

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TWITTER, INC.,
Petitioner,

v.

VIDSTREAM, LLC,
Patent Owner.

Case IPR2017-00829 (Patent 9,083,997 B2)
Case IPR2017-00830 (Patent 9,083,997 B2)

Record of Oral Hearing
Held: October 19, 2018

Before SALLY C. MEDLEY, CHARLES J. BOUDREAU, and
JESSICA C. KAISER, *Administrative Patent Judges*.

Case IPR2017-00829 (Patent 9,083,997 B2)
Case IPR2017-00830 (Patent 9,083,997 B2)

APPEARANCES:

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The above-entitled matter came on for hearing on Friday, October 19, 2018, commencing at 1:00 p.m. at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

P R O C E E D I N G S

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JUDGE MEDLEY: Okay. I think we're ready. Good afternoon.
This is the hearing for IPR 2017-00829 and IPR 2017-00830, Twitter v.
Vidstream. We'd like at this time for the parties to please introduce
counsel, beginning with Petitioner.

MR. MCCOMBS: Good afternoon.

JUDGE KAISER: Before we get started, Judge Medley, this is Judge
Kaiser in Denver. I'm not able to hear you.

COURT REPORTER: Okay. We are --

JUDGE MEDLEY: I'm sorry. Can you hear me now?

JUDGE KAISER: Yes. Thank you.

JUDGE MEDLEY: Okay. Sorry about that.

MR. MCCOMBS: Good afternoon. This is David McCombs, on
behalf of the Petitioner, Twitter. With me is my colleague, Raghav Bajaj.

JUDGE MEDLEY: And you'll be presenting, Mr. McCombs?

MR. MCCOMBS: Yes, Your Honor.

JUDGE MEDLEY: Okay. Thank you. And then for Patent
Owner?

MR. ROBINSON: Good afternoon, Your Honor. Eagle Robinson,
on behalf of Patent Owner. With me is Mr. Eric Green.

JUDGE MEDLEY: And you'll be presenting?

MR. ROBINSON: And I'll be presenting, yes.

1 JUDGE MEDLEY: Great. Thank you. And you all are familiar
2 with the order we sent out, but I'll go over just a few things on that. Each
3 party has 60 minutes to present arguments. Petitioner, you'll proceed first
4 to present your case with respect to the challenged claims and grounds for
5 which the Board instituted trial. And you may reserve some of your time to
6 respond to arguments presented by the Patent Owner.

7 Thereafter, Patent Owner, you will respond to Petitioner's
8 presentation. You may reserve argument time for sur-rebuttal. Are there
9 any questions as to the order of presentations? Petitioner, do you wish to
10 reserve time for rebuttal?

11 MR. MCCOMBS: Yes, Your Honor. I would like to reserve 20
12 minutes.

13 JUDGE MEDLEY: Okay. And how about you, Patent Owner, for a
14 brief surrebuttal?

15 MR. ROBINSON: Ten minutes, please, Your Honor.

16 JUDGE MEDLEY: Ten minutes? Okay. Thank you. We would
17 like to remind the parties that this hearing is open to the public, and the
18 transcript will be entered into the public record of these proceedings.

19 At this time I'm going to turn it over to Judge Kaiser, who is going to
20 address some preliminary matters in these cases.

21 JUDGE KAISER: Thank you, Judge Medley. I just want to make
22 sure that you can hear me in the room.

23 JUDGE MEDLEY: Yes, we can hear you. Thank you.

1 JUDGE KAISER: Okay. Very good. Good afternoon, everyone.
2 As Judge Medley said, before we get started I just wanted to address some
3 preliminary matters.

4 First of all, as to demonstratives, it appears that Petitioner has filed
5 its demonstratives in these two cases. But the Patent Owner has not. And
6 per our oral hearing order, demonstratives were to be filed. So Mr.
7 Robinson, I just wanted to verify that it's correct that Patent Owner hasn't
8 filed its demonstratives yet.

9 MR. ROBINSON: Your Honor, that is correct. My reading, and my
10 understanding from past experience was that within two days typically
11 meant within two days after, in case there were any rulings on demonstrative
12 objections that could present things. So, that was my understanding. I
13 can certainly file it immediately.

14 JUDGE KAISER: Okay. Very good. So it sounds like it would be
15 no issue, Mr. Robinson, for you to file those by Tuesday?

16 MR. ROBINSON: No, not at all.

17 JUDGE KAISER: Okay. Very good. And then second, I just
18 wanted to discuss the prehearing conference that was held on October 2nd,
19 or I'm sorry, October 16th in these cases. We had a conference call.
20 Counsel for both parties were present on that call. The prehearing
21 conference was requested by Patent Owner to address two issues.

22 First of all was Patent Owner's objection to Petitioner's
23 demonstrative exhibit number 7. Petitioner -- I'm sorry, Patent Owner
24 objected to that demonstrative, which has an excerpt of deposition testimony

1 of Dr. Olivier. Patent Owner argued that the excerpt is misleading without
2 other testimony from that deposition.

3 On that call, we overruled that objection, and we noted that the
4 demonstrative exhibits for this hearing are not evidence. But the Patent
5 Owner remains free during the hearing to point us to other portions of Dr.
6 Olivier's deposition.

7 We also heard argument from both Patent Owner and Petitioner on
8 Patent Owner's motion to exclude Exhibits 1041 to 1043. Patent Owner's
9 counsel stated that an early ruling was sought on that portion of its motion to
10 exclude, to avoid spending time during this hearing on those arguments.

11 At the prehearing conference we took those arguments under
12 advisement. We believe that those arguments are fully laid out in the
13 briefing on Patent Owner's motion to exclude. And so, we continue to take
14 them under advisement.

15 But for the purposes of this hearing the parties do not need to present
16 further argument on the motion to exclude those exhibits. The parties may
17 address those exhibits in arguing the substantive issues in these cases, such
18 as printed publication.

19 One final thing that I wanted to mention is that because Judge
20 Boudreau and I are both remote we can't see the screen that's in the hearing
21 room. And so, we have all of the documents electronically. But we ask
22 that counsel clearly identify the documents that they're referring to during
23 their presentations. So, please give us the exhibit or paper number, or the
24 demonstrative exhibit number, so that we can follow along.

1 In addition, it's difficult for us to hear anyone who is not standing at
2 the podium and speaking directly into the microphone. So, we just ask that
3 if you are speaking, that you do so at the podium. So, before we begin, are
4 there any other preliminary matters from Petitioner? Mr. McCombs?

5 MR. MCCOMBS: No, Your Honors.

6 JUDGE KAISER: Okay. And anything before we begin from
7 Patent Owner?

8 MR. ROBINSON: No, Your Honors.

9 JUDGE KAISER: Thank you very much. So, Mr. McCombs, you
10 can proceed whenever you're ready.

11 MR. MCCOMBS: Thank you, Your Honors. May it please the
12 Board, David McCombs, on behalf of the Petitioner, Twitter. There are a
13 number of issues that I would like to discuss today. But before I do so, let
14 me set the context for the 997 patent.

15 If we turn to Slide 3, the 997 patent is directed to recording and
16 sharing videos on websites. And we see here in the figures that a user,
17 through a graphical user interface that's shown in purple, accesses a website.
18 On the website the user then clicks an embedded link, which is shown in
19 light blue in the right hand figure, to launch media recorder software that
20 then appears in a previously blank portion of the web page.

21 The recorder software is launched from a video management server
22 that's shown in the red box at that bottom of the figure. The recorder then
23 appears in an iframe on the web page. With this the user can record a

1 video, which is then received as a video stream, and stored at the video
2 management server.

3 So, with that, on Slide 4 I've laid out the topics that I plan to address.
4 The first is claim construction. So, if we move directly to Slide 5, the
5 dispute in this case is over the term receiving a video stream. We disagree
6 with the negative limitation that the Patent Owner wants to read into the
7 meaning of this term. A video stream is --

8 JUDGE KAISER: Mr. McCombs, it wasn't clear to me from
9 Petitioner's briefing if Petitioner had a proposed construction for this term,
10 or if Petitioner was simply disputing a portion of Patent Owner's proposed
11 construction.

12 MR. MCCOMBS: We did not --

13 JUDGE KAISER: So, can you clarify that?

14 MR. MCCOMBS: Yes, Your Honor. We did not present, per se, a
15 construction at the outset. But our interpretation is that the correct
16 interpretation is simply sequential video data.

17 JUDGE KAISER: So, it's Petitioner's contention that any sequential
18 video data is a video stream?

19 MR. MCCOMBS: Yes.

20 JUDGE KAISER: Okay.

21 MR. MCCOMBS: So, we do agree with the Patent Owner that
22 sequential video data is a video stream. We can agree on that point. But
23 there's nothing in the patent, or elsewhere, that says that the data must be

1 independent of, and not associated with a file container, as the Patent Owner
2 is proposing.

3 Before we look at the evidence on this, why is this even at issue?
4 And here we see that the Patent Owner admits that yes, the Nassiri prior art
5 does transmit video as it's being recorded. But the Patent Owner says that
6 the data is transmitted in segments. The segments must be organized in a
7 file container format, such as Flash video, or other container format. And
8 once so formatted for transport then the data is, under the Patent Owner's
9 definition, no longer a video stream.

10 Now, the Patent Owner is characterizing the transmission of video
11 into three categories, streaming, segmenting, and whole file transfer. The
12 Patent Owner wishes to exclude segmenting from the definition of
13 streaming.

14 The Petitioner, on the other hand, recognizes that a person of skill
15 would understand segmenting techniques to be included in the definition of
16 streaming.

17 Here then, if the Board correctly finds that a video stream can be
18 transmitted using segmenting, then the Patent Owner has admitted that this
19 teaching exists in Nassiri. Their argument against Nassiri collapses solely
20 into one of claim construction.

21 So, let's turn now to why Patent Owner's construction is incorrect
22 and should be rejected by the Board. And I'm now on our Slide 6.

23 There is no reason that the construction of video stream should be
24 artificially pinched to exclude transport techniques associated with the file

1 container, such as segmenting. We see here on our Slide 6, first on the
2 lower left, the dictionary definition of stream that is presented in the
3 Microsoft computer dictionary.

4 There, a stream is any data transmission that occurs in a continuous
5 flow, period. There are no limitations on how that data is formatted.
6 Likewise, we have in the 997 patent itself the intrinsic evidence. Nowhere
7 does it restrict the meaning of video stream, as the Patent Owner is
8 suggesting.

9 And in fact, the evidence is to the contrary. If we look at the
10 language of the 997 patent it states that the video data is sent from the user
11 device to the server as a video stream, as described in the 471 application.
12 And that --

13 JUDGE KAISER: Mr. McCombs --

14 MR. MCCOMBS: Yes.

15 JUDGE KAISER: Before you go to the 471 application, I wanted to
16 ask you about this -- the definition in the Microsoft computer dictionary.
17 And in particular this piece about, that it occurs in a continuous flow. How
18 does segmenting occur in a continuous flow?

19 MR. MCCOMBS: Yes. So, segmenting occurs in a continuous
20 flow, because it's as it is perceived by the user. And so, if we go to
21 transport mechanisms that deliver video by segmenting, you'll see that those
22 segments are perceived in real-time, or quasi-real-time by the user. So, if
23 we go, for example to the --

1 JUDGE KAISER: So, just to be clear, it's your contention that as long
2 as, so this continuous flow is not in terms of how it's transmitted, but in
3 terms of how someone receiving the data will perceive it?

4 MR. MCCOMBS: That's correct. The claim term is receiving a
5 video stream. And we have that specifically with regard to segmenting.
6 We see on our Slide 16. We have the HTTP live streaming, which says
7 that the media data can be transferred soon after it is created, allowing it to
8 be played in near real-time.

9 So, if we go back to our Slide 6 again, we also have, again, looking
10 at the 997 patent, as I mentioned, that it is referring to video stream, as
11 referenced in the 471 application. And this is incorporated by reference
12 into the 997 patent.

