

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LULULEMON ATHLETICA CANADA INC. and LULULEMON USA INC.
Petitioners

v.

NIKE, INC.
Patent Owner

Case IPR2023-00180
Patent 10,232,220

PATENT OWNER'S NOTICE OF APPEAL

By Electronic Filing

Patent Trial and Appeal Board
U.S. Patent & Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

By Hand Delivery

Office of the General Counsel
U.S. Patent & Trademark Office
Madison Building East, 10B20
600 Dulany Street
Alexandria, VA 22314-5793

By Electronic Filing

Circuit Executive and Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

Pursuant to 35 U.S.C. §§ 141(c), 142 and 319 and 37 C.F.R. §§ 90.2(a), and 90.3(a), Nike, Inc. (“Patent Owner” or “Nike”) hereby appeals to the United States Court of Appeals for the Federal Circuit from the Patent Trial and Appeal Board’s (“Board”) Final Written Decision entered on May 13, 2024 (Paper No. 36) (“Final Written Decision”), and from all underlying findings, determinations, rulings, opinions, orders, issues, and decisions regarding the *inter partes* review of U.S. Patent No. 10,232,220 B2 (“the ’220 Patent”). A copy of the Final Written Decision is attached as Exhibit 1.

In accordance with 37 C.F.R. § 90.2(a)(3)(ii), Nike identifies that the issues on appeal include, but are not limited to: (1) The Board’s judgment that claims 11–

14, 19, and 20 of the '220 Patent are unpatentable, including any underlying questions of law or fact; (2) the Board's claim construction and application of the terms "record" and "in response to receiving the sharing option selection" as used in claim 11 of the '220 Patent; (3) whether the Board erred in its determination regarding the disclosures of Johnson, Sutton, the Plus 3 Webpages, and/or Fry; (4) whether the Board erred in its determination regarding what was established in the IPR petition; and (5) any Board finding, determination, judgment or order related to the foregoing issues, as well as all other issues decided adversely to Nike, including, without limitation, the Board's construction and application of the claim language, the Board's interpretation of the prior art, the Board's interpretation of expert evidence, and the Board's application of the law.

The Board issued its Final Written Decision on May 13, 2024. This notice is therefore timely filed within sixty-three (63) days of the Board's decision, as prescribed by 35 U.S.C. § 142 and 37 C.F.R. § 90.3(a)(1).

Nike is concurrently filing this Notice of Appeal with the Director of the United States Patent and Trademark Office and the Clerk of the United States Court of Appeals for the Federal Circuit, along with the required fees.

Nike does not believe that any fees are due to the United States Patent and Trademark Office with this Notice of Appeal. However, if any such fees are due, the Director is authorized to charge the fees to Deposit Account No. 50-2387.

Date: July 12, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the original of this PATENT OWNER'S NOTICE OF APPEAL was filed via hand delivery on July 12, 2024 with the Director of the United States Patent and Trademark Office at the address below:

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A copy of this Notice of Appeal is also being filed and served on July 12, 2024 as follows:

USPTO Patent Trial and Appeal Board:

Patent Trial and Appeal Board
U.S. Patent & Trademark Office
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EXHIBIT 1

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*.

JUDGMENT
Final Written Decision
Determining All Challenged Claims Unpatentable
35 U.S.C. § 318(a)

I. INTRODUCTION

We have authority to hear this *inter partes* review under 35 U.S.C. § 6(c). We enter this Final Written Decision pursuant to 35 U.S.C. § 318(a) and 37 C.F.R. § 42.73. Briefly, we determine that lululemon athletica Canada Inc. and lululemon USA Inc. (“Petitioner”) has proven by a

preponderance of the evidence that claims 11–14, 19, and 20 of U.S. Patent No. 10,232,220 B2 (Ex. 1001, “the ’220 patent”) are unpatentable. *See* 35 U.S.C. § 316(e); 37 C.F.R. § 42.1(d).

A. Background

Petitioner filed a petition for *inter partes* review of claims 11–14, 19, and 20 (the “challenged claims”) of the ’220 patent. Paper 2 (“Petition” or “Pet.”). Nike, Inc. (“Patent Owner”) timely filed a Preliminary Response. Paper 8 (“Prelim. Resp.”). On May 15, 2023, based on the record before us at the time, we instituted an *inter partes* review of all challenged claims on all grounds alleged as indicated in the table below. Paper 11 (“Institution Decision” or “Dec.”).

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

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.

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”).

Claim(s) challenged	35 U.S.C. §¹	Reference(s)
11, 13, 14, 19 ⁴	103	Sutton, Plus 3 ⁵
12	103	Sutton, Fry ⁶

After we instituted this review, Patent Owner filed a Patent Owner Response in opposition to the Petition (Paper 17, “PO Resp.”). Petitioner filed a Reply in support of the Petition (Paper 22, “Reply”). Patent Owner filed a Sur-reply responding to the Reply (Paper 26, “Sur-reply”). Patent Owner did not move to amend any claim of the ’220 patent. We heard oral argument on February 14, 2024, and a transcript of the argument has been entered in the record (Paper 35, “Tr.”).

B. Real Parties-in-Interest

Petitioner identifies the following entities as real parties in interest: lululemon athletica inc., lululemon athletica canada inc., lululemon usa inc., and Curiouser Products, Inc. Pet. 76. Patent Owner identifies only itself as the real party in interest. Paper 5, 2.

⁴ Although Petitioner lists this challenge in a table as relating to claims 11–14, 19, 20, Pet. 24, Petitioner only proffers argument and cites evidence that the combined teachings of Sutton and Plus 3 render claims 11, 13, 14, and 19 are unpatentable as obvious, *id.* at 67–72. Therefore, we analyze this ground as challenging only claims 11, 13, 14, and 19.

⁵ 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”).

⁶ Martha Fry (@MarthaFry), Twitter (January 5, 2009, 3:34 PM), <https://twitter.com/MarthaFry/status/1098244147> (Ex. 1007, “Fry”).

C. 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.

D. 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 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.

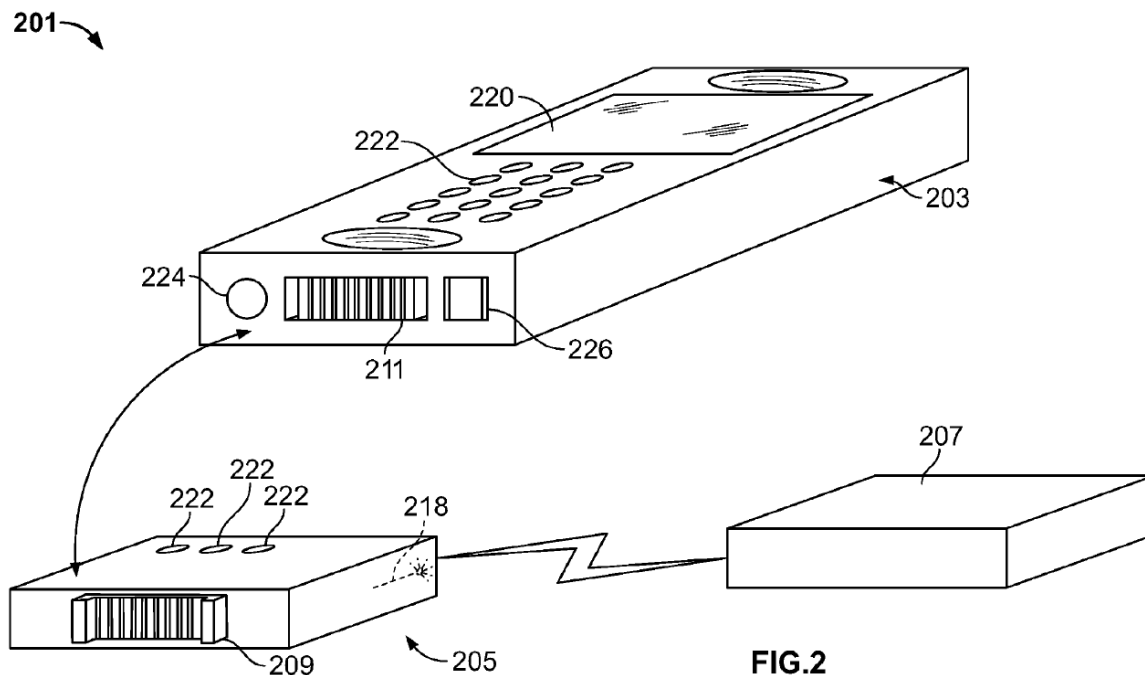


Figure 2 illustrates an exemplary device 201 that includes music player 203, electronic interface device 205, and athletic parameter measurement device 207 that sends athletic data measured from a sensor (e.g., an accelerometer) to music player 203 via interface 205. *Id.* at 11:27–43, Fig. 2.

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.* at 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.

