

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ROKU, INC., and VIZIO, INC.,
Petitioners,
v.
ANCORA TECHNOLOGIES, INC.,
Patent Owner.

IPR2021-01406
Patent 6,411,941 B1

Record of Oral Hearing
Held: October 3, 2022

Before THU A. DANG, KEVIN W. CHERRY, and RYAN H. FLAX,
Administrative Patent Judges.

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The above-entitled matter came on for hearing Monday,
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P-R-O-C-E-E-D-I-N-G-S

(2:32 p.m.)

JUDGE DANG: Good afternoon, everyone. We are here today for arguments for Case No. IPR2021-01406 between Roku, Inc. and Vizio, Inc, as Petitioner, and Ancora Technologies, Inc. as Patent Owner. This is concerning Patent No. 6,411,941.

First, let's get appearances. Counsel for Petitioner, please introduce yourself.

MR. WRIGHT: Good afternoon, Your Honor. Jon Wright for Petitioners Roku and Vizio. And with me at counsel's table is Dale Flannigan from Sterne Kessler. And I am joined by backup counsel Richard Crudo and Dohm Chankong, also from Sterne Kessler.

JUDGE DANG: And I believe Mr. Chankong is the LEAD counsel appearing today?

MR. WRIGHT: That's correct. So, that's correct. I'll be arguing the public portion of the hearing. And Mr. Chankong will be arguing the non-public portion of the hearing at the end.

JUDGE DANG: Great. Thank you. And Patent Owner?

MR. GOSSE: Your Honor, David Gosse for Patent Owner Ancora Technologies, Inc. I'm joined by backup counsel Nick Peters, and the inventor of the 941 patent, Mr. Miki Mullor.

JUDGE DANG: Okay, great. To start with, would you like to, you know, indicate whether or not it's still going to be 30 minutes for the confidential portion?

1 MR. GOSSE: Your Honor, Patent Owner would like to reserve 10
2 minutes for the confidential portion.

3 JUDGE DANG: Okay, great. And Petitioner?

4 MR. WRIGHT: So, we'd like to reserve 20 minutes for the
5 confidential portion. So, given that we have an hour and 15 minutes, that
6 would be 55 minutes for the public portion.

7 JUDGE DANG: Okay, great. So, yeah, so that's how you would like
8 15 minutes –

9 MR. WRIGHT: Yes.

10 JUDGE DANG: Okay. Great. Thank you so much.

11 MR. WRIGHT: You're welcome.

12 JUDGE DANG: Mr. Wright, you have 50 minutes, and you can start
13 any time you're ready.

14 Oh, I'm so sorry. Would you like to reserve also rebuttal time?

15 MR. WRIGHT: Yes, Your Honor. I'd like to reserve 15 of my total
16 55 minutes for rebuttal.

17 JUDGE DANG: Okay, great. So, you have 40 minutes.

18 MR. WRIGHT: Yes.

19 JUDGE DANG: Thank you so much.

20 Would you like to start?

21 MR. WRIGHT: Yes. Good afternoon, Your Honors. Again, Jon
22 Wright on behalf of Petitioners Roku and Vizio.

23 So, I'd like to move directly to Slide 3, which summarizes the
24 disputed issues in this case. And, of course, there's one claim construction
25 issue with respect to the term "agent."

1 There are two alleged missing limitations. Both center on the step of
2 using an agent to set up a verification structure.

3 Patent Owner Ancora has challenged the motivation to combine
4 Hellman and Chao. Patent Owners also challenge several dependent claims
5 that center on whether the license record would be stored in encrypted form.

6 And then, finally, Patent Owners put forth certain evidence alleging
7 objective initiative non-obviousness. And, of course, we'll be covering that
8 in the private section of the hearing.

9 So, unless the panel has a different priority, I'd like to begin with the
10 construction of the term "agent" and move directly to Slide 10. And there
11 we have summarized the parties' claim construction positions.

12 And, of course, the Patent Owner is interpreting the term "agent" quite
13 narrowly to exclude any hardware implementation and, not only that, but to
14 require OS level software program or routine.

15 And Petitioner for its part is taking a broader view of the term "agent"
16 that it should be given its plain and ordinary meaning, which can be
17 software, can be hardware, or it can be some combination of the two.

18 So, I'll now step through Petitioner's claim construction analysis with
19 a focus on the prosecution history. But first, of course, I'd like to briefly
20 review the claim and the specification because, of course, that intrinsic
21 evidence is the most important evidence when it comes to construing the
22 claim.

23 So, moving on to Slide 12, we have reproduced independent Claim 1.
24 And, of course, the claim itself, the preamble sets up the structure that the
25 method claim operates on. And, of course, the method claim has four steps:

1 Selecting a program; using an agent for verification structure;
2 verifying the program, using the license record that's stored in the
3 verification structure; and then acting on that program.

4 And with respect to the claim agent we, of course, see that the claim
5 itself puts no restriction on the term "agent." It does not say a software
6 agent. It certainly doesn't say an OS level software agent. And what we do
7 see is that the agent is kind of structurally and logically set apart from the
8 rest of the steps in the claim.

9 And that the agent is used only, used, broadly, to set up the
10 verification structure. That's the only place in the claim where the agent is
11 used.

12 So, again, on the face of the claim there is certainly no support for the
13 Patent Owner's narrow construction of "agent."

14 If we move to the next Slide 13, and of course, the patent specification
15 is usually dispositive when it comes to pursuing claims, but here since the
16 term "agent" is added during prosecution, the specification says nothing
17 about the term "agent." It doesn't use the term "agent." And, also, the
18 patent specification doesn't explicitly refer to operating systems, or refer to
19 OS level software, or anything of the kind.

20 And the Patent Owner, and this is in its Patent Owner response at page
21 35, with respect to the specification states only that, and I'm quoting, "The
22 specification of the 941 patent does not require a different meaning for the
23 claimed agents." And that is a different meaning than the narrow
24 construction that it has put forward for "agent."

1 So, saying that the specification does not require a different structure
2 is a far cry from alleging that the specification actually supports the narrow
3 construction that the Patent Owner is putting forward.

4 So, moving on to the prosecution history and on to Slide 15. So, the
5 Patent Owner relies, as it must, almost entirely on a theory of prosecution
6 history disclaimer.

7 And, of course, the Federal Circuit has put a very high bar on
8 prosecution history disclaimer in that there must be a clear and unequivocal
9 disclaimer in the prosecution history. It can't be ambiguous language if it's
10 going to support disavowal.

11 And –

12 JUDGE CHERRY: Mr. Wright.

13 MR. WRIGHT: Yes?

14 JUDGE CHERRY: Do you think that the Federal Circuit has backed
15 off this clear and unequivocal disclaimer language? I mean, doesn't it seem
16 like in recent cases they've taken a more holistic, I'll call it, approach where
17 something less than that can amount to a disclaimer?

18 MR. WRIGHT: No. I think it still has to be a clear and unequivocal
19 disclaimer.

20 Now, the Patent Owner has said that, well, it can be an implicit
21 disclaimer. And that may be true, but that doesn't cut away from the fact
22 that it still has to be clear and unequivocal.

23 And just one other point of law. And I'll stress this again when we
24 get to the very end of the prosecution history. But statements by an
25 examiner are legally insufficient to hang a prosecution history disavowal

1 argument on. That's a statement from the examiner, not a statement from
2 the Applicant.

3 And I'm going to go through kind of chronologically the way the
4 prosecution history played out here. But what I'd like the panel to focus on
5 is the fact that the Applicant doesn't use the term "agent" at all in any office
6 action, except when it amended the claim. The only person during the
7 prosecution history that used the term "agent," was the examiner himself in
8 the Notice of Allowance. And we'll get to that.

9 But please keep that in mind as we go through the prosecution history
10 because it's very hard to hang a prosecution history disavowal, a clear and
11 unambiguous disavowal on a term that the Applicant itself doesn't even use
12 in the prosecution history to, to distinguish the art.

13 So, moving on to Slide 16, the examiner initially, well, I think why we
14 have this action in rejected Claim 1 under Section 112 for failure to recite a
15 separate entity that performs the setting up step.

16 And there you can see the examiner explained that the device to write
17 to an EEPROM in the method taking into account said device are critical or
18 essential to the practice of the invention but are not included in the claims.
19 And the claim is not enabled by the disclosure.

20 So, how did the Applicant respond to that 112 rejection? We see that
21 on the next slide. I'm on Slide 17 right now.

22 And there the examiner amended the setting up step to say that it uses
23 an agent to set up a verification structure. But it went on to amend that step
24 to also focus on the fact that the verification structure is in an erasable, non-
25 volatile memory device.

1 So, in addition to having an agent, the Applicant focused on where the
2 verification structure is set up. And if we look at the language in the
3 Applicant's response, which is reproduced on the right-hand slide – sorry,
4 the right-hand portion of Slide 17, there, when the Applicant talks about the
5 amendment, the Applicant doesn't call out "agent" at all. What the
6 Applicant calls out is what the Applicant viewed to be the important part of
7 this limitation, which is specifically Claim 1 has been amended to recite that
8 the verification structure is stored in an erasable, non-volatile memory area
9 of device. That's what the Applicant chose to call out when describing the
10 amendment, not, not the agent.

11 And then he said that this responds to the rejections in the first
12 paragraph of Section 2, 3, 4, and 5. And it was Section 5 that I reproduced
13 on the, on the previous slide, or paragraph 5.

14 So, again, right after the office action, what the Applicant was
15 focusing on was the location of the verification structure.

16 So, moving ahead two slides to Slide 19.

17 So, after that amendment the examiner went on to reject the claims
18 over Misroe, Goldman, and Harris. And this Slide 19 and the next Slide 20
19 both kind of put forth the most relevant portions of the Applicant's
20 responses, the Applicant's written response to the off section.

