
6 further questions, please let me know.

7 So I would like to move to -- so going back to the
8 alternative configuration when key 150 is pressed to display
9 new information -- and maybe my further comments will help
10 clarify the issue for you. Okay. So there's actually six
11 minutes left.

12 It is important to point out that -- where was I? So
13 at page 10 of Petitioner's reply they mischaracterize a lot of
14 issues. So I'm reading from page 10 of Petitioner's reply in
15 the 1149 with regards to the '970 patent. Petitioner alleges
16 that Jahagirdar discloses "a configuration in which display
17 element 516 was not activated prior to actuation of key 150."
18 That is part of their critical sentence.

19 And specifically that is incorrect. There is no
20 disclosure. The wording of the critical sentence, as indicated
21 by Petitioner, it starts off with alternatively, right, and that
22 alternative is merely with regards to the status information. It
23 doesn't change the entire nature of the embodiment. That
24 alternative still falls within the descriptions of figure 8A and
25 the operations of figure 8A.

1 So it is important to note at this section of page 10
2 that neither Jahagirdar nor Petitioners say that the display
3 element was deactivated. They don't say it was off. Simply,
4 they can't. It is because it is clear that Jahagirdar and
5 Petitioners understand when key 150 is actuated, display
6 element 516 and driver 514 must be receiving power because
7 they were turned on in operation 802.

8 And they must be receiving power to recognize
9 that information was received for displaying. So they
10 continue on. They refer to blank to displaying information,
11 instead of off to on again, but I would like to move to their
12 characterization of Morley's testimony in the Petitioner's
13 reply.

14 So at page 10 in the Petitioner's reply, in 1149, the
15 Petitioners allege that Dr. Morley has taken contradicting
16 positions. However, instead, it is more so that Petitioners are
17 mischaracterizing Dr. Morley's testimony.

18 They first cite to 148, lines 4 to 7, in which Dr.
19 Morley's testimony is: "And even if that display area is clear
20 then, nonetheless, it is still turned on assuming that power is
21 enabled to it?" And Dr. Morley answers: Correct.

22 And then they allege, moments later, he reverses
23 his position by confirming that in relation to use of the term
24 activation, the '749 patent, there is no way for the LED to be
25 activated yet, nonetheless, lit up.

1 This is a mischaracterization because the full
2 context the Petitioner is asking for is an analogy. So if you
3 go back to line 15, page 148 of Morley's deposition testimony,
4 they are looking at figure 11.

5 And the question is: And this would be the visible
6 indicator that would be activated upon appropriate input,
7 right?

8 Answer: It is activated as the switch 1111 is
9 closed.

10 Question: Right. In this design there is no way
11 for the LED to be activated yet, nonetheless, not lit up, is that
12 right?

13 Answer: In this example the LED is either on or
14 off, depending -- activated or deactivated, depending upon the
15 position of the switch 1111.

16 So with two minutes left I first note that both of
17 those are characterizations of figure 11. And the description,
18 the specification of LED 1104, is simply referring to figure
19 11, indicator output device 1104 may, for example, be an
20 LED. When microchip 1113 pulls a line, 1114, to high, LED
21 shines. So it is completely consistent testimony with
22 everything we've got.

23 For further characterization, it is actually a
24 misquote with brackets that they allege as one having ordinary

1 skill in the art would have understood this. So I'm looking
2 now at Petitioner's reply at page 10.

3 So they say Dr. Morley -- at the bottom of page
4 10 -- Dr. Morley also admitted that in the context of a light
5 bulb there is a small amount of current going through the
6 filament but it is not serving any purpose of illuminating
7 anything. Bracket, one of skill in the art, bracket, might call
8 the thing off.

9 Here, if you go back and read the context, Dr.
10 Morley is making a distinction between what one having
11 ordinary skill in the art, an electrical engineer, would describe
12 as on and off.

13 And then in this case, in this exact quote, Dr.
14 Morley is referring to a layman. If a flashlight has a low
15 enough current that it is barely illuminated, a layman would
16 understand that as off or deactivated. It is an explicit
17 mischaracterization that, well, you should direct your
18 attention to.