13 And as we know, the 471 application became the 304 patent, which
14 is in the record as our Exhibit 1005. And when we go to the 304 patent,
15 and I have numerous citations to the record here on our Slide 6, it says that
16 the video data is streamed in FLV format, as well as other formats that are
17 capable of streaming video data.

18 Now, FLV is a file container format, so it can't be consistent with the
19 intrinsic evidence to require that the video stream be independent, and not
20 associated with a file container, when the 304 patent itself cites numerous
21 examples of the exact opposite, especially when it's pointing to FLV as what
22 it intended a video stream to mean. Now, what's remarkable --

23 JUDGE KAISER: Well, Mr. McCombs, my understanding is that
24 Patent Owner reads this portion of the 471 application differently. Because

1 it uses the word "other" before FLV format. So, it says, other formats that
2 identify as streaming, other than the FLV format. So, can you explain how
3 you interpret that second other --

4 MR. MCCOMBS: Yes.

5 JUDGE KAISER: -- in that sentence?

6 MR. MCCOMBS: I interpret those as examples. And I also
7 interpret it to mean that FLV is referred to specifically as the correct format.
8 I also would direct the Panel to the 304 patent specification at Column 20,
9 Lines 46 or so through 66, when it specifically is referencing the FLV file as
10 being something that's cached and streamed.

11 JUDGE KAISER: So, that's in Exhibit 1005?

12 MR. MCCOMBS: Yes. And so, we also have here on our Slide 8,
13 we have the Adobe specification, the Flash video file format specification
14 that specifically describes FLV as a container format. And it can't be
15 consistent with the intrinsic evidence here, you know, to require that the
16 video stream be independent of, or not associated with a container format,
17 when we have those citations in the 304, as well as when we go to Slide 7 in
18 our case.

19 And in Slide 7, it's remarkable here that the Patent Owner never
20 addressed the incorporated 304 patent specification in its claim analysis.
21 We asked Dr. Olivier about this. And here Dr. Olivier said, yes, that he did
22 review the patents that were incorporated in, by reference into the
23 specification. But never reviewed those with regard to the claim terms and
24 his understanding of them.

1 And we have, noteworthy in the record there's never a specific
2 reference where Dr. Olivier discusses the 304 specification and its
3 discussion of FLV as a file container format when interpreting the claims.

4 And this flaw can explain why he incorrectly opines that a video
5 stream would not be associated with a file container format, like FLV, and
6 the other examples in the 304 patent. He has to ignore the 304 patent to get
7 there.

8 If we look next to our Slide 8, I would like to again direct the Panel
9 to other evidence that the 997 patent's preferred example of Flash video as
10 the file container format for the video stream was well known. And here
11 again, the Adobe specification, our Exhibit 1040, describes FLV as the de
12 facto standard, the container format for delivering video streams.

13 We also refer here on the slide to Dr. Olivier's deposition in this
14 case, where he does recognize that FLV is a file format. But he never
15 makes the connection in this case that FLV as a container format would be
16 the same as what's referred to in the 997 patent, presumably because he
17 chose not to include the full intrinsic record. Now --

18 JUDGE KAISER: Mr. McCombs, I understand one of Patent Owner's
19 arguments to be that you can have data that's saved. Essentially you can
20 have a file container that's streamable. So, you start with a file, and then
21 you extract the data from the file. Then that data is what's streamed. But
22 the file itself is not the video stream. How do you respond to that
23 argument?

1 MR. MCCOMBS: To the extent that that is possible, that is not the
2 only way that that can be done. And if you look at the specifics of, for
3 example, HTTP live streaming. If you go to Exhibit 1037, if you go to
4 Page 26 of that reference, it's discussing that these segments are actually
5 files.

6 And in fact, there are references there to, that you have .ts files,
7 which are small file segments that are then transmitted. And even in that
8 case there's an example where it's discussing that for a media of something
9 that's along the lines of 15 minutes, there are 7,794 different segments that,
10 file segments that are transmitted. So, that would work out to roughly
11 seven or eight file segments per second. So, in the --

12 JUDGE KAISER: And where are you on Exhibit --

13 MR. MCCOMBS: 1037.

14 JUDGE KAISER: -- 1036 or 1037?

15 MR. MCCOMBS: Exhibit --

16 JUDGE KAISER: 1037?

17 MR. MCCOMBS: -- 1037 at Page 26.

18 JUDGE KAISER: Okay. And explain to me where you are in that
19 page.

20 MR. MCCOMBS: Okay. So, this is a page that is describing
21 examples of .ts files. This is Page 26 of 33 in the record.

22 JUDGE KAISER: Okay.

23 MR. MCCOMBS: And if we go down it says, in Section 8.4 it says,
24 playlist file with encrypted media segments. And you'll see as you go

1 down, it says, media sequence equals 7,794. You'll then see target duration
2 15. And then you'll see examples of file sequences, .ts files. So, that's
3 showing --

4 JUDGE KAISER: Okay.

5 MR. MCCOMBS: -- that we're streaming in files.

6 JUDGE KAISER: And do you have expert testimony that addresses
7 this particular part of Exhibit 1037?

8 MR. MCCOMBS: No. This was responsive directly to your
9 question.

10 JUDGE KAISER: Okay.

11 MR. MCCOMBS: But we have that in the record. This exhibit is in
12 the record.

13 JUDGE KAISER: Yes. Thank you.

14 MR. MCCOMBS: Okay. Okay. So, with regard to, next, if we go
15 to Slide 9. You know, as we've been discussing, you know, we do
16 recognize that the Patent Owner would like to exclude segmenting
17 techniques from its construction of receiving a video stream. But the
18 argument is flawed for several additional reasons.

19 And I want to point now the Panel to Paragraph 55 of Dr. Olivier's
20 report, where he does concede that segmenting allows for viewing a video
21 before it is transmitted in its entirety. And the question would be, why
22 would that not be perceived by the user as a video stream?

23 Secondly, we have the 997 patent itself. And it recognizes
24 segmenting techniques as streaming. In Column 10, Lines 12 through 26,

1 it's discussing caching and intermittently transmitting the video in quasi real-
2 time to maintain broadcast quality.

3 Now, that is a description of streaming. Or that is, I'm sorry, that's
4 a description of segmenting. And it specifically referred to in the patent as
5 the video stream. And I would direct the Panel specifically to Column 10,
6 Line 23.

7 JUDGE KAISER: Mr. McCombs, that's not how Patent Owner is
8 referring to segmenting. As I understand it, the Patent Owner is referring
9 to segmenting as not just caching and transmitting, but saving those, for lack
10 of a better term, chunks of data as separate files before they're transmitted.
11 Isn't that right?

12 MR. MCCOMBS: Yes. But caching is saving. And intermittently
13 transmitting those in quasi real-time is a description of segmenting. If we
14 go to our Slide 10, we have segmenting techniques being explained by Dr.
15 Almeroth, with respect to the HTTP live streaming and .mpeg dash media
16 streaming protocols that do operate by segmenting. They break the file into
17 chunks that are then intermittently transmitted and form the overall video
18 stream.

19 JUDGE KAISER: Well, I guess it comes down to what, in part at
20 least, what the parties contend that the file container is, right? Because
21 that's part of Patent Owner's contention, is that when you're doing this
22 caching, and sending things intermittently, you're not saving those into some
23 sort of file container.

1 Whereas, segmenting as they use it would be saving into a file
2 container. So, do we have testimony or evidence about what a file
3 container is, what the limits of that are?

4 MR. MCCOMBS: Well, Patent Owner did introduce the term file
5 container. But does not specifically define it. Dr. Olivier, the Patent
6 Owner's expert, did provide an example of .mpg extensions in his
7 declaration. This was in his declaration at Paragraph 51. But he offers
8 nothing else really to assist with the understanding of what is meant by file
9 container.

10 To the extent that we understand it, the Petitioner would propose that
11 a file container is defining a format for a video file. And that Flash video,
12 or FLV, would be one example, as indicated in Exhibit 1040, which is the
13 Adobe specification at Page 7. And Dr. Almeroth testified to this effect in
14 his declaration at Exhibit 1036, Paragraph 20. So, from --

15 JUDGE KAISER: How about transmitting data in packets? Would
16 that be considered, would packet transmission be considered a file
17 container?

18 MR. MCCOMBS: You know, I could speculate on that. I'm not
19 certain as to, you know, to what extent it has to -- I don't think that,
20 necessarily that segmenting would always require that the data be in files.

21 But again, what we're talking about is how the data is perceived by
22 the user when it's received. And perceived as the user in -- as being
23 received in real-time. Then that would be receiving a video stream.

1 And, you know, here we have Dr., you know, again, Dr. Almeroth's
2 testimony that, you know, to the extent you're using these protocols for
3 delivery of video streams, to the extent that they are segmented in video
4 files, that would be transmitting the entirety of the video as an overall
5 stream. So, that's consistent with receiving a video stream.

6 Our view is that again, segmenting is not excluded from the
7 definition of streaming. And that the proper construction, if you boil it
8 down, simply should be sequential video data.

9 JUDGE KAISER: So, let me ask you this just to move us maybe to
10 the next issue. In Petitioner's view does how the Panel construes video
11 stream matter in terms of Nassiri's teachings?

12 MR. MCCOMBS: No, Your Honor, it does not. I think under either
13 construction Nassiri has a clear teaching of receiving a video stream. And I
14 think if we could go to our slide on that, I think that's Slide 15.

15 On Slide 15 we have a discussion in Nassiri of its Paragraph 27.
16 And here it's providing an example of a feedback mechanism that can be
17 used, where, for example, the quality of the video can be adjusted in real-
18 time, where the server prompts the contributor to make adjustments to
19 brightness or contrast, and the like. And all this is happening while the
20 recording is being made.

21 And here, the reference Nassiri is referring to receiving video data.
22 And this is not discussing receiving a video file, but video data. And so, in
23 this case this shows that the video stream can be independent of a file
24 format, and meet the Patent Owner's construction exactly.

1 We have as well, Dr. Olivier, we asked him about this as well. And
2 he agrees that the term "video data" is agnostic as to whether that data is or
3 is not sent in a file format. So, this all supports that Nassiri is not limited to
4 transmitting data in a file container.

5 So, if we move to our Slide 16, if the Board, correctly in our view,
6 finds that the video stream can be transmitted using segmenting techniques,
7 the Patent Owner has admitted that this teaching exists in Nassiri. And we
8 cite to Dr. Olivier, Exhibit 2008 at Paragraph 74.

9 And we also showed that with respect to video data, even if you were
10 to adopt the construction proposed by the Patent Owner, Nassiri still makes
11 that teaching. So, both constructions would work. We think the correct
12 construction is simply sequential video data.

13 Okay. So if, unless there are further questions on this, I can move
14 to the next issue. Okay. So, the next issue is, if we go back to our
15 summary, this is on Slide 17. And the second point of contention is that,
16 how Nassiri and Bradford provide a link to a video recorder, or video
17 capture software, as that term is used in some of the claims.

18 If we look now on our Slide 18, we've reproduced the claim
19 language at issue in Claims 1 and 13. And we're talking now about
20 following a link to a recorder, to invoke the recorder in an iframe on the
21 same web page.

22 Now, proceeding directly to Slide 19 we show how Nassiri provides
23 a link on a web page to a video recorder. Paragraph 26 of Nassiri is
24 explicit. It's describing that a contributor accesses a website, that the

1 website includes an embedded or a standalone link to utilize the recorder.
2 And the user may follow the embedded or standalone link to utilize the
3 recorder.

4 So, Paragraph 18 reinforces the same teaching. The user accesses
5 the website, and then follows the link to the video capture page. We've
6 shown here as well --

7 JUDGE KAISER: So, Counsel, I want to go back to the claim
8 language here. And I think both in Claim 1 and in Claim 13 it talks about
9 providing a link to the media recorder software, to the capture software.

10 So then, if we look at Nassiri, paragraph 26 talks about a link
11 provided by the executable instructions for the video capture. And then
12 paragraph 18 talks about a link to a video capture page. So, how do you
13 reconcile that language with the link itself having to be to the software?