21 And there, the theme running through is that the art does not teach or
22 suggest, among other things, storing a verification structure, such as
23 software license information, in the BIOS of a computer. Because that was
24 the main theme in distinguishing the art. They don't store it in the memory
25 of the BIOS.

1 And, in fact, the Applicant argued that Misroe teaches away from
2 using BIOS as a storage area since, as the Applicant acknowledged, all
3 computers have BIOS. And Misroe didn't put his license information in the
4 BIOS, he alleged – or the Applicant alleged that Misroe cut away.

5 Setting aside whether that's an accurate argument or not, they went on
6 to explain that software management applications – and I'm on the right-
7 hand slide, right-hand part of Slide 19 right now – software management
8 applications, such as the present invention, are OS system level programs. It
9 doesn't say that the agent that's used to set up the verification structure is an
10 OS level program. It's, what I'm referring kind of colloquial to as the
11 verification software. That's the steps of selecting, setting up, verifying, and
12 acting on it.

13 That is what is OS level, and that is what the Applicant is saying, not
14 that the agent is OS level.

15 And, again, if we move on to the next Slide 20, we see again it's just a
16 theme that this goes against the what was the conventional wisdom in the art.

17 And we are putting our verification structure on the BIOS, not, nothing
18 about the agent in this.

19 Again, in those next two paragraphs the focus is that the ordinary
20 person skilled in the art would not consider BIOS as a possible storage unit.
21 And, again, at the end, that OS level applications would not consider the
22 BIOS as a storage unit. That was the thrust all the way through. That's the
23 fair thrust of the 941 patent specification is where are we going to store this
24 license information?

1 So, moving down to Slide 21, and now we get to the Notice of
2 Allowance. And here, again, we have the examiner speaking, not the
3 Applicant. And, again, the examiner, we can't hang prosecution history
4 disavowal solely on what an examiner says. The examiner again says that
5 the closest prior art system, singly or collectively, do not teach, now, do not
6 teach licensed programs.

7 The Federal Circuit looked at the prosecution history and said fairly
8 what the examiner is talking about there is not the licensed program but,
9 rather, the verifying software. Again, colloquially that's the steps of
10 selecting the program, setting up the verification structure, verifying it, and
11 acting on it.

12 So, that – Sorry. The closest prior art collectively does not teach
13 verification software running at the OS level, interacting with a program
14 verification structure stored in the BIOS to verify the program using the
15 verification structure. Again, the focus is on distinguishing or calling out
16 where they put the verification structure, not how it's done and, again,
17 nothing about the agent yet.

18 And then the examiner ends by saying that the present invention
19 overcomes this difficulty by using an agent to set up a verification structure
20 in the erasable, non-volatile memory area of the BIOS.

21 So, if anything, taken as a whole, setting the agent apart from OS level
22 software and apart from the verifying structure, and saying that, oh, you
23 solved this by using an agent. Now, again, you know, I think the examiner
24 erred here because there's no support for the agent, again, in the 941 patent
25 specification. It isn't taught about an agent or describing an agent. It's a

1 very broad term that the Applicant put in there to overcome the Section 112
2 rejection.

3 So, moving on to Slide 22, just again some key takeaways with
4 respect to the prosecution history and prosecution history disavowal. The
5 Applicant and the Patent Owner all along emphasized that the crux of the
6 claimed invention is storing the license record in the BIOS memory of a
7 computer. Said nothing about the agent.

8 That was set forth in the Patent Owner preliminary response, actually.
9 The inventor, when we deposed him, said that setting up the verification
10 structure in the BIOS was the key highway of this technology. You can see
11 that in our reply at 4-5 and Exhibit 1034. That's the cite there.

12 And the courts have kind of taken the same view of the prosecution
13 history, that the prosecution history demonstrates that the focus of the claims
14 is that the verification structure in the erasable portion of the non-volatile
15 memory uses the key in the separate non-erasable portion.

16 So, again, that was the focus all the way through. The agent was
17 added to overcome the 112 rejection, and then not mentioned again by the
18 Applicant over the course of the prosecution history.

19 The Applicant never mentioned the significance of the agent. And,
20 again, finally, just one more time, the examiner's use of the agent at the very
21 end, taking the totality of the prosecution history, does not amount to a clear
22 and unambiguous disavowal of claim scope. It can't legally. And that is the
23 best evidence that they are hanging their hat on for this prosecution history
24 disavowal of the use.

1 So, I went through that pretty fast. I'm happy to entertain additional
2 questions about the prosecution history.

3 JUDGE CHERRY: I mean, in the prior, prior discussion Mr. Gosse
4 suggested, and I'm just going to pull this in, Mr. Gosse suggested that, you
5 know, the agent was necessarily part of their application software, that that's
6 what – that all taken together – I mean, you can correct me if I'm
7 mischaracterizing – but my understanding was that the agent is there,
8 essentially the agent is part of the verification software.

9 What evidence do we have to say that it is or it isn't, or is there any
10 evidence?

11 MR. WRIGHT: Well, I think the base of the claim itself kind of
12 belies that, that construction. So, the one step in what I'm calling
13 colloquially the verification software, to separate it from the program to be
14 verified that selected in the first set, that the agent is set apart from the rest
15 of the verifying software on the face of the claim. It's only used, used
16 broadly, to set up the verification structure.

17 So, it says, okay, the verification structure which the crux of our
18 invention is that that is in the BIOS, the agent is used to do that. So, it's
19 setting the agent kind of logically, physically apart from the rest of the
20 verification structure.

21 So, I don't think that argument hangs together on the face of the
22 claim.

23 Okay. So, turning to the alleged missing limitations and on to Slide
24 24. Of course, the two alleged missing limitations are the agent under the

1 Patent Owner's narrow construction of the term "agent," and the verification
2 structure.

3 And, again, unless the panel has a different priority, I'll focus on the
4 alleged missing agent.

5 And moving on to the next slide, Slide 25, we describe the Hellman
6 prior art. So, what Hellman is is a fairly broad reference. And it describes
7 its principles in the context of a Base unit 12. And Base unit 12 in Hellman,
8 at least in one embodiment, is unambiguously a computer. We see that on
9 the left side of Slide 25 at Column 2, lines 24 to 29. It talks about similar
10 Base units, and then (computers).

11 And then also he suggests, and again this is on Slide 25, the user at
12 Base unit 12 can obtain a software package by purchasing it in a store or
13 over a telephone line using a modem.

14 And, so, if we move on to the next Slide 26. So, Hellman describes
15 two – Hellman's figures describe at least two instantiations of Base unit 12.
16 The first is in Figure 6, and the second is in Figure 8.

17 And these two instantiations of Base unit 12 are kind of functional
18 instantiations. They, they do not purport to describe everything that is in a
19 Base unit. We can see that if we just compare Figure 6 to Figure 8. They
20 have different elements in there, and Hellman's just using them to describe
21 the principles of play in preventing unauthorized use of, of software.

22 So, sticking with Figure 6 and Slide 26, of course it's our position that
23 Hellman's update, Unit 36, functions as the agent. It is that unit in Hellman
24 which interfaces directly with Hellman's non-volatile memory, which
25 Hellman describes as an EEPROM, to set up the verification structure

1 which, again, is a memory structure defined to be at a particular address that
2 corresponds to H, which is a hash of the computer program that is sought to
3 be protected.

4 And that is, frankly, all that the 941 patent specification requires for
5 setting up a verification structure is storing the license records in the
6 memory at the known address.

7 So, --

8 JUDGE CHERRY: What do you make of Patent Owner's argument
9 that the update unit has to be hardware, or it's ambiguous so there's
10 hardware separately citing offline the signal, supplies the signal H to the
11 EEPROM on the last -- Sorry.

12 Can you, it's on top of 26, applies to interrogatories, applies to
13 interrogatory signal representing H to a non-volatile memory 37. So, it's
14 talking about applying that interrogatory signal. Doesn't that seem to
15 suggest the circuit has hardware implementation?

16 MR. WRIGHT: Well, again, I think that the two descriptions of Base
17 unit 12 in Hellman are purely functional descriptions. And we can see that
18 because if we look, if we go to the next slide, Slide 27.

19 So, at the bottom of Column 10, again, Hellman is very broad. And
20 Hellman says that software player 42 will vary from application to
21 application. And that, for example, if the software is recorded music, then
22 software 42 would be a record player.

23 So that's, that's one embodiment, broad embodiment where what's
24 sought to be protected is digital music, and the player is a record player.

1 But moving on to the top of Column 11, Hellman also unambiguously
2 describes embodiment where the software is a computer program. So, what
3 we would kind of more traditionally think of as a software application. And
4 that then software player 42 would be a microprocessor, not a record player.
5 Or a CPU.

6 So, a computer having a CPU could be the player that is playing the
7 software. And that processor could also be the processor that is running
8 update unit 36 in the software instantiation of, of that principle.

9 So, again, there Hellman just doesn't focus on how update unit 36 is
10 actually instantiated, whether it's hardware, or software, or some
11 combination thereof. Hellman leaves that to the skilled artisan.

12 JUDGE CHERRY: Did your expert provide us some testimony to say
13 that certainly by, you know, by the time of the invention in 1998 that such a
14 software instantiation would be, would have been known or would have
15 been obvious to a person of ordinary skill?

16 MR. WRIGHT: Yes. So, let me get to the slide that has that
17 testimony. It is on Slide 28. And it's kind of moving away from the agent is
18 missing limitation, over to the motivation to combine references.

