

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

HTC CORPORATION, HTC AMERICA, INC., and
SAMSUNG ELECTRONICS AMERICA, INC.,
Petitioner,

v.

UNILOC 2017 LLC,
Patent Owner

Case IPR2018-01589¹
Patent 7,653,508 B1

Record of Oral Hearing
Held: December 11, 2019

Before SALLY C. MEDLEY, JOHN F. HORVATH, and
SEAN P. O'HANLON, *Administrative Patent Judges*.

¹ Samsung Electronics America, Inc., which filed a petition in IPR2019-00889, has been joined as a petitioner in this proceeding.

APPEARANCES:

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The above-entitled matter came on for hearing on December 11, 2019, commencing at 1:30 p.m., at the United States Patent and Trademark Office, USPTO Madison Building, 600 Dulany Street, Alexandria, VA 22314.

1 (Proceedings begin at 1:30 p.m.)

2 JUDGE O'HANLON: Please be seated. Good afternoon,
3 everyone. This is a hearing in Case No. IPR2018-01589,
4 HTC Corporation and HTC America, Inc., versus Uniloc 2017 LLC;
5 formerly Uniloc Luxembourg S.A. Samsung Electronics America,
6 Inc. has also been joined as a Petitioner in an understudy
7 role. This proceeding involves U.S. Patent No. 7,653,508.

8 I'd like to start by having counsel
9 for the parties introduce yourselves for the record, starting
10 with HTC Petitioner.

11 MR. LANDIS: Good afternoon. Todd Landis and Jeff
12 Swigart for HTC.

13 JUDGE O'HANLON: Is there anyone here for the
14 Samsung Petitioner?

15 MR. VALENTE: Yes, Your Honor. David Valente for
16 Samsung.

17 JUDGE O'HANLON: Okay. Thank you. For Patent
18 Owner?

19 MR. KOIDE: Good afternoon, Your Honor. Brian M.
20 Koide for Uniloc 2017 LLC.

21 JUDGE O'HANLON: Thank you. I'm Judge O'Hanlon.
22 I'm joined here in the Alexandria hearing room by Judge
23 Medley, and we're joined remotely by Judge Horvath. The

1 camera for Judge Horvath is located behind the
2 bench, so there's no need to look at the screen when
3 addressing him.

4 Judge Horvath will only be able to hear what the
5 microphones pick up, so I ask counsel to keep that in mind
6 when making your presentations today. And I'd also ask
7 counsel when referencing demonstratives to please state the
8 slide number so that Judge Horvath, as well as Judge Medley
9 and myself, can follow along more easily.

10 Per our order dated November 6th, each side will
11 have 30 minutes of total time to argue. Petitioner will go
12 first, followed by Patent Owner. Each side may reserve time
13 for rebuttal. If you run over during your argument in chief,
14 I will let you continue arguing using the time you have
15 reserved for rebuttal. I'll endeavor to let you know when
16 this happens, but please be mindful of the timer and the
17 lamps. And as usual, speaking objections are not allowed. You
18 may note anything you care during your time to argue.

19 And with that, I invite Mr. Landis to begin. Mr.
20 Landis, do you wish to reserve any time for rebuttal?

21 MR. LANDIS: Yes, Your Honor. I'd like to reserve
22 ten minutes for rebuttal, please?

23 JUDGE O'HANLON: Ten minutes. All right. So I'll
24 set the timer for 20 minutes. Okay. Begin when you're ready.

25 MR. LANDIS: Thank you, Your Honor. Mr. Swigart,

1 could we go to Slide 2, please?

2 Your Honors, we're here today really, in some ways,
3 from two different types of cases. We have the positions that
4 Uniloc took during their preliminary response and their
5 response, and now the positions that they've taken in their
6 sur-reply in this case. I think under either position that you
7 look at, this claim, Claim 20, the only claim we're here to
8 talk about, should be found unpatentable.

9 In the first instance, because as we see on the
10 slide, this Board has already found many of the claims in the
11 '508 unpatentable, including Claims 3, 13, 15, and 19. Claim
12 15 being the independent claim from which Claim 20 depends.
13 The Board has also found in its institution decision that
14 there's no dissimilarities between Claim 13, Claim 3, and
15 Claim 20. They found those claims to be similar.

16 And so for the same reasons the Board found Claims
17 13 and 3 to be unpatentable, they should find Claim 20 to be
18 unpatentable in favor of Fabio -- the Fabio reference.
19 There's no distinction. And when Patent Owner made their
20 preliminary response and made their actual response in this
21 case, they made the exact same arguments they made, and that
22 this Board heard from -- during the Apple IPR where they found
23 Claims 3, 13, 15, and 19 to be unpatentable. They're the
24 exact same arguments.

25 And for the reasons the Board didn't find those

1 arguments persuasive there, they shouldn't find them
2 persuasive here because as the Board found in the institution
3 decision, Claim 20 is not dissimilar from those other claims.
4 Faced with this, I think, inevitable conclusion, Patent Owner
5 decided to switch the game, and in their sur-reply, they now
6 try to make new arguments that were never before made, not in
7 their response. New arguments about patentability. And to do
8 so, what they have done is they've taken some claim language
9 and what appears to me to be is they're now trying to construe
10 that claim language. In particular, the word cadence.

11 They've made two arguments, as far as I can tell, in
12 their sur-reply. One is that the fact that the word window is
13 plural in Claim 20 lends to some distinct patentability for
14 Claim 20. The problem is cadence windows was in Claim 19,
15 too. And the Board found Claim 19 to be unpatentable over
16 Fabio. So the argument that they're making now really doesn't
17 have any merit, and has already been decided by this Board
18 that Fabio teaches cadence windows.