14 MR. MCCOMBS: The way we interpret it is, in Nassiri it's following,
15 it's in part, following the embedded or standalone link to the recorder, to
16 utilize the recorder functionality. And so, what we're talking about is a link
17 that would then invoke the recorder software. In one example in Nassiri
18 being in an iframe, or in another example being in a standalone web page.

19 JUDGE KAISER: Is it sufficient if the link takes you to a page where
20 you can use the software, even if the link is not to the software itself?

21 MR. MCCOMBS: I would say that, yes, it would be, to the extent
22 that it is taking you to a location that you can use the recorder, or invoke the
23 recorder on the page, that that would be, that link would be sufficient.

1 And if we go to our Slide 20 we're talking specifically now about
2 how the link is displayed, so that the user can follow it and invoke the video
3 recorder as required by the claims. And I'm focusing now on the display
4 issue. And here we see that the user again follows the embedded or
5 standalone link to utilize or invoke the recorder.

6 And similarly, we have on Paragraph 47, the link can be used to
7 direct users to a standalone site, or to a website with an embedded recorder.
8 We see in Paragraph 19, in one example, that the embedded recorder is
9 presented within an iframe. And I'll go to Paragraph 19 in more detail in a
10 minute.

11 But I thought it would be helpful on this Slide 20 to refer to Dr.
12 Olivier's testimony, where he -- this dispels any notion that the link in
13 Nassiri is somehow not displayed. It is.

14 In order to follow, for a user to follow the link, the user must see
15 something, so that can click on it. And Dr. Olivier agrees with this
16 unequivocally in his deposition.

17 If we go next to Slide 21 we have the embedded link being followed
18 to populate an iframe with reference to the Claims 1 and 13. And as I
19 mentioned, we have Paragraph 19, which is reciting specifically that an
20 HTML iframe can be used to embed the video recorder in a web page.

21 We see as well on Paragraph 47, it makes clear that the contributor
22 takes action to go to the embedded recorder by using a link, as we had
23 described previously.

1 I want to touch on as well, on Slide 22. This whole point that, our
2 point that the Board should not credit Patent Owner's position that somehow
3 an SRC attribute of an iframe is the embedded link. In Nassiri the SRC
4 attribute is not the embedded link.

5 We see on the top of our Slide 22, Dr. Almeroth's explanation in
6 Paragraph 53 of his reply, where he basically says that a person of skill
7 would understand what a link is, and that it has a clear meaning. A link is a
8 connection between one location in a hyperlink document and another
9 location.

10 It has an anchor tag. It has a HREF attribute, or hypertext reference
11 attribute. And that makes a link different than an SRC attribute.

12 So we have, summarizing at the bottom of our Slide 22, Dr.
13 Almeroth explaining, in his original declaration, that an embedded link is
14 just like the embedded link in Claim 13 of the patent. It's a link that the
15 user follows to the video recorder.

16 So, here we've established that you have in Nassiri a link that the
17 user clicks on to get a video, to get the video recorder in an iframe. But
18 Nassiri doesn't specifically discuss that the link and the iframe are on the
19 same page.

20 Nassiri talks about the link going to a web page. It doesn't say the
21 same web page. It's broad enough where it could be either the same or a
22 different web page. And so, this is where we bring in the Bradford
23 reference. And if we go to our Slide 23, we have discussion of Bradford
24 here on Page 161.

1 And what it's discussing here is how to use a link to target an iframe.
2 And we have a code example that's provided in Bradford on Page 161, in
3 which the link, and then the iframe that loads the content responsive to the
4 link are on the same web page. And this is all explained in Dr. Almeroth's
5 declaration at Paragraph 137.

6 There's no dispute as to the mechanics of how this works with the
7 Patent Owner. Bradford is providing a mechanism that will control where
8 the hyperlinked content is loaded. And that that content, such as the video
9 recorder, can be loaded within a displayed instance of the first web page, as
10 claimed.

11 Now, what is the Patent Owner's Response to this? And if we
12 move to our Slide 24, I do have some comments about the Patent Owner's
13 working example that was presented in Dr. Olivier's declaration.

14 And this was to refute the Nassiri and Bradford combination. And
15 this would be how a person of skill would implement a link that would then
16 go to a frame to present the recorder. Again, perhaps without realizing it,
17 this is a concession that it actually does work.

18 And our expert, Dr. Almeroth, saw this example and agreed that yes,
19 this is pretty much how it could work to load a link that would load on a web
20 page, the video recorder in the frame on the same page.

21 The point though that the Patent Owner was trying to make with all
22 of this was that the combination is flawed. And it works, but it's flawed.

23 But if you look closely at this example, if we move next to our Slide
24 25, all of the concerns about this implementation, or working example,

1 would be easily removed when you consider the ordinary knowledge of a
2 person having web design experience.

3 You will recall from the record, Dr. Olivier's person of skill doesn't
4 necessarily have web design experience. And as we mentioned in our Reply,
5 and Dr. Almeroth lays out here some very simple changes that an ordinary
6 web designer could make in order to address the concerns that Dr. Olivier
7 raises.

8 We have, for example, you could reposition the link so it's above the
9 iframe, and easier to see. You could take the border away from the iframe,
10 so you don't have an empty looking frame. You could insert a placeholder
11 image in the iframe that might say something like, thank you for shopping.
12 And then, you can from there go ahead and click on the link, and record a
13 video about your shopping experience.

14 And all of that is laid out in our Reply declaration at Paragraphs 67
15 through 79. And the end result is shown here on the slide. You have a link
16 to evoke the recorder in an iframe, on the page, that is within the displayed
17 instance of the web page as claimed.

18 So, for completeness on our Slide 26, these same arguments, those
19 would apply as well to Claims 20 and 31, which are addressed in our papers
20 for the 830 proceeding.

21 And I'll point out as well that all of the references on the bottom of
22 our slides refer to the 829. But they equally apply to the 830 proceeding as
23 well, as appropriate.

1 So, if we turn next to Slide 27, the next issue we have is the Bradford
2 book as a printed publication. And I'll move now to Slide 28.

3 And in our Petition we had presented several independent bases to
4 support that the Bradford book is a printed publication, prior to the critical
5 date of the patent. We know from the record the critical date is in May of
6 2012. And that the publication date is indicated in the copyright
7 registration is in November of 2011.

8 And we have here, there was no objection to this evidence by the
9 Patent Owner, either in the Preliminary Response, or upon institution. But
10 we do have, nonetheless, the Patent Owner's Response that's contesting the
11 publication status of Exhibit 1010. And we submit that the publication of
12 the textbook here is a clear one for the Board to decide, and confirm.

13 On our Slide 28, we show the copyright registration that was
14 submitted with the Petition, that has the Bradford book being published in
15 November of 2011. On its face this is sufficient, because the copyright
16 statute allows that the Certificate of Registration made within five years of
17 publication is prima facie evidence of the fact in the certificate of the date of
18 publication.

19 And we also have that that fact of publication is likewise confirmed
20 by our Exhibit 1016, which is the Amazon website. And it's showing that
21 the book, there's a picture of the book, it's identified in all the same ways.
22 That it was available for purchase on Amazon in December of 2011. Now
23 --

1 JUDGE KAISER: Mr. McCombs, how do you respond to Patent
2 Owner's argument that that Exhibit 1016 doesn't help you, because it shows
3 a different number of pages than the book that's in Exhibit 1010?

4 MR. MCCOMBS: If you look at the full exhibit, it's cropped here on
5 the slide. But the identifying information for the work is, by its unique
6 ISBN, the International Standard Book Number. The unique ISBN for the
7 book is shown on the Amazon website. It's the same ISBN that's identified
8 in the copyright registration. All of the identifying information is the same.

9 Now, Patent Owner had raised a challenge to the Copyright Office
10 website printout of the registration. And I'll move now to our Slide 29.

11 So, we resolved that by obtaining and submitting the Certificate of
12 Registration that bears the Copyright Office seal. And we show that here
13 on the slide. And Patent Owner cannot now credibly dispute the
14 registration.

15 What we have left from the Patent Owner is a misdirected argument
16 about Exhibit 1010, which are the scanned pages of Bradford that we
17 submitted with the Petition. The argument that we'll hear --

18 JUDGE KAISER: Counsel, I think one of the things that the Patent
19 Owner raises is that you don't have evidence that links the copyright
20 registration to either the specific version of Bradford that's in either Exhibit
21 1010 or Exhibit 1042. So, how do you respond to that?

22 MR. MCCOMBS: Again, the linkage is, it's the same author, same
23 title, same unique ISBN, all referencing the same work. And if you look at

1 our Petition at the bottom of Page 5, what we're identifying as the work that
2 was published is the Bradford textbook, with its unique ISBN number.

3 The pages from Exhibit 1010 are taken from that textbook, which is
4 the ISBN that's identified, you know, in that, as well as identified on the
5 Certificate of Registration, and as identified on the Amazon website, where
6 the book was shown to be independently available.

7 The argument about Bradford, about Exhibit 1010, is that those
8 specific scanned pages were not actually printed in 2011. And this misses
9 the point. Because again, we've established that it is the book, with its
10 unique ISBN that was published.

11 And it's the copyright registration for that particular ISBN, with the
12 evidence showing that it was published. And we also have the, again,
13 Amazon having the same ISBN.

14 The Patent Owner is arguing though that since Exhibit 1010 comes
15 from a reprint of the book, somehow that makes it a different version, with a
16 different publication date. But a reprint of a work does not change or reset
17 the publication date. It's still the same work.

18 And to address any question about whether there would be a
19 different version, we submitted Exhibit 1042. And this shows that there is
20 only one version of the book. The Exhibit 1042 is the Library of Congress
21 copy that was deposited to obtain the copyright registration. And we've
22 shown in the record that that is identical to Exhibit 1010.

23 So, when we look at the evidence, what remains is that there's only
24 one version of the work. It's been identified as being registered and then

1 published in November of 2011. We've also shown the independent
2 availability of this book on Amazon in November of 2011.

3 JUDGE KAISER: Do you, so, one of the things that Patent Owner
4 argues in their Patent Owner Response is about the declaration of the library
5 expert, Exhibit 1011. And particularly what the MARC record shows as
6 attached to that declaration.

7 Their contention is that one of the fields that appear in that MARC
8 record shows a later availability of Bradford. So, do you dispute the
9 contentions about that MARC record?

10 MR. MCCOMBS: Well, the MARC record is, first of all, it does say
11 that the book was catalogued in WorldCat in 2011. But what the MARC
12 record identification for say the George Mason Library, it wasn't necessarily
13 shelved at George Mason prior to the critical date, or the shelving date.

14 And again, shelving of that particular copy of the textbook is not
15 required to show that it was published. We have independent indication of
16 the publication date from the Certificate of Registration itself. And we also
17 have the showing that it was available on Amazon in 2011.

18 The fact that it wasn't in one particular library or another prior to that
19 time does not change the fact that it was indeed published. And we have
20 the deposit copy with the Library of Congress that we submitted as Exhibit
21 1042, all with the same identifying information that would have to have been
22 available in order for that Certificate of Registration to issue in January
23 2012.

1 JUDGE KAISER: So, following up on that, one of the Patent Owner's
2 arguments is that you haven't shown that the, I'm sorry, Exhibit 1042 is in
3 fact the deposited copy at the Library of Congress. So, how do you
4 respond to that?

5 MR. MCCOMBS: Yes. We have two bases to support that. 1042
6 was the deposit copy to obtain the registration, because we have the
7 publication date shown on the registration of November 2011. The
8 copyright statute requires that two, that the mandatory deposit be made of
9 two copies of the work within three months of publication. So, from
10 November that would have to have been submitted by February.

11 We also have the Certificate of Registration itself, which on its face
12 shows that it was completed and effective in January of 2012, which means
13 that the mandatory deposit has to have been received for that certificate to
14 issue.

15 And it says right on the Library of Congress Exhibit 1042, it says
16 right on it, Copy 2. And we know that that was the deposit copy with the
17 Library of Congress.