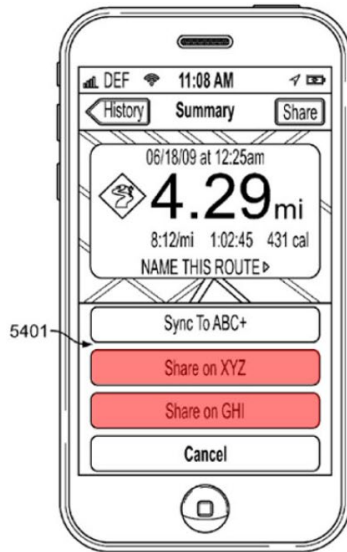


FIG. 54A

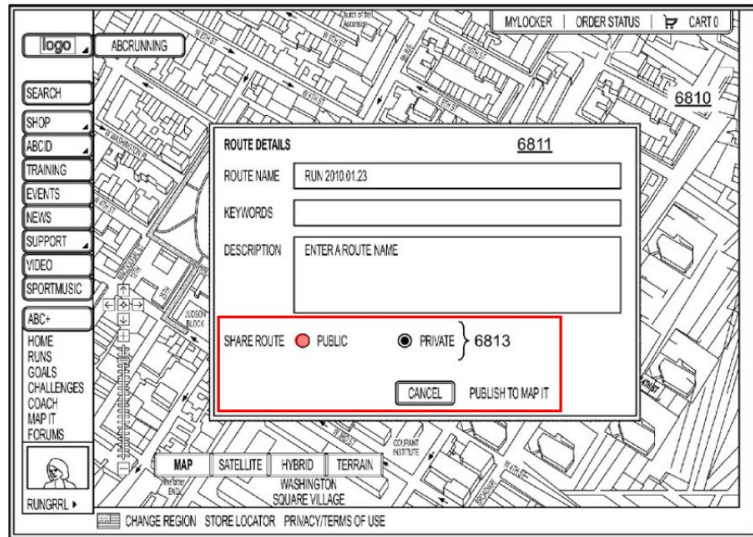


FIG. 68B

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. THE PARTIES’ POST-INSTITUTION ARGUMENTS

In our Institution Decision, we concluded that the argument and evidence adduced by Petitioner demonstrated a reasonable likelihood that at least one claim was unpatentable. Dec. 21. We must now determine whether Petitioner has established by a preponderance of the evidence that the challenged claims are unpatentable over the cited prior art. 35 U.S.C. § 316(e) (2018). We previously instructed Patent Owner that “any arguments for patentability not raised in the [Patent Owner Response] may be deemed waived.” Paper 12, 9; *see also In re NuVasive, Inc.*, 842 F.3d 1376, 1381 (Fed. Cir. 2016) (holding that patent owner’s failure to proffer argument at trial as instructed in scheduling order constitutes waiver). Additionally, the Board’s Trial Practice Guide states that the Patent Owner Response “should identify all the involved claims that are believed to be patentable and state the basis for that belief.” Patent Trial and Appeal Board Consolidated Trial Practice Guide (Nov. 2019) 66.⁷

III. LEGAL STANDARDS

To prevail in its challenges to the patentability of the claims, Petitioner must establish unpatentability by a preponderance of the evidence. 35 U.S.C. § 316(e); 37 C.F.R. § 42.1(d). “In an [*inter partes* review], the

⁷ See <https://www.uspto.gov/sites/default/files/documents/tpgnov.pdf>.

petitioner has the burden from the onset to show with particularity why the patent it challenges is unpatentable.” *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1363 (Fed. Cir. 2016) (citing 35 U.S.C. § 312(a)(3) (requiring *inter partes* review petitions to identify “with particularity . . . the evidence that supports the grounds for the challenge to each claim”)). This burden never shifts to Patent Owner. See *Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015) (citing *Tech. Licensing Corp. v. Videotek, Inc.*, 545 F.3d 1316, 1326–27 (Fed. Cir. 2008)) (discussing the burden of proof in *inter partes* review).

“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 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) when in evidence, considering objective evidence indicating obviousness or nonobviousness. *KSR*, 550 U.S. at 406 (citing *Graham*, 383 U.S. at 17–18).

Petitioner must explain how the proposed combinations of prior art would have rendered the challenged claims unpatentable. An obviousness analysis “need not seek out precise teachings directed to the specific subject

matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR*, 550 U.S. at 418; *accord In re Translogic Tech., Inc.*, 504 F.3d 1249, 1259 (Fed. Cir. 2007). However, Petitioner cannot satisfy its burden of proving obviousness by employing “mere conclusory statements,” but “must instead articulate specific reasoning, based on evidence of record” to support an obviousness determination. *In re Magnum Oil Tools Int’l, Ltd.*, 829 F.3d 1364, 1380–81 (Fed. Cir. 2016). Petitioner also must articulate a reason why a person of ordinary skill in the art would have combined the prior art references. *NuVasive*, 842 F.3d at 1382.

At this final stage, we determine whether a preponderance of the evidence of record shows that the challenged claims would have been rendered obvious in view of the asserted prior art. We analyze the asserted grounds of unpatentability in accordance with these principles.

IV. LEVEL OF ORDINARY SKILL

We review the grounds of unpatentability in view of the understanding of a person of ordinary skill in the art at the time of the invention. *Graham*, 383 U.S. at 17. Petitioner contends that a person of ordinary skill in the art, at the time of the invention of the ’220 patent,

would have had at least a (1) a bachelor’s degree in engineering, computer science, industrial engineering, biomechanics, or a related field, and (2) at least two years of experience researching, developing, designing, and/or testing fitness or physiological sensors, wearable devices, physiological or biomechanical devices, remotely-controlled systems or interfaces, and/or network-based applications and/or equipment, or the equivalent experience or education.

Pet. 22–23; *see also* Ex. 1003 ¶ 49 (Dr. Houh offering equivalent testimony).

Patent Owner “does not dispute [Petitioner’s] proposed level of skill in the art” in this case. PO Resp. 9–10; *see also* Ex. 2001 ¶ 37 (Patent Owner’s declarant, Dr. Stone, accepting and applying Petitioner’s proposed level of ordinary skill).

In determining the level of ordinary skill in the art, various factors may be considered, including the “type of problems encountered in the art; prior art solutions to those problems; rapidity with which innovations are made; sophistication of the technology; and educational level of active workers in the field.” *In re GPAC Inc.*, 57 F.3d 1573, 1579 (Fed. Cir. 1995) (citation omitted). The level of ordinary skill in the art also is reflected by the prior art of record. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001).

Neither party argues that the outcome of this case would differ based on our adoption of any particular definition of the level of ordinary skill in the art. Considering the subject matter of the ’220 patent, the background technical field, the prior art, and Petitioner’s unopposed definition of the skilled artisan, we apply the level of skill set forth above.

V. 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 be 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).

A. Element 11C: “record”

For context, element 11C refers to “computer-readable instructions” stored in “a non-transitory, computer-readable medium” (element 11B) that, when executed, presumably by the processor of element 11A, cause the apparatus to: “record athletic activity performed by a user.” Ex. 1001, 68:15–21.

Patent Owner argues that “record” means “measure or capture, and then save.” PO Resp. 10 (citing Ex. 2001 ¶¶ 48–56). According to Patent Owner, “[m]erely saving data is not enough.” *Id.* Petitioner disagrees, contending that Patent Owner’s proffered interpretation of “record” is inconsistent with the Specification, which “repeatedly distinguishes between ‘record’ and ‘measure’” and uses “‘record’ in connection with saving/storing and ‘measure’ in connection with sensing.” Reply 2–3 (citing Ex. 1001, 2:28–34, 8:51–53, 11:61–62, 11:65–67, 13:5–6, 15:18–24, 15:41–45, 20:2–6; Ex. 1017 ¶¶ 13–19). Based on our review of the parties’ argument and cited evidence, we find that “record” means “save” and does not encompass “measure or capture” as Patent Owner argues.

The Specification describes the act of measuring as being performed by various sensors or other devices. *See, e.g.*, Ex. 1001, 8:51–53 (“sensors for measuring”), 11:65–67 (“accelerometers . . . for measuring”), 15:18–24 (“Global Positioning Satellite (GPS) navigation device” for measuring

distance traveled and an “EKG monitor” for “measuring the electrical activity of the user”). The Specification also expressly distinguishes the act of measuring from the act of recording when discussing how the location of a user is measured and recorded. The Specification states:

The inclusion of GPS device 713 and accelerometer 715 in a single mobile device 700 allows device 700 to record athletic activity data in multiple workout settings. . . . If, . . . the individual is running outdoors such that the individual moves from one location to another, the GPS device 713 or recording of data therefrom (e.g., *GPS device is always active, but recording is turned on and off*) may be activated and used instead [of the data measured by accelerometer 715].

Id. at 19:59–20:6 (emphasis added). Even though GPS “is always active” and measuring the location of the user, “recording is turned on and off.” Accordingly, the Specification expressly distinguishes that act of measuring from the act of recording.

Patent Owner’s citations to portions of the Specification that describe measurement devices as “recording” data improperly conflate the acts of measuring data and recording data by disregarding the Specification’s description that the “mobile device” performs the “recording” while other hardware within the mobile device (e.g., GPS device 713, accelerometer 715) measures data. The Specification expressly states: “mobile device 700 may operate (e.g., *record data from*) both GPS device 713 and accelerometer 715.” Ex. 1001, 20:33–34. Thus, mobile device 700 records data “from” GPS device 713 and accelerometer 715.

Although claim 11 does not expressly recite the sensors that measure data, Patent Owner essentially argues that we should interpret “record” to require their presence within the claim because of “the ’220 patent’s express purpose: to measure athletic activity and thereby motivate the user.” PO

Resp. 14 (citing Ex. 1001, 1:29–35). The portion of the Specification cited by Patent Owner recognizes that athletic activity may be manually recorded by users without any measurement or capture necessarily required. *See* Ex. 1001, 1:29–32 (“individuals might not be as motivated to exercise because of the extra effort that may be required in recording and tracking workout results. For example, an individual may be required to manually enter [i.e., record] workout information.”). Although the Specification appears to be criticizing manual recording of athletic activity, claim 11 is recited broadly enough to cover an apparatus that is capable of allowing a user to manually record that activity.