19 Any further questions with a minute left? I have
20 got lots of good points. Second activation function.
21 Petitioner's counsel said on second activation, a second turn
22 on switch, that was activation of a function. We're talking
23 about activation of an indicator. Multiple presses can be
24 different functions. That's how our device works.

1 What about -- oh, the second activation with
2 regards to shutting down. Shutting down takes time. So even
3 though you can press the off button, your computer takes
4 time. There could be interrupt signals where you press a
5 button quickly and it interrupts the processes and starts back
6 up again.

7 And questions?

8 JUDGE PETTIGREW: Take a minute to conclude.

9 MR. CRISTLER: Well, so one last question that I
10 will address was the question of whether -- to what extent the
11 specification really describes activate.

12 So it starts with regards to the abstract of the '970
13 patent, where we say specifically, with an input that transmits
14 a signal to the microchip, when the load is activated or
15 deactivated, when the load is on or off.

16 We talked about figure 11, microchip 1113 can
17 activate the LED 1104 for a short time, for example, every --
18 or a hundred milliseconds every 10 seconds or so. It is the
19 entire nature of the invention that we have discussed at great
20 extent, that it is a microchip controlled power to the load, and
21 that is -- activation and deactivation is central to this entire
22 specification in all of these patents.

23 So if it pleases the Court, I will --

1 JUDGE BUSCH: Maybe I have one more question
2 and maybe I can make this less long than my last question
3 about the visual indicator.

4 It is your position that a visual indicator is
5 activated or deactivated when power is sent to it or taken
6 away from it regardless of the type of visual indicator?

7 MR. CRISTLER: And, of course, while I'm
8 thinking I forgot the question. Can I have you repeat the
9 question?

10 JUDGE BUSCH: Yes. Maybe I can even make it
11 shorter.

12 Is activating a visual indicator simply turning
13 power on and off? Is activating and deactivating turning
14 power on and off to that indicator?

15 MR. CRISTLER: I think, for example, with
16 respect to figure 11, some of the circuits that we have are very
17 limited and simple circuits to where activating, for example,
18 the LED 1104, as described in figure 11, that can be powering
19 on and powering off.

20 JUDGE BUSCH: And I guess that's kind of what
21 I'm trying to understand. In the examples in the specification,
22 as far as I can tell the only example of a visual indicator is an
23 LED? Correct me if I'm wrong.

24 MR. CRISTLER: I'm sorry, figure 11?

1 JUDGE BUSCH: In the specification as a whole,
2 the only example of a visual indicator is an LED. Is that
3 accurate?

4 MR. CRISTLER: Yeah, I think so. The figure 11
5 --

6 JUDGE BUSCH: Okay.

7 MR. CRISTLER: Go ahead. I'm sorry.

8 JUDGE BUSCH: But presumably you believe that
9 a visual indicator reads on more than just an LED?

10 MR. CRISTLER: Of course.

11 JUDGE BUSCH: So I guess my question is, in a
12 more complex system, what would determine whether a visual
13 indicator is active? The simplest one -- the next simplest
14 example I can think of is the one we have in front of us,
15 where it is the display that provides information.

16 So in that case your position is that the visual
17 indicator is activated or deactivated only upon turning on and
18 off that screen?

19 MR. CRISTLER: So turning on or off I think
20 would be sufficient for activation/deactivation as illustrated
21 in figure 11 by the on and off of the LED 1104, however,
22 conveying information as well, in the context of receiving
23 power from a driver, from -- with the decoder, as implemented
24 by -- as implemented, as described by Dr. Morley, that would
25 also be activation in that at least the conveyance of

1 information, it would at least at a minimum require that
2 power.

3 The reason why Jahagirdar fails, and the entire
4 basis or one of the bases of our arguments is that the
5 operations 814, 816 and 818 are not activation, is because the
6 display is already activated. So, more so, it is not activation.