18 JUDGE MEDLEY: You have about 17 minutes left on your total
19 time.

20 MR. MCCOMBS: Of my total time. All right. Thank you, Your
21 Honor. Let me just then, do you have any further questions on these
22 issues? I could move next to the dependent claims in this case.

1 All right. Let me move then to our Slide 30. And actually, I'll go
2 directly to Slide 31. And here what we have is, turning now to the Tosh.0
3 reference. And this is, again, now we're referring to Claim 9.

4 And this is inclusion of the videos in a linear television program.
5 And we've laid out the combination of Nassiri and Tosh.0, which is
6 straightforward, and teaches that sharing of Nassiri's videos can be done not
7 just on YouTube, but on a linear television program, as taught by Tosh.0.

8 We have Nassiri that's selecting highly liked videos for playback, in
9 Paragraph 61 of Nassiri. Those videos are shared on sites like Twitter or
10 YouTube, as taught in Paragraph 56, as shown on the slide here. And this
11 is all consistent with the goal of broadening their distribution. See
12 Paragraph 3.

13 So, we have Dr. Almeroth recognizing that television would be an
14 obvious and an efficient way to further broaden the distribution of the
15 Nassiri's videos, and expose them to a wider segment of the public.

16 And finally, I'll just turn to Slide 33. And this is Claim 10. And
17 this is reciting, providing editing tools in the media player software.

18 We showed that the edit, that in Nassiri you have a video player that
19 is in the server. That's in, we see here Figure 8 from Nassiri. The video
20 player's on the server side. The combination uses Lerman's teachings of
21 video editing tools, and applies them to the server side player in Nassiri.

22 Now, Patent Owner argues that Lerman's editing tools are on the
23 client side. But the Patent Owner stops without considering the
24 combination of Nassiri and Lerman.

1 And as Dr. Almeroth explained, when we apply the teachings of
2 Lerman to the system of Nassiri, this would result in those editing tools
3 being on the video player, which is on the server side of Nassiri.

4 All right. So, I will reserve the rest of my time for rebuttal.

5 JUDGE MEDLEY: Okay. Yes.

6 MR. MCCOMBS: Thank you.

7 JUDGE MEDLEY: Thirteen minutes left. When you're ready.

8 MR. ROBINSON: Okay. Thank you. Exhibit 1010, Bradford, on
9 its face was not a printed publication in May of 2012. It was not a printed
10 publication in late 2011. It says on its face that it wasn't printed until
11 December of 2015.

12 This Board, on several occasions, has looked at circumstances
13 similar to this and found that the Petitioner had not carried its burden.

14 In addition to the Dropbox decision that's cited in Patent Owner's
15 Response, the Intel institution decision looked at specifically the
16 circumstance where the exhibit relied upon as a prior printed publication was
17 on its face printed years after that critical date.

18 This situation is no different than those earlier circumstances. The
19 only exception is that the fact that this was a reprint in 2015 was concealed
20 until after institution.

21 All of the arguments we just heard about --

22 JUDGE KAISER: Mr. Robinson, is it your contention that this is
23 essentially a problem that can't be fixed? That because they put a later
24 printing with their Petition that that's just sort of the end of it?

1 MR. ROBINSON: Your Honor, the Board's own decisions reflect a
2 number of ways that this could have been addressed directly, and in a timely
3 fashion.

4 For example, the Dropbox decision references that timely
5 supplemental information could have shown, or with the Petition could have
6 shown that that copy was identical to a copy that had been shown to be
7 printed earlier. That --

8 JUDGE KAISER: Just to be clear, the Dropbox decision is
9 supplemental evidence, right? Because the Panel treated the Patent
10 Owner's contentions in the Preliminary Response as objections to evidence.
11 That's right, isn't it?

12 MR. ROBINSON: So, Your Honor, they did treat some as objections
13 to evidence and supplemental evidence. My read of the Dropbox decision
14 is that there was actually a second attempt to submit additional exhibits that
15 were rejected as untimely supplemental information as well.

16 There were actually two attempts to cure it in that Dropbox decision,
17 and both were rejected. And documents were actually excluded.

18 JUDGE KAISER: Right. But the, I don't want to, as I said at the
19 beginning, I don't think we need to talk about the timeliness issue. But
20 what I'm wondering is, because some of your arguments seem to say that
21 because -- seem to suggest that what Petitioner needs to prove up here is that
22 the actual document that was submitted with the Petition is pre-May 2012.
23 And that they can't do that because it was printed in 2015. So, I'm trying to
24 understand if that's your argument.

1 MR. ROBINSON: So, in this circumstance Petitioner has not done
2 any of the things that they might have done to try to address that issue. The
3 Board recognized that Petitioner could have sought to substitute a version of
4 Bradford that actually had been proven up.

5 They could have in a timely fashion submitted a version of Bradford
6 that could be authenticated, and shown to have been published. And
7 potentially argued that they had been identical.

8 Petitioner's efforts, even if 1041 through 1043 are admitted and
9 considered, do not do that. And the reason is this --

10 JUDGE KAISER: Well, let me ask you this question. If Petitioner
11 had shown that 1042 was publicly available in 2011, or was a printed
12 publication as of 2011, and they have the declaration in 1043 that says that
13 all the pages are identical between 1042 and 1010, in your mind would then
14 that have been sufficient to show that 1010 is a printed publication?

15 MR. ROBINSON: Your Honor, there are a few issues with that
16 question. I'm not sure that it would have. It hasn't been done here. But
17 if it had been done in the time that it was in this circumstance, then Patent
18 Owner was left to address that evidence for the first time on the reply, when
19 Patent Owner was limited to only cross examining the reply declarants, and
20 not having an opportunity to go out and further investigate, and submit
21 additional evidence that may tend to rebut whatever showing may have been
22 offered.

23 JUDGE KAISER: But you haven't requested any evidence, or any
24 additional discovery here as to the Petitioner's reply evidence, have you?

1 MR. ROBINSON: No, Your Honor. We requested the Sur-reply.
2 And we --

3 JUDGE KAISER: Right.

4 MR. ROBINSON: -- moved to exclude as untimely supplemental
5 information.

6 JUDGE KAISER: Okay. But I guess I feel like you didn't answer
7 my question, which was: if Exhibit 1042 had been proven, and assuming that
8 it was proven as being a 2011 copy, and we have the declaration that says
9 the relevant portions are the same between 1042 and 1010, then would that
10 eliminate your concerns about printed publication here?

11 MR. ROBINSON: If that had been done with the Petition, that would
12 certainly be a different set of circumstances that may not have the same
13 issues. Given --

14 JUDGE KAISER: Well --

15 MR. ROBINSON: Even on the circumstances that we have here
16 though, Exhibit 1042 and 1041 don't do that.

17 First, I'd like to point out, Petitioner's arguments just now about 1042
18 corresponding to 1041 because of the timing of the filing, were nowhere in
19 the Reply. We hear that today for the first time. They're not supported by
20 any declarant.

21 Petitioner's second argument about 1042 carrying the Copy 2
22 designation on a sticker that appears to have been added by the Library of
23 Congress, nowhere in the reply declaration, nowhere in the Reply. Those
24 arguments are brand new for the first time today.

1 Second, the declarant from the Library of Congress, the person that
2 could have shed light on these questions, didn't. The only thing the
3 declarant from the Library of Congress in 1042 said was this was in our
4 stacks as of 2018.

5 There is absolutely no testimony from anybody, much less anybody
6 with knowledge, that 1042 was submitted with a copyright registration of
7 1041. It's just not there. And the one declarant at the Library of Congress
8 that presumably would have been the best situated, didn't.

9 What we know from the Library of Congress' MARC records that
10 were submitted with the Petition is that even if that was the same copy that
11 made it to the Library of Congress, it wasn't indexed or shelved for public
12 accessibility until June of 2012. That's why Petitioner's --

13 JUDGE KAISER: So, do we know that's true from that MARC
14 record for any library other than George Mason?

15 MR. ROBINSON: We do not, Your Honor. But we don't have any
16 MARC record to suggest that it was indexed or shelved at any other library.

17 Second, Patent Owner, sorry, Petitioner argued that Exhibit 1043
18 shows that 1042 and 1010 are identical. In fact, it does no such thing. It
19 compares a very small subset of the pages, and completely neglects whether
20 overall the documents are the same.

21 Additionally, in light of the fact that we don't know that that book
22 existed before 2018, the fact that that subset of pages is just as consistent
23 with the copy that's currently in the Library of Congress' stacks, being
24 another reprint of a later version.

1 There's simply nothing to take either 1010 or 1042 back before the
2 critical date. And that, on this record, even if 1041 and 1043 are fully
3 considered, absolutely falls short of Petitioner's burden to show that 1010 or
4 any other version qualifies as a printed publication.

5 JUDGE KAISER: There's no mention in 1042 of a reprint, like there is
6 in, and I apologize, I don't have the exhibit number where you put in the
7 entire book in front of me. But that version you put in that has the made in
8 Delaware on the 2015 date; that doesn't appear in 1042 does it?

9 MR. ROBINSON: That does not appear, Your Honor. This is
10 another place though that there is no evidence to suggest that that absence
11 means that it was not a reprint. There's no testimony from the publisher,
12 from the book vendor, from anybody with any personal knowledge of these
13 books to comment one way or the other on any inference, or to support any
14 inference that the absence of that reprint was not there.

15 Ultimately, the Petitioner just hasn't shown that either of those
16 versions was a printed publication as of May of 2012, or as of early or late
17 2011.

18 The best evidence we have of when any version of that book was
19 indexed and shelved for public accessibility is the MARC reference
20 submitted with the Petition, and the testimony of Petitioner's own expert in
21 the 1131/1133 proceedings.

22 That's the only evidence that shows any version of this book was
23 ever actually indexed and shelved for public accessibility. The Amazon
24 web page, there's no copy of a book that was purportedly sold. There is no

1 testimony that the book ever was sold. There's no testimony to understand
2 how that book might have been searchable or findable on Amazon, to the
3 extent that it was. There's nothing there to draw the conclusion of
4 sufficient public accessibility. And even if there was, we don't have a
5 version that was for sale.

6 JUDGE BOUDREAU: Is there any requirement for the book
7 actually to have been purchased by anyone from Amazon?

8 MR. ROBINSON: The requirement, Your Honor, I believe, is
9 public accessibility, of being accessible to a sufficient population. And so -
10 -

11 JUDGE BOUDREAU: So isn't availability enough?

12 MR. ROBINSON: Potentially, availability could be enough if it is
13 accompanied by the types of indicia that actually allow people to find it.
14 So, for example, it's not enough that a book is on a library shelf if it's not
15 indexed in a way that people can actually find it.

16 Here, if we analogize that Amazon webpage, even if we assume that
17 there actually was a book behind that link that could be ordered, there's no
18 evidence that Amazon itself, that that particular webpage was actually
19 public, or indexed, or searchable, or findable at that time. There's just no
20 testimony, there's no declaration that would support that finding, even if
21 either version of this book had been tied to that Amazon webpage.

22 Additionally, Petitioner hasn't addressed the different number of
23 pages. So Petitioner's assertion seems to be, look, we can take everything
24 on that page at face value except this piece that is entirely inconsistent with

1 Exhibit 1010 having been associated with that webpage. So as long as we
2 ignore this contrary piece of evidence, then everything's fine. There's a
3 similar theme with Exhibit 1010. As long as we ignore the fact that it
4 wasn't made until December of 2015, then everything's fine. That is not the
5 burden.

6 Petitioner will stand here and assert that this is a body of evidence.
7 But it's not. It's a collection of individual pieces that are not tied together
8 by a common version. They're not tied together by any common testimony.
9 They just don't fit together.

10 And still, even if everything comes in, there is not a version in the
11 record that can be shown, that has been shown to have existed, much less
12 been published, prior to the critical day. Without Bradford --

13 JUDGE BOUDREAU: In Dropbox, the reference that was at issue
14 was simply a printout of an article that the Petitioner in that case alleged to
15 be the same as an ACM publication. In this case, this is a textbook. It's
16 not simply a printout of something that the Petitioner is alleging to be the
17 same as the content of a textbook. How do you reconcile the difference
18 there?