Petitioner persuasively points out that the Specification describes “an activity monitoring system and environment having one or more of the features described herein provides a user with an immersive experience that will encourage and motivate the user to engage in athletic activities and improve his or her fitness.” Reply 8 (citing Ex. 1001, 66:63–67). Rather than avoiding manual recording of athletic activity, the claimed apparatus focuses on a different mechanism for motivating users to exercise, namely enabling the user to share workout information with other users (elements 11D, 11E). The Specification recognizes that sharing athletic activity with others motivates users to exercise by indicating that users of the invention “may be motivated to exercise by being able to issue live challenges to other users.” Ex. 1001, 67:5–7. Thus, although the Specification describes avoiding the need to manually record athletic activity motivates users to exercise, the Specification describes another way to motivate users, e.g., sharing athletic activity, which is claimed. For all these reasons, we reject Patent Owner’s attempt to narrow “record athletic activity” as recited in

element 11C such that it also requires that the apparatus “measure or capture” the athletic activity.

B. Element 11E: “in response to receiving the sharing option selection”

For context, element 11E refers to “computer-readable instructions” stored in “a non-transitory, computer-readable medium” (element 11B) that, when executed, presumably by the processor of element 11A, cause the apparatus to: “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, 68:15–20, 68:24–28. The parties dispute focuses upon “in response to receiving the sharing option selection” from element 11E.

Patent Owner argues that “in response to receiving the sharing option selection” means “in response to receiving an individual user command or confirmation to share the recorded athletic activity.” PO Resp. 19. More specifically, Patent Owner contends that the Specification describes two ways for a user to select an option to share his recorded athletic activity, one automatic that is not claimed and another that is claimed in which the user selects an option to share information for each individual athletic activity “in response to receiving a user command or confirmation.” *Id.* at 20–21 (citing Ex. 1001, 46:21–23, 46:26–30, Figs. 55A, 55B). The portion of the Specification on which Patent Owner relies reads: “Once the user is logged in, the system may automatically share new run information through the information outlet. In some arrangements, the information might only be shared *in response to receiving* a user command or confirmation.” *Id.* at 21 (quoting Ex. 1001, 46:26–30 (emphasis added)). Because this quoted phrase

is the only location at which the Specification contains the words, “in response to receiving,” Patent Owner contends that “in response to receiving the sharing option selection” refers to “in response to receiving *a user command or confirmation*.” *Id.* at 20–21 (emphasis added). Patent Owner fails to explain why “sharing option selection” should refer to an “individual” user command or confirmation. *Id.* at 19–22.

Petitioner persuasively contends that the Specification discloses at least six additional ways for a user to select an option to share athletic information that would be excluded under Patent Owner’s proposed interpretation. Reply 11–12 (citing Ex. 1001, Figs. 53F, 53S, 53V, 54C, 77, 82, and accompanying text at 45:22–44, 46:23–28, 47:42–44, 47:63–48:15, 53:27–52). Petitioner also persuasively argues that portion of the Specification cited by Patent Owner fails to sufficiently express intent to limit the scope of “sharing option selection” to “a user command or confirmation.” *Id.* at 13 (citing *Thorner v. Sony Comp. Entm’t Amer. LLC*, 669 F.3d 1362, 1365–66 (Fed. Cir. 2012) (lexicography requires “clear” expression of intent to redefine the term (emphasis omitted))). Patent Owner’s attempt in the Sur-reply to cite cases for the proposition that claims need not cover all embodiments is unavailing because we discern no clear intent in the Specification to limit the claim to one specific embodiment.

For all these reasons, we reject Patent Owner’s proposed interpretation of “the sharing option selection”⁸ and instead read it according to its plain meaning, which encompasses, for example, the

⁸ The phrase “sharing option selection” is introduced in element 11D, and we conclude that phrase carries the same meaning as it does in element 11E.

selection of an option to automatically share athletic information in advance of a workout.

VI. ANALYSIS

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

Petitioner contends that Johnson anticipates claims 11–13 and 19. Pet. 24–42. For the reasons that follow, we determine that Petitioner has proven by a preponderance of evidence that Johnson anticipates claims 11–13 and 19.

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 id.* ¶¶ 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. Claim 11

a. 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) (alterations in original). 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 dispute Petitioner’s showing on these elements in its Patent Owner Response. *See* PO Resp. 22–29 (contending only that Petitioner fails to prove that Johnson describes elements 11C and 11E). Based on our review of Petitioner’s argument relating to Johnson’s disclosure of elements 11pre, 11A, and 11B, which we adopt as our own, and the evidence cited in support, we are persuaded that Petitioner

demonstrates by a preponderance of evidence that Johnson describes the limitations recited in elements 11pre,⁹ 11A, and 11B.

b. 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.

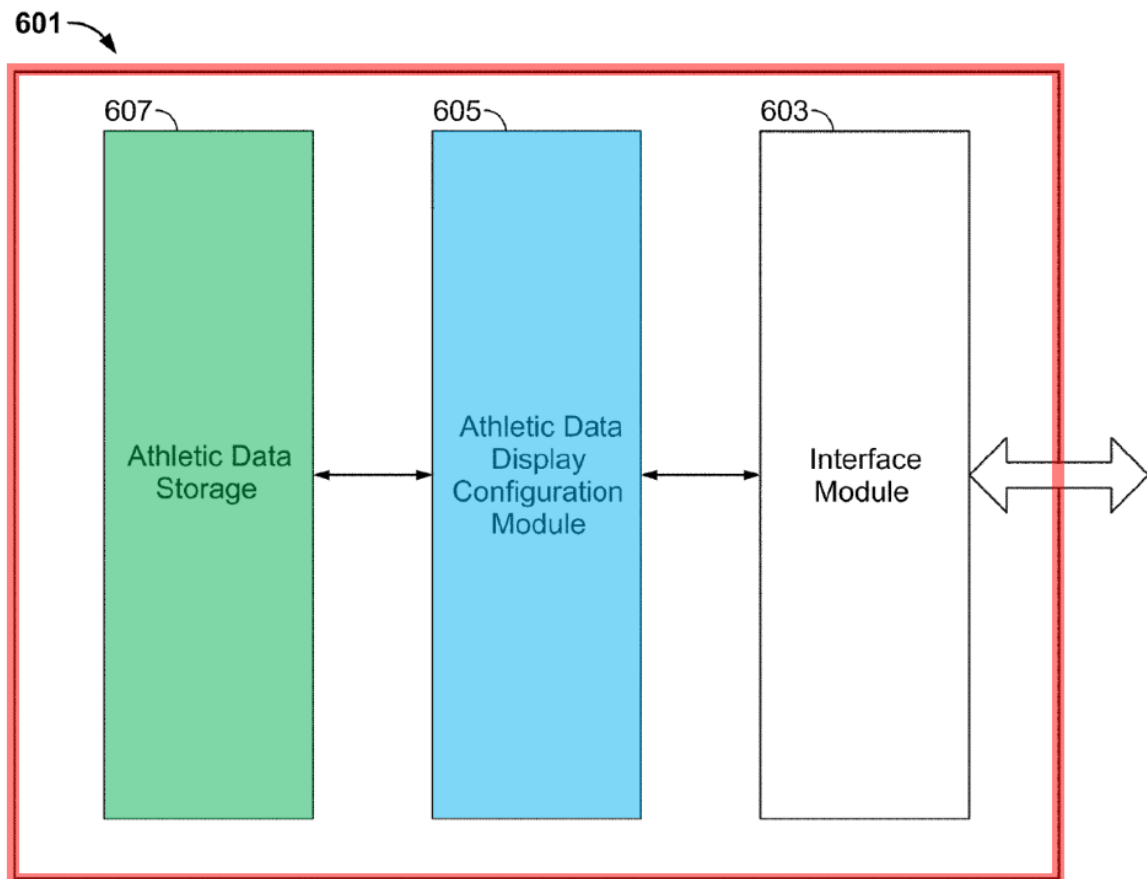


FIG. 6

⁹ We find that the preamble of claim 11, which merely recites “[a]n apparatus comprising” is not limiting.

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) (alterations in original). 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.

Patent Owner argues that Johnson's device 601 "does not 'record' (i.e., measure or capture, and then save) athletic activity." PO Resp. 23. 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 24. Patent Owner argues that "writing" data to memory is not "recording" data because it "does not include capturing or measuring the athletic activity itself, only saving it." *Id.*

Patent Owner concedes that Johnson's device 601 stores the user's athletic activity. PO Resp. 24; Sur-reply 8. Patent Owner's argument that Johnson fails to describe element 11C depends upon us ruling in its favor on the meaning of element 11C. As explained in Part V.A above, we reject Patent Owner's argument that "record" as used in element 11C also requires the apparatus to "measure or capture" athletic activity. Accordingly, based on Petitioner's argument regarding element 11C, which we adopt as our own, and the evidence cited in support, we find that Petitioner has shown by a preponderance of evidence that Johnson describes the limitations of element 11C.

c. 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. *Id.* at 32 (alteration in original). 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.* (quoting Ex. 1004 ¶ 92) (alteration in original).

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 does not dispute Petitioner’s showing on element 11D in its Patent Owner Response. *See* PO Resp. 22–29 (contending that Petitioner fails to prove that Johnson describes elements 11C and 11E). Based on our review of Petitioner’s argument and evidence relating to Johnson’s disclosure of element 11D, we are persuaded that Petitioner demonstrates by a preponderance of evidence that Johnson describes the limitations recited in element 11D.

d. 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).

Petitioner contends that Johnson transmits workout information to a social networking site in response to all four of the “sharing option selections” that it identifies in connection with its analysis of Johnson’s disclosure of element 11D. *Id.* at 32.