19 JUDGE O'HANLON: Mr. Landis, what about Patent
20 Owner's argument that measured cadence, which that exact
21 phrase is not in the prior claims, but the arguments of that
22 phrase means you must consider more than one previous step?

23 MR. LANDIS: Two points to that, Your Honor. First,
24 the argument that they're making is a claim construction
25 argument. And the support for that claim construction

1 argument when you look into the patent, actually comes from a
2 preferred embodiment. It doesn't say it's in every
3 embodiment. They're reading a limitation into the claim.
4 They're doing something that the Federal Circuit has told us
5 time and time again, and which patent owners routinely argue
6 about during claim construction, you shouldn't do. You
7 shouldn't read limitations from preferred embodiments in the
8 claims. That's point one.

9 Point two, Your Honor, is I believe they're
10 conflating two concepts here. They're conflating validation
11 with cadence. Cadence is, just by its own definition, is a
12 rhythmic series of something; in this case, steps. Fabio
13 teaches this exact concept. In Column 3 -- I'll get you the
14 exact cite, Your Honor. In Column 3, Lines 22 through 29 of
15 the Fabio reference, it teaches looking at a sequence of steps
16 in order to get a predetermined condition of regularity for
17 the gait of the person. The gait of the person being the
18 cadence of that person's steps.

19 This is exactly what Fabio teaches. It teaches that
20 you're going to look at cadence, you're going to measure the
21 cadence in terms of steps and come up with some baseline. And
22 then when the person starts walking, you're going to determine
23 whether they're in the baseline or not. And that's how Fabio
24 works. So Fabio doesn't teach anything different, and I don't
25 think it matters whether you accept -- whether the Board

1 accepts the definition of cadence or of measured cadence that
2 they have now put forth -- Patent Owner has now put forth,
3 because Fabio teaches a measured cadence as part of the
4 system.

5 So even if the Board were to accept these new
6 arguments, I think you still have to come to the conclusion
7 that it's taught in Fabio.

8 JUDGE O'HANLON: And does Fabio consider a measured
9 cadence, as you've discussed, simply by looking at one prior
10 step?

11 MR. LANDIS: I don't believe so, Your Honor. I
12 think the one prior step -- this is, again, is where I think
13 the conflation comes in. The one prior step is the validation
14 part, and it -- they don't validate based on the prior step,
15 as the Board has found in the past; it's really the current
16 step. But the one step, that process is used for the
17 validation part.

18 When we're talking about the cadence part, the
19 measured cadence, that is done with a sequence of steps, as is
20 said in column -- well, it's in more than one place, but in
21 Column 3, for example, Lines 22 through 29, and in Column 5,
22 Lines 40 through 45. They're talking about the gait. And the
23 gait of the person is the cadence, the measured cadence of the
24 walk. You get a window, you get a threshold, and then you
25 look when they start to walk whether they're within that

1 threshold. And if they are, then they -- then Fabio says you
2 start to count. You start to count the steps if you're in
3 that window.

4 So I think Fabio is not talking about measuring
5 cadence on a single step, and frankly, that would -- kind of
6 wouldn't make any sense. I mean, a cadence somewhat requires
7 more than one step in the end.

8 JUDGE O'HANLON: But Claim 20 says adjusting the
9 cadence window is based on a measured cadence. And I believe,
10 in your petition, you rely on the validation interval of Fabio
11 to be the cadence window, and isn't that adjusted based on one
12 measured step?

13 MR. LANDIS: So it's -- I think the window is
14 validated based on one measured step. I'm not sure it -- I'm
15 not sure you're determining the cadence based on one measured
16 step.

17 JUDGE O'HANLON: But it's the cadence window that is
18 based on a measured cadence. And you've identified in your
19 petition Fabio's validation interval TV to be the cadence
20 window. And doesn't Fabio adjust that for each new step based
21 on the timing of the most recent previous step?

22 MR. LANDIS: So, Your Honor, the window I think that
23 we're talking about here is what I believe I'm referring to
24 when I'm talking about measuring the sequence of steps in
25 Fabio. So the sequence of steps -- by measuring the sequence

1 of steps and getting the cadence, you can determine the window
2 for the cadence; the cadence window itself.

3 Then, once you want to validate whether or not
4 that's in -- when something's within that window, you're
5 looking at a step. But the window itself, according to Fabio
6 and the teachings of Fabio, is done -- is determined by
7 looking at a sequence of steps. And that's, again, Column 3
8 and Column 5. So, Your Honor, I mean, again, the --

9 JUDGE HORVATH: Let me ask you a question, Mr.
10 Landis.

11 MR. LANDIS: Sure.

12 JUDGE HORVATH: But isn't -- I mean, in Fabio
13 there's a formula for what the value of TV is. You would
14 agree that TV is the cadence window in Fabio, correct?

15 MR. LANDIS: Yes, Your Honor.

16 JUDGE HORVATH: And so TV has a -- let me see if I
17 can get to Fabio. I think it's in Column 5 --

18 MR. LANDIS: I think the Column 4, Line 40, Your
19 Honor?

20 JUDGE HORVATH: Line 40, yes. So it depends on
21 several times and a difference between times. It depends on
22 the time of the previous step K-1, right?

23 MR. LANDIS: Yes, sir.

24 JUDGE HORVATH: And it also depends on a difference
25 in time between step K-1 and K-2, right?

1 MR. LANDIS: Yes, Your Honor.

2 JUDGE HORVATH: That's what -- Delta K-1, or Delta
3 TK-1, I should say, is the difference in time between steps K-1
4 and K-2. So this -- in Fabio, you would agree then that
5 this cadence window TV is determined based on, really, two
6 times. The time of the step K-1, and the time of step K-2.
7 Wouldn't you agree with that?