19 So, again, Hellman is silent as to how update unit 36 is instantiated.
20 He leaves that to the skilled artisan.

21 Dr. Wolfe testified that update unit 36 would have been implemented
22 by a software routine, potentially along with a hardware module. He gave
23 reasons for doing that.

24 Probably the most compelling one is that a software implementation –
25 and this is the third bullet on Slide 28 – the software implementation would

1 allow the provider of the Base unit and authorization and billing unit to
2 change the implementation logic of the units over time without having to
3 physically disassemble, modify, and reassemble them.

4 Now, importantly, Patent Owner doesn't dispute that that would be of
5 benefit. Patent Owner instead comes in with additional or Patent Owner's
6 rebuttal argument centered on, oh, well, yeah, maybe so, but there would be
7 security risks if Hellman was instantiated in software.

8 And Dr. Wolfe addressed that in his reply declaration, and not just his
9 say-so. He pointed, said that those security risks would have – a person of
10 ordinary skill in the art would have been able to deal with them. That the
11 941 patent itself apparently didn't think that was an issue because it didn't
12 discuss security risks.

13 And Dr. Wolfe goes on to point to this specification, and then to
14 there's at least some other evidence in that, in that paragraph backing up.
15 And he says, the skilled artisan would have been able to deal with any
16 additional security problems that would arise if Hellman's update unit 36
17 were instantiated in software.

18 And, final point on, on this aspect of their rebuttal, they chose not to
19 depose Dr. Wolfe and on his reply declaration.

20 So, that technical testimony, which again is backed up by additional
21 evidence, stands unrebutted.

22 Did that answer that?

23 JUDGE CHERRY: Yes. That answered my question. Thank you.

24 MR. WRIGHT: Okay. Thank you.

25 Okay, so –

1 JUDGE DANG: Mr. Wright.

2 MR. WRIGHT: Yes?

3 JUDGE DANG: So, your proposed verification structure is a table; is
4 that correct?

5 MR. WRIGHT: That's one likely instantiation of the verification –
6 Well, the verification structure is the place in the memory of the BIOS where
7 the license record is going to be stored. And then that is, that corresponds to
8 H, which is a hash of the program that's to be verified

9 The memory table I think would exist in – that's not the verification
10 structure, I think that exists in update unit 36. We use that memory table to,
11 okay, which software program am I talking about? Which address do I have
12 to go to in the BIOS memory to figure out whether I have an authorized
13 license use remaining of this program.

14 JUDGE DANG: So, Hellman teaches this structure that, that makes –
15 I mean, it teaches the, I guess sending the H value and then the M value
16 back. Right?

17 MR. WRIGHT: It receives the H value from the whatever unit hashes
18 the program that's to be protected.

19 JUDGE DANG: Right. Right.

20 MR. WRIGHT: Okay. And then Hellman's update unit 36 accesses
21 the EEPROM, the memory of the BIOS --

22 JUDGE DANG: Right. Okay.

23 MR. WRIGHT: -- at that address, whatever address corresponds to H,
24 to access M.

1 And then the verification step is looking at M and saying, do we have
2 an authorized use left of this software or not.

3 JUDGE DANG: Right.

4 MR. WRIGHT: If there is, then it decrements M, and then stores M
5 back in the verification structure in the EEPROM minus one use.

6 So, I think your question was is the table the verification structure? I
7 would say no. That's what one instantiation Hellman as a – in software.
8 That was a direct response to Patent Owner's argument that H is some
9 nebulous disembodied random number that has no – that cannot correspond
10 to a specific address in memory.

11 So, Dr. Wolfe responded to that rebuttal and said, well, here's a very
12 easy way to do it, to just have a memory table that has H corresponding to
13 some memory in the EEPROM, which is the verification structure.

14 And, actually, that is what Dr. Wolfe suggested in prose in his original
15 declaration. It wasn't a new argument on rebuttal. He just said, well, this is
16 what I said in my original declaration, and then he kind of drew a memory
17 table for an instantiation of that.

18 JUDGE CHERRY: So, that has, which would be like a hash function
19 like in – be some kind of --

20 MR. WRIGHT: Some cryptographic operation –

21 JUDGE CHERRY: Yes.

22 MR. WRIGHT: -- that is beyond me.

23 JUDGE CHERRY: And so, you're just saying that that's how you
24 would match up – so, you're saying the verification structure is M. But
25 there has to be some way to get some person of ordinary skill to understand

1 there has to be some mapping of the H – of the hash to the location where M
2 is. That’s what you’re saying?

3 MR. WRIGHT: Yes. I can’t envision that H, some long graphic hash
4 or whatever is going to correspond exactly to some – I don’t remember how
5 EEPROMs are set up, but with a line number in an EEPROM. Right? There
6 has to be some step in there that the skilled artisan would understand.

7 And that’s what Dr. Wolfe was talking about with respect to the
8 memory table that you asked about, Judge Dang.

9 JUDGE DANG: So, what do you map it to in your petition?

10 MR. WRIGHT: The memory table? I guess I –

11 JUDGE DANG: Well, this is the same language for verification
12 structure. This is what you’re arguing about.

13 MR. WRIGHT: Right. So the, right, so – Okay. So, if we’re going to
14 the alleged missing verification structure.

15 JUDGE DANG: That’s it, yes.

16 MR. WRIGHT: Let me go – yeah, sorry.

17 So, let me move to Slide 34. So, if we look at the, at the 941 patent,
18 actually. I don’t know if I have that reproduced on a slide or not. But if we
19 look at the 941 patent to see what the verification structure is, it’s in Column
20 6, line 17. And that is describing Step 18 in the flow chart, which is the
21 setting up step.

22 So, it says, setting up the verification structure includes the steps of
23 establishing or certifying the existence of a pseudo unique key in the first
24 non-volatile memory area, and establishing at least one license structure in
25 the first or second non-volatile memory area.

1 And establishing – and moving on to the next paragraph – establishing
2 the license record includes the steps of forming a license structure by
3 encrypting the contents used to form the license structure with other
4 predetermined data contents, using the key. And then establishing the
5 encrypted license structure in one of the at least one established license
6 structure locations.

7 So, if we take those two paragraphs in Column 6 of the 941 patent, the
8 only thing that's required to set up a verification structure in the erasable,
9 non-volatile memory of the BIOS is to store the license record, encrypted or
10 non-encrypted, at a known location that can later be accessed by – in the
11 verifying step.

12 So, that's all that the 941 patent describes with respect to setting up
13 the verification structure is basically storing the license record in the BIOS
14 memory at a location where you can subsequently access it to carry out the
15 verification in your active steps.

16 JUDGE DANG: Yes. So, so originally that's what the examiner was
17 having an issue with: what's doing it? And that's why it was amended to
18 add the agent.

19 So, my question to you is, is update device, whatever it is, 36, is that
20 the one –

21 MR. WRIGHT: Update unit 36.

22 JUDGE DANG: -- that's doing all that?

23 MR. WRIGHT: Yes. Update unit. So, if we turn to Hellman now,
24 this is what I have on Slide 34. So, Hellman in the context of Figure 8.

1 So, Figure 8 in Hellman – So, Figure 6 in Hellman is the initial
2 establishment, the selection of a program, verifying that you have a license,
3 getting an authorization, and setting an initial license record into the
4 memory.

5 And then Figure 8 is in the context of verifying subsequent uses.

6 And what Hellman describes in the context of Figure 8 – and we have
7 this highlighted on Slide 34 – is that update unit 36 uses H as an address to
8 non-volatile memory 37, which is Hellman's EEPROM, which responds to
9 the signal presenting M, the number of uses, the number of uses of software
10 package 17, which are still available. So, that's in the context of subsequent
11 updates.

12 And, actually, I probably should have started with Hellman's Figure
13 6. And let me go to Slide 26.

14 So, here in the where the license record is initially established
15 Hellman says update unit 36 adds M and N and applies a signal representing
16 M and N to the non-volatile memory 37 so that M plus N replaces the old M
17 in the non-volatile memory.

18 So, all, every place you see now what update unit 36 is doing, it is that
19 entity that's responsible for directly accessing Hellman's EEPROM to store
20 an initial license record. And then at location H and then to subsequently
21 access that license record to verify additional uses of the software. And then
22 update it, so write to EEPROM again to update it. And then, you know, the
23 later steps of acting on that, which I don't think are in dispute.

24 So, yes, it is update unit 36 that is that entity that is interfacing
25 directly with the EEPROM to set up where you store the license record.

1 And that's all that the 941 patent requires with respect to the setting up of
2 the verification structure.

3 JUDGE CHERRY: One question I have is, it seems like Patent
4 Owner, and they can address this during their argument, is that there has to
5 be a data structure of some – it can't just be data that's stored in the memory
6 that has to be this complete data structure.

7 How do you – I mean, clearly there's a data structure, you know, the
8 base unit is creating a data structure that has the map, some kind of memory
9 map to access where this memory location is. But that doesn't appear to be
10 in the non-volatile memory. So, that I think Patent Owner's argument is that
11 that table that we're talking about, that where we map hash values to a
12 memory location, is not necessarily in the EEPROM. But what's stored in
13 the EEPROM is the M values.

14 Could you address that? Like what, what, how much is a – how much
15 of a structure does there need to be for this?

16 MR. WRIGHT: Nothing more than storing the license structure in the
17 non-volatile memory of the BIOS at a location where it can subsequently be
18 accessed. So, the initial storage at the location corresponding to H. And
19 then accessing subsequent uses.

20 And you could have more than one program that's under license. So,
21 you could have a second verification structure that corresponds to H2, and a
22 third verification structure that corresponds to H3, assuming you have, say,
23 three programs that are sought to be protected.