Patent Owner argues that Johnson fails to describe element 11E for two reasons. PO Resp. 24–30. First, Johnson fails to describe transmitting workout information in response to receiving the sharing option selection. *Id.* at 25–27. Second, Johnson fails to describe transmitting workout information to “a social networking site viewable to one or more other users.” *Id.* at 27–30.

i. Transmitting Workout Information “in response to the sharing option selection”

Patent Owner argues that because Johnson’s user selects an option to share athletic information in advance, Johnson does not describe Patent Owner’s proposed meaning for the “sharing option selection” of element 11E, which is “an individual user command or confirmation to share the recorded athletic activity.” PO Resp. 25–27. Patent Owner’s argument that Johnson fails to describe this aspect of element 11E depends upon us ruling in its favor on the meaning of element 11E. Patent Owner concedes that, at least through its “leaderboard option,” Johnson’s user can select an option in advance to automatically transmit or share information for all future workouts. *Id.* at 25–26. We also find that Petitioner demonstrates that Johnson’s three other alleged sharing option selections enables a user to automatically share athletic information with other people.

As explained in Part V.B above, we reject Patent Owner’s argument that “sharing option selection” as used in element 11E refers to “an individual user command or confirmation to share the recorded athletic

activity.” For the same reasons, we also find that “sharing option selection” encompasses the selection of an option to automatically share athletic information in advance of a workout. Based on our review of Petitioner’s arguments and cited evidence summarized in Part VI.A.2.c above, we find that Petitioner shows by a preponderance of evidence that each of the four different ways identified by Petitioner in which Johnson’s device 601 receives a “sharing option selection,” meets the “sharing option selection” aspect of element 11C.

ii. Transmitting Workout Information to “a social networking site viewable to one or more other users”

Patent Owner argues that Petitioner fails to show that any of Johnson’s four methods for sharing athletic information result in that information being transmitted to “a social networking site viewable to one or more other users.” PO Resp. 27–30. More specifically, Patent Owner argues that Petitioner fails to provide any evidence for Johnson’s “Brag to Friends” and “Share this Run” sharing options. *Id.* at 27. Regarding Johnson’s “Blog Post” sharing option, Patent Owner argues that Johnson’s blog 2900 is not a “social networking site” because Johnson merely describes an ability to include a blog in a “social networking page.” *Id.* at 28. Patent Owner argues that posting workout information via Johnson’s “Leaderboard” sharing option does not constitute transmitting workout information to a social networking site because Petitioner fails to adduce evidence that Johnson leaderboards are shared with any user other than the user who posted the information. *Id.* at 29–30.

Petitioner persuades us that all four of the options by which Johnson’s device 601 transmits workout information in response to the user’s selection of the sharing option involves sending that information to a social

networking site. Regarding the “Blog” sharing option, Johnson expressly states: “a user, athlete, or runner may include a blog 2900 in their web page or social networking page.” Ex. 1004 ¶ 167. Johnson further explains that: “Though described with reference blog 2900, 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.” *Id.* This statement generally describes a Johnson user being able to share on a social networking page any of the workout information described throughout Johnson.

Regarding Patent Owner’s argument that Johnson’s leaderboards are not proven to be shared among “other users,” we disagree. Johnson’s leaderboard reflects information shared by at least eleven users (named and enumerated as being ranked 1–10 and Rauchholz who is ranked 2932 on the leaderboard) and likely thousands more as implied by Rauchholz’s rank of 2932. Ex. 1004, Fig. 14A. None of the information shown for each of the runners ranked 1–10 or 2932 would appear on the leaderboard without the respective runner being a user that shared their information to the leaderboard. Ex. 2002, 205:22–206:1; Ex. 1003 ¶¶ 65–66. We discern no persuasive argument that such a leaderboard arrangement fails to constitute a “social networking site.”

For all the reasons expressed above, we find that Johnson describes “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” as recited in element 11E

iii. Summary

For the reasons expressed above, we find that Petitioner has shown by a preponderance of evidence that Johnson describes all limitations recited in element 11E.

e. Conclusion

For the reasons stated above, we find that Petitioner has proven by a preponderance of evidence that Johnson anticipates claim 11.

3. Claim 12

Claim 12 depends from claim 11 and further recites: “wherein the apparatus is further caused to tag a summary of one or more metrics from the recorded athletic activity with identifiers of one or more other users.” Ex. 1001, 68:28–31.

Petitioner contends that Johnson meets claim 12 by, for example, illustrating an interface tagging an avatar for each user who has “become a member of the 500 Mile Club” with a designation of “500” on their avatar. Petitioner provides the annotated version of Johnson’s Figure 23, which we reproduce below, and color codes the various avatars according to the “club” to which each user is a member.

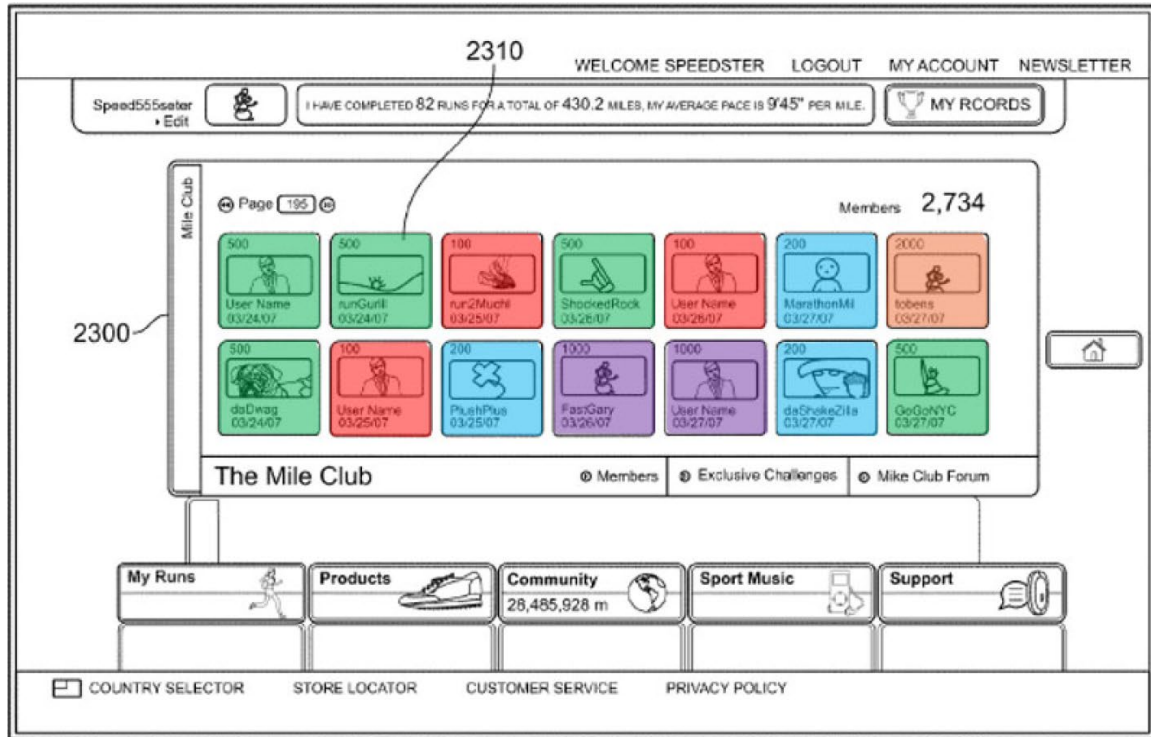


FIG. 23

The avatars associated with users who are a member of the various mileage clubs are color coded as follows: 100 mile club (red), 200 mile club (blue), 500 mile club (green), 1000 mile club (purple), and 2000 mile club (orange). Pet. 39 (citing Ex. 1004, Fig. 23, ¶ 160). Johnson describes Figure 23 as follows:

In an alternate screen, mile club 2300 may display the entire group of existing mile club members 2310 including their user names, avatars, mile club of which they are a member (e.g., 100 miles, 200 miles, 500 miles, 1000 miles, and the like), and the date they became mile club 2300.

Ex. 1004 ¶ 160. Johnson thus describes tagging subsets of at least fourteen users with one of at least five different metrics.

Patent Owner contends that Johnson's mile club tags fail to meet the requirements of claim 12 because the "tags do not include identifiers of the

club member and ‘one or more other users.’” PO Resp. 31. As a way of explaining its argument by example, Patent Owner states:

If lululemon contends that “daDwag” is the “user” of claim 11 then the 500-Mile Club tile does not show the “other user[]” recited in claim 12. The 500-Mile Club tile, which lululemon alleges is the claimed “summary of one or more metrics” contains (1) an achievement identifier and (2) an identifier for only one user—“daDwag.” *Id.*; Ex. 2002 210:11–211:9. There is no name listed that could be a claimed “other user[].”

If lululemon contends that the “daDwag” is the “other user[],” then there is no showing that the 500-Mile Club tile contains the “summary of one or more metrics from the recorded athletic activity,” recited in claim 12. Ex. 2001, ¶ 80. The recited “recorded athletic activity” is the activity performed by the “user” of claim 11. *Id.* But, the 500-Mile Club tile only contains summary information for “daDwag’s” workout, not the “user” of claim 11. *Id.* Therefore, under either interpretation, lululemon’s argument is not sufficient.

Id. at 32 (alterations in original).

Petitioner responds that Johnson’s Figure 23 illustrates three tiles, each bearing a name (i.e., an identifier) of a user, daDawg, User Name, and GoGoNYC, with each tile also bearing a tag of “500” to reflect that each user has run 500 miles (based on “metrics from the recorded athletic activity”). Reply 20–21 (citing Pet. 38–39; Ex. 1017 ¶ 46). The “summary” of claim 12 is membership in the “500-Mile Club.” Pet. 39; Reply 21. Patent Owner’s expert agreed with this description of the tiles, identifiers, and tags on Johnson’s Figure 23. Ex. 1016, 70:24–72:16.