8 MR. LANDIS: Your Honor, I believe that's correct.
9 I think what Your Honor's saying is there's two times -- and
10 I'm just looking at them to make sure, but I believe you're
11 correct, Your Honor.

12 JUDGE HORVATH: Okay. Thank you.

13 MR. LANDIS: So, Your Honors, again, these arguments
14 that we're hearing now from Patent Owner are wholly new
15 arguments. I think that the Board could rightly not consider
16 them, but even if we do consider them, I don't think they do
17 anything to prevent Claim 20 from being found unpatentable
18 based on Fabio. I think Fabio still teaches all of the
19 elements and anything that's new from Claim 20.

20 And again, I would also say that the only way Patent
21 Owner gets here is by putting forth a construction that we've
22 seen for the first time now, and that construction is based on
23 preferred embodiments out of the patent. It's not a
24 construction, it's not a definitional construction. There was
25 no lexicography, nor have they argued it. In fact, they

1 didn't really formally argue that it needed construction, but
2 they did put forth many definitional statements within their
3 response.

4 So for those reasons, Your Honor, I think that Claim
5 20 should be found unpatentable and I'm going to yield my time
6 now, unless Your Honors have any more questions for me?

7 JUDGE HORVATH: I do have one more question for you.

8 MR. LANDIS: Sure.

9 JUDGE HORVATH: So Claim 20 depends from Claim 19,
10 which, itself, depends from Claim 15, correct?

11 MR. LANDIS: Yes, Your Honor.

12 JUDGE HORVATH: So in Claim 15, that's where we
13 first are introduced with this concept of cadence windows.
14 And in particular, in Claim 15, which is, sort of, Column 16,
15 line -- let's say, 35 or so, to 37, it says -- or let's take
16 it a little bit earlier; 34 roughly to 38. There's a mode
17 logic that switches the device from non-active to active mode
18 after a number of periodic human motions are detected within
19 appropriate cadence windows.

20 So I guess the question I have for you is one, what
21 are the -- do the cadence windows -- would you agree that
22 the cadence windows refer to the windows within which the
23 periodic human motions are detected?

24 MR. LANDIS: If Your Honor could give me one second.
25 I think they're the windows in which periodic human motions

1 are looked to be detected. I'm not certain that they will
2 necessarily be detected, but it's the windows in which you
3 will look to detect them.

4 JUDGE HORVATH: Okay. Fair enough. My next
5 question then is, is there anything in Claim 15 that prevents
6 -- or that would preclude each periodic human motion -- let's
7 assume for the sake of this hypothetical that the steps are
8 all detected and validated?

9 MR. LANDIS: Yes, Your Honor.

10 JUDGE HORVATH: So is there anything within Claim 15
11 that would preclude each step from having its own appropriate
12 cadence window?

13 MR. LANDIS: Well, Your Honor, I think there would
14 because it's simply by the fact that you're looking for a
15 cadence. And I think that cadence -- it would be hard to have
16 a cadence with just one step. You need to know what the
17 cadence is. And so I think this is the same reason why Fabio
18 teaches what it teaches, which is to -- in order to have a
19 cadence, I think you probably need at least two steps so that
20 you know that the cadence is.

21 JUDGE HORVATH: Well, but earlier we had discussed
22 what -- TV being the cadence window, correct?

23 MR. LANDIS: Yes.

24 JUDGE HORVATH: And you agree that TV is based on
25 the timing of two previous steps, K-1 and K-2, correct?

1 MR. LANDIS: Yes. That's correct.

2 JUDGE HORVATH: So from those two previous steps, I
3 could determine TV in Fabio.

4 MR. LANDIS: Yes.

5 JUDGE HORVATH: And we -- and that -- your position
6 is that is a cadence window, correct?

7 MR. LANDIS: Yes, Your Honor.

8 JUDGE HORVATH: That I can use to validate a step,
9 correct?

10 MR. LANDIS: Yes.

11 JUDGE HORVATH: And if I validate a step using that
12 cadence window, then I will proceed to look for and
13 potentially validate a next step. So then, the question is
14 does that next step, can that have a different cadence window?

15 MR. LANDIS: Your Honor, I think that you can have
16 different cadence windows for different cadences, but if you
17 have a cadence from which the cadence window is determined,
18 then you're going to be within that cadence window, so your
19 step would be within that -- well, it would either get
20 validated for that window or not for that window.

21 I hope I'm understanding Your Honor's question, but I
22 think that once you have determined the cadence window, now
23 you're going to determine whether you fall within that cadence
24 of that window. Can there be other cadence windows at some
25 other time that have been determined? I would say, yes, there

1 can be. But once you've determined the window, I think you're
2 looking then to decide whether you're in the window or not.

3 JUDGE HORVATH: Well, let me try to rephrase the
4 question. I'm really trying to get an answer to a question
5 which is that if I look at Claim 15, it says that a
6 number of periodic human motions are detected within
7 appropriate cadence windows, and the question I'm trying to
8 ask is, is there anything in Claim 15 that precludes a
9 one-to-one correspondence between a human periodic motion and
10 a cadence window?

11 In other words, can you have one, two, three
12 periodic motions, and one, two, three cadence windows within
13 which those motions are detected? Or do you have to have one,
14 two, three periodic motions within a first cadence window, and
15 then four, five, six periodic human motions within a second
16 cadence window?