24 And I guess the second thing that I would point out is that aligns with
25 the only description that we have in the 941 patent specification with respect

1 to what is done to set up a verification structure, which is to store a license
2 record in the memory at a place where you can subsequently and reliably
3 access it.

4 JUDGE DANG: Mr. Wright, you have about a minute and
5 something. So, do you want to go into the motivation to combine?

6 MR. WRIGHT: Yes.

7 So, I'll move to Slide 40. I think has the easiest description of the
8 motivation to combine.

9 So, Hellman, of course, is the base reference. And it has virtually
10 every claimed element and all of the claim structure. It's just that Hellman
11 doesn't explicitly call out BIOS.

12 Now, again, Hellman is very broad. It could be a record player
13 protecting music, and the record player could be the software player. But it
14 also unambiguously has a computer or a CPU. And by 1998, computers
15 with CPUs that were playing software, that you either purchased in store or
16 purchased online, would have had operating systems.

17 Dr. Martin, that's Ancora's expert, acknowledged very candidly that
18 there were a number of operating systems in play at that time. That Ancora
19 itself acknowledged during prosecution history that every computer has a
20 BIOS in that time.

21 And I'm happy to use a little more of my, my rebuttal time if there are
22 questions on the motivation to combine.

23 So, what we rely on Chao for, again, Chao describes and explains that
24 there have been recent changes – and this is highlighted at the bottom of
25 Slide 40 – recent changes to computer BIOS memory storage that permits

1 writing data to the BIOS memory. And that offers an opportunity to
2 provide, in Chao's example, password protection within the same memory
3 that stores the BIOS.

4 So, Chao suggests, hey, we have improvements to BIOS. We can
5 now read and write to BIOS. We can do that with an EEPROM. And you, it
6 would be advantageous to store your BIOS on non-volatile memory that you
7 can read and write to. And EEPROM is one example that Chao expressly
8 calls out for that.

9 So, applying that to Hellman, Hellman has an EEPROM. And
10 Hellman at least in the embodiment, at least in the embodiment where
11 Hellman is a computer with a CPU that's running software programs by
12 1998, it would have a BIOS. Well, where would one be motivated to store
13 Hellman's BIOS? In Hellman's EEPROM.

14 And that is kind of the simplest explanation of the motivation to
15 combine the two references.

16 JUDGE DANG: So, in that case would you then have the same
17 update unit 36 or would you have to –

18 MR. WRIGHT: Yes.

19 JUDGE DANG: You would have to. Okay. You would have
20 to modify.

21 MR. WRIGHT: There's no need to modify Hellman at all.

22 Hellman is silent with respect to how update unit 36 is instantiated.

23 Dr. Wolfe testified that the skilled artisan, at least by 1998, would
24 have instantiated update unit 36 as software for benefits that I think
25 are undisputed. And, so, we are not relying on Chao at all for any

1 aspect of the agent, or any modification to the update unit. It's strictly
2 where would the skilled artisan have put Hellman's BIOS in
3 Hellman's instantiation where basically there's a computer with a
4 CPU running software that you purchased online. Where would the
5 skilled artisan be motivated to put Hellman's BIOS? In its EEPROM,
6 as suggested by Chao.

7 That's a beneficial, as Chao explains, that's a beneficial place to
8 store the BIOS, in memory you can read and write to.

9 JUDGE DANG: Okay. So, then you would suggest putting the
10 BIOS in the EEPROM.

11 MR. WRIGHT: Yes.

12 JUDGE DANG: Of Hellman.

13 MR. WRIGHT: Hellman.

14 JUDGE DANG: And then, then you would put also the
15 verification structure in that, that –

16 MR. WRIGHT: Yes. Well, Hellman already describes the
17 verification structure as being in that EEPROM. And we're saying
18 that the skilled artisan would have been motivated to put the BIOS
19 there as well.

20 So, when you have the BIOS collocated with other data that you
21 want to protect, that's what Chao suggests is beneficial.

22 JUDGE DANG: What about the concern in the prior art, and
23 that's why the examiner allowed the Notice of Allowance where you
24 would have to have this interaction between a program that's an OS

1 program and the verification structure that's in the BIOS, is there a
2 concern?

3 MR. WRIGHT: No. That's what Hellman's update unit 36
4 effectively is. It is that agent that is responsible for interfacing
5 directly with the EEPROM.

6 JUDGE DANG: Okay, great. Thank you.

7 MR. WRIGHT: Well, any other questions? Thank you.

8 JUDGE DANG: With that, yes, so you will have 11 minutes
9 for rebuttal.

10 MR. WRIGHT: Thank you.

11 JUDGE DANG: Thank you so much.

12 MR. WRIGHT: Thank you, Your Honor.

13 JUDGE DANG: Mr. Gosse, would you like to reserve some
14 time?

15 MR. GOSSE: Yes, please, Your Honor. If I could have 10
16 minutes for rebuttal.

17 JUDGE DANG: Ten minutes. So, you will have 40 minutes
18 then.

19 MR. GOSSE: Thank you, Your Honor.

20 JUDGE DANG: Please let me know when you're ready.

21 MR. GOSSE: Thank you, Your Honor.

22 JUDGE DANG: Okay.

23 MR. GOSSE: And good afternoon. David Gosse on behalf of
24 Ancora Technologies. I'm joined by my partner Nick Peters and the

1 inventor of the 941 patent, Mr. Miki Mullor, who is also a principal of
2 Ancora Technologies, Inc.

3 None of the references, Your Honor, cited against the 941
4 patent, including the references cited during examination, re-
5 examination, and again here in the context of this IPR proceeding,
6 none of those references disclose using an operating system software
7 to interact with a BIOS memory to set up a verification structure,
8 including one that includes at least one license record.

9 Prosecution history unambiguously shows, Your Honor, that
10 the Applicant and the examiner understood that the claimed agent
11 operates at the OS level. That's illustrated by the text on Slide 2,
12 Your Honors.

13 No other limitations incorporate the arguments from
14 prosecution, except for the claimed agent. And in view of this history,
15 the claimed agent must be interpreted as OS level software program or
16 routine.

17 The three points, Your Honor, with respect to non-obviousness:

18 First, neither Hellman, nor Chao, nor the asserted combination
19 teaches the OS level agent. Petitioner's obviousness arguments twist
20 the Hellman patent until it's unrecognizable.

21 Second, even under the plain meaning interpretation of "agent,"
22 Petitioners have not shown that the claims are obvious. The plain
23 meaning of the agent requires a software program or routine which is
24 not present in Hellman.

1 Further, Your Honors, a person of skill in the art would not
2 have replaced or modified Hellman's EEPROM with Chao's BIOS
3 memory based on Petitioners' experts' admissions.

4 And, lastly, with respect to non-obviousness, Your Honors,
5 objective indicia of non-obviousness play strongly in favor of the 941
6 patent based on industry praise and the multiple litigation settlements
7 that established commercial success of the invention.

8 We'll discuss that prong –

9 JUDGE FLAX: Counsel, if the plain meaning of the agent is a
10 software routine, say that again. What did you say it was?

11 MR. GOSSE: Software program or routine.

12 JUDGE FLAX: Software program or routine. Could you walk
13 me through Hellman and why your position is that it wouldn't make
14 that obvious? I know that you've told us before that it has to be some
15 sort of hardware, potentially there's some sort of a robot involved.

16 Can you walk me through why that can't – why that would not
17 be software?

18 MR. GOSSE: Sure, Your Honor. And if I may first dispose of
19 the robot issue. That comes up in the Oxford Dictionary of
20 Computing.

21 JUDGE FLAX: Okay. So, I can go to that.

22 MR. GOSSE: The Petitioners cite Hellman and the 941 patent,
23 Chao, Misroe –

24 JUDGE FLAX: No robots.

25 MR. GOSSE: No robots in any of those references.

1 JUDGE FLAX: So, walk me through the interaction between
2 the rest of Hellman's system and its non-volatile memory and why it
3 would not be software, why wouldn't it be obvious to use software to
4 do what it's doing?

5 MR. GOSSE: Sure, Your Honor. If I may, I will turn to Slide
6 33. As a first matter, Petitioner's expert acknowledges that Hellman
7 does not specifically disclose, at least he contends that Hellman does
8 not specifically disclose how the update unit 36 is implemented.

9 So, right there there's Petitioner's burden of proof applies here.
10 They have no proof that the update unit 36 would be software.

11 Second, the context of Hellman's disclosure, according to Dr.
12 Martin, plainly establishes that Hellman is talking about a hardware
13 implemented, tamper-resistant solution. The Base unit 12 that's
14 illustrated in Figure 8, you see the large box there, includes a series of
15 features that are all hardware-implemented, according to Dr. Martin.

16 You'll notice that software is outside of that box. Software 17
17 is not labeled 17 in Figure 8, but Hellman discloses it as 17 in a series
18 of other similar diagrams, Figure 6 being an example, where there's
19 the Base unit 12, and then there's software outside of it.

20 Dr. Martin further points to –

21 JUDGE FLAX: So, what does that mean really? That this Unit
22 12 doesn't have any software in it?

23 MR. GOSSE: Well, in the context of everything else that it
24 discloses being in that box, it certainly suggests that, Your Honor.

1 The box includes, for example, wire, a wire, a physical wire
2 sending a control signal from the Update unit 36 to the software
3 player 42.

4 JUDGE CHERRY: Every computer has a wire. For example,
5 this laptop there's a wire sending a signal from the CPU to the hard
6 disk drive; right? I mean, that's present in every, every kind of
7 implementation.

8 So, you're -- I mean, in the update unit, I mean, I mean it seems
9 like it's well-known that a general purpose processor can implement a
10 customized circuit that is a programmed general purpose processor.
11 You're not disputing that, are you?