7 And if you read it in context of the claims, that the
8 display was activated while the second display was on, and,
9 the second issue that I didn't get quite to cover, in the order
10 of operations, 802, 804, 806, the second display is on upon
11 activation of the first display.

12 And so in the context of the claims where the load
13 is not activated, the load is described as the second display.
14 And so in the context of the specific language of the claims,
15 the features aren't taught by Jahagirdar.

16 JUDGE BUSCH: I guess maybe I need to go
17 narrower with respect to examples in your claims. Some of
18 your claims indicate that the visible indicator provides
19 information about the battery status.

20 MR. CRISTLER: Agreed.

21 JUDGE BUSCH: If I have a computer that
22 otherwise meets all of your limitations, including a screen,
23 and the only way for me to get battery indication is to push a
24 button, and then on my screen a battery indicator shows up.

1 Does pushing that button satisfy activating, a
2 signal for activating the visual indicator because that's how I
3 get the battery status displayed?

4 MR. CRISTLER: Is the screen on?

5 JUDGE BUSCH: The screen has been on the
6 whole time.

7 MR. CRISTLER: The activation would require
8 both power to the display and display of information.

9 JUDGE BUSCH: We're presuming the power has
10 been on the whole time.

11 MR. CRISTLER: And so in that context, the
12 combination of the display of the information and the power
13 would indicate that the indicator has been activated.

14 JUDGE BUSCH: Okay. Thank you. I have no
15 further questions, Judges Shaw and Pettigrew.

16 JUDGE SHAW: All right. Turning to the '726
17 patent, the specification, if you have it in front of you. In
18 column 4 there is this one sentence, as an example, column 4,
19 line 34: According to a further embodiment of the invention,
20 an intelligent flashlight having a microchip-controlled switch
21 is provided comprising an input means for sending
22 activating/deactivating signals to the microchip, and a
23 microchip for controlling the on/off function and at least one
24 other function of the flashlight.

1 One reading -- one could think one reading of that
2 sentence implies that activating could be something different
3 from the on/off function. How would you respond to that?

4 MR. CRISTLER: Well, of course, the
5 specification in the GTS patents as a whole, as we've
6 discussed along, the specification from the beginning of the
7 abstract says activation on and off. Figure 11, activation of
8 an indicator on or off.

9 This column 4 of the '726, it might -- activation
10 can be broadly interpreted in some circumstances. But with
11 regards to the claim language -- so there with regard to the
12 claim language they are provided an activation signal and
13 that's a signal to turn on and off. And that can provide
14 various functions implemented through, for example, figure 11
15 and the LED of 1104.

16 JUDGE SHAW: Okay. I don't have any other
17 questions.

18 MR. KIBLAWI: May it please this Honorable
19 Panel, may I add something to that?

20 JUDGE PETTIGREW: One minute.

21 MR. KIBLAWI: 30 seconds is all I need because
22 we discussed this sort of ad nauseam yesterday, what the
23 patent discloses, what's at the central character. I'm sure you
24 are dreading hearing these words, required by the very
25 character of the invention.

1 The way things are activated and deactivated, the
2 way the microchip controls things in this patent is through
3 how? Conducting current through supplying power. That's
4 how it is done.

5 That is universal throughout that patent. In order
6 to activate the LED, deactivate the LED, it is controlling the
7 current supply. In order to activate or deactivate a particular
8 function, it is controlling the current supply, the power flow.

9 So I think earlier I think the question was whether
10 or not the activating, you know, how that relates to the power
11 supply. I think in the context of the patent it is interrelated,
12 interrelated, the power supply and the activating and
13 deactivating.

14 In terms of when it talks about receiving an
15 activation/deactivation signal, that's a signal triggering the
16 microchip to do its central function, controlling current,
17 controlling power supply, to turn on or turn off a
18 corresponding function.

19 And so I think that also feeds into their statement
20 earlier where they said that if activating means controlling the
21 power supply, then the claims would be valid.

