

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LULULEMON ATHLETICA CANADA INC.
AND LULULEMON USA INC.,
Petitioner,

v.

NIKE, INC.,
Patent Owner.

IPR2023-00180
Patent 10,232,220 B2

Before MITCHELL G. WEATHERLY, CARL M. DeFRANCO, and
STEPHEN E. BELISLE, *Administrative Patent Judges*.

WEATHERLY, *Administrative Patent Judge*.

DECISION
Granting Institution of *Inter Partes* Review
35 U.S.C. § 314

I. INTRODUCTION

A. Background

lululemon athletica Canada Inc. and lululemon USA Inc. (collectively “Petitioner”) filed a petition (Paper 2, “Pet.”) to institute an *inter partes* review of claims 11–14, 19, and 20 (the “challenged claims”) of U.S. Patent

No. 10,232,220 B2 (Ex. 1001, “the ’220 patent”). 35 U.S.C. § 311. Nike, Inc. (“Patent Owner”) timely filed a Preliminary Response. Paper 8 (“Prelim. Resp.”). Institution of an *inter partes* review is authorized by statute when “the information presented in the petition filed under section 311 and any response filed under section 313 shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. § 314(a).

Petitioner challenges the patentability of claims as follows:

Claim(s) challenged	35 U.S.C. §¹	Reference(s)
11–13, 19	102	Johnson ²
11, 12, 19, 20	102	Sutton ³
11, 12, 19, 20	103	Sutton
11–14, 19, 20	103	Sutton, Plus 3 ⁴

¹ The Leahy-Smith America Invents Act (“AIA”) included revisions to 35 U.S.C. §§ 102 and 103 that became effective March 16, 2013. The application for the ’220 patent was filed on October 9, 2017, and claims priority to continuation applications filed as early as December 9, 2011. Without deciding whether the written description of the 2011 application supports the challenged claims, we apply the pre-AIA versions of 35 U.S.C. §§ 102 and 103. The parties should address whether doing so is appropriate.

² U.S. Patent Application Publication No. 2010/0273610 A1, pub. Oct. 28, 2010 (Ex. 1004, “Johnson”).

³ U.S. Patent Application Publication No. 2009/0150178 A1, pub. June 11, 2009 (Ex. 1005, “Sutton”).

⁴ www.plus3network.com website pages archived by the Internet Archive’s Wayback Machine on December 26, 2008 (Ex. 1006, 5, 7, 9, 10, 12–14, 16–19, collectively “Plus 3”).

Claim(s) challenged	35 U.S.C. § ¹	Reference(s)
12	103	Sutton, Fry ⁵

Generally, Patent Owner contends that the Petition should be denied in its entirety. On April 24, 2018, the Supreme Court held that, under 35 U.S.C. § 314, the Office may not institute review of fewer than all claims challenged in the petition. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359–60 (2018). For the reasons expressed below, we determine that Petitioner has demonstrated a reasonable likelihood of establishing that at least claim 11 is unpatentable as anticipated by either Johnson or Sutton. In accordance with the *SAS* decision and 37 C.F.R. § 42.108(a), we institute an *inter partes* review of all challenged claims of the '220 patent on all grounds alleged by Petitioner.

B. Related Proceedings

Petitioner identified as a related proceeding the co-pending district court proceeding involving the '220 patent of *Nike, Inc. v. lululemon athletica inc. et al.*, S.D.N.Y. Case No. 1:22-cv-00082-AJN. Pet. 76; Paper 10, 2.

C. The '220 Patent

The '220 patent, which is entitled, “Monitoring Fitness Using a Mobile Device,” purports to address the problem of people having “difficulty finding the motivation required to maintain a regular exercise program.” Ex. 1001, 1:25–26. To address the problem, the Specification describes a system allowing users to record, track, and share their athletic

⁵ Martha Fry (@MarthaFry), Twitter (January 5, 2009, 3:34 PM), <https://twitter.com/MarthaFry/status/1098244147> (Ex. 1007, “Fry”).

activities. *Id.* at 1:55–2:49. For example, the disclosed system may include athletic information monitor device 201, which may take the form shown in Figure 2, reproduced below.