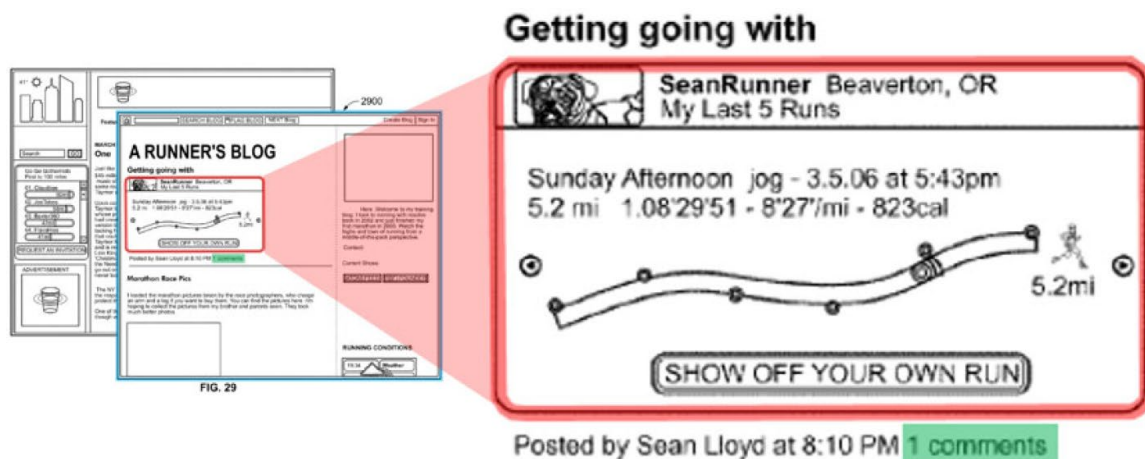
In the Sur-reply, Patent Owner contends that we should reject Petitioner’s Reply as reflecting a new argument. Sur-reply 14–15. We disagree because we consider Petitioner’s Reply to respond to Patent

Owner's contention that Figure 23 fails to identify the user recited in claim 11 along with other users recited in claim 12. Patent Owner also argues that Petitioner fails to explain why multiple tiles combine to make a "summary." We disagree, Petitioner contends that the "summary of one or more metrics from the recorded athletic activity" of claim 12 is membership in the "500-Mile Club" as reflected by the "500" tag appearing on each tile, which individually also bear an identifier for the particular user who is a member of the club. Pet. 39; Reply 21.

For these reasons, we find that Petitioner has proven by a preponderance of evidence that Johnson anticipates claim 12.

4. Claim 13

Claim 13 depends from claim 11 and further recites: "wherein the apparatus is further caused to include a message prompt on the network page, the message prompt configured to receive a message to be presented to the one or more other users on the social networking site." Ex. 1001, 68:33–37. Petitioner contends Johnson meets the limitations introduced in claim 13 because Johnson describes an ability for other users to post a comment in response to a blog post as shown in the annotated version of Fig. 29, which we reproduce below. Pet. 39–40.



The user's (SeanRunner's) blog post is identified with the red outline, and the figure reflects that the blog post has generated 1 comment as shown with green highlighting.

Patent Owner does not dispute Petitioner's showing relating to claim 13 except to contest Petitioner's showing for intervening independent claim 11. PO Resp. 22–32 (proffering arguments only for claims 11 and 12). Based on our review of Petitioner's argument, which we adopt as our own, and the evidence cited in support, we find that Petitioner has proven by a preponderance of evidence that Johnson anticipates claim 13.

5. Claim 19

Claim 19 depends from claim 11 and further recites: “wherein the apparatus is further caused to generate a social network message on the network page based on a location at which the athletic activity was performed by the user.” Ex. 1001, 68:59–62. Petitioner contends that Johnson's leaderboard and blog embodiments describe the limitations introduced in claim 19. The leaderboard interface illustrates a “GEO” filter control 1415 that allows a user to filter the leaderboard based upon the location at which each user on the leaderboard performed the athletic activity. Pet. 41 (citing Ex. 1004, Fig. 14A, ¶¶ 132, 134, 138). The blog embodiment includes an exemplary blog post in which the user posts information about a run performed in Beaverton, OR. *Id.* at 41–42 (citing Ex. 1004, Fig. 29, ¶¶ 92, 167).

Patent Owner does not dispute Petitioner's showing relating to claim 19 except to contest Petitioner's showing for intervening independent claim 11. PO Resp. 22–32 (proffering arguments only for claims 11 and 12). Based on our review of Petitioner's argument, which we adopt as

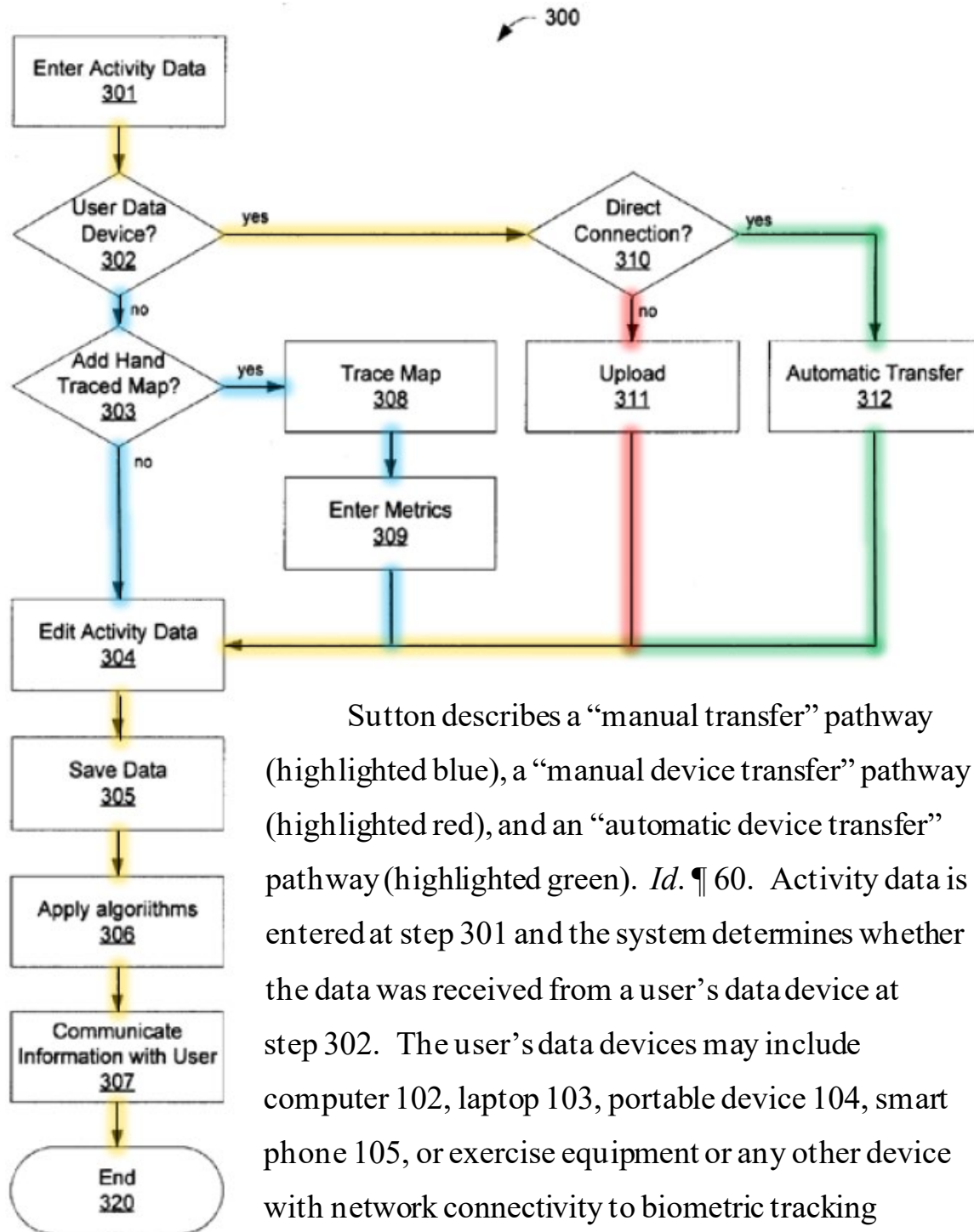
our own, and the evidence cited in support, we find that Petitioner has proven by a preponderance of evidence that Johnson anticipates claim 19.

B. 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 proven by a preponderance of evidence that Sutton anticipates claims 11, 19, and 20 but fails to do so for claim 12.

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

The screenshot shows a web form titled "Enter Activity By Hand" with a close button (X) in the top right corner. The form is organized into two columns. The left column contains: "Activity Name" with a text input field containing "Morning Run"; "Sport" with a dropdown menu showing "Running"; and "Description" with a text area containing "A five mile run from the house into the park and around the school yard." The right column contains: "Start Date / Time:" with a dropdown menu showing "11/20/2008 09:30 AM"; "Total Time (hours: minutes: seconds)" with three dropdown menus showing "00", "35", and "00"; "Total Distance" with a text input field showing "5" and a "miles" dropdown; "Course Rating" with five star icons, the third of which is filled; and "Privacy" with two radio buttons: "Public (visible to the Plus 3 Network community)" which is selected, and "Private (only visible to me)". At the bottom of the form are two buttons: "Save activity" and "Back to my activities".