17 I mean, is Claim 15 broad enough to accommodate both
18 those scenarios or only one of those scenarios? And if so,
19 which one?

20 MR. LANDIS: The way I read Claim 15, Your Honor --
21 and I think I understand Your Honor's question now. The way I
22 read Claim 15 is that the periodic motions that you're
23 detecting must be tied to the appropriate cadence window. So
24 if you're looking at steps one, two, three, you need to
25 determine whether they are within an appropriate window for

1 steps one, two, three. Not whether they are appropriate for a
2 different window.

3 So the time -- the way I read the claim is between
4 the periodic motion and a particular -- and I know that's not
5 the word in the claim, it's appropriate, but the way I read it
6 is a particular cadence window. So I hope that answers Your
7 Honor's question. I think I understood Your Honor's question,
8 and I hope I just answered it.

9 JUDGE HORVATH: All right. Thank you.

10 MR. LANDIS: All right. Thank you. I have nothing
11 further, unless you have more questions? For this time.

12 JUDGE O'HANLON: None from me. Thank you.

13 MR. LANDIS: Thank you.

14 JUDGE O'HANLON: Mr. Koide, we'll now hear from you.
15 Do you wish to reserve any time for rebuttal -- sur-rebuttal?

16 MR. KOIDE: Sure. I'll be reserving 15 minutes,
17 Your Honor.

18 JUDGE O'HANLON: Fifteen?

19 MR. KOIDE: Yeah. And if I go over, I'll -- well, I
20 might go over, but. And I apologize, Your Honor. Actually, I
21 didn't have a printout of my notes page, so I'm going to use
22 my demonstratives somewhat, but I'm going to have to go
23 offline to kind of look at my notes page. And just as Judge
24 Horvath, I'll refer to the demonstrative slide number for the
25 judges in the room. I apologize for that.

1 JUDGE O'HANLON: You may begin when you're ready.

2 MR. KOIDE: Okay. Your Honor, let me just start by
3 saying I just want to briefly address three kind of
4 overarching issues. I want to address what Counsel had
5 discussed with you. But the overarching issues and for time
6 management, I want to make sure I cover them, but I'll be very
7 brief.

8 The first two are issues I believe that the Panel
9 probably does not want to address. I'm largely doing them to
10 preserve issues on appeal, so I'm not going to go into much
11 detail here. And after those three issues, I'll go into more
12 of the patentable distinctions and some of the issues that
13 Counsel had addressed earlier.

14 First, with respect to the constitutional issue, I
15 want to raise that and make it clear that it's been preserved
16 in Paper 8 at 32 and 33 and Paper 11 at 18 to 19. I
17 understand the Panel declined to consider that issue given the
18 fact they've cited law saying administrative agencies do not
19 have jurisdiction to review (indiscernible), but for purposes
20 of appeal, I just want to preserve that.

21 The Board institution decision was made at the time
22 when -- before the Arthrex decision, so that decision should be
23 set aside, respectfully. There is -- we would also take the
24 position that Arthrex didn't go far enough --

25 JUDGE O'HANLON: Are you making arguments

1 regarding this proceeding or a separate proceeding?

2 MR. KOIDE: This proceeding, Your Honor.

3 JUDGE O'HANLON: But we haven't reached a final
4 decision in this proceeding yet.

5 MR. KOIDE: I understand.

6 JUDGE O'HANLON: How can it be --

7 MR. KOIDE: I understand. I'm talking about the
8 institution decision. The institution decision was made at
9 the time when the Panel, pre-Arthrex --

10 JUDGE O'HANLON: Do you think Arthrex addresses
11 institution decisions?

12 MR. KOIDE: I -- it's just our position, Your Honor.
13 I understand, but -- even the final written decision in this
14 case, I -- it would be our position that Arthrex didn't do
15 enough to fix the issue. The fix should've been a -- just
16 setting decisions aside and on congressional fix. There's no
17 mechanism for meaning for you -- before the PTAB decisions,
18 the Arthrex Panel, the Fed Circuit Panel that really come up
19 -- we -- it's really unclear to us whether we have the
20 authority to do that.

21 So it raises serious questions whether the Federal
22 Circuit has authority to rewrite the statute, and again, the
23 only fix is to declare the statute unconstitutional.

24 JUDGE O'HANLON: I don't believe these arguments are
25 presented in your briefs. You seem to be expanding greatly on

1 what's contained in your briefs.

2 MR. KOIDE: Well, they are, Your Honor, but in
3 fairness, there's been a lot of changes, as you're aware, in
4 the different panels. So I'm just making our position clear.
5 I don't want to be approached by opposing counsel down the
6 road saying you didn't raise it or you didn't -- so I'm just
7 trying to make our position clear right now.

8 Second -- the second issue is I think -- again, I
9 think it's clear, but the Panel directed the parties to only
10 address Claim 20. I want to make it clear, and of course, the
11 Apple final written decision came out in between the time of
12 the Patent Owner response and the reply. Certain arguments we
13 made were predicated on the Apple final written decision not
14 being finally resolved, and of course, it was.

15 So I just want to make it clear that today we're not
16 disputing the underlying points before this Board, but of
17 course, we reserve the right to pursue any disputes of that
18 decision on appeal. And so I'm not going to address any of
19 those in any detail, but I just wanted to say that for the
20 record.

21 Third, and this is an issue that somewhat relates to
22 the merits of the claim language, but Petitioner has raised a
23 waiver or sometimes phrased as a collateral estoppel argument.
24 That's at Paper 12 at 3 to 4. And again, this was after the
25 final written decision in the Apple case. They cite --

1 they've continually said there's substantial similarity that
2 was in their original petition. Again, we've made arguments
3 that they didn't really flesh it out in any detail. It's not
4 addressed by their expert.