19 MR. ROBINSON: Your Honor, the circumstances here are
20 actually almost identical to Dropbox. What we have here in Exhibit 1010
21 is an excerpt from a book that has been offered with a Petition. We don't
22 know -- in the ACM publication, my understanding of Dropbox is that that
23 was a compilation that was published as a book. They excerpted one article.

1 And it turned out that version was not the version that was printed with that
2 compilation.

3 Here, Bradford does appear to be a physical book. I would
4 respectfully disagree with the characterization as a textbook. Because there
5 is, again, no testimony here to give any context for what Bradford was made
6 for, whether it was distributed or actually used as a textbook. Presumably,
7 if this was a widely distributed textbook, it would be a much simpler matter
8 to just find a version or find somebody that could testify to its distribution
9 and public availability.

10 But we don't have that here. We've got a copy of a book printed in
11 2015. We've got a copy of a book that we know exists in 2018. But
12 nobody can tie those back to an earlier date.

13 The inference that Petitioner asked this Board to draw is simply that,
14 because an excerpt came from a 2015 version with the same ISBN, that it
15 must be the same as whatever was referenced by the Library of Congress or
16 by Amazon when, in fact, there are objective indicia on those documents to
17 suggest that they are not the same. It's different numbers of pages.

18 There's no showing that anything, anything would have been
19 sufficiently publicly accessible to qualify as a printed publication. And
20 whatever version was in the Library of Congress definitely did not until June
21 of 2012 when it was too late.

22 And this is critical, because every single ground depends on
23 Bradford Exhibit 1010 qualifying as a printed publication. Not a single
24 ground can survive without it.

1 So if this panel agrees with the Patent Owner that the sum total of
2 this evidence is not sufficient to show Bradford as a printed publication, it
3 can literally stop right there. Even if Bradford is fully considered, the
4 claims would not have been obvious over the proposed combinations.

5 A couple of brief points of clarification on the overall technology of
6 the 997 patent. And I'm referring, to begin with, to Slide 3 of Patent
7 Owner's demonstratives. There's a social networking system at the top,
8 which is described as an example of what's providing the social networking
9 webpage.

10 There's a video management server system at the bottom, which is
11 the server system that provides the recording software. And then there's
12 the display device, the end-user device on the left. That's where the
13 webpage is displayed. That's where the link is displayed, where the iframe
14 is displayed, and where the video recorder software is invoked.

15 On Slide 4 of Patent Owner's demonstratives is Figure 1B of the 997
16 patent. If we begin with the claim language of Claims 1 and 13, the
17 embedded link, 161, is displayed on the first webpage. The iframe in
18 which the recorder software is invoked is displayed on that same first
19 webpage.

20 There seems to be a little bit of confusion in the Petitioner's theories
21 in asserting that Nassiri has a link to an iframe or to software. Nassiri,
22 absolutely -- and I think I heard this a little bit clearer today -- Nassiri
23 absolutely does not have the link on the same -- displayed on the same

1 webpage in which the frame appears. So that's a fundamental difference
2 that we'll walk through a little bit as we get towards that position.

3 First on the claim construction, video stream is not the same thing as
4 video file.

5 JUDGE MEDLEY: And this is slide 29?

6 MR. ROBINSON: Sorry, I'm going to skip ahead to Slide 30 of
7 Patent Owner's demonstratives. Video stream is sequential video data that
8 is independent of and not associated with a file container. Petitioner asserts
9 that this is a negative limitation. It's not. It's simply a statement of what a
10 video stream is.

11 This isn't a negative limitation within the claims that needs written
12 description support. It is simply a construction that, as constructions do,
13 defines what is and what is not a video stream. And it is entirely consistent
14 with the specification and the claims.

15 JUDGE KAISER: Counsel, what's your contention about what a
16 file container is?

17 MR. ROBINSON: Your Honor, a file container is an extremely
18 well-known concept with persons of ordinary skill in the art. It is one that
19 is reflected repeatedly throughout the documents. And essentially, what it
20 comes down to is a file container is the piece that tells -- it's the information
21 that essentially wraps the video data, conceptually is how Dr. Olivier
22 described it.

23 It's the container. It wraps the video data; it tells you the start and
24 the beginning. It tells you the format so that when a system goes to open a

1 file container it knows what codec to use to decode the encoded video data
2 within that container.

3 And interestingly, it is a term that Dr. Almeroth can understand
4 without any hesitation when his opinions turn it to Petitioner's advantage.
5 So Dr. Almeroth repeatedly says this is a file container, this is isn't a file
6 container, until asked on cross examination, well, that doesn't have a file
7 container. Well, I don't know what you mean by file container.

8 JUDGE BOUDREAU: Is a packet an example of a file container?

9 MR. ROBINSON: No, Your Honor, it's not. And in fact, there is

10 --

11 JUDGE BOUDREAU: What evidence is there that a packet isn't a
12 file container?

13 MR. ROBINSON: Dr. Olivier was asked under cross examination,
14 Exhibit 1035, at 51, lines 16 through 20, whether a packet is the same as a
15 file container. And he explicitly testified it is not. Dr. Almeroth also
16 never testified that a packet is a file container. What both experts testified
17 to is that caching and packets are just fundamental building blocks of data
18 transfer in digital systems. Caching is not video files. Caching is
19 temporary storage of pieces of data as they are then transmitted.

20 Dr. Olivier was asked explicitly about this and explained, look, if
21 you are transferring data in a digital system, you cache it. Because
22 everything can't happen all at once. You collect this data in temporary
23 storage and you send it off. It has nothing to do whatsoever with a file
24 container.

1 You can cache a file container or a file, if that's what you're
2 transmitting. You can cache streamed data if that's what you're
3 transmitting. It's not dependent on any file structure. And that is a
4 fundamental difference from what we're talking about here.

5 JUDGE KAISER: How do you respond to Petitioner's reliance on
6 the definition that's in the Microsoft computer dictionary, and particularly
7 the idea that that doesn't mention any sort of file container or file format.
8 What it mentions is a continuous flow of data.

9 MR. ROBINSON: Your Honor, there are a couple of layers of
10 complexity to what's wrong with that position, which is the only reason I
11 hesitate. The first is Petitioner has attempted to introduce this concept of
12 user perception of flow. That's not in that dictionary definition. That's
13 not in Nassiri. There's absolutely nothing in Nassiri to suggest that a user
14 perceives the flow of data coming up to upload. There's nothing in the 997
15 patent to suggest that video stream is somehow limited by what a user
16 perceives as its being uploaded to the server for storage. And it's sort of an
17 overarching point of confusion in some of Petitioner's positions, is that there
18 is a fundamental difference between downloading from a server to user
19 devices for distribution and viewing, versus uploading video as it's being
20 captured from a user device to a server.

21 And Petitioner would like to gloss over the difference there, but there
22 are fundamental differences. As Dr. Olivier explains sort of just
23 conceptually, the difference is between streaming, whole file transfer, and
24 segmenting.

1 Whole file transfer transfers an entire file. The user has to wait.
2 When you're talking about downloading for distribution, the user has to wait
3 until it's all downloaded to watch it.

4 When you're talking about segmenting, you've got multiple files.
5 The user can watch one file once it's fully downloaded. But the problem
6 with both of those is that the user, once everything is downloaded, has the
7 entire video. And they can redistribute it.

8 The whole point of streaming, or at least one of the points of
9 streaming, is that for distribution, the stream comes down, the user can
10 watch it. But then it's not saved. The user can't take that and redistribute
11 it. And that's glossed over entirely in sort of this -- in this distinction.

12 So ultimately, coming back around to that definition, the Microsoft
13 technical definition of stream, again, it talks about the continuous flow of
14 data. It doesn't say anything about a user perception of how, you know,
15 data is received. And in fact, that distinction is easy to sort of illustrate the
16 fault with it in that, when you're transferring data in a binary system, bits just
17 necessarily follow one another. So if you're transferring a whole file, from
18 the perspective of the recipient computer, those bits are coming in in a
19 continuous stream.

20 What makes it discontinuous, in the video context, is that a video file
21 has a known start and a known end. And that's the difference between a
22 video stream and a video file. Ultimately, that's consistent with the claim
23 language. So Slide 31 in Patent Owner's --

1 JUDGE BOUDREAU: Mr. Robinson, excuse me for a minute, can
2 you point to anything in the challenged claims that requires that the video
3 stream not be capable of being stored and redistributed?

4 MR. ROBINSON: No, Your Honor, that's not recited in the claims.
5 In fact, the point of these claims --

6 JUDGE KAISER: Well, in fact, the claims sort of imply the
7 opposite, right? Because the claims require that you take the stream that
8 you receive and generate a file from it.

9 MR. ROBINSON: Exactly. And that's the sort of difference that
10 you won't find in any of the prior art. So Petitioner contends that Nassiri
11 uploads a video stream, but Nassiri never says a stream.

12 So the secondary reference is Bradford. What Bradford talks about
13 is an MPEG-4 file which is streamable, Exhibit 2010, objective evidence
14 discusses the difference between streaming video data and sending a video
15 file.

16 Ultimately, Claim 1 turns that on its head. It receives the video
17 stream, and it takes that received video stream and generates a video file. I
18 doesn't just save it, it generates a video file from that received video stream.

19 JUDGE KAISER: So Counsel, I want to ask you about one of the
20 arguments that Petitioner made. And this was on Petitioner's
21 Demonstrative Exhibit 6 that pointed us to the portion of the 997 patent that
22 refers to this 471 application that, I believe, the issued patent from which is
23 Exhibit 1005.

1 And in particular, they point to the sentence in Exhibit 1005. I
2 believe it's Column 21. But the -- as soon as it states other formats, and the
3 Petitioner relies on that to show that this FLV format is a streaming format.
4 How do you respond to that?

5 MR. ROBINSON: So, in a couple of ways. First, is the
6 specification, not this part, not any other part of the specification, says that
7 we are streaming a video file. Digital video can be recorded in flash format
8 using a flash server, 408.

9 And if you look at Figure 2 of the 304 patent, 408 is on the back-end
10 server where that video's being recorded. So this never says that it is
11 streaming a file. It doesn't say it here; it doesn't say it in the 997 patent.

12 Second, to the extent that Petitioner has latched onto this FLV
13 format, this sentence is actually saying other formats capable of providing
14 streaming video data, other than the FLV format. So Silverlight, SVG are
15 examples. MPEG-4 was one that has been discussed to some extent.

16 What the sentence actually --

17 JUDGE KAISER: In response to one of my questions, Mr.
18 McCombs pointed us to Column 20 of Exhibit 1005 and, in particular, lines
19 46 to 66. And if you can find that --

20 MR. ROBINSON: I've got it in front of me now.

21 JUDGE KAISER: Okay. If you can look at -- sorry, my
22 computer is being weird -- around Line 60, then it talks about caching and
23 streaming the video data. Here it's referring to a video -- a couple of lines

1 before that, it talks about a video file in FLV format. So does this not
2 support Petitioner's view that the FLV file format is a streaming format?

3 MR. ROBINSON: I want to make sure I answer that precisely in
4 terms of what you mean by the FLV format being a streaming format.
5 Video can certainly be streamed from an FLV video file, but that's not the
6 same as saying that you are going to stream the file itself, similar to the
7 MPEG-4 file format.

8 What actually follows here is that, just preceding that video file in
9 the FLV format it says, "Upon receiving the video data at the one or more
10 back-end servers, a corresponding video file is generated and stored." It's
11 not simply receiving a video file. It's receiving the video data that has been
12 streamed up and generating the video file which can be in the FLV format
13 that's stored on the back-end server.

14 So one of the really interesting things about this entire -- oh, did you
15 have a question, Judge?

16 JUDGE BOUDREAU: Yes, I just wanted to close the loop on the
17 question that I was asking before about the storage and redistribution. I
18 just want to make sure that I understand your argument.