12 MR. GOSSE: No, Your Honor. Of course not. But there's different
13 kinds of computers. Petitioner points out that Hellman discloses in one
14 example a computer. Hellman doesn't tell us what kind of a computer that
15 is. My phone in my pocket is a computer, right? An iPod is a computer. An
16 Mp3 player --

17 JUDGE CHERRY: They all have software on them. They're all
18 running software.

19 MR. GOSSE: Some of them are running software, yes, Your Honor.
20 But --

21 JUDGE CHERRY: Those examples that you gave all run software,
22 right? You're not disputing that -- I mean, every phone, I mean, since the
23 '90s has had -- it's running some kind of software, right, that's implementing
24 somehow an operating system or is performing some of these functions.
25 You're not disputing that, are you, at 1998?

1 MR. GOSSE: Your Honor, there were a certainly a number of
2 computers that ran software, yes. And the phone and a number of others are
3 examples of that. But Hellman does not disclose anything more than a
4 computer. It doesn't say what kind of a computer it is.

5 JUDGE CHERRY: Yeah. But, I mean, for example, even in the
6 1990s, you could buy emulators. For example, to play Atari games on your
7 personal computer that emulated the functionality that was embodied in
8 physical circuits in an Atari console could be emulated as -- and that's well
9 known.

10 I mean, that's not -- we're not -- so I guess why couldn't these -- yes,
11 maybe Hellman influenced some of these at some time in 1983 as actual
12 circuits. But why wouldn't a person in 1998 know that all these could be
13 implemented using software in a general-purpose microprocessor?

14 MR. GOSSE: Your Honor, the purpose of Hellman is quite different
15 from the Atari emulator that you cited as an example. But --

16 JUDGE CHERRY: But I mean, in terms of the embodiment, certainly
17 the embodiment where it's talking about the music player embodiment, I
18 mean, doesn't that involve software? Isn't that running on a computer?

19 MR. GOSSE: Is it running on a computer, Your Honor? No, it's
20 running on a software -- it's a software player. It's an mp3 player.

21 (Simultaneous speaking.)

22 MR. GOSSE: It's not necessarily a computer with operating system --

23 JUDGE CHERRY: In Hellman?

24 MR. GOSSE: Hellman is silent as to whether there's an operating
25 system or BIOS or any of the other features that are hallmarks of the

1 general-purpose computer. Hellman is disclosing a specific tamper resistant
2 mechanism for protecting licensed content.

3 JUDGE CHERRY: Yeah. In this update unit that Dr. Wolfe has
4 testified could be in the software in 1998.

5 MR. GOSSE: He's testifying that it could be implemented in
6 software, Your Honor, yes.

7 JUDGE CHERRY: And it would do that for certain benefits that Mr.
8 Wright pointed out that he testified to that Dr. Wolfe testified to.

9 MR. GOSSE: Yes, but Hellman was well aware of those benefits, as
10 would've anybody at the time.

11 And yet Hellman despite pointing out two full columns -- two and a
12 half columns' worth of information about how to encrypt various
13 information chose to disclose specific hardware that's put together in a
14 tamper resistant package to verify the structure and verify the licenses.

15 JUDGE CHERRY: But doesn't Dr. Wolfe testify that there were
16 advances in memory and in processor ability that would've made this much
17 more practical at that time in 1998 versus 1983?

18 MR. GOSSE: Even if there were such advancements that would make
19 it easier, Your Honor.

20 That doesn't overcome the difficulties and the security reasons for
21 keeping that functionality in hardware.

22 JUDGE CHERRY: What are the security reasons?

23 MR. GOSSE: Your Honor, Hellman points out a number of ways that
24 one could encrypt information.

1 He doesn't point out a lack of processing power or a lack of memory
2 as a reason not to use hardware to perform those operations.

3 JUDGE CHERRY: Maybe you could envision the huge leaps of
4 processing capability that would take place in 15 years, from 1983 versus
5 1998.

6 MR. GOSSE: Well, respectfully, Your Honor, Moore's Law was well
7 known at the time. It seems like a pretty --

8 (Simultaneous speaking.)

9 MR. GOSSE: -- stretch to say that he couldn't envision that.

10 JUDGE CHERRY: But I'm saying that for a person of ordinary skill
11 by 15 years later, there were a substantial -- I mean, we all agree that you're
12 admitting that Moore's Law existed.

13 So there were substantial progress. But I mean, that's what we're
14 looking from the point of view of someone in 1998, not someone in 1983.

15 So why wouldn't -- since the state of the art changed, why wouldn't we
16 be dealing with what the state of the art was then, not the state of the art
17 when Mr. Hellman or Dr. Hellman, whatever he was, timed his other
18 invention -- his invention?

19 MR. GOSSE: Your Honor, again, tamper prevention and hardware-
20 based tamper prevention provides advantages over software that make it --

21 JUDGE CHERRY: But that's a tradeoff that a person of ordinary skill
22 could make, right?

23 MR. GOSSE: It's a tradeoff that a person of ordinary skill would have
24 to make.

1 JUDGE CHERRY: Does Mr. Hellman say that you can't do this in
2 software?

3 I mean, because you're kind of making a teaching away argument,
4 right?

5 You're saying that this tradeoff would've been so great that you
6 wouldn't have made it.

7 (Simultaneous speaking.)

8 MR. GOSSE: It's not a teaching away argument, Your Honor. It's a
9 balancing of the motivations.

10 The only motivation -- the only reasonable reason -- the only reasoned
11 basis for Dr. Wolfe's conclusion that you would implement the updated unit
12 36 as software is this idea that the changing implementation logic would be
13 easier if the system was implemented in software.

14 But that has to be considered on balance against Dr. Martin's
15 testimony which explains at Exhibit 2018, paragraphs 169 through 172 and
16 again at paragraphs 174 through 175, all of the reasons why that would be
17 difficult and disfavored by a person of skill in the art, even in 1998.

18 So there has to be a balance there. The motivation isn't simply, let's
19 just find one reasons you could approach this in a certain way.

20 You have to take the motivation as a whole in view of all the
21 teachings in the art, including the fact that Hellman was well aware of
22 software methods for protecting information but chose not to implement
23 those despite potential advances.

1 JUDGE CHERRY: What case do you have to say that the silence in a
2 prior art reference should be weighed as kind of him disfavoring it -- as the
3 inventor in that case disfavoring it?

4 You're kind of asking us to read a lot into silence. So what case law
5 do you have to support that?

6 MR. GOSSE: I'm sorry, Your Honor. KSR requires a reasoned
7 analysis. It requires a fulsome analysis of both the motivations taught for
8 and the motivations taught against by the prior art.

9 JUDGE CHERRY: Did you offer evidence that Hellman would have
10 been aware? Is there evidence that Hellman would've been aware of this at
11 that time and then received it in this way based on some judgment?

12 MR. GOSSE: It's implied, Your Honor. Hellman discloses --
13 Hellman is a very well-known figure in the context of cryptography.

14 JUDGE CHERRY: But did you offer evidence that he made this
15 balance and then we should give weight to it?

16 MR. GOSSE: Your Honor, the evidence is Hellman himself. That's
17 the teaching that says, here's a whole bunch of different ways you can
18 encrypt information.

19 But I'm going to use a tamper resistant hardware implementing
20 solution.

21 JUDGE CHERRY: But does he -- I mean, I guess the Petitioner's
22 argument is that he doesn't, that some of them are definitely hardware
23 implemented.

24 But certainly, in terms of the base unit, it's not entirely -- he doesn't
25 say whether or not or kind of implying that it is because it's talking about a

1 signal. But it doesn't quite say that this must be hardware implemented, does
2 it?

3 MR. GOSSE: It doesn't say that it could be software, Your Honor,
4 either. And it's Petitioner's burden of proof to show that the person of skill
5 in the art would've been motivated to --

6 (Simultaneous speaking.)

7 JUDGE CHERRY: But you're kind of -- well, you kind of moved off.
8 You said basically that Hellman had made this judgment. He chose the
9 hardware solution so that we should give weight to that when weighing these
10 tradeoffs that we're talking about.

11 And now you said, no, no. Actually, it's silent about that and it was --
12 they just haven't shown that it would've been implemented in -- that he
13 would've done it in software.

14 So I mean, what is it? Does he say that he's implementing it in
15 hardware?

16 Is he just kind of silent as to how he's implementing it? He's kind of
17 given us this black box.

18 MR. GOSSE: He discloses a hardware implemented solution, Your
19 Honor.

20 JUDGE CHERRY: Wait. So all the ones he discloses are all
21 implemented hardware only?

22 MR. GOSSE: That is what I explained, Your Honor, yes.

23 JUDGE CHERRY: But you just said -- but didn't you just say that he
24 kind of is kind of silent about how he implements it?

25 MR. GOSSE: If I did, I misspoke, Your Honor, and I apologize.

1 But Petitioners are arguing, for example, that each of the boxes in
2 Hellman is a functional description of the invention.

3 And if that's true, Your Honor, it could very well be, the player 42
4 remains separate from the update unit. It remains separate from the --
5 (Simultaneous speaking.)

6 JUDGE CHERRY: Wait, wait, wait. So you're saying that -- you said
7 that could be true, that these could be just functional units, right?

8 MR. GOSSE: No, Your Honor.

9 JUDGE CHERRY: You just said that they were hardware
10 implemented.

11 Are they hardware implemented? Or are these just functional
12 representations?

13 MR. GOSSE: Your Honor, to the extent that you give credit to the
14 fact that Petitioners argue those could be hardware or functional
15 descriptions, you still need to recognize that those are separately disclosed
16 features of the invention.

17 And the context of Hellman is clear. It both explicitly and implicitly
18 shows that that base unit 12 is implemented in the hardware.