5 If you read the petition, Claim 20 really comes
6 across as an afterthought. It's kind of tagged on, which
7 it's acknowledged it was kind of tagged on to add on to that.
8 They also cite *Ohio Willow*, which is a collateral estoppel
9 case for a different test, and that's the differences between
10 the (indiscernible) claims, and adjudicated patent claims do
11 not materially alter the question of validity. We don't see
12 them moving from collateral estoppel, they just kind of threw
13 that in. So we don't think they've established or proved
14 that; we don't think it should apply.

15 As the Panel noted in its institution decision
16 citing the *Carlin Tech* decision and the Panel noted at Page 8
17 to 9 of its institution decision, the claim language differs
18 between these claims, meaning Claim 20, which is at issue here
19 and Claim 3 and 13 of the earlier Apple final written
20 decision, indicating that there was a presumption that claims
21 are different scope. We -- again, this has been a common
22 theme, but they have never really explained the difference in
23 scope, and they fault us in saying, Okay, we waive something
24 supposedly.

25 But they didn't prove it, they didn't rebut that

1 presumption, so it's not our duty to then point it out. So I
2 don't think there's been any waiver. We note some of the
3 differences in our papers. Claims 3 and 13 relate to a
4 cadence and a dynamic cadence window. Claim 20 is cadence
5 windows, which is previously discussed. And also, adjusting
6 based on a measured cadence associated with a period human
7 motion.

8 And this is addressed to, again, their argument that
9 there are -- we have two stories. That we somehow came up
10 with one story initially and came up with another one, and we
11 dispute that. I would -- I'm new to this case, I joined my
12 firm recently, and so I had -- I've read these papers several
13 times to get up to speed as lead counsel. And so I think the
14 issue that they're trying to do is they're trying to take
15 arguments -- we had multiple arguments in one statement in
16 something like the Patent Owner response, and saying, Okay,
17 well, it's all tied to retroactivity.

18 We did not do that. We aren't making only the
19 retroactivity argument, and we're also making the arguments
20 related to this. And we've outlined in our papers why we
21 think that's been preserved.

22 JUDGE HORVATH: Could you identify where in your
23 Patent Owner response that you made these arguments about
24 cadence windows being plural and measured cadence requiring
25 multiple cadence periods to do a -- to find a measured cadence

1 window? Where in your Patent Owner response is that argument
2 made?

3 MR. KOIDE: Sure. That would be at our -- Your
4 Honor, Patent Owner response Pages 17 to 18. We do not state
5 the word -- we don't spell it out as plural, but we are
6 focusing on the single aspect. What we state there is, Fabio
7 does not disclose -- this is quoting them -- I'm sorry. Fabio
8 does not disclose adjusting a cadence window based on a
9 measured cadence, as required by the claim language. And it's
10 not spelled out expressly there, but that was the point we
11 were trying to make.

12 It goes on to say, Petitioner does not dispute that
13 Fabio Exhibit 1006, (indiscernible) only look at the single
14 prior step, and uses the current step to validate the single
15 prior step. That gets into a debate about current or the
16 retroactivity. Again, that wasn't the only point we were
17 making, we were particularly pointing out the single step
18 there.

19 It goes on to say, Petitioner does not explain how
20 Fabio's use of a single prior step can approximate a measured
21 cadence, again, as required by the claim language. So could
22 it have been more expressed? Could we have spelled it out
23 more expressly? Yes, but I think it was identified there.
24 And I think patent attorneys sometimes tend to convey things
25 in a very compact fashion, and that was what was being

1 conveyed at that point.

2 JUDGE HORVATH: If I could ask you a question about
3 Claim 15?

4 MR. KOIDE: Yes.

5 JUDGE HORVATH: Which I asked, also, of Petitioner.
6 I'd like to give you the opportunity to address that as well.

7 So -- and I would like to sort of, maybe, ask it the
8 way I asked it the last time to Petitioner. So I'm trying to
9 understand what the scope of Claim 15 is. And so when I read
10 Claim 15, it says that there's a number of periodic human
11 motions that are detected within appropriate cadence windows.
12 And so I can imagine two scenarios for that, and the first one
13 is that there's a one-to-one correspondence between a detected
14 periodic human motion and the cadence window within which it's
15 detected.

16 So, for example, I could have periodic human motions
17 one, two, and three, and they are detected within appropriate cadence
18 windows A, B, and C. That's one scenario.

19 Now, here's the second scenario where I have a number of
20 periodic human motions one, two, three that are detected
21 within an appropriate cadence window A, and then I have
22 periodic human motions four, five, and six that are detected
23 within appropriate cadence window B.

24 So the question is, is Claim 15 broad enough to
25 encompass both of those scenarios, or is it limited to only

1 one of those scenarios? And in which case, which scenario is
2 it limited to?

3 MR. KOIDE: It's my understanding, Your Honor,
4 again, if I understand this in the hypothetical question,
5 it's covering the second scenario. And I think that's
6 outlined in the specification that can cover that. Let me
7 just briefly go --

8 JUDGE HORVATH: Well, does the specification limit
9 the coverage to that? Or is there anything in the
10 specification that -- is the specification, in other words,
11 limited to the periodic human motions being several periodic
12 human motions per cadence window? And where in the
13 specification is that limitation?