22 Thank you.

23 JUDGE PETTIGREW: I think we understand your
24 argument. Thank you.

1 Let's take a short five-minute recess. The clock on
2 the wall here says 3:55 so let's be back here at 4 o'clock.

3 (A recess was taken from 3:55 p.m. to 4:02 p.m.)

4 JUDGE PETTIGREW: Please be seated.
5 Petitioner, we will give you 45 minutes of rebuttal. Whenever
6 you are ready.

7 MR. MURPHY: Thank you. I will just say what
8 we are all praying for: Keep it brief.

9 I thought this was working. That's all right. It
10 was on a second ago. I may have done something wrong, but I
11 might not need -- is there a switch?

12 Well, you know what, actually I may be able to do
13 this without the screen.

14 JUDGE PETTIGREW: It was working. I know we
15 have technical issues with people switching back and forth.
16 But you are saying it was working and now it's not?

17 MR. MURPHY: Didn't it turn on when I plugged
18 in my computer? You know what, I don't think it's going to
19 be a problem, Your Honor. I should be okay.

20 I will start at the end, at the very last comment
21 that I heard during Patent Owner's presentation, and then I'll
22 rewind and go back to the beginning.

23 So the last comment that I heard is that the central
24 character of the Bruwer invention is controlling power to the
25 load with a microchip. And yesterday during the oral

1 argument in the related IPRs involving other Petitioners, there
2 was a lot of discussion about that in the context of the energy
3 consuming load.

4 Here, if I heard right, that argument is trying to
5 feed into the claim construction of activation. But what I
6 want to be clear on is that controlling power to the load with
7 the microchip is not novel. I don't think there is any dispute
8 about that.

9 So Jahagirdar, among other things, Jahagirdar
10 discloses controlling power to the load under the control of
11 the microchip, and there was no argument that the things that
12 were designated as the load by Microsoft were not
13 energy-consuming loads. There has been no argument that
14 that so-called essential feature was not disclosed. So I'll
15 leave it at that.

16 Oh, the screen is back.

17 Okay. Rewinding the clock back to motivation to
18 combine, a lot of the argument, what I heard was I think a
19 troubling invitation to rely on evidence after 1998. If we had
20 put in our petition or I had showed up here to argue that
21 because phones after 1998 had incorporated touch sensors on
22 the side of the phone that that renders something obvious as
23 of 1998, I don't know that -- I'm fairly certain that argument
24 would not have been accepted because what is relevant is the
25 knowledge of the state of the art at the time of the invention.

1 It didn't really seem fair to me that I -- I did not
2 even think, frankly, did not even think to look for such phones
3 because what would I do with that? I only looked for things
4 previous to 1998. So if we can't use it, I don't think it is
5 particularly fair for the Patent Owner to use that information
6 either.

7 Maybe a more commonsensical observation about
8 what happened, I think the industry took a fairly different
9 path. I had a flip phone in the late '90s. And it wasn't long
10 after that time when full-face touch screen interaction
11 capability came to phones. The screens got good enough. The
12 power supplies got good enough. And that's the direction the
13 industry went.

14 Flip phones are few and far between as of today,
15 Practically unheard of, but few and far between. It might
16 have been in 1998 that a person sitting there, Motorola or
17 wherever, looking at flip phones, might have thought, oh, this
18 is an interesting design variation I will try. It would have
19 been obvious to try this. It would have been obvious to put
20 one of these out there to see if it is something the users would
21 accept, even though ultimately that might not have been
22 successful and wasn't the direction that the industry went.

23 JUDGE PETTIGREW: What is your response to
24 the Patent Owner's argument that the disadvantages far

1 outweigh the advantages of replacing the buttons with touch
2 sensors?

3 MR. MURPHY: Well, we disagree. And so their
4 expert, Dr. Morley, testified that when he summed up all of
5 the pros and cons, he came out on the side of nonobviousness.
6 And when our expert summed up the pros and cons, he came
7 out on the side of obviousness.