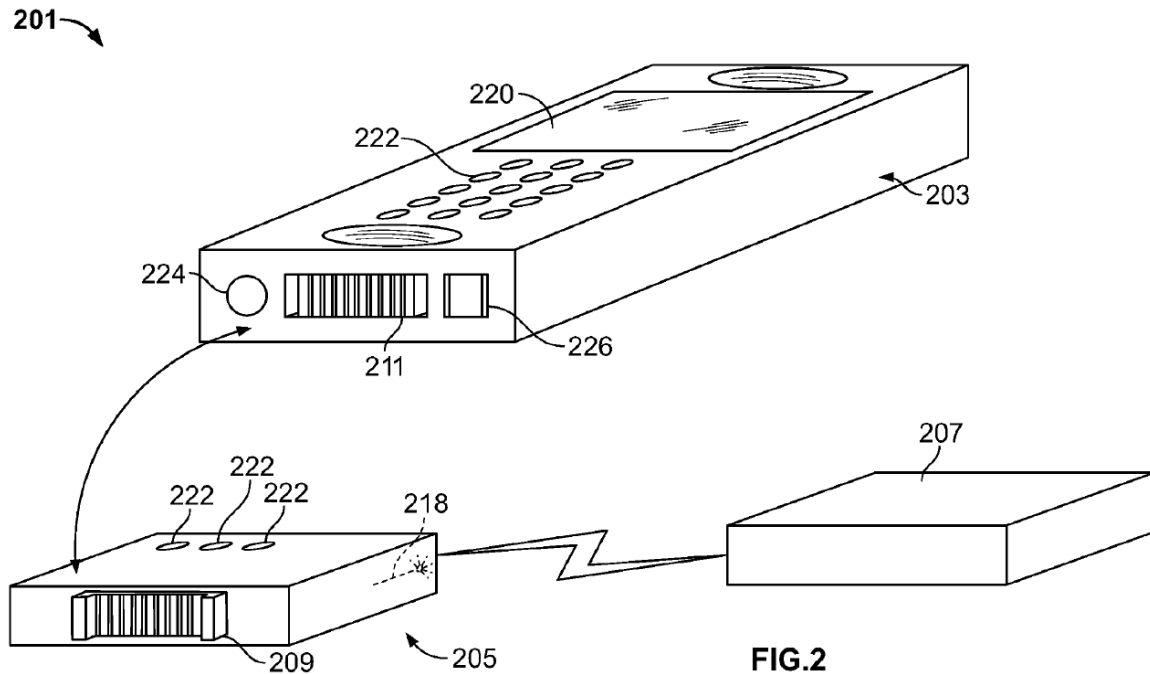


Figure 2 illustrates an exemplary device 201 that includes music player 203, electronic interface device 205, and athletic parameter measurement device 207 that sends athletic data measured from a sensor (e.g., an accelerometer) to music player 203 via interface 205. *Id.* at 11:27–43, Fig. 2.

The Specification explains that “an athletic information collection and display device 501” can “collect and/or display [received] athletic data” “from the athletic information monitoring device 201” and is implemented using any “suitable variation” of a computing device. *Id.* at 15:53–60, 16:4–6, Fig. 5. Athletic information collection and display device 501 transmits athletic data to “the athletic data display configuration device

601,” which stores it in memory “for future use,” such as for display to a user. *Id.* at 17:47–53; *see also id.*, Fig. 6.

Using the combination of devices 201, 501, and 601, users can record and upload their athletic activity data to social networking sites like Facebook and Twitter. *Id.* at 45:55–64. They can then share their workouts by, for example, clicking “Share on ...” or by selecting “public,” as depicted in the interfaces shown in Petitioner’s annotated versions of Figures 54A and 68B, which we reproduce below. *Id.* at 45:55–64, 61:1–7, 61:22–38.

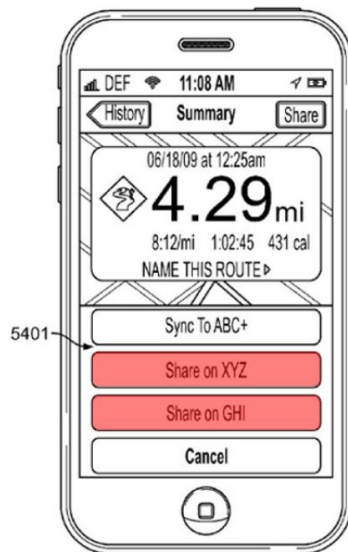


FIG. 54A

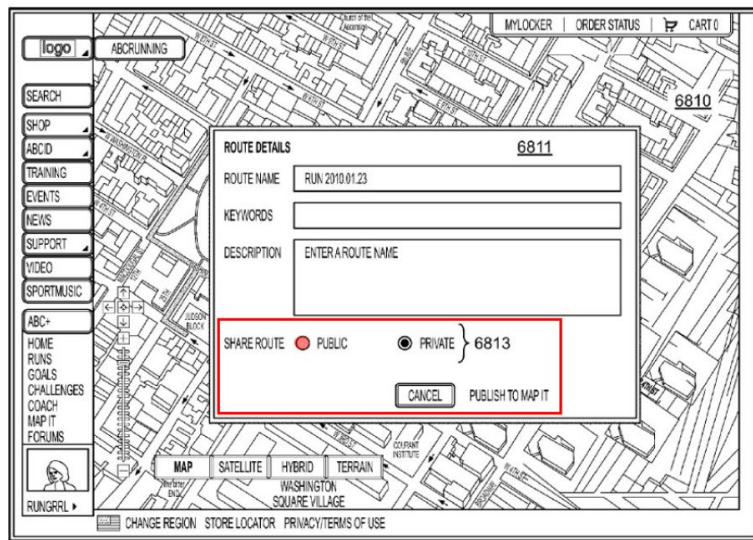


FIG. 68B

Petitioner’s annotated Figure 54A, above left, depicts a mobile phone interface including menu 5401 with two buttons (highlighted red) that permit a user to share workout information on social media sites “XYZ” and “GHI.” *Id.* at 45:55–64. Petitioner’s annotated Figure 68B illustrates an exemplary computer interface 6810 enabling the user to “save a route and add route details” and use options 6813 to define whether to share the route information as “public” or keep the information “private” as in the area enclosed within the added red box. *Id.* at 61:22–33.