14 MR. KOIDE: Sure. And this is related also to --
15 somewhat related to Counsel's opening argument saying that
16 there is somehow a, you know, like we were reading --
17 improperly reading preferred embodiments into the claim. And
18 I can address that -- I think both that and Your Honor's
19 question.

20 I think there are two different embodiments for
21 cadence windows disclosed, and this Claim 20 is directed to
22 one of those two embodiments. Okay. So if you look at page
23 -- Column 4 around Lines 24, it says, In one embodiment, the
24 cadence window is a dynamic cadence window that continuously
25 updates as a user's cadence changes.

1 For example, using a dynamic cadence window, a new
2 cadence window length that would be set after each step.
3 Okay. That's not what we're talking about with respect to
4 Claim 20, but that's one. That's more -- I would describe
5 that more as an instantaneous cadence window looking just at
6 one step. And again, there's an issue about retroactivity,
7 prior/current, but that's -- it's something very in the
8 moment.

9 Whereas contrast that with what we've pointed out on
10 -- sorry, Your Honor. Well, there's a reference -- I'm not
11 going to read it all, but there's a reference in Column 5
12 around page -- line 52, the rolling average logic. And then
13 -- okay. And then, if you go to Column 10, it talks about
14 that block -- the additional step added to the buffered step,
15 and one (indiscernible). So it talks about sampling several
16 periodic motions or steps that are then built in. It's like a
17 rolling average or a sampling of more than one cadence window.

18 And that's what Claim 20 is directed to, and that's
19 -- I think that's the disconnect on why Petitioner is not --
20 we're kind of missing each other. But that's what's really at
21 crux here. I think that's -- I'm not -- I think that answers
22 Your Honor's questions. I tried to, at least.

23 JUDGE HORVATH: The -- no, that -- well, that
24 addresses the question. I guess the next question, then, is
25 -- and I appreciate your answer. The next question is what is

1 it in Claim 15 that tells me that Claim 15 or Claim 20 is
2 really limited to that embodiment in claim -- in Column 10?

3 MR. KOIDE: I think it's the plural of cadence
4 windows. And also, it uses the word measured, the phrase --
5 hang on, let me just turn to it. Sorry, Your Honor. Measured
6 cadence associated with a periodic human motion, as we noted,
7 cadence has to be -- look over more than just one step, so it
8 has to get something that's over multiple things. So it's
9 talking about like -- almost like a sampling. It's that
10 phrase that links it up to what I just read, Your Honor.

11 JUDGE HORVATH: Is there a difference, in your
12 opinion, between a measured cadence and a determined cadence?

13 MR. KOIDE: I don't know, Your Honor. I don't know
14 the answer to that question. I have thought about whether
15 there's a difference between an actual cadence and a measured
16 cadence, and I think there would be a difference.

17 JUDGE HORVATH: Is there a difference between
18 determining a cadence and measuring a cadence?

19 MR. KOIDE: I don't know the -- I think, in the
20 context of this, measured cadence would mean what I referred
21 to in the context of that second embodiment. So I would say,
22 given that I don't have a specific definition in mind for
23 determining a cadence, I would say there is a difference. It's
24 broad -- determining broader.

25 JUDGE HORVATH: So determining a cadence is broader

1 than measuring a cadence?

2 MR. KOIDE: Yes.

3 JUDGE HORVATH: In that case, would you say a
4 determined cadence is broader than a measured cadence?

5 MR. KOIDE: I would have to look at the specific
6 claim language, Your Honor. But I don't know the answer to
7 that question, and I'm sorry I can't answer that.

8 JUDGE HORVATH: Okay.

9 MR. KOIDE: Okay.

10 JUDGE HORVATH: Thank you.

11 MR. KOIDE: Okay. I'm going to go off the slides
12 again. I'm sorry, Your Honors. I'm going to go to my slides
13 -- give me one second.

14 So I know I'm not going to cover the slides, which
15 Slides 2, 3, and 4, which is the claim language. I mean, we
16 already kind of covered that. Again, the -- a lot of the
17 situation of what we're in is the fact that Claim 20 was
18 really given short shrift in the petition. To me, just coming
19 new to this, it's unclear. I think if this was a standalone
20 petition and you had the level of detail that Petitioner had
21 really devoted to Claim 20, it's unclear to me if it would
22 even really survive institution.

23 I'm not trying to second guess the Board, but it
24 just -- I understand there was some momentum from the earlier
25 Apple IPR, but it's -- for instance, they don't even attempt

1 or even acknowledge or construe this particular language that
2 we're talking about. So they fault us for not trying to
3 construe something, but again, our attacks have been they
4 don't really -- they haven't even focused on the specific
5 claim language. I don't think it's our burden initially to
6 come up with a proposed claim language when they haven't even
7 addressed it in their petition. We were attempting to be
8 responsive to the petition.

9 I just -- on claim -- chart 5 -- Slide 5, make it
10 clear that we are not in any way attempting to base it on the
11 retroactive at this stage. They -- their brief kind of beats
12 us up saying we've tried to, like, you know, go into it a
13 little bit. We are not doing that. We've already talked
14 about some of the claim language.

15 I would like to talk about one issue, Your Honor,
16 relating to the substantially homogenous duration. And that's
17 something we haven't talked about here. They make much of the
18 -- and this is, again, directed to Slide 10, which is your
19 last slide. They make some attempt to argue a -- what we'll
20 call a claim differentiation argument for Fabio. They point
21 to Claims 5 and 6 being different, and they state that there's
22 somehow some -- because there's a broader Claim 5, that then
23 refers to substantially homogenous in the second -- Claim 6,
24 the dependent claim. Then there's -- somehow there's a
25 disclosure for that.