8 What I attempted to do here is show two things:
9 Number 1 is within -- except in perhaps extreme situations of
10 where the sum of the pros and cons is extremely
11 disadvantageous, the law of obviousness supports that minor
12 design variations with pros and cons would have all been
13 obvious. It is not a nonobviousness argument.

14 And I don't think this reaches an extreme case. I
15 don't think Dr. Morley thinks so either. In his transcript he
16 used the word abomination, and I heard that repeated in Patent
17 Owner's argument, but actually in the same materials that
18 were printed on Petitioner's demonstratives on slide 19 and on
19 Global Touch's demonstrative slide 18 of the '726 patent
20 demonstratives, where the further testimony was presented
21 from Dr. Morley's transcript, pages 175 through 177,
22 approximately, Dr. Morley really, I mean, he used the word
23 abomination, but then in the testimony that followed that he
24 said, well, it is just not as good. It is costly. You wouldn't

1 necessarily want to spend the money on a touch sensor when
2 you wouldn't achieve the benefits.

3 He really didn't, you know, it was not an extreme,
4 all that extreme reaction. And, yes, he opined on obviousness
5 the way that he did, but the foundations of his obviousness
6 argument, inadvertent actuation, that foundation, we showed
7 that, well, there is another type of inadvertent actuation that
8 you would avoid, and that might be helpful, not something
9 that Patent Owner has even attempted to rebut.

10 Another possibility is the reduction of wear,
11 mechanical parts and contamination and those things. Dr.
12 Morley thought that was fine, too. And then finally you have
13 the aesthetics factor, which perhaps is a wash if you look at
14 Horenstein and Morley's testimony.

15 You know, when you add it all up I think the
16 record is strongly on our side and I would submit to the Board
17 that you would agree with that.

18 I will offer one additional point. Dr. Horenstein
19 actually at the time of the petition thought about a lot of these
20 considerations, about the inadvertent actuation issue, gave it a
21 lot of thought, and in his opening declaration, which is
22 Exhibit 1010 to the '726 patent, IPR 1147, at paragraph 66, he
23 goes on at length describing some of these issues and thinking
24 about ways you might have overcome them.

1 Another time he does that is in his reply
2 declaration, which is Exhibit 1018, in paragraph 4. Just as a
3 couple simple examples, in his opening declaration he
4 recognized the issue of the potential of maybe you don't want
5 those touch sensors on the side of the phone to activate all of
6 the time.

7 And he said, well, it would be trivial to design it
8 so that the answering-the-phone button would be locked -- if
9 that was one of the buttons that were used for that -- would be
10 locked out when the phone is open so you wouldn't
11 inadvertently actuate it.

12 He proposed a number of other possible
13 modifications that one of skill in the art would be able to
14 easily implement. One was adjust the sensitivity, which is
15 something that Schultz had provided for. It's very easy to
16 adjust the sensitivity of the sensor.

17 He suggested moving the locations of the buttons.
18 He suggested putting the sensors inside little indentations so
19 it would be a little harder for your finger to brush against
20 them, unless you meant to.

21 He even discussed the idea of -- which is, you
22 know, a very simple thing to do, described in the Buxton
23 reference, which is, well, if you were getting really smart
24 about this you would use one touch sensor and you would

1 activate the different functions by touching the touch sensor
2 in a certain pattern, one or two or three taps.

3 All of that is in his testimony. All of that is
4 evidence of record. And all of those particular suggestions
5 totally un rebutted by Dr. Morley.

6 On the legal question, I want to revisit
7 obviousness law very briefly here. The case that is cited in
8 Patent Owner's demonstratives, the Plas-Pak case, that case is
9 a decision of the Federal Circuit.

10 It is a non-precedential decision. It is an appeal
11 from an inter partes reexam where the Board actually held that
12 there was nonobviousness and then the Federal Circuit held
13 there was substantial evidence to support that determination.

14 And what the case concerned was a mixing
15 dispenser for a coating. There were two cylinders filled with
16 some sort of material and they would be dispensed through
17 some novel nozzle type of arrangement.