19 JUDGE FLAX: It says that? It says it's hardware 12?

20 MR. GOSSE: Each of the features within 12, including the wire,
21 switch, update unit -- I'm sorry, the update unit, the non-volatile memory.

22 Those are illustrated as hardware communicating with each other via
23 signals or wires.

24 JUDGE FLAX: They're illustrated as boxes with words in them.

1 MR. GOSSE: And they're described as including signals passing back
2 and forth.

3 JUDGE FLAX: Okay.

4 MR. GOSSE: They're described as a physical switch. That's enclosed
5 in epoxy to prevent tampering.

6 JUDGE FLAX: Now that would be hardware. But that player would
7 probably include some hardware too. I would assume you've got to plug it
8 into something. What does the software do, though, that's in the other box
9 with the arrows going down into the larger device 12?

10 MR. GOSSE: The software is --

11 JUDGE FLAX: Is that not indicating that software is going into this
12 system and doing something?

13 MR. GOSSE: The software is disclosed at the highest level, and
14 Hellman does not describe any features of application programs, for
15 example. It just describes software that could be run either as, for example,
16 a music file or a program of some sort on a microprocessor.

17 JUDGE FLAX: I guess the music file but also how would you run the
18 music file that operating system would be part of the software.

19 So the bottom line is you're interpreting this reference that these
20 things are hardware. They're interpreting this reference that these things
21 could be software, could be hardware. The reference itself is not explicit
22 about it?

23 MR. GOSSE: Correct, Your Honor.

24 JUDGE FLAX: Okay. Thank you.

1 MR. GOSSE: Your Honor, if I could turn to claim construction
2 issues. I see my time runs short. Well, before I do that, Your Honor, just
3 one other point.

4 Hellman explicitly discloses that the EEPROM memory 37 has to be
5 accessed before the player can be activated. Now the Petitioners have
6 argued that player 42 is needed if it's running the update unit to access
7 Hellman's EEPROM.

8 So you run into this question of circularity. Can the player be
9 activated before the EEPROM is accessed and to activate itself?

10 So there's a separate issue there of inoperability that comes in when
11 you consider Petitioner's arguments on the proposed combination.

12 With respect to claim construction, Your Honor, there are two
13 disputes as Petitioners pointed out.

14 The first is prosecution history requires an OS level software program
15 or routine.

16 And the second is that that the plain meaning of Agent requires the
17 software program or routine.

18 Now in the Patent Owner's preliminary response, patent owner argued
19 that Agent should be construed as an OS level software program or routine
20 running on the recited conventional computer to write and/or erase data.

21 It was that considerably narrower definition than the definition that's
22 at issue here that the Board declines to adopt on institution.

23 I want to make that point at the outset to the extent that Petitioners
24 characterize that earlier construction as the same construction at issue here.

1 Turning over Your Honors to slide 12, the case law binds an applicant
2 to arguments that it has made in the context of prosecution history.

3 Your Honor, the Poly-America case that appears on Petitioner's slide
4 15 is a new case.

5 We hadn't seen that. At least I couldn't find it in the briefing on this
6 issue.

7 But it's an interesting case and one worth discussing. It holds that
8 statements were limiting in the context of prosecution history.

9 The term at issue was never expressly discussed in the context of the
10 prosecution history.

11 The term at issue there was a short seal. But the statements in the
12 prosecution history there require a narrower meaning based on the fact the
13 examiner had adopted a meaning implicitly required by the applicant's
14 statements and the record in prosecution history.

15 Same situation applies here, similar situation applied in the Kaken
16 Pharmaceuticals case.

17 JUDGE FLAX: In that Poly-America case, what was it about the
18 experience during prosecution that made a disclaimer clear and unequivocal?

19 MR. GOSSE: The applicant simply distinguished the prior art by
20 saying that in the bags that they were talking about, they were talking about
21 trash bags that fold over the top of a waste bin, right?

22 Hence, the benefit of the invention was that they neck of the bag, the
23 opening, was narrower than the overall width of the bag.

24 Applicants pointed out that the prior art did not disclose a neck that
25 was narrower.

1 I'm paraphrasing here. The exact words are slightly different. But the
2 prior art didn't disclose a neck that was narrower than the body of the bag.

3 Now there was no claim term in the claim that was at issue relating to
4 the neck relative to the size of the bag.

5 The only term at issue there was this short seal which was a portion of
6 the seal that ran along the side of the bag.

7 At the very top of the bag itself was one of these drawstring bags.

8 JUDGE FLAX: So a problem that I have with your argument is that it
9 doesn't seem like there's an analogous position taken by the patent holder
10 during the application process like this where they said something about the
11 Agent that does the setting up of the system.

12 Some of it's actually literally missing from the prosecution history.

13 But then you have the examiner kind of summing it up at the end with
14 a bit of a confusing paragraph.

15 It seems like it's hard to get to that clear and unequivocal level that
16 you need for this disclaimer. How do you feel like you met that threshold?

17 MR. GOSSE: I'll do two things first. As a matter of law, Petitioners
18 have been arguing that there's a high bar.

19 That language doesn't exist in any of the cases that they've cited or
20 any of the cases that I'm aware of in the context of disclaimer.

21 Clear and unequivocal is the standard. That's all that's required. And
22 that clear and unequivocal standard can come through an implicit statement
23 on the record.

24 Things like saying the present invention is this or distinguishing the
25 art in a certain way relative to a certain feature.

1 Those are implicit disclaimers and have been held so by the Federal
2 Circuit.

3 The Poly-America case is an example of that as is the Kaken
4 Pharmaceuticals case.

5 Now as to what is the evidence that we have in the record here. The
6 evidence is that applicants noted repeatedly that there's no teaching in an
7 operating system interacting with the BIOS to set up the verification
8 structure in the memory of the BIOS.

9 Now Petitioners have argued that it's all about setting up the
10 verification structure in the BIOS.

11 That ignores the context of the '941 patent itself which talks about
12 verifying application programs which would be understood by a person of
13 skill in the art as running on operating systems in a general-purpose
14 computer.

15 JUDGE CHERRY: How do you respond to the Petitioner's point that
16 the Agent is set apart from the other steps, that the Agent -- that certain steps
17 are performed. But one of them is performed by the Agent.

18 Why -- doesn't that suggest that there is some other -- there is one set
19 of software doing one step and this Agent doing the other steps?

20 MR. GOSSE: Respectfully, Your Honor, that's not what I heard
21 Patent Owner -- or Petitioner say.

22 JUDGE CHERRY: Okay.

23 MR. GOSSE: In Petitioner's comments, what I believe I heard was
24 that each of the steps is part of the -- loosely called it verifying software.

1 And that included a setup step. And so the Agent performing the
2 setup step wouldn't necessarily be part of the verifying software, even under
3 Petitioner's arguments.

4 Now also as a matter of logic, verifying software to the extent -- and I
5 don't want to repeat the discourse that we had this morning.

6 But for the record, I will. As a matter of logic, having an Agent that is
7 somehow separate of the operating system, separate of the verifying
8 software would require an Agent that exists somewhere.

9 Now if you assume that the Agent exists in the BIOS, you still have to
10 recognize the fact that the operating system according to applicants was
11 incapable of communicating with the BIOS.

12 And so having an Agent residing somewhere in the BIOS ran contrary
13 to the arguments that the applicants made during prosecution history.

14 So as a matter of logic, the Agent necessarily must be operating at the
15 operating system which really is when the operating system is running and
16 there's things running on the operating system, that's operating at the OS
17 level.

18 That's where the Agent would be communicating with the BIOS
19 memory to set up the verification structure.

20 Applicants -- or the Petitioners, I'm sorry, summarize the prosecution
21 history, Your Honor.

22 A couple of points relating to that in the context of the Section 112
23 rejection that the examiner made which was part of the final office action,
24 June 22nd, which appears in the record at Exhibit 2011 and ANCC166,
25 Claim 18.

1 Applicants responded to that office action in the 112 rejection by
2 amending the claims to include the claimed agent.

3 Now there's been some discussion about whether or not that makes or
4 requires or whether the Agent added there would've been enabled by the
5 patent specification itself.

6 The examiner certainly thought so. The examiner withdrew the 112
7 rejection after that amendment was made.

8 And prosecution continued based on our rejections from there. So
9 that issue is not at play here.

10 With respect to the examiner's reasons for allowance, the last sentence
11 of the state on the reasons for allowance does clearly recite using an Agent
12 to set up the verification structure in the BIOS.

13 And that's in response to an interview which is included in the record,
14 Exhibit 2011 at ANCC 166 where the applicant and the examiner agreed to
15 amend the second independent claim which now Claim 18 of the '941 patent
16 to include the word Agent which had not previously appeared in that claim
17 when applicant was discussing the differences between the MISRA
18 reference and the claimed invention.

19 And the fact that the word Agent, for example, doesn't appear in
20 applicant's earlier remarks has no bearing on what the applicant and the
21 inventor ultimately understood to be the thing that distinguished the prior art
22 which is having an Agent which is capable of communicating at the OS level
23 and communicating with a BIOS memory to set up a verification structure.

24 JUDGE FLAX: So counsel, when your counterpart was arguing in his
25 opening argument, he ran through this part of the examiner's reasons for

1 allowance and kind of made an interesting point that I think we hadn't heard
2 before that the portion of that paragraph describing an OS level is talking
3 about licensed programs running at the OS level which indicates to me those
4 would be the programs that the license governs.

5 And then the last sentence is using an Agent to set up a verification
6 structure in the original nonvolatile memory of the BIOS doesn't mention OS
7 level when it actually talks about the agent.