1 But Fabio clearly shows in the specification that
2 the only time nonhomogeneous is referenced is with respect to
3 irregularities that are ignored and do not interpret or
4 suspend updating the count. Okay. And that's Exhibit 1006,
5 Column 7, 16 to 17. And then, if you go on -- let me
6 apologize. Let me just get my reading glasses because the
7 type is really small.

8 If you go on, the Claim 6 of Fabio -- I'm sorry,
9 Claim 5 of Fabio recites, executing a first validation test of
10 a current detected step. So it's just saying executing the
11 validation test; it doesn't say all validation. Then Claim 6
12 says, evaluating whether duration of said current detected
13 step is homogeneous with respect to duration of the
14 immediately preceding detected step. So the only valid state,
15 as it were, is the homogenous -- homogeneity.

16 There is no -- contrary to what Petitioner says,
17 it's not a situation where there's both valid homogeneous and
18 nonhomogeneous steps. And I just wanted to address that
19 because that was raised in their reply, and I just wanted to
20 clarify that. I'll reserve the remainder of my time.

21 JUDGE O'HANLON: Okay. I have you at -- you ran a
22 little bit over, so you have about 12 minutes left.

23 MR. KOIDE: Thank you, Your Honor.

24 JUDGE O'HANLON: Mr. Landis, you have ten minutes
25 for rebuttal.

1 MR. LANDIS: Thank you, Your Honor. Hopefully it
2 can be brief. I just have a few points.

3 First, I guess I'd like to address this homogeneous
4 argument that's being made. And Counsel pointed out Column 7
5 of the Fabio patent, and I think he cited to Lines 16 through
6 18. The problem with what he's citing to is first, that
7 column, Column 7, is talking about the second counting
8 procedure in Fabio. Not all the counting procedures, not the
9 first counting procedure; it's talking about the second
10 counting procedure. A particular procedure within Fabio.

11 Second, if you read just a little bit further than
12 what Counsel cited, you get to the sentence starting at Line
13 19 in Column 7 that says, "However, if the gait becomes regular
14 again, even with a different rhythm, also the count promptly
15 resumes, because the first counting procedure is once again
16 executed." A different rhythm would mean nonhomogeneous, it's
17 a different rhythm than what was there before. It may come
18 into regularity so that it becomes homogeneous, but it's
19 different than what was there before.

20 So Fabio is not teaching at all scenarios that you
21 need homogeneity. That's not what is in Fabio, and again,
22 this column that they're citing to is about the second
23 counting procedure. Setting that aside, I heard Counsel argue
24 about whether Patent Owner had some responsibility in its
25 response to bring forth claim constructions that it would like

1 for cadence windows.

2 And I'm not here for the Board to say that there's a
3 burden shifting going on in any way, but I do believe that if
4 Patent Owner believes a claim construction is warranted in
5 order to render arguments about why a patent claim is
6 patentable, they're responsible for bringing those to the
7 Board's attention in their response. And they simply didn't
8 do it.

9 My colleague was asked a very direct question about
10 where is this stuff in the response, and the fact of the
11 matter is, you can't find it. And that's why in the sur-reply
12 when they tried to cite it, they just cited to four generic
13 pages, 15 through 18 of their response. They had no pinpoint
14 cites because none of these arguments were in their response.
15 They made the exact same arguments they made before the Board
16 in the Apple IPR dealing with this patent and the other
17 claims.

18 The other thing I'd like to point out if Your Honor
19 will give me a second? Judge Horvath asked, you know, about
20 where in the claim language do we have something that says
21 it's one embodiment versus another embodiment from the patent.
22 And the truth, Your Honor, is I can't find it. I don't know
23 where that is. I think the only way that Counsel can get
24 there is if he does a tortured construction of cadence windows
25 reading in embodiments from the patent.

1 But if you just take the claim language on its face,
2 I don't believe the claim language makes it any which way.
3 You know, it's one way or another way, I don't think you can
4 get there with just the plain claim language. And I don't
5 think there's anything in this patent which says that the
6 construction being proposed by Patent Owner is the proper
7 construction for cadence windows. As Counsel pointed out,
8 there are other embodiments which talk about cadence windows
9 in different ways. And so why would that construction be
10 necessary for Claim 15 and 19?

11 I would also point out that in Column 10, which is
12 one of the columns that Counsel for Patent Owner pointed to,
13 there is an embodiment where you can adjust the cadence window
14 by one step. And I don't know if that was quite what your
15 question was, Judge Horvath, but there is this embodiment, it
16 starts at Line 60 and goes to line 62, where the cadence
17 windows may be adjusted based on a -- each additional step.
18 So for each additional step, you can adjust the cadence
19 windows.

20 And all of this, in our opinion, is taught within
21 Fabio. This is what Fabio teaches. And so for those reasons,
22 we believe that Claim 1 -- Claim 20 should be found unpatentable.
23 For those reasons, and for the reasons that the Board gave for
24 Claims 3, 13, 15, and 19 in its decision in the Apple IPR.

25 That's all I have, unless Your Honors have questions

1 for me?

2 JUDGE O'HANLON: Judge Horvath, do you have any
3 questions?

4 JUDGE HORVATH: No questions from me, thank you.

5 JUDGE O'HANLON: No? Thank you.

6 MR. LANDIS: Thank you.

7 MR. KOIDE: I'll be very brief, Your Honor.

8 JUDGE O'HANLON: I believe I had you at 12 minutes.

9 MR. KOIDE: Okay.

10 JUDGE O'HANLON: You may begin when you're ready.

11 MR. KOIDE: I think that should be more than enough,
12 but thank you, Your Honor.

13 On the last point that Counsel referred to, which is
14 Column 10 -- this is, again, Exhibit 1001 of the '508 Patent.
15 It's around -- starting at Lines 60, it says, "an alternative
16 embodiment, once there are M steps in the buffered step count,
17 the cadence window may be adjusted for each additional step
18 that is recognized." It's still in that embodiment looking
19 back on the sample of steps. It's not looking at one step,
20 it's looking at a rolling average. So that's not the same
21 thing.