Claim 11, which is representative and the only independent claim among the challenged claims, recites:

11[pre]. An apparatus comprising:

[A] a processor; and

[B] a non-transitory, computer-readable medium storing computer-readable instructions that, when executed, cause the apparatus to:

[C] record athletic activity performed by a user;

[D] receive a sharing option selection configured to allow the recorded athletic activity to be shared; and

[E] in response to receiving the sharing option selection, transmitting workout information associated with the recorded athletic activity to a network page of a social networking site viewable by one or more other users.

Id. at 68:15–27 (with labels added to ease discussion)

II. ANALYSIS

A. Claim Interpretation

We interpret claims in the same manner used in a civil action under 35 U.S.C. § 282(b) “including construing the claim in accordance with the ordinary and customary meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent.” 37 C.F.R. § 42.100(b). When applying that standard, we interpret the claim language as it would have been understood by one of ordinary skill in the art in light of the specification. *Wasica Fin. GmbH v. Cont’l Auto. Sys., Inc.*, 853 F.3d 1272, 1279–80 (Fed. Cir. 2017). Thus, we give claim terms their ordinary and customary meaning as understood by an ordinarily skilled artisan. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed. Cir. 2005) (en banc). Only terms that are in controversy need to be construed,

and then only to the extent necessary to resolve the controversy. *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1017 (Fed. Cir. 2017).

Neither party expressly addresses the meaning of any claim language or contends that express claim interpretation is needed to decide whether to institute *inter partes* review. Pet. 22; Prelim. Resp. 6–7. We agree and apply the plain meaning of the terms according to the principles set forth above.

B. Legal Standards

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros., Inc. v. Union Oil Co. of Cal.*, 814 F.2d 628, 631 (Fed. Cir. 1987). The Supreme Court in *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), reaffirmed the framework for determining obviousness as set forth in *Graham v. John Deere Co.*, 383 U.S. 1 (1966). The *KSR* Court summarized the four factual inquiries set forth in *Graham* that we apply in determining whether a claim is reasonably likely to be unpatentable as obvious under 35 U.S.C. § 103(a) as follows:

(1) determining the scope and content of the prior art, (2) ascertaining the differences between the prior art and the claims at issue, (3) resolving the level of ordinary skill in the pertinent art, and (4) considering objective evidence indicating obviousness or nonobviousness. *KSR*, 550 U.S. at 406. With these standards in mind, we address each challenge below.

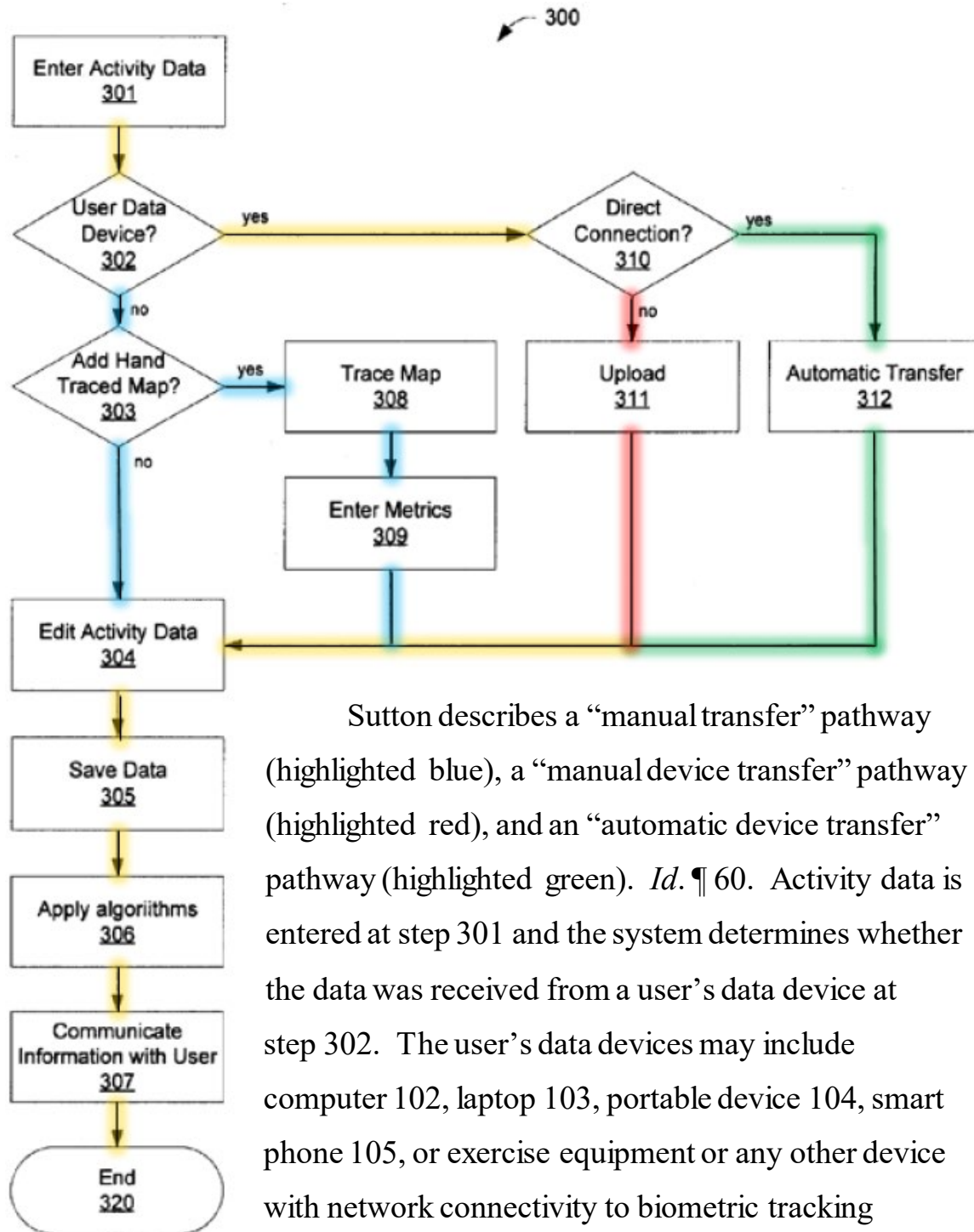
C. Claims 11, 12, 19, and 20: Anticipation by Sutton