8 So why do you think the examiner is requiring that the Agent be at
9 that OS level because it doesn't say that. I don't know if it was he or she.
10 But they don't say.

11 MR. GOSSE: Well, Your Honor, my counterpart correctly pointed
12 out that the Federal Circuit has noted that when the examiner was describing
13 licensed programs running at the operating system, what the examiner likely
14 meant was that the verifying software running at the operating system level
15 is interacting with the program verification structure stored in the BIOS.
16 And that's in the context of --

17 JUDGE FLAX: So the verifying program is the licensed program?

18 MR. GOSSE: The verifying software --

19 JUDGE FLAX: The verifying software --

20 MR. GOSSE: -- which is distinguished --

21 JUDGE FLAX: -- is the license program because that's what this says
22 that the closest prior art systems do not teach license programs running at the
23 OS level interacting with a program verification structure stored in the
24 BIOS.

1 MR. GOSSE: Right. The Federal Circuit found that the examiner
2 likely misspoke.

3 And distinguishing program, which is a word in claim 1, their dispute
4 there was whether program was application software and whether the
5 prosecution history required a program to be application software as
6 opposed to OS software, for example.

7 The Federal Circuit noted that the examiner likely misspoke. In the
8 context of this passage of the statement of reasons for allowance because it
9 makes no sense in the context of the discourse with the applicants to stay
10 that the licensed programs were the thing that applications were arguing
11 about.

12 Federal Circuit said it was the verifying software as opposed to the to
13 be verified software.

14 And the verifying software is a thing running at the OS level which
15 has not been taught to be interacting with the program verification structure
16 in the BIOS.

17 JUDGE CHERRY: But the structure of what he's saying seems to say
18 that the verification software then uses an Agent to do that stuff.

19 So it seems to suggest -- I mean, what he's saying, it seems to suggest
20 that this agent is somewhere else or something else.

21 MR. GOSSE: Well, the fact that the verification software uses the
22 Agent certainly does not exclude the Agent from also being operating
23 system level.

1 It's just a component of the operating system level software that
2 happens to be performing the particular step of setting up the verification
3 structure.

4 JUDGE CHERRY: But how does that establish that the Agent is -- I
5 mean, what you want us to do is read OS and Agent.

6 How does -- I mean, you're saying it doesn't exclude that. Okay.
7 That's fine. We're not trying to exclude it.

8 You're just trying to limit it to that situation. What in that sentence
9 suggests that that is limited to that situation?

10 MR. GOSSE: Well, Your Honor, there's nothing else in the claim that
11 would reflect the understanding between the applicant and the examiner as
12 to -- there is no verifying software in the claim.

13 The claim itself as a whole according to the Federal Circuit can only
14 be described as verifying software.

15 But there's no term that says verifying software in the claim. The only
16 turn that's in the claim is Agent.

17 Just like the Poly-America case, the term in the claim was short seal.

18 And the applicant's arguments and the examiner's statements of
19 reasons for allowance related to the arguments --

20 JUDGE CHERRY: But there is a -- I mean, well, that's not totally
21 true, right, because there is a step verifying the program using at least the
22 verification structure from the erasable non-volatile memory of the BIOS,
23 right?

24 Could we be talking about the software that performs this verifying
25 the programs, though?

1 MR. GOSSE: There is no described software that performs that stuff.
2 It's a method step, Your Honor, without explicit structure attached to
3 it. Obviously --

4 (Simultaneous speaking.)

5 MR. GOSSE: -- it's implementing software in the context of the '941
6 patent.

7 JUDGE CHERRY: Well, I mean, it is a method claim. So it doesn't
8 have to be a structure, right?

9 MR. GOSSE: Exactly, Your Honor. And the place where there is
10 structure is the Agent performing the step of setting up the verification
11 structure.

12 JUDGE CHERRY: But it doesn't say the Agent -- so you're saying
13 the Agent also verifies the program?

14 MR. GOSSE: Not in the context -- not in Claim 1, Your Honor.
15 Claim 18 differs.

16 Claim 18 explicitly recites the Agent performing additional steps
17 beyond just the setting up of the verification structure.

18 So when the applicant wanted to attach structure to those other steps,
19 they did so, specifically with respect to Claim 18.

20 JUDGE CHERRY: Well, but I mean, in terms of this, it seems to
21 reference this white paper. Does the white paper provide any --

22 MR. GOSSE: Yes, Your Honor. I'm glad you mentioned that. In the
23 context of the examiner interview, the applicants discuss the White Paper,
24 the FIBO White Paper which describes software that at the time applicants
25 intended to develop.

1 And that paper describes a Windows control panel applet. The white
2 paper itself appears at Exhibit 2011, ANCC 178 through 185.

3 The Windows control panel applet is described on page 182. And Dr.
4 Martin testifies that that Windows control panel applet would be an example
5 of an OS level Agent.

6 Dr. Martin's testimony on that point is at Exhibit 2018, paragraph 88.

7 JUDGE CHERRY: So is that applet, is that what performs the
8 verifying?

9 MR. GOSSE: I don't know offhand, Your Honor. The applet is
10 described as the thing that sets up and manages licenses.

11 And the claim only requires that the Agent performs the stuff of
12 setting up the verification structure.

13 Claim 18 as I've pointed out applies different meaning and additional
14 limitations on the use of the Agent which included, for example, the step of
15 verifying.

16 Your Honor, if there are no further questions, I'll conclude briefly and
17 reserve the rest of my time.

18 The proposed combination here is directly analogous to the art that
19 applicants overcame during prosecution.

20 That understanding between the applicants and the examiner must be
21 given weight.

22 Otherwise, the scope of the claims would be unbound by the
23 arguments that the applicant did make during prosecution which the
24 examiner clearly adopted.

1 Hellman in the context of this IPR is analogous to the Ginter
2 (phonetic) and the MISRA references that were cited during examination.
3 Chou is analogous to UWorks similarly disclosed BIOS memory.

4 Like those references, Hellman and Chou, singularly or collectively,
5 do not teach the claimed Agent running at the OS level, interacting with
6 program verification structure stored in the BIOS memory.

7 Ancora respectfully requests the Board to find Claims 1 through 3, 6
8 through 14, and 16 not invalid.

9 JUDGE DANG: Thank you very much. You have 12 minutes.

10 MR. GOSSE: Thank you, Your Honor.

11 MR. WRIGHT: If we could go to slide 29. So I want to --

12 JUDGE DANG: Yeah, I'm sorry. Mr. Wright, you have 11 minutes.

13 MR. WRIGHT: Thank you.

14 JUDGE DANG: You can start anytime.

15 MR. WRIGHT: Thank you. So I'm on slide 29 right now. And I
16 want to come at the claim construction argument from just a slightly
17 different direction.

18 So Dr. Martin when we deposed him, and this is -- I don't have it
19 reproduced on a slide. But it's cited here on slide 29, and it is Exhibit 1035
20 at page 131, lines 14 to 19.

21 So we asked Dr. Martin during his deposition, is it possible for
22 hardware to use to set up verification structure? And Dr. Martin said, and
23 I'm quoting, as I read this limitation, I don't see anything precluding the use
24 of hardware in setting up the verification structure.

1 And he goes on to say that, however, that hardware is not something
2 that would be part of the Agent that is recited in the limitation as well.

3 So this effectively -- with the concession that hardware can be used --
4 that nothing precludes hardware from being used in setting up the
5 verification structure sets up like this box drawing or line drawing argument
6 where only the software portion there is the Agent.

7 And even though the Agent can work with hardware, the statement
8 verification structure, it's not going to be -- the hardware is not going to be
9 part of the Agent. It's just going to be the software.

10 And not only that, it's OS level software that's limited to the Agent.
11 So just want to kind of point out that testimony to kind of come at it from the
12 other direction.

13 Our expert conceded that nothing in the claim precludes using
14 hardware to set up the verification structure.

15 So proof of Hellman as having software, again, first of all, they're
16 holding the prior art to a standard far higher than they're holding the '941
17 patent application which also doesn't, A, even use the term Agent, or B,
18 explain how the verification structure is set up.

19 It doesn't say in the '941 patent specification that the verification
20 structure is set up by a software only Agent.

21 It doesn't say. It's just the sheer fact of storing in the memory of the
22 BIOS in that EEPROM a license record that can later be accessed to confirm
23 subsequent uses of the software.

1 The specification is silent on that. So they're holding Hellman to a far
2 higher standard than the '941 patent specification even describes with respect
3 to how the verification structure is set up in the EEPROM.

4 Additionally, again, Hellman is broad. It describes each one of its
5 figures as a block diagram.

6 You can see that in Hellman in the description of the drawings. Each
7 of the figure is simply a block diagram.

8 And Hellman doesn't say within that block diagram how things are
9 carried out.

10 There's no capacitors or flip-flops or anything. Like, there's no
11 hardware described in Hellman.

12 Hellman leaves that implementation to the skilled artisan, just like the
13 '941 patent leaves the implementation of setting up verification structure to
14 the skilled artisan.

15 There's no explanation of how to do it in either. Dr. Wolfe testified
16 that by 1998 in the embodiment where Hellman is facing a computer running
17 a CPU, playing software that's purchased potentially via a modem.

18 To suggest that there is -- that Hellman's base unit is strictly hardware
19 and doesn't have software, that just does not comport with how the skilled
20 artisan would've read Hellman in 1998.

21 Additionally -- okay, so coming up to that, it's basically a design
22 choice for both the skilled artisan reading the '941 patent and the skilled
23 artisan reading Hellman.

1 Dr. Wolfe testified that the skilled artisan would have instantiated up
2 to unit 36 in software. And it gave a reason, that it would be very easy to
3 update that software without having to disassemble the computer.