19 I think you were arguing that segmenting differs from streaming in
20 that segmenting allows you to store and redistribute. Did I understand that
21 argument correctly? Whereas streaming does not?

22 MR. ROBINSON: In its basic sense, that is how Dr. Olivier
23 describes sort of the development of those three methods of distribution.
24 That's not necessarily to say that all forms of segmenting necessarily always

1 permit storage and redistribution. But in terms of the development of those
2 three, that was one of the motivations that Dr. Olivier describes for
3 developing streaming as an alternative.

4 JUDGE BOUDREAU: All right. I just want to make sure that I
5 understand the significance of your argument here.

6 MR. ROBINSON: Well, Your Honor, circling back around to
7 Patent Owner's Slide 36, Dr. Almeroth, Petitioner's own expert, recognized
8 that these were two different things. So in his opening declaration, before
9 cross examination, before having any of his opinions tested, in Exhibit 1007,
10 at Paragraph 158, Dr. Almeroth is addressing the fact that Nassiri never says
11 streaming.

12 And so in his attempt to inject that streaming concept into Nassiri,
13 what he said was, well, it would have been obvious to use streaming,
14 because you wouldn't want to save the video in multiple files before
15 transmitting. That is segmenting, saving the video in multiple files before
16 sending. It's not caching. It's not packets. It is saving a video in
17 multiple files.

18 And this is Dr. Almeroth's own testimony. One, recognizing that
19 these are two distinct things. Not only that, they're so distinct that he relied
20 on segmenting to differentiate streaming, and to say that a POSITA would
21 have found it obvious to read streaming into Nassiri even though Nassiri
22 doesn't disclose it.

23 Now, it's only after this, it's only after Patent Owner's Response
24 when Patent Owner explained this concept is absolutely right. Dr. Olivier

1 looked at this and said this is correct. There is a difference between a video
2 stream, and streaming, and segmenting.

3 It was only after that that Dr. Almeroth decided to, well, that Dr.
4 Almeroth's positions on this point started to shift. But it did so slowly.
5 Even in his first deposition, Dr. Almeroth recognized that these two things
6 are not synonymous.

7 So Patent Owner Slide 37, deposition testimony from Dr. Almeroth,
8 "I don't think stream necessarily has to be a file. It could come from a file,
9 it could go to a file." This is absolutely consistent with the idea of the
10 video stream being data that's independent of a file.

11 Now, as it evolves --

12 JUDGE KAISER: Isn't that testimony equally consistent with
13 saying that a stream isn't limited to a file? In other words, he says I don't
14 think a stream necessarily has to be a file. To me, that means it could be a
15 file, it could not be a file.

16 MR. ROBINSON: And this is where the evolution begins. It's
17 hedged a bit here, it's not nearly as clear as his very first statement that
18 segmenting is actually a different thing than streaming and a reason to read
19 streaming into Nassiri. It is the beginning of his evolution away from that
20 initial, I don't know, position from which the Petition actually started.

21 And it continues. As we get farther into his first deposition
22 testimony, he begins to hedge a bit more, and back away a bit more from
23 that. And he starts to say, you know, compressing. So we're talking here

1 about, in Patent Owner Slide 39, we're asking Dr. Almeroth about what it
2 means to encode video data.

3 And he's talking about the different things that happen with the video
4 data as it's encoded. He says you can do it as a stream, so you can encode a
5 video stream. You can encode it, or you can encode it into a single file, or
6 into a subdivision of files.

7 Now, his testimony goes on as it continues to evolve and he's asked
8 more questions and moves farther and farther away from what he said when
9 he wasn't challenged and didn't realize that it was inconsistent with
10 Petitioner's position.

11 Again, Paragraph 158 and Exhibit 1007, his very first declaration,
12 are Dr. Almeroth's purest words. When it suited his ends, these were two
13 different things.

14 Second claim construction issue, and then I'll jump back into the
15 streaming. Petitioner has attempted to say that any hyperlink is necessarily
16 displayed. They've tried to construe that as an opinion of Dr. Olivier.
17 That's not the case.

18 Patent Owner's construction of providing, on a first page, a link or
19 embedded link depends on the language that the link has provided on the
20 page. That's what Dr. Olivier says, that's what's consistent with the claim
21 language. It's the fact that it's on the page that the link is visible.

22 The streaming distinction, video stream versus segmenting, is a
23 critical distinction to these positions. If Nassiri does not itself disclose
24 video streaming to upload and be stored at a server, then the grounds

1 necessarily fail. Petitioner has said that Nassiri's discussion of uploading as
2 something is being --- as the video is being recorded necessarily implies
3 streaming. That is not consistent with in-part as it's being recorded.

4 So as you read through Nassiri, and you consider it in its entirety,
5 we've got two very basic statements. One, it's uploaded in part as it's being
6 -- it's uploaded as it's being recorded. And then, in Paragraph 35 here on
7 Patent Owner Slide 42, it's uploaded in-part as it's being recorded. In-part
8 is fundamentally inconsistent with streaming. If we go back to the
9 streaming definition of it being a --

10 JUDGE KAISER: Mr. Robinson, isn't it being transferred in-part
11 as it's being recorded exactly what the 997 patent is doing when it takes the
12 data, and caches it, and then transmits it?

13 MR. ROBINSON: No, Your Honor. And in fact, Dr. Olivier
14 explains that caching is incident to everything. That's consistent with
15 everything that's digital data transfer. The 997 patent is absolutely
16 consistent with that. The 997 patent talks about two alternatives. You can
17 send up an entire file, or you can stream it up.

18 And the discussion of caching, consistent with what Dr. Olivier
19 explained it to be, is agnostic to the two. It never says, you know, it does
20 not equate caching to any interruption or deviation from streaming or the
21 video transfer. And that's exactly what Dr. Olivier explained when asked
22 about it in his deposition, is that caching in the art is not understood to
23 interrupt the transfer of data. It is simply the process by which data is
24 transferred between two systems.

1 JUDGE KAISER: But in terms of some level of abstraction, you
2 know, at some level of abstraction, it interrupts the transfer of data when you
3 cache a certain number of packets or what have you, until you have the
4 amount that you want, and then you transmit them.

5 So it's doing it in part still, no?

6 MR. ROBINSON: Your Honor, I don't think it's accurate to
7 characterize it as being in part. What is being done in part is the temporary
8 storage or the caching. So the point of the temporary storage and the
9 caching is so that you can have a continuous data flow so that the cache is
10 essentially a buffer. So as bits are going out, bits are coming in, that's the
11 purpose. The fact that something is cached and data is transmitted doesn't
12 necessarily mean that the transmission of data is interrupted.

13 JUDGE KAISER: But maybe looking at a slightly different issue,
14 one of the parts of Nassiri that Petitioner relies on is Paragraph 27 of Nassiri.
15 And I don't believe that's in your demonstratives, but it's in Petitioner's
16 demonstrative, number 15. And there Nassiri talks about those computing
17 systems receiving video data and sort of doing this feedback process, as the
18 video is being recorded. So Petitioner says that that is consistent with the
19 description of streaming, because it's a real-time process. How do you
20 respond to that?

21 MR. ROBINSON: So, Your Honor, the first thing I'd point out is
22 that's not in the Petition. It is a new attempt to further buttress this idea.

23 The second is that Nassiri never says that that feedback process is in
24 real-time. It just doesn't. There is nothing in that paragraph that compels

1 or will even suggest a conclusion that that feedback is provided before the
2 entire video is received.

3 JUDGE KAISER: Doesn't it suggest that though? If you look at
4 the portion, and I'm looking at the demonstrative, but you look at the portion
5 that talks about transmitting the feedback indicating -- so it says, for
6 example, a light or other indicator may be displayed prompting the
7 contributor to use more or less lighting, or to speak louder or softer.
8 Doesn't that suggest that that's happening while the person is recording the
9 video? Otherwise, the feedback doesn't really help the contributor.

10 MR. ROBINSON: Well, Your Honor, no, respectfully it doesn't
11 suggest that. These are product feedback videos. If you get 30 seconds
12 into a product feedback video and everything's terrible, it doesn't do much
13 good for the last 30 seconds of the feedback video to be great. Because
14 you've started with half of a video that isn't up to standard.

15 So in terms of these videos, and what Dr. Olivier explains, it would
16 have been more expected by a POSITA reading this disclosure that this
17 would have been actually the video comes up, and then the system says that
18 video doesn't meet our standards. Try again.

19 JUDGE KAISER: And where is that addressed by Dr. Olivier?

20 MR. ROBINSON: I don't have that at my fingertips, but I will ask
21 Mr. Green to check it out so I can provide it to you. If that's okay.

22 JUDGE KAISER: Okay.

23 MR. ROBINSON: Ultimately, to the extent that it's even arguably
24 consistent with a real-time process, in Paragraph 27, it has the same issue

1 that Nassiri's Paragraphs 18 and 26 do. And that's that Nassiri, at the
2 outset, does not disclose video streaming.

3 If, as Petitioner contends, streaming was well known, it should have
4 been a simple matter to show a document that said we're going to stream up
5 to a server. We don't have that. We don't have any prior art document
6 that says that.

7 To the extent Bradford is considered at all, what it talks about is the
8 MPEG-4 file that is streamable down from the file. If you think about
9 applying that MPEG-4 to Nassiri, it goes completely against everything that
10 Dr. Almeroth said. Dr. Almeroth says you want to stream in Nassiri so you
11 don't have to save the file locally.

12 But what we know is if you want to stream the video of the MPEG-4
13 file that Petitioner references in Bradford, you have to save that entire file
14 first so that then you can stream it up. And that's completely the opposite.
15 That doesn't make any sense. It's completely inconsistent with all of the
16 reasons that Dr. Almeroth, in Paragraph 158, said that we should interpret
17 Nassiri to be streaming instead of segmenting.

18 JUDGE BOUDREAU: Can you address Paragraph 28 of Nassiri
19 where it says, "In some examples the video may be transmitted to the video
20 host computing system while it is being recorded?"

21 MR. ROBINSON: Certainly, Your Honor. That is an even
22 broader or less clear statement than in Paragraph 36 which says, in part as
23 it's being recorded. So it's really a matter of you start with this broad
24 statement. You then have to read that in the context of Nassiri overall in

1 terms of what it's disclosing. And what we find is the only clue that Nassiri
2 provides on that particular point, in terms of uploading as it's being recorded,
3 says that it's in part as it's being recorded.

4 Now, Petitioner would like to say, well, that's broad enough to
5 encompass both. But the fact is, there's nothing in the evidence to suggest
6 that, at this time, uploading a video stream was a known alternative for
7 uploading a video. And so --

8 JUDGE BOUDREAU: Let's go back to the question that Judge
9 Kaiser asked earlier. Isn't this very similar to what's disclosed in the 997
10 patent itself?

11 MR. ROBINSON: Your Honor, the 997 patent itself, as well as the
12 304 patents, actually describe in some detail uploading and streaming. So
13 that is actually a departure from all of the other art that's here. So
14 Petitioner has asserted that the similarities of the 997 patent is somehow
15 evidence that these were sort of known alternatives. But the 997 patent is
16 exactly the opposite. The 997 patent is describing those as something new.

17 Now, that's not to say that they were impossible, but the idea of
18 uploading streaming just isn't disclosed. Nassiri does not describe that as
19 an alternative. And so what we have to start with is what were known
20 alternatives. What's shown to have been known? Whole file transfer and
21 segmenting were both known for uploading video. There's no dispute
22 about that.

23 And so to the extent that Nassiri is ambiguous and doesn't say that
24 it's streaming, we can't read those words into it without some objective

1 evidence in the prior art that streaming to upload for saving was actually
2 something that was in the art. So respectfully, to look at the 997 patent as
3 an indicator that streaming should be read into Nassiri is textbook hindsight.