18 And one of the pieces of prior art was called
19 Fukuta, F-u-k-u-t-a. And Fukuta had involved with it a series
20 of check valves or stop valves that were designed for a very
21 specific function.

22 And when -- the proposal was to combine Fukuta
23 with another reference called Morris, and the Board rejected
24 this and the Federal Circuit held there was substantial
25 evidence to support that determination. The reason the Board

1 rejected it is in the Fukuta reference these check or stop
2 valves -- and these are quotes -- essential to the principle of
3 operation.

4 Another part of the opinion said that these check
5 or stop valves, it was directed to the very manner of how that
6 invention was operated. It really was the invention.

7 So what in that case the challenger to the patent
8 had proposed was completely destroying what the Board made
9 a factual finding on, was the essential principle of the device
10 in the prior art.

11 So in order for that argument to work for Patent
12 Owners, they would have to be able to show that the buttons,
13 the touch buttons, you know, being mechanical buttons and
14 not touch sensors, that that is the essential character or the
15 principle, essential principle of operation of Jahagirdar, to the
16 extent that changing them to touch sensors would destroy that
17 operation.

18 So that is completely unsupportable I think on the
19 factual record here. So the Plas-Pak case, in addition to being
20 non-precedential, is really not helpful I think to the Patent
21 Owners at all.

22 That's my last word on motivation to combine
23 unless there are any questions on this topic.

24 JUDGE PETTIGREW: No questions.

1 MR. MURPHY: On the topic of activation, so I'm
2 very comfortable with the analogy that counsel drew with the
3 screen on the wall in this room. To me if that screen is blank
4 and then somebody presses a button and the screen starts to
5 display something, that screen is activated.

6 And that is completely consistent with the
7 testimony that Dr. Horenstein gave and I don't really have any
8 problem with that analogy at all.

9 JUDGE BUSCH: Maybe I misunderstood his
10 analogy. I thought he said it was activated when the screen
11 turned on without any information being displayed. That's not
12 what you just said, correct?

13 MR. MURPHY: Well, so the question then is --
14 that's not what I said, you are right, Your Honor. So the
15 question then is can the same -- I suppose, it is a little
16 metaphysical -- but can the same screen be activated more
17 than once? Can the same device just be activated and then
18 activated again?

19 As a theoretical matter, the answer is yes. I think
20 as a matter of what is disclosed in Bruwer the answer is
21 certainly yes. The devices disclosed in Bruwer have these
22 microchip-controlled visible indicators of
23 microchip-controlled loads and the disclosure of Bruwer
24 repeatedly talks about providing an input into the microchip
25 that activates a function. And then you provide another input

1 and it activates another function. So you keep activating the
2 device over and over again.

3 And the reason is because the way the word
4 activation is used in Bruwer, it is not to enable power to the
5 device, which is what Patent Owners really need it to mean
6 for their argument to work. The way that activation is used in
7 Bruwer is to talk about something is not happening and then it
8 is happening.

9 In the case of a visible indicator, the test -- the
10 best as I have been able to put together -- I think the test is
11 what are you seeing? So in Dr. Morley's testimony, which
12 was on our slides we discussed before, Dr. Morley talked
13 about the LED example. He talked about a light bulb. And he
14 said, well, when you can see it, it is activated.

15 I mean, that is sort of a very commonsensical
16 interpretation of what activated means. And I think in the
17 context of a visible indicator which is supposed to be showing
18 you information, that makes perfect sense. When the user
19 sees that information, whatever step was taken in order to
20 make that information visible to the user, well, that's
21 activation.

22 JUDGE PETTIGREW: So that's your definition of
23 activation, making something visible to the user?

24 MR. MURPHY: I never put it that way before,
25 Your Honor, but I'm comfortable with it.

1 Closely related to this is the question of activating
2 the visible indicator when operation of the load is unaffected.

3 I was, admittedly, I was a little confused by the
4 argument, because what I find in reading the reply brief,
5 really I just looked at it again, that's all I'm seeing there, but
6 what I thought that argument was is -- first, Dan, can I have
7 slide 38?