FIG. 9

Figure 9, which we reproduce at 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.* at Fig. 9.

2. Claim 11

a. 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* PO Resp. 33–36 (contending only 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 by a preponderance of the evidence that Sutton describes these elements.

b. 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 VI.B.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 user’s athletic activity data is recorded by system 110 storing that data 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’ (i.e., measure or capture, and then save) athletic activity.” PO Resp. 34. Patent Owner contends that “Sutton’s system 110 merely ‘store[s]’ activity data in database 115.” *Id.* Patent Owner argues that “writing user exercise and activity data to memory in database” is “different that capturing or measuring and then saving activity data,” which is alleged to be required by element 11C. *Id.* at 34–35.

Patent Owner’s argument that Sutton fails to describe element 11C depends upon us ruling in its favor on the meaning of element 11C. As explained in Part V.A above, we reject Patent Owner’s argument that “record” as used in element 11C also requires the apparatus to “measure or

capture” athletic activity. Accordingly, based on Petitioner’s argument regarding element 11C, which we adopt as our own, and the evidence cited in support, we find that Petitioner has shown by a preponderance of evidence that Sutton describes the limitations of element 11C.

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 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.” Ex. 1005 ¶¶ 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 that a user manually enters “by

hand” rather than “recorded activity.” PO Resp. 35–36. Patent Owner alternatively argues that “to the extent Figure 9 shows a ‘sharing option,’ that option is only presented to the user in conjunction with manual entry of a previously performed athletic activity—not ‘recorded activity.’” *Id.* at 36. Patent Owner’s arguments thus rest 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 expressed in Part VI.B.2.b above, we reject that argument and find that Petitioner proves that Sutton describes element 11C. Accordingly, based on our review of Petitioner’s argument relating to element 11E, which we adopt as our own, and the evidence cited in support, we find that Petitioner proves by a preponderance of evidence that Sutton describes the limitations of element 11E.

d. Conclusion

For the reasons stated above, we find that Petitioner has proven by a preponderance of evidence that Sutton anticipates claim 11.

3. Claim 12

Claim 12 depends from claim 11 and further recites: “wherein the apparatus is further caused to tag a summary of one or more metrics from the recorded athletic activity with identifiers of one or more other users.” Ex. 1001, 68:28–31.

Petitioner contends that Sutton describes an interface illustrated in Figure 9 that reflects the manner in which a user may enter activity by hand including “metrics” (e.g., time and distance for a run) associated with an athletic activity as described in step 309 of Figure 3. Pet. 52–53. Petitioner contends that Sutton describes “identifiers of one or more other users” in

field 504 of its annotated version of Figure 5 reflecting information about “Road Biking” that occurred on September 17, 2008, which is reproduced below.

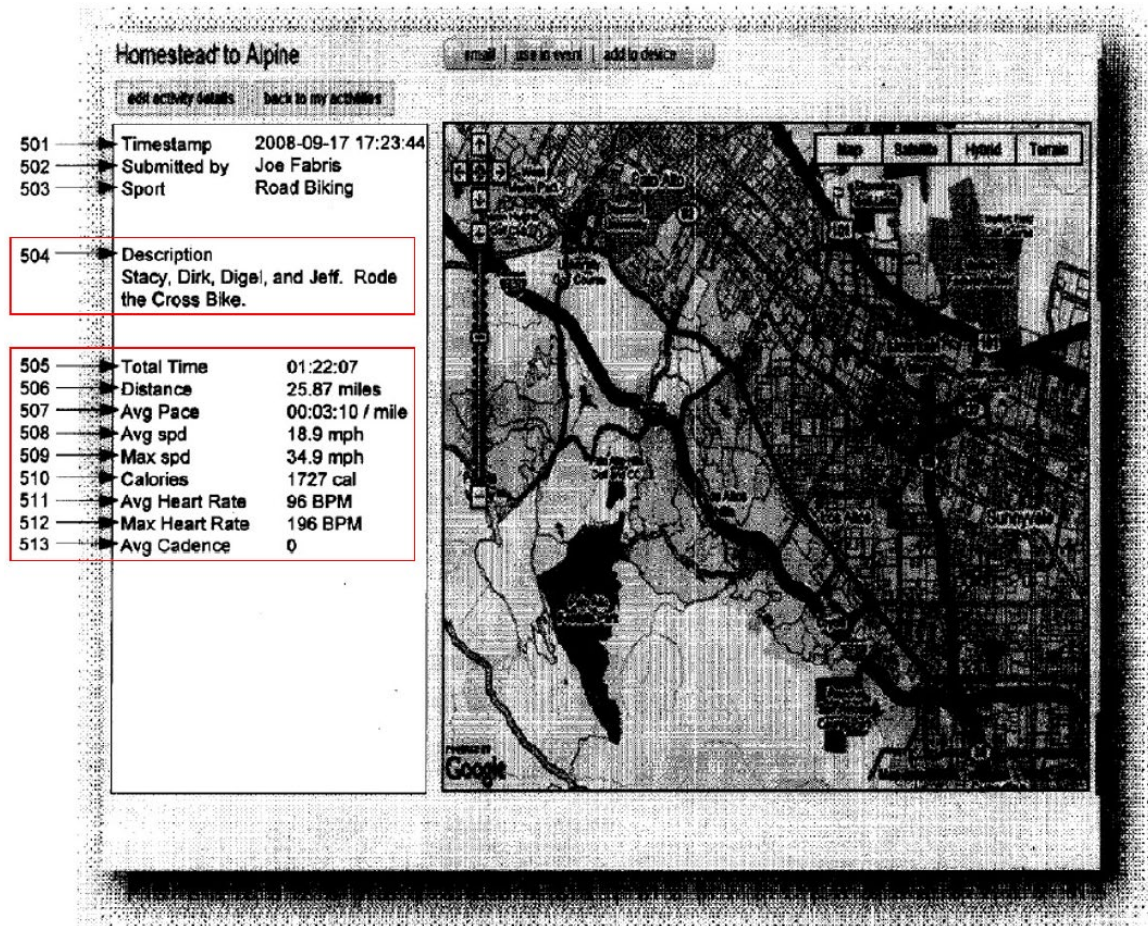


FIG. 5

Petitioner contends that at least one “other user” named “Dirk” is identified by name in the field labeled “Description” which contains the following information: “Stacy, Dirk, Digel, and Jeff. Rode the Cross Bike.” *Id.* at 54. Petitioner contends that Dirk is also identified by name in the interface shown in Figure 10, which is labeled, “View Event” and which lists “Dirk” among “Invited Friends” for an event called “Palm Run.” *Id.*

Patent Owner contends that Petitioner’s showing for claim 12 fails because it “offers no proof that the names it alleges are ‘identifiers’ are

associated with ‘one or more other users.’” PO Resp. 36. Petitioner responds that Sutton “relates generally to a computer system and method for capturing *users*’ [plural] activity.” Reply 24 (quoting Ex. 1005 ¶¶2, 14) (emphasis in original). Based on this general description that Sutton’s system captures activity of more than one user, Petitioner contends that an ordinarily skilled artisan “would have understood the individuals named in Figure 5’s map are users.” Reply 24 (citing Ex. 1017 ¶51). Petitioner also contends that Patent Owner’s expert, Dr. Stone, agrees that “names are identifiers.” *Id.* at 23 (citing Ex. 1016, 6:3–6).

We find Patent Owner’s position to be more persuasive. Petitioner fails to identify any express disclosure in the cited portions of Sutton that the persons named in the “Description” field of Figure 5 are also users of Sutton’s system 110. Without such express disclosure, Petitioner’s argument for anticipation falters. Additionally, we find that Petitioner’s strained reliance on Dr. Stone’s testimony significantly undermines its argument because, in the cited testimony, Dr. Stone merely indicates for the record that counsel may address him as Dr. Stone; he is not testifying that he agrees that a person’s name identifies them as a user of any system or apparatus, much less the apparatus of claim 12. Ex. 1016, 6:3–6 (“Q. So Dr. Stone is, kind of, the name that you identify as? A. That’s correct.”).

For all these reasons, we find that Petitioner has not proven by a preponderance of evidence that Sutton anticipates claim 12.

4. Claim 19

Claim 19 depends from claim 11 and further recites: “wherein the apparatus is further caused to generate a social network message on the network page based on a location at which the athletic activity was

performed by the user.” Ex. 1001, 68:59–62. Petitioner contends that Sutton discloses the “generat[ing] a social network message on the network page based on a location at which the athletic activity was performed by the user” in the form of “a hand-traced map” that reflects where the user’s activity occurred. Pet. 55 (citing Ex. 1005, Figs. 3, 5, ¶¶ 60, 63 and cross-referencing its showing for limitation 11E). As part of its showing for element 11E, Petitioner contends that Sutton describes transmitting the map entered by the user in step 308 to a social networking “page at <http://www.plus3networks.com>.” *Id.* at 50 (citing Ex. 1005, Fig. 4, ¶ 62). Petitioner contends that “plus3networks.com” (sic, “plus3network.com”) was a website for a “mobile, GPS-enhanced social network” called Plus 3 Network. *Id.* at 51 (citing Ex. 1006, 9). Sutton’s Figure 9 indicates that selecting the “Public” option of system 110’s privacy settings causes a user’s workout information to be “visible to the Plus 3 Network community”).