4 The 997 patent and the 304 go the step further and actually describe
5 how you implement this process.

6 JUDGE MEDLEY: You have about 14 minutes total time.

7 MR. ROBINSON: Thank you, Judge.

8 JUDGE KAISER: So I just want to understand, because it sounds
9 like you're making a, I mean, you are making a distinction here between
10 streaming for uploading versus streaming for downloading. But what
11 Nassiri definitely does disclose is transferring a video from a client
12 computer, so essentially transferring a video on upload while the video is
13 being recorded. And so the distinction that you're making -- you don't
14 dispute that, right?

15 MR. ROBINSON: No, Your Honor.

16 JUDGE KAISER: So then the distinction that you are making is
17 how that transfer is happening, right? And so what you're saying is that
18 what's not shown is that the transfer that's happening during the recording is
19 happening as streaming as opposed to some other way, i.e. segmenting?

20 MR. ROBINSON: Yes, Your Honor. That's absolutely correct.

21 JUDGE KAISER: But why would a person of ordinary skill
22 in the art not have understood that if you could do streaming on the
23 download as a way for transmitting data, why wouldn't a person of ordinary

1 skill in the art have equally understood that if you want to transmit
2 something in real-time on the upload, that that would be streaming?

3 MR. ROBINSON: Well, Your Honor, because there was an known
4 option for doing that. And it was segmenting. The idea of streaming to
5 upload was not a known option. And as Dr. Olivier explains in detail,
6 streaming introduces the potential of additional errors. Yes, there are
7 certain protocols that help mitigate errors, but that's not to say that those
8 errors and the introduction of those errors completely go away.

9 And in fact, Dr. Almeroth never says that those errors are completely
10 eliminated by the idea of using a TCP protocol. What Dr. Olivier explains
11 is if the point is to upload it to save it and redistribute it, you wouldn't turn to
12 an unknown mechanism of doing that with greater risk when you already
13 have this known option of segmenting where you simply save that video file
14 locally and send it out.

15 Now, Petitioner essentially relies on Nassiri as an anticipatory
16 reference for this particular element. It doesn't say it would have been
17 obvious to modify Nassiri; it says Nassiri discloses streaming. Now we
18 can look to Bradford to confirm that streaming was a thing, but again,
19 Bradford doesn't teach streaming up.

20 And so the only way that Nassiri can anticipate this element is if
21 Nassiri necessarily discloses streaming. And it does not. There's no
22 secondary reference to suggest that streaming up was a known method of
23 doing this. And so that's the shortcoming here.

1 Additionally, Petitioner's pivot to try to bring segmenting back
2 within the ambit of streaming, one, is completely inconsistent with the
3 Petition. It's completely inconsistent with Dr. Almeroth's opening
4 testimony. But it also depends on evidence that isn't helpful. So
5 HTTP live streaming, Internet draft document, it says right on its face, "Do
6 not refer to this as reference material." There's no indication that it's
7 published, there's no testimony sufficient to show that a POSITA would
8 have understood HTTP live streaming to be anything. Petitioner's
9 argument today about 1037, at Page 26, never cited in the record, never had
10 an opportunity to depose Dr. Almeroth on that point, because Dr. Almeroth
11 never cited that page, never explained what it meant. Still, Dr. Almeroth
12 hasn't explained why these HTTP livestreaming or DASH were purportedly
13 streaming, why they were purportedly segmenting. He just doesn't go into
14 that analysis. It's not there.

15 The MPEG-DASH standard came out literally years after 2012.
16 POSITA didn't have it. The document that Dr. Almeroth says shows
17 Netflix supported these segmenting streaming methodologies says exactly
18 the opposite. It says, as of the date of that document, to the extent you
19 want to credit a Netflix blog, said that Netflix didn't. They hadn't figured
20 out how to do this.

21 So not only is it a complete diametrical shift from the Petition and
22 Dr. Almeroth's beginning testimony that not only are streaming and
23 segmenting two different things, but the fact that they are means we should
24 interpret Nassiri to be streaming, this shift in position is completely

1 unsupported by any evidence to suggest that a POSITA would have actually
2 understood what he says they would have.

3 Sorry, I thought there was a question.

4 So skipping ahead to Patent Owner's Slide 51, and really coming
5 back to the link and the iframe on the same first web page -- I'm sorry, Judge
6 Medley, the 14 minutes a moment ago, was that --

7 JUDGE MEDLEY: You have about, you know, total time, you
8 have about eight and a half minutes total time.

9 MR. ROBINSON: Thank you. Claims 1 and 13 require the link
10 to be displayed in the same page as the frame in which the media recorder
11 software is invoked. Nassiri does not do that. Nassiri has two options.
12 There is a display link that goes to a different page, and there is a page that
13 embeds the recorder software via the SRC tag in the iframe.

14 So the link is not on the same page as the iframe. In fact, Nassiri
15 never says the link goes to a page with the iframe. That's important,
16 because it goes to what are the differences between Nassiri and the claims?
17 And how does Nassiri actually have to be modified to get there?
18 Ultimately, Nassiri discloses one example of an embedded link, and it's the
19 iframe with the URL in the source tag.

20 Despite Petitioner's argument that the URL in that source tag can't be
21 a link, Dr. Almeroth admitted that it could be in his second deposition after
22 his reply testimony. It's on Patent Owner's Slide 54 when asked about that
23 SCR tag, "Is it your opinion that that URL is not a link?"

1 "Well, it's not a hyper link or a link in the context of something that
2 you would click on." Well, that's critical, number one. You can't click on
3 it. It's not on the page. But then he goes on, "You can consider it a link in
4 the context of it's something that provides a link to another document or
5 object."

6 That's it right there. That URL is a link. Everything falls apart.
7 Petitioner cannot argue that is not a link. And so ultimately what we start
8 with is Nassiri which has two alternatives. The closest they get is an iframe
9 with the recorder software pre-recorded. And now Petitioner wants us to
10 look to Bradford to add a link to that page or to re-purpose an existing link.

11 Well, on the first option, why add a link to a frame when the frame
12 already has the software loaded into it? Petitioner says it's to save
13 resources. But we're talking about a video system that moves massive
14 amounts of data around.

15 Dr. Olivier goes through the details. Here's all the ways that you
16 could modify this, not that you would but that you could. And he explains,
17 look, if you take out -- if you don't load that software to begin with, then you
18 empty that source tag, now you've just got an empty space. It may not have
19 a border around it, but it's still an empty space. It's confusing, it's pointless,
20 it doesn't make sense, especially when Nassiri is trying to collect videos.

21 Then Dr. Almeroth responds. "Well, you could put a picture of the
22 interface in that space so there wouldn't be an empty space. So on his
23 deposition testimony and cross examination, he admits that the data for the

1 image as the placeholder would have been more data than the recording
2 software already used, so kilobytes versus hundreds of bytes.

3 So then the other option is to take a link. If you start with the
4 understanding that Nassiri has two options. There's a link on the page that
5 goes to a different page where there's an iframe that already has the recorder
6 software. Do you assume that there's already a link on that page with the
7 iframe and that we're going to take that link, change it to refer to the iframe
8 that already has the recording software in it? It just doesn't make sense.
9 And Dr. Olivier goes through this point, by point, by point.

10 The best that Dr. Almeroth can come back with is, well, if POSITA
11 would have had web design experience, and whatever other changes might
12 have been necessary, it would have been simple. We're just going back to
13 the basics of the analysis required by the Supreme Court. Step 1 is the
14 differences between the prior art and the claims.

15 Petitioner hasn't even done that. Because they can't decide between
16 the Petition and the Reply what Nassiri actually discloses in terms of the
17 iframe and the frame. They still haven't addressed all of the changes that
18 would have been necessary to get that there.

19 With that, I reserve my last couple of minutes for sur-rebuttal.

20 JUDGE MEDLEY: Okay.

21 MR. ROBINSON: Thank you.

22 JUDGE MEDLEY: You have three and half minutes left.

23 MR. MCCOMBS: I do have a few points to make in rebuttal.

24 First, with regard to video stream, you know, we did speak at length about

1 how Nassiri teaches receiving a video stream. And the essence of the
2 argument against Nassiri is that transmitting while recording limits is
3 somehow limiting Nassiri to segmenting and not streaming. We talked at
4 length about how, with respect to Paragraph 27, we have video data that is
5 being sent in a feedback mode. And I think that's pretty clear that is
6 happening in real-time. If you look at Paragraph 27, it does specifically
7 state that as the video is being recorded, these things are happening, or as the
8 video is being sent.

9 So as well, we have, with regard to the whole issue of segmenting, in
10 the patent it is referring to intermittent transmission, caching and intermittent
11 transmission. We know that in segmenting that is an intermittent
12 transmission, but what's important is how that data is received.

13 The claim is concerned with receiving a video stream. And the
14 details of exactly how that data is formatted, and whether or not it is sent in
15 chunks, that's not the issue. If the video is sent continuously from the
16 recipient's perspective, then that is receiving a video stream. Dr. Olivier --

17 JUDGE BOUDREAU: Mr. McCombs, if I could interrupt you for
18 a second. Mr. Robinson argued that Paragraph 27 of Nassiri, where it
19 refers to feedback, that it's talking about feedback that would be given after
20 the video is fully received. And perhaps it could be used to re-record the
21 video. How do you respond to that argument?

22 MR. MCCOMBS: If you look at Paragraph 27, about the fourth or
23 fifth line down it says, "Accordingly, as the video host computing system

1 receives video," this is when all of this is occurring. So it's in a feedback
2 operation as it is being received.

3 JUDGE BOUDREAU: And how does that preclude the suggestion
4 that Mr. Robinson made?

5 MR. MCCOMBS: Well, we're talking about feedback data to the
6 contributor to make adjustments where the contributor is prompted to make
7 adjustments while the recording is being made. So to me that's not after the
8 fact. It's during the recording. And it's sending the data and making
9 adjustments while the recording is being made.

10 JUDGE BOUDREAU: All right. Mr. Robinson also argued that
11 Bradford teaches only streaming download, as I think I understood the
12 argument. What evidence is there that streaming upload was also known
13 and would have been obvious to a person of ordinary skill in the art at the
14 time reading Nassiri?

15 MR. MCCOMBS: So on that whole idea, you know, conceptually
16 uploading is similar to downloading. I think that that doesn't alter the
17 person of ordinary skill's understanding whether it's uploading or
18 downloading.

19 With regard to this whole question of user perception with regard to
20 the transmission of video that's being received, you know, we also have Dr.
21 Olivier in his testimony at exhibit -- or in his deposition at Exhibit 1035,
22 Pages 30 and 31, when we're talking about segmenting, he says that, if the
23 segments are sufficiently small, then that's perceived as real-time.

1 So this question about segmenting versus transmission, you know,
2 whether it's in chunks, or whether it is received in small segments, or how
3 that data is formatted when it's sent is not the issue. If it's from the
4 recipient's perspective that the video can be played before the entire video is
5 received, and it is perceived by the user as being in real-time or quasi-real-
6 time, that is sufficient to constitute receiving a video stream. And that's
7 what Nassiri does.

8 JUDGE BOUDREAU: Well, I think I understand your position
9 that we have to focus on the user's perception. But if we were to, just for
10 the sake of argument, accept Patent Owner's contention that streaming is
11 different from segmenting, is there any evidence of record that streaming
12 upload was known in the art?

13 MR. MCCOMBS: I think that the streaming upload and download,
14 I understand, are the same. They're conceptually the same. And I think
15 with regard to that --

16 JUDGE BOUDREAU: Is there any evidence you can point to in
17 the record for that?

18 MR. MCCOMBS: I think at Olivier, Olivier said that they -- I
19 think it's Paragraph 57 of Dr. Olivier's testimony where he argues that
20 uploading and downloading, the Patent Owner's arguing that they're
21 different. But Olivier, at Paragraph 57, disagrees with that and that they
22 are the same.

23 JUDGE BOUDREAU: All right, thank you.

1 JUDGE KAISER: Mr. McCombs, how does user perception work
2 when it's an upload stream? In other words, here we're streaming to a
3 server. We're streaming from the user device to a server. So I'm a little
4 confused about how a user's perception would play into a stream on the
5 upload direction.