Petitioner contends that Sutton anticipates claims 11, 12, 19, and 20. Pet. 42–52. For the reasons that follow, we determine that Petitioner has

demonstrated a reasonable likelihood of proving that Sutton anticipates at least claim 11.

1. Overview of Sutton

Sutton discloses a system for recording athletic activity data and uploading it to a social networking site, “www.plus3network[.com].” Ex. 1005, Fig. 4. The “user may enter his/her activity data manually or import data from a data recording device including 102–105.” *Id.* ¶ 52. Petitioner provides an annotated version of Sutton’s Figure 3, which we reproduced below and is a block diagram illustrating three pathways for uploading a user’s athletic activity data (highlighted by Petitioner in blue, red, and green and discussed briefly below).



Sutton describes a “manual transfer” pathway (highlighted blue), a “manual device transfer” pathway (highlighted red), and an “automatic device transfer” pathway (highlighted green). *Id.* ¶ 60. Activity data is entered at step 301 and the system determines whether the data was received from a user’s data device at step 302. The user’s data devices may include computer 102, laptop 103, portable device 104, smart phone 105, or exercise equipment or any other device with network connectivity to biometric tracking system 110 (*id.* ¶ 28, Fig. 1A). If the activity data originated from a data device, Sutton uses either the “manual device transfer” pathway via step 311 or the “automatic device transfer” pathway via step 312 to upload that data. *Id.* ¶ 60.

On the manual transfer pathway, “[u]ser 101 may use a PC, a phone or any other data entry device to enter his/her activity data” manually. *Id.* ¶ 73. Sutton illustrates an exemplary interface for manually entering activity data in Figure 9, which we reproduce at

The screenshot shows a web form titled "Enter Activity By Hand". It contains several input fields and buttons. The "Activity Name" field is filled with "Morning Run". The "Sport" dropdown menu is set to "Running". The "Description" text area contains the text "A five mile run from the house into the park and around the school yard.". The "Start Date / Time" dropdown is set to "11/20/2008 09:30 AM". The "Total Time (hours: minutes: seconds)" is set to "00:35:00". The "Total Distance" is set to "5" with a "miles" dropdown. The "Course Rating" is set to 3 stars. The "Privacy" section has two radio buttons: "Public (visible to the Plus 3 Network community)" which is selected, and "Private (only visible to me)". At the bottom, there are two buttons: "Save activity" and "Back to my activities".

FIG. 9

right. The user can specify whether to share the activity data on the Plus 3 social network by selecting the “Public” option as shown in the lower right portion of Figure 9. *Id.*, Fig. 9.

2. Petitioner’s Unopposed Showing for Elements 11pre, 11A, 11B, and 11D

Petitioner identifies Sutton’s biometric tracking system 110, which includes server 111 and database 115, as the claimed apparatus. Pet. 42 (citing Ex. 1005 ¶ 28). Petitioner identifies various Sutton’s processor 1110 as the claimed processor (element 11A) and Sutton’s RAM 1125, ROM 1126, and storage 1127 as the claimed computer medium (element 11B). *Id.* at 43–45 (citing Ex. 1005 ¶¶ 25, 26, 94, 95; Ex. 1003 ¶¶ 83–84). Petitioner identifies Sutton’s interface 900 as the mechanism through which a user of Sutton’s system can select a sharing option that allows recorded athletic activity to be shared (element 11D). *Id.* at 47–48 (citing Ex. 1005 ¶¶ 28, 30, 61, 73, 78, 85, Figs. 1A, 9).

Patent Owner does not oppose Petitioner’s showing on these elements in its Preliminary Response. *See* Prelim. Resp. 23–28 (contending that Petitioner fails to prove that Sutton describes elements 11C and 11E). Based on our review of Petitioner’s argument and evidence relating to Sutton’s

disclosure of elements 11pre, 11A, 11B, and 11D, we are persuaded that Petitioner demonstrates a reasonable likelihood of proving that Sutton describes these elements.