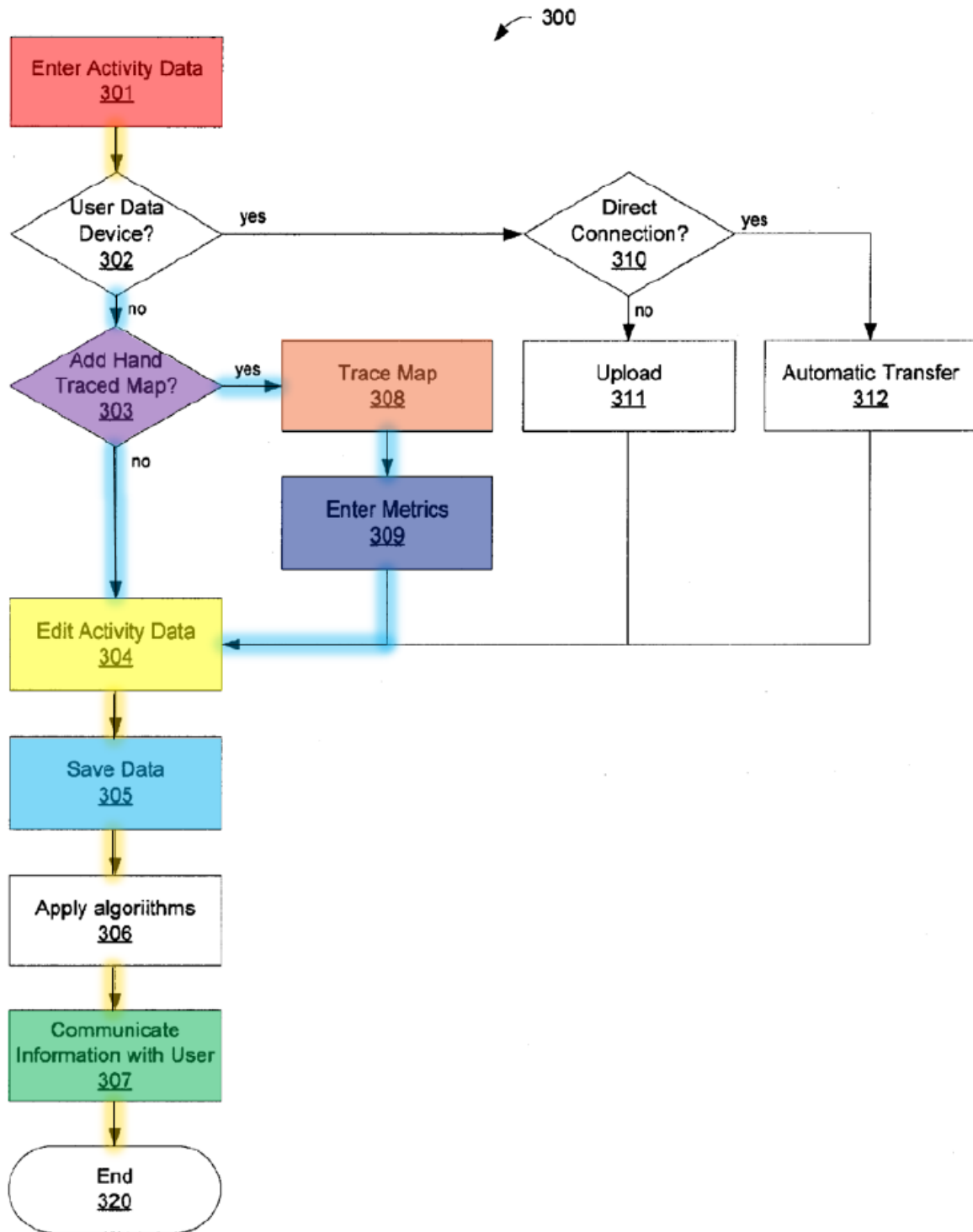
Patent Owner first argues that Sutton fails to describe generating a “social network message” because the “hand-traced map” is not such a message, but rather “workout information.” PO Resp. 39. Patent Owner also argues that “[b]ecause lululemon already relied on Sutton’s disclosure of a hand-traced map to purportedly meet limitation [11E], that map cannot also be part of a ‘social network message’ that the claimed apparatus is ‘further caused to generate.’” *Id.* at 40. Second, Patent Owner contends that Sutton’s hand-traced map is not “generate[d] based on a location at which the athletic activity was performed by the user” because “a hand-traced map does not depend on any location—it depends solely on what the user traces with their hand.” *Id.* at 40–41.

Petitioner’s argument is more persuasive. Regarding Patent Owner’s first argument, Sutton’s hand-traced map, when shared on the Plus 3 Network constitutes a message, in graphical form, that is generated on a social network. Regarding Patent Owner’s second argument, the claim does not require that the message “depend on” the location at which the athletic activity was performed. Rather, the message must merely be “based on a location.” Sutton’s hand-traced map is “based on” the location at which the user performed his run (i.e., the athletic activity) because the map identifies and describes that location.

For these reasons, we find that Petitioner has proven by a preponderance of evidence that Sutton anticipates claim 19.

5. Claim 20

Claim 20 depends from claim 19 and further recites: “wherein transmitting the workout information includes modifying the social network message based on a received user edit.” Petitioner contends that Sutton describes modifying the social network message by allowing the user to edit the message “during data transfer.” Pet. 55–56. Petitioner explains its contentions by referring to the annotated version of Figure 3, reproduced below.



Petitioner contends that Sutton’s user enters data for an activity at step 301 (red), can add a hand-traced map at step 308 (orange) along with metrics on the map at step 309 (navy). *Id.* (citing Ex. 1005 ¶¶ 60, 73). After the map

and metrics are added, but before the activity data is uploaded to a social networking site, the user may “correct and edit the entered activity data” at step 304 (highlighted yellow) of the process depicted above. *Id.* (citing Ex. 1005 ¶¶ 60, 62, Figs. 4, 5 and cross-referencing Pet. 48–52 (showing for element 11E)).

Patent Owner argues that Petitioner’s showing for claim 20 fails because “claim 20 requires the modification of ‘a social network message’ after its creation.” PO Resp. 41. Patent Owner agrees with Petitioner that Sutton describes an ability to review and edit previously entered activity data before the data is transmitted to a social networking site at step 307 of Figure 3. *Id.* However, Patent Owner contends that such editing occurs, before transmitting the activity data to a social networking site, and thus before a “social network message” is “generated” as required by intervening claim 19. *Id.* at 41–43.

Petitioner responds that claim 20 does not require that the apparatus be able to modify a previously posted social networking message. Reply 26–27. Rather, Petitioner contends that claim 20 recites modifying the social networking message being generated before that message is posted as part of process of “transmitting the workout information” that is specified within element 11E. *Id.* Petitioner’s argument relies upon the plain language recited within element 11E and the text introduced in claim 19. *Id.* Essentially, Petitioner argues that Patent Owner’s position is flawed because “it assumes that information cannot be a ‘social network message’ until it is posted on a social network.” *Id.* at 26.

Patent Owner responds that “[b]y definition, a social network message does not exist until it is posted on a social network.” Sur-reply 22. Patent

Owner also argues that the plain language of claim 19 requires that the apparatus is “caused to generate *a social network message on the network page*.” *Id.* (quoting with emphasis Ex. 1001, 68:59–61).

We find Petitioner’s argument to be more persuasive. Claim 20, by its express terms, requires the “modifying the social networking message” as part of “transmitting the workout information,” a process performed by the apparatus defined in element 11E. This transmitting process occurs before a social networking message is “on the network page” as recited in intervening claim 19. While “the social networking message” recited in claim 20 refers to the same “social network message” recited in claim 19, we cannot ignore the requirement recited in claim 20 that modifying the message occurs during “transmitting the workout information” to the network page of a social networking site. Accordingly, we find that Petitioner has proven by a preponderance of evidence that Sutton anticipates claim 20.

C. Claims 11, 12, 19, and 20: Obviousness Over Sutton Alone

Petitioner alternatively contends that Sutton alone renders claims 11, 12, 19, and 20 unpatentable as obvious. Pet. 57–67. For the reasons discussed in Parts VI.A.2, .4, and .5 above, regarding anticipation by Sutton of claims 11, 19, and 20, *a fortiori*, we determine that Petitioner has demonstrated by a preponderance of the evidence that claims 11, 19, and 20 would have been unpatentable as obvious over Sutton. *See Cohesive Techs., Inc. v. Waters Corp.*, 543 F.3d 1351, 1364 (Fed. Cir. 2008) (“[I]t is commonly understood that prior art references that anticipate a claim will usually render that claim obvious.”); *Game & Tech. Co. v. Activision Blizzard Inc.*, 926 F.3d 1370, 1381 (Fed. Cir. 2019) (“[Appellant’s] assertion that ‘a single reference . . . cannot support obviousness’ is wrong as a matter

of law.” (internal citation omitted, second alteration in original)); *Arendi S.A.R.L. v. Apple Inc.*, 832 F.3d 1355, 1361 (Fed. Cir. 2016) (“[A] patent can be obvious in light of a single prior art reference if it would have been obvious to modify that reference to arrive at the patented invention.”); *Therasense, Inc. v. Becton, Dickinson & Co.*, 593 F.3d 1325, 1336–37 (Fed. Cir. 2010) (affirming an invalidity judgment where claims were held obvious over a single reference).

Petitioner’s argument that Sutton renders claim 12 obvious depends heavily upon its showing that Sutton anticipates claim 12. Pet. 66 (cross-referencing Pet. 52–55 (anticipation showing)). However, for the reasons expressed in Part VI.B.3 above, we find that Petitioner fails to prove by a preponderance of evidence that Sutton expressly describes the limitations introduced in claim 12. Based on our review of Petitioner’s argument that Sutton suggests those limitations, we find that Petitioner fails to prove that Sutton suggests that names shown in the Description field of the interface shown on Sutton’s Figure 5 are other users. For all these reasons, we find that Petitioner has failed to prove by a preponderance of evidence that Sutton renders claim 12 unpatentable as obvious.