6 MR. MCCOMBS: Yes well, with respect to, again, if the recipient
7 may not necessarily be someone that's viewing but, again, it has to do with
8 the idea that the delivery, while recording or in part as it is being recorded,
9 you know, is sufficient so that it's perceived as a stream. You know, again,
10 with regard to the fact that it's received at a server, again, and potentially
11 later stored, I don't know how that would change the fact that it's still
12 received as a stream.

13 JUDGE KAISER: Is it maybe more consistent with being received
14 by a server to talk about real-time or quasi-real-time instead of a user's
15 perception?

16 MR. MCCOMBS: Yes, that would be correct.

17 JUDGE KAISER: Okay. And how do we judge that from the
18 perspective of a server?

19 MR. MCCOMBS: Again, I think the idea in the disclosure is, you
20 know, while recording. And I think we had the testimony of Dr. Almeroth
21 that he would view while recording and transmitting as recording as a real-
22 time operation.

23 And then as well, we have the testimony in Paragraph 27 that in that
24 feedback sense, again, for that kind of operation to take place where the

1 server is, you know, prompting the contributor, that would appear to me to
2 have been in a real-time setting.

3 JUDGE KAISER: On a slightly different note, if we sort of discard
4 this idea of upload versus download but instead look at it in terms of
5 transmitting data while that data is being created, so in other words, or I
6 should say streaming data while the data's being created. So a lot of Patent
7 Owner's arguments are related to you have a file, and you stream from a file.
8 And that's what streaming is.

9 Here, we don't really have a file. We're creating data by creating a
10 video. And then in the claim, we're streaming that. So what evidence is
11 there that that was known for streaming?

12 MR. MCCOMBS: Could you clarify the question? So you said --

13 JUDGE KAISER: Sure. It was long question. I apologize.
14 My idea is, basically, instead of streaming from a file, so instead of
15 streaming from data that's created. So you might imagine, for example,
16 that if I'm getting -- Netflix has been mentioned -- so if I'm getting streamed
17 information from Netflix, the Netflix server has that video already on it,
18 right. It's got the movie there, and I stream it to my computer.

19 If, instead, Netflix is creating the video, or I as a user am creating the
20 video, I don't have necessarily the whole video on my system, what evidence
21 is there about how streaming occurs in that circumstance and that that was
22 known for a streaming technique?

23 MR. MCCOMBS: I think it's the, well, I think the idea that if the
24 server can be using it before it's complete, then that would be streaming.

1 So with regard to that, again, that's exactly what happens in Netflix, is that
2 the user is able to begin using that video before the entire video is
3 transmitted. So it's happening while it's being recorded or as it's being
4 recorded, for example. It can be.

5 If we look at the slide here, we have, again, we're talking about the
6 media data can be transferred as soon as it is created, allowing it to be
7 played in near real-time. That's what HTTP livestreaming does.

8 JUDGE BOUDREAU: I'm sorry, which slide were you just
9 looking at?

10 MR. MCCOMBS: Slide 16.

11 JUDGE BOUDREAU: Thank you.

12 MR. MCCOMBS: And with regard to the discussion of HTTP live
13 streaming and MPEG-DASH, there were some questions raised perhaps
14 about those exhibits and their dates. I would refer the panel to Dr.
15 Almeroth, Exhibit 1036, at his Paragraphs 4 and Paragraph 22 where he says
16 that all of the evidence that he reviewed was from the timeframe of a person
17 of ordinary skill as of May 9th, 2012, and that those -- the Live Streaming
18 protocols were, in fact, known at the time of the patent.

19 I would also refer the panel, just even though those exhibits are not --
20 the data's not in question, I would refer the panel to last week's federal
21 circuit case dated October 12th, 2018, the Yeda Research v. Mylan
22 Pharmaceuticals case where it says that the Board can rely on evidence other
23 than prior art for how a person of ordinary skill would have understood the
24 prior art disclosures.

1 Judge Medley, how much time do I have left?

2 JUDGE MEDLEY: You have four minutes.

3 MR. MCCOMBS: Okay. So from here, I would like to then now
4 move to this whole discussion of linking. Oh, and with regard to that, I
5 would point there's many examples that are discussed in Nassiri about links.

6 This whole automatic loading theory with the SRC attribute that the
7 Patent Owner has discussed, we disagree with that theory. But even so, it's
8 missing the point. We have to look at the teachings as a whole. The
9 Patent Owner has admitted that Nassiri and Bradford could be combined.
10 And when we do so we have that, just that, a website with a link that can be
11 followed. When that link is followed, you have a video recorder in an
12 iframe on the same page.

13 And I would direct the panel back to our Petition, our original
14 Petition at Page 21. It's very explicit where there's a teaching in Nassiri, in
15 Paragraph 18, that a link may be provided in a page. And then Bradford
16 teaches how that link within a web page can target an iframe on the same
17 page. So that is a clear teaching regardless of any other examples, you
18 know, within the reference.

19 I would then also like to make a few additional comments with
20 regard to Bradford as a printed publication. Again, what's happening here
21 is that the Patent Owner -- the argument about Bradford and its publication
22 is attacking a strawman. It's an argument against Exhibit 1010, not the
23 work.

1 And the work was identified by its unique ISBN number. That's the
2 only ISBN number that's been identified throughout all of the evidence in
3 this case. We see the Amazon public accessibility, and that is sufficient.
4 It's referring to the same ISBN. So with all of the evidence on this point, I
5 think that we have sufficient reliable evidence that the textbook itself was
6 published.

7 JUDGE BOUDREAU: Could you address Patent Owner's
8 argument that the page count in Exhibits 1010 and 1042 are different from
9 each other? I believe 1010 is only an excerpt, so there is no page count
10 there. But I think the comparison would be between Exhibit 2004 and
11 Exhibit 1042.

12 MR. MCCOMBS: So you mean with respect to the Amazon
13 website and Exhibit 1042. Is that what you mean, Your Honor?

14 JUDGE BOUDREAU: No, I believe that Patent Owner was
15 arguing that the version that was provided in Exhibit 1042 --

16 MR. MCCOMBS: 1042.

17 JUDGE BOUDREAU: Was it 1042?

18 MR. MCCOMBS: Yes. So Exhibit 1042 was the Library of
19 Congress version. And again, it identifies the same ISBN. And the work
20 is identical as it relates to the text in question. Again, there's nothing that
21 would show there is any other version than the version with the ISBN
22 number that we've provided.

23 JUDGE KAISER: So one question is, it sounds like 1042 and
24 2004, unless I'm mistaken, I think Patent Owner's counsel may have argued

1 here that they have a different number of pages. But I don't think that's in
2 the Patent Owner Response.

3 MR. MCCOMBS: I don't think that there was any allegation that
4 the pages in question are different as it relates to anything involving the
5 subject matter or any indication that that would make this a different version
6 of the work. There's only one version of the work. And to the extent that
7 there would perhaps have been a reprint doesn't change or reset that
8 publication date.

9 JUDGE KAISER: Okay. But I do think the Patent Owner made
10 the argument in its brief that Exhibit 1010, which the complete, I think,
11 version of which is in Exhibit 2004, is a different number of pages than
12 what's referenced on the Amazon website that's at 1016. So how do you
13 respond to that?

14 MR. MCCOMBS: I would respond that the identifying portions on
15 the website and the exhibit are still the same. It's the same ISBN, it's the
16 same title, it's the same author, nothing that would indicate that the text itself
17 is different.

18 JUDGE MEDLEY: Okay, you're out of time.

19 MR. MCCOMBS: All right.

20 JUDGE MEDLEY: Do you have any other questions, Judge
21 Kaiser, Judge Boudreau?

22 JUDGE KAISER: Nothing for me, thanks.

23 JUDGE BOUDREAU: None for me either. Thank you.

24 MR. MCCOMBS: Thank you, Your Honors.

1 JUDGE MEDLEY: Thank you. Mr. Robinson, you have three
2 and a half minutes.

3 MR. ROBINSON: So a brief point of clarification. The argument
4 with respect to 1042 and 1010 is that Petitioner did not actually provide any
5 comparison to say that the entirety of those documents are the same. It was
6 simply that they had only compared a small subset of those pages.
7 Ultimately, though, neither copy aligns with the number of pages that are on
8 the Amazon webpage.

9 I believe Petitioner suggested just now that it's sort of relevant that
10 the pages that are relied upon have not been shown to have been published
11 prior to the critical date. But as long as there is something that suggests
12 that some version of this book might have been published, that is enough.
13 It's not. It is absolutely Petitioner's burden to show that the subject matter
14 on which it relies can be authenticated and shown to have been published
15 prior to the critical date.

16 There was a little bit of confusion, I think, earlier in terms of which
17 MARC record showed that this book had not been indexed or shelved prior
18 to June of 2012. Just to be clear, George Mason's MARC record doesn't
19 show when that library received it, shelved it, did anything with it. The
20 Library of Congress' MARC record shows that the Library of Congress did
21 not index or shelve that book prior to June of 2012.

22 So even if 1041 and 1042 come in to be considered, one, there's no
23 tie. So there's nothing that shows that 1041 actually relates to 1042. If we
24 accept that 1042 was submitted with the copyright registration, despite that

1 lack of evidence, the best evidence, so rebutting, even if we give the
2 presumption of the publication date for prima facie evidence as Petitioner
3 asked, both of the cases Petitioner cites as that prima facie evidence can be
4 rebutted.

5 And what we know is, even if we assume that 1042 is what's in the
6 Library of Congress' stacks, we know for a fact that it was not indexed or
7 shelved for public accessibility prior to June of 2012. The Amazon page
8 alone, not tied to that copy again, doesn't get us there.

9 JUDGE KAISER: I just want to be clear. Did you just say that
10 the MARC record establishes that it wasn't shelved in the Library of
11 Congress? I thought that only related to George Mason.

12 MR. ROBINSON: No, Your Honor. With the Petitioner were
13 two MARC records. One was George Mason and one was the Library of
14 Congress from which 1042 comes today. And that shows that whatever
15 version was in the Library of Congress back in 2012 was not indexed or
16 shelved until June of 2012.

17 So again, any of this evidence on Bradford taken individually or
18 together doesn't get us there. It doesn't get us to any version of Bradford
19 having been published that's in the record. The best inference they could
20 get would be that the Library of Congress record was, and again, there's no
21 evidence to support this, but if they ask for the inference that the Library of
22 Congress' record is the same one that was there in 2012, we know for a fact
23 it wasn't indexed, or published, or shelved until June of 2012 after the
24 critical date.

1 JUDGE MEDLEY: And you're out of time.

2 JUDGE KAISER: Well, where is the --

3 JUDGE MEDLEY: Wait, sorry.

4 JUDGE KAISER: Judge Medley, I'm sorry. I have just a couple
5 more questions.

6 JUDGE MEDLEY: All right.

7 JUDGE KAISER: Can you point me in the record to where the
8 Library of Congress MARC record is?

9 MR. ROBINSON: Certainly, Your Honor. Let me jump up. It's
10 referenced on Patent Owner's Slide 13. It is in Exhibit 1011, Pages 53
11 through 54. It's included as an --

12 JUDGE KAISER: Wait a minute. And then where in your Patent
13 Owner Response do you address this particular record?

14 MR. ROBINSON: So in 829 it is at Page 6, and in 830 it's at Pages
15 6 through 7.

16 JUDGE KAISER: Okay, very good. And then I just had one
17 other question for you. Well, no, I think I'm out, I'm okay. I've asked my
18 questions. Thank you.

19 JUDGE MEDLEY: Okay, thank you. Thank you for your
20 presentations. And we'll take it under advisement. We are adjourned, and
21 we'll take a ten minute break. That clock is a little bit fast. So I have
22 3:10. We're going to begin again at 3:20 for the next series of cases.

23 (Whereupon, the above-entitled matter went off the record at 3:10
24 p.m.)

Case IPR2017-00829 (Patent 9,083,997 B2)
Case IPR2017-00830 (Patent 9,083,997 B2)

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