3. Analysis of Patent Owner's Arguments

a) Element 11C

The parties refer to the following instruction stored in the computer readable medium as element 11C: “record athletic activity performed by a user.” Ex. 1001, 68:21. Petitioner contends that Sutton's system 110 records athletic activity in database 115 in the “manual transfer” pathway discussed in Part II.C.1 above when a user uses “a PC, a phone or any other data entry device to enter his/her activity data.” Pet. 45–47 (citing Ex. 1005 ¶¶ 28, 31, 34, 60, 73). At step 305, “Save Data” in Sutton's Figure 3, the activity data by system 110 writing activity data to memory in database 115. *Id.* at 46–47 (citing Ex. 1005 ¶¶ 28, 31, 34, 60).

Patent Owner argues that “Sutton's system 110 does not ‘record’ athletic activity. Sutton's system 110 comprises only a database (115) and a server (111). Ex. 1005, ¶ 28. Sutton's system 110 merely ‘store[s]’ prerecorded athletic activity data in database 115. *Id.*” Prelim. Resp. 24. Patent Owner argues that “writing” data to memory is not “recording” data as recited in element 11C. *Id.* (emphases omitted). Rather, Patent Owner argues that, just as a video camera “records” a video “by capturing the activity occurring on the other side of the lens,” the apparatus of claim 11 “‘records’ athletic activity by capturing the athletic activity performed by the user.” *Id.* (citing Ex. 1001, 1:60–61, 68:16–28). Of these two cited parts of the '220 patent, only the first refers to text in the Specification, which reads

in pertinent part: “By using both a GPS device and an accelerometer, the mobile device may record workout data.” Ex. 1001, 1:60–61.

Whether system 110 “records athletic activity” when it writes information about a user’s athletic activity into database 115 turns on the precise scope of “record” as recited in element 11C, and we invite both parties to brief the issue and identify probative evidence on the meaning of “record.” At this stage, we note that Merriam Webster’s online dictionary lists various definitions of the transitive verb form of “record” as follows: “to set down in writing” and “to cause (sound, visual images, data, etc.) to be registered on something (such as a disc or magnetic tape) in reproducible form.” Ex. 3001, 1. By noting these definitions, we foreclose no arguments about the proper scope of “record athletic activity” as used in element 11C. We do, however, also note that all three examples of an apparatus “recording” data cited by the parties, i.e., Sutton’s system 110, the “mobile device” cited in the Specification, and the allegedly analogous “video camera” discussed by Patent Owner, store data in memory as a form of “recording” that data. Accordingly, at this stage of the proceeding, we determine that Petitioner has demonstrated a reasonable likelihood of proving that Sutton’s system 110 “records athletic activity” as recited in element 11C.

b) Element 11E

The parties refer to the following instruction stored in the computer readable medium as element 11E: “in response to receiving the sharing option selection, transmitting workout information associated with the recorded athletic activity to a network page of a social networking site viewable by one or more other users.” Ex. 1001, 68:23–27.

Petitioner contends that Sutton's system 110 asks its user at step 307 to confirm "upload and transfer" of stored information to the internet at "http://www.plus3networks.com." Pet. 48–51 (citing Ex. 1005 ¶¶ 60–62, Figs. 3, 4; Ex. 1006, 9, 12; Ex. 1003 ¶ 89). Sutton discloses that if a user selects the "Public" sharing option, the transmitted workout information becomes "visible to the Plus 3 Network community." Ex. 1005, Fig. 9; Ex. 1006, 12. Additionally, Sutton describes that its system provides tools for "sharing activities" and "creating a personal profile and uploading [the user's] GPS tracked exercise efforts." *Id.* ¶¶ 86, 90. Accordingly, Petitioner contends that an ordinarily skilled artisan would understand that Sutton's system 110 transmits stored athletic activity information to a social networking site in response to the user selecting "Public" in the data entry interface of Figure 9. Pet. 51–52 (citing Ex. 1005 ¶¶ 86–93, Figs. 4, 5, 9, 10; Ex. 1003 ¶¶ 87–91).

Patent Owner criticizes Petitioner's showing on element 11E as relying on the transmission of information entered "by hand" rather than "workout information related to 'recorded' athletic activity." Prelim. Resp. 25. Patent Owner alternatively argues that "even if Figure 9 does disclose a 'sharing option,' that option is only presented to the user in conjunction with manual entry of a previously performed athletic activity" rather than "recorded athletic activity." *Id.* at 27. Patent Owner's argument thus rests upon our adoption of its argument that Sutton does not describe its system 110 "record[ing] athletic activity" as recited in element 11C.

For the reasons discussed in Part II.C.3.a) above, we find Petitioner's contention that Sutton describes element 11C to be sufficiently persuasive. Based on our review of Petitioner's argument and evidence, we also find that

Petitioner has demonstrated a reasonable likelihood of proving that Sutton’s system 110 also meets the requirements of element 11E.

4. Summary

Based on our review of the current record, we find that Petitioner has demonstrated a reasonable likelihood of proving that Sutton anticipates claim 11. We currently express no opinion on the persuasiveness of any of Petitioner’s contentions that Sutton anticipates claim 11 that are not expressly addressed above.