22 It's a different animal that we're talking about, in
23 what Fabio talks about where they've admitted in their papers
24 that it's just looking back on a single step. Again, there's
25 an underlying dispute which I don't want to concede about this

1 court for whether it's retroactive -- or retrospective or not,
2 but still, there's no dispute that they've admitted it's just
3 looking back at a single step. And this is fundamentally
4 different, which is done in -- what we're talking about in
5 Column 10, so there's that point.

6 The other point I want to make about Fabio --

7 JUDGE O'HANLON: Mr. Koide, but didn't you, when you
8 were arguing before, admit that there's a different embodiment
9 that adjusts the cadence window based on just a single step?

10 MR. KOIDE: Yeah, there is, Your Honor. But all I'm
11 saying -- and maybe I'm not being clear. In that embodiment,
12 it's looking back on a single step -- it looks to one step,
13 let's say it that way, right? In this embodiment in Column
14 10, it looks back to a -- multiple steps.

15 And what it's saying in the language that Counsel
16 pointed out -- Opposing Counsel pointed out is that it'll
17 still look back on multiple steps, but each step, it'll then
18 change. It's not saying -- it's still looking back on a
19 sample of M steps, as I understand that disclosure. Does that
20 answer your question, Your Honor? I don't mean to be obtuse.

21 JUDGE O'HANLON: And you're referring to second
22 embodiment that you --

23 MR. KOIDE: Yes, Your Honor. Yeah. I'm sorry, I
24 didn't mean to be unclear.

25 The other thing I would say about Fabio -- and this

1 was picked up somewhat by Your Honors colloquy with Counsel in
2 their opening remarks, Fabio is, I think, unique somewhat
3 compared to modern U.S. patent disclosures in that it's stated
4 very precisely and mathematically. It doesn't say, you know,
5 you could do this, you could calculate the TV value this one
6 way. It's -- in fact, it uses words precisely several times,
7 so I don't think there's any ambiguity. Again, Opposing
8 Counsel admits it that it looks back on a single step and what
9 we're talking about in Claim 20 is different, as I outlined in
10 my remarks.

11 That's all the remarks I have for now. I'm willing
12 to answer any questions the court may have -- the Board may
13 have.

14 JUDGE O'HANLON: Any further questions, Judge
15 Horvath?

16 JUDGE HORVATH: Give me a moment, I might have one.
17 Okay. I just want to read something in Fabio first before asking about it.

18 MR. KOIDE: Well, I could have one more thought --
19 well, Judge Horvath, I could mention something else on the
20 record as my time is clicking away.

21 Again, as I mentioned in my initial remarks, I
22 believe the arguments we're raising in our sur-reply were
23 raised adequately. Again, I think they were stated very
24 compactly. But I also think alternatively, even if the court
25 would disagree with that, there have been intervening events

1 with the Apple IPR coming out.

2 So I think it's -- I think, in fairness, I think
3 even if you were to say, Okay, well, I don't believe what you
4 said is -- that's been preserved. I think it's something that
5 we should be entitled to respond, given the change in
6 landscape. So that would be our, kind of, backup position.

7 JUDGE HORVATH: So I do have a question based on a
8 statement that you made, which is that TV is sort of
9 mathematically defined in Fabio, which I sort of agree with.
10 But then again, looking at Column 4 of Fabio --

11 MR. KOIDE: Yes, Your Honor?

12 JUDGE HORVATH: -- it does have some -- between
13 Lines 52 and 55, it says, "The validation interval TV could . . . be
14 symmetrical and have a different amplitude." And by amplitude,
15 Fabio really means the width of the window. And said -- then
16 Fabio continues, "In practice, it is verified that the last step
17 recognized is compatible with the frequency of the last steps made
18 previously."

19 So how would that impact your analysis of Fabio and
20 whether or not Fabio discloses that, in fact, the cadence
21 window can be based on multiple steps, the last steps
22 previously made?

23 MR. KOIDE: I don't -- I understand what Your Honor
24 may be asking, that there could be concept of sampling. I
25 would argue that given the mathematical nature in which

1 Fabio's laid out in a series fashion with a K-1, K, that I think
2 what that's saying there is with its last steps, meaning the
3 prior step, for a given step.

4 So using Your Honor's hypothetical, it would be a
5 one-to-one correspondence for each step. It still wouldn't
6 look back on one step being valid -- TV looking back to
7 multiple previous steps. I don't read it that way. And
8 again, there's no -- you would express the concept of looking
9 back on sampling in a totally different mathematical way than
10 what Fabio describes. So read as a whole, I don't read it as
11 I think Your Honor's suggesting. I don't read it that way.

12 JUDGE HORVATH: Okay. Thank you.

13 MR. KOIDE: Thank you. I have no further comments,
14 unless --

15 JUDGE O'HANLON: Anything else, Judge Medley?

16 MR. KOIDE: Thank you very much, Your Honors.

17 JUDGE O'HANLON: Thank you both for your
18 presentations today. A final written decision will be issued
19 in due course, and the hearing is now adjourned.

20 (Proceedings concluded at 2:22 p.m.)

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