4 The only rebuttal to that was, well, if you did it in software, you have
5 all these security risks. Dr. Wolfe responded and said a skilled artisan could
6 deal with those security risks.

7 He put in evidence backing that up, a number of references showing
8 how the skilled artisan would've known how to do that.

9 And they chose not to depose Dr. Hellman on that testimony and on
10 that technical point. His testimony remains unrebutted.

11 So we did meet our burden of proof, absolutely, for a software
12 instantiation of Update Unit 36 in hardware -- or Update Unit 36 in software.

13 And Dr. Wolfe addressed each of the rest of Dr. Martin's objections
14 over paragraphs, I think, 21 through 24 of Exhibit 1033.

15 And then those tradeoffs don't -- the tradeoffs that Dr. Martin
16 introduced again don't outweigh obviousness, especially when Dr. Wolfe's
17 testimony on that was unrebutted.

18 Going back to claim construction, there is not even an implicit
19 disclaimer upon which one can hang a clear and unequivocal disavowal of
20 the term, Agent, when the applicant never used the term, Agent, in any of its
21 remarks to the examiner distinguishing the prior art.

22 And again, not only is the prosecution history disavowal argument
23 faulty on those facts, it's also faulty on the law.

1 Their best argument for prosecution history disavowal is what the
2 examiner said. And the law is clear that an examiner's statement can't
3 provide the clear and unequivocal prosecution history disavowal.

4 That's the examiner's statement, not the applicant's statement. And we
5 have that --

6 JUDGE DANG: Mr. Wright --

7 MR. WRIGHT: -- case cited in our slides.

8 JUDGE DANG: I'm sorry. Let me interrupt where we're on, I guess,
9 claim interpretation for Agent.

10 Claim 18 is part of the specification, right? And Claim 18 defines or
11 actually cites Agent as performing verification. Now can that be done in
12 hardware?

13 MR. WRIGHT: Well, so, first -- well, again, even Dr. Martin testified
14 that nothing precludes the Agent -- nothing precludes the use of hardware in
15 setting up the verification structure.

16 But with respect to Claim 18, Agent was added at the very end of
17 prosecution because it was added to Claim 1. And there was an interview of
18 which we don't know what happened.

19 But likely the examiner said, look, you added Agent to Claim 1. You
20 forgot to add it to Claim 18. Add it to Claim 18, and we'll move on. And
21 the Agent in Claim 18, it does more steps than the Agent in Claim 1. But it's
22 Claim 1 that we're talking about here. Claim 18 isn't challenged.

23 JUDGE DANG: Correct, right. I'm just saying that we have to look
24 at the claim in view of the entire specification which does include Claim 18.

1 MR. WRIGHT: It does. But again, the Agent was added there at the
2 very end of prosecution. We don't know exactly why it was added.

3 JUDGE DANG: Thank you.

4 MR. WRIGHT: Are there questions that the Bebo white paper raises?
5 I'm happy to --

6 JUDGE CHERRY: Yes, could you give us your interpretation?

7 MR. WRIGHT: -- address them? So it's not, I think, in either party's
8 slides.

9 And I don't think either party relied on the Bebo white paper with
10 respect to claim construction in the papers.

11 But if you could go to Exhibit 2011. So I'm sorry that there are two
12 versions of the prosecution history in the record, Exhibit 1002 and 2011.

13 JUDGE CHERRY: I just wanted to note that you can proceed with
14 that.

15 But to the extent that is a new argument by Patent Owner raising this,
16 we won't consider either one.

17 But to the extent we consider argument, we will consider what you're
18 saying now.

19 MR. WRIGHT: Right. So if you could go to Exhibit 2011, ANC 181.
20 There's this architecture for the Bebo white paper. And what Mr.
21 Gosse pointed to was the license manager.

22 I'm not sure if we can blow that up. So the licensed manager is what I
23 think I heard Mr. Gosse saying is what instantiates the steps of the verifying
24 software.

1 And then what we see is a kernel-mode driver that is set apart from
2 the license manager that is the direct interface between the license manager
3 and the BIOS EEPROM.

4 So there to the extent that we can learn anything from this particular
5 embodiment that is not part of the prosecution history that we received from
6 the office in Exhibit 1002.

7 It's part of the prosecution history that was put in I think during
8 litigation, so a different version of the prosecution history that includes this
9 white paper.

10 But to the extent that we can learn anything from this embodiment is
11 that the agent that interfaces with the BIOS EEPROM is set apart from
12 whatever is happening in the licensed manager. That's the only thing I think
13 we can fairly take away from this.

14 JUDGE DANG: Okay. Thank you very much.

15 MR. WRIGHT: I see I'm at the end of my time. If there are any other
16 questions, I'm happy to address them.

17 JUDGE FLAX: I have a question. Why are there two different
18 prosecution histories?

19 MR. WRIGHT: I don't know the answer to that. I know that Exhibit
20 2011 because it has Bates stamping from I'm assuming one of the litigations
21 that Ancora has been involved in that the white paper was inserted there. I'm
22 not sure.

23 We took the order, the file history from the patent office and we put
24 that in as Exhibit 1002.

1 In our version of it, Exhibit 1002 doesn't have the white paper. But I
2 don't know the answer to that.

3 JUDGE CHERRY: Has anyone looked to see on Public PAIR if
4 there's this white paper? Is this just not in the office's version?

5 MR. WRIGHT: I don't remember the answer to that question. I think
6 I asked it at one point early on. But if I gave an answer, I'm not positive.

7 JUDGE CHERRY: That's okay.

8 JUDGE FLAX: Or for that matter, the page from the office action
9 response that's missing.

10 MR. WRIGHT: That's missing from the version that we ordered as
11 well. I don't think any party knows where that particular page is.

12 JUDGE FLAX: It'd be Venable.

13 MR. WRIGHT: I'm sorry?

14 JUDGE FLAX: Venable?

15 MR. WRIGHT: Maybe, don't know.

16 JUDGE FLAX: Thank you.

17 JUDGE DANG: Thank you very much.

18 JUDGE CHERRY: Thank you.

19 JUDGE DANG: Mr. Gosse, we gave Mr. Wright an extra minute. So
20 we'll give you an extra minute. So you have 13 minutes.

21 MR. GOSSE: Thank you, Your Honor. A couple of points on
22 rebuttal.

23 First, with respect to the differences in the prosecution history, what I
24 can say is I understand that Exhibit 2011 is a copy of the certified copy that
25 was ordered from the patent office which included the Bebo white paper.

1 And so I don't know why that doesn't appear in Petitioner's copy of the
2 file history.

3 But I do understand that Exhibit 2011 is the representation of a
4 certified copy.

5 And it would be available within the patent office's records. It's
6 possible that the Bebo white paper is non-patent literature and therefore not
7 available in the public version of the file history. I unfortunately can't
8 answer that question either entirely.

9 With respect to the missing page from the file history, I think all
10 parties involved would love to have that.

11 But it does appear to be missing to the sands of time. This patent has
12 been litigated since 2008.

13 I'm not certain. Nobody can be absolutely certain. But I would be
14 shocked if litigation counsel for one of the parties along the way didn't
15 request Venable's prosecution history -- prosecution files.

16 And the fact that it doesn't appear in the record here likely it means
17 that it doesn't exist anywhere, for better or worse, Your Honor.

18 I'll just point out, Your Honor, also that neither reference here, neither
19 Hellman nor Chou, discloses using OS to interact with the BIOS.

20 And that's really the crux of what the applicants and the examiner
21 seemingly recognize as the inventive component.

22 Chou is a BIOS that is modified by a BIOS routine. So the
23 information that's stored in Chou's BIOS is stored there by a BIOS routine.

24 It's not stored there by some separate Agent running at the OS level.

1 There's nothing outside of the BIOS that's ever stored into Chou's
2 BIOS.

3 There's no disclosure of that. The nub of the '941 patent ultimately is
4 the idea that you can have the BIOS storing a verification structure at the
5 behest of an operating system.

6 And that interaction between the operating system and the BIOS for
7 that purpose is the core of the invention.

8 And that's also the core of everything that's missing in the prior art.
9 Applicants have identified no disclosure in the prior art.

10 JUDGE CHERRY: I thought the BIOS wasn't running when the OS
11 was running. So the BIOS doing this saving?

12 MR. GOSSE: No, Your Honor. It's the BIOS memory region that's
13 storing that verification structure.

14 JUDGE CHERRY: Okay.

15 JUDGE DANG: But is the Update Unit, isn't it the one interacting
16 between the program itself and the EEPROM?

17 MR. GOSSE: In the context of Hellman, the Update Unit is the thing
18 operating.

19 It's not actually in communication directly with the processor. If you
20 look at what Hellman discloses, the Update Unit is a separate entity that's
21 receiving information from the hash generator and then querying the
22 EEPROM memory and then sending a signal to us which then controls and
23 activates the player 42.

24 JUDGE DANG: Thank you.

MR. GOSSE: Thank you, Your Honor. And if there's no further questions from the Board, I will take a seat.

JUDGE DANG: Okay, great. Thank you so much.

MR. GOSSE: Thank you, Your Honor.

JUDGE DANG: So we are -- if there's no other questions, we would like the public to leave, go off record.

(Whereupon, the above-entitled matter went off the record at 4:18 p.m. and resumed at 4:19 p.m.)

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This image consists of approximately 20 horizontal black bars of different lengths, stacked vertically. These bars represent redacted text from a document. The lengths vary significantly, with some bars spanning most of the width of the page and others being much shorter. There are no discernible patterns or structures other than the simple rectangular shapes used for redaction.

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10	10	70
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12 (Whereupon, the above-entitled matter went off the record at 4:58
13 p.m.)

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