D. Claims 11–13 and 19: Anticipation by Johnson

1. Overview of Johnson

Johnson is directed to “generating a training schedule and the selection of music” for that schedule with various aspects of the system relating to “collection and display of athletic information.” Ex. 1004 ¶¶ 2, 5. “[S]ets of athletic data may be obtained from a plurality of different persons and displayed.” *Id.* ¶ 9. Johnson’s Figures 1–6 are materially identical to Figures 1–6 of the ’220 patent, and the accompanying text in Johnson and the ’220 patent for this set of figures is also materially identical. *Compare* Ex. 1004, ¶¶ 57–92, Figs. 1–6, *with* Ex. 1001, 8:43–18:67, Figs. 1–6. Johnson’s users can share their data in “lists,” i.e., leaderboards, if they “agree in advance to have their data shared with others” Ex. 1004, ¶ 135; *see also id.* ¶ 134, Fig. 14A. Users can share that they recorded running 500 miles by selecting “BRAG TO FRIENDS” in an interface. *Id.* ¶ 159, Fig. 21. And users can share recorded athletic activity after each workout and/or promote it on their blogs by clicking on “SHARE THIS RUN” or “Blog Promotion” buttons. *Id.* ¶ 183, Fig. 43.

2. Petitioner’s Unopposed Showing for Elements 11pre, 11A, and 11B

Petitioner identifies Johnson’s athletic data display configuration device 601 as the claimed apparatus. Pet. 25 (citing Ex. 1004 ¶ 87, Fig. 6). Petitioner contends that device 601 includes a processor (element 11A) because the “display device . . . may be implemented using one or more application-specific integrated circuits . . . more typically, however, components of various examples of the invention will be implemented using a programmable computing device” *Id.* (citing Ex. 1004 ¶ 60). More specifically, Petitioner identifies Johnson’s processing unit 105 as element 11A, which is part of Johnson’s “computer 101,” i.e, its “programmable computing device.” *Id.* at 25–26 (citing Ex. 1004 ¶ 61, Fig. 1). Petitioner identifies the “System Memory” of Johnson’s computer 101, which includes ROM 109 and RAM 111, as element 11B. *Id.* at 26–27 (citing Ex. 1004 ¶ 61, Fig. 1). Petitioner argues that an ordinarily skilled artisan would understand that Johnson’s device 601 performs various functions based on instructions read from its system memory. *Id.* at 27 (citing Ex. 1003 ¶ 58).

Patent Owner does not oppose Petitioner’s showing on these elements in its Preliminary Response. *See* Prelim. Resp. 9–23 (contending that Petitioner fails to prove that Johnson describes elements 11C–11E). Based on our review of Petitioner’s argument and evidence relating to Johnson’s disclosure of elements 11pre, 11A, and 11B, we are persuaded that Petitioner demonstrates a reasonable likelihood of proving that Johnson describes these elements.

3. Analysis of Patent Owner's Arguments

a) Element 11C

The parties refer to the following instruction stored in the computer readable medium as element 11C: “record athletic activity performed by a user.” Ex. 1001, 68:21. Petitioner contends that Johnson’s device 601 records athletic activity by writing it to memory. Pet. 28. Petitioner provides an annotated colorized version of Figure 6, reproduced below, to explain the operation of device 601.