D. Claims 11, 13, 14, and 19: Obviousness Over Sutton in View of Plus3

We have already found that claims 11, 13, and 19 are unpatentable on other grounds addressed above. However, Petitioner solely relies upon the combined teachings of Sutton and Plus3 as rendering claim 14 unpatentable as obvious. Therefore, we address only claim 14 in our analysis of this ground of unpatentability.

Claim 14 depends from claim 11 and further recites: “wherein the apparatus is further caused to: receive a request to deactivate sharing of the

workout information; and transmit a modification request to remove the workout information from the social networking site.” Ex. 1001, 68:38–43.

For the reasons expressed in Part VI.B.2 above, we find that Sutton describes all limitations of intervening independent claim 11. For the reasons expressed on Part VI.C above, we also find that Sutton alone renders claim 11 unpatentable as obvious. We incorporate those findings in our analysis of Petitioner’s challenge that the combined teachings of Sutton and Plus3 render claim 14 unpatentable as obvious.

As part of its challenge to claim 14, Petitioner relies upon Plus3 as describing that users can deactivate sharing of workout information as follows:

“You ... have the ability to set an Activity to Public or Private ... If an Activity is set to Private, it is not displayed to other Users and only you can see it.” Users can also “remove [their] User Content from the Site at any time,” where “User Content” included “all content that you upload, publish or display ... on or through the Services or the Site, or transmit to or share with other Users”

Pet. 71 (citing Ex. 1006, 12, 17) (internal citations omitted, alterations in original). Petitioner argues that removing shared workout information as described by Plus3 “is a natural extension of Sutton’s disclosure that users can edit their data ‘if a correction of the previously entered data is required.’” *Id.* (citing Ex. 1005 ¶¶ 63).

Petitioner argues that it would have been obvious to configure Sutton’s apparatus that received a user’s sharing option to also receive a request to deactivate sharing as suggested by Plus3. *Id.* at 71–72 (citing Ex. 1003 ¶¶ 129, 130). Petitioner also argues that it would have been obvious to configure Sutton’s apparatus to transmit the request to the Plus 3

Network website so that the website could remove data. *Id.* at 72 (citing Ex. 1003 ¶¶ 129, 130).

Patent Owner contends that Petitioner fails to argue that Sutton teaches an apparatus that is caused to “receive a request to deactivate” or “transmit a modification request to remove the workout information” as recited in claim 14. PO Resp. 49–50. Patent Owner contends that Petitioner relies on the Plus 3 network administrator to remove workout information from a social networking site rather than the claimed apparatus. *Id.* at 50. We agree with Petitioner that Patent Owner mischaracterizes Petitioner’s argument by ignoring Petitioner’s evidence that it would have been obvious to modify Sutton’s apparatus to “receive a request to deactivate” and “transmit a modification request” to the social network. Reply 29–30.

Patent Owner also contends that Petitioner fails to prove that Sutton or Plus3 describe deactivating workout information that has already been shared on a social networking site. PO Resp. 50. We disagree. Petitioner cites Plus3’s description that “[u]sers can also ‘remove [their] User Content from the Site at any time.’” Reply 30 (citing Pet. 71 (citing Ex. 1006, 17)) (emphasis omitted, alterations in original).

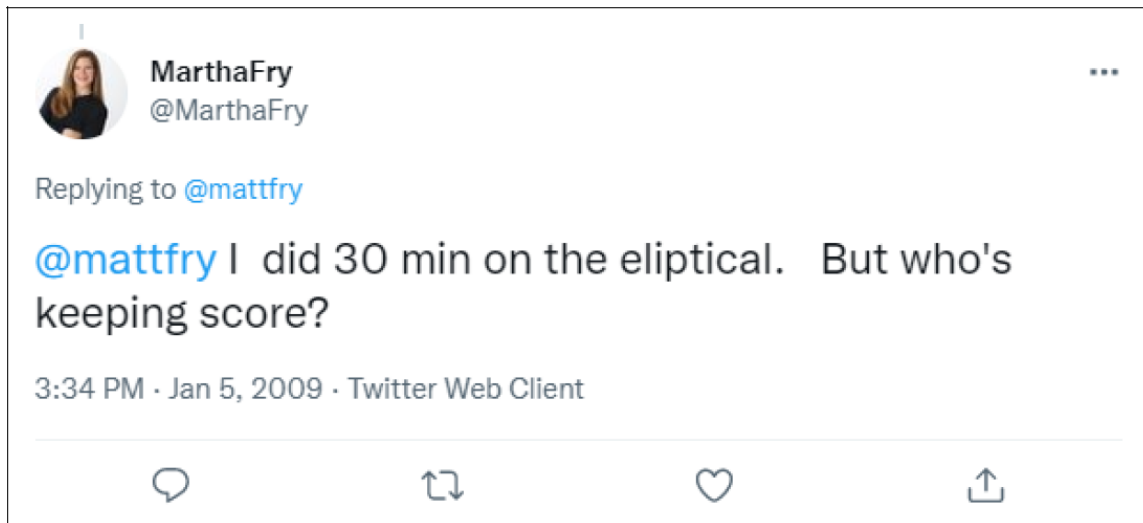
For all these reasons, we find that Petitioner has proven by a preponderance of evidence that the combined teachings of Sutton and Plus3 render claim 14 unpatentable as obvious.

E. Claim 12: Obviousness in View of Sutton and Fry

Claim 12 depends from claim 11 and further recites: “wherein the apparatus is further caused to tag a summary of one or more metrics from the recorded athletic activity with identifiers of one or more other users.” Ex. 1001, 68:28–31. For the reasons expressed in Part VI.A.3 above, we

have found that Petitioner does not demonstrate that Sutton expressly describes the limitations introduced in claim 12.

Petitioner also contends that claim 12 is unpatentable as obvious over the combined teachings of Sutton and Fry. Pet. 72–76. Fry is a tweet published by a Twitter user, @MarthaFry, that was posted on January 5, 2009, before the August 9, 2009, critical date of the '220 patent and is thus a prior art publication under pre-AIA § 102(a). Patent Owner does not dispute the prior art status of Fry. The tweet is reproduced below.



Petitioner points out that MarthaFry’s tweet tags another Twitter user, @mattfry, and summarizes the athletic activity of user @MarthaFry (“I did 30 min on the elliptical”). Ex. 1007.

Petitioner argues that it would have been obvious to modify Sutton’s device 104 and system 110 to tag a summary of a user’s athletic activity with another user’s name as in Fry. Pet. 73–74 (citing Ex. 1005 ¶¶ 30, 62, 73, 79, Figs. 1B, 4, 5, 9; Ex. 1003 ¶¶ 79, 134). Petitioner argues that an ordinarily skilled artisan “would have been motivated to combine Sutton and Fry to provide for more efficient communication between users, which many Tweets show is a desirable feature.” Id. at 74–75 (citing Ex. 1007;

Exs. 1008–1011 (providing four additional examples of tweets similar to that depicted in Fry); Ex. 1003 ¶ 133).

Patent Owner does not dispute Petitioner’s showing that the combined teachings of Sutton and Fry render claim 12 obvious except to argue that Sutton fails to describe all elements of intervening independent claim 11. PO Resp. 52. However, for the reasons expressed in Part VI.A.2 above, we find that Sutton anticipates intervening claim 11. Based on our review of Petitioner’s argument, which we adopt as our own, and the evidence cited in support, we find that Petitioner has proven by a preponderance of evidence that the combined teachings of Sutton and Fry render claim 12 unpatentable as obvious.

VII. CONCLUSION¹⁰

In summary,

Claims	35 U.S.C. §	Reference(s)	Claim(s) Shown Unpatentable	Claim(s) Not Shown Unpatentable
11–13, 19	102	Johnson	11–13, 19	
11, 12, 19, 20	102	Sutton	11, 19, 20	12

¹⁰ Should Patent Owner wish to pursue amendment of the challenged claims in a reissue or reexamination proceeding subsequent to the issuance of this decision, we draw Patent Owner’s attention to the April 2019 *Notice Regarding Options for Amendments by Patent Owner Through Reissue or Reexamination During a Pending AIA Trial Proceeding*. See 84 Fed. Reg. 16,654 (Apr. 22, 2019). If Patent Owner chooses to file a reissue application or a request for reexamination of the challenged patent, we remind Patent Owner of its continuing obligation to notify the Board of any such related matters in updated mandatory notices. See 37 C.F.R. §§ 42.8(a)(3), (b)(2).

Claims	35 U.S.C. §	Reference(s)	Claim(s) Shown Unpatentable	Claim(s) Not Shown Unpatentable
11, 12, 19, 20	103	Sutton	11, 19, 20	12
11, 13, 14, 19	103	Sutton, Plus 3 ¹¹	14	
12	103	Sutton, Fry	12	
Overall Outcome			11–14, 19, 20	

VIII. ORDER

For the reasons given, it is:

ORDERED, based on a preponderance of evidence, that claims 11–14, 19, and 20 of U.S. Patent 10,232,220 B2 are *unpatentable*; and

FURTHER ORDERED because this is a final written decision, the parties to this proceeding seeking judicial review of our Decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

¹¹ We do not reach the challenges to claims 11, 13, and 19 as obvious over Sutton and Plus3 because we found those claims unpatentable for other reasons. Claim 11 is anticipated by Johnson and Sutton and obvious over Sutton. Claim 13 is anticipated by Johnson. Claim 19 is anticipated by Johnson and Sutton and obvious over Sutton alone.

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