8 Okay. So what I thought this argument was that
9 Global Touch was making is -- and I'm speaking from Global
10 Touch's perspective -- I snap the phone closed. At that point
11 the top display is activated, under Global Touch's rubric. If
12 the top display is activated after I close the phone, at that
13 time when you close the phone the main display is
14 deactivated.

15 That's how Global Touch's thinking works. And so
16 I thought that is what their argument was, is the operation of
17 the load is unaffected because -- well, the operation of the
18 load is affected because when I activate the visible indicator,
19 the top display, the main display turns off.

20 So that is how I was tracking on Global Touch's
21 logic. But I think I heard more than that in the argument. I
22 think I heard Global Touch argue that, no, no, no, in fact, it is
23 worse than that for us, for Petitioners, I think I heard Global
24 Touch say that even if, even if touching the button on the side
25 of the phone is an activation, even if that is true, that is not

1 an activation when operation of the load is unaffected because
2 the load is off.

3 So I think what Global Touch is arguing is that the
4 only way the load can be unaffected is if it is on and
5 unaffected. If I have that right, if that's the argument that
6 was being made, that's the first time it has been made, A, and,
7 B, it is wrong. There is no support for that type of
8 interpretation, the load being unaffected, and it really should
9 be rejected.

10 The last point I would like to raise in rebuttal here
11 is about claim 4 of the '726 patent. The only point I would
12 like to make is I heard it was said that -- I heard an allegation
13 that Petitioners claim that the product is the backlight.

14 That is not Petitioner's argument at any point. The
15 argument that Petitioners made is the product is the phone and
16 that if you press a button on the side of the phone and you
17 activate that backlight, you turn that backlight on, you have
18 thereby activated the product.

19 So the product in the claim itself is laid out as
20 comprising a power source or connection for a power source
21 and an energy consuming load and so on. It has these various
22 parts. And if you press a button and you make one of those
23 parts light up, you have activated the product.

24 So that is Dr. Horenstein's opinion under the plain
25 meaning of the term. And, of course, in reply, once Global

1 Touch raised their argument, we said, well, look, if the power
2 button is the only way to activate the product, if that's true,
3 then the power button is there and it is in the same user
4 interface for the reasons I stated in my opening argument.

5 JUDGE BUSCH: Going back, to make sure I
6 understand the first part of that argument, you are saying that
7 basically activating any aspect of the product, which that
8 display is one of those portions of the product, would meet
9 that requirement?

10 MR. MURPHY: I don't know if any part of the
11 product, but the backlight is a very significant part of the
12 product. It is a high energy draw. It is very visible to the
13 user. It is something you would see.

14 I would think there are many parts of the product
15 that, if you activate it, would be activating the product, but
16 perhaps not any part.

17 JUDGE BUSCH: Okay. So, for example, making
18 a call so that you are activating the transceiver and
19 everything, that would activate the product as well because
20 that is a part of the product that is significant in being --
21 drawing the power?

22 MR. MURPHY: Yes, Your Honor.

23 JUDGE BUSCH: Okay. Thank you.

24 JUDGE PETTIGREW: And then the second part of
25 that argument is that even if activating the product means

1 activating the entire product, then you are relying on the
2 power button?

3 MR. MURPHY: That's correct. And our rebuttal
4 to the argument that the power button is not in the same user
5 interface is that actually there is only one user interface in
6 Jahagirdar, because there is one microchip, and everything
7 feeds into it.

8 If there is no further questions, we will rest.

9 JUDGE PETTIGREW: Judge Busch, any more
10 questions?

11 JUDGE BUSCH: Nothing. Thank you.

12 JUDGE PETTIGREW: All right. Thank you,
13 Mr. Murphy.

14 MR. MURPHY: Thank you.

15 JUDGE PETTIGREW: We thank both parties for
16 your arguments. A final written decision will be issued in due
17 course. This hearing is adjourned.

18 (Whereupon, at 4:22 p.m., the hearing was
19 adjourned.)