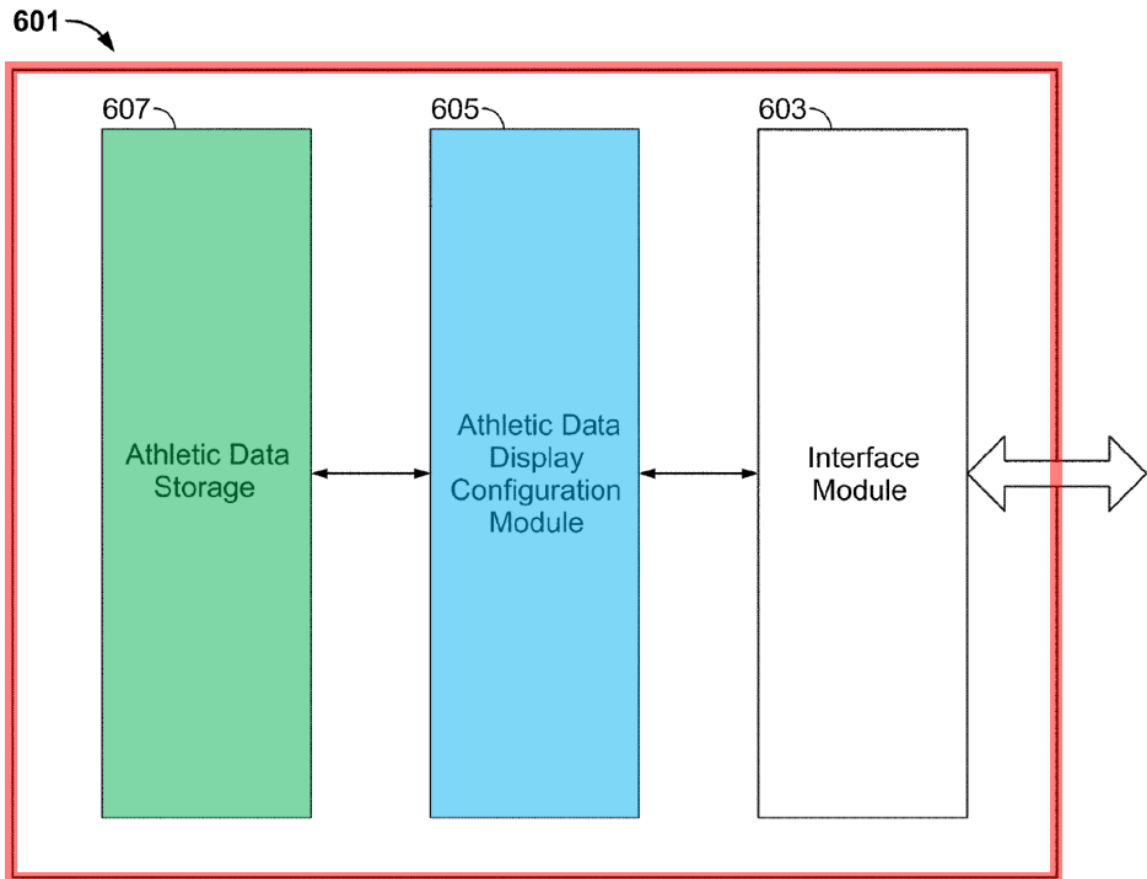


FIG. 6

Johnson’s device 201 “measure[s] athletic information corresponding [to] a user’s athletic activity.” *Id.* (citing Ex. 1004 ¶ 68; *see also id.* ¶ 69, Fig. 3.) Device 201 transmits the measured data to device 501, Ex. 1004 ¶ 82, which then transmits it to device 601 (red), *id.* ¶ 86. Device 601 includes an

“athletic data display configuration module 603 [blue] [that] may . . . store the athletic data in the athletic data storage 607 [green]” *Id.* ¶ 88.

As with its argument that Sutton does not describe element 11C, Patent Owner argues that Johnson’s device 601 “does not ‘record’ athletic activity.” Prelim. Resp. 11. Patent Owner contends that “Johnson’s device 601 merely receives and displays pre-recorded athletic activity data that it ‘receives’ from a separate ‘collection’ device” [501], which is the device that “records” the athletic activity. *Id.* at 12. As with the challenge based on Sutton, Patent Owner argues that “writing” data to memory is not “recording” data as recited in element 11C. *Id.*

For the same reasons discussed in Part II.C.3.a) above, we interpret “record” more broadly to include the concept of writing athletic information to memory. Accordingly, at this stage of the proceeding, we determine that Petitioner has demonstrated a reasonable likelihood of proving that Johnson’s device 601 “records athletic activity” as recited in element 11C.

b) Element 11D

The parties refer to the following instruction stored in the computer readable medium as element 11D: “receive a sharing option selection configured to allow the recorded athletic activity to be shared.” Ex. 1001, 68:22–23. Petitioner contends that Johnson describes four sharing options that may be received by device 601 including, by a user:

- (1) populating leaderboards in interface 1401 reflecting data shared by numerous users, Pet. 29 (citing Ex. 1004 ¶¶ 134, 135, Fig. 14A);
- (2) selecting “BRAG TO FRIENDS” in interface 1700, *id.* at 29–30 (citing Ex. 1004 ¶ 159, Fig. 21);

- (3) clicking “SHARE THIS RUN” in interface 4300, *id.* at 30–31 (citing Ex. 1004 ¶ 183, Fig. 43); and
- (4) clicking “Blog Promotion” in interface 4300, *id.* at 30–31 (citing Ex. 1004 ¶ 183, Fig. 43).

Petitioner argues that an ordinarily skilled artisan would have understood that device 601 receives a selection of each sharing option because device 601 receives information about which users “agree in advance to have their data shared.” *Id.* at 31 (citing Ex. 1004 ¶¶ 132, 135; Ex. 1003 ¶ 66). Johnson’s device 601 receives these selections made by users employing a “simple browser” running on device 501 that “serve[s] as a ‘thin client’ for the athletic data display configuration module 605” [of device 601]. While device 501 functions as a thin client, “all of the data display configuration functions may be performed by the athletic data display configuration module 605 [and] [t]he athletic data display module 509 will then only display the information provided to it.” *Id.* at 32 (quoting Ex. 1004 ¶ 92). Petitioner argues that an ordinarily skilled artisan would understand that, in this configuration, module 605 of device 601 receives the user sharing option selections. *Id.* (citing Ex. 1003 ¶¶ 66, 69, 71).

Patent Owner argues that Petitioner’s showing is insufficient for two reasons. Prelim. Resp. 12–17. First, Patent Owner criticizes Petitioner for “inconsistent mapping” of features of Johnson’s information collection and display device 501 to the claimed “apparatus” despite Petitioner relying upon device 601 as the claimed apparatus. *Id.* at 13–14. We find that Patent Owner materially mischaracterizes Petitioner’s showing because Petitioner contends that, for the “thin client” version of Johnson’s device 501, the information shown on interfaces depicted on the screen of device 501 is

provided by Johnson's athletic data display configuration module 605, which is part of device 601. Pet. 32 (citing Ex. 1004 ¶ 92). Petitioner thus persuades us that it consistently relies upon features of device 601 when identifying how Johnson meets the requirements of element 11D.

Second, Patent Owner argues that Petitioner fails to show that the "Brag to Friends" and "Blog Promotion" options actually share the user's recorded athletic activity. Prelim. Resp. 14–17. It is not currently necessary to resolve the dispute relating to this pair of alleged sharing options. Patent Owner does not address Petitioner's contentions that two other alleged sharing options, "'lists,' i.e., leaderboards" (Pet. 29) and "SHARE THIS RUN" (*id.* at 30–31), meet the requirements of element 11D. Based on our review of those contentions, Petitioner persuades us that Johnson describes element 11D at least for these alleged sharing options. We currently express no opinion on the persuasiveness of Petitioner's contentions that Johnson's "Brag to Friends" or "Blog Promotion" features constitute the claimed "sharing option."

c) Element 11E

The parties refer to the following instruction stored in the computer readable medium as element 11E: "in response to receiving the sharing option selection, transmitting workout information associated with the recorded athletic activity to a network page of a social networking site viewable by one or more other users." Ex. 1001, 68:23–27.

Petitioner contends that device 601 meets the requirements of element 11E. Petitioner points out that Johnson explains: "it is to be understood that any athletic information described herein may be provided to the user, athlete, or runner as part of their personal web page or social

network page.” Pet. 33 (quoting Ex. 1004 ¶ 167). Petitioner reasons that an ordinarily skilled artisan would have understood that, for athletic information stored in the memory of device 601 to reach a user’s “social network page,” device 601 would retrieve that information from memory and transmit it to that page. *Id.* (citing Ex. 1004 ¶ 88; Ex. 1003 ¶¶ 60, 61).

Patent Owner argues that Petitioner fails to demonstrate that the claimed apparatus transmits athletic activity information in response to the selection of any of the four alleged sharing options. Prelim. Resp. 17–23. In response to Petitioner’s contentions relating to the “leaderboards” sharing option, Patent Owner argues that Petitioner’s reliance on Johnson’s sharing of information when a user agrees “in advance to have their data shared with others” fails because it is a type of “automatic sharing [that] is not ‘in response to *receiving*’ a sharing option selection.” *Id.* at 18–19. Patent Owner does not cite evidence to support this implied interpretation of “in response to receiving the sharing option selection” or explain the scope of its implied interpretation. We invite both parties to expressly address at trial the proper interpretation of “in response to receiving the sharing option selection” as it appears in element 11E.

Petitioner contends that, when a user of Johnson’s system “agrees in advance to have their data shared with others,” the user selects a sharing option to display their athletic activity on public leaderboards visible in Johnson’s interface 1401. Pet. 33–34 (citing Ex. 1004 ¶¶ 88, 134, 135, Fig. 14A; Ex. 1003 ¶¶ 60, 56). As a result of this selection, interface 1401 is displayed when a user selects “Community” on interface 1700, which is accessible as a webpage of a social media site. Pet. 34–36 (citing Ex. 1004 ¶¶ 90–92, Figs. 14A, 17; Ex. 1003 ¶¶ 63, 64). At this stage, Petitioner

sufficiently persuades us that Johnson’s device 601 “transmit[s] workout information associated with the recorded athletic activity to a network page of a social networking site viewable by one or more other users” but only if the user selects to agree to share their information publicly (i.e., in response to this selection). Accordingly, we find that Petitioner has sufficiently demonstrated that Johnson meets the requirements of element 11E.

4. Summary

Based on our review of the current record, we find that Petitioner has demonstrated a reasonable likelihood of proving that Johnson anticipates claim 11. We currently express no opinion on the persuasiveness of any of Petitioner’s contentions that Johnson anticipates claim 11 that are not expressly addressed above.

III. CONCLUSION

For the reasons expressed above, we determine that Petitioner has demonstrated a reasonable likelihood of showing that claim 11 of the ’220 patent is unpatentable as anticipated by either Sutton or Johnson. In accordance with the Court’s decision in *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1359–60 (2018) and 37 C.F.R. § 42.108(a), we institute an *inter partes* review of all challenged claims of the ’220 patent on all grounds alleged by Petitioner. Nevertheless, this Decision does not reflect a final determination on the patentability of any claim. We further note that the burden remains on Petitioner to prove unpatentability of each challenged claim. *Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015).

IV. ORDER

For the reasons given, it is:

ORDERED that *inter partes* review of claims 11–14, 19, and 20 of U.S. Patent No. 10,232,220 B2 is *instituted* with respect to all grounds of unpatentability set forth in the Petition; and

FURTHER ORDERED that pursuant to 35 U.S.C. § 314(a), *inter partes* review of U.S. Patent No. 10,232,220 B2 is instituted commencing on the entry date of this Order, and pursuant to 35 U.S.C. § 314(c) and 37 C.F.R. § 42.4, notice is given of the institution of a trial.

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